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WHAT'S OLD IS NEW AGAIN

MICHAEL J. GERHARDT

INTRODUCTION

If past is prologue, judicial independence will be as inspiring and as contentious a constitutional ideal in the twenty-first century as it was during the preceding centuries. Judicial independence was an aspiration among Americans before the Constitution was first ratified. It was the focus of much controversy in the colonies, and the pre-ratification experience with judges heavily influenced the drafting of Article III of the Constitution. Judicial independence was obviously an objective of the Framers and the Ratifiers, even though the Constitution provides various mechanisms for checking the federal judiciary. Subsequently, national political leaders, federal judges, and scholars have sharply differed over the extent to which those mechanisms limit, or are limited by, judicial independence.

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2 The mechanisms for checking the federal judiciary include congressional regulation of federal jurisdiction, impeachment and removal, the process for amending the Constitution, abolishing inferior courts or seats on the Supreme Court, congressional budgeting of financial and other support for the federal judiciary, and the appointment process for federal judges.
Among legal scholars and others, there has long been a spectrum of viewpoints on judicial independence. At one end are the legal scholars who view judicial independence as strictly procedural. In their view, judicial independence is not a substantive ideal, but rather a function of whatever shape the judiciary happens to have after national political leaders deploy all the constitutional mechanisms for holding federal judges accountable. At the other end of the spectrum are the legal scholars who view the Constitution as substantively protecting certain decision-making activities of judges from political interference. In these scholars’ view, certain judicial functions are constitutionally insulated, both individually and collectively, from direct political retaliation.

In this Essay, I examine recent efforts to consolidate control over the federal judiciary and try to determine where those efforts fit on the spectrum of views on judicial independence. Analyzing the efforts of our leaders to influence both the direction and composition of the federal judiciary should help us better understand both their views on judicial independence and, more importantly, the constitutional limits on their efforts to shape judicial independence.

Indeed, recent efforts to influence judicial decision making reveal the following four things. First, these efforts reflect a core belief that some leaders apparently share, that there is a “right” way to judge and that any other ways of judging are not just wrong but dangerous. Second, President Bush and the Republican majority in the Senate have tried to reward and promote people with the “right” approach to judging. Third, failures to enact proposals that would strip jurisdiction over certain constitutional claims or require particular approaches to judging are significant and not unusual. These failures reflect...
the persistent, implicit recognition of a norm to protect the decisional independence of judges both individually and collectively. Fourth, a small number of conservatives in Congress as well as the academy favor what I call the strict liability theory of impeachment.5 Perhaps most dramatically, this vision helped to drive the most high-profile impeachment effort in the last twenty-five years. Though not directed against a judge, the impeachment and trial of President Clinton has some significant elements in common with recent criticisms of judges in Congress (particularly the House) and academia today. Interestingly, there is nothing new about the so-called strict liability theory of impeachment, nor its problems.

This Essay consists of three parts. Each part examines the efforts of national political leaders in different fora to consolidate control over the judiciary, and each part includes a critical assessment of the implications of, and constitutional authority for, those efforts. Part I focuses primarily on the Senate, whose leaders and majority party have, at least until the fall of 2006, attempted to shape public opinion on judging and to recast the confirmation process. Part II focuses on the House, particularly on proposals considered by the House Judiciary Committee to restrict federal jurisdiction over constitutional claims relating to gay marriage, the Pledge of Allegiance, the American flag, and public acknowledgments of G-d. The third and final part focuses on the federal impeachment process. It describes the arguments of some House members and a few conservative scholars in support of removing federal judges for bad decisions. In opposition to these arguments, I suggest that the most coherent and intellectually sound view of judicial independence is a synthesis of all pertinent sources of constitutional meaning and argumentation.6 Arguments for the removal of judges for bad decisions fail to do this, and are seriously flawed. I associate those flaws with what Akhil Amar calls “blinkered textualism,”7 and what I call blinkered constitutional argumentation. The strict liability theory of impeachment, like the failed efforts to legislatively prescribe what judges ought to do, depends on selective readings of constitutional history. In fact, the Constitution protects the independence of Article III judges in several ways. At the very least, it protects them both individually and collectively from congressional legislation retaliating against particular constitutional opinions, weakening or

5 As I explain both in this Essay and in previous writings, I understand the “strict liability theory of impeachment” as requiring the removal of impeachable officials once they are found to have violated particular standards of behavior or committed certain kinds of bad acts. See Michael J. Gerhardt, *The Special Constitutional Structure of the Federal Impeachment Process*, 63 LAW & CONTEMP. PROBS. 245, 247-48 (2000).

6 For the conventional modes or sources of constitutional argumentation, see generally PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

7 Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 303 (1999) (exemplifying the “blinkered textualist” as one who might contend, using a misguided structural argument, that the words “high crimes” do not “mean something somewhat different when applied to Presidents than when applied to other impeachable officers”).
undermining their exercise of basic constitutional duties, or allowing
impeachment or removal for mistaken decisions. These are a few, but not all,
of the features of the judicial independence guaranteed by the Constitution.

I. THE NEW RHETORIC AND MORE

In this part, I examine some relatively recent efforts in the Senate to
consolidate control over the federal courts. I describe the essential elements of
these efforts and their underlying assumptions about federal judicial
independence.

A. The New Rhetoric in the Senate

One of the most powerful weapons deployed against the Supreme Court, as
well as against some lower courts, has been rhetoric. The objective has
apparently been to build, or at least to maintain, support from certain
constituencies for appointing certain kinds of judges and for thwarting the
appointments of judges who are not committed to the “right” kind of judging.
This rhetoric can be found in at least three places – the proceedings for lower
court nominees, the fight over “the nuclear option,” and the confirmation
proceedings for President Bush’s Supreme Court nominees.

As of October 2006, President Bush had nominated over 250 people to
Article III judgeships. In making these nominations, President Bush cited
their credentials as one important criterion. He did not speak of, nor defend,
their judicial philosophies in specific terms. At most, his nominees shared a
commitment to “interpret the laws,” not to make the law or “legislate from the
bench.” His apparent strategy was to put the burden on Democrats to infer
any problematic ideological or jurisprudential commitments. While Democrats

8 S. COMM. ON THE JUDICIARY, 109TH CONG., JUDICIARY COMMITTEE REPORT ON

9 See Remarks Announcing the Nomination of Samuel A. Alito, Jr., To Be an Associate
Justice of the Supreme Court of the United States, 41 WEEKLY COMP. PRES. DOC. 1625,
1626 (Oct. 31, 2005) [hereinafter Alito Nomination] (commending Alito for
“understand[ing] that judges are to interpret the laws, not to impose their preferences”);
Remarks Announcing the Nomination of Harriet E. Miers To Be an Associate Justice of the
United States Supreme Court, 41 WEEKLY COMP. PRES. DOC. 1487, 1488 (Oct. 3, 2005)
[hereinafter Miers Nomination] (“Harriet Miers will strictly interpret our Constitution and
laws. She will not legislate from the bench.”); Address to the Nation Announcing the
Nomination of John G. Roberts, Jr., To Be an Associate Justice of the United States
Supreme Court, 41 WEEKLY COMP. PRES. DOC. 1192, 1192 (July 19, 2005) [hereinafter
Roberts Nomination] (stating that Roberts “will strictly apply the Constitution and laws, not
legislate from the bench”).
The most heated rhetoric over judicial appointments can be found in the fight over the Democrats’ use of the filibuster to block almost a dozen of President Bush’s nominees to the federal courts of appeal. Democrats primarily defended filibustering particular nominees on the ground that the nominees had judicial ideologies well outside the mainstream of American judges. In supporting a radical effort to dismantle the Democratic filibuster, known as either the constitutional or the “nuclear” option, Republican senators defended the nominees as well-qualified and as committed to the right approach to judging.

Of particular significance, the nominations of John Roberts (twice), Harriet Miers, and Samuel Alito showcased the new rhetoric on judging. This rhetoric apparently had at least three objectives – to make nominees politically appealing, to steer attention away from their judicial philosophy, and to use code messages to keep important constituencies both informed and in line. I explore each of these objectives in turn.

For at least half of 2005, the nation had the opportunity to witness a remarkably rare event; for the first time in thirty-four years the Court had two concurrent vacancies. Over the course of six months, the President, almost all Republican senators, and the nominees under consideration frequently used the same language to describe what they believed Supreme Court Justices ought to do. Chief Justice Roberts spoke at the greatest length. He characterized his approach to judging not in philosophical or ideological terms but rather in such terms as judicial “modesty,” “umpiring,” and “bottom up” judging.

10 See Judiciary Committee Report on Nominees, supra note 8 (reporting the confirmation of 15 of 20 U.S. Circuit Court nominees and 35 of 59 U.S. District Court nominees as of October 6, 2006).
11 See, e.g., 151 Cong. Rec. S4887, 4888 (daily ed. May 11, 2005) (statement of Sen. Kennedy) (insisting that Democrats only block judicial nominees “who are so far out of the mainstream that they have no place in our Federal judiciary”); Peter Wallsten, 2 Evangelicals Want To Strip Courts’ Funds, L.A. Times, Apr. 22, 2005, at A22 (discussing the Democrats’ use of the filibuster to block nominees “who they believe are too extreme in their views”).
12 See, e.g., 151 Cong. Rec. S5551, 5557 (daily ed. May 20, 2005) (statement of Sen. Cornyn) (“[A]ll we are talking about is trying to restore this 214 years of unbroken tradition of providing an up-or-down vote for any nominee who enjoys bipartisan majority support in this Chamber as this nominee, Priscilla Owen, does.”).
13 See Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55 (2005) [hereinafter Roberts Hearing] (statement of John G. Roberts, Jr.) (“[J]udges have to have the modesty to be open in the decisional process to the considered views of their colleagues on the bench.”).
14 See id. (statement of John G. Roberts, Jr.) (“Judges are like umpires. Umpires don’t make the rules, they apply them.”).
President Bush and Republican senators, particularly those on the Judiciary Committee, echoed some of the same terms and employed others, in particular referring often in positive terms to the nominees’ “character” and “heart.” Both as a candidate and when he was considering potential replacements for Chief Justice Rehnquist and Justice O’Connor, President Bush had promised to appoint “strict constructionists” to the Court, though he refrained from describing his Supreme Court nominees in these terms. When announcing his nominees, he described their commitment to “interpret the law” and not to make it. Similarly, Chief Justice Roberts, Justice Alito, and Harriet Miers (President Bush’s second, ill-fated nominee to replace Justice O’Connor) all promised, like every other Republican nominee to the Court for the past two decades, to interpret, not to make, the law.

It is unlikely this rhetoric was happenstance. Indeed, the rhetoric arguably furthered several important objectives. First, the rhetoric deflected public discourse, particularly during the hearings, about the nominees’ judicial ideologies. With fifty-five Republicans and forty-five Democrats in the Senate, the President and the nominees’ supporters in the Senate knew that the odds favored confirmation. With these numbers, President Bush had no incentive to be forthcoming about any potentially troubling aspect of his

15 See id. at 159 (statement of John G. Roberts, Jr.) (“I tend to look at the cases from the bottom up rather than the top down.”).

16 See Alito Nomination, supra note 9, at 1625 (stating that Alito “is a man of enormous character”); Miers Nomination, supra note 9, at 1488 (“I know her heart; I know her character.”).

17 See Roberts Hearing, supra note 13, at 54 (statement of Sen. John Warner) (applauding Roberts for “working on pro bono cases . . . out of the graciousness of his heart”); Roberts Nomination, supra note 9, at 1192 (stating that Roberts “has a good heart”).


19 See supra note 9 and accompanying text.

nominees. Promoting the nominees on the basis of their judicial philosophy would merely have invited trouble. At the same time, the solid majority of Republicans in control of the Senate put the nearly impossible burden on the Democrats to persuade the few uncommitted Republicans (as well as each other) that the nominees were not just flawed but unacceptable.

Second, the rhetoric helped to make the nominees politically appealing. Rather than describe themselves in any politically controversial or divisive terms, the nominees and their supporters discussed their approaches to judging in terms that had great appeal and were non-threatening. Moreover, the rhetoric served to create an important new precedent in the confirmation process. For some senators, such as Mike DeWine (R-Ohio), the successful confirmations of the President’s Supreme Court nominees showed that qualified conservatives, including outspoken critics of Roe v. Wade, could be appointed to the Supreme Court. At the same time, the successful confirmations of Chief Justice Roberts and Justice Alito helped to bury the Bork precedent. Many Republican senators have pointed to Bork’s rejection by the Democrat-dominated Senate in 1987 as the watershed event in which the confirmation process became improperly focused on nominees’ judicial philosophies. For years, Republican senators have wanted to put confirmation proceedings of their nominees on less contentious grounds, such as their basic qualifications.

Third, the rhetoric sent signals to important interest groups and leaders. To many observers, the rhetoric made most sense as a code, the meaning of which was plain to the President’s core constituencies. It told supporters that the nominees could be trusted to be the kinds of Justices that the President had promised to appoint. President Bush’s nominees had, in other words, the right kind of judicial commitments.

Fourth, the rhetoric reflected the shared conviction of many Republican leaders that merely expressing the right kind of ideological commitments was insufficient for a suitable Republican nominee. A nominee must have ideological commitments that are firmly grounded, or anchored, in something

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23 See 151 CONG. REC. S5815, 5820 (daily ed. May 24, 2005) (statement of Sen. Graham) (arguing that Judge Bork “was attacked because of his philosophy, not because of his qualifications”).

immutable to change. President Bush, his advisors, and many Republican senators wanted to avoid the mistakes made by President Reagan when he appointed Justices Kennedy and O’Connor, and by President George H.W. Bush when he appointed Justice Souter. Character, heart, and even faith were important as the solid, impermeable ground on which the nominees’ judicial attitudes were based.

Recall, for instance, that when first pressed by one evangelical about why President Bush had nominated White House Counsel Harriet Miers to the Court, Bush’s close advisor Karl Rove responded by mentioning her Christian faith. When President Bush was pushed by reporters to explain the appointment, he talked about her “character” and about how well he knew her “heart.” His message was that he knew that nothing would divert her from steadfastly remaining a strict constructionist on the court. Her faith, like that of Chief Justice Roberts and Justice Alito, presumably reflected moral commitments impervious to change. Ideology became a secondary (or implicit) consideration, as long as the nominee held it in conjunction with, if not in part because of, personal attributes completely resistant to liberal influences.

B. The New Rhetoric in Perspective

While conservatives achieved their immediate objectives through the rhetoric they employed in the confirmation proceedings for Chief Justice Roberts and Justice Alito, some significant questions remain about both its effectiveness and its implications for judicial independence.

First, the rhetoric plainly did not help Harriet Miers. Indeed, her nomination met resistance, if not outright opposition, as soon as it was announced, from several Republican senators who expressed concerns about whether she had a sufficiently conservative judicial philosophy. The nomination failed in part because she lacked a record of long-term, rigid commitment to the kind of judicial philosophy many Republican senators wanted Justice O’Connor’s

25 See Jason DeParle & David D. Kirkpatrick, In Battle To Pick Next Justice, Right Says Avoid a Kennedy, N.Y. TIMES, June 27, 2005, at A1 (reporting conservative disappointment and anger over Justice Kennedy’s record on the Supreme Court, and stating that “since the elevation of Earl Warren, Republican presidents have picked justices who disappoint the Republican faithful”).


27 See Miers Nomination, supra note 9, at 1488.

replacement to have (and to hold). The nomination also failed because of serious questions about Miers’ qualifications. Many Republicans, as well as many conservative commentators, questioned whether she had the necessary experience, temperament, intelligence, and skill to handle the demanding and important work of a Supreme Court Justice. Ultimately, talking about her “character,” “heart,” and “faith” failed to mask the deficiencies in her qualifications. That the deficiencies included her lack of a demonstrated commitment to the right kind of judicial ideology is telling.

Second, Chief Justice Roberts’ and Justice Alito’s appeal derived in part from their having been well-known figures at the time of their respective nominations to the Court. Well before their nominations to the Court, Chief Justice Roberts and Justice Alito enjoyed widespread reverence for their professional accomplishments, particularly among conservative commentators and interest groups. They were both on almost every short list of preferred candidates that conservative interest groups had assembled, due at least in part to their records of long-standing commitment to conservative judicial principles (and outcomes). This meant that once they were nominated, they could expect the support of the political leaders and conservative commentators who had previously lauded their credentials and jurisprudential or ideological pedigrees. All that remained was closing the deal with the Senate.

The new rhetoric employed in the hearings obscured, but did not entirely eliminate, the inquiry into judicial philosophy. Neither Chief Justice Roberts’ nor Justice Alito’s judicial philosophy was a secret. Nor was it a secret that each of the past three Republican administrations had put a premium on judicial philosophy as an indispensable element of their nominees’ qualifications. Likewise, President Bush has not defined merit as distinct from

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29 See, e.g., 152 CONG. REC. S333, 344 (daily ed. Jan. 31, 2006) (statement of Sen. Leahy) (blaming Harriet Miers’ failed nomination on the fact that “her conservative opponents were not confident that she would rule the way they wanted”); id. at 346 (statement of Sen. Reid) (expressing disappointment that “the radical rightwing torpedoed the nomination of White House counsel Harriet Miers and insisted that someone with Sam Alito’s ideology be put in her place”); CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE 206 (2006) (stating that conservatives “regarded the less qualified Miers as a squandered opportunity for President Bush to name an established ideological conservative to the Court”).


31 See, e.g., Roberts Hearing, supra note 13, at 24 (statement of Sen. Herbert Kohl, Member, S. Comm. on the Judiciary) (“Your legal talents are undeniably impressive.”); id. at 149 (statement of Sen. Patrick J. Leahy, Member, S. Comm. on the Judiciary) (“No one doubts you have had a very impressive legal career thus far . . . .”); Jeffrey Rosen, Obstruction of Judges, N.Y. TIMES, Aug. 11, 2002, § 6, at 38 (describing Roberts as one of “the most respected appellate lawyers in Washington”).
ideology; the two are merged in his and other Republican leaders’ calculations.32

Third, the rhetoric is (mostly) new, but its objective is not. President Bush, unlike his father and President Reagan, assiduously avoided attributing particular judicial philosophies to his Supreme Court nominees. He did not defend them on ideological terms; he promoted them on the basis of their qualifications.33 The focus on “character,” “heart,” “umpiring,” and judicial “modesty” is a relatively new variation on an old theme (indeed, some scholars have long pressed for the selection process to focus on the nominees’ moral character rather than their political or judicial views).34 Yet the effort to focus confirmation hearings on safe, rather than controversial, subjects is hardly a new political technique. American history is just as replete with efforts by senators to steer attention away from a nominee’s vulnerable attributes or records as it is with controversy over the direction in which a new nominee will take the Court.35

Fourth, the new rhetoric did not fully dominate public discourse, even within the Senate, when President Bush announced his Supreme Court nominees. The Democrats on the Judiciary Committee asked probing

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33 See, e.g., Remarks Following a Meeting with Former Texas Supreme Court Justices, 41 WEEKLY COMP. PRES. DOC. 1551, 1551 (Oct. 17, 2005) (“Harriet Miers is a uniquely qualified person to serve on the bench. She is a smart – she is capable. She is a pioneer. She’s been consistently ranked as one of the top 50 women lawyers in the United States. She has been a leader in the legal profession.”); Remarks Announcing the Nomination of John G. Roberts, Jr., To Be Chief Justice of the United States Supreme Court, 41 WEEKLY COMP. PRES. DOC. 1354, 1354 (Sept. 5, 2005) (“I chose Judge Roberts from among the most distinguished jurists and attorneys in the country because he possesses the intellect, experience, and temperament to be an outstanding member of our Nation’s highest court. . . . John Roberts has built a record of excellence and achievement, and a reputation for good will and decency towards others.”); Roberts Nomination, supra note 9, at 1192 (“[A] nominee to [the Supreme Court] must be a person of superb credentials and the highest integrity . . . .”).
34 See, e.g., Lawrence B. Solum, Judicial Selection: Ideology Versus Character, 26 CARDOZO L. REV. 659, 661 (2004) (arguing that “character should be of primary importance in the judicial selection process, and political ideology should play a relatively minor role” (footnote omitted)).
35 See, e.g., Nomination of Anthony M. Kennedy To Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 100th Cong. 154 (1987) (statement of Sen. Arlen Specter, Member, S. Comm. on the Judiciary) (“I am pleased to hear you say that you have no cosmology of constitutional theory, no over-arching principles, and I think that is a very important basic concept. When you take up the ideologies of original intent or you take up the ideologies of interpretivism and neutral principles, there is a tendency, as I see it, for the Supreme Court, for the federal courts or any courts to become musclebound and unduly restrictive.”).
questions about the nominees’ judicial philosophies. Consequently, the Roberts and Alito hearings could be construed as extending, rather than deviating from, the Senate’s practice of taking a nominee’s judicial philosophy into account in deploying its Advice and Consent authority.

Fifth, recent experience demonstrates that presidents, senators, and nominees all play important roles in protecting and defining the limits of judicial confirmation proceedings. Senators from both parties agree that the Constitution and judicial canons impose limits on the questioning of judicial nominees. They agree that nominees may be questioned generally about their judicial philosophies and their records, and they agree that nominees may not be questioned about how they would rule on particular matters likely to come before them as judges or Justices. Although senators diverge over the specificity or propriety of hypothetical questioning, they also recognize that they each have the authority to define and enforce the limits of such questioning. As nominees, Chief Justice Roberts and Justice Alito recognized that they had the discretion not to answer philosophical inquiries that trod, in their judgments, too closely upon their judicial independence.

President Bush and his staff conducted elaborate screening mechanisms for sifting through prospective nominations. Throughout the Alito, Miers, and Roberts nomination proceedings, President Bush, senators, and the nominees all took responsibility for defining and avoiding any threat to their personal or collective judicial independence.

36 See, e.g., Roberts Hearing, supra note 13, at 34 (statement of Sen. Russell D. Feingold, Member, S. Comm. on the Judiciary) (informing John Roberts that he planned to “ask questions about topics such as executive power, civil liberties, voting rights, the death penalty, and other important issues”); id. at 39 (statement of Sen. Charles E. Schumer, Member, S. Comm. on the Judiciary) (“[I]t is our obligation to ask and your obligation to answer questions about your judicial philosophy and legal ideology. . . . You should be prepared to explain your views of the First Amendment and civil rights and environmental rights, religious liberty, privacy, workers’ rights, women’s rights, and a host of other issues relevant to the most powerful lifetime post in the Nation.”).

37 See, e.g., id. at 8-9 (statement of Sen. Orrin G. Hatch, Member, S. Comm. on the Judiciary) (explaining that nominees cannot answer “questions that seek hints, forecasts or previews about how they would rule on particular issues,” or “questions asking them to opine or speculate about hypotheticals outside of an actual case”); id. at 39 (statement of Sen. Charles E. Schumer, Member, S. Comm. on the Judiciary) (admitting the need to avoid asking questions that would require a nominee to “indicate[] prejudgment about a future case”).

38 See supra notes 36-37.

39 See, e.g., Alito Hearing, supra note 20, at 514 (statement of Samuel A. Alito, Jr.) (warning that it “would undermine the entire judicial decisionmaking process” if judges indicated in advance how they might rule on cases); Roberts Hearing, supra note 13, at 147 (statement of John G. Roberts, Jr.) (refusing to answer a question, explaining “I think that gets to the application of the principles in a particular case, and based on my review of the prior transcripts of every nominee sitting on the Court today, that’s where they’ve generally declined to answer”).
Sixth, both the President and the Senate appear keenly interested in finding Justices who will be able to resist what they consider to be the “wrong” influences or impulses. The independence that counts, for them, appears to be an imperviousness to what I will call “constititutional laxity,” by which I mean a willingness to construe the Constitution in ways that President Bush and most senators would not. Judicial independence, for the President and the current Republican majority, apparently means standing up to Congress when it has exceeded its Commerce Clause powers or its powers under section five of the Fourteenth Amendment. It means resisting the advocacy of liberals who want to stretch constitutional protections for such issues as affirmative action and homosexual sodomy, and it means ignoring the pleas of other Justices who stray from rigid adherence to the original understanding of the Constitution. Judicial independence thus ultimately requires imperviousness to the liberal influences that apparently corrupted Justices O’Connor, Souter, and Kennedy. In other words, for conservatives, judicial independence means “holding the fort,” and “staying the course,” regardless of public opinion and changing fashions.

Faith also appears pertinent insofar as all three of President Bush’s nominees have had strong religious faith. Chief Justice Roberts and Justice Alito have become the Court’s fourth and fifth Roman Catholics, underscoring the apparent connection between religious faith and judicial performance. Even more important than nominees’ religious convictions may be their experience: all three of Bush’s nominees had significant professional experience in the executive branch. This follows a pattern, as seven of the last nine Republican nominees to the Court have had such experience. It is no coincidence that these Republican nominees had such experience in common, for it has clearly produced nominees (1) who tend to be sympathetic to executive branch arguments before the Court; and (2) whose beliefs on constitutional issues are well-known to the people responsible for judicial selection in the White House and Justice Department.

Last but not least, the real test of the “new” rhetoric has yet to take place. It will come when we re-enter a period of divided government, at which time senators from the opposition party will be pressed to take nominees’ judicial ideologies into account. Some Republican senators have argued that their Democratic colleagues ought to follow the precedent that conservatives set when they supported the nominations of Ruth Bader Ginsburg and Stephen Breyer, in spite of their liberal inclinations. President Clinton did not,

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41 See, e.g., Roberts Hearing, supra note 13, at 37 (statement of Sen. Lindsey O. Graham, Member, S. Comm. on the Judiciary) (“Justice Ginsburg got 96 votes, even though she expressed a view of the Federal Government’s role in abortion that I completely disagree with, and I think most conservatives disagree with.”); id. at 15 (statement of Sen.
however, nominate Justices Breyer and Ginsburg without first clearing their
nominations with the Republican leadership.\footnote{See GeYh, supra note 29, at 205.} When nominated, Ginsburg and Breyer already had the support of most senators on the record. President Bush, too, nominated Roberts and Alito only after seeking the opinions of more than half of the Senate about their and other possible nominees’ prospects. Thus, the success of future Supreme Court nominees apparently depends on assessing senators’ likely reactions before making nominations.

II. THE LIMITS ON THE POWER TO REGULATE FEDERAL JURISDICTION

This part examines various proposals introduced in, or considered by, the House of Representatives to restrict federal jurisdiction over particular constitutional claims. I examine both the most credible constitutional foundations for the proposals and the external constitutional constraints prohibiting their enactment.

A. The New Rhetoric (and More) in the House

In the past several years, some members of the House have proposed measures for keeping the federal judiciary in check. In several instances, the House Judiciary Committee has become the principal forum for expressing frustration with the Rehnquist Court and the federal judiciary generally, with particular emphasis on certain lower courts. The thrust of these proposals has been to correct or to minimize the damage done by what some have considered to be “unprincipled” judicial decisions.


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Charles E. Grassley, Member, S. Comm. on the Judiciary) (“I am hopeful that we will see a dignified confirmation process that will not degenerate into what we saw during the Bork and Thomas hearings. Rather, we need to see the same level of civility as we saw during the O’Connor, Ginsburg, and Breyer hearings.”).
Article III judge or Justice in interpreting the U.S. Constitution, and a
declaration that any such reliance is an impeachable offense.\textsuperscript{46}

These proposed bills have several things in common. First, none has passed.
Indeed, some critics might dismiss the proposed legislation as relatively
transparent, cynical appeals to particular constituencies. More importantly, the
failure of these measures may reflect the ongoing acceptance within the House
of a constitutional norm against legislation that would directly interfere with
judicial decisions or decision making.

Second, all of the proposed bills were responses to particular judicial
decisions. For example, the proposal to strip federal jurisdiction over any
claim relating to gay marriage derived from concerns that Article III judges
would render rulings similar to that of Massachusetts’ highest court, which
ruled in 2003 that the state constitution did not allow the state to bar same-sex
marriages.\textsuperscript{47} Moreover, the proposed measure barring reliance on foreign law
was a reaction to two decisions in which a majority of the Rehnquist Court
cited foreign law in passing as a basis for declaring a state law
unconstitutional.\textsuperscript{48} (This same measure may also show how Justices are able
to influence the political process; Justice Scalia may have fanned the flames of
outrage over these two decisions with his biting dissents in both cases, along
with his open denunciation of the two decisions in public speeches.)\textsuperscript{49}

Third, all of the proposed measures seek to vindicate particular conceptions
of judging. It is possible to construe these measures as efforts to hold up
Justices Scalia and Thomas as models of proper judging, for opinions by one
or both of them grounded the legislators’ disagreements with particular
decisions. Moreover, the proposed measures have had the arguably salutary
effect of putting pressure on other House members to commit to a position and
either openly agree or disagree with the criticism of the Court, and on the
President to appoint Justices, as he had hinted, in the mold of either Justice
Scalia or Thomas.\textsuperscript{50}

\textsuperscript{46} See H.R. 1070 §§ 201, 302; H.R. 3799 §§ 201, 302.
\textsuperscript{48} Roper v. Simmons, 543 U.S. 551, 577-78 (2005) (acknowledging “the overwhelming
weight of international opinion against the juvenile death penalty”); Lawrence v. Texas, 539
U.S. 558, 576 (2003) (recognizing that “[o]ther nations . . . have taken action consistent with
an affirmation of the protected right of homosexual adults to engage in intimate, consensual
conduct”).\textsuperscript{49}
\textsuperscript{49} Roper, 543 U.S. at 624 (Scalia, J., dissenting) (attacking the Court’s citation of foreign
law as an approach that “ought to be rejected out of hand”); Lawrence, 539 U.S. at 598
(Scalia, J., dissenting) (criticizing the Court’s discussion of foreign views as “[d]angerous
dicta”); Justice Antonin Scalia, Keynote Address at the American Enterprise Institute
Conference: Outsourcing of American Law (Feb. 21, 2006), \textit{available at}
http://www.aei.org/events/filter.all,EventID.1256/transcript.asp (insisting that “foreign legal
materials can never be relevant to an interpretation of . . . the United States Constitution”).
\textsuperscript{50} See Harriet Chiang, \textit{Election Could Shape Supreme Court for Years To Come}, S.F.
\textit{Chron.}, Oct. 24, 2000, at A4 (“Bush said in his first debate with Gore that he would appoint
Fourth, none of the proposed measures is believed, at least by its sponsors, to violate the constitutional principle of judicial independence. To the contrary, the measures are considered consistent with a construction of Article III that vests in Congress the plenary power to restrict the federal courts from considering any subject matter that Congress prefers for them not to hear. This construction requires reading the Constitution as providing no internal or external restraints on Congress’s power to regulate federal jurisdiction.\footnote{See, e.g., 150 CONG. REC. H7445, 7451 (daily ed. Sept. 23, 2004) (statement of Rep. Sensenbrenner) (reiterating Justice William Brennan’s statement that “virtually all matters that might be heard in Article III Federal courts could also be left by Congress to the State courts’’); 150 CONG. REC. H6559, 6568 (daily ed. July 22, 2004) (statement of Rep. Hostettler) (“Congress has the authority to make exceptions and regulations with regard to all of the appellate cases that come before the Supreme Court. Anyone that actually reads the Constitution and has a basic understanding of grammar and the English language in general can find that in fact the Constitution grants Congress the authority.”).}

Such nearly limitless regulation of federal jurisdiction may be understood as not interfering with legitimate, or lawful, judging. It may be understood instead as limiting unlawful or illegitimate judging (as understood by the sponsors of the proposed legislation). Thus, these proposed measures appear consistent with a quasi-procedural conception of judicial independence. I understand this conception as recognizing constitutional authorization of the Congress to restrict federal judges from committing certain abuses of their authority and to channel, or steer, them into what is considered “proper” judicial decision making. In short, these measures are attempts by Congress to keep judges in line.

B. The External Limits on Regulating Federal Jurisdiction

The recent proposals to strip the federal courts of the jurisdiction to hear constitutional claims regarding gay marriage, the Pledge of Allegiance, public acknowledgments of G-d, and the flag share the same problem – they all fail to comply with the Fifth Amendment’s Due Process Clause. While legal scholars have long been divided over the extent to which there are limits on Congress’ power to regulate federal jurisdiction,\footnote{See Ralph A. Rossum, Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause, 24 WM. & MARY L. REV. 385, 386 & nn.5-11 (1983) (citing scholarly literature debating “whether and to what extent Congress can or should strip the Court of appellate subject matter jurisdiction”).} those differences need not be settled in order to resolve the constitutionality of the recent proposals. As I discuss below, the fact that Congress may have plenary power to regulate the jurisdiction of the federal courts does not mean that the power is unbounded. The power to regulate federal jurisdiction is subject, like every plenary congressional power, to the Due Process Clause of the Fifth Amendment.
First, the Fifth Amendment Due Process Clause requires that there at least be a rational basis for each law enacted by Congress. The efforts to restrict federal jurisdiction over constitutional claims such as gay marriage or the Pledge of Allegiance, however, lack a rational basis. The restrictions are not based on plans to preserve the federal courts’ scarce resources. Nor are they based on the superior expertise of state judges in dealing with federal constitutional claims relating to such matters as gay marriage, the flag, or the Pledge of Allegiance. To the contrary, the restrictions are solely based on hostility to, or distrust of, Article III courts. It is not hard to figure that hostility to, or distrust of, Article III courts fails the traditional rational basis test. The Supreme Court, or any other Article III court, likely would not hesitate to find that proposed bills stripping federal courts of certain constitutional claims lacked a rational basis. Indeed, this would be similar to the ground on which the Court struck down a state law in *Romer v. Evans*: because it was based on animus, not on plausible justification.

Second, the proposed restrictions are designed to enable state courts to evade certain judicial rulings, and thus weaken them. The provisions would make the state courts the courts of last resort on certain constitutional questions that either the Supreme Court or some other federal court has already addressed. The state courts would thus have the last word on the Constitution in cases involving these interests.

The Supreme Court has more than once struck down regulations of jurisdiction that are designed to directly undermine, or weaken, its prior constitutional rulings. In *United States v. Morrison*, the Court made clear that it, not Congress, was the final arbiter in determining the scope of congressional powers. Congress may not undermine a ruling by redirecting an issue into the state courts whenever it disagrees with the Court’s resolution of the issue. Put another way, the proposals to strip the federal courts of all jurisdiction over certain previously adjudicated constitutional claims in the

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53 See, e.g., 150 CONG. REC. H7445, 7451 (daily ed. Sept. 23, 2004) (statement of Rep. Sensenbrenner) (“A remedy to abuses by Federal judges has long been understood to lie, among other places, in Congress’s authority to limit Federal court jurisdiction.”); 150 CONG. REC. H6559, 6563 (daily ed. July 22, 2004) (statement by Rep. Duncan) (arguing that the Marriage Protection Act of 2004 should be allowed to limit federal jurisdiction “because it is true that many, many people in this country have been upset that unelected judges have assumed so much super-legislative power in this country in recent years”).

54 Romer v. Evans, 517 U.S. 620, 634 (1996) (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”).

55 See, e.g., Dickerson v. United States, 530 U.S. 428, 432 (2000) (holding that Congress could not legislatively supersede the constitutional rule announced in *Miranda*); *Ex Parte Klein*, 80 U.S. 129, 147-48 (1871) (striking down a law that attempted to overturn the Court’s earlier ruling on the scope of the President’s pardon powers).


57 Id. at 614.
Supreme Court (or other Article III courts) would allow state courts to completely circumvent, narrow, and effectively overrule what the Court has already said about these or similar claims.

The most powerful defense of the proposed court-stripping measures is that they may not effectuate an actual deprivation of due process. In *San Antonio v. Rodriguez*, the Court rejected a Fourteenth Amendment challenge to Texas’ funding scheme for public schools, based in part on its determination that the scheme did not actually “deprive” any students of a public education. Students could continue to attend public schools, just as they had prior to the enactment of the funding scheme. Similarly, the proposed restrictions on federal courts’ power to hear certain constitutional claims arguably do not deprive those claims of a hearing consistent with due process. As long as state courts accorded those claims the same treatment they gave to other federal claims, it would be hard to argue that the deprivation of a federal forum for adjudicating the claims amounted to a deprivation of due process.

The main problem with this argument is that the denial of a federal forum for particular claims is plainly designed to effectuate a deprivation. The whole point of the legislation is to deprive certain claimants of access to a federal forum. While it is true that claimants redirected into state courts by the proposed federal measures would still have access to a judicial forum, they would be denied at least two essential features of the federal court system—finality and uniformity. The proposed measures would effectively make state courts the courts of last resort for particular federal claims. Consequently, these claims could be adjudicated differently in different states, thereby leaving the federal interest potentially subject to fifty different state court interpretations, and inconsistent or conflicting outcomes across the country.

An analogy may help to illuminate the potential problems with the proposed court-stripping measures. A state has no affirmative constitutional duty to create or fund public swimming pools. Nonetheless, a state needs to have at least a rational basis for closing a public pool or other public service. Although it is easy to imagine that a rational basis exists for not offering the service in the first place, it would be harder to devise a rational basis for

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59 Id. at 25.
60 See Martin v. Hunter’s Lessee, 14 U.S. 304, 348 (1816) (stressing the need for a “revising authority to control [different state courts’] jarring and discordant judgments, and harmonize them into uniformity”).
61 Palmer v. Thompson, 403 U.S. 217, 220 (1971) (“[N]either the Fourteenth Amendment nor any Act of Congress purports to impose an affirmative duty on a State to begin to operate or to continue to operate swimming pools.”). Likewise, a state has no affirmative duty to protect a child from the child’s own guardian. DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 195 (1989) (“[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”).
completely shutting down an already established service. This is especially true where the service has been closed in direct response to a judicial decision with which the state authorities do not wish to comply.

Thus, regardless of whether the withdrawal of jurisdiction leaves the claimants with a remedy in state court, it does not leave them whole. Prior to the withdrawal of federal jurisdiction, their claims would have had the benefit of potentially receiving uniform, final adjudication in Article III courts, but after the withdrawal, the claims have no chance of receiving any such treatment. Clearly, something is being deprived as a result of the withdrawal – namely, the opportunity for Article III courts to adjudicate the claims. There must have been something special about this opportunity or some special problem with Article III courts hearing these claims, or they would not need to be restricted from them. The problem for the proponents of the restriction is the impossibility of demonstrating a rational basis for depriving every Article III court of the power to hear the claims. Some, maybe even most, might get it right.

The Constitution Restoration Act has even more significant ramifications. Not only does the Act fail to comply with the Fifth Amendment’s Due Process Clause, it also violates judicial independence. In particular, its ban of judicial reliance on foreign law violates the independence of Article III judges to decide which sources to consult in constitutional adjudication. Justice Scalia made this point in a speech that was reported on in the Washington Post:

“It’s none of your business,” he said, referring to Congress. “No one is more opposed to the use of foreign law than I am, but I’m darned if I think it’s up to Congress to direct the [C]ourt how to make its decisions.”

The proposed legislation “is like telling us not to use certain principles of logic,” he said, adding: “Let us make our mistakes just as we let you make yours.”

Even Justice Scalia agrees that Congress has no constitutional authority to direct how the Court decides constitutional cases. The Constitution guarantees judges and Justices the discretion to choose an approach to deciding constitutional cases. The Constitution provides checks and balances for the other branches to correct the Court’s mistakes, but, as the next part shows, impeachment and removal are not among them.

III. THE STRICT LIABILITY THEORY OF IMPEACHMENT

In this part, I discuss the proposal, made by some House members and a few constitutional scholars, to allow removal of federal judges for bad decisions. After describing the proposal and its supposed support, I examine the opposing textual, structural, and historical arguments. I explain why the latter arguments

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A. The Strict Liability Theory of Impeachment

As previously noted, the Constitution Restoration Act provides, inter alia, that judicial reliance on foreign law in constitutional adjudication ought to be treated as an impeachable offense. Members of Congress who support this provision presumably believe that the Constitution both empowers Congress to make this declaration and to use it to impeach and remove federal judges who rely on foreign law. Apparently, some contemporary congressional leaders, as well as some scholars, believe that federal judges may be impeached and removed for employing the wrong techniques in constitutional adjudication. For instance, House Majority Leader Tom DeLay “repeatedly threatened to impeach liberal-leaning judges for their rulings,” and James Sensenbrenner, the Chairman of the House Judiciary Committee, proposed legislation establishing an inspector general to investigate federal judges.

DeLay was notorious as one of the leaders in the House pushing to impeach President Bill Clinton for perjury and obstruction of justice. A central claim he levied against Clinton was that he had violated the rule of law. Indeed, the mantra throughout President Clinton’s impeachment proceedings was that his removal was required in order to protect the rule of law. He had sworn an oath to tell the truth in both a deposition and grand jury testimony; his failure to do so constituted perjury. The context of the perjury – the fact that it occurred during a line of questioning about possible extramarital sexual misconduct – was irrelevant to proponents of Clinton’s ouster. His frame of mind was also irrelevant. What mattered was that Clinton had crossed a line, and that breach was sufficient to justify the imposition of impeachment’s unique sanctions – removal and disqualification. I describe this understanding of the grounds for impeachment as the “strict liability theory of impeachment,” because it requires both removal and disqualification for a bad act. Doing the

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66 See Bennett Roth, DeLay Carrying Flag in GOP’s Impeachment Charge, HOUSTON CHRON., Dec. 13, 1998, at A1 (“[M]any credit DeLay, the House majority whip, for reversing the momentum against impeachment.”).
67 See, e.g., 145 CONG. REC. S1743, 1790 (daily ed. Feb. 23, 1999) (statement of Sen. Hatch) (“President Clinton did more than just break the law. He broke his oath of office and broke faith with the American people. . . . I will vote for conviction on both articles of impeachment – not because I want to – but because I must. Upholding our Constitution . . . is more important than any one person, including the President of the United States.”); 144 CONG. REC. H9593, 9596 (daily ed. Oct. 6, 1998) (statement of Rep. Barr) (“If we accept that this inquiry is merely about sex and politics, we have already failed in our constitutional responsibility. This is about the rule of law. It is about accountability.”).
bad act, and nothing more, is all that is required, in this view, for removal and disqualification. In this view of impeachment, mens rea – or a malicious or bad intent – is not required for conviction in a Senate impeachment trial.

The belief that federal judges may be removed for bad decisions is an old one. It has had adherents throughout American history, and its proponents have claimed both textual and historical support. The textual argument is that the presence of the phrase “during good behavior” in the clause granting tenure to Article III judges implies that judges can be removed for bad behavior. This text could be read as establishing a different, lower standard of removal for federal judges than it does for the President and other high-ranking officials, who only may be removed for “Treason, Bribery, or other high Crimes and Misdemeanors.” On this reading of the Constitution, Article III judges may be impeached, but they may also be removed by means other than impeachment for misbehavior. Proponents of this lower standard maintain that it is supported by some statements made by both the Framers and the Ratifiers, and particularly by pre-ratification practices in some states and by Congress’ early, post-ratification practices.

The “strict liability theory of impeachment” has been advocated by some conservative scholars in recent years. First, Steven Fitschen has argued both in print and before the Federalist Society that the House has in fact previously introduced impeachment resolutions against some federal judges based on their bad decisions. Second, there is a recent article in the *Yale Law Journal*, by Saikrishna Prakash and Steve Smith, which argues that a bad act by a judge, including a bad decision, demonstrates a bad or dangerous tendency that may by itself serve as the basis for removing that judge from the bench.

The claim that a bad act, or a bad tendency, is sufficient for removal can be traced back to colonial America, and it can be heard at the constitutional and ratification conventions. It surfaced again in a few early federal and state impeachments. It was a position held by a minority at the time of the drafting and ratification of the Constitution. In almost every instance, the bad

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68 See U.S. Const. art. III, § 1 (declaring that judges “shall hold their offices during good Behaviour”).

69 See Raoul Berger, *Impeachment: The Constitutional Problems* 131-32 (1973) (“When the Constitution limited judicial tenure to ‘during good behavior,’ the Framers self-evidently did not intend that a judge who behaved badly and thus violated the condition of his tenure should be continued in office.”).

70 U.S. Const. art. II, § 4.


73 Prakash & Smith, supra note 71, at 78 & n.15.

74 See Hoffer & Hull, supra note 1, at 101.

75 See id. at 182-83, 186-87, 199, 228-40.
tendency standard, or what I call the “strict liability theory of impeachment,” was a minority viewpoint. Historical comments favoring the strict liability theory of impeachment were only a part of an ongoing dialogue among the Framers, early state legislators, and the members of the first few Congresses. The other side of the conversation, which almost always prevailed, rejected the strict liability theory of impeachment.

B. Why the Strict Liability Theory of Impeachment Is, and Always Has Been, Wrong

There are good reasons why the strict liability theory of impeachment, so popular among many proponents of President Clinton’s ouster and more recently among some conservatives, has never been recognized, much less applied, as a correct understanding of the constitutional law of impeachment. The theory was rejected in colonial America prior to ratification, it was rejected during the constitutional and ratification conventions, and it has been rejected in post-ratification state and federal impeachment practices. The consistently prevailing view among the Framers and the Ratifiers, as well as among our leaders and scholars, has been that impeachment and removal of federal judges require both a bad act and a malicious intent.

For a demonstration of what the Constitution requires for removal of federal judges, let’s return to the constitutional text. As we have seen, proponents of the strict liability theory of impeachment interpret the phrase “during good behavior” quite literally. It plainly means, they argue, what it says— that judges can be removed for any bad behavior or misbehavior. This reading is not silly, but it is not persuasive for the simple reason that it depends on reading the portion of Article III that defines judicial tenure as bearing no relationship whatsoever to any other part of the Constitution. Akhil Amar describes this kind of constitutional construction as “blinkered textualism,” because it fails to recognize that the meanings of particular words or phrases in the Constitution depend upon their context and their relationship to other parts of the text. There is an entirely different way to read the language defining judicial tenure in Article III: that it distinguishes such tenure from that of elected officials. Every official, except Article III judges, serves for a limited term. The phrase “during good behavior” may imply that Article III judges can be removed for misbehavior, but it does not mean that they can be removed for any kind of misbehavior. Article III judges are mentioned, like the President, as being subject to impeachment and removal for certain kinds of misconduct—namely, “Treason, Bribery, or other high Crimes and Misdemeanors.” Thus, if we put the pertinent portions of Articles II and III

76 See id. at 64, 97, 101-02, 254-55.
77 See id. at 142-45, 182-83.
78 Amar, supra note 7, at 303.
together, they may be read as allowing federal judges to serve for life subject to impeachment and removal only for certain kinds of misconduct.\textsuperscript{79}

The strict liability theory of impeachment is even harder to square with the structure of the Constitution. If the language “during good behavior” sets a lower standard for removal of federal judges, then it is reasonable to ask: removal by whom? The text is silent on this question. Since removal of judges is a serious business, this would seem to be an enormous oversight. Moreover, if the Constitution sets a lower standard for the removal of federal judges than for presidents or other officials, then why should members of Congress bother to subject judges to the federal impeachment process? In the federal impeachment process, there are highly restrictive grounds for removal. Removal may only be achieved when the tough standards of impeachment are met by a majority vote of the House, and at least a two-thirds vote of the Senate for conviction and removal. It would be an enormous waste of time to discipline judges through the cumbersome impeachment process set forth in the Federal Constitution rather than through some less exacting method. One basic canon of constitutional construction is to make sense of the structure, and subjecting Article III judges to the lower standard of removal for bad behavior produces a nonsensical structure.

Though proponents of the strict liability theory of impeachment rely on some historical materials, the original understanding of the federal impeachment process and historical practices prior to ratification show that the Framers’ roundly rejected the strict liability theory of impeachment. In fact, the constitutional and ratification conventions reflect a shared intent to narrow the grounds for judicial removal, particularly to protect the judiciary from popular control or retaliation. On the one occasion that the “good behavior” clause was directly challenged, the challenge failed.\textsuperscript{80} On August 27, 1787, John Dickinson moved that the good behavior clause be followed by an additional provision that judges “may be removed by the Executive on the application [of] the Senate and House of Representatives.”\textsuperscript{81} This was similar to impeachment provisions found in some early state constitutions.\textsuperscript{82} The


\textsuperscript{81} Id. (quoting 2 \textit{The Records of the Federal Convention of 1787}, at 428 (Max Farrand ed., rev. ed. 1966) (recorded by James Madison)).

\textsuperscript{82} See, e.g., \textit{Del. Const.} of 1776, art. 23 (“The President . . . and all others, offending against the state either by mal-administration, corruption or other means, by which the safety of the commonwealth may be endangered . . . shall be impeachable by the House of Assembly before the Legislative Council . . ..”); \textit{Mass. Const.} of 1780, pt. II, ch. 1, § 2, art. VIII (“The Senate shall be a court with full authority to hear and determine all impeachments made by the House of Representatives, against any officer or officers of the Commonwealth, for misconduct and maladministration in their offices . . . .”); \textit{Mass.}
motion was met with overwhelming opposition. Gouverneur Morris argued that it was “‘a contradiction in terms to say that the Judges should hold their offices during good behavior, and yet be removable without a trial,’” leading him to conclude that it would be “‘fundamentally wrong to subject Judges to so arbitrary an authority.’”\(^{83}\) James Wilson agreed: “‘Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our [government].’”\(^{84}\) Edmund Randolph likewise objected that the amendment would “‘weaken[] too much the independence of the Judges.’”\(^{85}\) The delegates rejected the motion by a vote of seven delegations to one.\(^{86}\)

Prior to ratification, some states defined judicial tenure as “during good behavior,” and some officially allowed impeachment for misbehavior.\(^{87}\) The Federal Constitution, however, combined “during good behavior” with language in Article II that narrowed the scope of impeachable offenses to “Treason, Bribery, or other high Crimes and Misdemeanors.” The only state that followed the federal model was Pennsylvania,\(^{88}\) where, as we will see, the state assembly tried but failed to implement the strict liability theory of impeachment.

The Framers drew heavily on their experience with impeachment in the states, which was influenced in turn by British and particularly colonial practices.\(^{89}\) One common theme in this period was the recognition of a common law of impeachment requiring both a bad act and a malicious intent for removal.\(^{90}\) During this period, people recognized that one of the obstacles to the easy removal of a public official was proving that the official had acted with malicious intent. The desire to make removal easier became stronger with the rise of the two-party system. The Constitution made no allowance for

\(^{83}\) Geyh & Van Tassel, \textit{supra} note 80, at 41 (quoting 2 \textit{THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 81, at 428 (recorded by James Madison)}).

\(^{84}\) \textit{Id.} (quoting 2 \textit{THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 81, at 429 (recorded by James Madison)}).

\(^{85}\) \textit{Id.} (alteration in original) (quoting 2 \textit{THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 81, at 429 (recorded by James Madison)}).

\(^{86}\) \textit{Id.}

\(^{87}\) See, e.g., DEL. \textit{CONST.} of 1776, art. 23; VA. \textit{CONST.} of 1776, ch. II, arts. XIV-XVII.

\(^{88}\) See PA. \textit{CONST.} of 1776, § 22.


removals driven by partisanship, however, because the Framers had designed the impeachment process without the possibility of a two-party system of government in mind. They had no experience with what we call “party-motivated behavior.” They did not expect that the impeachment process might be used in an attempt to consolidate a party’s power. Partisans seeking to remove officials who did not share their beliefs had to find ways to remove those officials with the mechanisms set forth in the newly ratified Federal Constitution.

The original understanding of the Constitution is squarely at odds with allowing removal for a federal judge’s bad decisions. As Professors Hoffer and Hull wrote:

No framer wished to bring the English ‘bad advice’ doctrine to American shores. As James Iredell told the North Carolina delegates: “God forbid that a man, in any country in the world, should be liable to be punished for want of judgment. This is not the case here. . . . Whatever mistake a man may make, he ought not to be punished for it, nor his posterity rendered infamous. But if a man be a villain, and wilfully abuse his trust, he is to be held up as a public offender, and ignominiously punished . . . nothing but real guilt can disgrace him.” Federalists and anti-Federalists alike shared Iredell’s view that judges were not to be “punished for want of judgment.” “Brutus,” a well-known anti-Federalist who feared that judges would exercise judicial review with too little caution, understood that judges who did so could not be impeached. He admitted that judges were “removable only for crimes,” and that “errors in judgment” were not crimes in the absence of “wicked and corrupt motives.”

Hamilton, in The Federalist, dismissed Brutus’ fears as overblown but concurred in the view that judges could only be impeached after a “series of deliberate usurpations.”

Thus both the Federalist and anti-Federalist papers “reinforce the view, apparently shared at the Convention, that impeachment and removal were available to remedy crimes politically defined” – such as judicial abuse of power – “but would not reach errors in judgment in isolated cases.”

In the pre-ratification period, no state judges were impeached or removed for erroneous decisions. As Professors Hoffer and Hull found,

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91 See Geyh, supra note 29, at 184-86.
92 Hoffer & Hull, supra note 1, at 118 (alterations in original) (quoting 4 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 126 (2d ed. 1859)).
94 Id. at 50 (quoting The Federalist No. 81, at 518 (Alexander Hamilton) (Robert Scigliano ed., 2000)).
95 Id.
"[i]ncompetence, inattention to duty, and excess partisanship in office were also grounds for impeachment when they endangered the state, but no one was impeached without evidence of intentional neglect or total incapacity to perform official duties." 96

There were, however, unsuccessful attempts to impeach judges based on their decisions. As Professors Hoffer and Hull write, "[t]he outstanding example of an impeachment intended to curb a branch of government in the period 1776-88 occurred in North Carolina." 97 Led by Chief Justice Samuel Ashe, the superior court judges of the state, most of whom were anti-Federalists, joined the state legislature in weakening the claims of ex-Loyalists. 98 Some conservative legislators, who supported the ex-Loyalists, drafted impeachment articles charging judges with such misconduct as refusing to hear suits brought by certain ex-Loyalists, directing a grand jury to bring misdemeanor indictments against certain ex-Loyalists, and missing some court sessions. 99 (This latter misconduct was allegedly committed by Ashe.) 100 The judges defended themselves on the quite reasonable ground that the assembly had asked them to dismiss claims and they had simply followed those instructions. 101 The legislature exonerated all of the judges but Ashe, who remained the main target of the conservative legislators. 102 When Ashe refused to come to the assembly to answer further charges of malfeasance, he was harshly condemned. 103 When he finally did appear, he was furious in responding to the charges. 104 He nevertheless remained on the bench and all efforts to punish him failed.

Those arguing for a lower standard of removal for judges rely on two precedents in particular. The first involves a district judge, John Pickering, whom the House impeached and the Senate removed essentially for his dangerous tendencies. 105 The difficulty with following the Pickering precedent is that it appears his fundamental problem was that he was insane, not that he was making bad decisions. The members of Congress voting to impeach and remove him from office were aware of his insanity, and the focus of the debate in his impeachment proceedings was on the question of whether mental instability could properly qualify as a "high crime or misdemeanor." 106

96 HOFFER & HULL, supra note 1, at 85.
97 Id. at 87.
98 Id. at 88.
99 Id. at 89.
100 Id.
101 Id. at 90.
102 Id. at 91.
103 Id.
104 Id.
106 Id.
While the House and the Senate each resolved this question in the affirmative, people at the time seem to have understood the Pickering impeachment as having demonstrated that the federal impeachment process could be employed to remove someone who was insane, and not necessarily as having demonstrated anything more.

The second precedent often cited by proponents of the strict liability theory of impeachment is the removal of Alexander Addison, president of the Fifth District Court of Pennsylvania.\footnote{Hoffer & Hull, supra note 1, at 195-205.} Addison was a heavy-handed Federalist who strictly enforced the Alien and Sedition laws.\footnote{Id. at 196.} In 1800, Addison barred Republican judge John Lucas from participating in or contributing to the instructions or rulings of the court.\footnote{Id.} Both chambers of the Pennsylvania legislature lobbied for the option of impeachment, which had proven successful previously in Pennsylvania and in other states.\footnote{Id. at 195-97.} Without any evidence of directly unconstitutional behavior on Addison’s part, the prosecutors in the impeachment trial reframed their accusations against him to instead claim that he had “acted in a way that undermined the constitution—that is to say, the consequences of his acts were the real misdemeanor.”\footnote{Id. at 198.} Addison tried to defend himself by arguing that he lacked any malicious intent, but he was convicted by the state senate by a vote of 20-4.\footnote{Id. at 204.} The penalty was disqualification from holding judicial office.

The legal significance of Addison’s conviction remains unclear. On the surface, it appears that his conviction did sanction impeachment on the basis of dangerous tendency. But Addison’s disqualification could just as easily be explained as having helped to secure the independence of Judge Lucas. After all, Addison had tried to bar Lucas from performing his judicial duties, and disqualifying Addison sent a strong signal that such interference was completely inappropriate.

However one may construe the Addison precedent, subsequent historical practices support the requirement of both a bad act and malicious intent for judicial removal.\footnote{Id. at 120.} Pennsylvania’s constitution did not precisely follow the federal example on impeachment. It empowered the Pennsylvania Senate to disqualify and remove a judge upon a vote of two-thirds of the senators.\footnote{Id. at 121.} The constitution defined impeachable offenses as “any misdemeanor in office,” language that was “considerably less specific and broader... than that
of the federal rule.”\textsuperscript{115} By contrast, most other state precedents were more specific:

[T]he first state impeachments after ratification of the federal Constitution resembled the state cases of the previous decade. . . . Gross, intentional, self-interested official misconduct, or some criminal act had to be alleged for the impeachment to go forward . . . .\textsuperscript{116}

The Pickering precedent, like the Addison precedent, proved to have quite limited utility. At the same time the House had been considering impeaching Justice Samuel Chase, it was considering impeaching District Judge Richard Peters. While the charge against Judge Peters was that he had sat with Justice Chase on a panel where they both joined in a troublesome ruling,\textsuperscript{117} the House decided not to proceed with an impeachment proceeding against Judge Peters, ultimately rejecting the petition for impeachment as ungrounded.\textsuperscript{118}

Meanwhile, a good deal of the arguments posited in Justice Chase’s impeachment and removal trial involved the propriety of importing into the impeachment process the dangerous tendency doctrine.\textsuperscript{119} This doctrine focused solely on the consequences of an action, not on whether the person doing the action had a bad or malicious intent. Of course, proponents of Justice Chase’s impeachment pointed to both Addison’s and Pickering’s impeachments for support.\textsuperscript{120} In the end, the Senate acquitted Chase, based in part on the recognition of the impropriety of removing a judge merely for his decisions.

In the meantime, Pennsylvania was the site of another critical test of the “dangerous tendency” standard for removal. While this standard had prevailed in Addison’s disqualification, the significance of his disqualification as a precedent was an issue in both Pennsylvania and at the federal level. It was tested by the attempted removal of three justices of Pennsylvania’s Supreme Court for their reliance on British common law as the basis for a citation of contempt.\textsuperscript{121} In 1803 and 1804, Pennsylvania law did not forbid state judges from relying on British common law. The three Pennsylvania Supreme Court justices had held a man in contempt of court based on his criticism of an earlier decision, in which they had upheld a lower court’s ruling against him in a civil matter. The justices claimed that the common law allowed them to issue such a citation, even in an instance where there was no case pending before their court. All three justices were Federalists. The state senate voted 13-11 to

\textsuperscript{115} \textit{Id.} at 120.

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} See \textit{Geyh, supra} note 29, at 132.

\textsuperscript{118} \textit{Id.} at 132-34.

\textsuperscript{119} See \textit{Hoffer & Hull, supra} note 1, at 236-37; \textit{Van Tassel & Finkelman, supra} note 105, at 101-07.

\textsuperscript{120} See \textit{Van Tassel & Finkelman, supra} note 105, at 102-03.

\textsuperscript{121} \textit{Hoffer & Hull, supra} note 1, at 220-27.
convict the judges,\textsuperscript{122} falling short of the requisite two-thirds for conviction
and removal.\textsuperscript{123} In acquitting the justices, the senate rejected the position of
James Monroe, among others, who commented at the time that “application of
the principles of English common-law to our constitution” was “good cause
for impeachment.”\textsuperscript{124} Monroe’s view, no doubt, was a variation on the strict
liability theory of impeachment, and it, like others, was rejected.

Some of the most eloquent defenses of judicial independence may be found
in the records of the Chase and Pennsylvania trials. In the House and
particularly the Senate, the strict liability theory of impeachment was roundly
rejected, especially on the ground that it would lead to the complete destruction
of judicial independence.\textsuperscript{125} Similarly, in Pennsylvania, state legislators
argued that simply allowing a bad act to serve as the basis for a judge’s
removal would allow the legislature to remove any judges with whose
decisions it disagreed.\textsuperscript{126}

The trials and impeachments of James Peck and Charles Swayne followed
the Chase precedent.\textsuperscript{127} In each, the Senate required proof of a bad act and a
bad intent for removal.\textsuperscript{128} In each, the Senate rejected the strict liability theory
of impeachment.

\textbf{CONCLUSION: A WORD ABOUT METHODOLOGY}

The strict liability theory of impeachment lives on, though it has been
rejected, repeatedly, throughout our history. The attraction of the strict
liability theory of impeachment is that it requires little or no discretion, little or
no thought. It operates as a flat rule: if you cross this line, if you make that
decision, then you will be removed.

The evidence is overwhelmingly against an interpretation of the Constitution
as sanctioning either a single style of judging or a strict liability theory of
impeachment. Evidence instead supports a substantive concept of judicial
independence that protects judges in their individual (and collective) decision
making. The proponents of a lower standard of removal fail to acknowledge
the many comments from George Mason and others about the importance of
insulating judges from majoritarian retaliation. Indeed, there is strong
evidence indicating that the Framers sought to prohibit removal solely on a

\textsuperscript{122} Id. at 226.
\textsuperscript{123} PA. CONST. of 1776, § 10.
\textsuperscript{124} HOFFER & HULL, supra note 1, at 221 (quoting Letter from James Monroe to John
Breckenridge (Jan. 15, 1802)).
\textsuperscript{125} See, e.g., id. at 235-50 (relaying the defense’s arguments against deploying the
“dangerous tendency” test against Chase); id. at 246 (stating that Chase’s defense counsel
“warn[ed] that were removal upon the whim of the majority of the House made into a rule,
no one would be safe from factions and demagogues”).
\textsuperscript{126} See id. at 225-27.
\textsuperscript{127} See GEYH, supra note 29, at 151.
\textsuperscript{128} See VAN TASSEL & FINKELMAN, supra note 105, at 109, 125.
political basis. A purely political impeachment was, in their view, one that sought to gain a political or partisan advantage. Many advocates of this lower impeachment standard point to the fact that there have been numerous impeachments based on disagreements with judges’ substantive decisions. Yet none of these impeachment attempts were successful. Their mistake is in conflating an unsuccessful argument with established precedent. This is akin to arguing that because some senators have previously argued that a simple majority of the Senate has the right to change Senate rules whenever it suits them, there is now a precedent for a simple majority to change the Senate rules. There is a step missing from this logic, to say the least. No doubt, some will always argue that an impeachment premised on a claim of judicial error is constitutional. They will claim that only one method of interpreting the Constitution is constitutionally acceptable. And there will continue to be numerous problems associated with this claim, including the failure of the Framers or Ratifiers to say as much, and the failure of every generation of Americans (and Justices) to accept the claim.

Ironically, the assertion that the Constitution permits a lower standard for impeaching judges is inconsistent with a strict construction of the Constitution. According to a strict construction, the federal government has limited powers. Yet Republicans and others who maintain we have a lower threshold for removing judges than presidents are, in effect, claiming expanded federal powers.

Moreover, some proponents of a lower standard of impeachment for judges ignore a major contradiction in their logic. In supporting the impeachment and removal of Bill Clinton, many members of Congress and some scholars maintained that there was only one standard of impeachment. Yet, some are now claiming that there is a different standard – indeed, a lower one – for impeaching or removing judges than there is for a president. We expect the Constitution to say the same thing about the standards of impeachment, regardless of the officials targeted for impeachment or removal. The standard should not change out of convenience. If the Constitution posits different standards for impeaching and removing judges than for presidents, then those standards ought not to change depending on how much we like or dislike the officials to whom they are being applied.

In various public fora, some Republican leaders and many conservative scholars have insisted for years that constitutional interpretation ought not depend on the interpreter’s personal or partisan preferences. Neither this admonition nor the practice to which it refers is new. It is common for critics

129 See, e.g., Sen. Kay Bailey Hutchison, Analysis of the Articles of Impeachment (1999), reprinted in 145 CONG. REC. S1457, 1469 (daily ed. Feb. 12, 1999) (“[T]he [impeachment] standards are set by the Constitution for all officers of the Federal government. They are precisely the same, and we are obligated to apply them evenly.”); 145 CONG. REC. S1337, 1338 (daily ed. Feb. 8, 1999) (statement of Rep. Sensenbrenner) (“To conclude that the standard of Presidential truthfulness is lower than that of a Federal judge is absurd.”).
to deride any judicial decisions with which they disagree as based not in law, but on the judges’ personal preferences. But an even older principle remains: the principle of judicial independence guaranteed by our Constitution. This principle protects judges, both individually and collectively, from political attacks masquerading as principled constitutional interpretation, regardless of the party of the attackers or of a judge’s nominating President.