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Invading an Article III Court's Inherent Equitable Powers: Separation of Powers and the Immediate Termination Provisions of the Prison Litigation Reform Act

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> *The legislative department derives a superiority in our governments from other circumstances. Its 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 co-ordinate departments.*[1]

I. Introduction

The separation of powers doctrine is fundamental to our constitutional system of government. It exhibits both the genius of the Framers and their concern for protecting individual due process rights. By maintaining integrity among the branches, the checks and balances envisioned by the Framers are ensured of proper operation; by appreciating the structural limitations within each pillar of the national government, the election of public officials and the vindication of civil rights and liberties through the judicial system are fully realized. Indeed, the purpose of the separation of powers doctrine has been described as serving "both to protect the role of the independent judiciary within the constitutional scheme of tripartite government, and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government."[2] In short, the doctrine is "basic and vital" to ensuring individual liberty, "namely, to preclude a commingling of the[ ] essentially different powers of government in the same hands."[3]

This Article addresses the separation of powers doctrine in the context of the increasing trend of Congress to legislate in areas that encroach upon the inherent adjudicatory powers of Article III courts. In so legislating, Congress is testing the boundaries where the legislative and judicial powers intersect. For example, one unsuccessful attempt was the passage of the Religious Freedom Restoration Act of 1993 (RFRA).[4] Congress purported to provide greater protection to religious rights pursuant to section five of the Fourteenth Amendment to the United States Constitution[5] by subjecting any regulation substantially burdening a person's exercise of religion to strict scrutiny.[6] The

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1. THE FEDERALIST NO. 48, at 251 (James Madison) (Garry Wills ed., 1982).

2. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986) (internal citations and quotations omitted).

3. O'Donoghue v. United States, 289 U.S. 516, 530 (1933) (citation omitted).

4. Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 1988, 2000bb to 2000bb-4) (1994), *declared unconstitutional by* City of Boerne v. Flores, 521 U.S. 507 (1997).

5. *See* U.S. CONST. amend. XIV, § 5.

6. *See* Religious Freedom Restoration Act, § 3, 107 Stat. at 1488-89 (stating that regulation must be "in furtherance of a compelling governmental interest" and "the least restrictive

United States Supreme Court declared the statute unconstitutional four years later, reasoning that Congress only has the power to enforce the provisions of section five of the Fourteenth Amendment, and not to determine what constitutes a constitutional violation of it.[7]

Another recent congressional effort to encroach upon the adjudicatory powers of Article III courts was the enactment of the Antiterrorism and Effective Death Penalty Act,[8] which fashioned major changes to substantive federal criminal law. For example, one provision of that act amends the federal habeas corpus laws to read:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[9]

The statute arguably places limitations on a federal court's adjudication of a constitutional right.[10] During a recent en banc argument before the United States Court of Appeals for the Third Circuit, one judge voiced his concern

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means of furthering that compelling governmental interest"). The Constitution expressly protects the free exercise of religion. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

7. *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (observing that design and text of section five are inconsistent with Congress's decreeing substance of Fourteenth Amendment's restrictions on states). Many commentators also have expressed this view. *See, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994) (arguing that Religious Freedom Act is unconstitutional because it violates principles of religious freedom and exceeds bounds of federal authority).

8. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of titles 8, 15, 18, 22, 28, 40, 42, 50 U.S.C.).

9. *Id.* § 104, 110 Stat. at 1219 (amending 28 U.S.C. § 2254(d)).

10. Although the Constitution expressly provides a right not to have the writ of habeas corpus suspended under most circumstances, the right to habeas corpus relief itself is statutory in nature. *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); 28 U.S.C. § 2241 *et seq.* (1996) (codifying power to grant writ of habeas corpus). However, the rights adjudicated in federal habeas corpus petitions over criminal convictions are rights substantively derived from the Constitution, such as the right to effective assistance of counsel found in the Sixth Amendment. *See* U.S. CONST. amend. VI ("[T]he accused shall enjoy the right to . . . have the Assistance of Counsel for his defence").

that the language in section (d)(1) appeared to regulate a court's adjudicatory function by forcing district courts to apply congressionally determined standards.[11]

Against this backdrop, this Article argues that Congress violates the separation of powers doctrine when it places restrictions on the equitable remedies afforded by Article III courts that adjudicate federal constitutional rights. However, Congress does not violate the separation of powers when it similarly limits the available equitable remedies for federal statutory rights. The Prison Litigation Reform Act of 1995 (PLRA) unmistakably illustrates Congress's attempt to limit the equitable powers of Article III courts when a constitutional right is at stake.[12] In an unprecedented and manifold manner, the PLRA altered the landscape of prison conditions litigation in the federal courts. Prison conditions lawsuits typically are brought on behalf of prisoners alleging federal constitutional violations, such as due process violations, and equal protection violations, or violations of the prohibition against cruel and unusual punishment.[13] This Article focuses on provisions that immediately terminate any prospective equitable relief previously ordered by a federal court in prison conditions cases. It concludes that these provisions violate the separation of powers doctrine because they impermissibly invade the inherent equitable powers of Article III courts.

Part II examines the PLRA's major provisions and its limited legislative history to ascertain the intent behind the passage of this controversial statute. In passing the act, Congress was motivated primarily by two desires: to discourage the filing of frivolous prisoner lawsuits and to curtail the power of the Article III judiciary in prison conditions cases. However, the floor debates also reveal that "serious constitutional problems" raised by the statute's provisions were acknowledged but never fully addressed.

Part III evaluates court decisions that have addressed the constitutionality of the immediate termination provisions. This part focuses primarily on two of the three separation of powers challenges – reopening final judgments and

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11. *See* Matteo v. Albion, 171 F.3d 877, 898 (3d Cir. 1999) (en banc). The parties argued this case en banc before the United States Court of Appeals for the Third Circuit on November 23, 1998.

12. Pub. L. No. 104-134, 110 Stat. 1321-66 to 1321-77 (1996) (codified in scattered sections).

13. Due process protections stem from the Fifth and Fourteenth Amendments to the United States Constitution, which proscribe the deprivation "of life, liberty, or property, without due process of law." U.S. CONST. amends. V and XIV, § 1. The Fifth and Fourteenth Amendments also guarantee equal protection of the laws. *See* Mathews v. De Castro, 429 U.S. 181, 182 n.1 (1976) (explaining that Due Process Clause of Fifth Amendment "encompasses equal protection principles"); U.S. CONST. amend. XIV, § 1. The Eighth Amendment proscribes the infliction of cruel and unusual punishment. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

prescribing rules of decision. Both theories have achieved mixed success in the courts, mostly because they suffer from definitional uncertainties and a loose-fitting analogy.

Finally, Part IV discusses the third challenge based on a violation of the separation of powers doctrine – impermissibly invading the inherent equitable powers of Article III courts when they are adjudicating constitutional rights. Although the arguments are compelling, no court has yet adopted this theory. This Article seeks to strengthen this theory of the separation of powers doctrine by presenting an original analysis of the text, history, and structure of the Constitution. Applying that analysis to the PLRA immediate termination provisions reveals why the provisions exemplify an impermissible constraint on a constitutional court's inherent equitable powers when they are adjudicating a constitutional right.

II. The PLRA and Its Legislative History

Federal courts have long utilized consent decrees as a means of accomplishing institutional reform after litigation has revealed a need for court intervention.[14] Using their equitable powers,[15] federal courts have ordered affirmative action measures to remedy discriminatory employment practices,[16] deseg-

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14. Consent decrees are formal agreements between the parties that take the form of a binding contract:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681-82 (1971). Consent decrees also are binding orders of the court. One of the critical items over which parties have bargained is the signature of an Article III judge. This seemingly ministerial act is the very essence of federal enforcement of the decree because no order is enforceable without this signature. A consent decree sanctioned by the court in this manner becomes "cloaked with federalness," embodying the expectations of both parties that future administration of the decree would take place before the auspices of a federal court.

15. A court implicates its equitable powers when it renders a decision according to principles of fairness. For example, when the common law remedy of monetary damages fails to redress the harm adequately, the court may issue an injunction or decree that "equitably" orders a party to act or to refrain from acting in a certain manner. *See infra* Part IV.C (explaining roots of equity jurisdiction).

16. *See, e.g.*, Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 580-83 (1984) (holding that district court exceeded its powers by entering injunction requiring white employees to be laid off when otherwise applicable seniority system would have laid off black employees with less seniority).

regated exclusive student bodies,[17] and, of course, ameliorated unconstitutional conditions in prisons.[18] After entering a consent decree, courts continue to monitor the institution's reform efforts by retaining jurisdiction over the case. Consequently, they exercise complete equitable discretion to enforce, to modify, or to terminate the decree should circumstances warrant such relief,[19] or even to hold parties in contempt for failing to comply with the decree.[20]

For example, since 1978, the United States District Court for the Southern District of New York has formulated a variety of decrees to remedy conditions of confinement in the New York City jails.[21] The city jails were the subject of seven class action lawsuits.[22] The Court of Appeals for the Second Circuit observed that "[t]hese decrees have generated a judicially administered structure comprising over ninety related court orders and extending to more than thirty discrete areas of prison administration."[23]

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17. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267, 281-89 (1977) (upholding district court's plan of remedial education programs for schoolchildren formerly subjected to segregation).

18. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 685-88 (1978) (holding that district court could limit confinement in isolation to thirty day maximum and holding that evidence supported finding that isolation cell conditions violated prohibition against cruel and unusual punishment).

19. "[T]he power of a court of equity to modify an injunction in adaptation to changed conditions," even if the injunction "was entered by consent," is "inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." United States v. Swift & Co., 286 U.S. 106, 114 (1932); *see also* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 382 (1992) (reaffirming principle that federal court has power under Fed. R. Civ. P. 60(b) to modify consent decree in response to significant change either in factual condition or in law).

20. *See, e.g.*, Walker v. City of Birmingham, 388 U.S. 307, 314-20 (1967) (stating that court orders must be obeyed unless and until defendant obtains judicial modification or dissolution of terms); *see also* Benjamin v. Jacobson, 172 F.3d 144, 157 (2d Cir. 1999) (en banc) [hereinafter Benjamin II] ("A plaintiff willing to settle constitutional claims by way of a consent decree seeks the assurance that, if the defendant fails to fulfill its agreed obligations, those obligations will be enforceable through the court's exercise of its contempt power.").

21. *See* Benjamin v. Jacobson, 124 F.3d 162, 165 (2d Cir. 1997), *vacated on other grounds en banc*, 172 F.3d 144 (2d Cir. 1999) [hereinafter Benjamin I].

22. *See id.*

23. *Id.* Specifically, the decrees:

> [E]nsure that detainee mail and property are handled properly, and that procedures in concert with constitutional protections are followed during detainee cell and body searches. On an institutional level, the Consent Decrees seek to maintain the physical plant of the jails in a condition safe for human habitation. They mandate that attention be given to vermin and insect control, sanitation, maintenance and refuse removal. Other provisions govern food services to the detainees and ensure that the detainees are adequately fed while in custody, with food that is prepared and served in a sanitary environment.

Benjamin v. Jacobson, 935 F. Supp. 332, 337 (S.D.N.Y. 1996), *aff'd in part, rev'd in part, and remanded*, 172 F.3d 144 (2d Cir. 1999) (en banc).

The arena of prison conditions litigation is rife with systemic problems. The Prison Litigation Reform Act is a significant step towards exercising some supervision over a situation that practitioners, policymakers, and the courts agree is empirically spinning out of control.[24] In response, Congress enacted the PLRA as Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996,[25] which President Clinton signed into law on April 26, 1996.[26] Myriad PLRA provisions create unprecedented limitations on prison conditions litigation. For example, the statute limits prison conditions litigation as follows: it bars federal courts from entering prisoner release orders unless a three-judge court previously has entered an order for less intrusive relief;[27] it deprives federal courts of subject matter jurisdiction over civil actions for mental or emotional injury suffered while in custody if there is no showing of prior physical injury;[28] it generally requires prisoners who seek to bring civil actions or appeals *in forma pauperis* to pay the full amount of the applicable filing fee prior to a determination on the petition;[29] it bars a prisoner from bringing a civil action or appeal if the prisoner has on three or more prior occasions brought an action or appeal in a federal court that was dismissed on grounds that the action was frivolous, malicious, or failed to state a claim upon which relief may be granted;[30] and it permits a court to revoke unvested earned good time credit if the court finds that the action was filed for a malicious or harassing purpose, or if the prisoner commits perjury or otherwise presents false evidence to the court.[31]

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24. *See, e.g.*, Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC MONTHLY, Dec. 1998 at 51 (discussing political, economic, and social conditions of prison systems nationwide).

25. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996).

26. Enacted as part of another act, the PLRA effectively escaped critical review and mark-up by the House and Senate Judiciary Committees. *See* 142 CONG. REC. S2285-02, at S2296 (daily ed. Mar. 19, 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."); 141 CONG. REC. H14078-02, at H14106 (daily ed. Dec. 6, 1995) (statement of Rep. Conyers) ("None of these [prison litigation reform and truth in sentencing] provisions belong in an appropriations bill. These are matters clearly within the jurisdiction of the Judiciary Committee and I am distressed that the Judiciary Committee's jurisdiction has been subverted in this way.").

27. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, § 802(a), Pub. L. No. 104-134, §§ 801-10, 110 Stat. 1321 (1996), codified at 28 U.S.C. § 1915 (1996) (amending 18 U.S.C. § 3626).

28. *See id.* § 803(d), 110 Stat. at 1321-72 (amending 42 U.S.C. § 1997e); *id.* § 806, 110 Stat. at 1321-75 (amending 28 U.S.C. § 1346(b)).

29. *See id.* § 804(a), 110 Stat. at 1321-73 to 1321-74 (amending 28 U.S.C. § 1915).

30. *See id.* § 804(d), 110 Stat. at 1321-74 to 1321-75 (amending 28 U.S.C. § 1915).

31. *See id.* § 809(a), 110 Stat. at 1321-76 (inserting 28 U.S.C. § 1932).

This Article addresses the PLRA immediate termination provisions, which generally mandate that any prospective relief [32] granted in a "civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs."[33] Furthermore, any prospective relief granted by a court is subject to narrow tailoring, which requires the court to find "that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."[34] Consequently, a party is entitled to immediate termination of any prospective relief that was granted in the absence of these findings.[35] A party is also entitled to termination of prospective relief when the court does not make "written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right,"[36] and the proposed relief is otherwise narrowly tailored as previously defined.

Surprisingly, for legislation that makes such marked changes in an area of intense federal litigation, there was little legislative debate elucidating the meaning and intended interpretation of these provisions. In the one published House Conference Report, the statute is purported "to limit the remedies for prison condition lawsuits and discourage frivolous and abusive prison lawsuits."[37] The report also included the following passage describing the immediate termination provisions:

> Section 802 amends 18 U.S.C. § 3626 to require that prison condition remedies do not go beyond the measures necessary to remedy federal rights

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32. "Prospective relief" is defined as "all relief other than compensatory monetary damages." *Id.* § 802(g)(7), 110 Stat. at 1321-70 (amending 18 U.S.C. § 3626). The statute also states that "the term 'relief' means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements." *Id.* § 802(g)(9), 110 Stat. at 1321-70. Thus, consent decrees are a form of prospective relief.

33. *Id.* § 802(a)(1)(A), 110 Stat. at 1321-66 (amending 18 U.S.C. § 3626).

34. *Id.*

35. *See id.* § 802(b)(2), 110 Stat. at 1321-68.

36. *Id.* § 802(b)(3), 110 Stat. at 1321-68. When enacted, this section read "current *or* ongoing" (emphasis added). Effective November 26, 1997, Congress amended this section to read "current *and* ongoing." *See* Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriates Act, 1998 Pub. L. No. 105-119, § 123(a)(2), 111 Stat. 2440, 2470 (1997) (emphasis added).

Procedurally, a party makes such a motion for immediate termination (1) two years after the date the court granted the prospective relief; (2) one year after the date the court has entered an order denying termination of prospective relief under the PLRA; or (3) in the case of an order issued on or before April 26, 1996, two years after that date. *See* PLRA § 802(b)(1), 110 Stat. at 1321-67 to 1321-68 (amending 18 U.S.C. § 3626).

37. 141 CONG. REC. H13874-01, at H13928 (daily ed. Dec. 4, 1995) (H. CONF. REP. NO. 104-378).

> violations and that public safety and criminal justice needs are given appropriate weight in framing such remedies. Specifically, the section places limits on the type of prospective relief available to inmate litigants. The relief is generally limited to the minimum necessary to correct the violation of a federal right.... Prior consent decrees are made terminable upon the motion of either party, and can be continued only if the court finds that the imposed relief is necessary to correct the violation of the federal right.[38]

One of the bill's main sponsors, Senator Spencer Abraham (R.-Mich.), identified three "obstacles" created by the federal judiciary that prevented state and local governments from effectively managing their prison systems. He first complained that federal judicial orders were unnecessarily raising the costs of running prisons, thereby undermining the legitimacy and the punitive and deterrent effects of prison sentences.[39] Because the cost of prison management is borne by state and local taxpayers, Senator Abraham declared that "people deserve to keep their tax dollars or have them spent on projects they approve. They deserve better than to have their money spent, on keeping prisoners in conditions some Federal judge feels are desirable, although not required by any provision of the Constitution or any law."[40]

Senator Abraham next criticized orders mandating prison population caps to relieve severe overcrowding because they resulted in the premature release of convicts.[41] Senator Orrin Hatch (R.-Utah) commented that "[a]s of January 1994, twenty-four corrections agencies reported having court-mandated populations caps" and, in his opinion, it was "past time to slam shut the revolving door on the prison gate and to put the key safely out of reach of overzealous Federal courts."[42] The overriding sentiment in Congress was that "[f]ederal judges have been attempting to micromanage correctional facilities throughout the country."[43]

And finally, Senator Abraham blamed federal court orders for the accompanying flood of prisoner lawsuits, which devoured enormous amounts of time

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38. *Id.*

39. *See* 141 CONG. REC. S14312, at S14316 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham); *see also* 141 CONG. REC. S14408-01, at S14419 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham) ("By interfering with the fulfillment of this punitive function, the courts are effectively seriously undermining the entire criminal justice system.").

40. *See* 141 CONG. REC. S14408-01, at S14419 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham) (describing "murderous early releases").

41. *See* 141 CONG. REC. S14312-03, at S14316 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham).

42. 141 CONG. REC. S14408-01, at S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch).

43. 141 CONG. REC. H14078-02, at H14106 (daily ed. Dec. 6, 1995) (statement of Rep. Canady).

and resources.[44] Indeed, Senator Robert Dole (R.-Kan.) complained about the "alarming explosion" of frivolous prisoner lawsuits: "Frivolous lawsuits . . . tie up the courts, waste valuable legal resources, and affect the quality of justice enjoyed by law-abiding citizens."[45] Numerous, often humorous, anecdotes of frivolous lawsuits also peppered the floor debates.[46]

With respect to the immediate termination provisions, Senator Abraham stated that the PLRA:

> [F]orbids courts from entering orders for prospective relief (such as regulating food temperatures) unless the order is necessary to correct violations of individual plaintiffs' Federal rights. It also requires that the relief be narrowly drawn and be the least intrusive means of protecting the Federal rights. And it directs courts to give substantial weight to any adverse impact on public safety or the operation of the criminal justice system caused by the relief.
>
> It also provides that any party can seek to have a court decree ended after 2 years, and that the court will order it ended unless there is still a constitutional violation that needs to be corrected.[47]

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44. *See* 141 CONG. REC. S14312-03, at S14316 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham).

45. 141 CONG. REC. S14408-01, at S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole). The National Association of Attorneys General, writing to Senator Dole in support of the PLRA, stated:

> Although numbers are not available for all of the states, 33 states have estimated that together inmate civil rights suits cost them at least $54.5 million annually. Extrapolating this figure to all 50 states, we estimate that inmate civil rights suits cost states at least $81.3 million per year. Experience at both the federal and state level suggests that, while all of these cases are not frivolous, more than 95 percent of inmate civil rights suits are dismissed without the inmate receiving anything. Although occasional meritorious claims absorb state resources, nonetheless, we believe the vast majority of the $81.3 million figure is attributable to the non-meritorious cases.

Id. at S14418.

46. *See, e.g.*, 141 CONG. REC. S14611-01, at S14627-28 (daily ed. Sept. 29, 1995) (statement of Sen. Reid) (describing inmate complaints including complaints about athletic shoe brand names and creamy versus chunky peanut butter). The Congressional Record includes the following list of the "Top 10 Frivolous Inmate Lawsuits Nationally": Inmate claimed $1 million in damages because his ice cream had melted; inmate alleged that being forced to listen to his unit manager's country and western music constituted cruel and unusual punishment; inmate sued because the piece of cake on his dinner tray was "hacked up"; inmate sued because he was served chunky instead of smooth peanut butter; two prisoners sued to force taxpayers to pay for sex-change surgeries while they were in prison; inmate sued for $100 million alleging he was told that he would be making $29.40 within three months when he only made $21.00; inmate claimed that his rights were violated because he was forced to send packages via UPS rather than U.S. mail; inmate sued demanding L.A. Gear or Reebok "Pumps" instead of Converse; inmate sued 66 defendants alleging that unidentified physicians implanted mind control devices in his head; and death row inmate sued corrections officials for taking away his Gameboy electronic game. *See id.* at S14629.

47. 141 CONG. REC. S14408-01, at S14419 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham).

He then declared that:

> [N]o longer will prison administration be turned over to Federal judges for the indefinite future for the slightest reason. Instead, the State [or the appropriate federal agency] will be able to run prisons as they see fit unless there is a constitutional violation, in which case a narrowly tailored order to correct the violation may be entered.[48]

In sum, supporters of the PLRA hoped that the legislation would "help restore balance to prison conditions litigation and . . . ensure that Federal court orders are limited to remedying actual violations of prisoners' rights, not letting prisoners out of jail."[49] Characterizing the PLRA's provisions as "guidelines," Senator Dole also hoped that the provisions would "restrain liberal Federal judges who see violations of constitutional rights in every prisoner complaint and who have used these complaints to micromanage State and local prison systems."[50]

Supporters of the PLRA evidently sought to address two perceived evils: (1) the enormous costs, both in time and money, imposed on the federal courts system by the filing of frivolous prisoner lawsuits, and (2) the meddling of federal courts in the business of prison administration. Congress viewed the federal courts as overstepping their institutional role and encouraging prisoners to continue filing needless, often frivolous, lawsuits. It believed that the problem lay in the courts' issuance of broad remedial orders, over which they retained jurisdiction and through which they micromanaged prisons.[51] The principle that individual taxpayers should be able to resort to a democratically elected, and thus accountable, state or local legislature in determining whether and how they should continue to bear the burden of paying for continued prison administration circumscribed these two concerns. For Congress, the proper time had come to divest the federal courts of their heretofore substantial role in managing prison conditions.

The timing of these statements illuminates Congress's attitude of disdain towards the federal judiciary and the ensuing groundswell of prison conditions litigation. With a Democratic president in the White House making appointments to the federal bench, Republicans felt renewed vigor to challenge the

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48. *Id.*

49. *Id.* at S14418 (statement of Sen. Hatch); *see also* 141 CONG. REC. H14078-02, at H14106 (daily ed. Dec. 6, 1995) (statement of Rep. Canady) ("It's time we restored some balance and common sense to the judiciary's handling of prison litigation.").

50. 141 CONG. REC. S14611-01, at S14626 (daily ed. Sept. 29, 1995) (statement of Sen. Dole).

51. Interestingly, despite all this concern over the federal courts, the PLRA presumably applies equally to relief entered by a state court based upon claims arising under the Constitution or federal law. *Cf.* PLRA § 802(d), Pub. L. No. 104-134, 110 Stat. 1321, 1321-68 (1996) (amending 18 U.S.C. § 3626) ("The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.").

nomination of perceived "liberal" judges after the 1994 mid-term elections placed Republicans in the majority of both houses of Congress for the first time in forty years.[52] The GOP Senate could flex its muscle because it is constitutionally empowered to confirm (or deny) all federal judicial nominations.[53]

The media was also casting aspersions upon federal judges for their apparently "liberal" rulings. The PLRA floor debates specifically condemned efforts by Judge Norma L. Shapiro of the Eastern District of Pennsylvania to impose a population cap on Philadelphia's prisons because of overcrowding.[54] Another example of perceived judicial excess that inflamed the Senate Judiciary Committee was the January 1996 ruling by Judge Harold Baer, Jr. of the Southern District of New York (a Clinton appointee), granting a criminal defendant's suppression motion. The ruling would have been routine but for the quantity of drugs at issue.[55]

Nonetheless, the PLRA was not without its detractors.[56] In particular, Associate Attorney General John Schmidt, who had appeared before the Senate Judiciary Committee at its only hearing on the legislation, testified that the immediate termination provisions "would raise serious constitutional prob-

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52. *See, e.g.*, Dan Balz, *A Historic Republican Triumph: GOP Captures Congress; Party Controls Both Houses for First Time Since '50s*, WASH. POST, Nov. 9, 1994, at A1.

53. *See* U.S. CONST. art. II, § 2, cl. 2 (President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law").

54. *See* 141 CONG. REC. S14408-01, at S14414 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) (discussing Philadelphia's court-ordered prison cap that put thousands of violent criminals back on city streets, often with disastrous consequences). Professor John Diiulio has pointed out: "Federal Judge Norma Shapiro has single-handedly decriminalized property and drug crimes in the City of Brotherly Love . . . . Judge Shapiro has done what the city's organized crime bosses never could; namely, turn the town into a major smuggling port."); *see also* Sarah B. Vandenbraak, *No Room at the Jail*, USA TODAY, Aug. 17, 1995, at 11A (reporting on crimes committed by prisoners whom Judge Shapiro released).

55. *See, e.g.*, *Life Tenure for a Reason*, WASH. POST, Mar. 26, 1996, at A12 (discussing furor raised by Judge Baer's conclusion that police search was illegal and excluding eighty pounds of heroin and cocaine). Amidst a national outcry calling for his impeachment, Judge Baer vacated his earlier ruling on a motion for reconsideration and ultimately denied the defendant's motion to suppress. *See* United States v. Bayless, 921 F. Supp. 211 (S.D.N.Y.), *vacating* 913 F. Supp. 232 (S.D.N.Y. 1996).

56. *See, e.g.*, 142 CONG. REC. S2285-02, at S2297 (daily ed. Mar. 19, 1996) (statement of Sen. Simon) (raising "strong concerns" regarding PLRA); *id.* at S2296 (statement of Sen. Kennedy) (expressing "deep concern" regarding PLRA); 141 CONG. REC. H14078-02, at H14106 (daily ed. Dec. 6, 1995) (statement of Rep. Conyers) (warning of negative impact on federal judiciary); 141 CONG. REC. S14611-01, at S14628 (daily ed. Sept. 29, 1995) (statement of Sen. Biden) (sharing concerns regarding PLRA).

lems" on due process and separation of powers grounds,[57] a prediction that has been borne out through the caselaw.[58] While believing that most of the provisions contained in the PLRA ultimately would withstand constitutional scrutiny, he identified two problems with the PLRA's immediate termination provisions:

> First, the [statute] apparently limits prospective relief to cases involving a judicial finding of a violation of a federal right. This could create a very substantial impediment to the settlement of prison conditions suits . . . because the defendants might effectively have to concede that they have caused or tolerated unconstitutional conditions in their facilities in order to secure judicial approval of the settlement. This would result in litigation that no one wants, if the defendants were unwilling to make such a damaging admission, and could require judicial Resolution of matters that would otherwise be more promptly resolved by the parties in a mutually agreeable manner.
>
> Second, . . . [i]n some cases the unconstitutional conditions on which relief is premised will not be corrected within this timeframe, resulting in a need for further prison conditions litigation. The Justice Department and other plaintiffs, would have to refile cases in order to achieve the objectives of the original order, and defendants would have the burden of responding to these new suits. . . . This point applies with particular force where the new litigation will revisit matters that have already been adjudicated and resolved in an earlier judgment.[59]

In the end, these entreaties were to no avail, and the PLRA became law in April 1996.[60] What is apparent from the legislative history, however, is the complete absence of any substantive debate about the constitutional issues raised by the PLRA or any detailed section-by-section analysis of the bill. At best, the legislative history presents paraphrases of the statute's actual language and vague, general descriptions of what the provisions are intended to accomplish.[61] Moreover, Congress devoted no extensive discussion to any potential separation of powers or other constitutional implications for the fed-

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57. 142 CONG. REC. S2285-02, at S2297 (daily ed. Mar. 19, 1996). The hearing was held before the Senate Judiciary Committee on July 27, 1995.

58. *See* discussion and notes *infra* Parts III- IV.A (presenting cases illustrating constitutional problems).

59. 142 CONG. REC. S2285-02, at S2300 (daily ed. Mar. 19, 1996) (testimony of John Schmidt).

60. *See* Omnibus Consolidated Recissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996).

61. *See, e.g.*, 141 CONG. REC. S14312-03, at S14316 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham) (stating that purpose of PLRA is to "return sanity and State control to our prison systems . . . by limiting judicial remedies in prison cases and by limiting frivolous prisoner litigation").

eral courts or the federal system. The Supreme Court has suggested that a congressional decision to legislate in an area after having given "substantial consideration to the constitutionality of the Act, is of course reason to respect the congressional conclusion."[62] Congress should be accorded no such presumption with respect to the PLRA.

III. Challenging the Immediate Termination Provisions

What are the "serious constitutional problems" raised by the immediate termination provisions? Since the enactment of the PLRA, state attorneys general nationwide have been utilizing the immediate termination provisions to terminate existing consent decrees.[63] In response, plaintiffs[64] have challenged the PLRA immediate termination provisions as a violation of: (1) the separation of powers doctrine; (2) their due process rights guaranteed under the Fifth and Fourteenth Amendments;[65] (3) their equal protection rights guaranteed under the Fifth and Fourteenth Amendments;[66] and (4) the Tenth

62. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 61 (1982).

63. *See, e.g.*, Benjamin II, 172 F.3d 144, 163-65 (2d Cir. 1999) (en banc); Hadix v. Johnson, 133 F.3d 940, 943 n.3 (6th Cir.) (dictum), *cert. denied sub nom.* Hadix v. McGinnis, 118 S. Ct. 2368 (1998); Dougan v. Singletary, 129 F.3d 1424, 1426 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 2375 (1998); Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 658-60 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2366 (1998); Gavin v. Branstad, 122 F.3d 1081, 1090-91 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 2374 (1998); Plyler v. Moore, 100 F.3d 365, 374-75 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2460 (1997); Ruiz v. Johnson, 37 F. Supp.2d 855, 867-69 (S.D. Tex. 1999); Vazquez v. Carver, 18 F. Supp.2d 503, 507-09 (E.D. Pa. 1998) (mem.); Imprisoned Citizens Union v. Shapp, 11 F. Supp. 2d 586, 600-01 (E.D. Pa. 1998), *aff'd on other grounds sub nom.* Imprisoned Citizens Union v. Ridge, 169 F.3d 178 (3d Cir. 1999); Green v. Peters, No. 71 C 1403, 1997 WL 769458, at *11-12 (N.D. Ill. Dec. 5, 1997) (mem.), *reconsideration granted in part and denied in part on other grounds*, 1998 WL 246487 (N.D. Ill. Apr. 27, 1998) (mem.); Thompson v. Gomez, 993 F. Supp. 749, 764 (N.D. Cal. 1997); James v. Lash, 965 F. Supp. 1190, 1198 (N.D. Ind. 1997); Jensen v. County of Lake, 958 F. Supp. 397, 405 (N.D. Ind. 1997).

64. Hereinafter, "plaintiffs" will refer to parties who originally brought suit alleging constitutional violations in the underlying litigation and who are challenging the PLRA.

65. *See* U.S. CONST. amend. V ("nor shall any person . . . be deprived of life, liberty, or property, without due process of law"); *id.* amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

66. *See* U.S. CONST. amend. XIV, § 1 ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws"). The Due Process Clause of the Fifth Amendment to the United States Constitution also has been interpreted as containing an equal protection component. *See* Matthews v. De Castro, 429 U.S. 181, 182 n.1 (1976) (explaining that Due Process Clause of Fifth Amendment "encompasses equal protection principles"); Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); *see also* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (observing that Fifth Amendment forbids discrimination "violative of due process").

Amendment.[67] The merits of the latter three challenges, while worthy of extensive discussion,[68] are beyond the scope of this Article. This Article will focus only on the separation of powers issues raised by the immediate termination provisions.

Plaintiffs have advanced three theories contending that the immediate termination provisions violate the separation of powers doctrine. First, plaintiffs maintain that the immediate termination provisions impermissibly reopen

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67. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

68. The plaintiffs advance three theories explaining why the immediate termination provisions violate the Due Process Clause of the Fifth and Fourteenth Amendments. First, plaintiffs contend that because the consent decree is a final judgment, they have vested property rights in the consent decree that are taken without due process as a result of the immediate termination. Second, they argue that because the consent decree constitutes an enforceable contract, due process limits the extent to which the federal government can interfere with those contractual rights. Third, plaintiffs maintain that the statute operates retroactively in violation of due process; that is, that no rational legislative purpose justifies the retroactive application of the legislation to their consent decrees in violation of due process. *See* Benjamin II, 172 F.3d 144, 163-65 (2d Cir. 1999) (en banc); Hadix v. Johnson, 133 F.3d 940, 943 n.3 (6th Cir.) (dictum), *cert. denied sub nom.* Hadix v. McGinnis, 118 S. Ct. 2368 (1998); Dougan v. Singletary, 129 F.3d 1424, 1426 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 2375 (1998); Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 658-60 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2366 (1998); Gavin v. Branstad, 122 F.3d 1081, 1090-91 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 2374 (1998); Plyler v. Moore, 100 F.3d 365, 374-75 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2460 (1997); Ruiz v. Johnson, 37 F. Supp.2d 855, 867-69 (S.D. Tex. 1999); Vazquez v. Carver, 18 F. Supp.2d 503, 507-09 (E.D. Pa. 1998) (mem.); Imprisoned Citizens Union v. Shapp, 11 F. Supp. 2d 586, 600-01 (E.D. Pa. 1998), *aff'd on other grounds sub nom.* Imprisoned Citizens Union v. Ridge, 169 F.3d 178 (3d Cir. 1999); Green v. Peters, No. 71 C 1403, 1997 WL 769458, at *11-12 (N.D. Ill. Dec. 5, 1997) (mem.), *reconsideration granted in part and denied in part on other grounds*, 1998 WL 246487 (N.D. Ill. Apr. 27, 1998) (mem.); Thompson v. Gomez, 993 F. Supp. 749, 764 (N.D. Cal. 1997); James v. Lash, 965 F. Supp. 1190, 1198 (N.D. Ind. 1997); Jensen v. County of Lake, 958 F. Supp. 397, 405 (N.D. Ind. 1997).

Equal protection challenges come in two forms. The plaintiffs initially assert that the immediate termination provisions single out the class of prison inmates and burden their fundamental right of access to the courts. Alternatively, they argue that the legislation fails under a rational basis review. *See, e.g., Benjamin II*, 172 F.3d at 151-54; *Ridge*, 169 F.3d at 189; *Hadix*, 133 F.3d at 943 n.3 (dictum); *Dougan*, 129 F.3d at 1427; *Rouse*, 129 F.3d at 659-61; *Gavin*, 122 F.3d at 1089-90; *Plyler*, 100 F.3d at 373; *Ruiz*, 37 F. Supp.2d at 869; *Green*, 1997 WL 769458, at *13; *Thompson*, 993 F. Supp. at 765; *James*, 965 F. Supp. at 1197; *Jensen*, 958 F. Supp. at 404.

The Tenth Amendment argument has been attempted in only one case to date. The argument contends that the immediate termination provisions interfere with the ability of state governments to enter into binding settlement agreements that will be enforceable in the future. *See Green*, 1997 WL 769458, at *15. Finding that the statute neither compels nor prevents states from acting with regard to prison litigation, the court concluded that the Tenth Amendment was not implicated by the PLRA. *See id.* at *16.

final judgments of federal courts.[69] Second, they argue that these provisions prescribe rules of decision to federal courts in pending cases, thereby usurping their adjudicatory function.[70] Finally, in the argument of most interest here, they assert that the provisions impermissibly invade the federal courts' inherent equitable powers.[71] This Part will critique the first two theories, ultimately concluding that they do not adequately embrace the precise separation of powers violation committed by the PLRA immediate termination provisions. The merits of the plaintiffs' third theory will be addressed in the next part of the Article.

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69. *See, e.g.*, Benjamin II, 172 F.3d 144, 151-59 (2d Cir. 1999) (en banc); Imprisoned Citizens Union v. Ridge, 169 F.3d 178, 183-87 (3d Cir. 1999); Taylor v. United States, 143 F.3d 1178, 1181 (9th Cir.), *reh'g en banc granted and op. withdrawn*, 158 F.3d 1059 (9th Cir. 1998), *and aff'd on other grounds as moot*, Nos. 97-16069 & 97-16071, 1999 WL 402748 (9th Cir. June 18, 1999); Hadix v. Johnson, 133 F.3d 940, 942 (6th Cir. 1998) (dictum), *cert. denied sub nom.* Hadix v. McGinnis, 118 S. Ct. 2368 (1998); Dougan v. Singletary, 129 F.3d 1424, 1426 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 2375 (1998); Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 656-57 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2366 (1998); Gavin v. Branstad, 122 F.3d 1081, 1085 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 2374 (1998); Plyler v. Moore, 100 F.3d 365 371(4th Cir. 1996); Ruiz v. Johnson, 27 F. Supp.2d 855, 871-72, (S.D. Tex. 1999); Green v. Peters, No. 71 C 1403, 1997 WL 769458, at *5 (N.D. Ill. Dec. 5, 1997) (mem.), *reconsideration granted in part and denied in part on other grounds*, 1998 WL 246487 (N.D. Ill. Apr. 27, 1998) (mem.); James v. Lash, 965 F. Supp. 1190, 1194 (N.D. Ind. 1997); Jensen v. County of Lake, 958 F. Supp. 397, 400 (N.D. Ind. 1997).

70. *See, e.g.*, Imprisoned Citizens Union v. Ridge, 169 F.3d 178, 186-89 (3d Cir. 1999); Taylor v. United States, 143 F.3d 1178, 1181 (9th Cir.), *reh'g en banc granted and op. withdrawn*, 158 F.3d 1059 (9th Cir. 1998), *and aff'd on other grounds as moot*, Nos. 97-16069 & 97-16071, 1999 WL 402748 (9th Cir. June 18, 1999); Hadix v. Johnson, 133 F.3d 940, 943 (6th Cir.) (dictum), *cert. denied sub nom.* Hadix v. McGinnis, 118 S. Ct. 2368 (1998); Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 657-58 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2366 (1998); Gavin, v. Branstad, 122 F.3d 1081, 1085 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 2374 (1998); Plyler v. Moore, 100 F.3d 365, 372 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2460 (1997); Ruiz v. Johnson, 37 F. Supp.2d 855, 878-880 (S.D. Tex. 1999); Green v. Peters, No. 71 C 1403, 1997 WL 769458, at *10 (N.D. Ill. Dec. 5, 1997) (mem.), *reconsideration granted in part and denied in part on other grounds*, 1998 WL 246487 (N.D. Ill. 1997) (mem.). The Second Circuit addressed this challenge in its original panel opinion. *See* Benjamin I, 124 F.3d 162, 173-74 (2d Cir. 1997), *vacated*, 172 F.3d 144 (2d Cir. 1999) (en banc). As the plaintiffs had not renewed this challenge to the immediate termination provisions during the en banc rehearing, the en banc court refrained from expressing any opinion on this ground when it vacated the panel opinion. *See* Benjamin II, 172 F.3d 144, 166 (2d Cir. 1999) (en banc).

71. *See, e.g.*, Imprisoned Citizens Union v. Ridge, 169 F.3d 178, 184-88 (3d Cir. 1999); Benjamin I, 124 F.3d 162, 173-74 (2d Cir. 1997), *vacated*, 172 F.3d 144 (2d Cir. 1999) (en banc); Tyler v. Murphy, 135 F.3d 594, 597 (8th Cir. 1998); Green v. Peters, No. 71 C 1403, 1997 WL 769458 at *8 (N.D. Ill. Dec. 5, 1997) (mem.), *reconsideration granted in part and denied in part on other grounds*, 1998 WL 246487 (N.D. Ill. Apr. 27, 1998) (mem.); Thompson v. Gomez, 993 F. Supp. 749, 763 (N.D. Cal. 1997).

A. Reopening Final Judgments

In *Plaut v. Spendthrift Farm, Inc.*,[72] the Supreme Court held that section 27A(b) of the Securities Exchange Act of 1934[73] violated the separation of powers doctrine because it legislatively required federal courts to reopen final judgments entered before its enactment.[74] In the seven to two decision written by Justice Antonin Scalia, the Supreme Court explored the textual, historical, and structural underpinnings of the separation of powers doctrine.

Reviewing how Article III of the Constitution was drafted, Justice Scalia wrote that the Framers intended federal courts to decide cases subject to review only by superior courts in the Article III hierarchy and with the understanding that a judgment conclusively resolves the case.[75] Conclusive resolution occurs because judicial power under Article III means that the courts have the power to render dispositive judgments.[76] Within this hierarchy, it was the Court's understanding that:

> [T]he decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress' latest enactment, even when that has the effect of overturning the judgment of an inferior court.... Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.[77]

Moreover, the Court opined that Article III also unequivocally made clear that:

> [T]he doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.... Separation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors.[78]

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72. 514 U.S. 211 (1995).

73. *See* 15 U.S.C. § 78aa-1 (1991) (codifying § 27A(b) of Securities Exchange Act of 1934).

74. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 229 (1995).

75. *See id.* at 218.

76. *See id.* (referring to historical record of history to show Framers' intent that judgments provide conclusive resolution).

77. *Id.* at 227.

78. *Id.* at 239.

Pursuant to this understanding of separation of powers, the Court pronounced that:

> When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than "reverse a determination once made, in a particular case." Our decisions stemming from *Hayburn's Case*[79] – although their precise holdings are not strictly applicable here – have uniformly provided fair warning that such an act exceeds the powers of Congress.[80]

The PLRA challenge based on a "*Plaut* violation" follows the Supreme Court's rationale in *Plaut*: Congress has enacted retroactive legislation designed to reopen and set aside, through the immediate termination provisions, consent decrees that have become final judgments of Article III courts.[81] To date, eight circuit courts of appeal have addressed this issue, and an additional four district courts representing two other circuits have ruled on it.[82]

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79. 2 U.S. (2 Dall.) 408 (1792).

80. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225 (1995) (citations omitted) (quoting THE FEDERALIST NO. 81, at 545 (Alexander Hamilton) (J. Cooke ed., 1961)).

81. *See, e.g.*, Benjamin II, 172 F.3d 144, 165-66 (2d Cir. 1999) (en banc) (arguing against immediate termination provisions of PLRA). The arguments made by the plaintiffs in *Benjamin I*, which the United States Court of Appeals for the Second Circuit heard en banc, illustrate why the PLRA may be constitutionally infirm. *See* Appellants' Brief at 15-23, *Benjamin II* (No. 96-7957); Appellants' Reh'g Brief at 25, *Benjamin II* (No. 96-7957). When making such a challenge to the PLRA, the plaintiffs assert that consent decrees are substantive entries of judgment, whose time for appeal has long passed. They interpret the *Plaut* Court to hold that, if the time for appeal has passed, a court's injunction is a final judgment under a separation of powers analysis.

Relying on a line of cases beginning with *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), the plaintiffs maintain that federal courts possess the power to alter final prospective relief in response to new legislation, but only when Congress has the power to alter the substantive law on which the judgment is based. In constructing this argument, the plaintiffs typically draw upon the distinction, also made in *Wheeling* and its progeny, between public and private rights. Public rights involve areas that Congress has plenary power to regulate and thus are subject to legislation altering the prospective effects of an injunction. *See, e.g.*, System Federation No. 91 v. Wright, 364 U.S. 642 (1961) (holding that district court abused its discretion by refusing to modify consent decree based on amendment to Railway Labor Act). *Wheeling* involved the right of navigation along interstate waterways. Congress has plenary power to regulate such a right of navigation under the Commerce Clause. *See Wheeling*, 59 U.S. at 431; *see also* U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power To . . . regulate Commerce . . . among the several States"). By contrast, Congress does not control private rights, such as the Eighth Amendment right to be free from cruel and inhumane punishment, because Congress does not control the legal rights on which courts base judgments regarding private rights. The plaintiffs' argument concludes that Congress may not effect a change of law that reopens or vacates final injunctions based on private rights. Because the underlying rights of the claims asserted by the plaintiffs in cases attacking the PLRA stem from the Constitution, the plaintiffs argue that the immediate termination provisions retroactively vacate final injunctive relief in constitutional cases.

82. The First, Second, Third, Fourth, Sixth, Eighth, and Eleventh Circuits have found no

The majority of courts have found no *Plaut* violation, essentially because they do not agree with the plaintiffs that consent decrees are final judgments for separation of powers purposes.[83] Relying on the same *Wheeling* line of cases on which the plaintiffs had relied, one court wrote:

> [T]he consent decree at issue here provides for prospective relief and is subject to the continuing supervisory jurisdiction of the district court. As such, the judgment approving the decree is not similar to a judgment for money damages. Rather it is akin to a final judgment granting injunctive relief, and thus it is subject to subsequent changes in the law.[84]

In contrast, a panel of the Ninth Circuit found a *Plaut* violation by distinguishing the law generally affecting injunctions from the substantive law governing the plaintiffs' claims. It concluded that Congress had not changed the substantive law upon which the parties' consent decree was entered because that law was the Constitution itself.[85] As a result, the court construed the immedi-

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Plaut violation. *See* Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 656-57 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2366 (1998); Benjamin II, 172 F.3d 144 at 161-62 (2d Cir. 1999) (en banc); Imprisoned Citizens Union v. Ridge, 169 F.3d 178, 184 (3d Cir. 1999); Plyler v. Moore, 100 F.3d 365, 371-72 (4th Cir. 1996), *cert. denied*, 520 U.S. 1277 (1997); Hadix v. Johnson, 133 F.3d 940, 942-43 (6th Cir.), *cert. denied sub nom.* Hadix v. McGinnis, 118 S. Ct. 2368 (1998); Gavin v. Branstad, 122 F.3d 1081, 1085-89 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 2374 (1998); Dougan v. Singletary, 129 F.3d 1424, 1426 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 2375 (1998). Unlike the other courts of appeals, a panel of the Ninth Circuit initially found a separation of powers violation, but after a rehearing en banc, the full court simply affirmed on other grounds, while opining in dictum that a violation would exist. *See* Taylor v. United States, 143 F.3d 1178, 1181-84 (9th Cir.), *reh'g en banc granted and op. withdrawn*, 158 F.3d 1059 (9th Cir. 1998), *and aff'd on other grounds as moot*, Nos. 97-16069 & 97-16071, 1999 WL 402748 (9th Cir. June 18, 1999).

District courts in the Seventh Circuit concur with the majority of appellate courts. *See* Green v. Peters, No. 71 C 1403, 1997 WL 769458, at *5-8 (N.D. Ill. Dec. 5, 1997) (mem.), *reconsideration granted in part and denied in part on other grounds*, 1998 WL 246487 (N.D. Ill. Apr. 29, 1998) (mem.); James v. Lash, 965 F. Supp. 1190, 1194-97 (N.D. Ind. 1997); Jensen v. County of Lake, 958 F. Supp. 397, 400-04 (N.D. Ind. 1997). However, one district court in the Fifth Circuit differs from the majority of courts. *See* Ruiz v. Johnson, 37 F. Supp.2d 855, 876,-82 (S.D. Tex. 1999).

83. *See, e.g.*, Plyler v. Moore, 100 F.3d 365, 371 (4th Cir. 1996) (observing that unlike final judgment, judgment providing for injunctive relief is subject to changes in law).

84. *Id.* at 371-72. The plaintiffs also rely on *Wheeling* for their argument. However, they argue that the finality of granting a judgment does not rely on the state of the law at the time the injunction is entered. Thus, the fact that district courts may prospectively modify or vacate their own injunctive orders in response to changed circumstances does not compromise the finality of those orders.

85. *See* Taylor v. United States, 143 F.3d 1178, 1183 (9th Cir.) (observing that PLRA defines scope and nature of remedy, but does not effect change in substantive law), *reh'g en banc granted and op. withdrawn*, 158 F.3d 1059 (9th Cir. 1998) (characterizing Congress's action as "defin[ing] the scope and nature of the remedy"), *and aff'd on other grounds as moot*, Nos. 97-16069 & 97-16071, 1999 WL 402748 (9th Cir. June 18, 1999).

ate termination provisions as impermissibly reopening final judicial decisions resolving constitutional claims.[86] After a rehearing en banc, however, the court simply affirmed on other grounds but rendered a similar disposition on the *Plaut* issue in dictum.[87]

A panel of the Second Circuit initially struck a lone interpretive path. In construing the effect of the immediate termination provisions, Judge Guido Calabresi concluded that the immediate termination provisions could be read plausibly in two ways, only one of which would raise constitutional concerns.[88] The first interpretation would deprive federal courts of subject matter jurisdiction over prison consent decrees, but the decrees themselves would still be enforceable in state courts as simple contracts.[89] The second interpretation would support the plaintiffs' claim that the statute renders null and void all past federal court-approved prison consent decrees unless they meet the narrow tailoring requirement found in 18 U.S.C. § 3626(b)(3).[90] Following the federal courts' historical avoidance of deciding constitutional questions whenever possible,[91] the panel adopted the former interpretation and found that Congress was merely changing the law regarding which forum would hear the plaintiffs' dispute, rather than attempting to alter the plaintiffs' constitutional rights.[92] In reaching this result, the panel observed that the second

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86. *Id.* at 1183-84.

87. Taylor v. United States, Nos. 97-16069 & 97-16071, 1999 WL 402748, at *6-9 (9th Cir. June 18, 1999).

88. Benjamin I, 124 F.3d 162, 166-68 (2d Cir. 1997), *vacated*, 172 F.3d 144 (2d Cir. 1999) (en banc).

89. *See id.* at 166-67. This interpretation essentially relies on the statutory definition of "relief," which includes consent decrees, to mean remedies arising out of, or issued pursuant to the consent decree, but not the consent decree itself. *Id.* at 168. The practical effect of this analysis is that the word "termination" would mean terminating subject matter jurisdiction over future enforcement of the consent decrees rather than the annulment of the consent decrees.

90. *Id.* at 167.

91. *See* United States *ex rel.* Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909). Under the doctrine of constitutional doubt, federal courts must interpret statutes to avoid "grave and doubtful constitutional questions." *Id.* "That doctrine enters in only 'where a statute is susceptible of two constructions.'" Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952, 1956 (1998) (quoting *Delaware & Hudson Co.*, 213 U.S. at 408).

92. *Benjamin I*, 124 F.3d at 167. Prior to *Benjamin I*, only one other court had adopted this alternative interpretation. *See* Inmates of the Suffolk County Jail v. Sheriff of Suffolk County, 952 F. Supp. 869, 875 (D. Mass.), *aff'd as modified and remanded*, 129 F.3d 649 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2366 (1998) (presuming Congress did not intend to usurp power constitutionally forbidden it). No court to date has followed the Second Circuit's interpretation, which has received much criticism. *See, e.g.*, Denike v. Fauver, 3 F. Supp. 2d 540, 544 (D.N.J. 1998) (finding Second Circuit's construction of § 3626(b) "hard to square with either the language of that provision or Congress's unmistakable intent when enacting it"); Green v. Peters, No. 71 C 1403, 1997 WL 769458, at *17 (mem.) (finding automatic termina-

interpretation would raise potential separation of powers problems because it would "strip the plaintiffs of all of the protections they negotiated into the Consent Decrees except for those narrowly tailored to federal rights."[93] After a rehearing en banc, a majority of the Second Circuit expressly rejected Judge Calabresi's construction, finding that the PLRA terminated, but did not annul or void consent decrees and further opined that there was "no basis, consistent with fundamental principles of contract law or with the Supremacy Clause of the Constitution, on which a state court would have the power to reinstate obligations originally imposed in the federal consent decree but terminated by the federal court."[94] The court then adopted the *Plaut* challenge analysis of

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tion provisions of PLRA constitutional but staying effect of termination provision pending appeal), *reconsideration granted in part*, 1998 WL 246487 (N.D. Ill. Apr. 27, 1998) (mem.); *id.* at *4 (stating that "the language of a statute cannot be molded like Silly Puddy to achieve a constitutional result").

The original panel's interpretation also relies on the implicit assumption that state courts are able and willing to exercise jurisdiction over such a controversy. During the en banc argument of *Benjamin II*, the topic that received the most attention was the fate of consent decrees over which federal courts cease to exercise jurisdiction. *See* Audio Tape of En Banc Oral Argument (Feb. 25, 1998), Benjamin II, 172 F.3d 144 (2d Cir. 1999) (No. 96-7957) [hereinafter Benjamin Audio Tape] (on file with, and transcribed by, author). Federal courts frequently make this assumption without questioning whether the state court forum would actually be available. *See, e.g.*, ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 520 (3d Cir. 1998) (holding that although Telephone Consumer Protection Act is federal law, Congress's express assigning of jurisdiction to court other than federal district court meant that access to federal courts was barred and that lawsuits invoking statute must be brought in state courts). Indeed, such jurisprudence presents precarious due process implications because litigants may find themselves barred from both federal and state courts. *See, e.g.*, Alden v. Maine, 119 S. Ct. 2240, 2246 (1999) (holding that Congress lacks power to subject non-consenting states to private suits for damages in state courts for violations of federal Fair Labor Standards Act). In *Alden*, state probation officers filed suit against their employer, the State of Maine, in federal court for violations of the overtime provisions of the Fair Labor Standards Act. *See id.* at 2246. While the suit was pending, the Supreme Court decided *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), in which it held that Congress lacks the power to abrogate the states' sovereign immunity from suits commenced or prosecuted in federal courts. The officers' suit was subsequently dismissed, and they refiled their action in state court. *See Alden*, 119 S. Ct. at 2246. The state trial court dismissed this second suit on sovereign immunity grounds as well, and the Maine Supreme Judicial Court affirmed. *See id.* The Supreme Court then affirmed the dismissal of the suit, thereby barring the officers from vindicating their federal right to overtime pay by initiating a private action in any court, federal or state. *See id.*

Moreover, by mirroring the subject matter restrictions and remedial limitations found in the PLRA, recent state legislative efforts also may bar prisoners from state courts in a manner similar to the way in which the PLRA bars them from federal courts. *See, e.g.*, S. 5378 (N.Y. 1999) (amending Court of Claims Act by adding new subdivision concerning prison litigation reform); S. 640 (Penn. 1997) (amending Title 42 of Pennsylvania Consolidated Statutes by adding new chapter concerning prison conditions litigation).

93. *Benjamin I*, 124 F.3d at 168.

94. Benjamin II, 172 F.3d 144, 157 (2d Cir. 1999) (en banc).

the other circuit courts of appeal.[95]

As was readily apparent from the questions posed by the judges during the en banc argument in *Benjamin II*,[96] the major weaknesses in the plaintiffs' arguments stem from at least two definitional uncertainties. First, the argument hinges upon the actual meaning of finality and whether it means the same thing in all contexts. Second, the statute is arguably capable of being construed as either permissibly changing the law underlying injunctions or impermissibly attempting to modify constitutional rights. That is, one must determine whether the nature of the remedy or the source of the underlying right is relevant to a separation of powers analysis.

Precisely because consent decrees are subject to future enforcement, modification, and termination by the court, their characterization as "final judgments" is called into question. Whether a consent decree has achieved the status of a final judgment ultimately depends on the definition of "finality." If finality means that the time for a party to appeal a judgment has expired, then previously entered consent decrees would become final merely by the passage of time.[97] By contrast, if finality means that the court relinquishes jurisdiction over the action, then consent decrees cannot be final because a court may revisit the terms of the decree and modify them as the underlying situation changes and, where circumstances warrant, terminate the decree.[98] However, as the appellant in *Benjamin II* concluded at the en banc argument, if consent decrees are deemed never to have the status of final orders, then a serious question of inconsistency with Article III arises: If *Plaut* is read to mean that a lower federal court's power to render dispositive judgments is intrinsic to the Article III hierarchy, then the PLRA's regulation of injunctive relief may be fundamentally inconsistent with this structure.[99]

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95. *Id.* at 162.

96. *See* Benjamin Audio Tape, *supra* note 92.

97. However, the *Plaut* Court may have rejected such a notion in the context of a consent decree because its definition of finality is that "a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy." Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 212 (1995). Some of the judges at the *Benjamin II* en banc oral argument also challenged the notion that the test for finality is the point at which the right to appeal has expired. The plaintiffs responded that finality cannot mean different things in different contexts. *See* Benjamin Audio Tape, *supra* note 92.

98. Judge John M. Walker, Jr., during the en banc argument of *Benjamin II*, took issue with the proper definition of "finality" in light of Fed. R. Civ. P. 60(b) and its interpretation in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). *See* Benjamin Audio Tape, *supra* note 92.

99. *See* Benjamin Audio Tape, *supra* note 92; *see also* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 86 n.38 (1982) ("Although the entry of an enforcement order is in some respects merely formal, it has long been recognized that '[t]he award of execution . . . is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment in the legal sense of the term without it.'" (quoting ICC v. Brimson,

Separation of powers should not turn on a seemingly arbitrary choice of defining whether something is final, or whether public or private rights are being implicated. Resting the doctrine of separation of powers on definitional choices encourages courts to engage in results-oriented decisionmaking by focusing their separation of powers analysis simply on the horizontal relationship between the branches of government, rather than the equally important vertical rights at stake. The danger of allowing federal courts to predetermine whether to terminate the decree prior to any rigorous consideration of the separation of powers issues implicated by the PLRA trivializes the fundamental role of protecting individual due process rights that the doctrine plays in our constitutional system of government.[100] The increasing pressure of federal dockets[101] and the sentiment that federal courts should extricate themselves from prison management provide additional incentives to apply the immediate termination provisions blindly, without giving much thought to their potential constitutional implications. Both horizontal and vertical integrity are necessary for separation of powers to work properly. Because separation of powers is a structural doctrine fundamental to the protection of individual rights, such oblivious application of the termination provisions is unsatisfying and unacceptable.

B. Prescribing Rules of Decision in Pending Cases

Congress also violates the separation of powers doctrine by prescribing rules of decision to Article III courts in pending cases.[102] In the aftermath of

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154 U.S. 447, 484 (1894))). Nonetheless, the en banc Second Circuit declared that finality "may be defined differently for different purposes" depending on whether the judgment is one for money damages or one for injunctive, executory relief. *Benjamin II*, 172 F.3d at 160. On the basis of this distinction, which the Second Circuit drew from the *Plaut* decision, and the inherent power of courts to modify or terminate prospective injunctive relief, the en banc court found no *Plaut* violation. *Id.* at 162.

100. In disagreeing with the en banc Second Circuit majority but concurring in the result, Judge Calabresi attempted to explain why his colleagues may have reached an incorrect decision. Judge Calabresi frankly acknowledged that judges "have been trained to downplay the significance of formal rules and to concern ourselves predominantly or even exclusively with results. [Judges] tend to look at law primarily as an engine to achieve immediate goals, and to ignore its symbolic significance. Thinking this way, it is all too easy to equate (a) the termination of judicial judgments with (b) changes in underlying laws, when both bring about the same results." Benjamin II, 172 F.3d 144, 190 (2d Cir. 1999) (en banc) (Calabresi, J., concurring).

101. There was a two percent increase in the total number of filings in federal district courts from 1996 to 1997, although case terminations rose less than one percent during that same time. *See* Leonidas Ralph Mecham, *Judicial Business of the United States Courts: 1997*, REPORT OF THE DIRECTOR 15 (1997). "Because filings outnumbered terminations, the pending caseload grew 9 percent." *Id.*

102. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871) (opining that proper duty of court is to "apply ordinary rules to new . . . circumstances" in such cases).

the Civil War, Congress passed the Abandoned and Captured Property Act of 1863,[103] which enabled non-combatant Confederate landowners to recover confiscated property upon proof of loyalty to the federal government.[104] The plaintiff in *United States v. Klein*[105] was the administrator of V.F. Wilson, a Confederate sympathizer, who sought to recover the proceeds of the sale of Wilson's cotton, which had been confiscated by the United States Treasury during the Civil War.[106] He brought suit in the Court of Claims, presenting evidence of a presidential pardon as proof of loyalty, in accordance with applicable Supreme Court precedent.[107] The Court of Claims granted judgment to the administrator, and the United States appealed.[108] While the case was pending, Congress enacted another statute declaring that a presidential pardon was proof of disloyalty, and directed the dismissal of any pending case on grounds of lack of jurisdiction.[109]

Chief Justice Salmon P. Chase, writing for the Court, began his analysis by first commenting on what the statute was *not*:

> Undoubtedly the legislature has complete control over the organization and existence of [the Court of Claims] and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make "such exceptions from the appellate jurisdiction" as should seem to it expedient.[110]

However, the Court surmised that the statute's "great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have."[111] Accordingly, the Court wrote that

> the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.[112]

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103. Abandoned and Captured Property Act of 1863, 12 Stat. 820 (1863).

104. *See Klein*, 80 U.S. at 131 (describing Abandoned and Captured Property Act of 1863).

105. 80 U.S. (13 Wall.) 128 (1871).

106. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 136 (1871) (describing Abandoned and Captured Property Act of 1863).

107. *Id.* at 133-34, 142-43. The Supreme Court established the competency of such proof in *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869).

108. *Klein*, 80 U.S. at 132.

109. *See id.* at 133-34, 143-44; *see also* 16 Stat. 235 (1870).

110. *Klein*, 80 U.S. at 145 (quoting U.S. CONST. art. III, § 2, cl. 2).

111. *Id.*

112. *Id.* at 146.

The Court observed that this was "not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power" and thus, invalidated the statute because it "passed the limit which separates the legislative from the judicial power."[113] In reaching this conclusion, the Court carefully distinguished *Wheeling* as a situation in which "the court was left to apply its ordinary rules to the new circumstances created by the act," whereas the legislation here created no new circumstances.[114] The Court was simply "forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary."[115]

The "*Klein* violation" challenge to the PLRA contends analogously that Congress has usurped an Article III court's adjudicatory function by prescribing a rule of decision, that is, immediate termination, to cases with pending consent decrees.[116] For the most part, courts that have considered the *Plaut* violation challenge to the termination provisions also have ruled on the *Klein* violation, with a majority of the courts finding no separation of powers violation on the *Klein* violation theory.[117] One such court has concluded that

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113. *Id.* at 146-47.

114. *Id.* at 147.

115. *Id.*

116. Once again, the arguments made by the plaintiffs in *Benjamin I* and *Benjamin II* illustrate why the PLRA may be construed as a *Klein* violation. *See* Appellants' Brief at 15-23, Benjamin II, 172 F.3d 144 (2d Cir. 1999) (No. 95-7957). The plaintiffs begin by drawing an analogy between the termination provisions and the statute at issue in *Klein*. They contend that both involve the determination of the existence of certain facts: a pardon in *Klein* and the absence of particular findings under the PLRA. The plaintiffs allege that Congress has impermissibly reduced an Article III court's power to decide substantive issues of law to a simple mechanical exercise.

The point the plaintiffs make, like the point that the plaintiff in *Klein* makes, concerns the enforcement of a constitutional, and not a statutory, right – a president's constitutional power of pardon in *Klein*, and the plaintiffs' constitutional rights under the PLRA. Accordingly, the plaintiffs maintain that Congress has infringed upon a proper exercise of judicial power of determining when a remedy in a constitutional case has been "effective" such that the constitutional violation will not recur. This argument dovetails into a discussion of *Wheeling* and what rights the PLRA has altered – legal rights derived from the Constitution.

117. The First, Third, Fourth, Sixth, Eighth, and Eleventh Circuits have found no *Klein* violation. *See* Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 657-58 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2366 (1998); Imprisoned Citizens Union v. Ridge, 169 F.3d 178, 186-87 (3d Cir. 1999); Plyler v. Moore, 100 F.3d 365, 372 (4th Cir. 1996), *cert. denied*, 520 U.S. 1277 (1997); Hadix v. Johnson, 133 F.3d 940, 943 (6th Cir.), *cert. denied sub nom.* Hadix v. McGinnis, 118 S. Ct. 2368 (1998); Gavin v. Branstad, 122 F.3d 1081, 1089 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 2374 (1998); Nichols v. Hopper, No. 97-6818, 1999 WL 238837, at *2-3 (11th Cir. Apr. 23, 1999). In contrast, the Ninth Circuit did find a separation of powers violation but then affirmed on other grounds after a rehearing en banc. *See* Taylor v. United States, 143 F.3d 1178, 1184-85 (9th Cir.), *reh'g en banc granted and op. withdrawn*, 158 F.3d 1059

"it is the authority of the district court to approve relief greater than that required by the Eighth Amendment, not the Eighth Amendment itself, that is at stake."[118] Consequently, Congress is considered to have deprived district courts of their authority "to award relief greater than that required by the federal law."[119] In so doing, Congress is considered to have amended the law applicable to the case rather than to have dictated a rule of decision.[120] As the Court of Appeals for the Eighth Circuit explained:

> The rule of *Klein* does not apply here because this is not a case in which Congress has prescribed a rule of decision and has left the court no adjudicatory function to perform. Congress has left the judicial functions of interpreting the law and applying the law to the facts entirely in the hands of the courts. The PLRA leaves the judging to judges, and therefore it does not violate the *Klein* doctrine.[121]

In the Second Circuit, the original panel relied on its construction of the statute to avoid the *Klein* problem altogether, although it cleverly observed that, "if legislation can be characterized as changing the underlying law rather than as prescribing a different outcome under the pre-existing law, it will not violate the separation of powers principle formulated in *Klein*."[122] On rehearing en banc, the plaintiffs did not renew their *Klein* challenge to the immediate termination provisions and the en banc court refrained from expressing any opinion on the *Klein* challenge when it vacated the panel opinion.[123]

In contrast to these courts, a panel of the Ninth Circuit insisted that the statute "provides no room for judicial decision-making."[124] The court argued that it presently was unable to make the findings required by the statute

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(9th Cir. 1998), *and aff'd on other grounds as moot*, Nos. 97-16069 & 97-16071, 1999 WL 402748 (9th Cir. June 18, 1999).

A district court in the Seventh Circuit concurs with the majority of appellate courts. *See* Green v. Peters, No. 71 C 1403, 1997 WL 769458, at *10 (N.D. Ill. Dec. 5, 1997) (mem.), *reconsideration granted in part and denied in part on other grounds*, 1998 WL 246487 (N.D. Ill. 1998) (mem.). However, one district court in the Fifth Circuit does not concur. *See* Ruiz v. Johnson, 37 F. Supp.2d 855, 878-79 (S.D. Tex. 1999).

118. Plyler v. Moore, 100 F.3d 365, 372 (4th Cir. 1996).

119. *Id.*

120. *Id.*

121. Gavin v. Branstad, 122 F.3d 1081, 1089 (8th Cir. 1997) (citations and footnote omitted), *cert. denied*, 118 S. Ct. 2374 (1998).

122. Benjamin I, 124 F.3d 162, 174 (2d Cir. 1997), *vacated*, 172 F.3d 144 (2d Cir. 1999) (en banc).

123. *See* Benjamin II, 172 F.3d 144, 159 (2d Cir. 1999) (en banc).

124. Taylor v. United States, 143 F.3d 1178, 1184 (9th Cir.) (observing that PLRA defines scope and nature of remedy but does not effect change in substantive law), *reh'g en banc granted and op. withdrawn*, 158 F.3d 1059 (9th Cir. 1998), *and aff'd on other grounds as moot*, Nos. 97-16069 & 97-16071, 1999 WL 402748 (9th Cir. June 18, 1999).

because no record would have been made at the time the consent decree was entered.[125] This result would occur because "[o]ne of the normal purposes of consent to the judicial decree is to avoid making a record which would lead to such findings."[126] Moreover, the court observed that if the decree were being obeyed, there would be no "current and ongoing violation," a necessary finding in order to continue the decree.[127] Finally, the court opined that if the violations of the past decree were indeed occurring, "to continue the decree the prisoner class would be required to prove an entirely new case, to establish a present constitutional violation of the same magnitude as would warrant relief had the existing case never occurred."[128] The court concluded that all the prisoners could "achieve under the PLRA is what can be achieved through any new action which proves current violations" and thus, "pre-PLRA consent decrees effectively are extinguished."[129] After a rehearing en banc, however, the court simply affirmed on other grounds and rendered no opinion on the *Klein* issue.[130]

The main weakness in the plaintiffs' argument is that the analogy to *Klein* is a loose fit. The core of a *Klein* violation is the total absence of the adjudicatory process by the judiciary; that is, the separation of powers violation occurs because Congress has usurped the judiciary's adjudicatory function by dictating the outcome of pending cases. In the challenge to the PLRA, despite the arguments made by the Ninth Circuit panel, the judiciary's role as a fact-finder is preserved: The consent decree will not be terminated if the court "makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation."[131] Although the practical effect of these narrow tailoring requirements may be that many pre-PLRA consent decrees will be terminated, it is by no means a foregone conclusion in every pending case.[132] Moreover, the plaintiffs' arguments again suffer from a definitional

125. *Id.* at 1185.

126. *Id.*

127. *See id.*

128. *Id.*

129. *Id.*

130. *See* Taylor v. United States, Nos. 97-16069 & 97-16071, 1999 WL 402748 (9th Cir. June 18, 1999).

131. 18 U.S.C. § 3626(b)(3) (Supp. III 1994).

132. However, this requirement invokes an argument that plaintiffs have not before attempted to argue when challenging the statute: that the termination provisions impermissibly dictate to the federal judiciary what constitutes a constitutional violation through the guise of laying out the conditions for prospective relief.

uncertainty as to what substantive law Congress is altering. As in the *Plaut* violation challenge, the majority of courts allow the horizontal separation of powers analysis to trump the vertical and so place less emphasis on the nature of the rights being adjudicated.

IV. Separation of Powers and Invading Inherent Equitable Powers

This Article thus far has surveyed the arguments made by plaintiffs challenging the PLRA immediate termination provisions on the basis that they impermissibly open final judgments and prescribe rules of decision in pending cases. In the *Plaut* violation scenario, plaintiffs essentially were challenging how the PLRA termination provisions operated to deprive them of a judgment sought and obtained in federal court. By questioning the prospective effects of a federal court's settled ruling, the separation of powers problem exemplified in *Plaut* only indirectly addresses the adjudicatory powers of a federal court. The *Klein* violation scenario, by contrast, can be thought of as a more direct challenge to the termination provisions because it is framed as depriving federal courts of their most basic function: to render decisions in the cases before them. However, as demonstrated in Part III, both theories fail to embrace the precise separation of powers violation committed by the PLRA immediate termination provisions because they suffer from definitional uncertainties and a weak analogy.

The third and final separation of powers challenge contends that Congress has impermissibly invaded the federal courts' inherent equitable powers in the course of its adjudications of constitutional claims. The challenge contends that Congress has done this by placing limitations on the way in which prospective relief may be issued and administered. This theory shifts the focus of the inquiry closer to the heart of the federal courts' adjudicatory function. Not explicitly based on any specific Supreme Court case, the challenge requires a deeper understanding of the judiciary's function in awarding equitable relief, and of how the PLRA's termination provisions

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The genesis of this argument comes from *City of Boerne v. Flores*, in which the Supreme Court declared RFRA unconstitutional because, under section 5 of the Fourteenth Amendment, Congress only has the power to enforce the provisions of that amendment, and not to determine what constitutes a constitutional violation. City of Boerne v. Flores, 521 U.S. 507, 517-18 (1997). Although Congress arguably accomplished exactly the same thing in *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938), with respect to the Norris-LaGuardia Act (29 U.S.C. § 113(c) (1937)), at that time there was no doubt that Congress had the power to dictate the terms under which an injunction would be issued for rights created solely by a federal statute, a creature of Congress's own making. Congress should not have such plenary authority with respect to the PLRA's attempts to circumscribe rights embodied within the federal constitution. To the extent Congress has changed the statutory or decisional law underlying prison conditions lawsuits, it has done so by dictating what constitutes a constitutional violation in the same way RFRA did. *See* Ruiz v. Johnson, 37 F. Supp. 2d 855, 877-78 & n.35 (S.D. Tex. 1999).

impermissibly encroach upon that function, thereby violating the separation of powers doctrine.[133] Initially, this Part evaluates the court decisions that have addressed this separation of powers challenge. This Part next demonstrates the provisions' constitutional infirmity by presenting an analysis of the text of the Constitution, its history, and its structure.

A. Current Success of the Argument

Only a handful of courts have expressly addressed this challenge and have uniformly found no violation of the separation of powers doctrine.[134] For example, in *Green v. Peters*,[135] the plaintiff contended that the termination provisions unconstitutionally restrained the remedial powers of courts to shape appropriate remedies in prison litigation cases by "[tying] the hands of

133. Once again, the plaintiffs' arguments in *Benjamin II* are illustrative. *See* Appellants' Brief at 25-39, Benjamin II, 172 F.3d 144 (2d Cir. 1999) (No. 96-7957); Appellants' Reh'g Brief at 45-49, *Benjamin II* (No. 96-7967). The plaintiffs begin by arguing that under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), it is a federal court's duty to determine the parameters of constitutional doctrine and to fashion adequate remedies for violations of law, particularly in enforcing constitutional rights. Pursuant to this duty, the plaintiffs claim that federal courts have the inherent power to provide aggrieved plaintiffs with a remedy and that this remedy must effectively address the constitutional violation in their particular case. Moreover, the plaintiffs claim that once a consent decree has been entered, its oversight and duration are governed by judicial rules that ensure its effectiveness. Under these rules, consent decrees are to be vacated only when the defendant demonstrates full and satisfactory compliance for a reasonable period of time, exhibits a good faith commitment to the decree and the legal principles that warranted judicial intervention, and demonstrates that it is unlikely to return to its former ways.

The plaintiffs further submit that while the decree is in effect the court has the power to modify it, if the proposed modification has been suitably tailored to the changed circumstance, and there has been a significant change in circumstances, in either fact or law. Because the PLRA requires termination of existing decrees in the absence of these showings, the plaintiffs contend that the PLRA conflicts with a court's duty to ensure that constitutional remedies are effective, thereby violating the separation of powers doctrine.

The plaintiffs conclude by arguing that the PLRA replaces a large body of Supreme Court precedents concerning the entry, modification, and termination of consent decrees with an ineffective remedial regime and that the caselaw upholding limitations on federal court remedial powers does not support the PLRA. In sum, the plaintiffs argue that a court's power to determine when equitable relief is no longer necessary is integral to the Article III judicial power.

134. *See* Benjamin II, 172 F.3d 144, 162 (2d Cir. 1999) (en banc); Imprisoned Citizens Union v. Ridge, 169 F.3d 178, 188 (3d Cir. 1999); Nichols v. Hopper, No. 97-6818, 1999 WL 238837, at *4 (11th Cir. Apr. 23, 1999); Tyler v. Murphy, 135 F.3d 594, 597 (8th Cir. 1998); Green v. Peters, No. 71 C 1403, 1997 WL 769458, at *8-9 (N.D. Ill. Dec. 5, 1997) (mem.), *reconsideration granted in part and denied in part on other grounds*, 1998 WL 246487 (N.D. Ill. Apr. 27, 1998) (mem.); Thompson v. Gomez, 993 F. Supp. 749, 763-64 (N.D. Cal. 1997).

135. No. 71 C 1403, 1997 WL 769458, at *8-9 (N.D. Ill. Dec. 5, 1997) (mem.), *reconsideration granted in part and denied in part on other grounds*, 1998 WL 246487 (N.D. Ill. Apr. 27, 1998) (mem.).

federal judges such that they will be unable to deal effectively with unconstitutional practices in our prisons."[136] While conceding that "[t]he PLRA may take away some of a court['s] discretionary power," the court concluded that "it still guarantees that a court may provide narrowly-tailored prospective relief upon a finding of an ongoing constitutional violation."[137] Moreover, the court found that the termination provisions "simply allow[ ] litigants a more direct way to facilitate such requests" and "[t]hough a close call . . . § 3626(b)(2) provides for the vacatur of judgments in compliance with the applicable constitutional safeguards."[138] Indeed, the *Green* court found that the PLRA's supposed "flexibility" in permitting a court to impose revised relief "saves § 3626(b)(2) from more serious constitutional concerns."[139]

Despite its different interpretation of the immediate termination provisions, the Second Circuit panel generally agreed with the other courts:

> It is of course true that section 3626(b) diminishes the power of the federal courts. That diminution, however, does not infringe upon the power that courts must retain in order to meet their obligation of forging adequate remedies. . . . While the Act takes away that discretionary power [to afford relief through consent decrees over and above what they could award after a litigated judgment concerning federal rights], it guarantees that the court may continue to give prospective relief if it finds on the record that federal constitutional violations exist and that the relief is appropriately tailored to remedy the violation. The courts will thus still be able to remedy violations of prisoners' constitutional rights as they have traditionally done in litigated cases.[140]

The diminution in a federal court's inherent powers was the subject of much colloquy during the *Benjamin II* en banc argument. Judge Fred I. Parker,

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136. Green v. Peters, No. 71 C 1403, 1997 WL 769458, at *8 (N.D. Ill. Dec. 5, 1997) (mem.), *reconsideration granted in part and denied in part on other grounds*, 1998 WL 246487 (N.D. Ill. Apr. 27, 1998) (mem.).

137. *Id; see also* Imprisoned Citizens Union v. Ridge, 169 F.3d 178, 187 (3d Cir. 1999) ("Under the PLRA, courts retain their authority to adjudicate constitutional challenges and grant equitable relief to remedy constitutional violations."); Thompson v. Gomez, 993 F. Supp. 749, 763-64 (N.D. Cal. 1997) (finding that *Rufo* "does not define a constitutional limit on Congress' power" and that the PLRA "does prevent courts from providing more relief than the minimum necessary to correct *federal* violations" by reducing "permissible relief to the constitutional 'floor'").

138. *Green*, 1997 WL 769458, at *9.

139. *Id; see also* Tyler v. Murphy, 135 F.3d 594, 597 (8th Cir. 1998) ("Section 3626(b)(3) expressly permits the district court to continue appropriately tailored prospective relief that the court finds necessary to remedy a current violation of federal rights. Thus, the statute preserves a court's ability to remedy constitutional violations." (citing *Green*, 1997 WL 769458, at *8)).

140. Benjamin I, 124 F.3d 162, 170 (2d Cir. 1997), *vacated*, 172 F.3d 144 (2d Cir. 1999) (en banc).

during the appellee's argument, expressly questioned whether the diminution in power of the federal court to enter relief was a separation of powers problem:

J. Parker: [A]s I understand it, one of the things that the parties cannot do is what they can do in every other constitutional litigation, which is to enter into a consent decree, to be approved by the court, which renders relief beyond whatever the constitutional rights may be. Now that seems to me to be an alteration of the power that the courts have in all other cases, and traditionally had in their adjudicative function. So that gets back to the separation of powers question.

Appellee: But I think it's an unexceptional diminution in power. All it really is, is just that courts can't enter relief which goes beyond, which is extra-constitutional relief. I don't think that that touches the constitutional right. By definition, that doesn't touch the constitutional right. Courts can still enter any relief that's needed.

J. Parker: It doesn't touch the constitutional right, but I'm talking about the power of the court being regulated by the Legislature. And that would be my concern. It seems to me that the power of court is being regulated.

Appellee: Yes. . . . Yes.[141]

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141. Benjamin Audio Tape, *supra* note 92. The following exchange between Judge Calabresi, Judge Parker, and the United States Attorney's Office (USAO) also demonstrates the court's concern over this issue:

J. Calabresi: Does Congress have the power, whether it exercised it or not, to make void a contract which is in exchange for constitutional rights?

USAO: I think the answer to that must be yes. But, if I could, simply reiterate that what Congress has done here is to change the applicable remedial standards. It has the power under Article I to change the court's regulatory powers.

J. Calabresi: Let me be clear. You say Congress has the power, but you say that we should read this statute as saying that they did not exercise that power. Or, at least, that we should leave it to state courts to decide that question as well.

USAO: Yes, your Honor. . . . What Congress did with respect to the PLRA was simply to invoke the powers that it possesses to set the standards for the imposition of prospective ongoing relief. Once Congress amends that applicable law, the courts have the obligation, the responsibility under the applicable law, in deciding whether or not it is appropriate to continue injunctive relief. . . . This Act does not strip the courts of their power, their inherent authority to remedy constitutional violations. . . .

J. Parker: What about their basic inherent authority to approve settlements? It deprives the courts in these kind of cases from doing so unless they make a different set of findings than required under prior

Ultimately, though, a majority of the en banc Second Circuit agreed with the original panel and concluded that the immediate termination provisions did not interfere with the courts' power and duty to remedy constitutional violations:

> In the PLRA, Congress has neither defined nor altered the federal rights that may be vindicated in prisoner litigation. Nor has it forbidden the court, if it finds a violation of federal right, to order or enforce such relief as the court finds is needed to remedy the violation of that right. The Act's termination provision simply forbids the continuation of prospective relief that exceeds what is needed to remedy a continuing violation of the federal right.[142]

Although concurring in the result, Judge Calabresi (joined by Judges Leval and Jacobs),[143] wrote vigorously in opposition to the majority's interpretation of the immediate termination provisions as directing federal courts to alter, modify, or terminate the decrees themselves: "[Under that interpretation, the PLRA] attempts to do exactly what has never been permitted. For then it grants the legislative and the executive branches naked power over the courts and their holdings. Such a grant impermissibly crosses the fence and trespasses on the judicial terrain."[144] Characterizing this interpretation as "upholding [an] unprecedented infringement" based only on dictum in *Plaut*,[145] Judge Calabresi opined that there was no difference, for separation of powers purposes, between a judgment of the Judiciary "that has prospective effect or one that does not. In both instances, the other branches directly invade judicial territory."[146] Consequently, he believed that, "under the majority's ruling, the legislature is, for the first time in our history, permitted directly to order courts to modify their final judgments."[147] Judge Calabresi concluded that, because "everything that Congress sought to achieve by this part of the PLRA is as well accomplished by terminating the future effects of the decrees as by destroying the judgments themselves, it is ill-advised to suppose that Congress, by its ambiguous language, meant to do something that raises such

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> law. . . . Why wouldn't I conclude that what the Congress did is order the court to vacate an approved settlement agreement that it had the power to approve in the first place?

Id.

142. Benjamin II, 172 F.3d 144, 163 (2d Cir. 1999) (en banc).

143. Curiously, Judge Dennis G. Jacobs joined both the majority opinion and Judge Calabresi's concurrence. The three concurring opinions and the length of time between the argument (February 25, 1998) and the decision (March 23, 1999) possibly evince the Second Circuit's difficulty in resolving these issues.

144. *Benjamin II*, 172 F.3d, at 177 (Calabresi, J., concurring).

145. *Id.* (Calabresi, J., concurring).

146. *Id.* at 178. (Calabresi, J., concurring).

147. *Id.* at 174. (Calabresi, J., concurring).

severe Separation of Powers problems."[148] The import of these statements appears to be that, absent his construction of the immediate termination provisions, Judge Calabresi most likely would have agreed with the plaintiffs' position on the *Plaut* violation issue.

Nonetheless, as the colloquy during the en banc argument suggests, there is great confusion concerning the effect of the PLRA immediate termination provisions. Congress may have overstepped its prerogative and meddled in the province of judicial decisionmaking by instructing lower federal courts to terminate prospective relief. Or, perhaps Congress avoided that indiscretion by adding the narrow tailoring requirement,[149] which appears to be a codification of Supreme Court precedents in the field of equity jurisdiction.[150] Or, assuming Judge Calabresi is correct, this concern may be merely academic because Congress properly has exercised its plenary power to deprive inferior federal courts of subject matter jurisdiction over certain types of cases.[151]

The arguments in support of this theory of legislative encroachment are formidable and, unlike the other two challenges, focus on the core adjudicatory functions of an Article III court. Instead of relying on definitional uncertainties or weak analogies, this challenge goes to the most fundamental of a federal court's functions: the ability to exercise decisionmaking jurisdiction and to remedy constitutional violations pursuant to the authority granted to it by the Constitution. As Judge Walker explained it at the very beginning of the appellant's argument in *Benjamin II*:

> From a constitutional perspective, isn't the separation of powers implicated by the actions of the Congress in passing legislation that may encroach on the court's ability to effectuate relief, and isn't it really the remedial aspects of the court's role that becomes at issue in the separation of powers question?
>
> I mean, here you've got the decision to limit the power of the district courts to provide prospective relief beyond that which neither federal law nor the constitution requires. And why isn't that just what matters in a separation of powers context?[152]

What is missing from the arguments is support from the text, history, and structure of the Constitution. A closer examination of the federal courts and their structure will reveal that the separation of powers violation created by the

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148. *Id.* at 181 (Calabresi, J., concurring); *see also id.* at 181-84 (Calabresi, J., concurring) (explaining why congressional intent behind PLRA can be effectuated without unconstitutionally infringing on court judgments).

149. *See* 18 U.S.C. § 3626(b)(3) (Supp. III 1994) ("[P]rospective relief shall not terminate if . . . the prospective relief is narrowly drawn and the least intrusive means to correct the violation.").

150. *See infra* Part IV.D (discussing precedents in equity jurisdiction).

151. *See infra* Part IV.B (explaining textual basis for jurisdictional bounds).

152. Benjamin Audio Tape, *supra* note 92.

PLRA immediate termination provisions is, indeed, one in which Congress has impermissibly encroached on an Article III court's inherent equitable powers.

B. Support from the Constitutional Text

Article III of the United States Constitution establishes a limited national judiciary. Federal judicial power is expressly vested only in the United States Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish"[153] and only extends to certain enumerated types of cases. The federal judicial power extends "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[154] Pursuant to these external restraints, Article I authorizes Congress "[t]o constitute Tribunals inferior to the supreme Court"[155] and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[156] Indeed, "Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by [the Supreme Court] as Congress might prescribe."[157] These enabling provisions have also long been interpreted as giving Congress the plenary power to dictate the scope of an Article III court's subject matter jurisdiction.[158]

The PLRA restricts both the subject matter jurisdiction of the federal courts[159] and the judiciary's ability to afford remedial relief in cases over

153. U.S. CONST. art. III, § 1.

154. *Id.* art. III, § 2, cl. 1.

155. *Id.* art. I, § 8, cl. 9.

156. *Id.* art. I, § 8, cl. 18.

157. Lockerty v. Phillips, 319 U.S. 182, 187 (1943).

158. *See generally* HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 28-33 (Richard H. Fallon et al. eds., 4th ed. 1996). When Congress first created lower federal courts under the Judiciary Act of 1789, it did not provide them with a grant of judicial power over cases arising under the Constitution or laws of the United States. *See id.* at 29. This only changed under the Circuit Court of Appeals Act of 1875 (better known as the Evarts Act), which conferred on the federal judiciary a general jurisdiction over all civil cases arising under federal law, subject only to an amount-in-controversy requirement. *See id.* at 35-36. With this enactment, "the lower federal courts . . . 'became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.'" Steffel v. Thompson, 415 U.S. 452, 464 (1974) (quoting FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT 65 (1928)), *mandate conformed to* Becker v. Thompson, 494 F.2d 691 (5th Cir. 1974).

159. *See, e.g.*, PLRA § 803(d) (1996) (revoking federal courts' subject matter jurisdiction over civil actions for mental or emotional injury suffered while in custody if there is no showing of prior physical injury).

which they may exercise (or have exercised) subject matter jurisdiction.[160] The immediate termination provisions are unequivocally of the latter category. They mandate what constitutes prospective relief,[161] entitle a party to automatic termination of that relief,[162] and provide only narrow limitations preventing that relief from terminating.[163] Moreover, the legislative history leading to the passage of the immediate termination provisions consistently demonstrates that Congress understood these provisions as rendering consent decrees inoperative.[164] That is, Congress intended to limit judicial relief and not to remove a class of cases from the court's subject matter jurisdiction.

Assuming that the immediate termination provisions limit judicial relief, the internal restraints of Article I do not provide any clear guidance. On the one hand, the text does not affirmatively give Congress the authority to limit the lower federal courts' equity jurisdiction or their equitable powers. Thus, Congress arguably does not possess the enabling power to enact legislation such as the PLRA immediate termination provisions. Although the Supreme Court, in a case involving the withdrawal of equity jurisdiction in cases arising under a federal statute, held that "[t]here is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court,"[165] the Court has not yet expressed an opinion about whether equity jurisdiction similarly could be withdrawn or limited when the adjudication of a constitutional right is at stake.[166]

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160. *See, e.g., id.* § 802(a) (barring federal courts from entering prisoner release orders unless court has previously entered order for less intrusive relief and only if three-judge court has entered that order).

161. *See id.* § 802(a)(1)(A) ("The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the rights, and is the least intrusive means necessary to correct the violation of the Federal right.").

162. *See id.* § 802(b)(2) (allowing termination automatically "if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right").

163. *See id.* § 802(b)(3) (disallowing termination "if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation") (as amended).

164. *See supra* notes 37-62 and accompanying text (discussing legislative history of immediate termination provisions of PLRA).

165. Lockerty v. Phillips, 319 U.S. 182, 187 (1943) (upholding Congress's vesting jurisdiction in Emergency Court of Appeals to restrain enforcement of price orders under Emergency Price Control Act of 1942 and Supreme Court to review judgments and orders of Emergency Court and upholding Congress's concurrent withdrawal of equity jurisdiction from every other federal and state court).

166. This distinction between federal statutory and federal constitutional rights will be

On the other hand, Congress retains the plenary authority to "constitute" the lower federal courts. Consequently, if Congress decided that the immediate termination provisions were "necessary and proper" for executing a healthy national judiciary, it may have the authority, perhaps even the plenary authority, to limit a federal court's equitable powers.[167]

The external restraints imposed by Article III are also ambiguous. The text suggests that federal judicial power with respect to cases arising under the Constitution, federal laws, or treaties must be vested "in Law and Equity" together. Nothing in the text discusses limitations on the federal courts' equity jurisdiction or equitable powers. Thus, when Congress chooses to establish inferior federal courts, it arguably may not divest equity jurisdiction from law jurisdiction, or place limitations on either law or equity jurisdiction. That is, Article III gives Congress the greater power to create lower federal courts. This power logically subsumes the lesser power to eliminate them *in toto*, but not the power to place limitations on their equity jurisdiction or equitable powers. Therefore, by placing restrictions on the federal courts' ability to afford equitable relief, the PLRA immediate termination provisions potentially run afoul of the constitutional text.

However, because the text is silent on the placement of any limitations on the courts' equity jurisdiction or equitable powers, an alternative interpretation is possible. Because the immediate termination provisions do not abolish equity jurisdiction completely, but only limit the federal courts' power to afford equitable relief, the law and equity jurisdictions remain vested in the federal courts. Thus, the immediate termination provisions may not implicate the text of Article III at all.[168]

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discussed in greater detail later. *See infra* Part IV.C (discussing distinction between cases that arise under Constitution and those that implicate federal laws and treaties).

167. In making this argument, I reject the interpretation of the "necessary and proper" language as limiting legislation to only those statutes that are indispensable to achieving the ends envisioned by Congress. This restrictive reading of the Necessary and Proper Clause was rejected by the Supreme Court long ago. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

168. However, a textual ambiguity arises if equity jurisdiction is limited by legislation to a point that is equivalent to a complete elimination of equitable powers. This elimination of equitable powers is akin to the dilemma presented by regulatory takings challenges under the Takings Clause jurisprudence. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."); *see also* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"). Since *Mahon*, however, the Supreme Court has made notable strides toward providing somewhat helpful guideposts and rules. *See generally* Eastern Enters. v. Apfel, 524 U.S. 498 (1998); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Agins v. City of Tiburon, 447 U.S. 255 (1980); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

The Second Circuit panel's creative, saving construction – interpreting the immediate termination provisions as merely depriving federal courts of subject matter jurisdiction over prison consent decrees – is also a plausible interpretation of the terms of the statute.[169] However, neither the constitutional text, nor the PLRA's language or legislative history[170] supports construing the immediate termination provisions in this manner.[171] The only benefit of adopting the Second Circuit panel's construction is to avoid the serious constitutional implications lurking underneath.[172]

Accordingly, at this point of the analysis, the constitutional text neither supports nor proscribes the power of Congress to place limitations on the federal courts' equity jurisdiction or equitable powers when they are adjudicating a constitutional right. Because the separation of powers doctrine is a structural hallmark of the Constitution (and thus, not expressly articulated therein), textual restraints on the enactment of statutes such as the PLRA termination provisions would not be expected. To find such restraints, one must search beyond the text for relevant historical and structural arguments that may better inform the analysis.

C. *Lessons from History*

The Federalist Papers provide a starting point for conducting a historical analysis. Exploration of *The Federalist Papers* leads to a consideration of the courts' equity jurisdiction, which the Framers developed from English roots. The nature of this equity jurisdiction demonstrates that the federal courts possess inherent equitable powers that resist congressional regulation. Constitutional history suggests that the PLRA immediate termination provisions impermissibly invade the federal courts' inherent equitable powers in violation of the separation of powers doctrine.

The Framers wanted to ensure that none of the three branches "possess directly or indirectly, an overruling influence over the others in the administration of their respective powers."[173] The Framers also were wary of the powers of the legislature and foretold that the legislature "can with greater facility, mask under complicated and indirect measures, the encroachments

169. *See supra* notes 140-52 and accompanying text (describing and analyzing Second Circuit panel's construction).

170. *See supra* Part II (discussing PLRA's language and legislative history).

171. *But see* Benjamin II, 172 F.3d 144, 171-84 (2d Cir. 1999) (en banc) (Calabresi, J., concurring) (concluding that PLRA's language and legislative history support such reading of statute).

172. *See id.* at 174-78 (Calabresi, J., concurring) (identifying separation of powers problem in majority's interpretation of PLRA immediate termination provisions).

173. THE FEDERALIST No. 48, at 250 (James Madison) (Garry Will ed., 1982).

which it makes on the co-ordinate departments."[174] Within this overall argument for the separation of powers doctrine as an indispensable structural hallmark of the new federal government, the Framers included passages suggesting that Congress violates the Constitution when it enacts legislation that places limitations on an Article III court's equitable powers.

Specifically, the Framers described the judiciary's use of rules of construction in its exercise of discretion in the following manner: "It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of law."[175] The Framers envisioned a fairly strict wall of separation between the branches that would render the discretion accorded to the federal courts impervious to assault by the legislature. Indeed, the practice of subjecting the judiciary's rulings to revisions by the legislature was practiced neither in Great Britain nor in the various state legislatures in existence at the time of the Constitution's ratification[176] and was not contemplated in the new government.[177] Consequently, the Framers understood that "[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."[178] This limitation exists because the legislature "prescribes the rules by which the duties and rights of every citizen are to be regulated," but the judiciary is empowered to interpret the laws – a function that "is the proper and peculiar province of the courts."[179]

Thus, the Framers intended that the judiciary's core adjudicative function be free from legislative alteration. Decisionmaking, an essential element of

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174. *Id.* at 251; *accord* Buckley v. Valeo, 424 U.S. 1, 122 (1976) ("The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.").

175. THE FEDERALIST NO. 78, at 396 (Alexander Hamilton) (Garry Will ed., 1982).

176. *See id.* NO. 81, at 411 (Alexander Hamilton) ("It is not true . . . that the parliament of Great Britain, or the legislatures of the particular states, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory neither of the British, nor the state constitutions, authorises the revisal of a judicial sentence, by a legislative act.").

177. *See id.* at 410 ("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.").

178. *Id.*; *accord* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-26 (1995) (providing extensive history of understanding that Legislature is not to revise Judiciary's rulings); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948) ("Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government.").

179. THE FEDERALIST NO. 78, at 393, 395 (Alexander Hamilton) (Garry Will ed., 1982).

the judiciary's adjudicatory powers, was to be left within the province of Article III courts. The historical nature of the equity jurisdiction of the lower federal courts, adopted from England, then becomes relevant to the analysis.

The English judicial system heavily influenced the American system. For example, American jurisprudence borrows from that which existed in Great Britain.[180] In discussing the right to a jury trial, the Framers believed that "the separation of the equity from the legal jurisdiction is peculiar to the English system of jurisprudence; which is the model that has been followed in several of the states."[181] The Framers thought that "great advantages result from the separation of the equity from the law jurisdiction."[182] However, in crafting Article III, the Framers chose to join the two jurisdictions in one resident tribunal, rather than adopt the separation of law and equity that existed in England at the time.[183] Irrespective of this joinder, American concepts of equity jurisprudence stem from English roots.[184] Indeed, the Supreme Court has consistently reaffirmed the understanding that:

> [o]riginal jurisdiction in equity, in a particular class of cases, conferred by the constitution on this court, has been interpreted to impose the duty to adjudicate according to such rules and principles as governed the action of the court of chancery in England, which administered equity at the time of the emigration of our ancestors, and down to the period when our constitution was formed. And when the constitution of the United States conferred that jurisdiction on this court, it cannot be construed to exclude the power possessed and constantly exercised by every court of equity then known, to use its discretion to award or refuse costs, as its judgment of the right of the case, in that particular, might require.[185]

Equity courts arose in England during the fourteenth century, although the Court of Chancery itself did not appear until the fifteenth century, when the volume of petitions necessitated a separate court.[186] Equity courts were designed to provide remedies in those situations in which the award of mone-

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180. *See, e.g., id.* NO. 83, at 426 (Alexander Hamilton) ("In this state our judicial establishments resemble more nearly, than in any other, those of Great-Britain. We have courts of common law, courts of probates (analogous in certain matters to the spiritual courts in England) a court of admiralty, and a court of chancery.").

181. *Id.* at 430.

182. *Id.* at 429.

183. *See* HENRY J. ABRAHAM, THE JUDICIAL PROCESS 16 (2d ed. 1968).

184. *See* Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 382 n.26 (1949) ("Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected.").

185. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 462 (1855).

186. *See* ABRAHAM, *supra* note 183, at 16.

tary damages by a law court failed to remedy the harm.[187] These remedies took the form of decrees rather than judgments.[188]

The courts did not consider themselves to be "administer[ing] any body of substantive rules that differed from the ordinary law of the land."[189] They were "administering the law but they were administering it in cases which escaped the meshes of the ordinary courts."[190] For example, a plaintiff might claim to be entitled to a remedy, but because of some other factor such as poverty, age, health, relative wealth, or fraud, the plaintiff is unable to utilize the procedures found in the ordinary law courts to procure the relief.[191] Of course, the courts were not permitted to overstep their bounds by becoming adjudicators of the substantive laws the plaintiff's complaint implicated.[192] That kind of adjudication was within the province of the law courts.

Although the sources of the chancery process are still imperfectly known, there was undoubtedly some connection to the common law.[193] During the course of the sixteenth century, "rules of equity and good conscience"[194] developed, allowing the Chancellor to rule according to the dictates of his conscience.[195] The adjudicatory process was fluid and informal, based entirely on individual discretion and not on any theory of judicial precedent. That is, the court decided cases without much reference to written authority. The court resorted to analogies from the common law or generally accepted maxims of jurisprudence when appropriate.[196]

Over time, the power of the Chancery Court gradually increased. Although it never asserted superiority over courts of law, it could, for example, hold that a judgment was wrongly granted, thereby finding that it would be inequitable for a party to enforce it.[197] Because the judgment itself was not annulled, the Chancery Court essentially prevented parties from further relief in the courts of law; however, law courts were not empowered to do the same to the Chancery Court.[198]

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187. *See id.*; H. G. HANBURY, ENGLISH COURTS OF LAW 138 (1960).

188. *See* ABRAHAM, *supra* note 183, at 17; HANBURY, *supra* note 187, at 128.

189. F. W. MAITLAND, EQUITY: A COURSE OF LECTURES 5 (1936).

190. *Id.*

191. *See id.* at 4-6.

192. *See id.* at 6.

193. *See* LORD NOTTINGHAM'S 'MANUAL OF CHANCERY PRACTICE' AND 'PROLEGOMENA OF CHANCERY AND EQUITY' 23 (D. E. C. Yale ed. 1965).

194. MAITLAND, *supra* note 189, at 8.

195. *See* HANBURY, *supra* note 187, at 128; MAITLAND, *supra* note 189, at 8.

196. *See* ABRAHAM, *supra* note 183, at 17; HANBURY, *supra* note 187, at 129; MAITLAND, *supra* note 189, at 8-9; NOTTINGHAM, *supra* note 193, at 16.

197. *See* MAITLAND, *supra* note 189, at 9.

198. *See id.* at 10.

Equity also acted *in personam*.[199] The predominate characteristic of equity procedure was the personal constraint of the defendant.[200] In acting against the defendant *in personam*, equity demanded that the defendant appear before the court pursuant to the plaintiff's complaint so that the defendant's conscience could be examined by the Chancellor.[201] Once in court, the defendant would be examined under oath and was subject to the direction of the court.[202] The inquiry focused on the defendant because the court was concerned with the defendant's conscience rather than the plaintiff's rights.[203]

If the court were satisfied that damages would be an inadequate remedy, it would issue a decree forbidding the defendant from commencing or continuing the complained-of conduct.[204] For example, in the area of contracts, it might decree specific performance, cancel the contract, or even reconcile conflicting written documents.[205] However, "[w]hat equity gave only equity could take away."[206] Thus, for example, if a mortgagee, once having obtained the relief of equity of redemption before the Chancery Court, wished to rid itself of that remedy, it could do so only by obtaining another remedy from the Chancery Court, the decree of foreclosure.[207]

Beginning in 1672, equity gradually became a system of precedents, resembling more and more the functioning of the courts of law and consequently, the common law.[208] Moreover, the legislature began codifying certain aspects of the equity jurisdiction. For example, the power to order the specific restitution of chattel was given to the common law action of detinue in 1854.[209] Also in 1854, the legislature granted injunctive and specific performance powers to common law courts, and in 1858, the legislature gave the Chancery Court the ability to order the payment of damages, thereby presaging the eventual joinder of equity and law in 1875.[210]

At least four general principles can be ascertained from the preceding discussion of equity jurisdiction in England. First, equity jurisdiction was rooted

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199. *See* NOTTINGHAM, *supra* note 193, at 17.

200. *See id.* at 19.

201. *See id.* at 22; MAITLAND, *supra* note 189, at 5.

202. *See* MAITLAND, *supra* note 189, at 5; NOTTINGHAM, *supra* note 193, at 23.

203. *See* NOTTINGHAM, *supra* note 193, at 22-23.

204. *See* ABRAHAM, *supra* note 183, at 17; HANBURY, *supra* note 187, at 138.

205. *See* HANBURY, *supra* note 187, at 138.

206. *Id.* at 139.

207. *See id.*

208. *See id.* at 137.

209. *See id.* at 138. Detinue was a common law action for the wrongful detention of personal property.

210. *See id.* at 142; MAITLAND, *supra* note 189, at 15.

essentially in the decisionmaker's discretion. This discretion was not unbridled; rather, it was circumscribed by its focus on fashioning a fair remedy to the situation presented by the facts. Equity jurisdiction often used analogies from the common law or applied generally accepted maxims of jurisprudence. Second, equity courts acted in those situations in which courts of law could not provide relief, but equity courts were in no way superior to either the law courts or the law. Third, only the entrance of another, counterbalanced remedy by the original issuing court alleviated equitable relief, once decreed. Last, equitable remedies could be codified by the legislature to enshrine in statutory form the powers exercised through equity jurisdiction. These principles suggest that equitable powers were considered by the English to be inherent to the very conception of equity courts. The power to afford equitable relief and the form of equitable relief were fundamental to equity jurisdiction, and both were aspects of the power of the equity court. These powers, broad in scope and effect, were intended to be flexible so that equity courts could fashion appropriate remedies.

By adopting the English judicial system, the Framers incorporated these same principles into the federal courts' equity jurisdiction.[211] Although all federal courts except the Supreme Court are created by acts of Congress, the federal courts' equity jurisdiction is an inherent component of their structure and should remain impervious to legislative regulation once created. Accordingly, under the general equitable principles discussed above, although Congress may codify the traditional equitable remedies offered by a federal court in its exercise of equity jurisdiction, it may neither expand nor limit those powers.

But the foregoing argument, taken to its logical end, would mean that Congress may not alter the equitable powers of a federal court for *any and all* cases arising under the first category of federal judicial power, namely, the Constitution, federal laws, and treaties. Surely it would be counterintuitive to have a system of government in which Congress cannot dictate the terms

211. *See, e.g.*, THE FEDERALIST NO. 83, at 426 (Alexander Hamilton) (Garry Will ed., 1982) ("In this state our judicial establishments resemble more nearly, than in any other, those of Great-Britain. We have courts of common law, courts of probates (analogous in certain matters to the spiritual courts in England) a court of admiralty, and a court of chancery."). *See also* Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 119 S. Ct. 1961, 1972 (1999) (stating that First Congress borrowed from English Court of Chancery "in conferring equitable powers on the federal courts"); *id.* at 1976 (Ginsberg, J., dissenting) ("From the beginning, we have defined the scope of federal equity in relation to the principles of equity existing at the separation of this country from England."); Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563, 568 (1939) (holding that jurisdiction conferred on federal courts by Judiciary Act of 1789 over all suits in equity "is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries").

and conditions of rights and benefits it has itself created – and the Supreme Court has held so.[212] This Article argues that a separation of powers violation occurs only when a federal court is adjudicating rights derived from the Constitution.

There is a marked distinction between cases that arise under the Constitution and those that implicate federal laws and treaties. When Congress legislates to limit the remedial powers of an Article III court in cases arising under a federal law or treaty, it is either creating the federal right or benefit for the first time or amending a previously enacted federal right or benefit. If a statute creates a federal right or benefit for the first time and simultaneously limits the courts' equitable powers, there would be no impediment to Congress's legislating in that manner, so long as the other internal and external restraints of the Constitution are met:

> [W]hen Congress creates a statutory right, it clearly has discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created.[213]

Alternatively, if the statute limits the power of a federal court to afford equitable relief pertaining to a previously enacted federal right or benefit, the amended statute can be construed as having been the one Congress intended to enact in the first place. With respect to statutes that limit the courts' equity jurisdiction in cases arising under federal statutes, the Supreme Court has stated:

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.[214]

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212. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 80 (1982) ("[I]t is clear that when Congress creates a substantive federal right, it possess substantial discretion to prescribe the manner in which that right may be adjudicated.").

213. *Id.* at 83 (footnote omitted).

214. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (reviewing enforcement proceeding brought pursuant to Emergency Price Control Act); *see also* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 576 n.9 (1984) ("[A] district court cannot enter a disputed modification of a consent decree in Title VII litigation if the resulting order is inconsistent with that statute. Thus, Title VII necessarily acted as a limit on the District Court's authority to modify the decree over the objections of the City; the issue cannot be resolved

Thus, in essence, no encroachment has occurred because Congress could always have enacted the amended version of the federal right or benefit when the statute was originally enacted. And by making it clear that the courts' equity jurisdiction is being restricted in cases arising under a federal statute, Congress is exercising its constitutional prerogative to place limitations on the scope of federal rights it has created.

By contrast, cases arising under the Constitution necessarily must be different because the document itself, not Congress, has created the federal right or benefit. Moreover, the document that creates the right is also the origin of the federal courts' existence. The Supreme Court has observed that "[i]n such a situation, substantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress's power to define rights that it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power."[215] Accordingly, Congress is powerless to alter the scope of those rights and benefits, unless it does so through a duly enacted constitutional amendment.

The PLRA immediate termination provisions violate the separation of powers doctrine because prison conditions lawsuits seek equitable relief pursuant to rights guaranteed by the Constitution. In enacting these provisions, Congress has prescribed substantive and procedural rules that govern how federal courts treat their issuance of prospective relief when a constitutional right is at stake. This type of rulemaking impermissibly invades the courts' inherent equitable powers.

Moreover, Congress's action has an overruling influence over the administration of justice in the federal courts. Regardless of whether Congress adopts the Second Circuit's interpretation that the immediate termination provisions are regulating the scope of the federal courts' subject matter jurisdiction, Congress is accomplishing indirectly what it may not accomplish directly. If Congress cannot directly control the Judiciary by requiring the courts to render decisions according to its own views, it should not be able to do so indirectly by regulating their equitable powers. While Congress may enact legislation to terminate consent decrees issued by federal courts for the remedying of statutory violations, it may not do so for those rendered to remedy constitutional violations without impermissibly invading the courts' inherent equitable powers.

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solely by reference to the terms of the decree and notions of equity."); System Federation No. 91 v. Wright, 364 U.S. 642, 651 (1961) ("[T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce.").

215. *Northern Pipeline*, 458 U.S. at 83-84.

D. Acknowledging a Significant Structural Impediment

Despite the foregoing historical analysis, the fact remains that the Supreme Court has affirmed the power of Congress to regulate the equity jurisdiction of Article III courts to some degree. Congress expressly authorized the equity jurisdiction of the inferior federal courts in 1792 when it "provided that the modes of proceeding in equity suits shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of law."[216] Moreover, the Supreme Court also made clear that its understanding of equity jurisdiction was that it was "subject, of course, to the provisions of the acts of congress, and to such alterations and rules as in the exercise of the powers delegated by those acts, the courts of the United States may, from time to time, prescribe."[217] The Supreme Court consistently recognized this concurrent power to regulate the equity jurisdiction of the federal courts throughout the nineteenth century.[218]

However, in the 210 years since the ratification of the Constitution, the balance of power between the two branches has shifted in such a way that Congress may no longer exercise this power to regulate a federal court's equity jurisdiction. The structure of the American constitutional government has changed. Equitable remedies for violations of constitutional rights have taken on a different meaning altogether. One formidable structural obstacle that indicates that this has happened is the line of cases beginning with the Supreme Court's landmark opinion in *Brown v. Board of Education. (Brown I).*[219] After the institutionalization of this body of precedent, Congress may not summarily act to expand or limit a federal court's equity jurisdiction in cases arising under the Constitution, except through a constitutional amendment.

In what is now a familiar story, Chief Justice Warren, writing for a unanimous Court, delivered the opinion that found "separate but equal" offensive to the Equal Protection Clause of the Fourteenth Amendment.[220] This singular decision made the federal judiciary's use of its inherent equitable powers to provide appropriate relief to remedy constitutional violations explicitly consti-

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216. Boyle v. Zacharie, 31 U.S. (6 Pet.) 648, 658 (1832).

217. *Id.*

218. *See, e.g.*, Noonan v. Lee, 67 U.S. (2 Black) 499, 509 (1862) ("The equity jurisdiction of the Courts of the United States is derived from the Constitution and Laws of the United States. Their powers and rules of decision are the same in all the States. Their practice is regulated by themselves, and by rules established by the Supreme Court. This Court is invested by law with authority to make such rules."), *overruled in part by* Hornbuckle v. Toombs, 85 U.S. 648 (1873).

219. 347 U.S. 483 (1954).

220. Brown v. Board of Education, 347 U.S. 483, 495 (1954) (finding "separate but equal" impermissible) [hereinafter Brown I].

tutional.[221] Since 1954, federal courts repeatedly have invoked *Brown* in crafting equitable decrees designed to afford substantive remedies for constitutional violations in areas pertaining to schools,[222] public housing authorities,[223] police and firefighting forces,[224] mental hospitals,[225] and, of course, prisons.[226]

In doing so, courts have strived to fashion remedies whose scope is determined by the nature and extent of the constitutional violation:

> The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself. Because of this *inherent* limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation.[227]

Indeed, after some forty years of jurisprudence, the federal courts themselves have established and institutionalized a coherent set of rules and principles by which they monitor their issuance of equitable decrees to remedy constitutional violations. These rules focus on three factors:

> [First,] the nature of the [equitable] remedy is to be determined by the nature and scope of the constitutional violation. The remedy must therefore be related to the condition alleged to offend the Constitution. Second, the decree must indeed be remedial in nature, that is, it must be designed as nearly as possible to restore the victims of [unconstitutional] conduct to the position they would have occupied in the absence of such conduct. Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.... *Once invoked, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.*[228]

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221. Commentators have questioned whether federal courts actually do possess the inherent authority to impose broad, institutional reform upon governmental institutions through equitable decrees. *See, e.g.*, John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 8 CALIF. L. REV. 1121 (1996) (arguing that Constitution does not permit federal courts to exercise remedial powers to engage in structural reform of state and local institutions). This Article, however, does not question the propriety of the Supreme Court's jurisprudence in this area as expressed in *Brown I* and its progeny.

222. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267 (1977).

223. *See, e.g.*, Hills v. Gautreaux, 425 U.S. 284 (1976).

224. *See, e.g.*, Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).

225. *See, e.g.*, Thomas S. v. Flaherty, 902 F.2d 250 (4th Cir. 1990).

226. *See, e.g.*, Hutto v. Finney, 437 U.S. 678 (1978).

227. *Milliken*, 433 U.S. at 281-82 (emphasis added).

228. *Id.* at 279-81 (internal citations and quotations omitted) (emphasis added); *see also*

In the case of modifying or terminating consent decrees, the current constitutionalized standards are found in a pair of cases, one of which involved prison conditions. In *Rufo v. Inmates of the Suffolk County Jail*,[229] the county sheriff filed a motion to modify a consent decree requiring the construction of a new jail. The Court held that requests to modify a previously entered consent decree were to be analyzed by placing the burden on the party seeking the modification of a consent decree. The plaintiff had to establish that a significant change in law or fact warranted a departure or revision from the terms of the original decree.[230] The opinion did not expressly address a party's request to terminate consent decrees. However, the Court's holding can be interpreted to allocate the burden of proof and the concomitant substantive requirement of demonstrating a significant change in law or fact on the party seeking to terminate the decree.

Alternatively, in *Board of Education v. Dowell*,[231] the Court specifically addressed requests by school boards to terminate court-ordered decrees that imposed a desegregation plan. The Court directed district courts, when reviewing the request to terminate the decree, to "address [themselves] to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable."[232] Adapted to the context of prison conditions litigation, a court might have to determine "whether the [prison] had complied in good faith with the consent decree since it was entered, and whether the alleged constitutional violation had been eliminated to the extent practicable."

Notably, in drafting the narrow tailoring requirements of the immediate termination provisions, Congress did not simply codify the rules and principles that the federal courts used in affording equitable relief. Courts have characterized these requirements as being equivalent to Supreme Court precedents dictating that relief be limited to the extent of the constitutional injury.[233] However, it is not, and has never been, the federal courts' practice

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Brown v. Board of Education, 349 U.S. 294, 300 (1955) [hereinafter Brown II] ("In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power.") (footnotes omitted).

229. 502 U.S. 367 (1992).

230. *See* Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 383 (1992).

231. 498 U.S. 237 (1991).

232. Board of Education v. Dowell, 498 U.S. 237, 249-50 (1991).

233. *See, e.g.*, Imprisoned Citizens Union v. Ridge, 169 F.3d 178, 188 (3d Cir. 1999) ("[T]he PLRA amounts to little more than a codification of already-existing rules governing judicial interference with prisons."); Green v. Peters, No. 71 C 1403, 1997 WL 769458, at *11-

to terminate consent decrees absent certain factual findings. The remedial authority is much broader and more sensitive to the factual circumstances underlying the need for equitable relief: it vests discretion in a federal court to fashion a decree that is peculiarly appropriate to the situation present before the court at the time when the decree is entered. The Supreme Court has described the use of consent decrees in the following manner:

> [A] consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction. Furthermore, consistent with this requirement, the consent decree must "com[e] within the general scope of the case made by the pleadings" and must further the objectives of the law upon which the complaint was based. However, in addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree. Therefore, a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.[234]

At the very least, the PLRA immediate termination provisions place the burden of proof on the wrong party because the purpose of the courts in revisiting and supervising consent decrees is to "apply its powers and processes on behalf of the party who obtained that equitable relief" in the first instance.[235] Instead of allocating the burden of proof to the party seeking termination of the consent decree, the termination provisions require the party opposing the termination to create a record from which the court can sustain the consent decree. Moreover, for pre-PLRA consent decrees, none of the parties would have given any thought at the time when the decree was entered to creating a record that would satisfy today's narrow tailoring requirements of the statute.

Brown I and its progeny are not just a body of precedent; they have become an institutionalized part of the Article III judicial power. This power of federal courts to afford equitable relief in cases arising under the Constitution has become an inherent component of their equity jurisdiction that has forever altered the balance of power between the Legislature and the Judiciary. The rules and principles developed by the federal courts over the last four decades have been carefully crafted to recognize the Judiciary's self-

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12 (N.D. Ill. Dec. 5, 1997) (citing Supreme Court cases defining scope of equitable remedies) (mem.), *reconsideration granted in part and denied in part on other grounds*, 1998 WL 246487 (N.D. Ill. Apr. 27, 1998) (mem.).

234. Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) (quoting Pacific R.R. v. Ketchum, 101 U.S. 289, 297 (1879)) (additional citations omitted).

235. System Federation No. 91, Ry. Employees' Dep't v. Wright, 364 U.S. 642, 647 (1961).

imposed limitations in adherence to the two fundamental doctrines of separation of power and federalism. As Justice Clarence Thomas has stated:

> Article III courts are constrained by the inherent constitutional limitations on their powers. There simply are certain things that courts, in order to remain courts, cannot and should not do. There is no difference between courts running school systems or prisons and courts running executive branch agencies.[236]

This structural shift in the balance of power obstructs Congress's desire to restrict the equitable powers of an Article III court. The federal courts' equity jurisprudence, as applied to violations of the Constitution, now rests in the federal courts. Only the federal courts themselves may define the scope of the equitable relief afforded. For Congress to restrict those remedial powers in the absence of a constitutional amendment overturning *Brown I* and its progeny is tantamount to an unconstitutional encroachment upon the province of the Judiciary and thus, a violation of the separation of powers doctrine.

E. Some Final Thoughts

This Article has argued that when federal courts adjudicate constitutional claims the PLRA immediate termination provisions are impermissible under the Constitution from the perspective of its text, history, and structure. The plain text of the Constitution neither supports nor proscribes the power of Congress to place limitations solely on the exercise of a federal court's equity jurisdiction. However, the Framers' writings during the ratification period indicate that they intended the judiciary's core adjudicatory function to be regulated by the courts themselves through the exercise of discretion, and not regulated by Congress through legislation. In addition, the nature of equity jurisdiction in England and its subsequent adoption by the Framers suggest that the federal courts derive their adjudicatory powers from the Constitution itself and possess the same inherent equitable powers of England's Chancery Court. Consequently, Congress may codify the traditional equitable remedies offered by a federal court in its exercise of equity jurisdiction, but it may neither expand nor limit those powers in cases arising under the Constitution.

Finally, Congress historically has regulated the equity jurisdiction in some manner, but *Brown v. Board of Education* and its progeny have permanently altered the balance of power between Congress and the Article III courts when the federal courts use their equity jurisdiction to adjudicate constitutional rights. Thus, although Congress could have altered the equity jurisdic-

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236. Missouri v. Jenkins, 515 U.S. 70, 132-33 (1995) (Thomas, J., concurring).

tion of the federal courts during the early days of the Republic, it is now impossible because of the institutionalization of the body of caselaw beginning with *Brown I*.

The foregoing analysis of the constitutional text, history, and structure reveals that the separation of powers doctrine is violated when Congress encroaches upon an Article III court's equitable powers in cases adjudicating a constitutional right. "The Federal Judiciary was . . . designed by the Framers to stand independent of the Executive and Legislature – to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial."[237] This conclusion also creates a bright-line rule that Congress may not legislate to regulate, in any manner, the core equitable decisionmaking functions of federal courts when those courts are adjudicating a constitutional right. The rule does not depend on potentially ambiguous definitions or on the application of an analogy. The rule underscores the notion that the source of the underlying right, rather than the nature of the remedy, is relevant to a separation of powers analysis. The plaintiff who seeks to vindicate individual constitutional rights must focus on establishing his/her right to relief before claiming any particular remedy. So, too, courts should focus on the right to relief.

Although such bright-line rules are necessarily both over- and under-inclusive, perhaps such rules approach separation of powers problems prudently by erecting "high walls and clear distinctions" on the theory that "[g]ood fences make good neighbors."[238] For the same reason that the Supreme Court should not encroach upon Congress by legislating under the guise of interpreting the laws,[239] Congress should be similarly constrained from adjudicating under the guise of making the laws. And, as Judge Calabresi remarked towards the end of his concurrence in *Benjamin II*, it is the Judiciary that must take a firm position on this:

> [W]e cannot rely on any other institution of government to guard the formal boundaries. It is illusory to expect that the legislature or the executive will mind the fence, especially when it is the judiciary's symbolic

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237. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982).

238. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995). *But cf. id.* at 240 (Breyer, J., concurring in judgment) (expressing concern that "the unnecessary building of such walls is, in itself, dangerous, because the Constitution blends, as well as separates, powers in its effort to create a government that will work for, as well as protect the liberties of, its citizens" (citing THE FEDERALIST NO. 48 (James Madison))).

239. *See generally* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998). In these two milestone decisions rendered on the same day, the Supreme Court judicially created a heretofore unknown affirmative defense against claims of sexually hostile work environments brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

> terrain that is trespassed upon. It is equally illusory to count on the parties to care about formal Separation of Powers notions. When these notions do not affect the result, the parties will not be much interested. If the Separation of Powers – and especially that involving the judiciary – is to be protected in its formal and symbolic importance, the courts must be the guardians.[240]

Perhaps what is most troubling about the continued viability of legislation like the PLRA immediate termination provisions is the message it sends to Congress about the propriety of legislating the termination of consent decrees in other contexts. For example, combined with the current constitutional uncertainty of affirmative action decrees designed to remedy systemic discrimination, there may be few limitations on Congress terminating such decrees in cases involving public authorities or higher education institutions. Even if an affirmative action decree were to be found constitutional under the standards of the Equal Protection Clause, Congress may nonetheless be able to terminate it, for example, by the rules that it drafts regulating the court's ability to provide equitable relief.

Congress's recent efforts demonstrate that perhaps the federal government is approaching an "institutional crisis" wherein Congress and the Judiciary need rules as clear as those in *Plaut* and *Klein*.[241] This Article proposes one such rule.

V. Conclusion

In an unprecedented manner, Congress has embarked to alter the landscape of prison conditions litigation by, among other things, curtailing the ability of the federal judiciary to afford equitable relief. The manner in which Congress has undertaken this endeavor raises serious constitutional concerns that have only been touched upon by an examination of the immediate termination provisions.

These provisions are a relatively clear application of the analysis presented in this Article. These provisions exemplify, more clearly than any of the other provisions in the statute, the type of legislation proscribed by the proposed separation of powers analysis. These provisions also have been the subject of much interesting litigation and varied interpretation across a spec-

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240. Benjamin II, 172 F.3d 144, 191 (2d Cir. 1999) (en banc) (Calabresi, J., concurring) (footnote omitted).

241. For an informative and thought-provoking analysis of the intertwining between the Judiciary and the Legislature, see Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165 (1996) (proposing creation of Interbranch Commission on Law Reform and Judiciary that would review statutory proposals affecting Judiciary as well as procedural rule reforms).

trum of federal courts. This same analysis could likely be applied to other provisions in the PLRA, although no effort has been made to address them here. Indeed, as suggested in Part III, the statute's various provisions may suffer from additional constitutional infirmities, including federalism and other due process concerns. Moreover, the vexing question of what exactly happens to these consent decrees after the application of the PLRA remains; the status of the consent decrees once they are terminated pursuant to the PLRA is uncertain. Consequently, the future willingness of parties to enter into consent decrees or other settlements may be affected adversely by these provisions.

In certain cases, federal courts may be involved too heavily in the management and administration of prisons. Congress should be applauded for making strides towards enacting much needed reform in this area. However, a solution that violates one of the most fundamental aspects of the American constitutional scheme of government cannot be allowed to stand at the expense of cherished individual liberty and due process rights. Congress's current effort involves legislative regulation of the federal courts' equity jurisdiction in the very instances when the courts are adjudicating a federal constitutional right. This regulation cannot pass constitutional muster under the separation of powers analysis presented in this Article.

ESSAY