Articles

PRISONS, PRISONERS, AND PINE FORESTS: CONGRESS BREACHES THE WALL SEPARATING LEGISLATIVE FROM JUDICIAL POWER

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Writing for a six-justice majority in *Plaut v. Spendthrift Farm, Inc.*,[1] Justice Scalia stated: "[T]he doctrine of separation of powers is a *structural safeguard*.... In its major features...it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict."[2] These "high walls" are now threatened by a series of seemingly unrelated legislative actions. Dissatisfied with judicial interpretations of constitutional provisions and enacted statutes,[3] Congress—either politically unwilling or unable to propose constitutional amendments or to amend substantive law—has resorted to procedural mechanisms to compel changes in judicial outcomes.[4] Though substantively unrelated, these

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I thank Jordan Leader, Columbia University Law School, Class of 1999, for his excellent research assistance.

1. 514 U.S. 211 (1995) (holding that a statutory requirement that federal courts reopen final judgments entered before its enactment contravened the Constitution's separation of powers).

2. *Id.* at 239 (emphasis added).

3. Senior Circuit Judge Jon O. Newman, former chief judge of the Second Circuit Court of Appeals, attributes much of the congressional dissatisfaction to Congress' failure "to eliminate needless uncertainties when it enacts laws." Jon O. Newman, *Misdiagnosing Courts' Problems*, ST. LOUIS POST–DISPATCH, Jan. 28, 1998, at B7.

4. Professor John Choon Yoo has written that structural reform cases are likely to become the subject of "a more interactive process, in which Congress and the judiciary react and learn from each other." John Choon Yoo, *Who Measures the Chancellor's Foot?*

legislative actions all ultimately jeopardize individual liberties.[5]

Justice Scalia's concerns voiced in *Plaut* echo those expressed by some of the framers. During the debates regarding the ratification of the Constitution, Alexander Hamilton, quoting the celebrated Montesquieu, warned that "there is no liberty if the power of judging be not separated from the legislative and executive powers."[6] Ultimately, of course, the Constitution incorporated the cardinal principle articulated by James Madison that none of the branches should have the power to overrule the others in the administration of their core powers.[7] The making, executing, and interpreting of the law should be separated, with each department given "the necessary constitutional means and personal motives to resist the encroachments of the others."[8] Judicial review is the means available to the judicial branch. When Chief Justice John Marshall confirmed the principle of judicial review in *Marbury v. Madison*, he stated that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[9]

In addition to the principle of judicial review, finality has long been critical to the role of the judiciary and to curtailing the threat presented by executive or legislative revision.[10] Forty years ago, the Court underscored the principle that judicial decisions cannot be revised or overturned by Congress or the executive branch.[11] In the same year, the Court reaffirmed the binding character of its decisions.[12] Recently, in *City of Boerne v. Flores*,[13] the Court reinforced that it is

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The Inherent Remedial Authority of the Federal Courts, 84 CAL. L. REV. 1121, 1176 (1996). This Article takes issue with some of Professor Yoo's conclusions regarding the inherent authority of the federal courts.

5. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47 (James Madison).

In his concurring opinion in *Plaut* Justice Breyer wrote: "For one thing, the *authoritative* application of a general law to a particular case by an independent judge, rather than by the legislature itself, provides an assurance that even an unfair law at least will be applied evenhandedly according to its terms." *Plaut*, 514 U.S. at 241 (Breyer, J., concurring) (emphasis added).

6. THE FEDERALIST NO. 78 (Alexander Hamilton) (quoting 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, SPIRIT OF THE LAWS 165 (1792)).

7. *See* THE FEDERALIST NO. 48 (James Madison) ("It is evident that [no branch of government] ought to possess, *directly or indirectly*, an overruling influence over the others in the administration of their respective powers." (emphasis added)).

8. THE FEDERALIST NO. 47 (James Madison); THE FEDERALIST NO. 51 (James Madison).

9. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

10. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), *Marbury*, and the recent pivotal decision in *City of Boerne v. Flores,* 117 S. Ct. 2157 (1997).

11. Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948).

12. Cooper v. Aarons, 358 U.S. 1, 18 (1958) ("[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").

unacceptable for Congress to attempt to undo judgments through legislation. *City of Boerne* involved a challenge to the Religious Freedom Restoration Act of 1993,[14] through which Congress expressly attempted to overrule the Court's interpretation of the Free Exercise Clause[15] in *Employment Division v. Smith.*[16] In *City of Boerne*, the Court declared:

> When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed.[17]

Plaut[18] also emphasized the Court's concern for the protection of the integrity of judicial power. *Plaut* challenged a December 1991 amendment to the Securities and Exchange Act that not only specified the statute of limitations to be applied in certain securities actions, but also sought to reinstate cases that had been dismissed on statute of limitations grounds as a consequence of two June 18, 1991, Supreme Court decisions, *Lampf v. Gilbertson,*[19] and *James B. Beam Distilling Co. v. Georgia.*[20] The Court stated:

> Article III establishes a "judicial department" with the "province and duty...to say what the law is" in particular cases and controversies.... [T]he Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments."[21]

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13. 117 S. Ct. 2157.

14. Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb–4 (1994)).

15. U.S. CONST. amend. I.

16. 494 U.S. 872 (1990).

17. *City of Boerne*, 117 S. Ct. at 2172 (citation omitted); *see also* Hobson v. Hansen, 265 F. Supp. 902, 922–23 (D.C. 1967) (Wright, J., dissenting) ("If judicial resolution of a case will be subject to revision or kindred subsequent action by the Legislature or Executive, the federal court must stay its hand." (citations omitted)); PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 95 (3d ed. 1988) (Recognition of the propriety of a power of revision threatens "in some fundamental way the integrity of the judicial process.").

18. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

19. 501 U.S. 350 (1991)

20. 501 U.S. 529 (1991).

21. *Plaut*, 514 U.S. at 218–19 (citations omitted). Justice Scalia expounded upon the historical rationale: "The Framers...lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression." *Id.* at 219.

While the separation of powers principle has long held an important place in our government's organization, the current Supreme Court has responded to the recent congressional attack upon the "high wall" protecting the authority of Article III courts with puzzling inconsistency. In one strand of decisions, represented by *Plaut*[22] and *City of Boerne*[23]—involving increasingly blatant encroachments by Congress—the Court has acted forcefully to protect the constitutional prerogatives of Article III courts. It rejected direct attempts by Congress to reopen final judgments and to impose its own interpretation of the meaning of the Constitution's Free Exercise Clause upon the judiciary. Yet with regard to other congressional intrusions[24] that threaten the authority of Article III courts in equally effective but more subtle ways, the Court appears reluctant to "use the necessary constitutional means"[25]—judicial review—to prevent Congress from "possess[ing]...an overruling influence" upon the judiciary.[26] The Court has allowed Congress to curtail or reverse the effects of prior judicial decisions and orders and to cabin the Article III judicial power itself.

Although the relationships between the legislative and executive branches and between the executive and the judicial branches have been the subjects of much study, the relationship between the legislative branch and the judiciary has received less attention.[27] Yet judicial independence from legislative interference is at the foundation of personal liberty. Congress gives voice and power to political and popular passions. As a result, legislative enactments sometimes endeavor to vitiate unpopular judicial decisions—often those intended to protect minority rights and interests.[28] The temptation for political leaders to rouse popular passions

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22. 514 U.S. 211 (1995) (challenging the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102–242, § 476, 105 Stat. 2236, 2387 (codified at Securities Exchange Act of 1934 § 27A, 15 U.S.C. § 78aa–1 (1994)).

23. 117 S. Ct. 2157 (1997) (challenging the Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb–4 (1994)).

24. These intrusions include the Emergency Salvage Timber Sale Program, Pub. L. No. 104–19, § 2001, 109 Stat. 194, 240 (1995) (codified at 16 U.S.C. § 1611 (Supp. I 1995)), and its predecessor, the Northwest Timber Compromise, Pub. L. No. 101–121, § 318, 103 Stat. 701, 745 (1989); the Prison Litigation Reform Act of 1995, Pub. L. No. 104–134, §§ 801–810, 110 Stat. 1321, 1321–66 (1996) (to be codified as amended at scattered sections of 11 U.S.C., 18 U.S.C., 28 U.S.C., 42 U.S.C.); and the habeas corpus reform provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, §§ 101–107, 110 Stat. 1214, 1217 (to be codified at 28 U.S.C. §§ 2244, 2253–2255, 2261–2266).

25. THE FEDERALIST NO. 51 (James Madison).

26. THE FEDERALIST NO. 48 (James Madison) (emphasis added).

27. *See, e.g.*, JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY (Robert A. Katzmann ed., 1988); ROBERT A. KATZMANN, COURTS AND CONGRESS (1997).

28. As Justice Jackson wrote with his usual eloquence:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property,...and other fundamental rights may not be submitted to vote;

against judges and their decisions may be irresistible, particularly during periods of uncertainty and insecurity.[29] Once aroused, the popular passions are sometimes assuaged by political leaders through attempts, in Madison's words, to exercise "an overruling influence" over unpopular judicial decisions.[30]

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they depend on the outcome of no elections.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

29. *See, e.g.*, James Bennet, *'Judicial Dictatorship' Spurns People's Will, Buchanan Says*, N.Y. TIMES, Jan. 30, 1996, at B1.

Also, the April 1, 1996, decision to suppress physical evidence (80 pounds of cocaine and heroin) by Judge Harold Baer, Jr., in *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), *vacated*, 921 F. Supp. 211 (S.D.NY. 1996), precipitated a political maelstrom. *See, e.g.*, Don Van Natta Jr., *Judge Baer Takes Himself off Drug Case*, N.Y. TIMES, May 17, 1996, at B1. According to Ramon W. Pagan, Ms. Bayless' lawyer: "This is one of the most unusual cases in jurisprudence, where you had the three most powerful men in the United States [(the President, the Speaker of the House, and the Senate Majority Leader)] threaten a judge and cause my client to feel she could not trust any of his future decisions." *Id.*

A similar outcry occurred when Judge Stewart B. Dalzell found a woman convicted of murder in Pennsylvania to be "actually innocent" and barred the state from retrying her. Lambert v. Blackwell, 962 F. Supp. 1521 (E.D. Pa. 1997), *vacated*, 134 F.3d 506 (3d Cir. 1998). A petition signed by 37,000 people demanded that Judge Dalzell be impeached. *See, e.g.*, Jan Hoffman, *Federal Judge Overturns Murder Verdict, Fueling Feud on Judicial Power*, N.Y. TIMES, Dec. 27, 1997, at A1. Judge Dalzell's decision was vacated by the Third Circuit because Ms. Lambert had failed to exhaust her available appeals in the Pennsylvania court system. Lambert v. Blackwell, 134 F.3d 506 (3d Cir. 1998).

30. THE FEDERALIST NO. 48 (James Madison). The sentiments expressed by Judge H. Lee Sarokin of the Third Circuit Court of Appeals, when he announced his resignation on June 4, 1996, demonstrate that the issue is not solely a matter of academic speculation. *The New York Times* reported: "Saying that political attacks on judges had hampered his ability to render independent decisions, Judge H. Lee Sarokin...announced that he would resign from the bench. The judge...said that 'to hold judges responsible for crime is like blaming doctors for disease.'" Neil MacFarquhar, *Federal Judge to Resign, Citing Political Attacks*, N.Y. TIMES, June 5, 1996, at B4.

Illustrative of such attacks is the Judicial Reform Act of 1997, H.R. 1252, 105th Cong. (1997), introduced by the Chairman of the House Judiciary Committee, Representative Henry Hyde of Illinois. The purpose of the bill is to control "judicial activism." The sponsors believe that the bill will "ensure that a few rogues in our judiciary do not spoil our Founders' visions." *Judicial Reform Act of 1997, Hearings on H.R. 1252 Before the House Subcomm. on the Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 26 (1997) (statement of Rep. Ed Bryant). Representative Hyde, in a press statement, expounded: "This necessary legislation addresses one of the most disturbing problems facing our constitutional system today—the infrequent but intolerable breach of the separation of powers by some members of the Federal judiciary." Sam Stratman, *Hyde Introduces Judicial Reform Measure*, GOV'T PRESS RELEASES, Apr. 9, 1997, *available in* 1997 WL 4431404.

Senator Orrin G. Hatch of Utah, chairman of the Senate Judiciary Committee, struck a similar note in his August 13, 1997, column defending the slow pace of Senate confirmation of judicial nominees:

> The calls to oppose activist nominees are ever timely, as examples of judicial activism abound.... Earlier this month, a handful of Ninth Circuit

This Article will ascertain the condition of the high wall between the legislative and judicial branches by examining three recent statutes in which Congress has attempted to exercise an "overruling influence" through the employ of several constitutionally questionable devices. These devices include eliminating or limiting judicial review, sweeping aside judicial orders—including permanent injunctions and court-approved consent decrees—and curtailing jurisdiction. The statutes govern matters as diverse as timber sales, prisoner litigation, and writs of habeas corpus. Part I of this Article appraises the effect of the Emergency Salvage Timber Sale Program[31] upon the judiciary's power to "say what the law is." Part II examines the Prison Litigation Reform Act of 1995.[32] Part III analyzes key provisions of the Antiterrorism and Effective Death Penalty Act of 1996[33] that affect the writ of habeas corpus. The conclusions of the discussion follow in Part IV.

I. THE EMERGENCY SALVAGE TIMBER SALE PROGRAM AND ITS PROGENITORS

The Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, 1995 was signed into law by President Clinton on July 27, 1995.[34] Like much recent legislation, the 1995 Rescissions Act, as it has come to be known, is somewhat misleadingly named. Its most controversial provision is Title II, the Emergency Salvage Timber Sale Program,[35] which promoted three different types of timber sales: the salvage

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> Court of Appeals judges continued their personal campaign to undermine the death penalty, unabashedly engaging in Houdini-like legal contortions to stay an execution where there plainly was no legal basis for doing so. Many are increasingly frustrated by these and other judicial efforts to circumvent the law and thwart the democratic process.

Orrin G. Hatch, *There's No Vacancy Crisis in the Federal Courts*, WALL ST. J., Aug. 13, 1997, at A15.

The slow pace of Senate confirmation produced an unusual comment by Chief Justice William Rehnquist in his 1997 year end report: "[T]he Senate should act within a reasonable time to confirm or reject them.... The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or down. In the latter case, the President can then send up another nominee." William H. Rehnquist, *The 1997 Year-End Report on the Federal Judiciary* (Jan. 1, 1998) <http://www.uscourts.gov/cj97.htm>.

31. Pub. L. No. 104–19, § 2001, 109 Stat. 194, 240 (1995) (codified at 16 U.S.C. § 1611 (Supp. I 1995)).

32. Pub. L. No. 104–134, §§ 801–802, 110 Stat. 1321, 1321–66 (1996) (to be codified as amended at scattered sections of 11 U.S.C., 18 U.S.C., 28 U.S.C., 42 U.S.C.).

33. Pub. L. No. 104–132, §§ 101–107, 110 Stat. 1214, 1217 (to be codified at 28 U.S.C. §§ 2244, 2253–2255, 2261–2266).

34. Pub. L. No. 104–19, 109 Stat. 194.

35. Different viewpoints regarding the controversy are expressed in Rick Bass, *The Yaak's Last Stand*, N.Y. TIMES, Aug. 19, 1996, at A13; Paul S. Kibel, *The Salvage Logging Rider and the Constitution*, LEGAL TIMES, July 1, 1996, at 22; Paul S. Kibel,

timber sales referred to in the title,[36] timber sales on lands covered by Option 9,[37] and Northwest Timber Compromise Sales under section 318.[38]

The 1995 Rescissions Act marked yet another event in the long-running political and legal battles involving the northern spotted owl (the "billion-dollar bird"[39]) and timber harvesting in the old growth forests of the Pacific Northwest.[40] During the 1960s and 1970s, Congress had approved or amended a series of laws—the Act to Amend the Migratory Bird Treaty Act of 1918 ("MBTA"),[41] the Multiple-Use Sustained-Yield Act of 1960,[42] the National Environmental Policy Act of 1969,[43] the Endangered Species Act of 1973[44] (under which the northern spotted owl is listed as threatened), the Forest and Rangeland Renewable Resources and Planning Act of 1974,[45] the National Forest Management Act of 1976,[46] and the Federal Land Policy and Management Act of 1976.[47] Environmental groups used these acts to challenge the practice of logging in many

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Timber Lawyer Dodged Key Logging-Rider Issues, LEGAL TIMES, July 29, 1996, at 21; Mark C. Rutzick, *Salvaging The Logging Rider*, LEGAL TIMES, July 15, 1996, at 24.

For contrasting, longer-term views of the complex issues involving the northern spotted owl and the old-growth forests, compare ALSTON CHASE, IN A DARK WOOD: THE FIGHT OVER FORESTS AND THE RISING TYRANNY OF ECOLOGY (1995), with KEITH ERVIN, FRAGILE MAJESTY (1989).

36. § 2001(b), 109 Stat. at 241. Salvage timber sales involved the removal primarily of diseased, dead, damaged, or downed trees. *Id.* § 2001(a)(3), 109 Stat. at 240. The "emergency period" during which these salvage timber sales were to be permitted extended from the date of enactment until September 30, 1997. *Id.* § 2001(a)(2), 109 Stat. at 240. The expiration date is defined as follows: "The authority provided by subsections (b) and (d) shall expire on December 31, 1996. The terms and conditions of this section shall continue in effect with respect to salvage timber sale contracts offered under subsection (b) and timber sale contracts offered under subsection (d) until the completion of performance and contracts." *Id.* § 2001(j), 109 Stat. at 246–47.

37. *Id.* § 2001(d), 109 Stat. at 244. Option 9 involved lands from which timber sales had been authorized by an April 13, 1994, memorandum of the Secretaries of Interior and Agriculture. *Id.*

38. *Id.* § 2001(k), 109 Stat. at 246. Section 318 sales involved lands subject to the Northwest Timber Compromise, Pub. L. No. 101–121, § 318, 103 Stat. 701, 745 (1989).

39. ERVIN, *supra* note 35, at 205.

40. *See supra* note 35 and accompanying text.

41. Pub. L. No. 93–300, 88 Stat. 190 (1974) (codified as amended at 16 U.S.C. § 703 (1994)).

42. Pub. L. No. 86–517, 74 Stat. 215 (codified at 16 U.S.C. § 528–531 (1994)).

43. Pub. L. No. 91–190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 432–4370d (1994 & Supp. I 1995)).

44. Pub. L. No. 93–205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–1544 (1994 & Supp. I 1995)).

45. Pub. L. No. 93–378, 88 Stat. 884 (codified as amended at 16 U.S.C. §§ 1600–1687 (1994 & Supp. I 1995)).

46. Pub. L. No. 94–588, 90 Stat. 294 (codified as amended in scattered sections of 16 U.S.C.).

47. 43 U.S.C. §§ 1701–1785 (1994 & Supp. I 1995).

potentially economically lucrative areas of the Pacific Northwest.[48] More recently, however, Congress has evidently come to view these laws as inopportune because they restrict the logging industry and other economic development.[49] But rather than take on the politically difficult task of amending the underlying environmental laws, Congress endeavored to cabin these laws through the use of a series of legislative "shortcuts," using appropriations bills as the principal vehicle.

The first of these legislative shortcuts was the Northwest Timber Compromise, section 318 of the Department of the Interior and Related Agencies Appropriations Act, Fiscal Year 1990.[50] The Northwest Timber Compromise sought to resolve litigation among the U.S. Forest Service, environmental organizations, and timber companies over whether a Forest Service administrative decision had given the northern spotted owl, an endangered species, adequate protection in designated areas.[51] For the purposes of this Article, the critical portion of the Compromise is found in subsection 318(b)(6)(A). It provides:

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48. *See, e.g.*, Inland Empire Pub. Lands Council v. United States Forest Serv., 88 F.3d 754 (9th Cir. 1996); Seattle Audubon Soc'y v. Moseley, 80 F.3d 1401 (9th Cir. 1996); National Audubon Soc'y v. United States Forest Serv., 46 F.3d 1437 (9th Cir. 1993). As these cases illustrate, rather than claiming protection from logging under one statute, groups commonly bring suits in which they allege violations of several of the federal environmental laws.

49. Congress' current views may be accounted for, at least in part, by the shift to Republican control beginning with the 104th Congress. The 1995 Rescissions Act was signed into law by President Clinton, a Democrat, but on February 24, 1996, only seven months after signing it, the President "told a Seattle audience that his support for the provision had been a mistake and called for a repeal of the timber language." Allan Freedman, *Provision Renews Timber Fight*, CONG. Q. WKLY. REP., Mar. 9, 1996, at 606.

The intensity of the politics, as well as its impact upon the judiciary, is epitomized by the push to break up the Ninth Circuit. Former Ninth Circuit Chief Judge Albert T. Goodwin once told reporters "that the effort was a reflection of the frustration that timber and mining interests felt about the Ninth Circuit's ruling in favor of preserving habitats of the spotted owl." Neil A. Lewis, *Western Senators Are Pushing to Break up Circuit Court*, N.Y. TIMES, Sept. 1, 1997, at A3.

The political consequences of the 1995 Rescissions Act continue to reverberate. "No matter the question, lurking near the surface is the memory of the timber salvage rider in 1995. That measure, which was a prime force behind the government shutdown that year, remains a powerful symbol even today." Charles Pope, *Members Go out on a Limb over National Forests*, CONG. Q. WKLY., Apr. 18, 1998, at 975.

50. Pub. L. No. 101–121, § 318, 103 Stat. 701, 745 (1989).

51. Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992). In his opinion for the Court, Justice Clarence Thomas blandly described the Compromise:

> The Compromise established a comprehensive set of rules to govern harvesting within a geographically and temporally limited domain.... The Compromise both required harvesting and expanded harvesting restrictions.... [S]ubsections (b)(1), (b)(2), and (b)(4) specified general environmental criteria to govern the selection of harvesting sites by the Forest Service. Subsection (g)(1) provided for limited, expedited judicial review of individual timber sales offered under § 318.

Id. at 433.

> [T]he Congress hereby determines and directs that Management of areas according to subsections (b)(3) and (b)(5) of this section...is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89–160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89–99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87–1160–FR. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States.[52]

After the Compromise was enacted, the timber companies moved, based upon Congress' determination and direction, to dismiss the pending cases. The Audubon Societies of Seattle, Washington, and Portland, Oregon, countered with a challenge to the constitutionality of the Compromise.[53] Consolidating the appeals from two district court decisions, the Ninth Circuit held that the Compromise was an unconstitutional attempt to interfere with the judicial power. The first sentence of subsection 318(b)(6)(A), it found, "does not, by its plain language, repeal or amend the environmental laws underlying this litigation," but rather "directs the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court. This is what *Klein*[54] and subsequent cases agree is constitutionally proscribed."[55] The Supreme Court, however, reversed the decision of the Ninth Circuit. "We conclude that subsection (b)(6)(A) compelled changes in law, not findings or results under old law."[56] The Court determined that the underlying law governing these timber sales had been changed by setting new requirements; it rejected the argument

> that subsection (b)(6)(A) did not modify old requirements because it deemed compliance with new requirements to "mee[t]" the old requirements.... Congress might have modified MBTA directly.... Instead, Congress enacted an entirely separate statute deeming compliance with subsections (b)(3) and (b)(5) to constitute compliance with § 2—a "modification" of the MBTA, we conclude, through operation of the canon that specific provisions qualify general ones....[57]

One commentator, sharply criticizing the *Robertson v. Seattle Audubon Society* decision, has observed:

> What is most troublesome here is that the Court's reasoning...turns against itself. That is,...the Court deemed

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52. § 318(b)(6)(A), 103 Stat. at 246.

53. Portland Audubon Soc'y v. Lujan, 21 Envtl. L. Rep. 20,018 (D. Or. 1989); Seattle Audubon Soc'y v. Robertson, No. 89–160 (W.D. Wash. Nov. 14, 1989).

54. United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

55. Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1316 (9th Cir. 1990), *rev'd*, 503 U.S. 429 (1992).

56. *Robertson*, 503 U.S. at 438.

57. *Id.* at 439–40.

> congressional means to be irrelevant. Then, after deeming it irrelevant, the Court apotheosized congressional means into the very crux of the issue. The Court stated that "[t]o the extent that subsection...affected the adjudication of the cases, it did so by effectively modifying the provisions at issue in those cases" and approved legislation on this basis. In so doing, the Court resurrected the approach—the means analysis—that it had just implicitly abandoned.[58]

Do the principles of separation of powers limit how Congress accomplishes the ends it desires? Is there a point at which the inclusion of a number of questionable legislative devices—such as abrogation of outstanding consent decrees, elimination of prospective equitable remedies, and "deemed to satisfy" and "notwithstanding any other provision of law" language—aimed at reversal of judicial decisions, breaches a separation of powers barrier?

Perhaps emboldened by the unanimous Supreme Court decision in *Robertson*, Congress included a number of such legislative devices and shortcuts in the 1995 Rescissions Act, some applicable to salvage timber sales, some to Option 9 timber sales, and some, principally involving judicial review, applicable to both types of sales. These artifices include the elimination of all pending restraining orders, the elimination of prospective equitable remedies, short timetables for judicial decisions, the lack of a standard of review, very short statutes of limitations periods and periods for appeal, and "deemed to satisfy" and "notwithstanding any other provision of law" language. The array of provisions goes far beyond the more limited language sustained by the Supreme Court in *Robertson*. The crux of the issue is whether the means used by Congress to affect judicial decisions breaches the constitutional separation of powers.

Under the 1995 Rescissions Act, contracts for salvage timber sales are to be awarded in accordance with its provisions "notwithstanding any other provision of law, including a law under the authority of which any judicial order may be outstanding on or after the date of the enactment of this Act."[59] The process of awarding such contracts "shall be exempt from" the applicable requirements of the Competition in Contracting Act and the Small Business Act.[60] In addition, the procedures specified in Title II for awarding and operating salvage timber sales are "deemed to satisfy the requirements of the following applicable federal laws (and regulations implementing such laws)": six specific statutes and two catch-all provisions covering "[a]ny compact, executive agreement, convention, treaty, and international agreement, and implementing legislation related thereto" and "[a]ll

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58. Amy D. Ronner, *Judicial Self-Demise: The Test of when Congress Impermissibly Intrudes on Judicial Power After* Robertson v. Seattle Audubon Society *and the Federal Appellate Courts' Rejection of the Separation of Powers Challenges to the New Section of the Securities Exchange Act of 1934*, 35 ARIZ. L. REV. 1037, 1053–54 (1993) (citation omitted).

59. Emergency Salvage Timber Sale Program, Pub. L. No. 104–19, § 2001(b)(1), 109 Stat. 194, 241 (1995).

60. *Id.* § 2001(c)(5)(B)(i)–(ii), 109 Stat. at 243.

other applicable Federal environmental and natural resource laws."[61] Although some of these clauses standing alone would pass constitutional muster,[62] they are each part of a comprehensive congressional design to override legal challenges to salvage timber sales. Using an appropriations bill as the vehicle,[63] all prior substantive legislation is swept aside, all standing judicial orders are nullified, and judicial review is severely constrained.

These provisions raise four fundamental issues. First, by use of the "notwithstanding any other law" provision, Congress abrogated all outstanding judicial orders, some of which were "final orders." Second, by use of the "deemed to satisfy" provision, Congress limited judicial review and made it almost standardless. Third, by incorporating these provisions in a rescissions bill, Congress used an appropriations bill to override substantive legislation. Fourth, Congress sought to impose a rule of decision upon the judiciary, thus violating the principles derived from the seminal *Klein* case. How Congress acts, even when exercising its own Article I powers, is subject to judicial review.[64]

One of the most troublesome individual provisions of Title II is subsection 2001(c)(9), which provides as follows: "The Secretary concerned may conduct salvage timber sales under subsection (b) notwithstanding any decision, restraining order, or injunction issued by a United States court before the date of the enactment of this section."[65] Sweeping aside all outstanding judicial decisions and orders, the provision makes no distinction regarding their source, nature, or basis—constitutional or statutory.

If a permanent injunction is a "final decision" of a federal court, then this provision clashes with the holding in *Plaut*.[66] The Court in *Plaut* held that Congress could not require the federal courts to reopen a final judgment because such an enactment would violate "the text, structure, and traditions of Article III,"[67] which includes the power to issue conclusive judgments that finally resolve a

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61. *Id.* § 2001(i)(1)–(8), 109 Stat at 246.

62. *See Robertson*, 503 U.S. at 438–40.

63. This is, indeed, a peculiar appropriations and rescission bill in that it provides: "Salvage timber sales undertaken pursuant to this section shall not be precluded because the costs of such activities are likely to exceed the revenues derived from such activities." § 2001(c)(6), 109 Stat. at 243.

64. *See* Powell v. McCormack, 395 U.S. 486 (1969) (involving the attempt by the House of Representatives to refuse to seat Representative Powell, who had been duly elected to the 90th Congress).

In *Bowsher v. Synar*, 478 U.S. 714 (1986), the Supreme Court rejected, as a violation of separation of powers principles, the attempt by Congress to vest in an officer controlled by Congress (the Comptroller General) the power to execute the laws. The principle applies as well to an attempt by Congress to apply the law.

65. § 2001(c)(9), 109 Stat. at 244. A similar provision, to be discussed *infra* in Part II, is included in the Prison Litigation Reform Act of 1995, Pub. L. No. 104–134, §§ 801–802, 110 Stat. 1321, 1321–66 (1996) (to be codified as amended at scattered sections of 11 U.S.C., 18 U.S.C., 28 U.S.C., 42 U.S.C.).

66. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

67. *Id.* at 218.

dispute and that may not be altered by retroactive legislation.[68] During the pendency of an appeal, Congress may alter the law, and the higher court is bound by the change in the law.[69] Once the availability of further appeal to a higher Article III court has been exhausted or waived, however, the judgment is final and is no longer open to legislative alteration.[70]

The consequences of the principles articulated in *Plaut* upon a judgment that includes an executory decree such as a permanent injunction, however, have been controversial because of the Supreme Court's earlier decision in *Pennsylvania v. Wheeling & Belmont Bridge Co.*[71] *Wheeling* involved a Supreme Court injunction requiring that a bridge across the Ohio River either be removed or raised because it obstructed the free navigation of the river. After the Court's decision, Congress enacted a statute that declared the bridge to be lawful and designated it a post road. Following the destruction of the bridge during a storm, Pennsylvania sought to enjoin its reconstruction. The Court, however, dissolved the initial injunction because of the new statute, distinguishing in its decision an action for damages from a decree in equity.[72] The Court restated this principle in *United States v. Swift & Co.* as follows: "The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative."[73] Courts of appeals decisions have held that when the judgment involves an executory decree and the court retains supervisory jurisdiction, then the judgment's "prospective effects" are not final for purposes of separation of powers.[74]

The Supreme Court addressed the issue of the mutability of injunctive relief most recently in *Agostini v. Felton*, which involved a challenge under Federal Rule of Civil Procedure 60(b)(5) for relief from a permanent injunction entered ten years earlier.[75] Justice O'Connor, for the five-justice majority, wrote:

> [I]t is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show "a significant change either in factual conditions or in law." A court may recognize subsequent changes in either statutory or decisional

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68. *Id.* at 219.

69. *See id.* at 226; Landgraf v. USI Film Prods., 511 U.S. 244, 273–80 (1994); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869).

70. *Plaut*, 514 U.S. at 227.

71. 59 U.S. (18 How.) 421 (1856).

72. *Id.* at 431–32.

73. 286 U.S. 106, 114 (1932) (holding a court of equity has the power to modify a consent decree if the conditions upon which the original decree was based have substantially changed).

74. *See, e.g.*, Daylo v. Administrator of Veterans' Affairs, 501 F.2d 811, 818 (D.C. Cir. 1974); Western Union Tel. Co. v. International Bhd. of Elec. Workers, Local 134, 133 F.2d 955, 957 (7th Cir. 1943).

75. 117 S. Ct. 1997 (1997).

> law.... A court errs when it refuses to modify an injunction or consent decree in light of such changes.[76]

In regard to permanent injunctions involving salvage timber sales in effect when the 1995 Rescissions Act was signed into law, there were no changes in either factual conditions[77] or decisional law. The only change that could arguably have occurred involved the statutory law. But did the statutory law really change? All of the prior statutes upon which the outstanding permanent injunctions were based remained unamended. Congress merely declared that the procedures specified in Title II were "deemed to satisfy" all "applicable Federal environmental and natural resource laws."[78] Unlike the change in status of the bridge involved in *Wheeling*, which was designated a post road by Congress, nothing in the legal status of the old growth forests was changed because all of the underlying laws remained unamended. All that happened was that Congress issued a series of instructions to the courts involving decisions in past and pending cases. The statute sweeps much further than the provisions of the Northwest Timber Compromise sustained in *Robertson* because of its impact upon the permanent injunctions previously issued and its derogation of unspecified environmental laws.

Concomitantly, judicial review of salvage timber sales was significantly limited by a key part of Title II, which also applies to Option 9 timber sales. Judicial review was limited to the U.S. district court of the state in which the federal lands were located and subject to a fifteen-day statute of limitations.[79] Although an automatic forty-five day freeze was imposed on a proposed sale, all federal courts were barred from issuing any restraining orders, preliminary injunctions, or injunctions pending appeal.[80] The federal district .court was mandated to issue its final decision regarding any challenge within forty-five days, "unless the court determined that a longer period of time was required to satisfy the requirement of the United States Constitution."[81] The standard for judicial review of individual salvage timber sales was "arbitrary and capricious or otherwise not in accordance with applicable law (other than those laws specified in subsection (i))."[82] Recall that subsection 2000(i) includes the two catchall provisions,[83] which vitiate the efficacy of the "not in accordance with applicable law" element of the standard. Thus judicial review in these cases was made virtually standardless and therefore meaningless, destroying a core element of Article III power.[84]

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76. *Id.* at 2006.

77. The old growth forests could, in the words of *Swift*, be described as "so nearly permanent as to be substantially impervious to change." *Swift*, 286 U.S. at 114.

78. Emergency Salvage Timber Sale Program, Pub. L. No. 104–19, § 2001(i)(8), 109 Stat. 194, 246 (1995).

79. *Id.* § 2001(f)(1), 109 Stat. at 244.

80. *Id.* § 2001(f)(2)–(3), 109 Stat. 244–45.

81. *Id.* § 2001(f)(5), 109 Stat. at 245.

82. *Id.* § 2001(f)(4). Whether this is also intended to be the standard of review for Option 9 timber sales is an open question.

83. *Id.* § 2001(i)(7)–(8), 109 Stat. at 246; *see supra* text accompanying note 61.

84. Indeed, even the period for appeal of the district court decision was set at 30 days after the date of the final decision, § 2001(f)(7), 109 Stat. at 244, contrasted with the

All of this was accomplished through an appropriations bill. An appropriations bill is legislation, and the Supreme Court will sustain the repeal of substantive law by an appropriations bill, but only where the congressional intention to repeal is clear.[85] In *TVA*,[86] a case which also involved the Endangered Species Act, Chief Justice Burger, on behalf of a six-justice majority, opined:

> To find a repeal of the Endangered Species Act under these circumstances would surely do violence to the "cardinal rule...that repeals by implication are not favored."..."The intention of the legislature to repeal must be clear and manifest."
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> ....
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> The doctrine disfavoring repeals by implication...applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act. We recognize that both substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure.[87]

The principle rejecting the use of appropriations legislation to achieve repeals of substantive law by implication applies to the 1995 Rescissions Act, which is by its title an appropriations bill. Under the doctrine of *TVA*, the 1995 Recissions Act could, for purposes of salvage timber sales, repeal (or "deem[] to

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60-day period normally applicable when the United States is a party, 28 U.S.C. § 2107(b) (1994).

The Supreme Court has implied the existence of an inherent power of judicial review in somewhat analogous situations. In *Stark v. Wickard*, 321 U.S. 288 (1944), during World War II, an injunction was sought against the Secretary of Agriculture for exceeding his statutory authority, although the applicable statute did not provide for judicial review. The Supreme Court opined: "[t]he responsibility of determining the limits of statutory grants of authority...is a judicial function entrusted to the courts by Congress *by the statutes establishing courts and marking their jurisdiction.*" *Id.* at 310 (emphasis added).

85. During recent years, Congress has increasingly resorted to omnibus budget bills to address deficit reduction and, concomitantly, many aspects of substantive law. The concerns expressed about the proper use of appropriations bills thus are becoming more central. *See infra* note 116 and accompanying text; *see also* Charles Pope, *Environmental Bills Hitch a Ride Through the Legislative Gantlet*, CONG. Q. WKLY. REP., Apr. 4, 1998, at 872.

86. 437 U.S. 153 (1978) (holding that the Endangered Species Act prohibited the impoundment of the Little Tennessee River by the multimillion-dollar Tellico Dam, then under construction, because of the presence of the snail darter, a species designated endangered by the Secretary of the Interior).

87. *Id.* at 189–90 (citations omitted).

satisfy"[88]) the six explicitly listed environmental laws. But can this appropriations measure support the catch-all repeal of unnamed "compacts, executive agreements, conventions, treaties, international agreements, and implementing legislation" and unspecified "all other applicable Federal environmental and natural resource laws"?[89]

Even more significantly, the question arises whether the 1995 Rescissions Act, by its sweeping limitations upon the judiciary, crosses the constitutional line drawn by *United States v. Klein*.[90] The plaintiff in *Klein* was the administrator of the estate of V.F. Wilson, the deceased owner of cotton sold by representatives of the United States government during the Civil War. The plaintiff sued for the proceeds of the sale under legislation authorizing recovery by noncombatant Confederate owners upon proof of loyalty.[91] The Supreme Court had earlier held that loyalty could be established by a presidential pardon.[92] After the plaintiff won in the U.S. Court of Claims and during the pendency of the appeal to the Supreme Court, Congress passed legislation providing not only that a presidential pardon would not be admissible as proof of loyalty, but also that acceptance, without a written disclaimer, of a pardon that reported the claimant had supported the rebellion would be conclusive evidence of the claimant's disloyalty. The statute directed the Court of Claims and the Supreme Court to dismiss for lack of jurisdiction any pending claims based upon a presidential pardon.[93]

In *Klein*, the Supreme Court held the supervening congressional statute unconstitutional upon two grounds. First, by forbidding the Court "to give the effect to evidence which, in its own judgment, such evidence should have"[94] and directing the Court "to give it an effect precisely contrary,...Congress ha[d] inadvertently passed the limit which separates the legislative from the judicial power."[95] Second, the "rule prescribed [was] also liable to just exception as impairing the effect of a pardon, and thus infring[ed] the constitutional power of the Executive."[96] The Court in *Klein* thus sought to protect the judicial and executive branches in the exercise of their core constitutional responsibilities from the intrusion of Congress.

There has been considerable debate regarding the precise significance of the *Klein* decision.[97] The most expansive view of *Klein* is that it is a broad

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88. § 2001(i), 109 Stat. at 246.

89. *Id.* § 2001(i)(7)–(8), 109 Stat. at 246.

90. 80 U.S. (13 Wall.) 128 (1871). The same issue arises in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, §§ 101–107, 110 Stat. 1214, 1217 (to be codified at 28 U.S.C. §§ 2244, 2253–2255, 2261–2266). *See infra* Part III.

91. United States v Klein, 80 U.S. (13 Wall.) 128, 136 (1871).

92. United States v. Padelford, 76 U.S. (9 Wall.) 531 (1870).

93. *Klein*, 80 U.S. at 143–44.

94. *Id.* at 147.

95. *Id.*

96. *Id.*

97. *See, e.g.*, Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697 (1995); Julian Velasco, *Congressional*

limitation on Congress' power to prescribe rules of decision for the federal judiciary. In 1980, the Supreme Court offered a somewhat narrower explanation: "it prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor."[98] The narrowest explication of *Klein* is it precludes Congress from forcing the judiciary into an action that is independently unconstitutional. Congress mandated an instruction regarding the consequences of the exercise of the constitutional pardon power, which Article II[99] grants exclusively to the executive branch of government, and whose constitutional effects under the principles of *Marbury*[100] are for the judiciary to decipher.

As noted earlier, *Robertson* rejected the *Klein* challenge to the section 318 language standing by itself, viewing section 318 as an amendment to existing substantive law.[101] But the salvage timber provisos of Title II combine statutory language similar to that used in section 318 with many restrictions upon potential challengers and constraints upon the judiciary. These restrictions and constraints in combination make it extremely difficult—far more difficult than it had been under prior law and judicial decisions—for plaintiffs, including plaintiffs with both closed and ongoing cases, to prevent the federal government's salvage timber sales. The cumulative impact of these restrictions and constraints should be measured against the statement of the *Klein* test offered by the Supreme Court in *United States v. Sioux Nation of Indians*: "[*Klein*] prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor."[102] The severe limitation upon the judiciary's use of equitable remedies, an important issue in environmental litigation, together with the very short statute of limitations period and the specified brief period for decision by the district court judge[103] combine to "stack the deck" in the government's favor. Stacking the deck in this manner violates the constitutional separation of powers principles articulated in *Klein* and *Sioux*

Control over Federal Court Jurisdiction: A Defense of the Traditional View, 46 CATH. U. L. REV. 671 (1997); Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States v. Klein *Revisited*, 1981 Wis. L. Rev. 1189; J. Richard Dodge, Note, *Is Purely Retroactive Legislation Limited by the Separation of Powers?: Rethinking* United States v. Klein, 79 CORNELL L. REV. 910 (1994).

98. United States v. Sioux Nation of Indians, 448 U.S. 371, 404 (1980).

99. U.S. CONST. art II, § 2, cl. 1.

100. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

101. *See supra* notes 50–57 and accompanying text.

102. *Sioux Nation*, 448 U.S. at 404.

103. Justice Cardozo, writing for the Court, without dissent, emphasized that the timing of the judge's decisions is of the essence of the judicial process:

> Apart, however, from any concession, the power to stay proceedings is incidental to the power in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

Landis v. North Am. Co., 299 U.S. 248, 254–55 (1936).

Nation. Even if such congressional action could survive a constitutional challenge if accomplished through substantive legislation, the holding in *TVA*[104] leads inexorably to the conclusion that Congress cannot so act through an appropriations measure of ambiguous reach.

II. OF PRISONS AND PRISONERS

A. The Federal Judiciary and Criminal Justice

Evidently satisfied with the approach to cabining the judiciary applied in the 1995 Rescissions Act, Congress thereafter followed a similar approach in the criminal justice arena. The increasingly shrill outcry from the public and politicians for retribution has made criminal justice policy making more rancorous in recent years than in the past.

One measure of the growing demand for retribution is the rise in the number of people imprisoned within the United States.[105] Sentences are being lengthened and prison conditions made harsher.[106] Consequently, the states are continuing to expand prison capacity at a rapid pace.[107] Racial and ethnic issues, with their divisive elements, are also manifest.[108]

The federal judiciary holds the fragile center[109] between the conflicting

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104. 437 U.S. 153 (1978).

105. The federal and state prison population is rising dramatically, more than doubling, from 502,507 to 1,182,169, between 1985 and 1996. State prisons held 1,076,625 inmates as of December 31, 1996, and, as of June 30, 1996, locally operated jails held an additional 518,492 adults, either awaiting trial or serving sentences of one year or less. State prisons were operating at 16% to 24% over capacity, while federal prisons were operating at 25% over capacity. Christopher J. Mumola & Allen J. Beck, *Bureau of Justice Statistics Bulletin: Prisoners in 1996* (June 1997) (visited Apr. 10, 1998) <http://www.ojp.usdoj.gov/bjs/pub/ascii/p96.txt> [hereinafter *BJS Bulletin*].

106. *See, e.g.*, Larry Rohter, *In Wave of Anticrime Fervor, States Rush to Adopt Laws*, N.Y. TIMES, May 10, 1994, at A1 (describing the various methods states have adopted to punish criminals more severely and make it more difficult for them to be released from prison).

107. New York State's $68 billion budget for the 1997–98 fiscal year includes a plan to build a new 750–cell maximum security prison and add 800 more maximum security cells to existing prisons. Richard Perez-Pena, *New York Attains a Budget Accord that Trims Taxes*, N.Y. TIMES, July 30, 1997, at A1; *see also* Kyle Hughes, *Pataki Gets Part of Prison Building Plan*, GANNET NEWS SERV., July 30, 1997, *available in* 1997 WL 8833327 ("State Prison system spokesman James Flateau said...the new prison will be the largest single expansion of maximum-security capacity in 70 years.").

108. "During the decade from 1985 through 1995 there was a 12.2 percent average annual increase in the number of Hispanic inmates among state prisoners, compared to a 9.4 percent increase for blacks and 7.6 percent for whites." *BJS Bulletin*, *supra* note 105.

109.

> Things fall apart; the centre cannot hold;
> Mere anarchy is loosed upon the world,
> The blood-dimmed tide is loosed, and everywhere

demands for harsh punishment and the protections afforded criminal defendants and convicted prisoners by the Constitution.[110] As Justices Brennan and Marshall have emphasized: "[b]ecause the strongest advocates of Fourth Amendment rights are frequently criminals, it is easy to forget that our interpretations of such rights apply to the innocent and the guilty alike."[111] The perception of the federal judiciary's fairness and neutrality in this realm may well be as significant during the next decade as its role in the desegregation realm was during the past four decades. The Prison Litigation Reform Act[112] and the habeas corpus reform provisions of the Antiterrorism and Effective Death Penalty Act of 1996,[113] however, seek to circumvent prior, and to constrain future, judicial decisions affecting criminal prisoners and defendants.

B. The Prison Litigation Reform Act of 1995

The Prison Litigation Reform Act of 1995 ("PLRA"), Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, was signed into law by the President on April 26, 1996,[114] nine months after the 1995 Rescissions Act.[115] Its adoption, also as part of an appropriations act,[116] followed

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The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.

William Butler Yeats, *"The Second Coming," in* THE COLLECTED POEMS OF WILLIAM BUTLER YEATS 184–85 (Macmillan 1974) (1956).

110. U.S. CONST. amends. IV–VI, VIII, XIV. See *Korematsu v. United States*, 323 U.S. 214 (1944), which involved the internment of Japanese Americans during World War II, for an example of the failure of the federal judiciary to hold the center and protect constitutional rights. On the other hand, during the same period, United States district court Judge Dilbert E. Metzger attempted to protect individual liberties by declaring that a military tribunal created by the Military Governor of Hawaii during World War II had no authority to try civilians. *Ex parte* Duncan, 66 F. Supp. 976 (D. Haw. 1944). Although Judge Metzger was reversed upon appeal in *Ex parte Duncan*, 146 F.2d 576 (9th Cir. 1944), the Supreme Court reversed the appeals court in *Duncan v. Kahamoku*, 327 U.S. 304 (1946), after the war had ended. Although the excuse of war was the basis for the executive branch actions in these cases, by 1944, neither Hawaii nor California was threatened by Japanese military forces. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1867).

111. United States v. Sokolow, 490 U.S. 1, 11 (1989) (Marshall, J., dissenting) (citing Illinois v. Gates, 462 U.S. 213, 290 (1983) (Brennan, J., dissenting)). Judge Baer quoted the same passage in *United States v. Bayless*, 921 F. Supp. 211, 217 (S.D.N.Y. 1996).

112. Prison Litigation Reform Act of 1995, Pub. L. No. 104–134, §§ 801–802, 110 Stat. 1321, 1321–66 (1996) (to be codified as amended at scattered sections of 11 U.S.C., 18 U.S.C., 28 U.S.C., 42 U.S.C.).

113. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, §§ 101–107, 110 Stat. 1214, 1217 (to be codified at 28 U.S.C. §§ 2244, 2253–2255, 2261–2266).

114. Pub. L. No. 104–134, §§ 801–810, 110 Stat. 1321.

115. *See supra* Part I.

116. The increasing use of omnibus budget and reconciliation bills by Congress, incorporating many amendments to substantive law, will undoubtedly lead to further

increasing criticism of "country-club" prisons and concomitant steps taken by a number of states to "harden" prison time.[117] The purposes of the PLRA, as described by its supporters in Congress, were to end what was thought to be overly intrusive intervention by the federal judiciary in the management of prisons and to curb what was described as frivolous inmate litigation.[118] The goals of the PLRA are to be accomplished by limiting prospective remedies in legal actions in which prison inmates have prevailed,[119] and by modifying the processing of prison inmate litigation in order to reduce prisoner access to the federal courts.[120]

Of greatest concern here is Congress' limitation of judicial remedies, in particular the provisions terminating prospective relief provided through consent

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exploration of this issue. Professors Wildavsky and Caiden have written:

> Another sign and (further cause) of polarization is what Robert Reischauer has called "the fiscalization of the public policy debate." Few programs are considered solely on their substantive or political merits. Rather, it is asked, to what degree do programs contribute to the deficit? Do they fit within the latest congressional budget resolution or the president's budget?... The substantive question, however—What is being bought with the money?—increasingly is shunted aside.

AARON WILDAVSKY & NAOMI CAIDEN, NEW POLITICS OF THE BUDGETARY PROCESS 94 (3d ed. 1997).

117. *See, e.g.*, Neal R. Peirce, *But in Its Prisons, Georgia Has Reverted to the Bad Old Days*, PHILA. INQUIRER, July 19, 1996, at A19 (writing about the return of chain gangs in several states); *see also* Stephen Goode, *Chain Gangs Are Good, Say Citizens*, WASH. TIMES, Mar. 31, 1997, at 4; Peter T. Kilborn, *Revival of Chain Gangs Takes a Twist*, N.Y. TIMES, Mar. 11, 1997, at 18; Donatella Lorch, *A New Tough Sentence for Inmates in New York City's Jails: No Smoking*, N.Y. TIMES, July 7, 1996, at A15; *Prisons in America: Just Desserts*, ECONOMIST, Mar. 15, 1997, at 33.

Letters to nationally syndicated columnist Ann Landers reflect public desire for harder time: Ann Landers, NEWSDAY, July 24, 1997, at B21 ("We can't build prisons fast enough, and criminals are being released after serving one-third of their sentences because we can't house them all."); Ann Landers, *Single Son Thinks Parents are Favoring Married Sibling*, HOUSTON CHRON., July 10, 1997, at 2 (advocating tougher sentences for DWI offenders); Ann Landers, NEWSDAY, May 29, 1997, at B11 ("Prisons are not institutions designed to educate. They are institutions that mete out punishment.").

On the other hand, Fyodor Dostoevsky observed that "the degree of civilization in a society can be judged by entering its prisons." RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 285 (Suzy Platt ed., 1989).

118. *See, e.g., Prison Reform: Enhancing the Effectiveness of Incarceration: Hearings on S. 3, S. 38, S. 400, S. 866, S. 930, H.R. 667 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) [hereinafter *Prison Reform*].

On the Senate floor, Senator Spencer Abraham argued: "By interfering with the fulfillment of this punitive function, the courts are effectively seriously undermining the entire criminal justice system. The legislation we are introducing today will return sanity and State control to our prison systems." 141 CONG. REC. S14419 (daily ed. Sept. 27, 1995) (statement of Sen. Spencer Abraham).

119. Prison Litigation Reform Act of 1995, Pub. L. No. 104–134, § 802, 110 Stat. 1321, 1321–66 (1996) (to be codified as amended at 18 U.S.C. § 3626).

120. *Id.* §§ 803–810, 110 Stat. at 1321–71 to 1321–77 (to be codified as amended at scattered sections of 11 U.S.C., 18 U.S.C., 28 U.S.C., 42 U.S.C.).

decrees. As characterized by the Fourth Circuit in a decision upholding the constitutionality of the Act, "[T]he PLRA also provides an avenue for states to end their obligations under consent decrees providing for greater prospective relief than that required by federal law."[121]

The avenue is created by several provisions of section 802,[122] which entitle defendants and intervenors[123] to the immediate termination of prospective relief, including prospective relief provided by consent decrees,[124] unless the relief

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121. Plyler v. Moore, 100 F.3d 365, 369 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2460 (1997).

122.

> (b) TERMINATION OF RELIEF.—
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> (2) IMMEDIATE TERMINATION OF PROSPECTIVE RELIEF.—In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.
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> (3) LIMITATION.—Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that prospective relief is narrowly drawn and the least intrusive means to correct the violation.
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> ....
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> (e) PROCEDURE FOR MOTIONS AFFECTING PROSPECTIVE RELIEF.—
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> (2) AUTOMATIC STAY.—Any prospective relief subject to a pending motion shall be automatically stayed during the period—
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> (A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b);
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> ... and
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> ending on the date the court enters a final order ruling on the motion.

§ 802(b), 110 Stat. at 1312–67 to 1312–68 (amending 18 U.S.C. § 3626).

The word "or" in subsection 802(b)(3) was amended to "and" by Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105–119, § 123(a)(2), 111 Stat. 2440, 2470 (1997). This act, which made several significant amendments to the PLRA, is yet another example of Congress using an appropriations bill to amend substantive law significantly. *See* T.R. Goldman, *Curbing Judges' Power over Prisons*, LEGAL TIMES, Nov. 24, 1997, at 1; *see also supra* notes 85, 116 and accompanying text.

123. Pub L. No. 105–119 markedly expands the group of state or local officials with standing to initiate or intervene under the PLRA by including "legislators." § 123(a)(1)(B)(ii)(I), 111 Stat. at 2470.

124. In PLRA subsection 802(c), regarding settlements, the limitation upon "consent decrees" is written prospectively: "In any civil action with respect to prison

order was accompanied by specified findings. For the relief to continue, the court must make a determination—not required prior to the PLRA—that the relief is narrowly drawn, necessary to correct the violation of a federal right, and the least intrusive means of redressing the violation.[125] The prospective relief is to continue only if the court now makes such written findings based upon the record.[126] Thus the prospective relief provided by many prison consent decrees entered into throughout the nation can now be aborted because, in almost all cases, the defendants agreed to the consent decree in part because they did not wish to admit any constitutional violations.[127] A number of defendants and intervenors have

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conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a)." § 802(c)(1), 110 Stat. at 1321–68. Subsection 802(a) addresses prospective relief. *Id.* § 802(a), 110 Stat. at 1321–66. "Prospective relief" is defined in section 802(g)(7) as "all relief other than compensatory monetary damages." *Id.* § 802(g)(7), 110 Stat. at 1321–70. Subsection 802(c)(1), regarding consent decrees, does not refer to subsection 802(b), regarding termination of relief, thus leaving open the possibility that the amendments do not apply to consent decrees in place prior to the enactment of the PLRA. *Id.* § 802(c)(1), 110 Stat. at 1321–68; *id.* § 802(b), 110 Stat. at 1312–67. Such an interpretation is supportable upon the premise that consent decrees were entered into voluntarily by the parties. It also avoids the necessity of considering the constitutional issues otherwise implicated. However, most of the reported decisions treat consent decrees no differently from contested, court-ordered prospective relief. See, for example, *Benjamin v. Jacobson*, 935 F. Supp. 332 (S.D.N.Y. 1996), *aff'd in part and rev'd in part*, 124 F.3d 162 (2d Cir. 1997), in which Judge Harold Baer, Jr., vacated long-standing consent decrees affecting New York City prisons. Judge Baer had previously been the subject of attack for his initial decision in *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), which he subsequently vacated in *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996). *See supra* note 29 and accompanying text.

On appeal in *Benjamin*, the Second Circuit reversed Judge Baer in part, holding as follows:

> We therefore reverse the court's decision below to the extent that it vacated the Consent Decrees, and note that, while the defendants may be entitled to immediate termination of prospective relief from the federal courts, there is nothing to prevent the plaintiffs from seeking the enforcement of the Consent Decrees in state courts.

Benjamin v. Jacobsen, 124 F.3d 162, 164–65 (2d Cir. 1997). The court also held that "the plaintiffs are now entitled to an evidentiary hearing to determine whether any prospective federal court relief is warranted under section 3626(b)(3)." *Id.* at 165; *see also* Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997); *infra* note 152 and the cases cited therein.

125. § 802(b)(2), 110 Stat. at 1321–68.

126. *Id.* § 802(b)(3).

127. *See, e.g.*, Richard J. Costa, Note, *The Prison Litigation Reform Act of 1995: A Legitimate Attempt to Curtail Frivolous Inmate Lawsuits and End the Alleged Micro-Management of State Prisons or a Violation of Separation of Powers?*, 63 BROOK. L. REV. 319, 319 (1997) ("In order to avoid an adjudication by the courts that state prisons were being operated unconstitutionally, prison officials over the years have settled claims made by prisoners and entered into consent decrees."); *see also Prison Reform*, *supra* note 118, at 77 (statement of Steve J. Martin) ("Departments of Corrections elect to settle those cases that they have determined they are likely to lose at trial," in order to foreclose the possibility of being found to have violated the Constitution, and to thereby avoid liability to other

already rushed into federal court to initiate actions to break out of consent decrees into which they had voluntarily entered.[128]

Further limiting the federal court's normal discretion, the PLRA provides only thirty days for the court to make the findings necessary to a continuation of the prospective relief or the relief is automatically stayed regardless of the balancing of the equities and the irreparable harm that may ensue.[129] A November 26, 1997, amendment to the PLRA, in an attempt to counter constitutional challenges, permits the court to postpone the effective date of an automatic stay specified in subsection 802(e)(2)(A) for not more than sixty days for good cause. A postponement, however, is not permissible because of the "general congestion of the court's calendar."[130]

These statutory provisions appear to violate separation of powers principles. Congress has reopened "final decisions"[131] by retroactive changes to the rules of decision, and virtually compelled a decision favorable to the governmental entity involved through the short time permitted for the judge to make the required findings necessary to support continuation of a consent decree.

The argument in support of the PLRA is premised upon two well-accepted principles: (1) injunctions are subject to modification (at least by the judiciary) as a result of changing conditions, including changes in factual conditions or decisional or statutory law[132] and (2) the jurisdiction and remedies of the lower federal courts are subject to congressional control and modification.[133]

The application of these principles to consent decrees, however, is limited by at least two constitutional considerations. First, consent decrees are considered final judgments,[134] and the reopening of final judgments by Congress, as opposed

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prisoners.); Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321 (1988); Bernard T. Shen, Comment, *From Jail Cell to Cellular Communication: Should the* Rufo *Standard Be Applied to Antitrust and Commercial Consent Decrees*, 90 NW. U. L. REV. 1781 (1996).

128. *See, e.g.*, Inmates of the Suffolk County Jail v. Sheriff of Suffolk County, 952 F. Supp. 869 (D.Mass. 1997), *aff'd as modified sub nom.* Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997); Hadix v. Johnson, 933 F. Supp. 1362 (W.D. Mich. 1996); Benjamin v. Jacobson, 935 F. Supp. 332 (S.D.N.Y. 1996), *aff'd in part and rev'd in part*, 124 F.2d 162 (2d Cir. 1997).

129. § 802(e)(2)(A)(i), 110 Stat. at 1329–69.

130. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105–119, § 123(a)(3)(C), 111 Stat. 2440, 2470 (1997). Given the Senate's deliberately slow pace in confirming new federal judges, *see* Rehnquist, *supra* note 30, however, Congress' apparent disregard for "court calendar congestion" may well raise constitutional concerns.

131. Consent decrees affording prospective relief are considered final judgments. *See infra* notes 138–44 and accompanying text.

132. *See supra* text accompanying notes 73–76.

133. *See, e.g.*, Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938) (upholding the Norris-LaGuardia Act, which denied federal courts the jurisdiction to issue injunctions in labor-management disputes unless the court made specific findings set forth in the Act); BATOR ET AL., *supra* note 17, at 370; *see also* Yoo, *supra* note 4.

134. *See infra* notes 137–41 and accompanying text.

to modifications of such judgments by the court, is limited by the *Plaut* principles.[135] Second, the short thirty-day period provided by the PLRA for judicial decisions on motions to vacate consent decrees, even with the possibility of a sixty-day extension "for good cause," combined with the requirement that specific findings be made, violate the *Klein-Sioux Nation* principles.[136]

The standards involving modification of consent decrees were considered fully by the Supreme Court in *Rufo v. Inmates of Suffolk County Jail.*[137] In that case, based upon changes in decisional law and fact, the sheriff of Suffolk County moved to modify provisions of a long-standing consent decree that prevented double-bunking of pretrial detainees. The Court considered both the final nature of consent decrees and the reasons defendants had agreed to a decree requiring more than the district judge was authorized to order had the case been litigated.

The Court expressly found consent decrees to be final judgments: "[A] consent decree is a final judgment that may be reopened only to the extent that equity requires."[138] Its status as a final judgment, however, is different from that of a court-imposed injunction, an executory decree.[139] Although a consent decree may be reopened by the court, "only to the extent that equity requires," as a final decree it is not—under the principle of finality defined by the series of cases culminating in *Plaut*[140]—subject to being reopened by Congress.[141] Since its decisions in *Hayburn's Case*[142] and *Marbury v. Madison,*[143] the Supreme Court has explained the importance of the finality of its decisions to the fulfillment of its particular role in the constitutional structure: "Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or

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135. *See infra* notes 140–46 and accompanying text.

136. *See infra* notes 155–56 and accompanying text.

137. 502 U.S. 367 (1992).

138. *Id.* at 391.

139. *See supra* notes 71–76 and accompanying text.

140. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995); *see infra* notes 145–46 and accompanying text.

141. *But see* Benjamin v. Jacobson, 124 F.3d 162, 170–73 (2d Cir. 1997) (finding constitutional the PLRA's immediate termination of prospective relief in federal courts required by the applicable consent decrees, while also finding the consent decrees not vacated by the PLRA). The decision, however, does not make the important distinction between the judiciary modifying a consent decree and Congress forcing the reopening of the decree. The court concluded that *Plaut* was not violated because it interpreted the PLRA termination provision as "doing no more than limiting the remedial jurisdiction of the federal courts." *Id.* at 173. The court found that the PLRA did not "attempt to disturb the underlying Consent Decrees, but only precludes their future articulation and enforcement in federal courts." *Id.* at 172.

Interestingly, the court's discussion mentions *Rufo* only in a footnote and seeks to distinguish it on the basis of *Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local 134*, 133 F.2d 955 (7th Cir. 1943). *Benjamin*, 124 F.3d at 170 n.13. However, this decision preceded both *Chicago & Southern Air Lines, Inc.* and *Cooper. See supra* notes 11–12 and accompanying text.

142. 2 U.S. (2 Dall.) 409 (1792).

143. 5 U.S. (1 Cranch) 137 (1803).

refused faith and credit by another Department of Government."[144] *Plaut* held that Congress could not require the federal courts to reopen final judgments because it is "repugnant to the text, structure and traditions of Article III,"[145] which include the power to issue conclusive judgments that finally resolve a dispute and may not be altered by retroactive legislation.[146]

The importance of the finality of consent decrees for separation of powers purposes becomes clear when one examines the differences between a consent decree and a court-imposed injunction. The parties to a civil suit agree to the terms of a consent decree assuming that their agreement resolves the litigation with commitments that are acceptable to all. Each side surrenders its expectations of victory, as well as the possibility of loss, for the assurance that its obligations are limited to what has been agreed upon within the boundaries of the law as it stands, and to avoid findings of constitutional violations that may lead to additional legal exposure. Justice White, writing for the majority in *Rufo*, explained:

> To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation. The position urged by petitioners "would necessarily imply that the only *legally enforceable* obligation assumed by the state under the consent decree was that of ultimately achieving minimal constitutional prison standards.... Substantively, this would do violence to the obvious intention of the parties that the decretal obligations assumed by the state were not confined to meeting minimal constitutional requirements."[147]

The PLRA permits state and local government defendants, as well as intervenors, now including legislators,[148] to escape their commitments by moving to terminate immediately the consent decree because of the absence of a finding that the prospective relief "extends no further than necessary to correct the violation of the Federal right,"[149] a finding that many defendants deliberately avoided by agreeing to the consent decree. The prospective relief provided by the consent decree is automatically stayed after thirty days—with the possibility of the sixty-day extension—if the district judge does not find that "such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."[150] The record that would form the basis of such a finding ordinarily

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144. Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948).

145. *Plaut*, 514 U.S. at 218.

146. *Id.* at 219; *see supra* note 21 and accompanying text.

147. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 389–90 (1992) (quoting Plyler v. Evatt, 924 F.2d 1321, 1327 (4th Cir. 1991)).

148. *See supra* note 123 and accompanying text.

149. Prison Litigation Reform Act of 1995, Pub. L. No. 104–134, § 802(b)(2), 110 Stat. 1321, 1321–68 (1996) (to be codified at 18 U.S.C. § 3626).

150. *Id.*

takes many months, sometimes even years, to develop through discovery and hearings.[151] Yet the PLRA requires that the prospective relief is automatically stayed no more than ninety days after the filing of the motion.

Although *Rufo* emphasized that "the moving party bears the burden of establishing that a significant change in circumstances warrants modification of a consent decree,"[152] the short time limit effectively shifts the burden to the prisoners to satisfy the three criteria for avoiding the stay. A long-standing consent decree, a "final judgment," entered into voluntarily by the parties (including the government defendants), affecting the federal rights of hundreds or thousands of prisoners, will be vacated after no more than ninety days as the consequence of congressional mandates forcing judicial action. Although in theory, as suggested by one circuit court and one district court, the consent decree could remain in place without implementation of prospective relief, its force would be severely weakened.[153] The consequence, in the words of the *Plaut* majority, "consists of depriving judicial judgments of the conclusive effect that they had when they were announced."[154]

As indicated, this scenario is a haunting reminder of *Klein*. Justice Blackmun, writing for the majority in *Sioux Nation*[155] explained the import of *Klein*:

> The Government's appeal from the judgment in Klein's case was decided by this Court following the enactment of the appropriations proviso.... This holding followed from the Court's interpretation of the proviso's effect: "Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have."

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151. *See, e.g.*, Inmates of Suffolk County Jail v. Sheriff of Suffolk County, 952 F. Supp. 869, 872 (D. Mass. 1997) ("After years of substantive and procedural conflict, the parties entered into the Consent Decree on May 7, 1979."), *aff'd as modified sub nom.* Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997); Hadix v. Johnson, 933 F. Supp. 1362, 1364 (W.D. Mich. 1996) ("Such a determination in this case necessarily will involve thorough reviews of the extensive records on the various issues that have been raised, ruled on, and in most cases appealed, over the last eleven years.").

152. *Rufo*, 502 U.S. at 392 n.14.

153. Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997); *Inmates of Suffolk County Jail*, 952 F. Supp. 869. This aspect of the district court's decision, however, was modified upon appeal. Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997). The First Circuit in *Rouse* required termination of the consent decree, explicitly declining to follow the Second Circuit's position in *Benjamin*. *Rouse*, 129 F.3d at 655.

In a May 4, 1998, decision, a Ninth Circuit panel found the PLRA provision requiring immediate termination of consent decrees, 18 U.S.C. § 3626(b)(2), to be unconstituional according to *Rufo*, *Plaut*, and *Klein*. Taylor v. United States, Nos. 97–16069, 97–16071, 1998 WL 214578 (9th Cir. May 4, 1998). The *Taylor* decision creates a conflict among the circuits. *See* Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997); Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997); *Inmates of Suffolk County Jail*, 129 F.3d 649; Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996).

154. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 228 (1995).

155. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).

> Thus construed, the proviso was unconstitutional in two respects: First, it prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor.... "Can [Congress] prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself."
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> ....
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> ...First, of obvious importance to the *Klein* holding was the fact that Congress was attempting to decide the controversy at issue in the Government's own favor.... Second, and even more important, the proviso at issue in *Klein* had attempted "to prescribe a rule for the decision of a cause in a particular way."[156]

Here, not only is Congress prescribing a rule of decision for cases involving consent decrees that virtually assures victory for the government defendants, but it is also prescribing a rule of decision for cases that involve, as *Plaut* did, already-entered final judgments that are not subject to appeal. By undermining consent decrees, Congress is also undercutting the ability of the federal courts to encourage parties to enter consent decress, a mechanism often used to resolve institutional reform litigation.

III. HABEAS CORPUS REFORM: TITLE I OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

The Antiterrorism and Effective Death Penalty Act of 1996[157] ("AEDPA" or "Antiterrorism Act") was signed into law by President Clinton on April 24, 1996, two days before the signing of the PLRA. Like the 1995 Rescissions Act,[158] the name of the AEDPA is somewhat misleading. Title I,[159] addressed to habeas corpus reform, has little to do with terrorism. It does, however, raise profound questions about the relationship between the Congress and the judiciary regarding the writ of habeas corpus.[160]

Other commentators have analyzed the changes from prior statutory and decisional habeas corpus law accomplished by the AEDPA.[161] This Article will

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156. *Id.* at 403–05 (citations omitted).

157. Pub. L. No. 104–132, 110 Stat 1214.

158. Pub. L. No. 104–19, 110 Stat. 240 .

159. §§ 101–107, 110 Stat. at 1217 (to be codified at 28 U.S.C. §§ 2244, 2253–2255, 2261–2266).

160. Habeas corpus *ad subjiciendum* permits inquiry into the legality of a prisoner's detention with a view to an order for his release. Fay v. Noia, 372 U.S. 391, 399 n.5 (1963), *overruled by* Wainright v. Sykes, 433 U.S. 72 (1977).

161. *See, e.g.*, Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996); Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868 (1997).

address one substantive provision that intrudes upon the exercise of the judicial power by threatening the basic character of the writ of habeas corpus.[162]

Professors Hart and Wechsler summarize the function of the writ of habeas corpus as follows:

> The Great Writ always serves the function of precipitating a judicial inquiry into a claim of illegality in the petitioner's detention for the purpose of commanding his release, or other appropriate disposition, if he is found to be illegally detained. The underlying premise is, of course, that only law can justify detention, the specific contribution of the English struggle with royal prerogative in which the writ played an historic part.[163]

The writ of habeas corpus immigrated to America during the colonial period, and it was explicitly recognized in Article I of the Constitution, which provides: "The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[164] Alexander Hamilton, in defending the absence of a bill of rights in the original Constitution, cited the "establishment of the writ of habeas corpus" as one of the "greater securities to liberty."[165] The first Congress expressly gave the Justices of the Supreme Court and judges of the district courts the power to issue the writ by enacting section 14 of the Judiciary Act of September 24, 1789.[166] In 1867, the federal courts were given jurisdiction to consider habeas corpus petitions from state prisoners.[167] Habeas corpus is the only federal remedy open to a state prisoner to challenge his or her confinement.[168] The writ is a "remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law, even though imposed pursuant to conviction by a court of competent jurisdiction."[169]

The significance and power of the writ is explained neither by the Constitution nor by statute. The Supreme Court has described the nature of the writ

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162. § 104, 110 Stat. at 1218–19 (amending 28 U.S.C. § 2254).

163. BATOR ET AL., *supra* note 17, at 1468.

164. U.S. CONST. art. 1, § 9, cl. 2.

165. THE FEDERALIST No. 84 (Alexander Hamilton).

166. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82.

167. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 383, 385. In the light of the subsequent ratification of the Fourteenth Amendment in 1868, could this jurisdiction now be withdrawn by Congress? Such a withdrawal would sever the constitutional connection between the guarantee of due process against state action provided by Section 1 of the Fourteenth Amendment and the writ of habeas corpus. *See* Fay v. Noia, 372 U.S. 391, 402 (1963) ("[T]his bill [(referring to a bill introduced in the House of Commons in 1593)] accurately prefigured the union of the right to due process drawn from Magna Charta and the remedy of habeas corpus accomplished in the next century.").

168. Issues related to challenges to the *conditions* of confinement in prison were considered *supra* in Part II.

169. Preiser v. Rodriguez, 411 U.S. 475, 485 (1973). The Court found that a habeas proceeding was a proper method to seek restoration of prisoners' good-conduct time credits. *Id.* at 487–88.

as follows:

> The statute does not define the term *habeas corpus*. To ascertain its meaning and the appropriate use of the writ in the federal courts, *recourse must be had to the common law, from which the term was drawn, and to the decisions of this Court interpreting and applying the common law principles which define its use when authorized by statute.*
>
> ...Its use was defined and regulated by the Habeas Corpus Act of 1679.... This legislation and the decisions of the English courts interpreting it have been been accepted by this Court as authoritative guides in defining the principles which control the use of the writ in the federal courts.[170]

The most penetrating discussion in this century of the nature of the Great Writ is found in the seminal case of *Fay v. Noia*.[171] Justice Brennan wrote at length—forty-eight pages in U.S. Reports[172]—regarding the origin and character of the Writ:

> It is "a writ antecedent to statute, and throwing its root deep into the genius of our common law.... We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired,' and unsuspended, save only in the cases specified in our Constitution."[173]
>
> Although in form the Great Writ is simply a mode of procedure, its history is inexplicably intertwined with the growth of fundamental rights of personal liberty.[174]

Four principles are essential if the writ of habeas corpus is to serve this elevated purpose. First, the writ must be treated as of constitutional origin. Second, the issuance of the writ must be accepted as a judicial function. Third, the purpose of the writ is to serve as a judicial-constitutional check upon the arbitrary or nonlegal restraint of liberty by the political branches of both the federal and the state governments. Fourth, although authority for a particular Article III court to grant the writ must be bestowed by Congress,[175] the standards for determining whether the writ should issue are of constitutional origin and should therefore be defined by the judicial branch.

Title I of the Antiterrorism Act should be tested against these underlying principles. This Article seeks to return the focus of discussion to the essential constitutional aspects of the Great Writ and Congress' inability to alter these

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170. McNally v. Hill, 293 U.S. 131, 136 (1934) (emphasis added), *overruled in part by* Peyton v. Rowe, 391 U.S. 54 (1968); *see also* Jones v. Cunningham, 371 U.S. 236, 239 (1963).

171. 372 U.S. 391.

172. *Id.* at 394–441.

173. *Id.* at 400 (citations omitted).

174. *Id.* at 401.

175. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94 (1807).

aspects. Although the Supreme Court's 1996 decision in *Felker v. Turpin*[176] resolves some of the jurisdictional issues raised by Title I, it sidestepped the question of whether Congress is unconstitutionally instructing an Article III court how to interpret the Constitution.[177] Chief Justice Rehnquist, writing for the unanimous Court, opined: "[T]he restrictions on repetitive and new claims imposed by subsections 106(b)(1) and (2)...apply without qualification to any 'second or successive habeas corpus application under section 2254.'... Whether or not we are bound by these restrictions, they certainly *inform our consideration* of original habeas petitions."[178] The cautious suggestion that Congress may not have the power to bind the Supreme Court may derive from the Court's earlier conclusion in *Fay v. Noia* that "the Constitution invites, if it does not compel, a generous construction of the power of the federal courts to dispense the writ conformably with common-law practice,"[179] a power Congress cannot infringe without violating principles of separation of powers.

Several sections of Title I of the AEDPA address substantive standards for the issuance of the writ of habeas corpus. Portions of section 104 amend 28 U.S.C. § 2254 in particular:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.[180]

Through new 28 U.S.C. § 2254(e)(1), Congress thus seeks to establish substantive standards governing the granting of the writ of habeas corpus. The question for the judiciary, then, is how far can Congress go in defining rules of decision in habeas cases. Is Congress, through the use of its Article I legislative powers,[181] including the power "[t]o constitute Tribunals inferior to the supreme Court,"[182] or its Article III power to "ordain and establish" inferior federal courts,[183] legislating a series of standards that are tantamount to a partial suspension of the writ in violation of Article I, section 9, clause 2 of the Constitution? Perhaps not yet. But Congress, by enacting the substantive standards

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176. 518 U.S. 651 (1996).

177. In *Lindh v. Murphy*, a bare five-justice majority ruled that the provisions of Chapter 153 of the AEDPA apply only to cases filed after the Act became effective, thus avoiding a constitutional issue. Lindh v. Murphy, 117 S. Ct. 2059 (1997).

178. *Id.* at 2339 (emphasis added).

179. 372 U.S. at 406 (internal citations omitted).

180. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 104, 110 Stat. 1214, 1218 (to be codified at 28 U.S.C. § 2254).

181. "All legislative Powers herein granted shall be vested in a Congress of the United States...." U.S. CONST. art. I, § 1. It is certainly not self-evident that the power to set standards for the issuance of the writ of habeas corpus is a power "herein granted" to Congress.

182. *Id.* art. I, § 8, cl. 9.

183. *Id.* art. III, § 1.

in the Antiterrorism Act, is once again infringing upon the Article III judicial power by setting forth rules of decision in violation of the well-established principles of separation of powers pronounced in *Klein*.[184]

As discussed earlier, there has been considerable debate regarding the precise significance of the *Klein* decision.[185] Even under the narrowest interpretation of *Klein*, Congress violated separation of powers principles by enacting the provisions cited above. If the writ of habeas corpus were not considered a power granted to the judiciary by the U.S. Constitution, it would lose its historical significance[186] as the most cherished safeguard of personal liberty through its ability to check arbitrary action by the political branches of government.[187] In the ringing words of Justice Holmes: "habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell."[188]

Only the federal judiciary has the independence to determine whether the proceedings "have been more than an empty shell." Article III judges are appointed for life ("during good Behaviour"[189]) and protected from salary reductions to preserve their independence.[190] Many state judges, on the other hand, are elected, often in partisan elections. In twenty-eight states, judges of the major courts of original jurisdiction are elected.[191] In fourteen states, some judges of these courts are subject to retention elections.[192] In twenty-three states, judges of some or all of

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184. United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

185. *See supra* text accompanying notes 97–100.

186. The history of the writ may perhaps extend as far back as Roman times. *See* Albert S. Glass, *Historical Aspects of Habeas Corpus*, 9 ST. JOHN'S L. REV. 55 (1934).

187. *See, e.g.*, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1040–45 (1970).

In England it was the judiciary that decided whether and under what circumstances the writ should be granted, and that concept emigrated to the United States. *See* Fay v. Noia, 372 U.S. 391, 400 (1963).

188. Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

189. U.S. CONST. art. III, § 1.

190. *Id.* In *The Federalist*, Alexander Hamilton explained the importance of life tenure and protection against salary diminution to protecting the fortitude and independence of federal judges. THE FEDERALIST NOS. 78, 79 (Alexander Hamilton).

191. ROBERT A. CARP & RONALD STIDHAM, JUDICIAL PROCESS IN AMERICA 257 (3d ed. 1995).

192. These states include Alaska, Arizona, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Montana, Nebraska, Pennsylvania, Utah, and Wyoming. William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, *in* JUDICIAL POLITICS: READINGS FROM JUDICATURE 61, 63 (Elliot E. Slotnick ed., 1992) [hereinafter JUDICIAL POLITICS].

The Commission, merit selection, or Missouri plan for state judicial selection, out of which the retention election emerged, is described as follows:

> A nominating commission would nominate candidates for a judicial position and the governor would then make the appointment from the list of nominees.

the state appellate courts are elected;[193] in other states they are subject to retention elections.[194]

State judges have been sharply criticized by governors and legislators for decisions in criminal cases.[195] Some judges have been challenged and a small number have been voted out of office in recent years in retention and other elections because of unpopular decisions in criminal cases.[196]

With the increasing reliance upon negative attack advertisements in

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> ...Citizens would be asked to determine—by means of a retention election—whether a judge should remain on the bench. The retention ballot did not require a judge to run against an opponent, *but only on the record compiled in office.*

Id. at 62 (emphasis added).

193. *See* CARP & STIDHAM, *supra* note 191, at 258.

194. *See* John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability, in* JUDICIAL POLITICS, *supra* note 192, at 71.

195. Governor George E. Pataki of New York has perhaps been the most vocal critic. Regarding his criticism of Judge Lorin Duckman, see Joseph P. Fried, *State Panel Removes Judge from Bench*, N.Y. TIMES, Oct. 25, 1997, at B1; Gary Spencer, *Charges to Be Filed Against Duckman; Pataki Asks Judge to Resign; Threatens Removal by Senate*, N.Y.L.J., Apr. 23, 1996, at 1; Don Van Natta, Jr., *Judge Rebuked After a Woman Is Slain*, N.Y. TIMES, Feb. 15, 1996, at B3. As for Governor Pataki's criticism of the New York State Court of Appeals, see James Dao, *Pataki, in High Court, Exchanges Barbs with Top Judge*, N.Y. TIMES, May 2, 1996, at B3; Norman A. Olch, *Soft on Crime? Not the New York Court of Appeals*, N.Y.L.J., May 6, 1996, at 1. *Cf.* Anna Cekola & Scott Martelle, *O.C. Appeals Court Finds Itself Subject to Review Law*, L.A. TIMES, Sept. 2, 1997, at A1 (reporting prosecutors' criticisms of the six justices of California's Third Division, Fourth District Court of Appeals); Dan Walters, *A Second Chance on "Three Strikes,"* SAN DIEGO UNION & TRIB., June 25, 1996, at B6 (reporting Governor Pete Wilson's criticism of the California Supreme Court's decision to void a key section of the "three strikes and you're out" sentencing law).

196. Trial judges are politically most vulnerable to attack because they preside individually over what are often highly publicized and, in some states, televised trials. The most controversial retention elections have, however, involved appellate judges, including the 1986 electoral defeat of three justices of the California Supreme Court—Chief Justice Rose Bird and Justices Joseph Grodin and Cruz Reynoso. *See* Wold & Culver, *supra* note 194, at 71–80. Also telling is the travail of Florida Supreme Court Justice Leander Shaw, Jr., during his 1990 retention election. *See* CARP & STIDHAM, *supra* note 191, at 259–60.

The authors of a study of the 1986 California judicial retention election offer these observations:

> What do our findings imply with respect to future retention elections? One implication is that, although voter indifference to judicial elections may be the historical norm, such indifference can be dispelled by a pattern of highly publicized judicial decisions. In other words, lines of decisions that arouse voter attention *and* hostility can become influential factors in retention elections. Likewise, despite historical patterns throughout the nation, judicial retention campaigns *can* become highly visible phenomena.

See Wold & Culver, *supra* note 194, at 77–78.

political elections generally, judges facing forthcoming elections can expect to be the targets of such advertisements as well. Decisions of elected judges may, therefore, be influenced, consciously or unconsciously, by popular passions and by concerns about remaining in office.[197]

To insulate habeas corpus proceedings from political machinations, therefore, substantive standards for granting the writ must be considered a form of federal constitutional common law. If the legislative branch can, by ordinary law, determine the standards for habeas corpus decisions and can pivot the standards upon the decisions of politically vulnerable state judges, then the historical purpose of the writ is dissipated. That is why, in Chief Justice John Marshall's words, "for the meaning of the term habeas corpus, resort must unquestionably be had to the common law."[198] And, it is, of course, the function of the judiciary to proclaim the common law.

Yet, the Antiterrorism Act seeks to define and limit the standards by which federal courts grant the writ to state prisoners. New 28 U.S.C. § 2254(2)(e) governs the review of factual determinations by state courts, an element of habeas review in which the AEDPA seeks to restrain the federal courts significantly. It creates a statutory presumption that the determination of a factual issue by a state court is correct and requires the applicant to rebut the presumption of correctness by clear and convincing evidence, a burden significantly greater than a preponderance of the evidence standard. Prior to the AEDPA, a federal judge had

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197. In *The Federalist No. 78*, Alexander Hamilton explains why judges elected for term appointments often do not have the independence to withstand popular passions:

> That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people..., there *would be too great a disposition to consult popularity*, to justify a reliance that nothing would be consulted but the Constitution and the laws.

THE FEDERALIST NO. 78 (Alexander Hamilton) (emphasis added).

The framers based the Constitution upon their deep insight into human nature, which A. James Reichley describes as follows:

> The founders' conception of human nature was largely derived from the Judeo-Christian belief that man is inherently inclined to sin (that is, to pursue his own ends to the detriment, if necessary, of all others).... *Federalist* paper number fifty-one, generally attributed to Madison, states perhaps most memorably the view of human nature that underlies the Constitution: "But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary."

A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 105 (1985).

198. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93–94 (1807).

discretion to hold an evidentiary hearing:

> In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. If he concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and ordinarily should, accept the facts as found in the hearing. *But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim.*[199]

Although principles of federalism often require deference to state court determinations,[200] the importance of the writ and its history suggest that federal judges in habeas cases have inherent authority to make an independent judgment about the evidence in each individual case.[201] The level of the state courts from which findings of fact emerge, the extent of the independence of the state judges,[202] and the degree of scrutiny given to such findings by state appellate courts vary considerably among the states.[203] The essence of the writ of habeas corpus is the authority of the federal judge to evaluate the legality of the detention. A congressionally mandated evidentiary presumption for all state cases defies this essence. The lessons of half a millennium, cogently captured by dissenting Justice Holmes, should not permit form to hide substance, which would mark a return to the days of *Frank v. Mangum*,[204] when excessive deference was given to state court decisions.

New 28 U.S.C. § 2254(e)(1) also has an impact much like the statutory direction found unconstitutional in *Klein*. First, it forbids the court from giving "the effect to evidence which, in its own judgment, such evidence should have,"[205] and in many cases will direct the court "to give it an effect precisely contrary."[206] A statutory presumption of reasonableness and regularity forces the court into a particular posture when weighing the evidence before it and often alters the

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199. Townsend v. Sain, 372 U.S. 293, 318 (1963) (emphasis added), *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

200. The grant of the writ of habeas corpus is based upon violations of the Due Process Clause of the Fourteenth Amendment. Even under the current limiting view of federal court powers over state actions expressed in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), an exception is carved out for federal power exercised under the authority of the Fourteenth Amendment, which includes the due process limitation upon the states.

201. *See* Fay v. Noia, 372 U.S. 391, 415–35 (1963).

202. *See supra* notes 191–97 and accompanying text.

203. *See* Lambert v. Blackwell, 962 F. Supp. 1521 (E.D. Pa. 1997), *vacated*, 134 F.3d 506 (3d Cir. 1998); Chris Hutton, *The New Federal Habeas: Implication for State Standards of Review*, 40 S.D. L. REV. 442 (1995).

204. 237 U.S. 309 (1915); *see* MELISSA FAY GREENE, THE TEMPLE BOMBING 68–76 (1996) (describing the circumstances of the case).

205. United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871).

206. *Id.*

outcome of a case.[207]

Second, also like the holding in *Klein*, the "rule prescribed is...liable to just exception as impairing the effect" of a writ of habeas corpus, "and thus infringing the constitutional power"[208] of the judiciary. If the authority to grant the writ of habeas corpus is of constitutional origin as an inherent or implied part of the judicial power vested in the Article III courts by the Constitution,[209] then congressional legislation limiting the substantive standards for the grant of the writ infringes the Article III powers of the judiciary, just as impairing the effect of a pardon infringes on the Article II powers of the president.[210] Even under the most constricted reading of *Klein*, the provisions of Title I of the Antiterrorism Act that instruct the judiciary regarding the standards for granting the writ are

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207. Before the AEDPA, the Court held that two standards of review of state fact finding existed. If a petitioner met one of the exceptions under 28 U.S.C. § 2254(d), there existed no presumption of correctness, and thus petitioner only had to establish the state court's error by a preponderance of the evidence. "Where state factfinding is presumed correct, the petitioner must establish the state court's error 'by convincing evidence.'" Keeney v. Tamayo-Reyes, 504 U.S. 1, 20 (1992) (O'Connor, J., dissenting) (quoting Sumner v. Mata, 449 U.S. 539, 551 (1981)). O'Connor predicted in *Keeney* that a convincing evidence standard (much like the clear and convincing language in the AEDPA) would be "unattainable for most petitioners." *Id.* at 21; *see* Larry Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 449 n.26 (1996) ("The new law insists that rebuttal evidence must be both 'convincing' and 'clear,' but I doubt that difference is consequential.").

> Initially, the new statute confirms the requirement that a federal court must typically presume that a state court's finding of historical fact is correct, as well as the rule that a prisoner can rebut that presumption only by producing "convincing" evidence. Under preexisting law, however, the presumption in favor of a state factual finding was contingent on sound process in state court. The prior statute contained a list of procedural standards that a state proceeding must meet if its results were to have the benefit of the presumption in federal court.

Id. at 388. Subsection 2254(e) removes

> any federal standards for the fact-finding process in state court and thus ostensibly establishes a presumption in favor of a state finding of fact, without regard for the process from which it was generated. A regime of that kind may, of course, raise serious due process questions—at least in some cases.

Id. As Professor Yackle points out, there may not be a significant distinction between "convincing" and "clear and convincing." If it is convincing, it is also likely to be clear. There is, howerver, as Justice O'Connor foresaw, a sharp distinction between what either of these standards accomplish—creating a presumption in favor of a state finding that requires convincing or clear and convincing evidence to overcome—and the prior applicable "preponderance of the evidence" standard if the petitioner satisfied one of the exceptions.

208. *Klein*, 80 U.S. at 147.

209. U.S. CONST. art. I, § 9, cl. 2.

210. Congress cannot, for example, instruct the judiciary regarding the meaning of the Free Exercise of Religion Clause of the First Amendment. *See* City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

unconstitutional. Even if these provisions codify current case law,[211] they limit the ability of the judiciary to adapt to changing conditions—such as the rapidly spiraling number of state and local prisoners,[212] the increasing length and harshness of state sentences,[213] and the use of privately managed prisons[214]—and, most importantly, to exercise judicial judgment in each individual proceeding.[215]

IV. CONCLUSIONS

A baffling anomaly has developed recently in the Supreme Court's view of the core authority of Article III courts. In one line of decisions, represented by *Plaut* and *Boerne*, the Court has acted effectively to protect the core constitutional powers of Article III courts. It has rejected direct attempts by Congress to reopen final judgments and impose its view of the meaning of the Constitution's Free Exercise Clause upon the judiciary.

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211. *See, e.g.*, Thompson v. Keohane, 516 U.S. 99, 110 (1995) ("[W]e have reaffirmed that 'basic, primary, or historical facts' are the 'factual issue[s]' to which the statutory presumption of correctness dominantly relates."); Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); Demosthenes v. Baal, 495 U.S. 731, 735 (1990) ("A state court's determinations on the merits of a factual issue are entitled to a presumption of correctness on federal habeas review. A federal court may not overturn such determinations unless it concludes that they are not 'fairly supported by the record.'").

212. *See supra* note 105 and accompanying text.

213. *See supra* notes 106, 117 and accompanying text.

214. The concerns about privately managed prisons are illustrated by a report about conditions in Texas:

> And just this week, Federal authorities announced an investigation into conditions at a privately run county jail in northwest Texas, which houses hundreds of inmates from Montana and Hawaii. Prisoners there have complained about strip searches and the guards' use of warning shots in giving them orders. And an audit by Montana's Corrections Department concluded that there was inadequate food, medical care and counseling services at the prison.

Sam Howe Verhovek, *Texas Jail Video Puts Transfer Programs in Doubt*, N.Y. TIMES, Aug. 22, 1997, at A1.

215. The law of unintended consequences has come into play as the result of a combination of the Federal Sentencing Guidelines, lengthening state sentences, the PLRA, and the AEDPA. The cumulative impact of these changes may be placing increasing pressure on the "front end" of the criminal justice system. For federal prisoners, the longer sentences and the limitations upon post-conviction challenges appear to be leading to abuses of section 5K of the *Sentencing Guidelines*, *see* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1, cmt. n.1., through which prosecutors recommend reductions in sentences for defendants or prisoners providing substantial assistance in the investigation or prosecution of another person. *See* Roberto Suro, *More Informers Buy a Break on U.S. Sentence Guidelines; Potential for Abuse Worries Many in Justice System*, WASH. POST, Aug. 12, 1997, at A1. It is curious that several recent, serious challenges to the judicial branch's integrity spring from constitutionally questionable legislation affecting separation of powers principles. *See, e.g.*, Ira Bloom, *The Aftermath of* Mistretta*: The Demonstrated Incompatibility of the United States Sentencing Commission and Separation of Powers Principles*, 24 AM. J. CRIM. L. 1 (1996).

Yet in situations—such as the Emergency Timber Sale Program, its predecessor the Northwest Timber Compromise, the Prison Litigation Reform Act, and the habeas corpus reform provisions of the Antiterrorism Act—that threaten the authority of Article III courts in equally pivotal but more subtle ways, the few Supreme Court decisions involving these statutes evince great caution. The language of the unanimous *Robertson*[216] decision failed to send any signal that would caution Congress against expanding upon an approach that forces a specific interpretation of law upon the Judiciary.[217] And the language of the Court's opinion in *Felker v. Turpin*[218] presents only the barest hint regarding whether the Court feels bound by the new restrictions on repeated and new habeas petitions imposed by the Antiterrorism Act: "Whether or not we are bound by these restrictions, they certainly *inform our consideration* of original habeas petitions."[219]

Perhaps it is necessary to return, as professional sports managers and coaches often pronounce, "to the fundamentals."[220] Justice Brennan in *Fay v. Noia,*[221] took great care to remind us of the constitutional origins and significance of the inherent authority of Article III courts to issue the writ of habeas corpus in cases involving state prisoners. The Great Writ has been a bulwark for the protection of individual liberties for many hundreds of years. It is a protection against the encroachment of individual rights by all governments in the United States, and it depends for its continued efficacy upon an independent judiciary. These concepts were well understood by the framers of the Constitution, who saw the legislative branch of government as the greatest threat to individual liberties.[222] If the Supreme Court permits the undermining of the judicial side of the high wall of separation of powers by congressional actions, our fundamental individual liberties will once again be threatened because "low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict."[223]

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216. Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992).

217. Perhaps the *Robertson* opinion suffered from being unanimous. It lacked a dissent that would have tested the language of the unanimous opinion of Justice Thomas.

218. 116 S. Ct. 2333 (1996).

219. *Id.* at 2339 (emphasis added).

220. At the beginning of his first full season as the New York Knicks Coach, Jeff Van Gundy said, "We're still not good enough with our fundamentals." Steve Adamek, *Knicks Not Passing Board Test*, BERGEN REC., Oct. 10, 1996, at S2.

221. 372 U.S. 391 (1963).

222. *See e.g.*, THE FEDERALIST NO. 48 ("The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.") (James Madison).

223. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995). For the consequences to individual liberties see, for example, *Korematsu v. United States*, 323 U.S. 214 (1944).