

ARTICLES

Keeping the "Wolf Out of the Fold": Separation of Powers and Congressional Termination of Equitable Relief

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After eight years of litigation and the incursion of over one million dollars in litigation costs, the city of Chicago finally prevails in a lawsuit filed in federal court against the country's principal gun manufacturers. The gun manufacturers agree to enter into a consent decree with the city, and the court enters judgment on that decree. Under the decree, the gun companies agree to curtail the production of the guns most commonly used during street crimes and to take a number of specified steps to prevent guns from falling in the hands of criminals and youth. In return for these concessions from the gun industry, the city of Chicago agrees to forgo its pursuit of millions of dollars in compensatory and punitive damages from the gun manufacturers.

Like the falling of dominoes, other similar lawsuits pending against the gun manufacturers are soon settled across the country through court-enforceable consent decrees. A few months later, in response to the intense lobbying of the gun manufacturers and the NRA, Congress enacts a statute requiring the termination, upon motion of a defendant gun manufacturer, of injunctive relief awarded against the manufacturer unless the court had made or now makes a number of specified findings. Under the statute, the court must, for example, have found or now find that a particular gun manufacturer is currently violating the plaintiff's rights, that the injunctive relief is needed to rectify that violation, and that the court-ordered relief is the least intrusive means of accomplishing this objective.

Since these findings did not have to be made, and hence were not made, when the city of Chicago and other cities entered into consent decrees with the gun manufacturers, courts across the country will now have to hold hearings to determine whether the statutory requirements for injunctive relief against gun manufacturers are met. The district judge overseeing the case in Chicago estimates that the hearing will consume two to three months of the court's time and much more of the parties' time in preparation for the hearing.

But even if the evidence adduced at the hearing confirms that the statutory requirements are met and that the court-ordered relief should remain in effect, city officials will not likely sigh in relief. For their work has just begun. Under the newly enacted statute, the court is required, upon the motion of a defendant gun manufacturer filed at least one year after the denial of an earlier motion to terminate injunctive relief, to consider whether the statutory requirements for injunctive relief are still met. In a year then, and each year thereafter, the city will, if one or more gun manufacturers files such a motion,

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have to muster the resources to prove, once again, its entitlement to injunctive relief from the gun manufacturers.

Congress has not enacted the statute just described. But could it? Would such a statute, requiring courts to readjudicate claims culminating in an award of injunctive relief, be constitutional? More specifically, would such a statute unconstitutionally impinge on the separation of powers by requiring a court to reopen a final judgment?

The answer to this question, according to a number of federal courts of appeals analyzing an analogous statutory provision in the Prison Litigation Reform Act (PLRA),¹ is no. But are these courts right?

This article probes this seminal constitutional question — whether Congress can, as it has under the PLRA, require a court to readjudicate a claim for injunctive relief on which judgment was entered before the statute was enacted. Part I begins by examining the requirements that, under pre-PLRA law, had (and in nonprisoner cases still have) to be met to modify or terminate injunctive relief. Part II contains an overview of the PLRA's termination requirements and a discussion of two bills introduced in Congress to expand the number of previously entered court orders subject to termination.

Part III reviews two of the Supreme Court decisions that the courts of appeals have considered particularly pertinent to the resolution of the separation-of-powers question upon which this article focuses, and Part IV discusses and analyzes these decisions of the courts of appeals. Part V then fills in a gap in these courts' analyses, examining historical evidence bearing on the question whether the Framers of the Constitution envisioned that Congress could constitutionally set aside previously entered orders for injunctive relief. Part VI highlights some of the reasons why it is evident that the courts of appeals have erred in their interpretation of the doctrine of separation of powers embedded in the Constitution. Part VII concludes with a discussion of some of the long-term implications of the separation-of-powers issue that has come to the forefront with the enactment of the PLRA.

I. Pre-PLRA Modification and Termination of Final Judgments

A. Rule 60(b) of the Federal Rules of Civil Procedure

Since the adoption of the Federal Rules of Civil Procedure in 1938, the mechanism customarily employed to modify or terminate a final judgment entered by a federal district court is a motion for relief from judgment filed under Rule 60(b). Rule 60(b) describes six categories of reasons for granting a motion for relief from judgment: (1) mistake, inadvertence, surprise, or excusable neglect; (2) the discovery of new evidence that could not, with "due diligence," have been discovered in time to move for a new trial; (3) fraud, misrepresentation, or "other misconduct" of an opposing party to the lawsuit; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, a prior judgment upon which the current judgment is based has been reversed or vacated, or it would no longer be equitable to apply the judgment prospectively; and (6) "any other reason" warranting relief from the judgment.²

1. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended at 11 U.S.C. § 523(a) and 18 U.S.C. §§ 3624(b), 3626 and in scattered sections at 28 and 42 U.S.C.).

2. Motions under Rule 60(b) must be filed within a "reasonable time" and, if filed for one of the first three reasons recounted above, must be filed within a year after entry of the final judgment. FED. R. CIV. P. 60(b). Rule 60(b) specifically states that the filing of a motion for relief from judgment does not affect the judgment's finality or suspend its operation. *Id.*

Rule 60(b) is not couched in mandatory terms. A court "may" relieve a party from a final judgment for the reasons set forth above. But the decision whether or not to grant the Rule 60(b) motion is remitted to the court's equitable discretion.³ If the court grants the motion, Rule 60(b) directs the court to grant the motion "only upon such terms as are just."

B. Supreme Court Interpretations of Rule 60(b)

Three of the Supreme Court cases construing Rule 60(b) provide particularly helpful guidance in understanding when a motion for relief from judgment filed under the rule should be granted — *Rufo v. Inmates of the Suffolk County Jail*,⁴ *Freeman v. Pitts*,⁵ and *Board of Education of Oklahoma City Public Schools v. Dowell*.⁶

1. Modification of Consent Decrees: *Rufo v. Inmates of the Suffolk County Jail*

In *Rufo*, the Court outlined when a motion filed under Rule 60(b) to modify a consent decree should be granted. In the consent decree at issue in *Rufo*, a sheriff and various other government officials sued by a group of pretrial detainees confined in a county jail had agreed to construct a new jail in order to abate allegedly unconstitutional conditions in the old jail.⁷ Under the terms of the consent decree, the new jail was to be single-celled.⁸ In other words, only one detainee was to be confined in each individual cell.

Ten years after the district court had entered the consent decree, the sheriff moved to modify the decree to permit double-celling in the new jail, whose construction had still not been completed.⁹ The modification of the consent decree was needed, the sheriff argued, because of an unanticipated rise in the inmate population in recent years.¹⁰

The Supreme Court in *Rufo* observed that a consent decree is "a final judgment that may be reopened only to the extent that equity requires,"¹¹ a statement that stands, as we shall see, in stark contrast to recent pronouncements of several courts of appeals about the nature of consent decrees. The Supreme Court then enunciated a two-part test that has to be met in order for the reopening and modification of a consent decree to be considered equitable.

First, the party moving for modification has to prove that, since entry of the decree, there has been a significant change in the facts or the law that warrants the decree's revision.¹² The Supreme Court cited several examples of when a change in the facts might justify the modification of a consent decree: when the change in facts has made compliance with the decree substantially more burdensome; when compliance is no longer feasible because of unforeseen problems; and when compliance with the decree under the changed circumstances would be harmful to the public interest.¹³ The Court emphasized that just because compliance with the decree is "no longer convenient" will not justify reopening the court's decree.¹⁴

3. *Agostini v. Felton*, 521 U.S. 203, 238 (1997); *Railroad Employees v. Wright*, 364 U.S. 642, 648 (1961).

4. 502 U.S. 367 (1992).

5. 503 U.S. 467 (1992).

6. 498 U.S. 237 (1991).

7. 502 U.S. at 374-75.

8. *Id.* at 375.

9. *Id.* at 376.

10. *Id.*

11. *Id.* at 391.

12. *Id.* at 384.

13. *Id.*

14. *Id.* at 383.

The Court also elaborated on the protocols for modifying a consent decree because of a change in the law since the decree was entered. The Court observed that modification is a must when an obligation set forth in the decree is now prohibited by federal law.¹⁵ In addition, modification might be appropriate when the law now authorizes what the decree was intended to prevent.¹⁶ The Court hastened to add, though, that just because the law has been clarified since the consent decree's entry (making it now evident that certain commitments set forth in the consent decree are not constitutionally required) does not automatically mean that modification of the consent decree would be either equitable or appropriate.¹⁷

If a party moving for modification of a consent decree succeeds in establishing that modification is warranted because of a significant change in the facts or the law, the party must then demonstrate that the proposed modification is "suitably tailored" to the change in circumstances.¹⁸ The Court in *Rufo* emphasized that the consent decree should be modified only to the extent necessitated by the change in circumstances.¹⁹ The reopening of the consent decree does not give a court license to rewrite a consent decree to meet only the minimal requirements of the Constitution.²⁰ If, during the give and take of the negotiations culminating in the entry of the consent decree, a defendant agreed to provide relief not mandated by the Constitution, that commitment embodied in the consent decree will generally be preserved and enforced, only changing when required by the alteration of conditions since the consent decree's entry.

In *Rufo*, the Supreme Court addressed the question of the extent to which a court should defer to the judgment of government officials that a consent decree needs to be modified. According to the Court, a court should not defer to the views of government officials during the first step of the court's modification-assessment process — when determining whether there has been a significant change in the facts or law that justifies changing the terms of the consent decree.²¹ If the court determines that such a change has occurred, however, the court should give "significant weight" to the officials' views about how the decree should be adapted to meet the change in circumstances.²² Both public interest and federalism concerns justify this degree of deference to the judgment of the government officials charged with the responsibility of implementing the terms of the consent decree.²³

2. *Withdrawal of Court Supervision: Freeman v. Pitts*

The issue before the Supreme Court in *Freeman v. Pitts* was whether a federal district court can end its supervision over the implementation of certain parts of a consent decree even when the court must retain jurisdiction over the case while compliance with the decree is achieved in other areas. The consent decree at issue in *Freeman* was designed to end segregation in a school district and remediate the adverse consequences—what are called the "vestiges"—of that segregation on African-American children.²⁴ Seventeen years after the consent decree's entry, the district court found that the school

15. *Id.* at 388.

16. *Id.*

17. *Id.* at 389-90.

18. *Id.* at 391.

19. *Id.*

20. *Id.* at 391-92.

21. *Id.* at 392 n.14.

22. *Id.*

23. *Id.* at 392.

24. 503 U.S. at 471, 474.

district had complied with many parts of the consent decree - those covering the assignment of students to schools, transportation, facilities, and extracurricular activities.²⁵ The court therefore withdrew its supervision over those parts of the consent decree.²⁶ At the same time, the court retained jurisdiction in the case and continued its supervision over other areas in the consent decree, such as teacher assignments, in which full compliance had not yet been achieved.²⁷

In rejecting the plaintiffs' argument that a court can withdraw its supervision only when full compliance with a consent decree has been achieved, the Supreme Court underscored the need for flexibility in the exercise of a court's equitable power.²⁸ In order to ensure, as it must, that its withdrawal of control is "orderly," a court may therefore, in its discretion, relinquish that control in stages as compliance is achieved with discrete portions of the decree.²⁹

The Court in *Freeman* underscored that compliance with a portion of a consent decree does not necessarily give a court *carte blanche* to terminate its supervision in that area.³⁰ Instead, a court must consider additional factors, beyond whether there has been full compliance in the area in which relinquishment of court control is contemplated, when determining whether partial withdrawal of the court's supervision is warranted. One such factor is whether the continuation of court supervision in areas in which compliance has been achieved will facilitate the achievement of compliance in other areas.³¹ An additional consideration is whether the officials responsible for implementing the decree have manifested a good-faith commitment to meeting its terms and upholding the law upon which it is founded.³²

3. *Termination of Jurisdiction: Board of Education of Oklahoma Public Schools v. Dowell*

In *Board of Education of Oklahoma Public Schools v. Dowell*, the Supreme Court addressed when a federal district court can take the next step beyond withdrawing its active supervision over an area encompassed by a court decree and terminate the decree itself. The distinction between the termination of court supervision and the termination of jurisdiction is an important one. If a court ends its active supervision over an area but retains jurisdiction in a case, the court can reassume supervision if the defendants begin, once again, to violate the terms of the court decree in an area in which supervision has been withdrawn. By contrast, if the court has dissolved the decree, thereby ending its jurisdiction in the case, the court generally lacks the authority to redress alleged violations of the now-lapsed decree.

In *Dowell*, the Supreme Court indicated that the litmus test for termination of a decree is whether "the purposes of the litigation as incorporated in the decree" have been "fully achieved."³³ The Court observed that the purposes of the litigation in the case before it, another school desegregation case, will have been met upon a finding by the district court that the school district is operating in conformance with constitutional requirements and is unlikely to return to prior unconstitutional practices.³⁴ Relevant

25. *Id.* at 474.

26. *Id.*

27. *Id.*

28. *Id.* at 487.

29. *Id.* at 489-90.

30. *Id.* at 491 (discussing "factors which must inform the sound discretion of the courts").

31. *Id.*

32. *Id.*

33. 498 U.S. at 247 (quoting *United States v. United Shoe Machine Corp.*, 391 U.S. 244 (1968)).

34. 498 U.S. at 247.

factors identified in *Dowell* to be considered by a district court when determining whether dissolution of a decree is appropriate include whether officials have, in good faith, complied with the decree³⁵ and whether they have, to the extent possible, eliminated the aftereffects of their unconstitutional actions.³⁶

II. PLRA and Post-PLRA Termination Provisions

A. Termination under the PLRA

The Prison Litigation Reform Act was enacted into law on April 26, 1996.³⁷ According to its relatively sparse legislative history,³⁸ the Act had two purposes: one, to end what was perceived to be judicial micromanagement of correctional facilities across the country; and two, to discourage prisoners from filing frivolous lawsuits.³⁹ At least

35. There is some ambiguity in *Dowell* regarding the length of time that officials must have complied with the requirements of the decree to satisfy the good-faith requirement needed to terminate the decree. In one part of its opinion, the Court said that the officials must have complied with the decree for a "reasonable period of time." *Id.* at 248. Elsewhere in its opinion though, the Court directed the district court to determine on remand whether the school board had complied with the desegregation decree since its entry by the court. *Id.* at 249-50.

36. *Id.*

37. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (April 26, 1996). Although enacted in 1996, the PLRA was originally entitled the Prison Litigation Reform Act of 1995.

38. Apart from a House Report briefly discussing two House bills that were precursors to the PLRA – the "Stopping Abusive Prisoner Lawsuits Act" and the "Stop Turning Out Prisoners Act," H.R. REP. No. 104-21, 104th Cong., 1st Sess., reprinted in BERNARD D. REAMS & WILLIAM H. MANZ, 1 A LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, Document No. 50 (1997) (hereinafter H.R. REP. No. 104-21), the PLRA's legislative history consists primarily of isolated comments of legislators found in the *Congressional Record*, *Id.* § III, and the testimony of sixteen witnesses during hearings in the Senate and House of Representatives. *Id.* § III. *Taking Back Our Streets Act of 1995: Hearings on H.R. 3 Before the Subcomm. On Crime of the House Comm. On the Judiciary*, 104th Cong., 1st Sess. 134-36, 155-59, 208, 212, 215-16, 222-23, 246-82 (1995) (testimony and statements of Daniel E. Lungren, California Attorney General; Robert H. Macy, District Attorney, Oklahoma City, Oklahoma; Carl R. Peed, Sheriff, Fairfax County, Virginia; Patrick Boyle, Detective, Philadelphia Police Department; Lynne Abraham, District Attorney, Philadelphia, Pennsylvania; Alvin J. Bronstein, Director, National Prison Project, American Civil Liberties Union, reprinted in BERNARD D. REAMS & WILLIAM H. MANZ, 2 A LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, Document No. 53 (1997) (hereinafter 2 REAMS & MANZ); *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearings on S. 3, S. 38, S. 400, S. 866, S. 930, and H.R. 667 Before the Senate Comm. On the Judiciary*, 104th Cong., 1st Sess. 9-16, 20-101, 107-08, 111-13, 141 (1995) (testimony and statements of John Schmidt, Associate U.S. Attorney General; William P. Barr, former U.S. Attorney General; Paul T. Cappuccio, Attorney, Kirkland and Ellis; Professor John J. DiIulio, Princeton University; Lynne Abraham, District Attorney, Philadelphia, Pennsylvania; Michael Gadola, Director, Office of Regulatory Reform, Michigan; Robert J. Watson, Delaware Commissioner of Correction; Steve J. Martin, former General Counsel, Texas Department of Corrections; O. Lane McCotter, Executive Director, Utah Department of Corrections; James A. Collins, Executive Director, Texas Department of Criminal Justice), reprinted in 2 REAMS & MANZ, *supra*.

Congressional critics of the PLRA decried what they considered Congress's cursory review of the PLRA, which was enacted as part of an omnibus appropriations bill. *See, e.g.*, 142 CONG. REC. 5193 (1996) (statement of Sen. Kennedy) ("Although a version of the PLRA was introduced as a free-standing bill and referred to the Judiciary Committee, it was never the subject of a committee mark-up, and there is no Judiciary Committee report explaining the proposal. The PLRA was the subject of a single hearing in the Judiciary Committee, hardly the type of thorough review that a measure of this scope deserves."); *id.* at 5194 (statement of Sen. Simon) ("I am very discouraged that this legislation was considered as one of many issues on an appropriations bill. Legislation with such far reaching implications certainly deserves to be thoroughly examined by the committee of jurisdiction and not passed as a rider to an appropriations bill.").

39. H.R. REP. No. 104-21, *supra* note 38, at 7-9; 141 CONG. REC. S14413-14 (daily ed. Sept. 27, 1995) (statement of Senator Dole).

one court has opined that the real purpose of the PLRA was to discourage prisoners from filing any lawsuits at all, whether frivolous, nonfrivolous, or even meritorious.⁴⁰

In order to achieve the PLRA's first stated objective — putting a halt to what was considered overzealous judicial supervision of prisons and jails nationwide, the PLRA places limits on the prospective relief that a federal district court can order in a case concerning prison conditions.⁴¹ The term "prison conditions" has a broad meaning under the Act, encompassing not only conditions in prisons but also in federal, state, or local jails, juvenile detention centers, juvenile training schools, or other facilities housing juveniles or adults charged with, convicted of, or adjudicated delinquent for crimes.⁴² The term "prospective relief" is also defined broadly, including "all relief" other than compensatory damages.⁴³

In addition to placing limits on the scope of prospective relief that courts can order after the date of the PLRA's enactment in cases involving prison conditions, the PLRA places limits on the prospective relief awarded in cases in which judgment was entered before the PLRA's enactment. Under 18 U.S.C. § 3626(b)(2), the prospective relief is subject to "immediate termination" unless the court approving or granting the relief had found that the relief was "narrowly drawn," extended no further than necessary to correct the violation of a federal right, and was the least intrusive way to remedy this violation.

Were it not for a caveat in the PLRA (discussed *infra*) every, or virtually every, consent decree in the country — and there are many⁴⁴ — involving conditions in prisons or other correctional facilities could be immediately terminated under 18 U.S.C. § 3626(b)(2). That is because before the PLRA was enacted, there was no need for a court to make the prescribed findings in a case the parties had agreed to settle.⁴⁵ In fact, correctional officials entering into consent decrees have typically always insisted on inserting a proviso in the decree to the effect that the officials' agreement to enter into the decree does not mean, and should not be construed as meaning, that they are admitting that conditions in the correctional facility are unconstitutional.⁴⁶ The purpose of these provisos is to protect correctional officials from later being deluged by a wave of suits for damages filed by prisoners riding on the coattails of the consent decrees awarding injunctive relief to the plaintiffs.⁴⁷

40. *Collins v. Kelly*, 1998 WL 614221 at *1 (N.D. Ill. 1998) ("Congress' express purpose in adopting the Act was to discourage the filing of lawsuits by people in prison.").

41. The restrictions the PLRA places on the issuance of prospective relief are somewhat overlapping. The prospective relief must be narrowly drawn, "extend no further than necessary to correct the violation of the Federal right," and be the "least intrusive means" of rectifying the violation." 18 U.S.C. § 3626(a)(1)(Supp. III 1997).

42. *Id.* § 3626(g)(2),(5).

43. *Id.* § 3626(g)(7).

44. Several months before the PLRA was enacted, the National Prison Project reported that thirty-six states, as well as the District of Columbia, Puerto Rico, and the Virgin Islands, had one or more prisons operating under a court order or consent decree. NATIONAL PRISON PROJECT, STATUS REPORT: STATE PRISONS AND THE COURTS 1 (Jan. 1, 1996).

45. In order for a court to enter judgment on a consent decree under pre-PLRA law (the law that still applies to consent decrees not involving conditions of confinement), the consent decree simply had to concern a matter falling within the court's subject-matter jurisdiction, fall within the general scope of the pleadings, and further the goals of the law under which the lawsuit was brought. *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986).

46. *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing on S. 866 Before the Senate Comm. On the Judiciary*, 104th Cong., 1st Sess. 216 (statement of Chase Riveland, Secretary, Washington Department of Corrections).

47. *Id.*

Because of a limitation on the PLRA's immediate-termination provision found in 18 U.S.C. § 3626(b)(3), not all pre-PLRA consent decrees governing prison conditions will necessarily be set aside. If a court "makes written findings based on the record" that four somewhat overlapping requirements are met, then the prospective relief must remain in effect.⁴⁸ The court must find that: (1) the prospective relief is still needed to correct a "current and ongoing" violation of a federal right; (2) the relief extends no further than necessary to correct the violation; (3) the relief is "narrowly drawn"; and (4) the relief is the "least intrusive means" of rectifying the violation.⁴⁹

If a court makes the findings required by § 3626(b)(3) and consequently denies a termination motion, the court may only have a short respite before revisiting the issues underlying the findings. Under the PLRA, if a court denies a motion to terminate prospective relief, the defendants or an intervenor can file another termination motion one year after the date on which the previous order denying termination was entered.⁵⁰ And until the defendants or intervenors prevail on their termination motion, they can continue filing, and the court will then have to adjudicate, a termination motion each succeeding year.

B. Proposals to Expand the PLRA's Termination Provision

Since the PLRA's enactment, several bills have been introduced in Congress to further expand the number of court judgments and remedial awards subject to termination. Congressman DeLay, the House Majority Whip, introduced one of the bills, which has been approved by the House of Representatives.⁵¹ This bill declares that any consent decree that provides remedial relief for prison conditions and was in effect at the time of the PLRA's enactment shall "cease to be effective" upon the date of the current Act's enactment.

What is noteworthy about the "DeLay amendment" is that it removes some of the qualifications to termination in the current law. If the DeLay amendment is enacted into law and is deemed constitutional, consent decrees will be set aside even if no one has moved for termination and indeed, even if the correctional officials are adamantly opposed to termination. In addition, consent decrees must be set aside under the DeLay amendment even if conditions in correctional facilities subject to the decrees are unconstitutional.

Another bill extends the termination of prospective relief beyond the corrections context. This bill, introduced by Senator Hatch, provides for the termination of prospective relief provided in judgments to which state or local officials are bound.⁵² As is true with the PLRA, this termination provision is subject to a proviso: the relief will remain in effect if the court makes written findings that the relief is necessary to correct a "current and ongoing" violation of a federal right, extends no further than necessary to correct that violation, and is the least intrusive means of doing so.⁵³

III. Pivotal Supreme Court Cases

The courts analyzing the constitutionality of the PLRA's termination provision have considered two Supreme Court cases particularly relevant to their analysis — *Plaut v.*

48. 18 U.S.C. § 3626(b)(3)(Supp. III 1997).

49. *Id.*

50. *Id.* § 3626(b)(1)(ii).

51. H.R. 1501, 106th Cong., 1st Sess. § 110(c)(1) (1999).

52. S. 248, 106th Cong., 1st Sess. § 3 (1999).

53. *Id.*

*Spendthrift Farm, Inc.*⁵⁴ and *Pennsylvania v. Wheeling and Belmont Bridge Company*.⁵⁵ These two cases are discussed below.

A. *Plaut v. Spendthrift Farm, Inc.*

The litigation in *Plaut v. Spendthrift Farm, Inc.* was the outgrowth of an earlier case adjudicated by the Supreme Court. In that case, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,⁵⁶ the Supreme Court construed the limitations period applicable to lawsuits brought under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission.

The way in which the Supreme Court defined the limitations period was apparently unanticipated by many people.⁵⁷ But in *James B. Beam Distilling Co. v. Georgia*, decided the same day as *Lampf*, the Court announced that new rules enunciated in Supreme Court opinions are to apply to pending cases.⁵⁸ Application of the limitations period newly enunciated in *Lampf* therefore led to the dismissal of a number of pending cases across the country, including *Plaut*, that had been brought under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5.

Concerned about the application of the newly defined limitations period to pending cases, Congress responded quickly with legislation to modulate the effects of *Lampf*. The statute, codified at 15 U.S.C. § 78aa-1, defined the limitations period for cases pending at the time of the Supreme Court's decision in *Lampf* differently than the Supreme Court had. And in § 78aa-1(b), Congress directed the courts to reinstate, upon motion of a plaintiff filed within sixty days of the statute's enactment, any case pending when *Lampf* was decided that was dismissed as time-barred but would not be time-barred under the limitations period set forth in the statute.

The plaintiff's lawsuit in *Plaut* would have been reinstated under this statute, but the district court held that it was unconstitutional, a decision in which the Sixth Circuit Court of Appeals concurred.⁵⁹ The Supreme Court agreed, concluding that the statute, by requiring federal courts to reopen final judgments, violated separation-of-powers principles subsumed within the Constitution.⁶⁰

In an opinion written by Justice Scalia, the Supreme Court noted that Article III of the United States Constitution vests "the judicial Power of the United States" in the Supreme Court and other lower courts established by Congress.⁶¹ "Deeply rooted" in Article III, the Court observed, is the premise that it is the responsibility, and the prerogative, of the courts to "say what the law is" in judgments conclusively resolving a case.⁶²

The Supreme Court acknowledged that Congress can enact statutes modifying the rules to be applied by courts in future cases.⁶³ Congress can also require courts to apply those new rules in pending cases, including cases pending on appeal.⁶⁴ But if a case has

54. 514 U.S. 211 (1995).

55. 59 U.S. 421 (1855).

56. 501 U.S. 350 (1991).

57. See *id.* at 370 (O'Connor, J., dissenting)("[T]he Court shuts the courthouse door on respondents because they were unable to predict the future.").

58. 501 U.S. 529 (1991).

59. 514 U.S. at 215.

60. *Id.* at 240.

61. *Id.* at 221.

62. *Id.* at 218-19.

63. *Id.* at 222.

64. *Id.* at 226.

already culminated in a final judgment, Congress cannot, according to the Court, tamper with that judgment or require a court to revisit that judgment.⁶⁵

What is instructive about *Plaut* is how the Supreme Court defined what constitutes a "final judgment" that Congress is constitutionally forbidden from reopening. The demarcation line, according to the Court, is drawn at the point when the time period for an appeal has lapsed or the appeal has otherwise been completed as determined by statute.⁶⁶ It is at this point that a judgment becomes "final," insulated from congressional modification or reopening. The Supreme Court observed that this dividing line — between judgments in which all appeals have been waived or finished and judgments still being appealed or still subject to appeal — is "implicit" within Article III's creation of one "judicial department."⁶⁷

The Supreme Court in *Plaut* also pointed to history to support its conclusion that 18 U.S.C. § 78aa-1(b) unconstitutionally reopened final judgments. The Court noted that the Framers of the Constitution were well aware, at the time they drafted the Constitution, of the havoc wrought in the colonies during the 1600s and 1700s by colonial assemblies and legislatures setting aside court judgments.⁶⁸ During that time period, litigants dissatisfied with a court judgment typically turned to the legislature for redress.⁶⁹ The legislature would often oblige by enacting laws either changing the outcome in a case or directing that the judgment be set aside and the plaintiff's claim readjudicated.⁷⁰

The Supreme Court in *Plaut* cited historical materials highlighting the problems generated by such legislative interference with courts' final judgments.⁷¹ One expressed concern was the adverse impact this interference had on litigants who had filed suits and had, often after the incursion of significant expenses, prevailed, only to have their victory wiped away by a legislative sleight of hand.⁷² But the historical materials, which will be examined in greater depth later in this article, also evinced a more fundamental concern about legislative overrides of court judgments: a concern that the power of the courts was being eroded and supplanted by legislatures exercising judicial power as they reopened courts' final judgments.⁷³

B. *Pennsylvania v. Wheeling and Belmont Bridge Company*

This case, like *Plaut*, was the outgrowth of earlier litigation before the Supreme Court.⁷⁴ In 1847, the Wheeling and Belmont Bridge Company began building a bridge across the Ohio River pursuant to a statute enacted by the Virginia legislature.⁷⁵ The state of Pennsylvania contended in a lawsuit that the bridge unlawfully impeded navigational rights because large steamboats could not pass under it.⁷⁶ The Supreme Court

65. *Id.* at 227.

66. *Id.*

67. *Id.*

68. *Id.* at 219.

69. *Id.*

70. *Id.* The Supreme Court in *Plaut* cited documents collecting cases in four states in which this legislative intervention had occurred -- Vermont, Pennsylvania, New Hampshire, and Massachusetts. *Id.* at 219-21. This article focuses on these four states to determine whether the state legislatures were only interfering in cases involving claims for damages and whether concerns about legislative incursions on the courts in these states were limited to suits for monetary relief.

71. *Id.* at 219-21.

72. *Id.* at 220.

73. *Id.* at 220-24.

74. *Pennsylvania v. Wheeling and Belmont Bridge Company*, 54 U.S. 518 (1851).

75. *Id.* at 530.

76. *Id.* at 557.

agreed and issued an injunction in 1851 directing that the bridge either be demolished or raised so that it did not obstruct navigation on the Ohio River.⁷⁷

Three months after this injunction was issued, Congress enacted a statute declaring that the bridge was a "lawful structure" at its current elevation and was a post-road for the carrying of United States mail.⁷⁸ The company then completed building the bridge, but in 1854, the bridge was blown down during a storm.⁷⁹ When the company began taking steps to rebuild the bridge at the same height as before, the state of Pennsylvania filed several motions to enforce the previously entered judgment.⁸⁰

The Supreme Court, however, refused to enforce the injunctive portion of its earlier decree.⁸¹ The Court first noted that Congress was vested with the power to determine what constitutes an obstruction to navigation as part of its power, under the Constitution, to regulate interstate commerce.⁸² Consequently, because of the statute enacted in 1852, the bridge whose construction the state of Pennsylvania sought to enjoin was no longer, as a matter of law, an obstruction to navigation even if it was such an obstruction as a matter of fact.⁸³ The Court therefore refused to enjoin the rebuilding of the bridge whose construction was now, because of the statute, entirely lawful.

The state of Pennsylvania argued that Congress had no authority to annul the Court's prior judgment or the determination of rights embodied in that judgment.⁸⁴ The Court responded as follows: "This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it."⁸⁵ Thus, the Court seemed to concur that, at least usually, Congress cannot overturn a judgment by making legal that which a court has decreed in the judgment to be illegal.

But this case, the Court observed, represented an exception to the general rule.⁸⁶ The right to free navigation was "a public right secured by acts of congress" and subject to congressional control.⁸⁷ The equitable powers of the Court could not therefore be exercised to protect a right that, due to the actions of Congress, simply did not exist.⁸⁸

The Supreme Court in *Wheeling* observed that the result in the case would have been very different had the suit been one for damages rather than injunctive relief: "[I]f the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress."⁸⁹ The Court explained that the entitlement to damages would have derived from the Court's judgment and would not have depended on the scope of navigational rights as later defined by Congress.⁹⁰ In keeping with this observation, the Court in *Wheeling*, though denying the motion to enforce the injunctive portion of its

77. *Id.* at 578.

78. 59 U.S. at 429.

79. *Id.* at 422, 425.

80. *Id.* at 422.

81. *Id.* at 435-36.

82. *Id.* at 431.

83. *Id.* at 430.

84. *Id.* at 431.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 431-32.

89. *Id.* at 431.

90. *Id.*

previous decree, granted the motion to enforce the part of the decree that had ordered the defendants to pay costs to the plaintiff.⁹¹

IV. The Constitutionality of the PLRA'S Termination Provision: Decisions of the U.S. Courts of Appeals

Thus far, the courts of appeals that have addressed the question whether the PLRA's termination provision unconstitutionally reopens a final judgment have upheld the constitutionality of § 3626(b)(2).⁹² Despite this surface consensus, an examination of the courts' analysis of the question reveals a deep split in the courts' reasoning as to why the termination provision passes constitutional muster. This division of opinion reflects, at a minimum, the underappreciated complexity of this fundamental separation-of-powers question.

A. One View: Judgments Granting Injunctive Relief Are Not Final

Some of the courts of appeals have concluded that 18 U.S.C. § 3626(b)(2) does not unconstitutionally abridge separation-of-powers principles because a consent decree or other judgment providing for injunctive relief is not a "final judgment."⁹³ Some of these courts have extrapolated their definition of what constitutes a "final judgment" from language in *Plaut v. Spendthrift Farm, Inc.* There, the Supreme Court observed that "[h]aving achieved finality . . . , a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy."⁹⁴

91. *Id.* at 431, 436.

92. *Benjamin v. Jacobson*, 172 F.3d 144 (2d Cir. 1999); *Imprisoned Citizens v. Ridge*, 169 F.3d 178 (3d Cir. 1999); *Hadix v. Johnson*, 133 F.3d 940 (6th Cir. 1998); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997); *Dougan v. Singletary*, 129 F.3d 1424 (11th Cir. 1997); *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997); *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996).

In *Berwanger v. Cottey*, 178 F.3d 834 (7th Cir. 1999), the Seventh Circuit Court of Appeals held that a district court had erred in terminating an injunction placing a population cap on a jail without first determining whether the injunction met the requirements of § 3626(b)(3) and should therefore remain in effect. In rather cryptic *dicta* though, the Seventh Circuit seemed to concur with the conclusion of other courts of appeals that the termination provision does not unconstitutionally reopen a final judgment: "These decisions point out that the PLRA establishes new criteria for relief, a constitutionally sufficient ground for reopening the prospective component of a judgment." *Id.* at 839.

A decision of a panel of the Ninth Circuit Court of Appeals striking down the termination provision on separation-of-powers grounds was withdrawn by the *en banc* court. *Taylor v. United States*, 143 F.3d 1178 (9th Cir. 1998), *withdrawn*, 158 F.3d 1059 (9th Cir. 1998). The *en banc* court ultimately skirted the constitutional question, holding that the termination motion in that particular case should have been denied as moot. *Taylor v. United States*, 181 F.3d 1017 (9th Cir. 1999).

93. *Dougan v. Singletary*, 129 F.3d 1424 (11th Cir. 1997); *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996). There is some language in *Benjamin v. Jacobson* suggesting that the Second Circuit considers injunctions not to be final judgments in the constitutional sense. *See, e.g.*, 172 F.3d at 160. ("Finality," however, may be defined differently for different purposes."). Other language in the case, however, suggests that the court found no separation-of-powers problem because final judgments providing for injunctive relief are subject to equitable modification due to changes in the law. *Id.* at 161. ("[T]o the extent that a court's final judgment consists of an injunction, Congress may require alteration or termination of its future effect if the law on which the injunction was predicated has been changed.").

The basis for the Sixth Circuit's upholding of the PLRA's immediate-termination provision is also unclear. In *Hadix v. Johnson*, 133 F.3d 940, 943 (6th Cir. 1998), the court simply cited the decisions of the other courts of appeals and said that it agreed with their analysis, not recognizing the substantial differences in their analyses.

94. 514 U.S. at 227.

The courts of appeals upholding the constitutionality of § 3626(b)(2) because it does not, in their opinion, unsettle a final judgment have cited what they have described as the ongoing judicial oversight of injunctions' implementation following the entry of judgments granting injunctive relief.⁹⁵ These courts have furthermore underscored that injunctive relief is subject to court modification during the implementation period.⁹⁶ Because the terms of an injunction may change over time, an injunction is not "the last word of the judicial department" in a case and consequently not, in the opinion of these courts, a final judgment for separation-of-powers purposes.⁹⁷

The courts of appeals holding, on these grounds, that § 3626(b)(2) poses no separation-of-powers problems have distinguished this PLRA provision from the statute stricken down by the Supreme Court in *Plaut*. *Plaut* is not controlling here, according to these courts, because *Plaut* involved an attempt by Congress to set aside judgments entered in suits for monetary, not injunctive, relief.⁹⁸ And, these courts have added, the constitutionality of congressional intervention in cases involving judgments for injunctive, as opposed to monetary, relief is evident from the Supreme Court's dichotomous treatment of injunctive and monetary relief in *Wheeling*.⁹⁹

**B. A Second View: Judgments Granting Injunctive Relief are Final,
But Equity Requires that Final Judgments Subject to the PLRA
be Reopened**

Some of the courts of appeals that have considered the question whether § 3626(b)(2) unconstitutionally reopens final judgments have acknowledged that judgments granting injunctive relief are indeed final judgments.¹⁰⁰ These courts have, however, pointed out that even final judgments can be reopened and revised "to the extent that equity requires."¹⁰¹ And because of the change in the law wrought by the PLRA - its directive to courts to terminate prospective relief unless the courts made or now make certain findings, equity, according to these courts of appeals, requires that the judgments subject to the PLRA be reopened and reexamined by the courts.¹⁰²

The courts of appeals following this line of analysis have relied heavily on previous cases decided by the Supreme Court and snippets from those cases. These courts have been particularly swayed by statements of the Supreme Court in three of the cases discussed earlier in this article — *Pennsylvania v. Wheeling and Belmont Bridge Company*,¹⁰³ *Rufo v. Inmates of the Suffolk County Jail*,¹⁰⁴ and *Plaut v. Spendthrift Farm, Inc.*¹⁰⁵

First, the courts of appeals have relied heavily on the care with which the Supreme Court in *Wheeling* distinguished prospective from monetary relief.¹⁰⁶ Both the analysis

95. *Dougan*, 129 F.3d at 1426; *Plyler*, 100 F.3d at 371-72.

96. *Dougan*, 129 F.3d at 1426; *Plyler*, 100 F.3d at 371.

97. *Dougan*, 129 F.3d at 1426.

98. *Benjamin v. Jacobson*, 172 F.3d at 161; *Plyler*, 100 F.3d at 371.

99. *Benjamin*, 172 F.3d at 161; *Plyler*, 100 F.3d at 371.

100. See, e.g., *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d at 657 ("[C]onsent decrees are final judgments, but they are final judgments subject to revision 'to the extent that equity requires.'").

101. See, e.g., *id.*

102. *Benjamin v. Jacobson*, 172 F.3d at 162; *Imprisoned Citizens Union v. Ridge*, 169 F.3d at 185; *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d at 657; *Gavin v. Branstad*, 122 F.3d at 1088.

103. See text accompanying notes 74-91, *supra*.

104. See text accompanying notes 7-23, *supra*.

105. See text accompanying notes 56-73, *supra*.

106. *Imprisoned Citizens Union*, 169 F.3d at 184; *Benjamin*, 172 F.3d at 161; *Inmates of Suffolk County Jail*, 129 F.3d at 656. But see *Gavin v. Branstad*, 122 F.3d at 1086 ("The case we now consider is not quite

and result in *Wheeling* confirm, according to these courts, that final judgments granting injunctive relief are not inviolate. Congress can appropriately require the courts to apply a new law to a previously issued injunction, and application of this new law can, without encroaching on the separation of powers, lead to the court's refusal to enforce the injunction.

Second, some of the courts of appeals have ascribed considerable importance to the following statement made by the Supreme Court in *Rufo*: "The consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under the federal law."¹⁰⁷ These courts have reasoned that the PLRA makes certain obligations placed on correctional officials by consent decrees now impermissible — those obligations to provide relief not strictly required to remedy a constitutional violation.¹⁰⁸ Consequently, according to these courts of appeals, these consent decrees can — and must — be reopened for equitable reasons, as *Rufo* envisioned.

Finally, there are two places in the Supreme Court's opinion in *Plaut* where the Court seemed to intimate, though admittedly in *dicta*, that its analysis, and perhaps even the result of its analysis, might be different were it confronting a case in which an injunction had been issued. In one place, the Court referred to cases cited by the petitioners to support their argument that the statute before the Court reopening final judgments did not unconstitutionally impinge on separation-of-powers principles embedded in the Constitution.¹⁰⁹ One of the cited cases was *Wheeling*.¹¹⁰ The Court in *Plaut* summarily said, without elaboration, that *Wheeling* was distinguishable because it concerned "the prospective effect of injunctions entered by Article III courts."¹¹¹

Later in its opinion, the Court in *Plaut* responded to the dissenters' argument that Congress has, in the past, enacted statutes that require courts to reopen final judgments and that this accepted practice demonstrates that the Constitution condones this kind of legislation. One of the statutes cited by the dissenters¹¹² was the Handicapped Children's Protection Act of 1986.¹¹³ This statute, which authorizes the award of attorney's fees in suits brought under the Education for All Handicapped Children Act, was enacted in response to the Supreme Court's holding in *Smith v. Robinson* that attorney's fees were not recoverable in these kinds of cases.¹¹⁴

like either *Plaut* or *Wheeling II*, for Congress has not attempted to tinker with the results in damage actions that have become final, nor has Congress amended the law on which the prisoners' cause of action is based.").

107. 502 U.S. at 369.

108. *Imprisoned Citizens Union v. Ridge*, 169 F.3d at 184-85; *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d at 657. The contrary argument would be that the PLRA does not make "impermissible" an obligation "placed upon the parties" — that it does not foreclose correctional officials from agreeing to go beyond minimal constitutional requirements when remedying alleged constitutional violations in the conditions of confinement or foreclose them from meeting the terms of such a previous agreement. See 18 U.S.C. § 3626(c)(2) (parties are not precluded from entering into private settlement agreements that don't comply with § 3626(a)'s limitations on prospective relief, although a court only has the power to enforce the agreement through reinstatement of the case in which a settlement was reached). While the termination provision does not prohibit prison officials from meeting obligations to which they may have earlier agreed, what it does do is place restrictions on the power of the courts to enforce those obligations.

109. 514 U.S. at 232.

110. *Id.*

111. *Id.*, quoted in *Imprisoned Citizens Union v. Ridge*, 169 F.3d at 183; *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d at 656; *Gavin v. Branstad*, 122 F.3d at 1086.

112. *Plaut*, 514 U.S. at 258 (Stevens, J., dissenting).

113. 20 U.S.C. § 1415(i)(3)(B).

114. 514 U.S. at 235.

The Handicapped Children's Protection Act of 1986 not only authorizes the award of attorney's fees in actions brought after the date of the Act's enactment, but also in cases pending when *Smith* was decided.¹¹⁵ The majority in *Plaut* emphasized that this Act does not say that final judgments should be reopened.¹¹⁶ The Court observed that consequently, the Act might simply mean that attorney's fees are recoverable in suits already filed on the date of the statute's enactment, but not yet terminated.¹¹⁷ The Court then said: "This interpretation would be consistent with the only case the dissent cites, which involved a court-entered consent decree not yet fully executed. *Counsel v. Dow*, 849 F.2d 731, 734, 738-739 (CA 2 1988)."¹¹⁸

This sentence suggests that the Supreme Court might agree with the courts of appeals that congressional interference with final judgments providing for injunctive relief is, from a constitutional perspective, different from congressional inroads on final judgments for monetary relief.¹¹⁹ The distinguishing allusion to consent decrees may be a sign from the Supreme Court that it would not consider consent decrees granting injunctive relief to be final judgments for separation-of-powers purposes. Whether the Supreme Court would be right in arriving at this conclusion depends, in part, on the historical underpinnings of the separation-of-powers principle embedded in the Constitution.

V. The Reopening of Final Judgments by State Legislatures: An Historical Analysis

The primary focus of the decisions of the courts of appeals concluding that the PLRA's immediate-termination provision does not unconstitutionally reopen final judgments has been on discerning the meaning of certain cases previously decided by the Supreme Court. The extrapolation, and sometimes selective extrapolation, of quotations from these Supreme Court opinions has provided the foundation for the courts of appeals' conclusion that 18 U.S.C. § 3626(b)(2) does not encroach on the separation of powers between the judicial and legislative branches of the federal government.

Some courts, as mentioned earlier,¹²⁰ have seized on the language in *Plaut* equating "finality" of a judgment with "the last word of the judicial department with regard to a particular case or controversy," ignoring the Supreme Court's statement just a few sentences earlier pinpointing where the Constitution has drawn the line between judgments that are final and those that are not: "[A] distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in what Article III creates: not a batch of unconnected courts, but a judicial *department* composed of 'inferior Courts' and 'one supreme Court.'"¹²¹ Some of the courts of appeals have also insisted that the sentences in *Plaut* that, at least arguably, appear to distinguish injunctive relief from monetary relief demonstrate that judgments providing for injunctive relief are not final judgments, overlooking the Supreme Court's contradictory statement in *Rufo* that "a consent decree is a final judgment that may be reopened only to the extent that equity requires."¹²²

115. *Id.*

116. *Id.*

117. *Id.* at 235-36.

118. *Id.* at 236.

119. *Hadix v. Johnson*, 947 F.Supp. 1100, 1110 (E.D. Mich. 1996).

120. See text accompanying notes 94-96, *supra*.

121. 514 U.S. at 227 (emphasis in original).

122. 502 U.S. at 391.

Conspicuously absent from the analysis of any of the courts to have thus far addressed the constitutionality of § 3626(b)(2) is an analysis of the historical underpinnings of the constitutional prohibition on the reopening of final judgments by Congress. This gap in the courts' analysis is especially troubling because the results of such an analysis provided the foundation for the Court's conclusion in *Plaut* that Congress had encroached on the Constitution's separation of powers. But the Court's analysis in *Plaut* did not focus, because it did not need to focus, on the question which now needs to be answered in order to correctly resolve the separation of powers issue raised by § 3626(b)(2): Was the reopening of final judgments by state legislatures that spawned the constitutional prohibition on the congressional overriding of such judgments limited to judgments for monetary relief, or were the legislatures reopening judgments for equitable relief as well? It is to this question that this article will now turn.

The time period upon which this historical analysis will focus falls between 1776, the year in which the American colonies declared their independence from England, and 1787, the year in which the United States Constitution was signed. These were formative years for the newly created states. As the states adopted and implemented their first constitutions, mistakes were made, as some of the framers of those constitutions openly acknowledged. In his *Notes on Virginia* published in 1784, Thomas Jefferson, for example, noted that time had revealed that Virginia's first constitution was plagued with some "very capital defects," the outgrowth of its framers having been "new and unexperienced in the science of government."¹²³

It is therefore instructive to examine the extent to which, if at all, state legislatures were setting aside final judgments for nonmonetary relief in the years immediately preceding the adoption of the Constitution. Equally probative are the responses engendered by the actions of the legislatures during this time period.

A. Vermont

Vermont enacted its first constitution in 1777, shortly after declaring itself an independent republic.¹²⁴ The constitution lodged the "supreme legislative power" in the House of Representatives and the "supreme executive power" in the Governor and Council.¹²⁵ The constitution also provided for the establishment of courts in every county in the state, although the constitution did not say that these courts were vested with "supreme judicial power."¹²⁶ What the constitution did say is that the state's supreme court and courts of common pleas should, in addition to "the powers usually exercised by such courts," have the powers of a court of chancery.¹²⁷

Vermont's first constitution contained a singularly noteworthy section patterned after a provision in Pennsylvania's constitution.¹²⁸ This section provided for the election of a Council of Censors in 1785 and every seven years thereafter.¹²⁹ This Council's constitutional charge was to determine "whether the constitution has been preserved inviolate, in every part; and whether the legislative and executive branches of government have

123. Thomas Jefferson, *Notes On Virginia* (1784) reprinted in *The Life and Selected Writings of Thomas Jefferson*, at 236 (Adrienne Koch & William Peden eds. 1944).

124. 20 *The World Book Encyclopedia Vermont* 334 (1998).

125. CONSTITUTION OF THE STATE OF VERMONT ch. II, §§ II, III (1777), reprinted in VERMONT STATE PAPERS 1779-1786, at 246 (William Slade ed., 1823).

126. *Id.* ch. II, § IV.

127. *Id.* ch. II, § XXI, reprinted in VERMONT STATE PAPERS, *supra* note 125, at 251.

128. See text accompanying note 149, *infra*.

129. CONSTITUTION OF THE STATE OF VERMONT, ch. II, § XLIV (1777), reprinted in VERMONT STATE PAPERS, *supra* note 125, at 255.

performed their duty as guardians of the people; or assumed to themselves, or exercised, other or greater powers, than they are entitled to by the constitution."¹³⁰

In the *Address of the Council of Censors to the Freemen of the State of Vermont* dated February 14, 1786,¹³¹ the Council emphasized the importance of its responsibilities under the constitution. Determining whether the legislative and executive branches of the government had transgressed constitutional boundaries and arrogated powers reserved for another branch of the government would help to preserve the balance of power carefully crafted by the state's constitution.¹³² Without this balance, the Council noted, liberty would be lost, supplanted by either tyranny or anarchy.¹³³

The Council of Censors reserved some of its strongest criticism for the General Assembly's usurpation of judicial power. The Council lambasted the Assembly for vacating court judgments, thereby assuming what the Council described as "the judicial power in the last resort."¹³⁴

Of the four examples cited by the Council of Censors of instances when the General Assembly had unconstitutionally set aside a court judgment,¹³⁵ two involved nonmonetary relief. In one of those cases, the General Assembly passed a law vacating a judgment that resulted in the defendant's eviction from a farm.¹³⁶ The legislature directed that the defendant be permitted to remain on the land pending adjudication of his claim for compensation for improvements he had made to the land.¹³⁷ In the second case, after finding that a person who had applied to the Assembly for relief was entitled to the possession of a particular piece of land, the General Assembly declared that court judgments to the contrary were null and void.¹³⁸

The Council of Censors also criticized the General Assembly for staying the execution of judgments, actions which the Council considered similar to annulling those judgments.¹³⁹ One of the two instances cited by the Council when the Assembly had unconstitutionally stayed a judgment involved a judgment for nonmonetary relief. The Act in question stayed the execution of a writ of possession until a legislative committee could meet to resolve the land dispute.¹⁴⁰

The Vermont Council of Censors not only censured the General Assembly for vacating court judgments and staying their execution, but also for arrogating to itself the

130. *Id.* Vermont's constitution also directed the Council of Censors to determine whether taxes had been "justly laid and collected," the uses for which the money collected had been spent, and whether the laws had been "duly executed." *Id.*

131. ADDRESS OF THE COUNCIL OF CENSORS TO THE FREEMEN OF THE STATE OF NEW YORK (1786)(hereinafter VERMONT COUNCIL OF CENSORS), reprinted in VERMONT STATE PAPERS, *supra* note 125, at 531-44.

132. *Id.* at 533.

133. *Id.*

134. *Id.* at 540.

135. *Id.* at 540-41.

136. "An Act to secure Daniel Marsh, in the possession of a certain farm, until he shall have opportunity of recovering his betterments, and nullifying several judgments rendered against him (passed 18 June 1785)," reprinted in VERMONT STATE PAPERS, *supra* note 125, at 499.

137. *Id.*

138. "An Act confirming Andrew Graham, of Putney, in the county of Windham, in the quiet and peaceable possession of the farm on which he now lives in said Putney, and rendering all judgments respecting the possession of the same, heretofore had and rendered by any court of law whatsoever, null and void (passed 18 June 1785)," reprinted in VERMONT STATE PAPERS, *supra* note 125, at 500.

139. VERMONT COUNCIL OF CENSORS, reprinted in Vermont State Papers, *supra* note 125, at 541.

140. "An Act to stay the execution on a Judgment given by the Superior Court, against Witherby Wittum, Malachi Wittum, and Witherby Wittum, Jun., in favor of David Caswell and Thomas White (passed 25 February, 1782)," reprinted in VERMONT STATE PAPERS, *supra* note 125, at 445.

power to resolve disputes that the Council said should be resolved by courts. The Council criticized legislation divesting the courts of the authority to adjudicate disputes regarding land ownership and assigning to the General Assembly the power to resolve such disputes based on "*justice and equity*."¹⁴¹ Another set of unconstitutional laws singled out by the Council of Censors gave the Governor, the Council, and the General Assembly the "powers of a court of chancery" to resolve cases in equity where the value of the matter in dispute exceeded four thousand pounds.¹⁴² While these two examples of legislative usurpation of judicial power did not involve the vacating of judgments, what is significant for our purposes is that it is clear that the Council of Censors was concerned, and arguably most concerned, about legislative encroachments on the courts' equitable powers. By making themselves the final adjudicators of land disputes, the legislators were "assuming to themselves the judicial power."¹⁴³ And, unlike the courts, the legislators were not "shackled with rules, but [only] by their crude notions of equity."¹⁴⁴

As mentioned earlier, the Council of Censors warned that the General Assembly's unconstitutional exercise of judicial powers was a threat to liberty. But the Council also expressed concerns about the inefficiency that was the byproduct of such legislative incursions on the judiciary. A litigant could spend a lot of time and money proving a claim in court, only to have the judgment he had succeeded in obtaining swept away by a legislative fiat.¹⁴⁵ Of equal concern was the uncertainty and mass confusion engendered by the legislature's assumption of judicial powers as people, with increasing frequency, were turning to the legislature, rather than the courts, to resolve individual grievances.¹⁴⁶

Finally, such resort to the General Assembly for redress was, according to the Council of Censors, unnecessary. In one case cited by the Council, for example, the Assembly had vacated a deed to some land because it had been obtained through fraud. The Council of Censors noted that there was no need for the legislature to exercise such judicial power since the supreme court, having both legal and equitable authority, could have provided appropriate relief from the fraud.¹⁴⁷ The Council of Censors ended its indictment of the legislature for unconstitutionally exercising judicial power in this particular case by observing that "all men . . . [should] be alarmed at the precedent" the General Assembly had set for future incursions on the courts' judicial power.¹⁴⁸

B. Pennsylvania

Pennsylvania's first constitution, like Vermont's, provided for the election of a Council of Censors to determine every seven years whether the executive and legislative branches of the government had exceeded their constitutionally delegated authority.¹⁴⁹

141. VERMONT COUNCIL OF CENSORS, *reprinted in* VERMONT STATE PAPERS, *supra* note 125, at 536-37 (emphasis in original).

142. *Id.* at 537-38. See An Act constituting the Superior Court a Court of Equity, and declaring their power (October, 1779) and An Act for quieting disputes concerning landed Property (February, 1781), *reprinted in* VERMONT STATE PAPERS, *supra* note 125, at 394, 424.

143. Vermont Council of Censors, *reprinted in* Vermont State Papers, *supra* note 125, at 537.

144. *Id.*

145. *Id.* at 540.

146. *Id.* at 542.

147. *Id.*

148. *Id.*

149. The constitution, which was adopted in 1776, directed the Council of Censors to determine "[w]hether the Constitution has been preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves or exercised

Like its counterpart in Vermont, the Pennsylvania Council of Censors recognized the central importance of the tasks with which it had been delegated. Restoring the balance of power between the different branches of the government was, according to the Council, "highly essential to constitutional liberty."¹⁵⁰ The Council noted, in particular, that preserving the independence of the judiciary was critical to "the greater security of the people."¹⁵¹

In its report dated September 24, 1784, the Council of Censors reported having found "multiplied instances" when the General Assembly had exceeded its authority under the state's constitution.¹⁵² The Council considered the General Assembly's exercise of judicial powers a matter of particularly grave concern. Significantly, the Council singled out the Assembly's exercise of "equitable power" as having established "extremely dangerous" precedents.¹⁵³ The Council noted that individuals were increasingly turning to the legislature for the redress of grievances and that "favour (sic) and partiality have, from the nature of public bodies of men, predominated in the distribution of this relief."¹⁵⁴

The Council listed, for illustrative purposes, selected examples of the General Assembly acting outside the boundaries set by the state constitution.¹⁵⁵ Some of the examples of legislative usurpation of judicial powers cited by the Council of Censors included the General Assembly's amendment of land titles,¹⁵⁶ dissolution of marriages,¹⁵⁷ and remission of fines.¹⁵⁸ According to the Council, the Assembly had also transgressed constitutional limits on its authority when it had ordered the return of property that had been wrongfully distrained¹⁵⁹ and granted a claim to a forfeited estate.¹⁶⁰ The General Assembly had, in addition, unconstitutionally intruded on the judiciary when it directed the attorney general to refrain from implementing a verdict of a justice of the state's supreme court until the General Assembly next convened.¹⁶¹

What is noteworthy about this partial listing of unconstitutional legislative encroachments on the judiciary is that the Council's concerns were not confined to cases where the legislature had either itself resolved, or had set aside judgments resolving, claims for monetary relief. The General Assembly was, rather, regularly interceding in the resolution of claims for equitable relief. And it was just such exercises of equitable power that the Council of Censors profiled as particularly "dangerous procedures."¹⁶²

In its report, the Pennsylvania Council of Censors not only identified when the legislature had unconstitutionally exercised judicial power, but why these legislative incursions on judicial authority were cause for alarm. First, as mentioned earlier, the eradi-

other or greater powers than they are entitled to by the constitution." CONSTITUTION OF PENNSYLVANIA-1776, § 47, 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 285 (William F. Swindler ed., 1979).

150. THE DRAUGHT OF AN ADDRESS FROM THE COUNCIL OF CENSORS TO THE FREEMEN OF THE COMMONWEALTH OF PENNSYLVANIA 1 (Philadelphia, Bailey 1784)[hereinafter ADDRESS FROM THE PENNSYLVANIA COUNCIL OF CENSORS].

151. A REPORT OF THE COMMITTEE OF THE COUNCIL OF CENSORS 3-4 (Philadelphia, Bailey 1784).

152. *Id.* at 3.

153. *Id.* at 6.

154. *Id.*

155. *Id.* at 3.

156. *Id.* at 8.

157. *Id.* at 9.

158. *Id.* at 9-10.

159. *Id.*

160. *Id.* at 10.

161. *Id.*

162. *Id.* at 6.

cation or dissipation of the constitutional division of powers between the legislature and the judiciary would imperil liberty.¹⁶³ Second, the option of turning to the legislature for the redress of grievances that fell within the courts' province would lead to the circumvention of courts by litigants or potential litigants and the eventual inundation of the legislature with judicially cognizable claims.¹⁶⁴ And third, the legislature's exercise of judicial powers would lead to capriciousness, favoritism, and corruption in the rendering of decisions that the constitution had allotted to the judiciary.¹⁶⁵

C. New Hampshire

The New Hampshire Constitution of 1776 was the first state constitution adopted after the colonies had declared their independence from England.¹⁶⁶ Written in the midst of the tumult spawned by the war, the constitution was neither designed nor intended to lay a permanent foundation for the state's government.¹⁶⁷ The 1776 constitution only sketchily outlined the government's framework, delineating the composition and some of the powers of the legislature.¹⁶⁸ The constitution neither provided for a separate executive branch nor an independent judiciary.

This constitution was supplanted in 1784 by a new constitution.¹⁶⁹ This new constitution carved the government into three branches¹⁷⁰ — a two-branch legislature called "The General Court of New Hampshire,"¹⁷¹ a "supreme executive magistrate,"¹⁷² known as the president, and the judiciary.¹⁷³ The constitution remitted to the legislature the decision as to what courts would comprise the judiciary. But the constitution defined the purposes of these courts — to hear, try, and determine "all manner of" civil and criminal disputes between persons living in the state or otherwise arising in the state.¹⁷⁴

Significantly, the New Hampshire Constitution of 1784 also directed that the powers of the three branches of the government be, to the extent possible, kept separate. Specifically, the constitution provided that the government's "three essential powers"— legislative, executive, and judicial — "ought to be kept as separate from and independent of

163. ADDRESS FROM THE PENNSYLVANIA COUNCIL OF CENSORS, *supra* note 150, at 1.

164. A REPORT OF THE COMMITTEE OF THE COUNCIL OF CENSORS *supra* note 151, at 6 (Individuals have come to see an application to the legislature "as a shorter and more certain mode of obtaining relief from hardships and losses, than the usual process at law."); *Id.* at 10 ("If complaints like these, can be thus listened to, . . . the house must sit every day in the year.").

165. *Id.* at 4 (History has shown that the concentration of power in one or a few hands is "subversive of all public justice and private rights, and introductive of the capricious, unsteady domination of prejudice, party, and self interest, instead of the government of laws, prescribed, promulgated and known."); *id.* at 6 ("[F]avour and partiality have, from the nature of public bodies of men, predominated" in the General Assembly's distribution of equitable relief.); *id.* at 8 (The Assembly's amendment of land titles "tempts to fraud."); *id.* at 10 ("If complaints like these, can thus be listened to, the laws of the land will be corrupted. . .").

166. Albert Stillman Batchellor, *An Outline of New Hampshire History*, in STATE BUILDERS: AN ILLUSTRATED HISTORICAL AND BIOGRAPHICAL RECORD OF THE STATE OF NEW HAMPSHIRE AT THE BEGINNING OF THE TWENTIETH CENTURY 20 (George Franklyn Willey, ed., 1903).

167. *Id.*

168. N.H. CONST. OF 1776, 6 SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 342-43 (William F. Swindler ed., 1976) [hereinafter CONSTITUTIONS].

169. N.H. CONST. OF 1784, CONSTITUTIONS, *supra* note 168, at 344-57.

170. *Id.*, Part I, art. XXXVII, CONSTITUTIONS, *supra* note 168, at 347.

171. *Id.*, Part II, CONSTITUTIONS, *supra* note 168, at 348.

172. *Id.*, CONSTITUTIONS, *supra* note 168, at 351. The constitution also provided for the selection of a Council, comprised of five members of the legislature, to advise the president. *Id.* at 353.

173. *Id.*, CONSTITUTIONS, *supra* note 168, at 348.

174. *Id.*

each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity."¹⁷⁵

A review of the laws enacted in New Hampshire between 1776 and 1787¹⁷⁶ reveals that the legislature was immersed in processing and resolving private claims and disputes. The brunt of the controversies into which the state legislature delved concerned the ownership of land¹⁷⁷ and other real-estate matters. The legislature repeatedly enacted laws confirming or restoring different individuals' title to land and laws authorizing the conveyance of land whose ownership was or might become the subject of dispute.¹⁷⁸ The legislature also provided remedial relief though in other situations involving disputes between individuals. The legislature, for example, enacted numerous acts dissolving marriages.¹⁷⁹

While many of the acts enacted by the New Hampshire legislature between 1776 and 1787 adjudicated private claims submitted to the legislature in the first instance, others vacated judgments on claims that had already been adjudicated by a court. Often, for example, the legislature reopened claims that a court had dismissed¹⁸⁰ or authorized a

175. *Id.* Part I, art. XXXVIII, CONSTITUTIONS, *supra* note 168, at 347.

176. 4 LAWS OF NEW HAMPSHIRE, REVOLUTIONARY PERIOD 1776-1784 (Henry Harrison Metcalf, ed., 1916)[hereinafter 4 N.H. LAWS]; 5 LAWS OF NEW HAMPSHIRE, FIRST CONSTITUTIONAL PERIOD 1784-1792 (Henry Harrison Metcalf, ed. 1916)[hereinafter 5 N.H. LAWS].

177. *See, e.g.*, An Act to Confirm to Silas Hedges the Title of a Certain Tract of Land Situate in Goffestown in the County of Hillsborough & State Aforesaid, 4 N.H. LAWS, *supra* note 176, at 114-15 (deed to land sold to the petitioner was "acknowledged" before a judge but not recorded, and another deed to the same land was then sold to that judge); An Act to Secure to John Taylor of Londonderry Yeoman the Title to a Certain Piece of Land in Said Londonderry, *id.* at 175-76 (petitioner could not read the deed prepared by the buyer, which included a description of land that the petitioner had not agreed to sell); An Act to Restore to Robert White His Title to Certain Lands in New Boston, *id.* at 295-96 (petitioner could not pay his mortgage payment because the mortgagee, a Tory, had absconded from the area); An Act to Confirm the Title of James Banks to Certain Lands in Packersfield, 5 N.H. LAWS, *supra* note 176, at 212 (petitioner had lived on and cultivated land for which he had a recorded deed, but the seller from whom petitioner purchased the land had not perfected his title to the land); An Act to Confirm Unto Jonas Cutting a Certain Lot of Land in Croydon, *id.* at 258 (petitioner had purchased deed to land, but the deed was not recorded and the seller had then sold another deed to the same land).

178. *See, e.g.*, An Act to Enable Daniel Pierce of Westmoreland in the County of Cheshire to Convey Fifty Acres of Land Part of the Estate of John Ranstead Late of Said Westmoreland Deceased, to Ephraim Stone, 4 N.H. LAWS, *supra* note 176, at 166 (administrator of estate of decedent, who had received money for his land but had not yet executed the deed for the land at the time of his death, authorized to convey the land to the buyer); An Act to Enable Esther Meserve Wife of George Meserve to Sell and Convey Certain Lands in Wolfborough and Apply the Proceeds Thereof to the Support of Herself and Family, *id.* at 330-31 (destitute wife of decedent authorized to sell land to avoid costs that would be incurred if the estate's trustee sold the property); An Act Impowering Simeon Smith to Sell & Convey a Lot of Land in Northfield in Behalf of His Son John Smith, Being a Minor, *id.* at 511-12 (petitioner authorized to sell, on behalf of his minor son, land to which his son had a deed, because his son had no means to pay the taxes on the land); An Act to Enable Timothy Walker Esqr. As Guardian of Paul Rolfe to Sell & Convey Certain Lands Belonging to His Said Ward, for His Support & Education, 5 N.H. LAWS, *supra* note 176, at 6 (minor's guardian authorized to sell land to obtain funds needed for minor's support and care).

179. *See, e.g.*, 4 N.H. LAWS, *supra* note 176, at 145, 220-21, 297, 366, 426.

180. *See, e.g.*, An Act to Restore George Atkinson Esqr. To His Law & Enable Him to Prosecute an Action Commenced Against Benjamin Whiting to Final Judgment and Execution, *id.* at 328-29 (petitioner can renew action on attachment of land dismissed by a court under a statute directing that such actions be dismissed).

new trial after entry of a final judgment by a court.¹⁸¹ This common practice of annulling a court judgment was called "restoring the party to his rights."¹⁸²

Many of the acts enacted in New Hampshire between 1776 and 1787 to modify or annul a court judgment, and indeed most of such acts enacted between 1784 and 1786, affected cases in which monetary relief had been awarded.¹⁸³ But the cases in which the legislature intervened in disputes already adjudicated by the courts were not confined to those involving monetary relief.¹⁸⁴ "An Act to Enable Jonathan Swett to Review a Certain Action of Ejectment Commenced Against Him by Jonathan Moulton As Guardian And At The Inferior Court of Common Pleas Holden In June One Thousand Seven Hundred and Sixty Three" is a case in point.¹⁸⁵ In that case, following the entry of a court judgment in an ejectment action, Jonathan Swett was ejected from land on which he lived.¹⁸⁶ Swett then petitioned the legislature for relief. The ensuing act passed by the legislature directed that Swett be afforded still another trial to determine his entitlement to the land.¹⁸⁷

The interference of the New Hampshire legislature in cases already adjudicated by the courts continued unabated, even after the adoption of the Constitution of 1784,¹⁸⁸ which specifically provided for a separation of powers between the three branches of the government.¹⁸⁹ In 1818 though, the Superior Court of Judicature of New Hampshire ruled in *Merrill v. Sherburne* that this legislative practice was unconstitutional.¹⁹⁰ This case was the outgrowth of a probate dispute between Benjamin Merrill, to whom all of a testator's property was devised under a will, and the testator's heirs.¹⁹¹ At the conclusion of the litigation of the case through the state courts, the heirs had succeeded in obtaining a final judgment disallowing the will.¹⁹² As a result of that judgment, Merrill

181. See, e.g., An Act to Enable Jonathan Swett to Review a Certain Action of Ejectment Commenced Against Him by Jonathan Moulton Esqr. As Guardian & at the Inferior Court of Common Pleas Holden in June One Thousand Seven Hundred & Sixty Three, *id.* at 303-04 (petitioner authorized to obtain another trial on the merits of his claim of ownership of land from which he had been ejected); An Act to Enable John Blazo to Review and Prosecute an Action of Ejectment Against Reuben Sanborn, *id.* at 324-25 (petitioner entitled to another trial in action to eject him from land); An Act to Enable John Paul Jones Esqr. To Re Enter An Action Brought Against Him by Ebenezer Hogg & Judgment Obtained Thereon by Default and to Empower the Said Jones to Have a Hearing Upon the Merits of the Said Action, *id.* at 549-50 (default judgment annulled).

182. William M. Meigs, *The American Doctrine of Judicial Review and Its Early Origin*, 47 AM. L. REV. 683, 685 (Sept.-Oct. 1913). This practice provoked a protest in 1790 from Woodbury Langdon, a justice on the Superior Court, who accused the legislature of improperly interfering with the court by nullifying its judgments. 21 EARLY STATE PAPERS OF NEW HAMPSHIRE 813-14 (Albert Stillman Batchellor, ed., 1892).

183. See, e.g., 5 N.H. LAWS, *supra* note 176, at 26, 126-27, 174-76, 210-11, 214-15, 288-89.

184. See, e.g., An Act to Enable John Blazo to Review and Prosecute an Action of Ejectment Against Reuben Sanborn, 4 N.H. LAWS, *supra* note 176, at 324-25 (petitioner entitled to another trial in action to eject him from land); An Act to Nullify an Order of the Court of General Sessions of the Peace Held at Amherst Within and For the County of Hillsborough, on the First Thursday Next Following the First Tuesday of January 1781. — Relative to a Highway Through Land of Jonathan Searls of Nottingham West, *id.* at 524 (court order authorizing the construction of an open road through petitioner's land is annulled; a bridle way with gates and bars can be constructed); An Act to Reverse a Judgment of the Superior Court of Judicature Against Jonathan Gove, 5 N.H. LAWS, *supra* note 176, at 243 (voiding conviction for passing counterfeit money).

185. 4 N.H. LAWS, *supra* note 176, at 303-04.

186. *Id.* at 304.

187. *Id.*

188. *Merrill v. Sherburne*, 1 N.H. 199, 216-17 (Super. Ct. 1818).

189. See *supra* note 174 and accompanying text.

190. 1 N.H. at 217.

191. *Id.* at 199.

192. *Id.*

would have been dispossessed of land on which he had lived for many years.¹⁹³ But Merrill, like so many other litigants aggrieved by court judgments had done in the past, petitioned the legislature for relief. The legislature obliged by passing an act granting Merrill's administratrix the right to have the case retried by the superior court.¹⁹⁴

The superior court held in *Merrill* though that by granting Merrill the right to have his claim reheard by the court, the legislature had exercised judicial power in contravention of the state's constitution.¹⁹⁵ The court noted that granting a motion for a new trial is an inherently judicial act and that the authority to grant such motions was entrusted, by the state's constitution, to the courts.¹⁹⁶ It made no difference to the superior court that the legislature did not itself resolve the probate dispute.¹⁹⁷ If it had, the court noted, the legislature would have performed two independent judicial acts – "materially alter[ing] the effect of the final judgment" of a court and deciding the merits of the private dispute the courts had been vested with the authority to resolve.¹⁹⁸

The superior court in *Merrill* took pains to underscore that its decision holding unconstitutional the longstanding practice of annulling and modifying court judgments was not case-specific. In other words, there were no idiosyncrasies in the law of probate that made a directive from the legislature to the courts to rehear a probate claim any more constitutionally suspect than similar legislative directives in other kinds of cases. The Superior Court emphasized that it was enunciating "general principles" and deciding the separation-of-powers question before it in the "abstract."¹⁹⁹

Although *Merrill* was decided in 1818, long after the adoption of the United States Constitution in 1787, the superior court was interpreting the meaning of a state constitution enacted in 1784. The court's discussion of the contemporary understanding in the 1780s of the nature of the constitutional division between the powers of the legislative and judicial branches of government is therefore highly relevant to questions concerning the meaning and import of the separation of powers within the United States Constitution.

D. Massachusetts

In 1820, Daniel Webster highlighted how difficult it had been to implement in practice the constitutional divide between the legislative and judicial branches of the state government in Massachusetts: "Nor has it been found easy, nor in all cases possible, to preserve the judicial department from the progress of legislative encroachment. . . . As if Montesquieu had never demonstrated the necessity of separating the departments of government; as if Mr. Adams had not done the same thing, with equal ability, and more clearness in his defense of the American Constitution; as if the sentiments of Mr. Hamilton and Mr. Madison were already forgotten; we see, all around us, a tendency to extend the legislative power over the proper sphere of the other departments."²⁰⁰

In part, the difficulty of implementing the constitutional separation of powers between the courts and the legislature was due to long-entrenched practices in the state. When Massachusetts was a colony, the provincial legislature frequently intervened in a

193. *Id.*

194. *Id.*

195. *Id.* at 217.

196. *Id.* at 205.

197. *Id.*

198. *Id.*

199. *Id.* at 211.

200. HARRY CUSHING, HISTORY OF THE TRANSITION FROM PROVINCIAL TO COMMONWEALTH IN MASSACHUSETTS 257 n.3 (AMS Press 1970).

range of ways in court cases or tried cases itself.²⁰¹ Some of these cases were collected in a *Harvard Law Review* article published in 1901.²⁰² As the editor of that article observed, the provincial legislature could often be found "acting in a judicial capacity, sometimes trying causes in equity, sometimes granting equity powers to some court of the common law for a particular temporary purpose, and constantly granting appeals, new trials, and other relief from judgments, on equitable grounds."²⁰³

In 1778, a convention of delegates met in Essex County, Massachusetts to consider a proposed constitution for the new state.²⁰⁴ In a 68-page report known as the "Essex Result," the convention delegates enunciated what they called the "very principles" of government that should be incorporated in a constitution.²⁰⁵ The delegates then registered their strong objections to the proposed constitution, outlining how it deviated from those basic principles.²⁰⁶

One of the delegates' chief concerns was that the proposed constitution did not adequately secure a separation of power between the legislature and the courts.²⁰⁷ The delegates underscored that the legislature should not exercise judicial power because if it does, the law will be "dictated by the whims, the caprice, or the prejudice of the judge."²⁰⁸ The delegates also cautioned that if legislatures were permitted to act as judges, the law would be injected with a great deal of uncertainty.²⁰⁹

The "Essex Result" contributed to the denouement of the proposed constitution.²¹⁰ At the same time, the principles articulated in the "Essex Result" laid the foundation for a new constitution adopted in 1780.²¹¹ This constitution not only directed that the powers of the legislative, executive, and judicial branches of the government be separated, but explained, though briefly, why such a separation was critically important. Specifically, Article XXX of the Constitution of 1780 stated: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men."²¹²

Despite this constitutional directive, the state legislature's resolution of legal claims and intervention in cases already decided by the courts continued unabated. In 1784, for example, the legislature repeatedly authorized new trials after entry of default judgments,²¹³ directed courts to receive complaints or appeals that had been tardily filed,²¹⁴

201. See the cases collected in *Judicial Action by the Provincial Legislature of Massachusetts*, 15 HARV. L. REV. 208 (1901).

202. *Id.*

203. *Id.* at 208 n.1.

204. CUSHING, *supra* note 200, at 221-22.

205. *Id.* at 223-25.

206. *Id.* at 225-26.

207. RESULT OF THE CONVENTION OF DELEGATES HOLDEN AT IPSWICH IN THE COUNTY OF ESSEX, WHO WERE DEPUTED TO TAKE INTO CONSIDERATION THE CONSTITUTION AND FORM OF GOVERNMENT, PROPOSED BY THE CONVENTION OF THE STATE OF MASSACHUSETTS BAY 5 (Newbury-Port, John Mycall 1778).

208. *Id.* at 24-25.

209. *Id.*

210. CUSHING, *supra* note 200, at 223.

211. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 148 (1967).

212. CONSTITUTION OF MASSACHUSETTS-1780 PREAMBLE ART. XXX, *reprinted in* SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 96 (William F. Swindler ed., 1975).

213. See, e.g., Resolve on the Petition of Josiah Moore, Entitling Him to a New Trial on the Action Mentioned, &c, ACTS AND RESOLVES OF MASSACHUSETTS 245-46 (Boston, Adams & Nourse 1889); Resolve

directed courts to reconsider probate claims,²¹⁵ nullified court judgments,²¹⁶ and authorized courts to correct mistakes in judgments.²¹⁷ Significantly, there is no indication from the resolves enacted by the legislature in Massachusetts in 1784 that the legislature confined its intercession in court disputes to those involving an award of damages. For example, the legislature that year regularly immersed itself in probate disputes, often requiring probate courts to reopen probate claims that had already been adjudicated.²¹⁸

As Daniel Webster noted, efforts to curb what he considered "legislative encroachment" on the judiciary were protracted and not immediately successful.²¹⁹ In 1788, the legislature enacted what in effect was a gap-filler law – one designed to eliminate the perceived need for the legislature to intervene in court-adjudicated cases in order to prevent miscarriages of justice. This act authorized the Superior Judicial Court and the Court of Common Pleas to review court judgments, within three years of their entry, when those judgments stemmed from accident, mistake, want of plea, or other reasons delineated in the act "to the hindrance and subversion of justice."²²⁰

In 1791, the legislature enacted another law further expanding the courts' authority to review final judgments. This act authorized the Supreme Judicial Court and the Court of Common Pleas to grant reviews of judgments whenever they thought it "reasonable," provided that the review occurred within three years of the entry of a judgment.²²¹ But even with the enactment of this act and the act of 1788, the legislature's intervention in court disputes and setting aside of court judgments continued. In 1792, for example, the legislature authorized two litigants to bring a writ of review in an action in which judgment had already been entered.²²²

on the Petition of Levi Rawson, Permitting Him to Re-enter His Action, and Staying Execution, &c, *id.* at 269; Resolve on the Petition of Elihu Gifford, Granting Him a New Trial in the Case of John Bean, *id.* at 290.

214. *See, e.g.*, Resolve on the Petition of Jonathan Bradshaw, Empowering the Justice of the Supreme Judicial Court to Receive His Complaint at Their Next Sessions to be Holden in the County of Middlesex, *id.* at 210; Resolve on the Petition of Benjamin Convers of Chester, Giving Him Leave to Enter His Appeal Mentioned, at the Next Court of Common Pleas at Worcester, *id.* at 229; Resolve on the Petition of David Tilden, of Pembroke, Giving Him Leave to Enter the Complaint Mentioned at the Supreme Judicial Court, *id.* at 299.

215. *See, e.g.*, Resolve on the Petition of Paul Dudley Sargent, Authorizing the Judge of Probate to Cause the Commissioners to Sit Again, and Allow the Claims Against the Estate of William Brown, Esq., *id.* at 204; Resolve on the Petition of Elizabeth Snelling, Authorizing the Judge of Probate, of Suffolk County, to Recommit the Demand Mentioned, *id.* at 261-62; Resolve on the Petition of Martha Lee, and Others, Empowering the Judge of Probate, for Essex County, to Cause a Re-Examination of the Claims on the Estate of Jeremiah Lee, Esq; of Marblehead, Deceased, *id.* at 262.

216. *See, e.g.*, Resolve on the Petition of Oliver Wood, Esq; Reversing the Judgment and Directing a New Trial; *id.* at 207; Resolve on the Petition of William Cooke, Declaring Null and Void a Certain Judgment, and Directing the Clerk of the Said Court to Bring Forward the Action Mentioned, the Said Cooke to Notify Mr. Gabriel Johonnot, *id.* at 214-15.

217. *See, e.g.*, Resolve on the Petition of William Swan, in Behalf of Hannah Marsh, Empowering the Judges of the Supreme Judicial Court to Correct a Mistake, *id.* at 377.

218. *See* cases cited *supra* note 215.

219. *See supra* text accompanying note 200.

220. DAVID L. CHILD, REVIEW OF A REPORT TO THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF MASSACHUSETTS ON THE CASE OF WILLIAM VANS WITH OBSERVATIONS ON THE DISPENSING POWER OF THE LEGISLATURE, AND UPON A DECISION OF THE SUPREME JUDICIAL COURT, NULLIFYING THE SAID POWER 74 (Boston 1833).

221. *Id.* at 75.

222. *Id.*

VI. A False Dichotomy: the Distinction Between Laws Requiring Court Consideration of Claims for Monetary Relief and Court Reconsideration of Claims for Prospective Relief

In *Plaut v. Spendthrift Farm, Inc.*, the Supreme Court relied heavily on history in concluding that Congress's directive to the courts to readjudicate certain cases that they had previously dismissed unconstitutionally encroached on the separation of powers.²²³ Citing the "ruins" spawned by a system in which legislative and judicial powers were intermingled, the Court recounted how state legislatures, before the Constitution was enacted, had, with regularity, exercised the powers of a court – deciding cases, reviewing cases on appeal, and ordering new trials or appeals after setting aside judgments.²²⁴

In upholding the constitutionality of the PLRA's immediate-termination provision, however, the courts of appeals have distinguished *Plaut* on the grounds that the statute the Court struck down in that case reopened final judgments in cases involving claims for damages.²²⁵ As was discussed earlier in this article,²²⁶ these courts have found there to be no infringement on the constitutional separation of powers when Congress directs the courts to reconsider awards of nonmonetary relief. According to some of these courts, a judgment for prospective relief, unlike a judgment for damages, is not a final judgment for separation-of-powers purposes, at least as long as the court retains jurisdiction over the case. Other courts of appeals, while conceding that a judgment awarding prospective relief is a final judgment, have reasoned that Congress can require courts to revise judgments providing for prospective relief, though not damages relief, based on Congress's conception of what the standards of equity should be in a particular case or class of cases.

The historical analysis in the preceding pages of this article belies the validity of the distinction the courts of appeals have erected between laws requiring court reconsideration of claims for monetary relief and court reconsideration of claims for prospective relief. Set forth below is a summary of lessons learned from this historical analysis and other reasons why the dichotomy the courts of appeals have created between judgments for monetary relief and judgments for nonmonetary relief is a false one.

A. Lessons Learned: the Historical Backdrop for the Drafting of the Constitution

The preceding review of some of the historical underpinnings of the tripartite separation of powers embedded in the Constitution—specifically of some of the underpinnings of the constitutional prohibition on the reopening of final judgments by Congress—has revealed a dearth of historical support for the stratagem employed to defend the constitutionality of the PLRA's immediate-termination provision—distinguishing between congressional interference with judgments for monetary relief and congressional interference with judgments granting equitable relief. It is clear that during the preconstitutional period from 1776 through 1787, those state legislatures on which the article has focused were heavily involved in the adjudication of disputes involving not just damages, but also non-monetary relief. The state legislatures, like earlier colonial assemblies,²²⁷ sometimes adjudicated those disputes themselves—subpoenaing wit-

223. See *supra* text accompanying notes 68-70.

224. 514 U.S. at 219.

225. See text accompanying notes 93-118, *supra*.

226. *Id.*

227. Alison G. Olson, *Eighteenth Century Colonial Legislatures and Their Constituents*, 79 J. AM. HIST. 543, 546-47 (Sept. 1992).

nesses, considering evidence, listening to counsels' arguments, and reaching a verdict. In addition, state legislatures frequently overturned court judgments, including judgments for non-monetary relief, and directed courts to reconsider the claims on which judgment had already been entered.

It is equally clear from the historical record that the contemporary objections asserted against this injection of the legislature into the resolution of legal disputes were not confined to legislative intervention in the resolution of claims for damages. Critics of this legislative intervention did not argue that the overturning of judgments for damages was an unconstitutional exercise of judicial power, but that the overturning of judgments for other kinds of relief was not. For example, in their reports excoriating the state legislatures for usurping powers reserved for the judiciary, both the Vermont Council of Censors and the Pennsylvania Council of Censors condemned, in one breath, legislative intrusions in the resolution of claims for monetary and non-monetary relief.²²⁸

Indeed, there is an irony to the constitutional distinction the courts of appeals have made between laws requiring courts to review damages' claims after a final judgment (a clear exercise of judicial power under *Plaut*) and laws requiring courts to review claims for other kinds of relief (not, according to the courts of appeals, an exercise of judicial power). For history reveals that the concerns about legislative encroachment on the separation of powers stemmed primarily from the very fact that the state legislatures were operating as courts of equity during this time period.²²⁹

The reasons why state legislatures during this time period were acting as courts of equity are, in a sense, understandable. In some states, there were no chancery courts empowered to dispense equitable, including injunctive, relief.²³⁰ And in other states in which courts had been vested with equitable powers, those powers were limited.²³¹

There are a number of reasons why the state legislatures conferred no or limited equitable jurisdiction on the courts. Most significantly, courts of chancery were equated with English oppression.²³² Under English law, chancery courts exercised the king's authority.²³³ This commingling of executive and judicial authority led the colonists to view courts of equity as the undemocratic tools of a corrupt king.²³⁴ This distrust of courts of equity, fueled by the revolutionary fervor of the times, was compounded by the perception that courts of equity had virtually unbounded authority, limited only by vague notions of natural justice.²³⁵

There were also practical reasons for early Americans' wariness of chancery courts, a wariness that persisted into the revolutionary period. Since courts of chancery were the courts that enforced the collection of quit-rents, the payment of these annual sums

228. See *supra* text accompanying notes 135-44, 154-61.

229. See, e.g., *supra* text accompanying notes 141, 153.

230. GARY L. MCDOWELL, *EQUITY AND THE CONSTITUTION* 34 (1982); Spencer R. Liverant & Walter H. Hitchler, *A History of Equity in Pennsylvania*, 37 *DICKINSON L. REV.* 156, 164 (Jan. 1933).

231. Edwin S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 *AM. HIST. REV.* 511, 515 (Apr. 1925).

232. MCDOWELL, *supra* note 230, at 32.

233. 1 JOSEPH STORY, *COMMENTARIES ON EQUITY AND JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA* 35-36 (12th ed., Boston, Little, Brown, and Co. 1877). The office of the chancellor, whose equitable-review function had evolved by the fifteenth century into a Court of Chancery, was known as the "Keeper of the King's Conscience." McDowell, *supra* note 230, at 5, 24-25.

234. MCDOWELL, *supra* note 230, at 35.

235. WILLIAM LOYD, *THE EARLY COURTS OF PENNSYLVANIA* 160 (1910).

due to proprietors of the land could be avoided by the abolition, or failure to erect, such courts.²³⁶

Another practical consideration that underlay the reluctance of the newly created states to vest courts with equitable powers was the complexity, at that time, of the law of equity.²³⁷ The rules of chancery pleading and practice were complex and, for many, befuddling,²³⁸ a problem compounded by the fact that so many judges at that time were not learned in the law.²³⁹ Requiring resort to a court for equitable relief, therefore, seemed ill-suited to the "primitive social conditions" that prevailed in the 1700s.²⁴⁰

There is still another reason why the distinction the courts of appeals have drawn, for separation-of-powers purposes, between damages and equitable relief is historically unfounded. In the 1700s, the common-law courts were utilizing inventive ways to, at least partially, fill the vacuum caused by the absence of chancery courts in some states and the courts' limited equitable jurisdiction in others.²⁴¹ As a result, there was a complex intermingling of equitable and legal remedies.

One of the most common mechanisms through which equitable relief was dispensed was a conditional verdict.²⁴² In cases in which an injunction was needed but could not be issued, a verdict for a large amount of damages was returned. The verdict specified though that the defendant could avoid paying the damages by taking certain actions within a specified time period. Conditional verdicts were similarly used to enforce the specific performance of contractual obligations.²⁴³

Another substitute for injunctive relief employed by the common-law courts was a writ of estrepement.²⁴⁴ A writ of estrepement prohibits a party from committing waste by, for example, despoiling land.²⁴⁵ The writ provides relief very similar, but not identical, to an injunction.²⁴⁶

Common-law courts further adapted to the absence of chancery courts in their state by incorporating equitable principles and rules into the common law.²⁴⁷ In Pennsylva-

236. Solon D. Wilson, *Courts of Chancery in America - Colonial Period*, 18 AM. L. REV. 226, 240 (March-April 1884).

237. LOYD, *supra* note 235, at 160.

238. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 48 (1973).

239. Hosea W. Parker, *The Bench and Bar of New Hampshire*, STATE BUILDERS: AN ILLUSTRATED HISTORICAL AND BIOGRAPHICAL RECORD OF THE STATE OF NEW HAMPSHIRE AT THE BEGINNING OF THE TWENTIETH CENTURY 134 (George Franklyn Willey, ed., 1903). See also Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in *LAW IN AMERICAN HISTORY*, 257, 270 (Donald Fleming & Bernard Bailyn eds., 1971).

240. LOYD, *supra* note 235, at 160.

241. Liverant & Hitchler, *supra* note 230, at 165-66.

242. *Id.* at 172; LOYD, *supra* note 235, at 208.

243. Liverant & Hitchler, *supra* note 230, at 174.

244. *Id.* at 175.

245. *Voss v. Green*, 389 A.2d 273, 274 (Del. Super. Ct. 1978).

246. The *Voss* case, *id.*, demonstrates the hindrances common-law courts not vested with equitable jurisdiction have faced in providing remedial relief to parties. In that case, the plaintiffs, who were farmers, brought an ejectment action in the Superior Court of Delaware because the defendants' driveway was on land that they contended was theirs. The defendants, in turn, petitioned the court to issue a writ of estrepement because the plaintiffs had plowed up their driveway. The Superior Court held that the current use of the land for farming purposes would not prevent the driveway from being rebuilt and that therefore the use of the land did not constitute the kind of waste that would justify issuing a writ of estrepement. *Id.* at 274. The court noted that in order to regain possession of the land on which the driveway had been located and prevent future interferences with their possession, the defendants would have to seek an injunction, but only the Chancery Court could provide that kind of relief. *Id.*

247. Liverant & Hitchler, *supra* note 230, at 166.

nia, for example, courts permitted defendants in suits on bonds to raise the equitable defenses of fraud and mistake,²⁴⁸ and purchasers of land obtained specific performance of their contracts through actions for ejectment.²⁴⁹ This blending of equity and law, including the overlap between equitable and legal remedies, was well-known at the time the Constitution was adopted, leading one writer to pronounce in a Philadelphia newspaper published in 1787 that "there cannot be anything more absurd than a distinction between *law* and *equity*."²⁵⁰ Indeed in Pennsylvania, this fusion of law and equity occurred to the point that it could be said, "In Pennsylvania equity is law."²⁵¹

It is in another of the common-law courts' adaptive devices that we see perhaps most clearly the artificiality of the constitutional distinction the courts of appeals have made between laws requiring courts to review, once again, final judgments for monetary relief and laws requiring reconsideration of final judgments for equitable relief. The enforcement of such laws has the same effect as a court's granting of a motion to reopen and modify a judgment. The historical antecedent of this latter motion was a bill in equity.²⁵² If a judgment had been obtained in a common-law court that transgressed equitable principles, a bill in equity would be filed in a chancery court. For example, if a common-law court had entered a judgment for damages because a contract had been breached, but the contract's execution had been induced by fraud, the losing party could turn to the chancery court for relief by filing a bill in equity.

In states in which there were no courts of equity, the mechanism adopted to provide redress in such a situation was, as it is today, a motion to reopen the judgment.²⁵³ The significant point is that the setting aside of a judgment has long been considered an exercise of equitable power. And in what entity does the Constitution entrust this equitable power? It is to that question that we now turn.

B. The Text of Article III

"The judicial power of the United States shall be vested in one supreme court, and such inferior courts as the Congress may from time to time ordain and establish."²⁵⁴ So begins Article III of the United States Constitution, which grants to the judicial branch of the government that which is described as the "judicial power."

A parsing of the text of Article III reveals that the constitutional distinction the courts of appeals have made between requiring courts to review, once again, claims for monetary relief and requiring courts to reconsider their dispensation of claims for equitable relief finds no support in the Constitution itself. First, Article III vests "[t]he" judicial power in the Supreme Court and whatever lower courts Congress establishes. Article III does not allocate "some" of the judicial power to the courts, power that is to be shared with the legislative and/or the executive branches of the government. All of the judicial power is vested in the courts, subject to any specific exceptions found elsewhere in the Constitution, such as the power accorded the Senate to try impeachments.²⁵⁵

248. *Id.* at 169-70.

249. *Id.* at 174. For a number of additional examples of equitable defenses and claims that, over the years, came to be asserted in Pennsylvania courts, *see id.* at 166-79.

250. *PENN. V. PACKET* Oct. 10, 1787, reprinted in 1 *PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788* 153 (John Bach McMaster & Frederick D. Stone eds., 1970) (emphasis in the original).

251. *Liverant & Hitchler, supra* note 230, at 167 (quoting *Hawthron v. Bronson*, 116 S. & R. 269).

252. *Katz, supra* note 239, at 266.

253. *Liverant & Hitchler, supra* note 230, at 171.

254. U.S. CONST. art III, § 1.

255. *Id.* art. I, § 3. At the time the Constitution was adopted and ratified, there was no indication that Congress as a whole, as opposed to the Senate, had been granted judicial power. For example, James Wilson,

Second, the power that Article III allocates to the courts is the "judicial power." As mentioned earlier in this article,²⁵⁶ setting aside court-ordered relief because of its inequity has always lain within the core of courts' equitable powers. In fact, the very *raison d'être* for creating chancery jurisdiction was to enable such relief to be set aside.²⁵⁷

Third, Article III states that the judicial power of the United States "shall be vested" in the courts identified. In other words, while Congress is allotted the discretion not to create any lower federal courts,²⁵⁸ once they have been created, they are imbued by the Constitution with "judicial power" that Congress cannot dislodge them of or reserve for itself.²⁵⁹

Fourth, Article III imparts the judicial power to one "supreme" court, as well as to any lower courts that Congress establishes. Yet there would surely be nothing "supreme" about this court if Congress could pass laws willy nilly requiring the Supreme Court to reconsider its rulings in certain cases. But if, as the courts of appeals have held, a legislative directive to the district courts to review an injunction issued in a case that had culminated in a final judgment is not an exercise of judicial power, then a similar directive from Congress to the Supreme Court to reconsider its holding in a particular case would, it would seem, generally pass constitutional muster.

History confirms that the prospect of Congress directing the Supreme Court to reconsider its rulings, if given a foothold to do so through the upholding of the PLRA's immediate-termination provision, is not fantastical. For the early state legislatures interceded in court decisions, not only by directing that new trials be held in the trial courts, but also by directing that claims already disposed of on appeal be reconsidered by appellate courts.²⁶⁰ The attempt, though ultimately unsuccessful, to pass a law in Massachusetts in the early 1780s directing the Massachusetts Supreme Court to rehear a case in which it had declared slavery unconstitutional²⁶¹ is but a portent of the legislation that could follow on the coattails of a Supreme Court decision upholding the constitutionality of the PLRA's immediate-termination provision.

a member of the Pennsylvania delegation who had signed the Constitution, extolled what he described as a "good quality" of the Constitution: "In it the legislative, executive, and judicial powers are kept nearly independent and distinct. I express myself in this guarded manner, because I am aware of some powers that are blended in the Senate. They are but few; and they are not dangerous. It is an exception; yet that exception consists of but few instances, and none of them dangerous." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 479 (Jonathan Elliot, ed., 2d ed. 1881). See also the comments of William Davie during the North Carolina ratification debates: "The Senate try impeachments. This is their only judicial cognizance. As to the ordinary objects of a judiciary - such as the decision of controversies, the trial of criminals, &c. - the judiciary is perfectly separate and distinct from the legislative and executive branches." 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot, ed., 2d ed. 1891).

256. See *supra* note 252 and accompanying text.

257. Initially, the king's chancellor exercised appellate jurisdiction only, providing relief from common-law judgments when the rigidity of the common law had led to unjust results. CHARLES BARTON, HISTORY OF A SUIT IN EQUITY 28 (1877). Later, the English Court of Chancery exercised original jurisdiction in cases in which there was no adequate remedy at law. *Id.* at 28-35.

258. U.S. CONST. Art. I, § 8. See *Seminole Tribe v. Florida*, 517 U.S. 44, 81 n. 6 (1996) (Stevens, J., dissenting).

259. See THE FEDERALIST NO. 47 (James Madison) ("It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that neither of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.").

260. *Plaut*, 514 U.S. at 219.

261. EDWARD S. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 38 n.57 (1914).

That the descriptor "supreme" in Article III has substantive significance becomes evident when Article III's structuring of the federal court system is compared to other court structures existing at the time the Constitution was enacted. The New Jersey Constitution of 1776, for example, denominated the Governor and the Legislative Council as "the Court of Appeals, in the last resort."²⁶² And the Delaware Constitution of 1776 provided for appeals from the Delaware Supreme Court to a "court of appeals" comprised of the president (the chief executive officer), three persons appointed by the Legislative Council, and three persons appointed by the House of Assembly.²⁶³ The Delaware constitution granted to this court of appeals "all the authority and powers heretofore given by law in the last resort to the King in council."²⁶⁴

Had the Framers of the Constitution intended that Congress would serve as a "court of last resort" – in effect, remanding cases back to the courts for further review – it seems unlikely that they would have structured the federal court system as they did, particularly when alternative models were readily available.²⁶⁵ In fact, one of the Antifederalists' primary concerns about the Constitution was that it remitted to the Supreme Court the power to make a final decision in a case, one that Congress could not set aside:

The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their error, or control their adjudications. From this court there is no appeal. And I conceive the legislature themselves, cannot set aside a judgment of this court, because they are authorised by the constitution to decide in the last resort.²⁶⁶

262. N.J. CONST. of 1776, art. IX, reprinted in CONSTITUTIONS, *supra* note 168, at 451.

263. DEL. CONST. of 1776, art. 17, reprinted in 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 202 (William F. Swindler ed., 1973).

264. *Id.*

265. In the *Federalist Papers*, Alexander Hamilton explained why the Constitution did not grant Congress the power to set aside court decisions:

[E]very reason which recommends the tenure of good behavior for Judicial offices, militates against placing the judiciary power, in the last resort, in a body composed of men chosen for a limited period. There is an absurdity in referring the determination of causes, in the first instance, to Judges of permanent standing; in the last, to those of a temporary and mutable constitution. And there is a still greater absurdity in subjecting the decisions of men, selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men, who, for want of the same advantage, cannot but be deficient in that knowledge. The members of the Legislature will rarely be chosen with a view to those qualifications which fit men for the stations of Judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information, so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshalled on opposite sides will be too apt to stifle the voice *both of law and of equity*.

THE FEDERALIST NO. 81 (Alexander Hamilton) (emphasis added). Note that there was nothing in Hamilton's words that suggested that Congress could intercede in judgments in which equitable relief had been awarded in a way that it could not when monetary relief had been awarded to a party. To the contrary, he indicated that Congress had no superseding authority in cases in equity or cases at law.

266. Brutus, *The Supreme Court Will Mould The Government Into Almost Any Shape They Please*, N.Y.J., Jan. 31, 1788, reprinted in 2 The Debate on the Constitution: Federalist and anti-Federalist Speeches, Articles, and Letters During The Struggle Over Ratification 132 (Bernard Bailyn ed., 1993). See also the comments of William Grayson during the Virginia ratification debates: "In England they have great courts, which have great and interfering powers. But the controlling power of Parliament, which is a *central focus* corrects them. But here each party is to shift for itself. There is no arbiter or power to correct their interference." 3 The

Finally, Article III states that the judicial power extends “to all cases, in law *and equity*” arising under the Constitution, federal laws, and treaties or concerning other matters listed in the Article.²⁶⁷ There is nothing in this undifferentiated language that suggests that the federal courts’ equitable powers are second-class powers – that Congress can interfere in final judgments granting equitable relief in a way that Congress cannot in judgments granting monetary relief.²⁶⁸ To the contrary, the language suggests that the exercise of judicial power in equity is no more subject to congressional limitation than the exercise of such power in a case at law.²⁶⁹

C. Practical Implications

There are a number of untoward consequences that would ensue were the Supreme Court to conclude, erroneously, that Congress can require the courts to both review equitable relief embodied in a final judgment and modify that relief in order to conform to congressional definitions of what is equitable. The first problem that would result is that there would never be finality in the disposition of equitable claims by the federal courts. A court might grant a petition for injunctive relief, only to have Congress direct that the injunction be terminated unless it met standards newly propounded by Congress. And even if the court determined that these standards had been met, Congress might then require the court to apply still another set of standards to the court-awarded relief since Congress, unlike the courts, is not bound by precedent. In the face of this merry-go-round of courts’ equitable determinations being trumped by congressional directives requiring courts to continually revisit their holdings, the Supreme Court’s decision in *Rufo v. Inmates of the Suffolk County Jail*,²⁷⁰ which articulates the circumstances under which it would be equitable to modify an injunction, would become a historical footnote.

Debates In The Several State Conventions On the Adoption of the Federal Constitution 563 (Jonathan Elliot, ed., 2d ed. 1836).

The New York Convention that ratified the Constitution was also concerned that the Supreme Court’s decisions could not be set aside except by the Court itself. But the Convention’s concerns were somewhat more limited in nature. The Convention proposed that the Constitution be amended to permit persons aggrieved by a Supreme Court judgment, sentence, or decree to seek redress from a commission appointed by the President, upon the advice and consent of the Senate, to correct the Supreme Court’s errors and “do justice to the parties.” 1 The Debates In The Several State Conventions On the Adoption of the Federal Constitution 331 (Jonathan Elliot ed., 2d ed. 1836)(hereinafter 1 Convention Debates). This authority to provide redress, however, could only be exercised in cases in which the Supreme Court had original jurisdiction. *Id.*

267. The other kinds of cases over which the federal courts have jurisdiction include those involving ambassadors, admiralty and maritime cases, cases in which the United States is a party, and disputes between states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming land under grants from different states, and between a state or its citizens and another country or citizens from another country.

268. In discussing the inviolability of court judgments in the *Federalist Papers*, Alexander Hamilton did not differentiate between cases in which monetary relief had been awarded and cases in which equitable relief had been awarded: “A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases.” THE FEDERALIST NO. 81 (Alexander Hamilton).

269. The Constitutional Convention’s rejection of the following proposed amendment buttresses this conclusion: “In all the other cases before mentioned, the judicial power shall be exercised in such manner as the legislature shall direct.” The Convention delegates could have adopted a revised version of this amendment to allow Congress to direct how the judicial power shall be exercised in cases in equity. Instead, the Convention rejected the proposed amendment in its entirety. 1 CONVENTION DEBATES, *supra* note 266, at 269.

270. 502 U.S. 367 (1992). See *supra* text accompanying notes 7-23.

A second problem that would stem from the continual intercession of Congress into courts' past equitable determinations is that it would drain the resources of the parties, courts, and Congress. Plaintiffs would often spend thousands of dollars proving their entitlement to injunctive relief, only to be told that they must now reprove their case under the standards newly articulated by Congress. The courts, too, would be burdened as Congress directed them to repeatedly review the equitable relief they had awarded in a case, the equivalent, though infinitely more burdensome, of a law school dean requiring a professor to regrade the same set of examinations each year under new grading guidelines.

Permitting Congress to intercede in cases already decided and in which equitable relief was awarded would also prove burdensome to Congress. In the 1700s, when this kind of legislative intervention in court cases was common, critics of this intervention expressed consternation that the state legislatures were being sidetracked from important matters that fell within their "proper province."²⁷¹ A newspaper article published in Philadelphia in 1786 highlighted this concern about the Pennsylvania legislature: "When the assembly leave the great business of the state, and take up private business, or interfere in disputes between contending parties, they are very liable to fall into mistakes, make wrong decisions, and so lose that respect which is due to them, as the Legislature of the State."²⁷²

Which brings us to a third adverse consequence that would ensue from a failure to recognize the separation-of-powers problem with immediate-termination provisions like that found in the PLRA – injustice. To understand how immediate-termination provisions will spawn injustice, its counterpart – "justice" – must first be defined. In its most basic jurisprudential sense, "justice" simply means giving a person "his due."²⁷³

There are several ways in which immediate-termination provisions applied to cases in which plaintiffs have already prevailed and been awarded equitable relief would deprive them of "their due." First, requiring plaintiffs to continually relitigate claims on which they had prevailed would at some point wear some or all of them down, causing them to forfeit the relief to which a court had deemed them entitled.²⁷⁴

Second, as the Philadelphia newspaper article quoted earlier recognized,²⁷⁵ legislatures (including Congress) are likely to make mistakes when intervening in court cases. In particular, this is because the congressional decision-making process is not structured to ensure that decisions are based on the full facts or are even fact-based at all. There is, in Congress, no adversarial process like that found in the courts through which the facts of a dispute are fully fleshed out, the arguments of competing counsel weighed, and decisions rendered by a neutral arbiter. In addition, time constraints foreclose Congress from holding the kind of lengthy hearings that would be needed to deliberatively consider whether equity requires that a court reconsider the remedial relief awarded in a case or class of cases.

271. See, e.g., text accompanying note 164 and note 164, *supra*. See also BENJAMIN GALE, BRIEF, DECENT, BUT FREE REMARKS, AND OBSERVATIONS ON SEVERAL LAWS PASSED BY THE HONORABLE LEGISLATURE OF CONNECTICUT, SINCE THE YEAR 1775, 31-32 (1782) (The legislature has enough to do "without their condescending to decide private controversies; and if some few instances of private nature require a decision in equity, if the Superior Court, whose province it at present is, may not be thought sufficient for the decision of those matters, let a Court be formed for that end. . .").

272. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 454 (1998).

273. BLACK'S LAW DICTIONARY 1002 (4th ed. 1968).

274. The recognition that repeated litigation of cases will wear down some prevailing parties and induce them to forgo their legal rights underlies the double-jeopardy prohibition on retrying a defendant who has been acquitted of a crime. *Green v. United States*, 355 U.S. 184, 187-88 (1957).

275. See *supra* text accompanying note 272.

The third reason why injustice would follow from a holding that Congress has the constitutional power to require courts to reexamine the equitable relief awarded in a case under new standards established by Congress is that such a holding would, in time, likely generate corruption. It would probably only be a matter of time until Congress intercedes in a case or class of cases, not because of the demands of equity, but because of the allure of campaign contributions and other political considerations.²⁷⁶

VII. Conclusion

Many of the court cases upholding the constitutionality of the PLRA's immediate-termination provision display a disconcerting insouciance about the long-term ramifications of their holdings, seemingly unmindful that they have given away their judicial power to determine whether and how equitable relief embodied in a court judgment should be modified or even terminated. Modification or termination of prospective relief under the PLRA occurs not after a balancing of the equities by the courts but after the courts have applied what a congressional edict says is now to be the measure of equity in a case that has already culminated in a final judgment – after they have applied what the Vermont Council of Censors decried as the legislature's "crude notions of equity."²⁷⁷

In a sense, the courts have been misdirected by a piece of legislation that, through several stratagems, cleverly masks Congress's encroachment on the judicial power constitutionally delegated to the courts.²⁷⁸ First, the PLRA's immediate-termination provision applies to a class of cases – conditions-of-confinement cases brought by prisoners – rather than to an individual case. In the latter situation, the unconstitutional interference with judicial power stemming from a congressional directive to a court to reexamine the relief awarded in the case would be more transparent. But for separation-of-powers purposes, there is no difference between Congress's requiring courts to reopen a judgment in a class of cases and requiring a court to reopen a judgment in one particular case, as the Supreme Court recognized in *Plaut*:

To be sure, § 27A(b) reopens (or directs the reopening of) final judgments in a whole class of cases rather than in a particular suit. We do not see how that makes any difference. The separation-of-powers violation here, if there is any, consists of depriving judicial judgments of the conclusive effect that they had when they were announced, not of acting in a manner-*viz.*, with particular rather than general effect. . .
²⁷⁹

Second, the PLRA leaves to the courts the final decision whether the prospective relief awarded in conditions-of-confinement cases should be modified or terminated under the new standards for remedial relief set forth in the PLRA. But this was true of the statute the Supreme Court struck down on separation-of-powers grounds in *Plaut*. That statute required the reinstatement of securities-fraud actions dismissed as time-barred

276. The historical foundation for this prediction can be found in the report of the Pennsylvania Council of Censors, which noted that the legislature's increasing intervention in cases was driven by "favour (sic) and partiality." See *supra* text accompanying note 154. The Council of Censors warned that this legislative intervention would eventually foster corruption. See *supra* text accompanying note 165 and note 165.

277. VERMONT COUNCIL OF CENSORS, *supra* note 131, at 537.

278. James Madison warned against such subtly disguised legislative encroachments on the powers constitutionally delegated to the other branches: "Its [the legislative branch's] constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the coordinate departments." THE FEDERALIST NO. 47 (James Madison).

279. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227-28 (1995).

after June 19, 1991 if two requirements were met: the actions had been timely filed under the limitations period in effect in the state on that date, and the plaintiff had filed the motion to reinstate the case within sixty days after the statute's enactment.²⁸⁰ Under this statute, the courts, not Congress, were left to decide in which cases the requirements for reopening a final judgment had been met.

As the Superior Court of Judicature of New Hampshire recognized many years ago, the mere fact that a legislature has left the courts with the authority to adjudicate a case reopened by the legislature does not negate the unconstitutional encroachment on the courts' judicial power that has occurred from that legislatively compelled reopening of the case:

The circumstance, also, that the legislature themselves did not proceed to make a final judgment on the merits of the controversy between these parties cannot alter the character of the act granting a new trial. To award such a trial was one judicial act, and because they did not proceed to perform another, by holding that trial before themselves, the first act did not become any more or less a judicial one.²⁸¹

Third, prospective relief is not terminated under 18 U.S.C. § 3626(b) if the relief is still necessary to remedy a constitutional violation and is the least intrusive means of doing so. This caveat to termination, found in § 3626(b)(3), has seemed to have a lulling effect on the courts: the immediate-termination provision, it seems to the courts, is really not "so bad" – it passes constitutional muster – because inmates' constitutional rights will still be protected by the courts.²⁸² All that the immediate-termination provision deprives inmates of is their right, under a previously entered court judgment, to relief that goes beyond the requirements of the Constitution.²⁸³

In rejecting constitutional challenges to the PLRA's immediate-termination provision for the above reason, the courts seem not to have comprehended that what is directly at stake here, as far as the constitutional separation of powers is concerned, is not whether prisoners' constitutional rights will be enforced. What is rather at stake here is power – the courts' power.²⁸⁴ Does directing a court to reexamine the equitable relief granted in a case constitute an exercise of judicial power, power that is entrusted, by the Constitution, to the courts? The answer to that question does not hinge on whether courts still retain the real or theoretical power²⁸⁵ to enforce plaintiffs' constitutional rights.

280. *Id.* at 214-15.

281. *Merrill v. Sherburne*, 1 N.H. 199, 205 (Super. Ct. 1818).

282. *See, e.g., Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 186 (3d Cir. 1999) ("This would be a very different case if we were convinced. . . that the PLRA categorically terminates all relief available to 'prisoners who claim constitutional violations.' *Taylor*, 143 F.3d at 1183. But the PLRA expressly preserves the courts' authority to remedy violations of prisoners' federal rights.").

283. In reality, the immediate-termination provision deprives inmates of more than the relief they won that exceeded minimal constitutional requirements. In addition, the inmates have lost their right to have a court continue its enforcement of an injunction needed to rectify a constitutional violation unless the defendants prove the requisite changed circumstances for modification or termination of that injunction. Instead, the inmates now have the burden, upon the filing of a termination motion, of proving their entitlement to the court-ordered relief.

284. *See Plaut*, 514 U.S. at 228 ("*P*ower is the object of the separation-of-powers prohibition.") (emphasis in the original).

285. Since the PLRA authorizes the relitigation each year of the question whether the prospective relief awarded in conditions-of-confinement cases is necessary to rectify a constitutional violation, 18 U.S.C. § 3626(b)(1)(ii), even the courts' power to enforce constitutional rights is arguably ephemeral, dissipated by the demands of perpetually readjudicating issues resolved by the courts in earlier years.

A final reason why the courts may not have recognized that the PLRA's immediate-termination provision breaches the constitutional separation of powers is that its application is confined to prisoners. In recent years, the courts have more narrowly construed the rights of prisoners compared to earlier decisions expounding on the rights of prisoners,²⁸⁶ and decisions upholding the constitutionality of the immediate-termination provision are consistent with that trend. If the immediate-termination provision affected other litigants though—if it, for example, required federal courts to review and apply new standards to judgments awarding injunctive relief in all antitrust, environmental, or civil rights cases over which the courts still exercised jurisdiction, the unconstitutionality of the immediate-termination provision might be more evident to at least some courts.

If the Supreme Court upholds the constitutionality of the PLRA's immediate-termination provision, it will likely unleash a flurry of laws requiring courts to review the equitable relief awarded in cases that had culminated in a final judgment but over which the courts are still exercising jurisdiction.²⁸⁷ And after elections, after the composition of Congress has changed, Congress may direct the courts to review those judgments once again and modify them to accord with different congressional dictates. Those who contend that we can trust Congress to "do the right thing"—to not wreak havoc in the courts by requiring widespread review of cases over which the courts have jurisdiction and in which equitable relief has been awarded—should be mindful of Thomas Jefferson's response to this kind of argument. Criticizing the Virginia legislature for injecting itself into matters that he said "should have been left to judicial controversy," Jefferson warned: "It is better to keep the wolf out of the fold, than to trust to drawing his teeth and claws after he shall have entered."²⁸⁸

286. Compare, e.g., *Sandin v. Conner*, 515 U.S. 472 (1995)(prisoner's confinement in disciplinary-segregation unit did not trigger due-process protections), with *Wolff v. McDonnell*, 418 U.S. 539, 571 n. 19 (1974)(prisoners sentenced to solitary confinement as a disciplinary sanction are entitled to procedural due process), and *Thornburgh v. Abbott*, 490 U.S. 401 (1989)(applying a deferential reasonableness test to inmates' first-amendment challenges to mail restrictions), with *Procunier v. Martinez*, 416 U.S. 396 (1974)(applying an intermediate level of scrutiny to such challenges).

287. As mentioned earlier, a bill has already been introduced in Congress to extend the immediate-termination provision to cases in which prospective relief was awarded against state or local officials. See *supra* text accompanying notes 52-53.

288. THOMAS JEFFERSON, NOTES ON VIRGINIA (1784), reprinted in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 238 (Adrienne Koch & William Peden, eds. 1944). Jefferson's comments came at a time when Americans were moving away from their "evangelical faith in legislative supremacy." MCDOWELL, *supra* note 230, at 35. Having extricated themselves from foreign control, Americans initially welcomed the dominance of their own legislatures. FRIEDMAN, *supra* note 238, at 107. Over time though, they began to recognize that legislative tyranny posed the greatest threat to their liberty. THOMAS JEFFERSON, *supra*, at 464 ("The tyranny of the legislature is the most formidable dread at present. . ."). In discussing the importance of the constitutional separation of powers in the *Federalist Papers*, James Madison highlighted the legislative branch's rapacious appetite for powers relegated to the executive and judicial branches: "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." THE FEDERALIST NO. 47 (James Madison).