

THE PRISON LITIGATION REFORM ACT: A SEPARATION OF POWERS DILEMMA

I. INTRODUCTION

In 1995, Senate Majority Leader Bob Dole and Arizona Senator John Kyl introduced the initial version of the Prison Litigation Reform Act.¹ The general intent of the PLRA was to (1) stop frivolous prisoner lawsuits from muddling the federal court docket, and (2) return the control of prisons to the so-called "responsible parties," the state governments.² Senator Dole remarked that the PLRA would work to restrain "liberal Federal judges" who happened to find constitutional violations in every prisoner complaint.³ The thrust of the proposed legislation centered upon the presumption that prisons had become too comfortable as a result of the federal judiciary.⁴ Senator Spencer Abraham stated, "[p]eople 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."⁵

While the PLRA drew a number of supporters, it had its fair share of opposition. Senator Ted Kennedy voiced his concerns over the lack of in-depth analysis and debate over the PLRA and called the Act "far-reaching."⁶ In addition, Kennedy questioned

1. S. 1279, 104th Cong. (1995). Hereinafter, the Prison Litigation Reform Act will be referred to as the "PLRA."

2. 141 CONG. REC. S14,316 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham); see *Benjamin v. Jacobson*, 935 F. Supp. 332, 340 (S.D.N.Y. 1996) (stating that the municipal and state legislature should take care of their own correctional facilities), *aff'd in part and rev'd in part*, 124 F.3d 162 (2d Cir. 1997).

3. 141 CONG. REC. S14,414 (daily ed. Sept. 27, 1995) (statement of Sen. Dole).

4. See *Benjamin*, 935 F. Supp. at 341.

5. 141 CONG. REC. S14,419 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham).

6. 142 CONG. REC. S2296 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy). In addition to Senator Kennedy's remarks, a letter from Senators Thompson,

whether the effort to enact the PLRA as part of an omnibus appropriations bill was appropriate.⁷ Senator Paul Simon expressed his apprehension that the PLRA would actually lead to an increase in extensive litigation.⁸ Furthermore, Associate United States Attorney General John Schmidt testified before the Senate Judiciary Committee that the PLRA may interfere with final judgments producing an "unconstitutional encroachment" upon Article III courts.⁹ Despite such efforts, after a single Senate hearing before the Judiciary Committee, the PLRA was signed into law on April 26, 1996.¹⁰

The Act raised constitutional separation of powers concerns immediately after it was passed. As a result, prison rights activists began challenging the PLRA, especially the immediate termination provision.¹¹ The current status of PLRA litigation varies from circuit to circuit. As of November 1998, eight circuits had decided the PLRA was constitutional.¹² Three of these deci-

Jeffords, Kennedy, Biden, and Bingaman to Janet Reno specifically expressing their concern over the PLRA was introduced into the record. *Id.* at S2297.

7. *Id.* at S2296 (statement of Sen. Kennedy).

8. *Id.* at S2297 (statement of Sen. Simon).

9. *Id.* at S2297-2300 (testimony of Associate United States Attorney General John Schmidt). Senator Simon asked for unanimous consent to print relevant portions of Schmidt's testimony into the record. 142 CONG. REC. S2297 (daily ed. Mar. 19, 1996) (statement of Senator Simon).

10. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, 1321-66 (1996) (codified as amended at 18 U.S.C.A. § 3626 (West Supp. 1998)). For purposes of this Article, the relevant portion of the PLRA provides that:

In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

18 U.S.C.A. § 3626(b)(2) (West Supp. 1998). This portion of the PLRA is often referred to as the "immediate termination provision."

11. See, e.g., *Hadix v. Johnson*, 947 F. Supp. 1100 (E.D. Mich. 1996), *rev'd*, 133 F.3d 940 (6th Cir. 1998), *cert. denied*, *Hadix v. McGinnis*, 118 S. Ct. 2368 (1998); *Gavin v. Ray*, No. 4-78-CV-70062, 1996 WL 622556 (S.D. Iowa Sept. 18, 1996), *rev'd*, *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 2374 (1998).

12. See, e.g., *Hadix*, 133 F.3d at 942; *Zehner v. Trigg*, 133 F.3d 459 (7th Cir. 1997); *Klein v. Coblentz*, 132 F.3d 42 (10th Cir. 1997); *Dougan v. Singletary*, 129 F.3d 1424 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 2375 (1998); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2366 (1998); *Benjamin v. Jacobson*, 124 F.3d 162 (2d Cir. 1997); *Gavin*, 122 F.3d at 1081;

sions were reversals of district court rulings.¹³ However, an Arizona district court recently held that the Act violated the separation of powers doctrine and, thus, deemed the PLRA unconstitutional.¹⁴ In addition, in May 1998 a New Jersey District Court ruled the PLRA unconstitutional despite the fact the Second Circuit had upheld it.¹⁵ As of November 1998, *Taylor* and *Denike* were the only decisions ruling the PLRA to be unconstitutional that had not been overturned.

While a majority of the courts of appeals have validated the PLRA, their reasoning behind upholding its constitutionality varies by circuit.¹⁶ For example, the Second Circuit interprets § 3636(b)(2) as not terminating the underlying consent decree, but as "merely divest[ing] federal courts of jurisdiction to enforce prospective relief . . ."¹⁷ In comparison, the First Circuit stated the provision did not vacate the underlying decree, but actually terminated it.¹⁸ Finally, the Fourth and Eighth Circuits interpreted the statute to require "vacatur of the underlying decrees."¹⁹ The obvious disparity in interpretation along with the district court cases which have found the PLRA to be unconstitutional essentially assure review by the Supreme Court.²⁰

This Article argues that the district courts in *Hadix v. Johnson*,²¹ *Gavin v. Ray*,²² *Dougan v. Singletary*,²³ and *Taylor v.*

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

13. *Hadix*, 133 F.3d at 942; *Dougan*, 129 F.3d at 1426; *Gavin*, 122 F.3d at 1087.

14. *Taylor v. Arizona*, 972 F. Supp. 1239 (D. Ariz. 1997), *aff'd*, *Taylor v. United States*, 143 F.3d 1178 (9th Cir. 1998), *opinion withdrawn and reh'g granted en banc*, 158 F.3d 1059 (9th Cir. 1998).

15. *Denike v. Fauver*, 3 F. Supp. 2d 540 (D.N.J. 1998). *But see Benjamin*, 124 F.3d at 162.

16. *Green v. Peters*, No. 71C1403, 1997 WL 769458 (N.D. Ill. Dec. 5, 1997).

17. *Green*, 1997 WL 769458, at *5 n.1 (citing *Benjamin v. Jacobson*, 124 F.3d 162 (2d Cir. 1997)).

18. *Id.* (citing *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997)).

19. *Id.* (citing *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996)); *see also Gavin v. Branstad*, 122 F.3d 1081, 1087 (8th Cir. 1997) (stating that a consent decree is an executory form of relief that remains subject to later development), *cert. denied*, 118 S. Ct. 2374 (1998). This Article focuses on the PLRA as interpreted by the *Plyler* and *Gavin* courts. It should be noted that the Eleventh Circuit, in *Dougan v. Singletary*, 129 F.3d 1424, 1426-27 (11th Cir. 1997), followed their reasoning.

20. *See Stacey Heather O'Bryan, Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 VA. L. REV. 1189, 1190 (1997).

21. 947 F. Supp. 1100 (E.D. Mich. 1996), *rev'd*, 133 F.3d 940 (6th Cir. 1998),

Arizona,²⁴ were correct in holding that the PLRA violated the separation of powers principle espoused in the United States Constitution. Part II is a brief synopsis of the PLRA as passed. Part III examines how the immediate termination provision of the PLRA is an unconstitutional violation of the separation of powers doctrine. Section III.A. examines how the Act wrongfully disturbs the final judgments of Article III courts. Section III.B. explains why the PLRA does not fall within the "Wheeling exception" to the final judgments rule. Section III.C. considers how the immediate termination provision unlawfully prescribes rules of decision in pending cases. Finally, Part IV is a brief conclusion concerning the future of the PLRA.

II. THE PRISON LITIGATION REFORM ACT (PLRA)

The decision in *Swann v. Charlotte-Mecklenburg Board of Education*²⁵ opened the door for the federal judiciary to control prison reform. The Supreme Court granted lower courts a broad equitable power to remedy past wrongs once petitioners show a right and a violation of that right.²⁶ While *Swann* dealt specifically with school desegregation, courts have not been hesitant to extend its holding to allow them to construct remedial decrees redressing unconstitutional prison conditions.²⁷ Consequently, prisoners began filing lawsuits ranging from demands for redressing general sanitary conditions²⁸ and overcrowding,²⁹ to the right to wear Reeboks instead of Converse.³⁰ Supporters of

cert. denied, *Hadix v. McGinnis*, 118 S. Ct. 2368 (1998).

22. No. 4-78-CV-70062, 1996 WL 622556 (S.D. Iowa Sept. 18, 1996), *rev'd*, *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 2374 (1998).

23. *Dougan v. Singletary*, No. 81-11-CIV-J-10 (M.D. Fla.), *rev'd*, 129 F.3d 1424, (11th Cir. 1997), *cert. denied*, 118 S. Ct. 2375 (1998).

24. 972 F. Supp. 1239 (D. Ariz. 1997), *aff'd*, *Taylor v. United States*, 143 F.3d 1178 (9th Cir. 1998), *opinion withdrawn and reh'g granted en banc*, 158 F.3d 1059 (9th Cir. 1998).

25. 402 U.S. 1 (1971).

26. *See Swann*, 402 U.S. at 15.

27. BRADLEY STEWART CHILTON, *PRISONS UNDER THE GAVEL: THE FEDERAL TAKEOVER OF GEORGIA PRISONS* 43 (1991).

28. *Farmer v. Brennan*, 511 U.S. 825 (1994).

29. *LaMarca v. Turner*, 995 F.2d 1526 (11th Cir. 1993).

30. *See* 141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Reid). Proponents of the PLRA presented a "Top Ten" list of frivolous prisoner law-

prison litigation reform assert the argument that these frivolous lawsuits are clogging the federal court system.³¹ As a result of prisoner litigation, by 1995, thirty-nine states were under court order or consent decree to improve prison conditions and control population in their entire state system or at least in their major facilities.³² In addition, only three states have never incurred litigation challenging prison population and conditions.³³

The PLRA was a direct attempt by Congress to curb the post-*Swann* intervening powers of the federal courts and to stop frivolous prisoner lawsuits.³⁴ As a result, the PLRA has curtailed prisoner litigation from both sides of the judicial spectrum. For prisoners, the Act directly impacts a prisoner's right to access the federal courts to remedy alleged constitutional deprivations.³⁵ It forbids a prisoner from bringing a civil action if the prisoner has, on three or more prior occasions while in prison, brought an action which was subsequently dismissed on the grounds that it was frivolous, malicious, or it failed to state a claim upon which relief may be granted.³⁶

In addition, the Act restricts the power of the federal judiciary to grant relief in prisoner litigation.³⁷ The limiting power of the PLRA raises serious questions of whether Congress improperly overstepped its constitutional authority by performing a judicial function. As a result, three subsections of the PLRA have dominated PLRA litigation. First, the Act calls for prospective relief to be granted only with respect to prison conditions if such relief is "narrowly drawn," not overreaching, and is the "least intrusive means necessary" to correct the violation.³⁸ Second, the PLRA automatically stays any prospective relief subject

suits. Some of the cases included a prisoner suing for the right to have smooth peanut butter, a suit over the taking of a Nintendo Gameboy, and a suit in regards to a prisoner's right to eat ice cream. *Id.* at S14,629.

31. 141 CONG. REC. S14,413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole).

32. See ACLU, THE NATIONAL PRISON PROJECT (Jan. 1995).

33. *Id.*

34. See 141 CONG. REC. S14,413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole).

35. See 28 U.S.C.A. § 1915(g) (West Supp. 1997).

36. *Id.* For a thorough analysis of this portion of the Act, see Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You're Out of Court—It May Be Effective, But Is It Constitutional?*, 70 TEMP. L. REV. 471 (1997).

37. See 18 U.S.C.A. § 3626 (West Supp. 1998).

38. *Id.* § 3626(a).

to a pending motion beginning thirty days after such motion is filed.³⁹ Prospective relief subject to a pending motion ends on the date the court enters a final order ruling on the motion.⁴⁰ Finally, the Act orders the *immediate termination* of prospective relief where the relief is approved without a court finding that it 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."⁴¹ In other words, if a consent decree conferring prospective relief were not narrowly drawn and were not the least intrusive corrective means available, movants would be entitled to the termination of such relief.⁴² It is the constitutionality of this section, the immediate termination provision, that is the preferred target of PLRA opponents⁴³ and the focus of this Article.

III. SEPARATION OF POWERS—THE JUDICIARY, NOT CONGRESS, HAS THE POWER TO SAY WHAT THE LAW IS IN PARTICULAR CASES AND CONTROVERSIES

The separation of powers into three coordinate branches is fundamental to the guiding principles of this country.⁴⁴ Article III of the Constitution establishes a judicial department with the authority to say what the law is in particular cases and controversies.⁴⁵ Judgments of Article III courts may not be "revised, overturned or refused faith and credit by another Department of Government."⁴⁶ In *The Federalist*, Alexander Hamilton described the importance of the separation principle as one which was "requisite to guard the Constitution and the rights of individuals from the effects of those ill humors"⁴⁷ As recently

39. *Id.* § 3626(e)(2)(A)(i).

40. *Id.* § 3626(e)(2)(B).

41. *Id.* § 3626(b)(2).

42. See 18 U.S.C.A. § 3626(b)(2) (West Supp. 1998).

43. See *Green v. Peters*, No. 71C1403, 1997 WL 769458, at *5 n.1 (N.D. Ill. Dec. 5, 1997).

44. See *Mistretta v. United States*, 488 U.S. 361, 380 (1989).

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

46. *Plaut v. Spendthrift Farm*, 514 U.S. 211, 226 (1995) (quoting *United States v. O'Grady*, 89 U.S. 641, 647-48 (1875)).

47. THE FEDERALIST NO. 78, at 508 (Alexander Hamilton) (Bicentennial ed., 1976).

espoused by the First Circuit, the separation of powers doctrine is basic and vital to the livelihood of our constitutional system.⁴⁸

In *Plaut v. Spendthrift Farm*,⁴⁹ the Supreme Court reaffirmed the principle that Congress violates the separation of powers doctrine when it mandates the reopening of final judgments.⁵⁰ The issue in *Plaut* arose after the Supreme Court in *Lampf v. Gilbertson*⁵¹ shortened the limitations period for a securities dispute under section 10b of the Securities Exchange Act.⁵² In response to *Lampf*, Congress enacted legislation restoring the limitations period previously used.⁵³ In addition, the legislation provided for reinstatement of cases which had been dismissed as untimely after the Court's decision in *Lampf*.⁵⁴ Declaring the legislation unconstitutional, the Court stated, "[w]e know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason. The Constitution's separation of legislative and judicial powers denies it the authority to do so."⁵⁵

A. Consent Decrees Are Final Judgments of Article III Courts

The express language of *Plaut* makes it clear that Congress cannot tamper with the final judgments of the federal judiciary.⁵⁶ However, the question raised throughout PLRA litigation is whether a consent decree is a final judgment for separation of

48. *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 656 (1st Cir. 1997), cert. denied, 118 S. Ct. 2366 (1998).

49. 514 U.S. 211 (1995).

50. *Plaut*, 514 U.S. at 218-25. A final judgment is one that has "been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) (citation omitted).

51. 501 U.S. 350, 364 (1991).

52. *Lampf*, 501 U.S. at 364.

53. Securities Exchange Act of 1934, Pub. L. No. 102-242, sec. 476, § 27A(b), 105 stat. 2387 (1991) (codified as amended at 15 U.S.C. § 78aa-1(b) (1994)).

54. *Id.*

55. *Plaut*, 514 U.S. at 240.

56. *Id.*

powers purposes.⁵⁷ In *Rufo v. Inmates of Suffolk County Jail*,⁵⁸ a case addressing prison conditions in Massachusetts, the Supreme Court addressed the significance of consent decrees.⁵⁹ The Court described consent decrees as agreements that the parties expected to be enforced, and which are subject to the general rules of other judgments and decrees.⁶⁰ In addition, the court explicitly stated that a consent decree is considered a "final judgment that may be reopened only to the extent that equity requires."⁶¹ Supporters of the PLRA emphasize the last half of the statement, while those opposed to the PLRA point to the "final judgment" language of *Rufo*.⁶²

In *Gavin v. Branstad*,⁶³ prisoners combined the holdings of *Rufo* and *Plaut* to support their argument that the PLRA was unconstitutional.⁶⁴ In summary, the argument stated that *Rufo* placed consent decrees beyond the reach of congressional action because *Plaut* protects final judgments from legislative alteration.⁶⁵ However, the Eighth Circuit found that this was a misreading of the above decisions.⁶⁶ The court did not interpret *Plaut* to hold that final judgments were "invariably immune to congressional tinkering;" rather, it held that protection was afforded only to "the last word of the judicial department with regard to a particular case or controversy."⁶⁷ Therefore, according to the Eighth Circuit, the fact that a decree remains subject to later developments does not make it the "last word" of an Article III court and, in return, does not afford it the protection adopted in *Plaut*.⁶⁸

57. Compare *Taylor v. Arizona*, 972 F. Supp. 1239, 1245 (D. Ariz. 1997) (holding that a consent decree is a final judgment), *aff'd*, *Taylor v. United States*, 143 F.3d 1178 (9th Cir. 1998), *opinion withdrawn and reh'g granted en banc*, 158 F.3d 1059 (9th Cir. 1998), with *Dougan v. Singletary*, 129 F.3d 1424, 1426 (11th Cir. 1997) (holding that a consent decree is not the last word of judicial department; therefore, it is not a final judgment), *cert. denied*, 118 S. Ct. 2375 (1998).

58. 502 U.S. 367 (1992).

59. *Rufo*, 502 U.S. at 374.

60. *Id.* at 378.

61. *Id.* at 391 (emphasis added).

62. *Taylor*, 972 F. Supp. at 1245.

63. 122 F.3d 1081 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 2374 (1998).

64. *Gavin*, 122 F.3d at 1087.

65. *Id.*

66. *See id.*

67. *Id.*

68. *See id.*; see also *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 657

The Fourth Circuit has followed the same general reasoning of the Eighth Circuit. In *Plyler v. Moore*,⁶⁹ the court stated that an order providing injunctive relief remains subject to changes in the law, and therefore is not a final judgment for separation of powers purposes.⁷⁰ The court based its analysis upon a comparison of money damages and consent decrees.⁷¹ Unlike monetary awards, a consent decree must be modified if at some time it appears that the obligations placed upon one of the parties have become impermissible.⁷² Seemingly, the Fourth Circuit believed that the opportunity for judicial modification of a consent decree gives a corollary reconsideration power to the legislature. However, in *Plyler*, the court failed to present any authority to support its analysis.

The Eleventh Circuit has followed the reasoning of the Fourth and Eighth Circuits. In *Dougan v. Singletary*,⁷³ Florida prisoners challenged the termination of a consent decree regarding the opportunity for outdoor exercise.⁷⁴ Upholding the termination, the court followed the "last word" or "true final judgment" analysis enacted by other circuits.⁷⁵ While the court stated consent decrees were final judgments, it determined that they were not considered "true final judgments" for separation of powers purposes.⁷⁶ A "true" final judgment was not an appealable judgment, but one that represents the "last word of the judicial department with regard to a particular case or controversy."⁷⁷ Because the decree could be amended by the district court, the termination provision of the PLRA was held not to undermine the finality of an Article III court for separation of powers purposes.⁷⁸

(1st Cir. 1997) (holding the "termination of a consent decree in response to the PLRA, therefore, merely effectuates Congress's decision to divest district courts of the ability to construct or perpetuate prospective relief when no violation of a federal right exists"), *cert. denied*, 118 S. Ct. 2366 (1998).

69. 100 F.3d 365 (4th Cir. 1996).

70. *Plyler*, 100 F.3d at 371.

71. *Id.* at 372.

72. *Id.* (citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388 (1992)).

73. 129 F.3d 1424 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 2375 (1998).

74. *Dougan*, 129 F.3d at 1425.

75. *Id.* at 1426 n.9.

76. *Id.* at 1426.

77. *Id.* (quoting *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 227 (1995)).

78. *Id.*

However, in *Taylor v. Arizona*,⁷⁹ the court decided the immediate termination provision of the PLRA was unconstitutional for separation of power purposes.⁸⁰ The court, relying on the plain language of *Rufo*, considered consent decrees to be final judgments.⁸¹ In addition, a distinction between "true" final judgments and final judgments was not raised.⁸² The court stated that *Plaut* clearly defined final judgments as "judgments wherein the right to appeal has been exhausted, waived or elapsed."⁸³ Furthermore, the court said nothing about a possible exception for consent decrees and found that "there is no distinction between finality for appeal purposes and finality for separation of powers purposes."⁸⁴ In other words, when the time for an appeal under the Federal Rules of Civil Procedure has elapsed, a consent decree, like any other judgment, becomes final.

It is inconsistent with *Rufo* and *Plaut* for the federal courts of appeals to create this new subsection of "true" final judgments. The character of an injunctive judgment, such as a consent decree, does not compromise its finality and hence its immunity to legislative reopening. The fact that a court may alter a final judgment does not affect the finality of the judgment, nor does it affect the inability of Congress to tamper with it.⁸⁵ The court's ability to relieve the parties of a judgment's consequences does not make the judgment itself any less final.⁸⁶

In addition, *Plaut* does not overturn *Rufo*'s black-letter prin-

79. 972 F. Supp. 1239 (D. Ariz. 1997), *aff'd*, *Taylor v. United States*, 143 F.3d 1178 (9th Cir. 1998), *opinion withdrawn and reh'g granted en banc*, 158 F.3d 1059 (9th Cir. 1998).

80. *Taylor*, 972 F. Supp. at 1244-45; *see also* *Hadix v. Johnson*, 947 F. Supp. 1100 (E.D. Mich. 1996) (holding the PLRA violated constitutional separation of power principles by retroactively instructing federal courts to reopen final judgments), *rev'd*, 133 F.3d 940 (6th Cir. 1998), *cert. denied*, *Hadix v. McGinnis*, 118 S. Ct. 2368 (1998); *Gavin v. Ray*, No. 4-78-CV-70062, 1996 WL 622556 (S.D. Iowa Sept. 18, 1996) (concluding the automatic termination provision violates separation of powers principles), *rev'd*, *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 2374 (1998).

81. *Taylor*, 972 F. Supp. at 1244-45 (citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 391 (1992)).

82. *See id.*

83. *Id.* at 1245.

84. *Id.*

85. *See Plaut v. Spendthrift Farm*, 514 U.S. 211, 234-36 (1991).

86. *Balark v. City of Chicago*, 81 F.3d 658, 662 (7th Cir. 1996).

ciple that consent decrees are final judgments.⁸⁷ If the Supreme Court refused to make the contrasting analysis between consent decrees and "true" final judgments in *Plaut*, what gives the courts of appeals the authority or precedent to do it in PLRA cases? Consent decrees are a tool used liberally throughout the judicial system. In *Plaut*, the Supreme Court had an opportunity to exclude consent decrees as final judgments, or to create a new, higher level of final judgments called "true" final judgments. However, the Court did not even approach such a decision. Accordingly, the view of the Eighth, Fourth, and Eleventh Circuits that the separation of powers principle only affects "true" final judgments is without merit.

Furthermore, the analysis of *Plaut* strengthens the argument of those opposed to the PLRA. The holding of *Plaut* clearly establishes that a law that retroactively affects a final judgment of a court of the United States is unconstitutional.⁸⁸ The PLRA has clear retroactive effects because it "attaches new legal consequences to events completed before its enactment."⁸⁹ The PLRA subjects consent decrees, some of which have been in existence for more than a decade, to a re-opening requirement which was not in existence at the time the decree was entered into.⁹⁰ It is inherent within the founding principles of this country 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."⁹¹ The immediate termination provision of the PLRA explicitly reverses pre-existing prisoner litigation consent decrees.⁹² While Congress may require judges to specifically enumerate relief findings, it may not overturn pre-PLRA decrees already made in particular cases.

Through the passage of the immediate termination provision, Congress overrode exactly what the separation of powers doctrine set out to protect. When Congress abrogates a court's

87. See *Plaut*, 514 U.S. at 211.

88. See *id.* at 225.

89. *Taylor v. Arizona*, 972 F. Supp. at 1244 (quoting *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994)).

90. See *Taylor*, 972 F. Supp. at 1245.

91. THE FEDERALIST NO. 81, at 526 (Alexander Hamilton) (Edward Mead Earl ed., 1976).

92. 18 U.S.C.A. § 3626(e)(2)(B) (West Supp. 1998).

power to enforce an order, "[it] has invaded one of the most vital constitutional powers of the judiciary."⁹³ Just because consent decrees are subject to equitable judicial revision under Rule 60(b) of the Federal Rules of Civil Procedure⁹⁴ does not mean that Congress has identical or even comparable power to revise.⁹⁵ Rule 60(b) is not a legislative mandate to reopen cases, but merely a reflection of the *judicial* power to set aside consent decrees when equity requires such action.⁹⁶ While courts obviously have the power to correct and modify consent decrees, Congress has no such corresponding power.

The Framers of the Constitution felt it was necessary to separate the judicial and legislative powers because of the "vigorous, indeed often radical, populism of the revolutionary legislatures and assemblies [which] increased the frequency of legislative correction of judgments."⁹⁷ A brief examination of the legislative history of the PLRA illustrates a congressional intent to control "liberal Federal judges."⁹⁸ However, disagreements based upon political preferences do not provide a substantive basis to violate the separation of powers.⁹⁹ In fact, by correcting judicial decisions with legislative behavior, Congress was doing exactly what the Framers intended to protect against.¹⁰⁰ The PLRA violates the separation principle simply because Congress nullified a final judgment of an Article III court. The fact that Congress was purportedly acting with exemplary motives does not give it the power to overstep the constitutional boundaries of the separation of powers doctrine.

93. *Hadix v. Johnson*, 947 F. Supp. 1100, 1110 (E.D. Mich. 1996), *rev'd*, 133 F.3d 940 (6th Cir. 1998), *cert. denied*, *Haddix v. McGinnis*, 118 S. Ct. 2368 (1998).

94. FED. R. CIV. P. 60(b) governs consent decrees as well as other judgments. See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 379-81 (1992).

95. *Taylor*, 972 F. Supp. at 1245.

96. *Id.* (citing *Plaut v. Spendthrift Farm*, 514 U.S. 211, 234 (1991)).

97. *Id.* at 1249 (quoting *Plaut*, 514 U.S. at 219).

98. See *supra* notes 1-10 and accompanying text.

99. See *Taylor*, 972 F. Supp. at 1249.

100. *Id.*

*B. The PLRA Does Not Fall Under the
"Wheeling Exception"*

Even if consent decrees are considered final judgments for separation of powers purposes, supporters of the PLRA argue that the legislation passes constitutional muster under the antiquated "Wheeling exception."¹⁰¹ In *Pennsylvania v. Wheeling and Belmont Bridge Co.*,¹⁰² the Supreme Court awarded damages and issued an injunction ordering the removal or destruction of an Ohio River bridge because it was a public nuisance obstructing the free navigation of the river.¹⁰³ In response, Congress reopened the final judgment by enacting a statute declaring the bridge lawful.¹⁰⁴ After a storm destroyed the bridge, Pennsylvania cited to the injunction in an attempt to stop reconstruction.¹⁰⁵ However, the Supreme Court dissolved its initial injunction based on the new statute and allowed construction.¹⁰⁶ In upholding the statute, the Court noted a distinction between injunctive relief and money damages, and a distinction between the idea of a public versus a private right.¹⁰⁷

Since 1855, *Wheeling* has stood for the proposition that "an injunction is vulnerable to retroactive legislation only to the extent that it is based on 'public rights common to all.'"¹⁰⁸ Retroactive legislation affecting purely private constitutional rights

101. See *Benjamin v. Jacobson*, 124 F.3d 162, 171 (2d Cir. 1997); *Gavin v. Branstad*, 122 F.3d 1081, 1086 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 2374 (1998); *Plyler v. Moore*, 100 F.3d 365, 371 (4th Cir. 1996).

102. 59 U.S. (18 How.) 421 (1855).

103. *Wheeling*, 59 U.S. at 429.

104. *Id.*

105. *Id.* at 422.

106. *Id.* at 436.

107. *Id.* at 431-32. The Court explained Congress had the power to modify the injunction because the bridge was no longer causing an interference with the enjoyment of a public right inconsistent with the law. *Wheeling*, 59 U.S. at 431-32.

108. *Taylor v. Arizona*, 972 F. Supp. 1239, 1246 (D. Ariz. 1997), *aff'd*, *Taylor v. United States*, 143 F.3d 1178 (9th Cir. 1998), *opinion withdrawn and reh'g granted en banc*, 158 F.3d 1059 (9th Cir. 1998); see also *Hodges v. Snyder*, 261 U.S. 600 (1923) (interpreting *Wheeling* to make a distinction between public and private rights). *But see Gavin v. Branstad*, 122 F.3d 1081, 1088 (8th Cir. 1997) (describing the public/private distinction as "irrelevant" to the separation of power analysis), *cert. denied*, 118 S. Ct. 2374 (1998).

does not fall under the purview of *Wheeling*.¹⁰⁹ The PLRA does not fall under the "*Wheeling* exception" because the rights implicated by the act are purely private.¹¹⁰ "Constitutional rights inhere to the individual and, as such, they are the very antithesis of public rights."¹¹¹ In addition, the argument that the PLRA affects public rights because it addresses the deficiencies in the federal system is also without merit.¹¹² *Wheeling* focuses on the source underlying the consent decree or injunctive relief, not the source of the rights sought to be protected by the PLRA.¹¹³ Because the rights implicated in prisoner litigation are private constitutional rights, the PLRA does not fall under the umbrella of *Wheeling*.¹¹⁴

C. *The PLRA Prescribes a Rule of Decision*

In addition to unconstitutionally opening final judgments of Article III courts, the PLRA unlawfully prescribes a rule of decision in pending cases.¹¹⁵ In *United States v. Klein*,¹¹⁶ the Supreme Court decided that Congress may not direct a particular decision in a case without repealing or amending the law underlying the decision.¹¹⁷ In *Klein*, former Confederate soldiers who had subsequently been granted presidential pardons sued the United States for property confiscated during the Civil War.¹¹⁸ The soldiers relied on an earlier Supreme Court decision which held that such pardons had the effect of entitling the soldiers to fair and adequate compensation for the confiscated property.¹¹⁹ However, in response to the earlier decision, Congress enacted a

109. See *Taylor*, 972 F. Supp. at 1246.

110. *Id.*

111. *Id.*

112. See *id.*

113. See *id.*

114. See *Taylor*, 972 F. Supp. at 1246.

115. The district court cases which declared the PLRA unconstitutional began (and ended) their analyses with the final judgment issue; therefore, these courts did not discuss the rule of decision issue. See, e.g., *Taylor*, 972 F. Supp. at 1245-47.

116. 80 U.S. (13 Wall.) 128 (1872).

117. *Klein*, 80 U.S. at 146-47.

118. President Lincoln issued a proclamation offering a full pardon with restoration of all rights of property to all Confederates who would take and keep inviolate a prescribed oath. See *id.* at 139-40.

119. *Id.* at 132.

statute directing the courts to consider the pardons as conclusive evidence of disloyalty, thus resulting in an automatic dismissal of the claim.¹²⁰ The Act required the court to "ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill."¹²¹ Declaring the Act unconstitutional, the Supreme Court posed the following question: "[w]hat is this but to prescribe a rule for the decision of a cause in a particular way?"¹²² Furthermore, the Court explained that it was not within the power of the legislative branch to make exceptions and "prescribe regulations" to the appellate power of the judiciary.¹²³

The PLRA provides that prospective relief is to be vacated unless the order contains "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."¹²⁴ In other words, if the court determines there is an absence of narrowly tailored findings, the *substantive relief* properly ordered through valid processes then becomes invalid. This is notably similar to the situation in *Klein*.¹²⁵ Just as the congressional mandate at issue in *Klein* attempted to tell the courts that if certain facts existed (namely a pardon), their jurisdiction for appeal had ceased, the PLRA similarly prescribes a rule for the decision of a case in a particular way upon a factual finding. Here, Congress has unconstitutionally mandated the vacatur of a previously valid consent decree upon determining the absence of particular findings. Clearly, Congress is not ordering termination of prospective relief based upon substantive changes in the law, but instead is improperly dictating results upon changes in court procedure. In addition, the rule of decision mandated by the PLRA defies the language of *Rufo*.¹²⁶ In *Rufo*, the Court clearly stated that consent decrees are enforceable even if they provide greater relief than would be awarded at

120. *See id.* at 133-34.

121. *Id.* at 146.

122. *Klein*, 80 U.S. at 146.

123. *Id.*

124. 18 U.S.C.A. § 3626(b)(2) (West Supp. 1998).

125. *Klein*, 80 U.S. at 146.

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

trial.¹²⁷ In contrast, the PLRA prescribes the court to vacate decrees which extend further than necessary to correct the violation and may not be the least intrusive means necessary to correct the violation.¹²⁸

IV. CONCLUSION

The final determination of the PLRA will likely be resolved by the Supreme Court. Clearly, the plain language of the statute implicates serious separation of powers concerns. However, it is questionable whether the Court would rule against the view taken by the majority of circuits that the Act is constitutional. Nonetheless, it will be arduous for the Court to reconcile its holding in *Rufo* that a consent decree is a final judgment with the courts of appeals which have classified consent orders as final judgments, but not "true" final judgments.¹²⁹ Furthermore, the language in the statute seemingly mandates lower courts to determine the outcome of a case by a factual finding not related to the underlying constitutional violation.¹³⁰

The separation of powers doctrine has been a fundamental principle of the United States since the Constitution was originally composed. It is not a principle that is overlooked, disregarded, or dissected into smaller parts. In *Plaut*, the Court clearly reinforced the power that Article III has over our constitutional system.¹³¹ Describing the importance of the separation of powers doctrine, Justice Scalia stated, "[i]n its major features . . . it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict."¹³² If the Court validates the immediate termination provision, it is certainly laying a foundation of "low walls." If consent decrees are allowed to be controlled by Congress, there seems to be an absence of proper safeguards to ensure that other "final judgments" will not meet the same fate. There is no ques-

127. *Rufo*, 502 U.S. at 383.

128. 18 U.S.C.A. § 3626(b)(2) (West Supp. 1998).

129. *Rufo*, 502 U.S. at 383.

130. *See id.*

131. *See Plaut v. Spendthrift Farms*, 514 U.S. 211, 238-40 (1995).

132. *Plaut*, 514 U.S. at 239.

tion that prison litigation is a major factor in the overloaded federal docket. However, placing the legislature in the position of a federal judge is exactly what the PLRA does, and what the United States Constitution clearly forbids. The PLRA was hastily drafted and hastily passed. If upheld, the precedent set would severely undermine the long-standing fundamental separation principle. While not everyone agrees with liberal federal judges, Congress does not have the right to undermine their final judicial decisions. The PLRA may have been passed with good intentions, but its far-reaching nature cannot be reconciled with the power of Article III courts.

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