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THE "CONSTITUTION RESTORATION ACT" AND JUDICIAL INDEPENDENCE: SOME OBSERVATIONS

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This Essay uses the proposed Constitution Restoration Act of 2005[1] as the vehicle for exploring some aspects of contemporary concerns about judicial independence and the mechanisms available to control what might be perceived as abuses of judicial authority. The Act contains two provisions relevant here. First, it provides:

> In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.[2]

Second, it asserts that so relying "shall be deemed to constitute the commission of (1) an offense for which the judge may be removed upon impeachment and conviction; and (2) a breach of the standard of good behavior required by article III, section 1 of the Constitution."[3]

I doubt that the Act has a serious chance of enactment,[4] but its introduction provides an opportunity to examine some difficulties associated with congressional control of judicial decision-making. I begin by treating the Constitution Restoration Act as a real statute, asking

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1 H.R. 1070, 109th Cong. (2005), 2005 CONG US HR 1070 (Westlaw).

2 *Id.* § 201.

3 *Id.* § 302.

4 I believe that the proposal is what political scientist David Mayhew calls "position taking," which he defines as "the public enunciation of a judgmental statement on anything likely to be of interest to political actors," and includes purely symbolic action, such as the introduction of a legislative proposal that has no chance of enactment, which merely "express[es] an attitude." DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 61 (1974).

what its substantive terms mean. I argue that there is substantial tension between what the Act says and what its sponsors manifestly hope to accomplish. In addition, I note some constitutional questions about the Act. I then turn to the "enforcement" clauses. After briefly examining the proposition that the grounds for judicial impeachment are unconstrained by law, I argue that the function of the enforcement clauses is to provide a legal justification for impeachment. And that justification is available even though the statute may not in fact prohibit the behavior that Supreme Court justices have engaged in, and even though the statute might in fact be "unconstitutional" in some sense. This, however, returns us to the proposition that there are no legal constraints on judicial impeachment.

I. THE CONSTITUTION RESTORATION ACT AS A STATUTE

What does the Constitution Restoration Act *mean*? The major question is, what constitutes "rel[iance] upon" in constitutional adjudication?[5] There are, however, some additional minor puzzles.[6] For example, how does the exception for pre-adoption common law work?[7] Consider here Justice Stevens's opinion in *Lackey v. Texas*,[8] which in the course of explaining why the claim that prolonged detention on death row in itself might constitute cruel and unusual punishment referred to a 1983 opinion by two judges in the British House of Lords, which argued that such detention "would have infringed the prohibition against cruel and unusual punishments to be found in section 10 of the Bill of Rights 1689."[9] The British decision was rendered after 1789 (or 1791), of course, but it purported to interpret a pre-adoption statute. Has Justice Stevens "relied upon" pre-adoption or post-adoption English constitutional or common law?[10]

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[5] Hereafter I use variants of "rely upon" without indicating emendations.

[6] One highly technical puzzle is this: a federal court that applies international law such as a multilateral treaty as interpreted by some agency authorized to do so, such as the WTO appellate body, in a context in which that treaty provides the governing law is obviously relying upon that organization's actions. It is also interpreting the U.S. Constitution's Supremacy Clause, U.S. CONST. art. VI, cl. 2, in holding that that interpretation has the force of domestic law. I doubt that the proposed Act's sponsors considered this problem.

[7] For that matter, is the relevant date 1789, 1791, or 1868? That is, with respect to rights made applicable to the states by the Fourteenth Amendment, U.S. CONST. amend. XIV, would a judge act in a manner proscribed by the Act if she "relied upon" an 1832 British decision?

[8] 514 U.S. 1045 (1995).

[9] *Id.* at 1046-47 (citing Riley v. Attorney Gen. of Jam., [1983] 1 A.C. 719, 734, (P.C. 1982) (Lord Scarman, dissenting)).

[10] A similar, though more complex, example can be developed involving treaties that might be cited in the course of interpreting a constitutional provision, where the question of treaty interpretation is addressed in part with reference to decisions by courts of treaty partners interpreting the treaty.

Consider also the phenomenon of "aversive" constitutionalism,[11] in which a court refers to constitutional decisions elsewhere as a reason for *rejecting* a proposed interpretation of the U.S. Constitution. For example, Justice Antonin Scalia's dissent in *McCreary County v. ACLU* began with an anecdote about the Justice's experience on September 11, 2001.[12] He was, he wrote, in Rome attending an international conference, and one of his colleagues commented that ending a presidential address with "God bless America," as President Bush had just done, was "absolutely forbidden" in his country. Justice Scalia continued:

> That is one model of the relationship between church and state—a model spread across Europe by the armies of Napoleon, and reflected in the Constitution of France, which begins "France is [a] . . . secular . . . Republic." Religion is to be strictly excluded from the public forum. This is not, and never was, the model adopted by America.[13]

Has Justice Scalia "relied upon" non-U.S. law to support his interpretation of the U.S. Constitution?

Or, suppose a U.S. judge mentioned the Canadian decision in *R. v. Keegstra*[14] to show that enforcement of anti-hate speech regulations threatens a slide down a slippery slope, and that the First Amendment should (therefore) be interpreted to impose substantial restrictions on the adoption of hate speech regulations. Has the judge "relied upon" non-U.S. law in interpreting the U.S. Constitution?[15]

Third, we might wonder about unexpressed reliance. That is, a judge might consult a wide range of materials, including non-U.S. materials, in the quiet of his or her chambers, and then write an opinion drawing upon—"relying upon," in ordinary language—the non-U.S. materials but not mentioning them. The opinion might use concepts with which the judge became familiar in doing the research, or might interpret domestic doctrinal terms informed by the

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[11] On aversive constitutionalism, see Sujit Choudhry, *The* Lochner *Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1 (2004); Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296 (2003).

[12] 125 S. Ct. 2722, 2748 (2005) (Scalia, J., dissenting).

[13] *Id.* (citation omitted).

[14] [1990] 3 S.C.R. 697.

[15] Another small puzzle: non-U.S. institutions, such as the European Community, sometimes file amicus curiae briefs in Supreme Court cases. Suppose a judge cites such a brief for a factual proposition relevant to the case's disposition. Has the judge "relied upon" "an action" of an international organization, the action being the filing of the amicus brief?

interpretations of parallel terms in non-U.S. law.[16] Has the judge "relied upon" non-U.S. law within the statute's contemplation here?[17]

These are small puzzles. More important is the behavior that appears to have motivated members of Congress to introduce the Constitution Restoration Act. That behavior is the reference in recent Supreme Court constitutional decisions to non-U.S. law. I use the term *reference* here deliberately, to point out that in most contexts we would distinguish between references to non-U.S. law and reliance upon it. Consider, for example, *Atkins v. Virginia*,[18] holding it unconstitutional to subject criminals who had mental retardation to the death penalty. *Atkins* contained the following footnote:

> Additional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. For example, several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. See Brief for American Psychological Association et al. as *Amici Curiae*; Brief for AAMR et al. as *Amici Curiae*. In addition, representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an *amicus curiae* brief explaining that even though their views about the death penalty differ, they all "share a conviction that the execution of persons with mental retardation cannot be morally justified." Brief for United States Catholic Conference et al. as *Amici Curiae* 2. Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded

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[16] *Cf.* Konrad Schiemann, *A Response to* The Judge as Comparatist, 80 TUL. L. REV. 281, 287 (2005).

> [E]ven a judge who has deliberately investigated and drawn on foreign material may nevertheless consciously chose [sic] not to mention this fact in his judgment. There are a number of reasons for this . . . .
>
> For instance, in England, intellectual exhibitionism is—or in any event was throughout much of the last century—widely regarded as socially unacceptable, even amongst those who are well read.
>
> Moreover, in England the tradition is for the judgment not to contain matter that has not been canvassed with the advocates. Most advocates will not be able, without advance warning, to sensibly take part in a discussion involving references to foreign law, let alone the writings of philosophers and others.

Id. (citations omitted).

[17] And, of course, if so, how could we ever find out?

[18] 536 U.S. 304 (2002).

> offenders is overwhelmingly disapproved. Brief for The European Union as *Amicus Curiae* 4.[19]

Justice Scalia derided the reference in this excerpt's final sentence by awarding it a share of "the Prize for the Court's Most Feeble Effort to fabricate 'national consensus.'"[20] I think there is a genuine question whether this reference counts as "reliance upon" non-U.S. law in the ordinary sense.

Only slightly different is the more recent *Roper v. Simmons*.[21] The Court held that it was unconstitutional to execute offenders who committed their crimes when they were under eighteen years of age. *Roper* differed from prior cases referring to non-U.S. law, because the prior cases mentioned non-U.S. law only in passing, as the *Atkins* footnote illustrates, whereas *Roper* contained an entire section dealing with non-U.S. law. How, though, did the opinion "deal with" that body of law? The structure of the *Roper* opinion is this: Taking its guidance from prior U.S. decisions dealing with the Eight Amendment, the Court first examines the question, is there a discernible trend in U.S. law and practice against the imposition of the death penalty on this class of offenders? It concludes that there is such a trend. Then, again predicated on its analysis of U.S. precedents, the Court asks whether, in the justices' exercise of their own independent judgment about the morality of and justifications for imposing the death penalty in these cases, they believe the practice to be unjustified. It concludes that such an independent judgment leads to the conclusion that the practice is unjustified. Then comes the section on non-U.S. law. In that section, the Court asserts that its prior conclusions—about the trend in domestic law and about what an independent judgment reveals—"find[] confirmation" in practices elsewhere in the world.[22] Does confirming a judgment already reached by checking it against judgments made elsewhere constitute "reliance upon" non-U.S. law?

My personal view is that our ordinary language usages would lead us to conclude that neither *Atkins* nor *Roper*—nor, I believe, any of the other recent cases in which the Supreme Court or individual justices have referred to non-U.S. law—involve reliance, but rather only reference.[23] Perhaps we should take the term *rely upon* as a term of art, a phrase that uses words familiar in ordinary language but given a

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[19] *Id.* at 316 n.21.

[20] *Id.* at 347 (Scalia, J., dissenting).

[21] 543 U.S. 551 (2005).

[22] *Id.* at 575.

[23] For a more detailed argument to that effect, see Mark Tushnet, *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, 35 U. BALT. L. REV. (forthcoming 2006).

specialized meaning in this context. The next question then would be, What are the sources from which we can discern the meaning of the term of art? Ordinarily, I think, such terms get embedded in the law gradually: they start out having close to their ordinary meaning in cases or statutes, but as time passes they take on a specialized meaning. I do not know of other statutes in which the term *rely upon* has a specialized meaning, though. The remaining possibility is that the term would be given meaning in practice—that is, in impeachment proceedings.

If we cannot treat *rely upon* as a term of art, we would have to face interesting questions about statutory interpretation. I have no doubt that the Constitution Restoration Act's sponsors believe that they are addressing a class of decisions that includes *Roper* and probably *Atkins*.[24] The natural reading of their statute leads to the conclusion that they have missed their mark. In such circumstances, should we interpret the statute to do what the sponsors intended, or what they said?[25] In the former case, the term *rely upon* means what the proposed statute's sponsors subjectively intend it to mean. I merely note the irony of taking this course in a context in which Justice Scalia, probably the most prominent critic of references to sponsors' subjective intent in statutory interpretation, has been one of the moving forces in bringing critical public attention to the issue of references to non-U.S. law in Supreme Court cases.

Assuming that the statute applies to *Roper* and similar cases, is it constitutional?[26] Can Congress prescribe the interpretive methodology the federal courts must use? Or, more precisely, can it proscribe a

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[24] *See, e.g.*, Bernard Schoenberg, *High Level Race or a Mess? GOP Sorting Its Options*, COPLEY NEWS SERVICE, Oct. 3, 2005, *available at* www.lexis.com (quoting Rep. John Shimkus as explaining his endorsement of the Act in these terms: "Liberal judges have admitted using laws and decisions from foreign nations in making judgments that should only be based on our own laws and traditions . . . . This is, in effect, turning over our sovereignty and is an outrageous abuse of judicial interpretation."). For a discussion of the Act's background, see Sam Rosenfeld, *Disorder in the Court*, THE AM. PROSPECT, July 3, 2005, at 24, *available at* www.prospect.org/webpage.ww?section=root&name=ViewPoint$articleID=9867.

[25] Perhaps one can get around this difficulty by conceding that the most natural reading of the statute is the one I have offered, that is, to take the term *rely upon* as a term of art. Next the argument must be made that it does not wildly distort ordinary understandings of the term *rely upon* to invoke it with respect to *Roper* and the cases the Act's sponsors see as related, and that the statute can fairly be interpreted to do what its sponsors intended, without torturing the language they used.

[26] Were the statute's constitutionality to come into question during an impeachment proceeding, the courts would not play a role in resolving the constitutional question. *See* Nixon v. United States, 506 U.S. 224 (1993) (holding that the question of whether the procedures according to which the Senate "tried" Judge Nixon's impeachment presented a nonjusticiable political question). The Nixon court asserted that "[j]udicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the 'important constitutional check' placed on the Judiciary by the Framers." *Id.* at 235.

particular interpretive method? I begin with one strong intuition and one precedent. The intuition is that constitutional interpretation, and the choice of methods of constitutional interpretation, is at the heart of the judicial enterprise.[27] The precedent is *United States v. Klein*,[28] which holds that Congress cannot dictate a "rule of decision" about a constitutional provision's meaning. But, prescribing a rule of decision is simply an extremely severe constraint upon the interpretive methods judges use.

A contemporary controversy, not yet authoritatively resolved, indicates that the problem of legislative constraints on constitutional interpretation is not entirely new. The Antiterrorism and Effective Death Penalty Act (AEDPA) states that federal judges can issue habeas corpus relief only if they find that the petitioner's rights were violated when measured against "clearly established Federal law, as determined by the Supreme Court of the United States."[29] The statute appears to preclude a federal judge from issuing relief based upon circuit precedent.[30] In *Lindh v. Murphy*,[31] Judge Kenneth Ripple argued in dissent that this restriction interfered with the court's ability to exercise the judicial function: Congress "has no power to dictate how the content of the governing law will be determined within the judicial department."[32]

In the present context, *Klein* indicates that severe limitations on the methods judges use are unconstitutional. *Klein* lies at the end of a continuum. The intuition that the choice of interpretive methods is at the core of the judicial function suggests that Congress lacks power even when we move away from *Klein*'s extreme. This is particularly so when attempts to prescribe interpretive methods can be understood

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[27] My intuition about statutory interpretation is much weaker, and points in the other direction. Methodological directives with respect to statutes seem to me more like provisions intrinsic to the statutes themselves, and in light of the obvious congressional power to prescribe a statute's terms (and so its meaning), congressional power to prescribe interpretive methods seems to me to follow. *See* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992); *see also* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002). *But see* Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97 (2003) (arguing that Congress lacks the power to enact laws directing how courts should interpret statutes adopted after the directive law's enactment).

[28] 80 U.S. (13 Wall.) 128 (1871).

[29] 28 U.S.C. § 2254(d)(1) (2001).

[30] Putting aside the problem of determining whether circuit precedent is sufficiently founded on the Supreme Court precedent that the latter is, so to speak, transitively transmitted through circuit precedent to the case at hand.

[31] 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997).

[32] *Id.* at 887. The majority responded with an argument inapplicable in the present context, that Congress did have broad power to prescribe remedies for violations of constitutional rights, and in so doing did not violate the core judicial function by restricting the court's interpretive resources. *Id.* at 869.

as congressional "aggrandizement,"[33] that is, as efforts to increase congressional power over constitutional interpretation at the expense of judicial interpretation.[34] Ordinarily, aggrandizement occurs when one branch tries to *do* something previously done by another branch: Congress enhances its power by taking it away from the President and exercising the power itself, for example.[35] Here the increase in power is less direct. Congress is not prescribing any particular outcomes,[36] but it is asserting a power to structure how the courts go about doing their job. That, I would think, should count as the kind of aggrandizement against which the separation of powers guards.

Perhaps one might find in the Constitution a categorical rule against congressional power to prescribe interpretive methods. I doubt, though, that it would be sensible to interpret the structural guarantees of separation of powers to deny Congress *all* power to do so. Consider, for example, a statute purporting to ban the federal courts from using Latin phrases other than those commonly found in legal dictionaries, adopted, for example, to ensure that federal court decisions would be accessible to ordinarily literate Americans.[37] I am hard-pressed to deploy my intuition about the core judicial function against such a statute.

The constitutional standard then would appear to be one of degree: Congress has some power to prescribe interpretive methods, but cannot exercise that power to a degree that would substantially impair the courts' ability to perform the job of constitutional interpretation. Opinions will of course differ on whether the Constitution Restoration Act violates that standard. For what it is worth, my tentative judgment is that it does not: the practice at which it appears to be directed has

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[33] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 122 (1976) (asserting that separation of powers provides a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other").

[34] Obviously, the Constitution Restoration Act's enforcement clauses support an "aggrandizement" view of the proposal.

[35] *See, e.g.*, Bowsher v. Synar, 478 U.S. 714 (1986) (holding unconstitutional the Graham-Rudman-Hollings budget reduction act on the ground that the statute gave the power to implement budget cuts to the head of the (then) General Accounting Office, who by statute was subject to removal by joint resolution of Congress, rather than by the President).

[36] Putting aside the peculiar, and I think likely to be rare, case in which eliminating one interpretive method from the courts' toolkit would affect the substantive outcome, as when non-U.S. law would play a dispositive role.

[37] *See, e.g.*, Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842).

> The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romæ, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omni tempore, una eademque lex obtenebit.*

Id.

played a rather small role in recent constitutional interpretation,[38] and depriving the courts of the method would not, I think, substantially limit their ability to do the job the Constitution gives them.[39]

II. THE CONSTITUTION RESTORATION ACT AND IMPEACHMENT

The Constitution Restoration Act purports to enforce its substantive provisions by subjecting those who violate its terms to removal from office. Why might such a statute be thought necessary? That is, assume a majority of Representatives believes that a judge who relies upon non-U.S. law in constitutional interpretation should be removed from office. Does the Constitution Restoration Act strengthen their position?

I begin with the proposition, most famously associated with Gerald Ford, that impeachment is a purely political process. Discussing the proposed impeachment of William O. Douglas, Ford asserted that the grounds for impeachment were "whatever a majority of the House of Representatives considers them to be at a given moment in history."[40] The rejection of that proposition appears to be one fixed point in impeachment law. Which is to say, impeachment is a process that at least *combines* politics and law, so that Representatives must have some argument that a judge's performance constitutes bad behavior (or a high crime or misdemeanor),[41] as a predicate for impeachment.[42] Or, to put it more forcefully, there is something appropriately called a *law of impeachment.*

Further, there is a fixed point in impeachment law, emerging from the failed impeachment of Samuel Chase. That failure has been taken to establish the legal proposition that Congress may not remove a federal judge from office *merely* on the basis of disagreement with the judge's rulings.[43] Recent impeachments of federal judges suggest that

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[38] And not all that large a role throughout the history of constitutional interpretation.

[39] Because the question is one of degree, there is no tension between the position I tentatively take here and Professor Hamilton's argument that the more expansive interpretive directive contained in the Religious Freedom Restoration Act violates the separation of powers.

[40] 116 CONG. REC. 11912, 11913 (1970).

[41] To the extent that there is a distinction between bad behavior and commission of high crimes or misdemeanors, it would appear to be that the term *good behavior* might preserve the possibility of judicial removal for mental incompetence and similar disabilities that would not count as high crimes or misdemeanors. For a contrary view, see RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 159-65 (1973) (concluding that the original understanding was that "misbehavior" was identical to commission of a high misdemeanor for purposes of removing a judge from office).

[42] *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 67 (1999) (describing the "legalistic turn" in the impeachment of Samuel Chase).

[43] For a discussion, see *id.* at 20-71. Whittington summarizes the substantive outcome of the Chase impeachment in terms different from, but I believe consistent with, mine: "The primary result . . . that emerged from the trial of Samuel Chase was that removals should be

they can be removed from office only for the commission of offenses that violate existing criminal statutes.[44]

One might think that the Chase precedent shows that the enforcement provisions of the Constitution Restoration Act are insufficient to provide the legal basis for impeaching a judge who relies upon non-U.S. law in constitutional interpretation. After all, are not members of Congress who would vote to remove a judge for relying upon non-U.S. law simply disagreeing about the propriety of the judge's rulings? Not quite. I think it at least fairly arguable—a term that will be important in a moment—that the existence of a statute changes the picture, making removal for violation of the Act removal for something other than "mere" disagreement with the judge's rulings. *After* the adoption of the Constitution Restoration Act, a member of Congress can say of a judge who relies on non-U.S. law, "I am not simply disagreeing with the reliance on non-U.S. law, which is bad enough. Worse, this judge defied *the law*, which certainly ought to be ground for removal."

Now, reintroduce the interpretive ambiguities associated with the statute, and its possible unconstitutionality.[45] Those who believe the targeted judges should not be removed will certainly argue first, that they did not violate the statute because they only referred to and did not rely upon non-U.S. law, and second, that the statute is an unconstitutional intrusion on core judicial functions. Those who support impeachment will deploy legal arguments about statutory and constitutional interpretation to counter their opponents. Put another way, the existence of the Constitution Restoration Act allows representatives who support impeachment to explain both that they are not overriding the Chase precedent and that they are acting in a manner consistent with the rejection of the Ford position because they have a legal rather than a merely political basis for their actions. Opponents of

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limited to serious offenses that violated the duties of the office, though such offenses could be essentially political in nature." *Id.* at 38; *see also id.* at 65 (summarizing the outcome of the impeachment trial as "protect[ing] federal officers from removal by impeachment for mere technical errors in the conduct of their office, for private political sentiments, or simply for the purpose of creating vacancies").

[44] The impeachments of Walter Nixon and William Clinton suggest, albeit with some qualification, that the criminal offenses need not be connected to the performance of their official duties. The qualifications arise from the fact that Walter Nixon was impeached for a criminal offense that involved his contacts with a state prosecutor, contacts that might have been significant to the prosecutor precisely because Nixon was a federal judge, and from the fact that Clinton was not convicted.

[45] I note the remote possibility that a litigant in ordinary litigation might be able to challenge the Act's constitutionality. The litigant might claim that reference to non-U.S. law is essential to the litigant's success on the merits, and that precluding such reference is unconstitutional. The ripeness problems associated with this position are evident.

impeachment will make their own legal arguments: that what is really going on is an attempt to remove judges with whom the proponents disagree, contrary to the Chase precedent, that the targets did not in fact violate the badly written Constitution Restoration Act, and that the Act is unconstitutional anyway.

How will this legal controversy be resolved? In the course of the impeachment proceeding itself.[46] That is, the rejection of the Ford position means that those supporting impeachment must have some plausible legal arguments for their actions—but those arguments need not be "correct" in some sense external to the impeachment process itself. If that is so, though, have not we actually returned to the Ford position? Again, not quite. The Ford position failed to acknowledge that impeachment (like the rest of constitutional law, I believe) is simultaneously political *and* legal—that constitutional law is a special kind of law, a political law.[47] The toolkits, so to speak, of adjudicated law and political law (the law of impeachment) are the same. Perhaps adjudicated law uses a wrench—reference to precedent, for example—more often than political law does, although the Chase example shows that political law uses precedent too. And perhaps political law uses a screwdriver—reference to sound public policy—more often than adjudicated law does, although judges sometimes predicate their legal interpretations on judgments of what would be good public policy.[48] Despite these differences around the edges, the two domains are not categorically different.

III. CONCLUSION

As I indicated earlier, the Constitution Restoration Act stands little chance of enactment in the short run. Its sponsors might be playing to some important constituencies, which will be satisfied—or so the sponsors might think—merely by the fact that the sponsors are taking a position on the question. Or, the sponsors might be attempting to signal their displeasure to the Court. Yet, such a signal might be ineffective, or even backfire, if the statute is not enacted. A judge might take the *failure* to adopt the statute to signal that too few members of

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[46] By which I mean to refer not only to the formal proceedings in the House of Representatives and the Senate (if any occur), but also the public reaction to those proceedings.

[47] *See* Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. (forthcoming 2006).

[48] For recent arguments by prominent judges that their task involves at least reference to judgments of what constitutes good public policy, see STEPHEN BREYER, ACTIVE LIBERTY (2005). *See also* Richard A. Posner, *The Supreme Court 2004 Term Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005).

Congress to worry about are bothered by the practice of referring to non-U.S. law.[49]

Unless there are dramatic changes in our political circumstances, the Constitution Restoration Act will not become law. Such changes are more likely today than they have been at any time in the recent past. Until 2002, the United States had experienced functionally divided government for the prior thirty years.[50] Having created a unified government, Republicans have begun to construct the institutions for securing their position for at least the next few election cycles. If their effort succeeds—an open question as I write in early 2006—they might take on the remaining resistance they might face from the courts. The Constitution Restoration Act, whose enactment is unlikely *today*, might be part of an effective judicial reform package after a new constitutional order takes hold.

Like many legislative initiatives, failed as well as successful, this one too may illuminate some important issues about constitutional law. Thinking about the Constitutional Restoration Act has shown how constitutional law is political law, and shown in addition that, whatever one thinks about the Act itself, there is nothing especially wrong with that.

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[49] One might suggest that a good strategy for judges who think the practice a good one would be to refer to non-U.S. law prominently in an opinion upholding a statute against constitutional challenge.

[50] This paragraph draws upon the argument in MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003).