

RETAKING THE FIELD: THE CONSTITUTIONAL CONSTRAINTS ON FEDERAL LEGISLATION THAT DISPLACES CONSENT DECREES

BRIAN M. HOFFSTADT*

I. THE ELIMINATION AND MODIFICATION OF FEDERAL CONSENT DECREES	61
A. <i>Separation of Powers</i>	61
1. <i>Pending Cases</i>	63
2. <i>“Final” Cases</i>	70
a. <i>Cases Where No Prospective Relief Is Awarded</i>	70
b. <i>Cases Where Prospective Relief Is Awarded</i>	73
i. <i>Injunctive Relief</i>	73
ii. <i>Consent Decrees</i>	78
3. <i>Changes in the Law</i>	82
4. <i>The PLRA and the Telecommunications Act of 1996</i>	88
B. <i>Contract-Based Claims</i>	92
1. <i>The Takings Clause</i>	95
a. <i>Private Property</i>	95
b. <i>Taking</i>	97
2. <i>The Contracts Clause</i>	102
3. <i>The Due Process Clause</i>	102
C. <i>Remaining Constitutional Claims</i>	105
1. <i>Equal Protection Guarantee</i>	105
2. <i>Bill of Attainder Clause</i>	106
3. <i>Ex Post Facto Clause</i>	107
II. THE ELIMINATION AND MODIFICATION OF STATE CONSENT DECREES	107
A. <i>Preemption and the Supremacy Clause</i>	108
B. <i>The Tenth Amendment</i>	113
III. THE STATUTORY REPLACEMENT FOR THE DECREES	117

* Counsel, Office of Policy Development, U.S. Department of Justice; Adjunct Professor of Law, George Washington University Law School. Although the author was clerking on the Supreme Court when a number of the cases discussed in this Article were handed down and was subsequently involved in litigating the constitutionality of the Telecommunications Act of 1996, the views expressed in this Article are not based on any information not within the public domain. Moreover, the views are the author’s own and do not necessarily reflect the views of Justice O’Connor, the Federal Communications Commission, or the Department of Justice. The author also wishes to thank Jeffrey Lanning for the good-natured, contentious discussions that provoked much thought about a number of the issues discussed in this Article, and Bill Nardini for his thoughtful comments during the drafting process.

A.	<i>The Bill of Attainder Clause</i>	119
1.	<i>Specificity</i>	119
2.	<i>Punishment</i>	122
3.	<i>Application of These Principles</i>	129
B.	<i>The Equal Protection Guarantee</i>	138
IV.	CONCLUSION.....	140

In recent years, Congress has exercised its authority under Article I of the United States Constitution to enact legislation covering a number of new fields. In 1996, for example, Congress enacted the Prison Litigation Reform Act (“PLRA”)¹ and reined in the authority of the federal courts to grant remedial relief in prison reform litigation. That same year, Congress also enacted the landmark Telecommunications Act of 1996² and brought the Nation’s telecommunications industry under its watchful eye. This trend is likely to continue into the future, particularly if Congress enacts federal legislation to govern the activities of the tobacco industry.³

These pieces of legislation are in many respects unremarkable. Congress often brings new industries or subjects into the universe of those already governed by federal law. Moreover, each statute would seem to be a permissible

1. Pub. L. No. 104-134, sec. 802, 110 Stat. 1321-66 (1996) (codified at 18 U.S.C. § 3626 (Supp. III 1997)).

2. Pub L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

3. Congress recently has considered a number of bills concerning the manufacture, marketing, and distribution of tobacco products. *See, e.g.*, Universal Tobacco Settlement Act, S. 1415, 105th Cong. (1998); Universal Tobacco Settlement Act, S. 1414, 105th Cong. (1998); Preventing Addiction to Smoking Among Teens Act, S. 1648, 105th Cong. (1998); Kids Deserve Freedom from Tobacco Act of 1998, S. 1889, 105th Cong.; Teen Tobacco Use Prevention Act of 1998, H.R. 3889, 105th Cong.; Tobacco Products Control Act of 1997, S. 201, 105th Cong.; Tobacco Disclosure and Warning Act of 1997, S. 527, 105th Cong.; Tobacco Disclosure and Warning Act of 1997, H.R. 1244, 105th Cong. Other bills concern restrictions on second-hand smoke. *See, e.g.*, A Bill To Reduce Exposure to Environmental Tobacco Smoke, S. 2066, 105th Cong. (1998); Smoke-Free Environment Act of 1997, S. 826, 105th Cong.; Smoke-Free Environment Act of 1997, H.R. 1771, 105th Cong. Much of this legislation is directed at discouraging minors from smoking. *See, e.g.*, Healthy Kids Act, S. 1638, 105th Cong. (1998); Placing Restraints on Tobacco’s Endangerment of Children and Teens Act, S. 1530, 105th Cong. (1998); Tobacco Use By Minors Deterrence Act of 1997, S. 1238, 105th Cong.; Bipartisan No Tobacco for Kids Act of 1998, H.R. 3868, 105th Cong.; International Tobacco Responsibility Act, H.R. 3478, 105th Cong. (1998); Healthy Kids Act, H.R. 3474, 105th Cong. (1998); Healthy and Smoke Free Children Act, H.R. 3028, 105th Cong. (1998); Tobacco Use By Minors Deterrence Act of 1997, H.R. 2017, 105th Cong.; Healthy and Smoke Free Children Act, S. 1492, 105th Cong. (1997); No Tobacco For Kids Act, S. 828, 105th Cong. (1997); Stop Kids from Smoking Act, H.R. 3298, 105th Cong. (1997); Control Youth Access to Tobacco Act, H.R. 2594, 105th Cong. (1997); Tobacco Use By Minors Deterrence Act of 1997, H.R. 2034, 105th Cong.; No Tobacco for Kids Act, H.R. 1772, 105th Cong. (1997); Youth Protection from Tobacco Addiction Act of 1997, H.R. 762, 105th Cong.; Youth Smoking Prevention Act of 1997, H.R. 516, 105th Cong.

exercise of Congress's legislative power: The Telecommunications Act and any future tobacco legislation would seem to fall safely within Congress's broad power under the Commerce Clause "[t]o regulate Commerce . . . among the several States."⁴ The PLRA would seem to fall within Congress's power to "ordain and establish" the "inferior [federal] Courts."⁵ What makes this legislation unusual is that the subject matter of each law was already subject to regulation by one or more judicial consent decrees at the time Congress elected to assert its regulatory authority.

When the PLRA took effect in 1996, for example, the federal courts had already exercised their remedial authority to issue consent decrees covering the administration of prisons in more than thirty states.⁶ Similarly, at the time the Telecommunications Act became law, the major participants in the telephone industry were already governed by a series of consent decrees administered by the District Court of the District of Columbia: the AT&T Consent Decree regulated the participation of AT&T and its Bell operating companies in various telecommunications markets,⁷ the GTE Consent Decree regulated that

4. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . among the several States.").

The Court has found that Congress has the power to enact laws regulating the tobacco industry. *See, e.g.,* *Campbell v. Hussey*, 368 U.S. 297 (1961) (upholding federal Tobacco Inspection Act's preemption of Georgia law that required different method of classifying tobacco crops).

Congress's Commerce Power also covers the telecommunications industry. Congress clearly has authority over *interstate* telephone lines. *See* *United States v. Classic*, 313 U.S. 299, 316 (1941) (noting that "interstate telephone, telegraph and wireless communication" are "concededly" within "the application of the commerce clause"); *Western Union Tel. Co. v. Pendleton*, 122 U.S. 347, 356 (1887) ("intercourse by the telegraph between the states is interstate commerce"). This authority encompasses *intrastate* lines as well because telephone networks form a single integrated network. *See* *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986) ("virtually all telephone plant that is used to provide intrastate service is also used to provide interstate service, and is thus conceivably within the jurisdiction of both state and federal authorities"). While it is true that Congress has erected a presumption against the federal regulation of "intrastate communication service[s]," 47 U.S.C. § 152(b) (1994), it is well established that the line between intrastate and interstate service is of congressional and not constitutional origin. *See* *Iowa Utils. Bd. v. FCC*, 119 S. Ct. 721 (1999) (Congress has authority to give FCC intrastate rulemaking power); *Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 562 (D.C. Cir.) (finding that Congress, in section 276 of the Act, granted FCC "authority to regulate the rates for local coin calls [from payphones]"), *clarified on reh'g*, 123 F.3d 693 (D.C. Cir. 1997), *cert. denied*, 118 S. Ct. 1361 (1998).

5. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *see also* *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) ("There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.").

6. *See* Richard J. Costa, *The Prison Litigation Reform Act of 1995: A Legitimate Attempt To Curtail Frivolous Inmate Lawsuits and End the Alleged Micro-Management of State Prisons or a Violation of Separation of Powers?*, 63 BROOK. L. REV. 319, 328-29 & nn.46-47 (1997).

7. *See* *United States v. AT&T*, 552 F. Supp. 131, 226-34 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

company's activities in the local and long-distance markets,⁸ and the AT&T-McCaw Decree regulated AT&T's acquisition of McCaw Cellular Communications.⁹ By the time Congress enacts national tobacco legislation, a number of States will have entered into consent decrees with the major tobacco companies; Florida, Texas, Mississippi, and Minnesota already have entered into consent decrees with the tobacco companies¹⁰ and the remaining states are likely to enter into decrees pursuant to the November 1998 Multistate Settlement with the Tobacco Industry.¹¹

Thus, as part of both the PLRA and the Telecommunications Act, Congress was forced to contend with these outstanding decrees. In the PLRA, Congress mandated the termination of outstanding decrees unless the federal courts that issued them find that the decrees satisfy the new congressional standard.¹² In the Telecommunications Act, Congress terminated the prospective effect of the three prior decrees by providing that "[a]ny conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by" any of the decrees would, after the Act, "be subject to the restrictions and obligations imposed by" the new Act.¹³

8. *See* United States v. GTE Corp., 603 F. Supp. 730 (D.D.C. 1984).

9. *See* United States v. Western Elec. Co., 158 F.R.D. 211 (D.D.C. 1994), *aff'd*, 46 F.3d 1198 (D.C. Cir. 1995). The decree itself purported to settle a Clayton Act action to bar AT&T's acquisition of McCaw Cellular. *See id.* at 213 n.4. The AT&T-McCaw Decree had not yet been approved by the district court when the Telecommunications Act of 1996 took effect.

10. *See* Settlement Agreement, Florida v. American Tobacco Co. (Fla. Cir. Ct. Aug. 25, 1997) (No. 95-1466 AH), *available at* <<http://stic.neu.edu/FL/flsettle.htm>>; Comprehensive Settlement Agreement and Release, Texas v. American Tobacco Co. (E.D. Tex. Jan. 16, 1998) (No. 5-96CV-91), *available at* <<http://stic.neu.edu/Tx/Texas-settlement.htm>>; Memorandum of Understanding, In re Moore *ex rel.* Mississippi Tobacco Litig. (Chancery Ct. July 2, 1997) (No. 94-1429), *available at* <<http://stic.neu.edu/MS/mssettle.htm>>; Settlement Agreement and Stipulation for Entry of Consent Judgment, Minnesota v. Philip Morris, Inc. (Minn. Dist. Ct. May 8, 1998) (No. C1-94-8565), *available at* <<http://stic.neu.edu/MN/settlement.htm>>.

11. *See* Part XIII, Master Settlement Agreement, *available at* <http://www.tobacco.neu.edu/Extra/multistate_settlement.htm> (requiring states with pending lawsuits against tobacco industry to enter into consent decrees settling those suits); *see also id.* Exhibit L (model consent decree).

12. Section 3626(b)(2)-(3) of the PLRA states:

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 . . . [unless] 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.

18 U.S.C. § 3626(b)(2)-(3) (Supp. II 1996).

13. Pub. L. No. 104-104, § 601(a)(1)-(3), 110 Stat. 56, 143 (1996) (codified at 47 U.S.C. § 152 (Supp. II 1996) (statutory and historical notes)).

Given that the PLRA and the Telecommunications Act seem to be part of an emerging trend—a trend likely to continue with national tobacco legislation—it becomes important to know whether the constitutional constraints placed on federal laws that supplant regulatory consent decrees differ from the constraints placed on laws that do not. In other words, it is important to know if the Constitution prohibits, or in any way limits, congressional efforts to “retake the field” from the Judiciary.

The lower federal courts are grappling with this question right now. For a time the circuit courts of appeals were split over whether section 3626(b)(2) of the PLRA violates the separation of powers guarantee of the Constitution as an impermissible legislative mandate to terminate final orders of the judicial branch.¹⁴ The Ninth Circuit, the sole dissenting circuit, withdrew the decision of its panel in *United States v. Taylor*¹⁵ that found section 3262(b)(2) unconstitutional and scheduled the case for en banc review.¹⁶ If the Ninth Circuit affirms the panel’s decision and recreates a split of circuit authority, the case might be a good candidate for Supreme Court review given the importance of the issue to prison administration across the country. Even if the Ninth Circuit ultimately agrees with the other circuit courts that section 3262(b)(2) is constitutional, however, the varying rationales employed by the circuit courts indicate that the federal courts are unable to agree on how to analyze this type of legislation.

The federal courts have also had difficulty assessing the constitutionality of the provisions of the Telecommunications Act that replaced the AT&T Consent Decree with constraints that apply solely to the Bell operating companies.¹⁷ The first court to confront the issue, the District Court for the Northern District of

14. Compare *Hadix v. Johnson*, 133 F.3d 940 (6th Cir. 1998) (per curiam) (PLRA termination provision is consistent with separation of powers guarantee in Constitution), *cert. denied*, 118 S. Ct. 2368 (1998), *Dougan v. Singletary*, 129 F.3d 1424 (11th Cir. 1997) (per curiam) (same), *cert. denied*, 118 S. Ct. 2375 (1998), *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997) (same), *cert. denied*, 118 S. Ct. 2366 (1998), *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997) (same), *cert. denied*, 118 S. Ct. 2374 (1998), and *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996) (same), *cert. denied*, 117 S. Ct. 2460 (1997), with *Benjamin v. Jacobson*, 124 F.3d 162, 176 (2d Cir. 1997) (PLRA termination provision is constitutional only if construed narrowly so that decree remains intact and can still be enforced in state court), with *Taylor v. United States*, 143 F.3d 1178, 1181 (9th Cir.) (PLRA termination provision improperly “reopen[s] the final judgments of the federal courts and unconditionally extinguish[es] past consent decrees affecting prison conditions”), *withdrawn*, 158 F.3d 1059 (9th Cir. 1998).

15. 143 F.3d 1178 (9th Cir.), *withdrawn*, 158 F.3d 1059 (9th Cir. 1998).

16. The Ninth Circuit, sitting en banc, heard oral argument on January 21, 1999. A decision has yet to be announced.

17. See 47 U.S.C. §§ 271-275 (Supp. II 1996).

Texas, concluded that all five replacement provisions were unconstitutional.¹⁸ The Fifth Circuit reversed that decision, but did so over a vocal dissent.¹⁹ The D.C. Circuit in separate decisions recently upheld the constitutionality of two of the five provisions, those which bar the Bell operating companies from providing certain long-distance services without prior governmental approval and from providing electronic publishing services for four years.²⁰ While that court, like the Fifth Circuit, found those sections constitutional, it also did so over a dissent (or, in the second of the two cases, a grudging concurrence).²¹ One of the D.C. Circuit decisions is still pending on writ of certiorari before the Supreme Court.²² Even should the Supreme Court deny certiorari, the divergent reasoning of the two courts of appeals bespeaks of a need for guidance.

This Article attempts to resolve some of this confusion by identifying the provisions of the Constitution most likely implicated when Congress retakes a field from judicial consent decrees and examines the constraints, if any, that those provisions place upon such congressional action. As one might expect, legislation that retakes a field necessarily performs two distinct functions: (i) elimination or modification of the prior consent decrees and (ii) replacement of those decrees with the new statutory provisions. With the Telecommunications Act of 1996, for example, Congress eliminated the consent decrees that governed most of the local telephone conglomerates²³ and established the statutory regime that would take their place.²⁴ Which constitutional provisions are implicated depends both upon which function is being performed and the identity of the court that issued the decree.

When Congress performs the function of eliminating or modifying consent decrees issued by federal courts, the primary constitutional issue, and by far the most troubling, is one of separation of powers. A separation of powers issue arises when “one branch [of the Federal Government]”—here, the Legislature—

18. See *SBC Communications, Inc. v. FCC*, 981 F. Supp. 996 (N.D. Tex. 1997), *rev'd*, 154 F.3d 226 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 889 (1999).

19. See *SBC Communications, Inc. v. FCC*, 154 F.3d 226 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 889 (1999).

20. See *BellSouth Corp. v. FCC*, 144 F.3d 58 (D.C. Cir. 1998) (upholding section 274 regarding electronic publishing); *BellSouth Corp. v. FCC*, 162 F.3d 678 (D.C. Cir. 1998) (upholding section 271 regarding long-distance services).

21. See *BellSouth*, 144 F.3d at 71 (Sentelle, J., dissenting); *BellSouth*, 162 F.3d at 694 (Sentelle, J., concurring).

22. See *BellSouth*, 144 F.3d 58, *petitions for cert. filed*, 67 U.S.L.W. (U.S. Dec. 28, 1998) (No. 98-1046), 67 U.S.L.W. 3484 (U.S. Jan. 19, 1999) (No. 98-1153).

23. See Pub. L. No. 104-104, § 601(a), 110 Stat. 56, 143.

24. See *id.* §§ 251-261, 271-276, 110 Stat. at 61-79, 86-107.

“invades the territory of another”—the Judiciary.²⁵ But the possible infirmity with such legislation is not limited to this issue because consent decrees are not ordinary court orders. The terms of a consent decree, unlike the terms of a traditional court order, reflect the agreement of the parties and are often beyond the power of the court to impose without the parties’ consent.²⁶ As a result, consent decrees may be viewed as a hybrid of court order and contract.²⁷ To the extent they are viewed as a contract, congressional interference with such decrees implicates those provisions of the Constitution that provide protection to contractual interests—the Takings Clause,²⁸ the Contracts Clause,²⁹ and the Due Process Clause.³⁰

The elimination or modification of state court consent decrees raises many of the same issues. As one would expect, the constitutional constraints on interfering with the *contractual* aspects of a consent decree are largely the same whether the decree is approved in state or federal court. The constitutional constraints are not identical, however, because Congress stands in a different relationship to state courts than it does to federal courts. Accordingly, federal legislation that displaces state decrees implicates the constitutional provisions dealing with state sovereignty—the Supremacy Clause³¹ and the Tenth

25. *New York v. United States*, 505 U.S. 144, 182 (1992). This is, as noted above, the issue that had, for a time, engendered a split among the circuit courts with respect to the PLRA. *See supra* note 14 and accompanying text.

26. *See Local No. 93 v. City of Cleveland*, 478 U.S. 501, 522 (1986) (“[I]t is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree.”); *see also id.* at 525 (“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”); Peter M. Shane, *Federal Policy Making By Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241, 267 (“the boundaries of permissible agreement between consenting parties [are] set by their legal authority to enter into the promises made, not by the court’s authority to impose remedies after trial”).

27. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992) (noting that consent decrees “in some respects [are] contractual in nature”); *Local No. 93*, 478 U.S. at 519 (“[C]onsent decrees ‘have attributes both of contracts and of judicial decrees,’ a dual character that has resulted in different treatment for different purposes.” (quoting *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975))).

28. “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

29. “No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .” U.S. CONST. art. I, § 10, cl. 1.

30. “No person shall . . . be deprived of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. V.

31. “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.

Amendment³²—instead of those dealing with the allocation of power among the branches of the Federal Government.

After eliminating or modifying the prior decrees, Congress turns to the second function performed by retaking legislation and prescribes the federal regulatory scheme that will supplant the decrees. Here it faces a different group of potential constitutional roadblocks. Because these roadblocks pertain to the replacement scheme and accordingly do not depend on which court's decrees the legislation displaces, this analysis applies equally to legislation that retakes the field from either state or federal courts. In this context, the constitutional roadblocks arise primarily because the new legislative scheme is likely to apply to all relevant persons, whether or not they were previously parties to a decree. The Telecommunications Act of 1996, for instance, regulates all local and long-distance telephone carriers, but the three consent decrees that had previously regulated the industry only covered the largest carriers—AT&T, GTE, and the Bell operating companies.³³ Likewise, the Prison Litigation Reform Act applies to any decree concerning the administration of any prison, although not every prison was subject to such a decree when Congress passed the Act.³⁴

Congress may, of course, choose to treat all persons the same under its new regime, whether they were previously subject to a decree or not. For example, under the PLRA, all prison decrees must be preceded by certain findings whether they are newly instituted or have been on the books for years.³⁵ But Congress may choose to draw distinctions in its new legislative scheme on the basis of whether certain persons or groups were previously subject to a decree. Congress clearly did so in the Telecommunications Act of 1996 when it subjected the Bell operating companies (and only them) to greater restrictions on entering certain markets in part because those companies were the only ones

32. "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." U.S. CONST. amend. X.

33. Compare 47 U.S.C. §§ 251-261 (Supp. II 1996) (provisions that apply to "telecommunications carriers," which are defined in section 153(44) as "any provider of telecommunications services" with one exception not relevant here), with *United States v. AT&T*, 552 F. Supp. 131, 226-34 (D.D.C. 1982) (AT&T Consent Decree applies to AT&T and Bell operating companies), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), *United States v. GTE Corp.*, 603 F. Supp. 730 (D.D.C. 1984) (GTE Consent Decree applies to GTE), and Proposed Final Judgment and Competitive Impact Statement, *United States v. AT&T* (D.D.C.) (No. 94-01555), reprinted in 59 Fed. Reg. 44,158 (1994) (AT&T-McCaw Consent Decree applies to AT&T).

34. Compare 18 U.S.C. § 3626(a) (Supp. II 1996), with *Costa*, *supra* note 6, at 328-29 & nn.46-47 (observing that more than 30 states are subject to federally administered prison decrees).

35. See 18 U.S.C. § 3626(a) (requiring all new decrees to be preceded by certain findings); *id.* § 3626(b)(2) (requiring termination of prior decrees unless judge makes required findings).

subject to the AT&T Consent Decree.³⁶ In such a case, Congress implicates the equal protection guarantee, which requires legislative distinctions to be rational.³⁷ Moreover, if the differently treated parties are burdened by the new law, it also implicates the Bill of Attainder Clause, which prohibits Congress from punishing specified persons.³⁸

This Article examines how each of these constitutional provisions, as interpreted in the Supreme Court's leading precedent, affects Congress's ability to retake the field. This Article concludes that these provisions place only modest limits on such legislation. Part I focuses on the provisions implicated when Congress eliminates or modifies the regulatory consent decrees of federal courts—the separation of powers guarantee, the Takings Clause, the Contracts Clause, and the Due Process Clause. Part II examines the Supremacy Clause and Tenth Amendment issues that potentially circumscribe congressional efforts to displace the decrees of state courts. Part III discusses the Equal Protection and Bill of Attainder Clause concerns that define the degree of latitude Congress enjoys when crafting its new regulatory scheme.

I. THE ELIMINATION AND MODIFICATION OF FEDERAL CONSENT DECREES

As discussed above, when Congress attempts to retake a field already occupied by consent decrees issued by federal courts, its actions potentially implicate a number of constitutional guarantees—the separation of powers guarantee, the Takings Clause, the Contracts Clause, and the Due Process Clause. Each of these provisions, as well as the limitations they place upon the ability of Congress to alter federal consent decrees, is discussed separately below.

A. *Separation of Powers*

The first three Articles of the Constitution apportion the various functions of the Federal Government among three branches—the legislative, executive, and

36. See 47 U.S.C. §§ 271-276 (placing limits on Bell's entry into long-distance and equipment manufacturing markets); see also *AT&T*, 552 F. Supp. at 226-34 (AT&T Consent Decree doing same).

37. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1. The Equal Protection Clause of the Fourteenth Amendment applies only to the states but has been incorporated through the Fifth Amendment's Due Process Clause to apply to the Federal Government as well. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995) (noting that Court "treat[s] the equal protection obligations imposed by the Fifth and the Fourteenth Amendments as indistinguishable"); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

38. "No Bill of Attainder . . . shall be passed." U.S. CONST. art. I, § 9, cl. 3.

judicial.³⁹ Although the Constitution expressly enumerates the core “Powers” of each branch, it does not devote much attention to delineating the limits of each power.⁴⁰ To ensure that each branch stays within its boundaries, the courts have inferred from the structure of the Constitution an independent “separation of powers” guarantee.⁴¹ The courts have not interpreted the Constitution to require a hermetic separation among the branches.⁴² Instead, they have defined the separation of powers limitation narrowly so as only to “guard against ‘encroachment or aggrandizement’ by [one branch] at the expense of the other branches of government.”⁴³

Even with this narrow focus, the line between permissible interaction and impermissible encroachment is difficult to draw, particularly between the legislative and judicial branches. Ever since *Marbury v. Madison*,⁴⁴ it has been “the province and duty of the judicial department to say what the law is.”⁴⁵ The judicial branch, as the Supreme Court recently reaffirmed, has a monopoly on saying what the constitutional law is.⁴⁶ But the judicial branch shares with

39. See U.S. CONST. art. I (describing “All legislative Powers”); U.S. CONST. art. II (describing “[t]he executive Power”); U.S. CONST. art. III (describing “[t]he judicial Power”).

40. See U.S. CONST. art. I, §8 (enumerating 17 specific legislative powers and granting more general power “[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”); U.S. CONST. art. II (enumerating specific Powers belonging to President but also granting more general power to “take Care that the Laws be faithfully executed”); U.S. CONST. art. III (enumerating cases over which Supreme Court has jurisdiction but also vesting “judicial Power of the United States” in Supreme Court). Indeed, even the limitations explicitly placed on the legislative branch are difficult to interpret. See, e.g., U.S. CONST. amend IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); 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.”).

41. See *INS v. Chadha*, 462 U.S. 919, 946 (1983) (“The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers . . .”).

42. See *United States v. Nixon*, 418 U.S. 683, 707 (1974) (“In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.”); see also *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977) (noting that “the Court [had] squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches”).

43. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982) (Brennan, J., plurality opinion) (citing *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)); see also *New York v. United States*, 505 U.S. 144, 182 (1992) (“The Constitution’s division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment.”); *Chadha*, 462 U.S. at 963 (Powell, J., concurring) (“the doctrine may be violated when one branch assumes a function that more properly is entrusted to another”).

44. 5 U.S. (1 Cranch) 137 (1803).

45. *Id.* at 177.

46. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2162-64 (1997). For a further discussion of this point, see *infra* text accompanying notes 56-59.

Congress the power of saying what the statutory law is because Congress under Article I may enact, amend, and repeal the very statutes that the courts under Article III may interpret.⁴⁷ Given this overlap, there are many instances when Congress, in the exercise of its power, can affect the outcome of cases before the Judiciary without exceeding its legislative power as set out in Article I.⁴⁸ But that power is not plenary, and the Supreme Court has not hesitated to say when “Congress has . . . passed the limit which separates the legislative from the judicial power.”⁴⁹ The Court has evolved a complex body of precedent delineating this “limit”—that is, the circumstances under which Congress may alter statutory law that affects cases moving through the judicial branch. This limit varies depending on whether the affected cases are still being litigated or have been finally resolved by the Judiciary.⁵⁰ Thus, the precedent governing each scenario is discussed separately below.

1. Pending Cases

Under the Court’s separation of powers precedent, Congress may in certain circumstances exercise its Article I authority to legislate even when by doing so it intends to alter the outcome of cases that are still pending in the federal court system. More specifically, Congress may enact legislation that either (i) withdraws or modifies the court’s subject matter jurisdiction over the case or (ii) changes the statutory law the courts are relying upon to resolve the pending case.

Congress’s authority to influence the outcome of pending cases by redefining the jurisdiction of the federal courts hearing them is derived from Article III itself. Article III enumerates the cases over which the Supreme Court has original jurisdiction and some of the cases over which it has appellate jurisdiction but otherwise leaves it to Congress to expand the Supreme Court’s appellate jurisdiction and to create, and define the jurisdiction of, the lower

47. “It is undoubtedly true that, in our system of government, the law-making power is vested in Congress, and the power to construe laws in the course of their administration between citizens, in the courts.” *Stockdale v. Insurance Cos.*, 87 U.S. (20 Wall.) 323, 332 (1873).

48. *See* *Maine Cent. R.R. v. Brotherhood of Maintenance of Way Employees*, 813 F.2d 484, 492 (1st Cir. 1987) (observing that “the distinction between legislative and adjudicative purposes and effects can be illusory”).

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

50. *See* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (“a distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in what Article III creates”).

federal courts.⁵¹ Consistent with this grant of authority, the Supreme Court has upheld federal legislation that affected the outcome of cases pending in the federal trial⁵² and appellate courts⁵³ by altering the jurisdiction of those courts.

In most circumstances, Congress may also affect the outcome of a case pending before the trial or appellate courts by amending the federal statutory law underlying that case.⁵⁴ To do so, Congress need only make clear its intent that the amended law apply to pending cases, so as to overcome the usual presumption that new laws apply solely on a prospective basis.⁵⁵ This power is confined to amendments to statutory law; Congress does not have the authority to amend constitutional law, as the Supreme Court's recent decision in *City of Boerne v. Flores*⁵⁶ soundly reaffirms. In that case, the Court examined the

51. See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” (emphasis added)); see also *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (“All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to ‘ordain and establish’ inferior courts, conferred on Congress by Article III, § 1, of the Constitution.”); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) (“There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.”).

52. See, e.g., *Norris v. Crocker*, 54 U.S. (13 How.) 429 (1851) (holding that Congress’s repeal of 1793 act bars action under that act pending at time of its repeal).

53. See, e.g., *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868) (dismissing habeas petition on ground that Congress’s repeal of Supreme Court’s appellate jurisdiction over such petitions required dismissal, even though petition was pending before Court at time Congress acted); *Bruner v. United States*, 343 U.S. 112 (1952) (dismissing appeal of case in light of legislation that withdrew district court jurisdiction over Tucker Act claims, even though appeal was pending when Congress acted); *Insurance Co. v. Ritchie*, 72 U.S. (5 Wall.) 541, 544 (1866) (dismissing suit when act upon which federal court’s jurisdiction was based was repealed and replaced by act that expressly denied federal jurisdiction).

54. See Ira Bloom, *Prisons, Prisoners, and Pine Forests: Congress Breaches the Wall Separating Legislative from Judicial Power*, 40 ARIZ. L. REV. 389, 400 (1998) (“During the pendency of an appeal, Congress may alter the law, and the higher court is bound by the change in the law.”); see also *infra* note 55.

55. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). Prior to *Landgraf*, there was no consistent approach to when a new law would be applied to pending cases. One line of cases, culminating in *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), demanded that the court apply the new law to pending cases on the ground that it was the obligation of the Judiciary to apply the law in effect at the time of decision. See also *Hall v. Beals*, 396 U.S. 45, 48 (1969) (dismissing petitioner’s challenge to Colorado voting requirement after Colorado changed its law, reasoning that “[w]e review the judgment below in light of the Colorado statute as it now stands, not as it once did”); *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 201 (1921) (applying Clayton Act standard for propriety of injunctive relief in labor dispute, even though Act became effective after initial suit was on appeal).

A second line of cases, culminating in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), insisted that the new law *not* apply to pending cases because such retroactivity is not to be favored in the law. *Landgraf* harmonized these two lines of cases by adopting a rebuttable presumption in favor of purely prospective application of a new law that could be overcome by a showing of clear congressional intent to apply the law to pending cases. See 511 U.S. at 280.

56. 117 S. Ct. 2157 (1997).

constitutionality of the Religious Freedom and Restoration Act (“RFRA”),⁵⁷ which it understood as a congressional attempt to redefine the protection afforded by the First Amendment’s Free Exercise Clause. “When the Court has interpreted the Constitution,” it observed, “[the Court] has acted within the province of the Judicial Branch, which embraces the duty to say what the law is.”⁵⁸ Congress, by enacting RFRA, attempted to exercise the inherently judicial power of revising prior judicial interpretation of a constitutional provision. The Court accordingly concluded that the Legislature had encroached upon the exclusive domain of the Judiciary and thereby violated the separation of powers guarantee.⁵⁹

Notwithstanding the precedent allowing Congress to modify the courts’ subject matter jurisdiction or to amend statutory law, Congress’s power to influence the outcome of pending cases is not without limits. In *United States v. Klein*,⁶⁰ the Supreme Court for the first time held, with respect to pending cases, that Congress may not make any withdrawal of jurisdiction dependent “solely on the application of a rule of decision.”⁶¹

Klein involved an executor’s attempt to recover from the United States the value of property that the Government had confiscated from the decedent during the Civil War. Klein, the executor, had brought suit in the Court of Claims under an 1863 Act that entitled persons to recover the proceeds of confiscated property “on proof . . . that [the plaintiff] has never given any aid or comfort to the present rebellion.”⁶² Before his death, the decedent took advantage of a Presidential proclamation, made pursuant to an 1862 Act of Congress, that pardoned any person who had previously aided the rebellion if he took an oath of allegiance to the Union.⁶³ On the basis of the decedent’s pardon, the Court of Claims awarded the decedent’s estate \$125,300 under the 1863 Act.⁶⁴

While Klein’s case was on appeal, the Supreme Court decided *United States v. Padelford*,⁶⁵ which upheld an award of property to a claimant holding a pardon issued pursuant to a Presidential proclamation. In direct response to *Padelford*, Congress in 1870 enacted legislation declaring such pardons to be

57. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-2000bb-4 (1994)).

58. *Flores*, 117 S. Ct. at 2172.

59. *See id.*

60. 80 U.S. (13 Wall.) 128 (1871).

61. *Id.* at 146.

62. *Id.* at 131 (emphasis omitted).

63. *See id.* at 131-32.

64. *See id.* at 132.

65. 76 U.S. (9 Wall.) 531 (1869).

“conclusive evidence that such person did take part in, and give aid and comfort to, the late rebellion” such that the Supreme Court would be without jurisdiction to hear any appeals based on such evidence.⁶⁶

When the Government moved for dismissal of Klein’s case in light of the new legislation, Klein argued that the 1870 Act was unconstitutional and prevailed. The Supreme Court acknowledged that Article I granted Congress the power to modify the jurisdiction of the inferior courts and the nonconstitutional appellate jurisdiction of the Supreme Court but concluded that Congress did not actually exercise that power in the 1870 Act. To be sure, the Act withdrew the jurisdiction of the federal courts. But it did so conditionally. Under the Act, the Court observed, “The [federal] court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists [that is, the plaintiff has a pardon], its jurisdiction is to cease and it is required to dismiss for cause for want of jurisdiction.”⁶⁷ Thus, Congress, through the use of its power of jurisdiction, effectively dictated to the courts how they were to resolve a subset of pending cases: if those cases involve a Presidential pardon (that is, if the Government was going to lose under *Padelford*), they were to be dismissed. The Court found that such a law, which it characterized as tying “the denial of jurisdiction” to “the application of a rule of decision, in causes pending, prescribed by Congress,” “passed the limit which separates the legislative from the judicial power.”⁶⁸

Unfortunately, the Court’s articulation of *Klein*’s prohibition is less than crystal clear and accordingly has spawned numerous interpretations.⁶⁹ On the one hand, it is possible to limit this language to the situation present in *Klein* itself—that is, Congress may not make a court’s continued jurisdiction contingent upon the court’s conclusion that a particular party will prevail (in *Klein*’s case, the Government). At the other extreme, it is possible to read *Klein* as standing for the much broader proposition that Congress may not ever, either by modifying jurisdiction or amending statutory law, dictate the outcome of any pending case.⁷⁰ Proponents of this latter view often point to a passage in *Klein*

66. *Klein*, 80 U.S. (13 Wall.) at 134 (quoting 16 Stat. 235 (1870)).

67. *Id.* at 146.

68. *Id.* at 146, 147.

69. It is fairly clear, however, that the term “rule of decision” used in *Klein* is not necessarily the same as the term “rules of decision” used in the Court’s subsequent decision in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) (interpreting federal courts’ power to make federal common law). In *Klein* the term appears to refer to both substantive and procedural law; in *Erie* the term appears to refer to the substantive rules of law.

70. See Bloom, *supra* note 54, at 404 (citing *United States v. Sioux Nation of Indians*, 448 U.S.

in which the Court seems to find fault with the act of “prescrib[ing] a rule for the decision of a cause in a particular way.”⁷¹ They also point to the Court’s subsequent decision in *United States v. Sioux Nation of Indians*.⁷² In *Sioux Nation*, the Court upheld a federal law that gave the Sioux a forum for a constitutional claim that had already been rejected by the courts on res judicata grounds because, unlike in *Klein*, “Congress made no effort . . . to control the Court of Claims’ ultimate decision of that claim.”⁷³ Proponents regard this passage in *Sioux Nation* as indicating the Court’s agreement with their view that *Klein* prohibits legislative efforts to direct the outcome of pending cases.

Analysis of the Court’s precedent reveals, however, that the Court has rejected this broader view and all but limited *Klein* to its facts. It is, for instance, quite clear that Congress may eliminate the jurisdiction underlying pending cases, even when doing so effectively directs a result in favor of one party, including the Government. In *Ex parte McCordle*,⁷⁴ a pre-*Klein* opinion that continues to be cited as good law today, the Court upheld legislation that eliminated the Supreme Court’s appellate jurisdiction over habeas corpus petitions, including petitions pending on appeal.⁷⁵ Similarly, in *Bruner v. United States*,⁷⁶ the Court sustained federal legislation that withdrew jurisdiction over Tucker Act claims from the district courts because “when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law.”⁷⁷ The Court referred to this rule as one that “has been adhered to consistently by this Court.”⁷⁸ In both cases, the Court upheld the legislation at

371, 404 (1980), for the proposition that “[*Klein*] proposed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government’s favor”); see also *Sioux Nation*, 448 U.S. at 405 (finding no violation of *Klein* because “Congress made no effort . . . to control the Court of Claims’ ultimate decision on [a] claim”); *Hadix v. Johnson*, 133 F.3d 940, 943 (6th Cir.) (The PLRA does not “prescribe[] a rule of decision” because the PLRA’s termination provision “only prescribes the standard for authorizing a remedy in any given case. It does not dictate the result a court must reach in determining whether relief is warranted.”), *cert. denied*, 118 S. Ct. 2368 (1998); *James v. Lash*, 965 F. Supp. 1190, 1195 (N.D. Ind. 1997) (finding that PLRA does not violate *Klein* because it “does not mandate a specific result”).

71. *Klein*, 80 U.S. (13 Wall.) at 146.

72. 448 U.S. 371, 407 (1980).

73. *Id.* at 405.

74. 74 U.S. (7 Wall.) 506 (1868).

75. Although *McCordle* was decided two years before *Klein*, the Court in *Klein* did not purport to overrule *McCordle* and a number of post-*Klein* cases continue to cite *McCordle* as good law. See, e.g., *Glidden Co. v. Zdanok*, 370 U.S. 530, 567-68 (1962); *De La Rama S.S. Co. v. United States*, 344 U.S. 386, 390 (1953).

76. 343 U.S. 112 (1951).

77. *Id.* at 116-17.

78. *Id.* at 116 & n.8 (collecting cases); see also *Hallowell v. Commons*, 239 U.S. 506 (1916) (dismissing from federal court suit for equitable title on Indian land in light of congressional withdrawal of

issue even though it had the effect of directing a verdict in the Government's favor. Thus, *Klein* has not been understood to preclude the simple withdrawal of jurisdiction, whether that withdrawal changes the plaintiff's tribunal (as in *Bruner*) or, because no tribunal remains, eliminates a substantive right (as in *McCardle*).

This result is not particularly surprising, as the Court in *Klein* did not purport to alter the longstanding rule that "the legislature has complete control over the organization and existence of [a federal] court and may confer or withhold the right of appeal from its decisions."⁷⁹ Thus, Congress could have mandated dismissal of *Klein*'s case without violating the separation of powers guarantee had it simply repealed the district court's jurisdiction over all cases arising under the 1863 Act. Had Congress done so, its actions would have been sustained under *McCardle* and *Bruner*.

It is equally clear, moreover, that Congress may amend the statutory law that underlies pending cases and thereby affect the outcome of those cases. In *United States v. Schooner Peggy*,⁸⁰ the Court upheld federal legislation that required the Government to return property it had captured but not yet legally condemned as applied to a suit still pending on appeal.⁸¹ Congress had amended the law of condemnation, and the Court sustained the amendment. Under this reasoning, Congress would have encountered no constitutional obstacles in *Klein* had it repealed the 1863 Act altogether because doing so would have effected a change in the law. Indeed, the Court's more recent precedent has frankly acknowledged this and now more explicitly provides that *Klein*'s "prohibition does not take hold when Congress 'amend[s] applicable law.'"⁸² Had Congress repealed the 1863 Act and specified that the repeal would apply to pending cases, the Supreme Court would have been forced to recognize the repeal in *Klein* and to enter judgment for the Government.⁸³

jurisdiction over such cases).

79. *Klein*, 80 U.S. (13 Wall.) at 145.

80. 5 U.S. (1 Cranch) 103 (1801).

81. *See id.* at 107, 110. *Schooner Peggy* was recently reaffirmed in *Landgraf v. USI Film Products*, 511 U.S. 244, 273 (1994).

82. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (quoting *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)); *see also Plyler v. Moore*, 100 F.3d 365, 372 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2460 (1997) ("While the Court has never determined the precise scope of *Klein*, at the very least it is clear that Congress does not mandate a rule of decision when it amends the law underlying a pending case."); Kristin L. Burns, Note, *Return to Hard Time: The Prison Litigation Reform Act of 1995*, 31 GA. L. REV. 879, 900 (1997) ("In *United States v. Klein*, the Supreme Court held that Congress may not prescribe a rule of decision in cases pending before the federal judiciary, except when Congress amends the law underlying the particular case.").

83. Thus, the argument that *Klein* is violated if a statutory amendment dictates a result in the

Indeed, *Klein* also does not bar Congress from altering the facts underlying a pending lawsuit even when doing so will change its outcome. In *The Clinton Bridge*,⁸⁴ the Supreme Court dismissed an action for injunctive relief to have a bridge over the Mississippi River torn down as a public nuisance. While the suit was awaiting trial, Congress passed an act declaring the bridge to be “a lawful structure, and . . . recognized and known as a post route.”⁸⁵ The Court had little difficulty concluding that Congress’s modification of the quasi-factual issue of whether the bridge was a public nuisance was permissible notwithstanding the fact that it “gave the rule of decision for the court.”⁸⁶

In light of this subsequent precedent, *Klein* effectively has been limited to congressional efforts to dictate the outcome of pending cases through the conditional withdrawal of jurisdiction. This reading is not only consistent with *Klein* itself, it is also consistent with *Sioux Nation*, which proponents of the broader view tout as their main support. To be sure, the Court in *Sioux Nation* distinguished the legislation it was reviewing from the legislation in *Klein* on the ground that the law before it only required a new hearing and did not purport to “control the . . . ultimate decision of that claim.”⁸⁷ But to say that the legislation in *Sioux Nation* did not dictate the outcome is not the same as holding that any law that does is, for that reason alone, constitutionally infirm. After all, no one would read a statement by the Court that a particular law does not implicate religion as a holding that all laws implicating religion are unconstitutional.

The narrowness of *Klein*’s limitation makes sense. The separation of powers guarantee ensures that one branch of the Federal Government does not invade another’s domain.⁸⁸ *Klein* could not bar Congress from changing the law or facts underlying a pending case: The courts have no interest in which statutory law they apply or in who prevails. The courts do, however, have an interest in preserving the integrity of their own decision-making process. That integrity is

Government’s favor is inconsistent with the Court’s precedent.

84. 77 U.S. (10 Wall.) 454 (1870).

85. *Id.* at 462.

86. *Id.* at 463. Although *Clinton Bridge* was decided a year before *Klein*, *Klein* preserved its validity. The Court in *Klein* went out of its way to distinguish the act at issue in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), from the act at issue in *Klein*. The Court in *Klein* stated, “No arbitrary rule of decision was prescribed in [*Wheeling*], but the Court was left to apply its ordinary rules to the *new circumstances* created by the act.” *Klein*, 80 U.S. at 146-47 (emphasis added). By preserving *Wheeling*, the Court in effect preserved *Clinton Bridge* as well because *Clinton Bridge* rested on the “same principle” as *Wheeling*. See *Clinton Bridge*, 77 U.S. (10 Wall.) at 463.

87. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 405 (1980).

88. See *supra* notes 39-43 and accompanying text.

compromised when Congress converts the rules governing jurisdiction, which ostensibly have little to do with the substantive outcome of a case, into tools for dictating particular substantive outcomes. Allowing such sleight of hand leaves Congress less accountable for changes in the law because it permits Congress to influence the outcome of pending cases by tampering with jurisdictional rules instead of facing the political fallout that might accompany amendment of the underlying statutory law.⁸⁹

Congress has a great deal of latitude in enacting legislation that affects cases pending in the federal courts. As the above discussion illustrates, it may influence the outcome of those cases without violating the separation of powers guarantee either by altering the courts' jurisdiction or by amending the underlying substantive law. It must only refrain from dictating the result in pending cases through conditional withdrawal of subject matter jurisdiction.

2. "Final" Cases

Congress's power to influence cases that have been finally decided by the judicial branch depends on the type of relief awarded when the case was resolved.⁹⁰ As discussed below, cases in which a court has awarded damages or declaratory relief have, for most intents and purposes, passed beyond the constitutional power of Congress to influence. But when a case results in the award of ongoing prospective relief—injunctions or consent decrees—it resembles a pending case and Congress retains some ability to influence the continued validity of the prospective relief.

a. Cases Where No Prospective Relief Is Awarded

As the Court recently made clear in *Plaut v. Spendthrift Farm, Inc.*,⁹¹ Congress has almost no authority to enact legislation that affects cases that have been finally resolved by the courts and have not resulted in the issuance of any

89. At least one member of the Court has found congressional accountability to be a relevant concern in the separation of powers analysis. See *INS v. Chadha*, 462 U.S. 919, 966 (1983) (Powell, J., concurring); see also *New York v. United States*, 505 U.S. 144, 168-69 (1992) (discussing how need for congressional accountability precludes Congress from commandeering state legislatures under Tenth Amendment).

90. See, e.g., *Benjamin v. Jacobson*, 124 F.3d 162, 171 (2d Cir. 1997) (noting that *Plaut* drew a line between "final judgments without prospective effect . . . and final judgments with prospective effects").

91. 514 U.S. 211 (1995).

prospective relief.⁹² In *Plaut*, Congress had amended the Securities and Exchange Act of 1934 to extend the statute of limitations for section 10(b) actions; the amendment also ordered the reinstatement of any section 10(b) actions that had been dismissed as untimely under the prior limitations period if those actions would have been timely under the new limitations period.⁹³ This amendment, the Court noted, had the effect of “revers[ing] a determination once made, in a particular case.”⁹⁴ The Court found that a law with this effect implicated the separation of powers guarantee because the Constitution “gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that ‘a judgment conclusively resolves the case’ because ‘a “judicial Power” is one to render dispositive judgments.’”⁹⁵ “By retroactively commanding the federal courts to reopen final judgments,” Congress encroached upon the judicial power and violated the separation of powers guarantee.⁹⁶

The Court has recognized what amounts to a very narrow exception to this otherwise absolute rule. In a line of cases that started with *Cherokee Nation v. United States*,⁹⁷ the Court has held that Congress may create new causes of action for damages against the United States, even when doing so effectively

92. Of course, Congress remains free to “overrule” a federal court decision by statute when the new provision has a purely prospective effect. *See, e.g.*, *McCarty v. McCarty*, 453 U.S. 210 (1981) (concluding that federal law regarding designation of beneficiary for nondisability, military retirement pay preempts state community property law), *superseded by* 10 U.S.C. § 1408(c)(1) (1994). But only the courts may overrule their prior decisions interpreting the Constitution. *See City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

93. *See Plaut*, 514 U.S. at 214-15.

94. *Id.* at 225 (quoting THE FEDERALIST NO. 81, at 545 (Alexander Hamilton) (J. Cooke ed., 1961)); *see also* *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855) (accepting “as a general proposition” argument that “act of congress cannot have the effect and operation to annul the judgment of the court already rendered”).

95. *Plaut*, 514 U.S. at 218-19 (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)).

96. *Id.* at 219. The Executive is also prohibited from tampering with final judgments.

Judicial jurisdiction implies the power to hear and determine a cause, and inasmuch as the Constitution does not contemplate that there shall be more than one Supreme Court, it is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the government.

United States v. O’Grady, 89 U.S. (22 Wall.) 641, 647-48 (1874) (holding that Secretary of the Treasury could not revise court’s judgment); *see also* *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792) (taking case under advisement and noting that lower court had urged repeal of law which allowed Secretary of War, an executive branch official, to review pension determinations made by district courts; Court never ruled on this issue because Congress repealed law while case was under advisement); *Plaut*, 514 U.S. at 225-26 (collecting cases).

97. 270 U.S. 476 (1926).

reopens a prior judicial judgment that the United States is not liable for a particular debt. In *Cherokee Nation*, the Court sustained a 1919 Act of Congress that required the Court of Claims to examine whether the Cherokee Nation was entitled to compound interest on a longstanding debt, even though the issue “would have been foreclosed as *res judicata*” by a prior judgment of the Court of Claims awarding simple interest to the Cherokee Nation.⁹⁸ The Court saw no impediment to allowing Congress to waive the defense of *res judicata*, particularly when the precise issue of compound interest had not been raised in the previous action.⁹⁹

The Court extended the *Cherokee Nation* “new obligation” rule slightly in subsequent cases by allowing Congress to create new causes of action as to claims previously considered and rejected by courts. In *Pope v. United States*,¹⁰⁰ Congress had passed a Special Act requiring the Court of Claims to hear Pope’s claims for services rendered in building a tunnel to transport water into Washington, D.C., notwithstanding a prior Court of Claims judgment denying Pope payment for this work.¹⁰¹ The Court refused to “construe the Special Act as requiring the Court of Claims to set aside the judgment in a case already decided.”¹⁰² Instead, the Court viewed the Act as “creat[ing] a new obligation of the Government to pay petitioner’s claims where no obligation existed before,”¹⁰³ which the Court felt was squarely within Congress’s power under the Debt Clause of the Constitution.¹⁰⁴ The Court relied upon identical reasoning in *United States v. Sioux Nation of Indians*,¹⁰⁵ where it sustained a law ordering the Court of Claims to examine whether the Government’s breach of a treaty with the Sioux violated the Takings Clause, even though a prior judgment of that court had dismissed the same Takings claim on jurisdictional grounds. As in *Pope*, the Court found Congress’s actions “consistent with a substantial body of precedent affirming the broad constitutional power of Congress to define and ‘to pay the Debts . . . of the United States.’”¹⁰⁶

98. *Id.* at 486. Although the Court of Claims is not an Article III court, the Supreme Court has deemed this distinction irrelevant for separation of powers purposes. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 405 n.25 (1980).

99. *See Cherokee Nation*, 270 U.S. at 486.

100. 323 U.S. 1 (1944).

101. *See id.* at 3-4.

102. *Id.* at 9.

103. *Id.*

104. *See id.*; *see also* U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power . . . to pay the Debts . . . of the United States . . .”).

105. 448 U.S. 371 (1980).

106. *Id.* at 397 (quoting U.S. CONST. art. I, § 8, cl. 1).

The Court has refused to extend this particular line of precedent to situations not involving Congress's exercise of its power under the Debt Clause. Most recently, the Court in *Plaut* rejected the Government's attempt to analogize section 27A(b) of the Securities Act, which required the federal courts to reinstate section 10(b) actions previously dismissed as untimely, to the Act upheld in *Sioux Nation*.¹⁰⁷ Although both statutes achieved the same result—the reopening of final judgments—the Court refused to extend *Sioux Nation*. Instead, the Court stated “our holding [in *Sioux Nation*] was as narrow as the precedent on which we had relied” and applied only when Congress “‘mere[ly] waiv[ed] . . . the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States.’”¹⁰⁸ This result seems correct as a matter of separation of powers precedent, for the statutes in *Cherokee Nation*, *Pope*, and *Sioux Nation* effectively reopened final judgments. These statutes thus performed a function that, absent an express and overriding constitutional grant such as the Debt Clause, belongs exclusively to the judicial branch.¹⁰⁹

b. Cases Where Prospective Relief Is Awarded

Although cases in which prospective relief is awarded are “final” insofar as they are no longer subject to appeal,¹¹⁰ the Supreme Court has found that Congress still has the authority to influence these cases. The extent of Congress's authority may, however, depend upon the type of prospective relief awarded.

i. Injunctive Relief

Since before the Civil War, the Court has consistently recognized that injunctions based on federal law are subject to modification—and, indeed, must be modified—when Congress changes that law. The seminal case for this

107. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230-31 (1995).

108. *Id.* at 230 (quoting *Sioux Nation*, 448 U.S. at 407).

109. Some members of the Court would not recognize any exception to the general rule against tampering with final judgments. See, e.g., *Sioux Nation*, 448 U.S. at 427 (Rehnquist, J., dissenting) (urging Court to acknowledge that “Congress [had] reviewed the decisions of the Court of Claims, set aside the judgment that no taking of the Black Hills occurred, set aside the judgment that there is no cognizable reason for relitigating this claim, and ordered a new trial”).

110. See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 391 (1992) (noting that “consent decree is a final judgment”).

proposition is *Pennsylvania v. Wheeling & Belmont Bridge Co.*¹¹¹ The *Wheeling* case actually reached the Supreme Court twice. In its first appearance, the Supreme Court affirmed a lower court judgment that issued an injunction ordering Wheeling to remove or elevate a bridge it had erected over the Ohio River because the bridge was too low for passing ships and thus constituted a public nuisance.¹¹² When, in 1854, Wheeling rebuilt the same bridge after it was destroyed in a summer storm, the State of Pennsylvania sought to have Wheeling held in contempt of court. In its second appearance before the Supreme Court, Wheeling argued that the injunction could no longer be enforced in light of an 1852 Act of Congress. The 1852 Act declared “the bridges across the Ohio River at Wheeling . . . to be lawful structures in their present positions and elevations” and designated such bridges “post-roads for the passage of the mails of the United States.”¹¹³ The Court held that the 1852 law could not upset its earlier judgment awarding costs to the State of Pennsylvania¹¹⁴ but reached a different holding with respect to the injunctive portion of its earlier judgment:

But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If, in the mean time, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced.¹¹⁵

The High Court has not rejected *Wheeling* in the intervening 150 years and has recently followed its logic in *Robertson v. Seattle Audubon Society*.¹¹⁶ There, the Seattle and Portland Audubon Societies each brought suit in district court to enjoin proposed timber sales they claimed would harm the northern spotted owl in violation of a number of federal statutes.¹¹⁷ In both cases, the

111. 59 U.S. (18 How.) 421 (1855).

112. See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 578 (1851).

113. *Wheeling*, 59 U.S. (18 How.) at 429.

114. See *id.* at 431.

115. *Id.* at 431-32.

116. 503 U.S. 429 (1992).

117. See *id.* at 432-33.

lower court enjoined certain timber sales.¹¹⁸ “In response to this ongoing litigation,” Congress enacted the Northwest Timber Compromise.¹¹⁹ The Compromise established certain harvesting requirements for the forests at issue in those cases.¹²⁰ The Compromise also declared that compliance with its provisions was “adequate consideration for the purpose of meeting the statutory requirements that are the basis for the [two outstanding cases].”¹²¹ A unanimous Court concluded that the Compromise effected a change in the five statutes at issue in the cases by creating a temporary alternative means of complying with them.¹²² The enjoined parties were therefore entitled to dismissal of the injunctions as long as they followed the schedule of harvesting set out in the new statutory law.¹²³

A few lower courts and commentators have read these cases narrowly, seizing on language in *Wheeling* as well as a handful of other cases not involving injunctive relief to support the argument that Congress may only modify the law underlying final injunctive relief when that law involves “public right[s] secured by acts of congress.”¹²⁴ In *Wheeling*, the Court distinguished the “private right to damages,” which it found beyond the power of Congress to amend, from the “public right of the free navigation of the river,” which it found

118. *See id.*

119. *Id.* at 433. The act was officially called Section 318 of the Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 101-121, sec. 318, 103 Stat. 701, 745 (1989).

120. *See id.* at 433-34 & n.1 (describing and selectively quoting provisions of Compromise).

121. *Id.* at 435 (quoting Appropriations Act, sec. 318(b)(6)(A), 103 Stat. at 747).

122. *See id.* at 438.

123. *See id.* at 438 (“[The] operation [of the Compromise], we think, modified the old provisions.”).

Congress enacted a similar statute affecting timber sales five years later. *See* Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, Pub. L. No. 104-19, 109 Stat. 194 (1995) (“Rescissions Act”). The Rescissions Act took a slightly broader approach than the Northwest Timber Compromise because the Rescissions Act did not amend only the particular statutes underlying certain outstanding lawsuits. Instead, it provided that “[t]he Secretary concerned may conduct salvage timber sales under subsection (b) notwithstanding any decision, restraining order, or injunction issued by a United States court before the date of the enactment of this section.” *Id.* § 2001(c)(9), 109 Stat. at 244 (codified at 16 U.S.C. § 1611 (Supp. II 1996)) (emphases added).

124. *Wheeling*, 59 U.S. (18 How.) at 431; *see also* *Costa*, *supra* note 6, at 355-59 (arguing that “the nature of the rights [public or private] involved is essential in determining the scope” of separation of powers doctrine).

The federal courts assessing the constitutionality of the Prison Litigation Reform Act are split on whether the distinction between public and private rights is a valid one. *Compare* *Benjamin v. Jacobson*, 124 F.3d 162, 171-72 (2d Cir. 1997) (noting in dicta that distinction may be valid), *with* *Gavin v. Branstad*, 122 F.3d 1081, 1088 (8th Cir. 1997) (“character of the right involved has nothing to do with the separation of powers issue”), *cert. denied*, 118 S. Ct. 2374 (1998), *and* *Jensen v. County of Lake*, 958 F. Supp. 397, 403 n.3 (N.D. Ind. 1997) (rejecting distinction).

to be “under the regulation of congress.”¹²⁵ The Court seemed to draw a similar distinction between public and private rights in *Stockdale v. Insurance Cos.*¹²⁶ by sustaining a law imposing tax liability for prior years in part because that law did not “interfere with or invade personal rights which were beyond the constitutional power of Congress.”¹²⁷ The Court referred to the dichotomy of public and private rights once more in *Hodges v. Snyder*,¹²⁸ where it held that a state legislature did not violate due process when it passed a law declaring a particular school district to be lawful after the state supreme court had enjoined the district as unlawful. The Court stated:

It is true that . . . the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation.

This rule, however, as held in the *Wheeling Bridge Case*, does not apply to a suit brought for the enforcement of a public right . . .¹²⁹

Upon further analysis, however, it becomes clear that the Supreme Court has not embraced the notion that Congress’s ability to alter statutory law and consequently affect the continuing validity of injunctive relief hinges on whether the rights involved are public or private. The Court has time and again declined to confine *Wheeling* to cases involving congressional modification of public rights. For example, in *System Federation No. 91 v. Wright*,¹³⁰ the Court upheld the modification of a consent decree that had settled a labor dispute between private parties when Congress amended the underlying labor law. Nor did the Court in *Robertson* find any infirmity with the Northwest Timber Compromise, which effectively ended disputes between private parties regarding the propriety of certain timber sales.¹³¹ In fact, the Court’s most recent pronouncement on when consent decrees must be modified, *Rufo v. Inmates of Suffolk County Jail*,¹³² makes no attempt to confine its rule that decrees must be modified in response to a “significant change . . . in law” to the law affecting

125. 59 U.S. (18 How.) at 431.

126. 87 U.S. (20 Wall.) 323 (1873).

127. *Id.* at 333.

128. 261 U.S. 600 (1922).

129. *Id.* at 603 (citations omitted).

130. 364 U.S. 642 (1961).

131. *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429 (1992); *see also supra* notes 116-23 and accompanying text.

132. 502 U.S. 367 (1992).

public rights.¹³³

Even the precedent cited in favor of this distinction does not support it. In both *Wheeling* and *Stockdale*, as in *Wright* and *Robertson*, the Court's primary concern was whether Congress had the authority over the subject matter it was attempting to regulate. Thus in *Wheeling*, the Court found Congress's legislative approval of the bridge constitutional because the "public right of the free navigation of the river" was "under the regulation of congress."¹³⁴ In that same vein, the Court found no impediment to amendment of the tax laws in *Stockdale* because Congress did not attempt to "interfere with or invade personal rights which were beyond the constitutional power of Congress."¹³⁵ Given that the Court's focus has been on Congress's authority, the distinction between public and private rights would seem to be relevant only if it were a reliable proxy for whether the law affecting such rights is within Congress's enumerated powers—that is, if all laws affecting private rights were beyond Congress's power while all laws affecting public rights were within its authority. In light of *Wright* and *Robertson*, where the Court sustained modifications to laws (and therefore judgments) affecting private rights, it is difficult to conclude that one is a proxy for the other.

To be sure, the Court in *Hodges* seemed to articulate a more rigid dichotomy between legislation that amended the law affecting public versus private rights.¹³⁶ But *Hodges* was not a separation of powers case—it was a due process case involving the power of a state legislature to modify an injunction issued by a state court. For that reason alone, *Hodges* must be approached with caution as a separation of powers precedent. Nevertheless, the Court in *Hodges* purported to draw its distinction between public and private rights from *Wheeling*, a separation of powers case.¹³⁷ The distinction drawn in *Wheeling*, however, was, as noted above, based on the power of Congress to affect the judgments in that case: Congress could enact legislation affecting the judgment regarding the legality of the bridge because of its power over free navigation of the Nation's rivers; it could not touch the judgment of costs because that

133. *Id.* at 384; *see also* *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853 (1986) ("this Court has rejected any attempt to make determinative for Article III purposes the distinction between public rights and private rights").

134. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855).

135. *Stockdale v. Insurance Cos.*, 87 U.S. (20 Wall.) 323, 333 (1873); *see also id.* at 332 ("And it may be conceded that Congress cannot . . . invade private rights, with which it could not interfere by a new or affirmative statute." (emphasis added)).

136. *Hodges v. Snyder*, 261 U.S. 600, 603-04 (1923).

137. *See id.*

judgment was final. Even assuming that *Hodges* can be translated to the separation of powers context and that the distinction it draws is a cognizable one, *Hodges*' language condemning legislation that modifies prospective relief affecting private rights was ultimately dicta, for *Hodges* involved public rights. When the Court finally confronted legislation that sought to modify a final judgment of injunctive relief in a case involving private rights, as it did in *Wright*, the Court sanctioned the modification. Thus, *Hodges* would not seem to qualify *Wheeling*.¹³⁸

ii. *Consent Decrees*

Consent decrees are not injunctions, however. Although they are similar to injunctions in that they “bear some of the earmarks of judgments entered after litigation[,] . . . because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts.”¹³⁹ Because the terms of consent decrees are agreed upon by the parties, they can and often do afford relief beyond that which a court could have imposed on its own after trial.¹⁴⁰ The question is whether the hybrid nature of consent decrees—part contract and part judgment—requires a different rule from that governing injunctions as to whether Congress, by amending federal law, can require modification of a consent decree.

Both precedent and the policy underlying the separation of powers guarantee indicate that the rule should be the same for both injunctions and consent decrees.¹⁴¹ A change in the applicable statutory law should, upon a party's request, require modification of a consent decree, as it does with an

138. For a discussion of the extent to which these due process concerns are relevant to the inquiry into the propriety of congressional interference with consent decrees, see *infra* Part I.B.3.

139. *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 519 (1986); see also *id.* (“The question is not whether we can label a consent decree as a ‘contract’ or a ‘judgment,’ for we can do both.”).

140. See *id.* at 525. In *Local No. 93*, for example, the Court upheld a consent decree that included class-wide quotas for the promotion of minorities within the City of Cleveland's Fire Department even though the Civil Rights Act upon which it was based did not permit remedies to be awarded to those who had not personally suffered discrimination. See *id.* at 514-15.

141. At least one scholar disagrees. In a recently published article, Professor Bloom argues that consent decrees may be modified “only to the extent that equity requires,” such that consent decrees are different from injunctions and are “not . . . subject to being reopened by Congress.” Bloom, *supra* note 54, at 411 (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 391 (1992)). As discussed below, however, the “equity requires” language Professor Bloom relies upon for his argument comes from the Supreme Court's decision in *Rufo* and referred to the *extent* of modification and not whether consent decrees should be modified in the first place. See *infra* text accompanying notes 161-63. In this latter respect, which is the issue here, consent decrees and injunctions are treated similarly.

injunction.¹⁴² To be sure, modification will be mandatory when the new law makes one or more of the decree's terms illegal.¹⁴³ The Supreme Court has not confined the rule of mandatory modification to just those modifications necessary to avoid illegality, however. In *System Federation No. 91 v. Wright*,¹⁴⁴ the Court examined how an amendment to the Railway Labor Act that legalized "union shops" affected a consent decree that had barred them. Although the decree continued to be legal under the newly amended Act (because the new law did not require "union shops"), the Court nevertheless required the decree to be modified. The Court reasoned that "[t]he parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction" notwithstanding subsequent changes in the law.¹⁴⁵

The Court's most recent exposition on when consent decrees must be modified, *Rufo v. Inmates of Suffolk County Jail*,¹⁴⁶ in large part reaffirms the Court's earlier precedent. In that case, the Court determined whether its intervening decision in *Bell v. Wolfish*,¹⁴⁷ regarding the constitutionality of double bunking prison inmates, and increases in the inmate population necessitated the modification of a consent decree governing the construction of a new county jail. In deciding this question, the Court set forth the threshold standard as to when consent decrees should be modified: "A party seeking modification of a consent decree may meet its initial burden by showing a significant change either in factual conditions or in law."¹⁴⁸

142. The same rule holds when it comes to changes in the *decisional law*. In *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), the Supreme Court reversed a district court's decision not to modify a school desegregation decree in light of the Court's intervening decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The Court found that the lower court had "overlook[ed] well-established rules governing modification of even a final decree entered by a court of equity." *Spangler*, 427 U.S. at 437; *cf. Rufo*, 502 U.S. at 388-90 (mandating modification for bona fide changes in decisional law, but leaving it optional for "clarifications" in decisional law).

143. *See Rufo*, 502 U.S. at 388 (setting forth rule requiring mandatory modification "if, as it later turns out, one or more of the obligations placed upon the parties [by the decree] has become impermissible under federal law").

144. 364 U.S. 642 (1961).

145. *Id.* at 651. This rule is consistent with the Court's more general view that a court's power to modify a consent decree is constrained more by the underlying statutory law than by the terms of the decree. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576 n.9 (1984) (overturning district court's modification of decree because modification, while consistent with parties' intent, would have caused decree to conflict with statutory law forming its basis).

146. 502 U.S. 367 (1992).

147. 441 U.S. 520 (1979).

148. *Rufo*, 502 U.S. at 384. This standard marked a departure from the standard previously set down in *United States v. Swift & Co.*, 286 U.S. 106 (1932), which allowed modification upon "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions." *Id.* at 119.

Technically speaking, modification of a decree is not effected under *Rufo*, but under Rule 60(b)(5) of

The courts of appeals are currently divided on whether the *Rufo* standard applies in situations aside from the institutional reform context of *Rufo* itself. Six of the eight circuits have applied some variant of *Rufo*'s modification standard to all consent decrees,¹⁴⁹ while the Federal and Sixth Circuits have largely confined *Rufo* to its facts.¹⁵⁰ Determining which of these competing interpretations of *Rufo* is truest to the Supreme Court's intent is beyond the scope of this Article (and is dealt with in other scholarship),¹⁵¹ but it is worth noting that the weight of appellate authority favors a broad reading of *Rufo* and those decisions are, in that regard, well reasoned. If and when the Supreme Court resolves this split of authority, it is likely that the Court will hold that *Rufo*'s modification standard applies at the very least to the regulatory consent decrees that are the subject of this Article. The Court hinted as much in *Agostini v. Felton*,¹⁵² when it relied upon the *Rufo* standard to examine a motion to

the *Federal Rules of Civil Procedure*, which empowers a federal court to relieve a party from a final court order when "it is no longer equitable that the judgment should have prospective application." FED. R. CIV. P. 60(b)(5). *Rufo* nevertheless establishes that it is inequitable for a court to maintain a decree when the law or facts that initially justified the decree have been altered by Congress.

149. Three circuits have held that all of *Rufo*'s standard is to be applied to motions to modify all decrees. See *Bellevue Manor Assocs. v. United States*, 165 F.3d 1249, 1255 (9th Cir. 1998) ("[W]e join a significant number of other Courts of Appeals in finding that *Rufo* sets forth a general, flexible standard for all petitions brought under the equity provision of Rule 60(b)(5)."); *United States v. Western Elec. Co.*, 46 F.3d 1198, 1203 (D.C. Cir. 1995) ("We therefore agree . . . that *Rufo* gave the 'coup de grace' to *Swift*"); *Hendrix v. Page (In re Hendrix)*, 986 F.2d 195, 198 (7th Cir. 1993) ("[T]he Supreme Court gave [*Swift*] the coup de grace in [*Rufo*]," such that "the 'flexible standard' adopted in *Rufo* is no less suitable to other types of equitable case[s].") (citation omitted). Two others have held that *Rufo* applies to motions to modify all decrees but should be applied with solicitude of whether the underlying decree protects fully accrued private rights or involves the supervision of changing conduct or conditions. See *Alexis Lichine & Cie. v. Sacha A. Lichine Estate Selections, Ltd.*, 45 F.3d 582, 586 (1st Cir. 1995) (describing *Rufo* and *Swift* "as polar opposites of a continuum in which we must locate [a particular] case"); *Building & Constr. Trades Council v. NLRB*, 64 F.3d 880, 887-88 (3d Cir. 1995) (adopting *Alexis* rule). Finally, one other has held that *Rufo* does not apply to motions to modify all decrees, but only to those decrees of a "public nature." See *Patterson v. Newspaper & Mail Deliverers' Union of New York*, 13 F.3d 33, 38 (2d Cir. 1993) (*Rufo* applies where the injunction to be modified seeks "to vindicate significant rights of a public nature").

150. See *W.L. Gore & Assocs., Inc. v. C.R. Bard, Inc.*, 977 F.2d 558, 562 (Fed. Cir. 1992) ("The institutional reform cases present considerations not found in consent decrees settling commercial disputes"); cf. *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141, 1148-49 (6th Cir. 1992) (finding *Rufo* appropriate for "institutional reform" litigation, and implying that *Rufo* should not apply outside that context).

151. See, e.g., Jed Goldfarb, Note, *Keeping Rufo in Its Cell: The Modification of Antitrust Consent Decrees after Rufo v. Inmates of Suffolk County Jail*, 72 N.Y.U. L. REV. 625 (1997) (arguing that *Rufo*'s standard should not apply to antitrust consent decrees); Bernard T. Shen, Comment, *From Jail Cell to Cellular Communication: Should the Rufo Standard Be Applied to Antitrust and Commercial Consent Decrees?*, 90 NW. U. L. REV. 1781 (1996) (arguing that *Rufo*'s standard should apply to commercial and antitrust consent decrees as well as to institutional reform decrees).

152. 521 U.S. 203 (1997).

modify an injunction between a school district and private parties that regulated the district's provision of educational services to religious schools. Because most regulatory consent decrees are equally, if not more, concerned with ongoing regulation involving issues of "public" dimension than the decree in *Agostini*, it is fair to assume that *Rufo*'s modification standard will be applied to those decrees as well.¹⁵³

After announcing its modification standard, the Court in *Rufo* went on to explain when modification is mandatory once its threshold was met. As expected, the Court reaffirmed that modification is mandatory if the change in law renders the decree wholly or partially illegal.¹⁵⁴ Where the change in law does not render the decree illegal, but instead "make[s] legal what the decree was designed to prevent," whether modification is warranted depends on the nature of the new law.¹⁵⁵ If the new law constitutes a clarification of the old law, modification is discretionary; if there is a genuine change in the law, *Wright*'s rule of mandatory modification governs.¹⁵⁶ The distinction between a clarification in the prior law and a bona fide change to it, although not explicitly defined by the Court in *Rufo*, seems to turn on the state of the law at the time the parties entered into the decree. If the law was unclear and the parties entered into the decree notwithstanding the uncertainty, subsequent changes to the relevant law are likely to be considered a clarification and the parties will not be entitled to automatic modification;¹⁵⁷ because the parties may have simply agreed to abide by the terms of the decree no matter what the law required, later clarification of the law does not vitiate their consent to the decree.¹⁵⁸ The Court found this to be the case in *Rufo* itself, where the parties agreed to build a jail with single bunking even though a case regarding the constitutionality of double bunking was pending before the Supreme Court at the time the decree was approved.¹⁵⁹ When the law is clear at the time that the parties negotiated the decree, however, the parties are likely to have considered the law at the time as the regulatory baseline, such that changes in the law warrant modification of the

153. At least one court of appeals has used much the same reasoning to reach the same conclusion. See *Bellevue Manor Assocs.*, 165 F.3d at 1255-56.

154. See 502 U.S. at 388.

155. *Id.*

156. See *id.* at 388-90; see also Catherine G. Patsos, Note, *The Constitutionality and Implications of the Prison Litigation Reform Act*, 42 N.Y.L. SCH. L. REV. 205, 225 (1998) (observing how *Rufo* drew line between "changes" in law and "clarifications" of law).

157. See *Rufo*, 502 U.S. at 388-90.

158. See *id.* at 388.

159. See *id.*

decree.¹⁶⁰

A handful of lower courts have read *Rufo* differently, insisting that modification of a consent decree is discretionary even in the face of genuine changes in the law.¹⁶¹ The basis for this view is a passage in *Rufo* that provides “a consent decree is a final judgment that may be reopened only to the extent that equity requires.”¹⁶² But this statement was made in the middle of a discussion about the Court’s requirement that any “proposed modification [be] suitably tailored to the changed circumstance.”¹⁶³ Thus, the “equity requires” standard refers to the extent of the modification, not whether it is required in the first place.

Notwithstanding *Rufo*’s distinction between clarifications and changes in the law, Congress has the power to make modification of all decrees mandatory by making any contrary rule illegal, thereby rendering any decree inconsistent with the new law illegal and subject to mandatory modification. This power makes consent decrees virtually indistinguishable from injunctions. Equating these two types of prospective relief is also sound from a policy standpoint. As the Court in *Wright* observed, it makes no sense to give the parties to a consent decree the power to exempt themselves from genuine changes in the law when the parties would not have this option if they were subject to a court-ordered injunction.¹⁶⁴

160. *See id.* at 390.

161. In their view, a change in law may not warrant modification unless “equity requires.” *See, e.g.,* *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 657 (1st Cir. 1997) (citing *Rufo*, 502 U.S. at 391), *cert. denied*, 118 S. Ct. 2366 (1998); *see also* Bloom, *supra* note 54, at 411.

162. 502 U.S. at 391.

163. *Id.*

164. *System Fed’n No. 91 v. Wright*, 364 U.S. 642, 650-51 (1961). Of course, this does not stop parties to consent decrees from trying. The model consent decree included as part of the Multistate Settlement with the Tobacco Industry, for example, provides that “a change in law that results . . . in more favorable or beneficial treatment of any one or more of the [tobacco companies] shall not support modification of this Consent Decree.” *See* Part VI.C., *available at* <http://www.tobacco.neu.edu/Extra/multistate_settlement.htm>. The success of such efforts has yet to be determined. *See* *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223-24 (1986) (“Contracts, however express, cannot fetter the constitutional authority of Congress.” (quoting *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240, 307 (1935))); *Eastern Enters. v. Apfel*, 118 S. Ct. 2131, 2148 (1998) (plurality opinion) (reaffirming this language).

3. *Changes in the Law*

Once it is established that Congress may constitutionally change the law and thereby affect consent decrees in much the same fashion as it could change the law and affect pending cases, it is necessary to consider whether there are limits as to which laws Congress may change for this purpose. As discussed above, Congress is limited in two ways when it seeks to change the law affecting pending cases: (i) it cannot change the courts' interpretation of constitutional law and (ii) it cannot make the continued jurisdiction of the courts dependent upon a preordained substantive outcome.¹⁶⁵ The prohibition against tampering with judicial interpretations of constitutional law would seem to apply with equal force when Congress attempts to change the law that affects final judgments because modification of such interpretations is simply "off limits" to the legislative branch except through the amendment process.

The singular constraint on Congress's ability to alter statutory law affecting final judgments is *United States v. Klein*.¹⁶⁶ While *Klein* itself dealt with pending cases, the Court in both *Robertson* and *Plaut* observed that *Klein* is at least relevant in the context of final judgments.¹⁶⁷ *Klein*'s relevance is logical, given that final cases involving prospective relief, like those cases that are not yet final, are still "within" the court system and thus affected by an impermissible withdrawal of the courts' jurisdiction. In light of the narrow interpretation the Court has given *Klein* in its own context, however, it comes as little surprise that the Court has also not read *Klein* as a significant limitation on Congress's power to amend the law underlying prospective relief awarded upon final judgment. In fact, the Court has held that *Klein*'s "prohibition does not take hold when Congress 'amend[s] applicable law,'" and the Court has defined "applicable law" quite broadly.¹⁶⁸

At the center of the universe of applicable law that may be amended by Congress are the statutes on which an injunction or decree is based. In *Wright*, for example, when Congress amended section 2 of the Railway Labor Act, the Court held that a consent decree based on section 2 had to be modified in light

165. See *supra* Part I.A.1.

166. 80 U.S. (13 Wall.) 128 (1871).

167. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (finding no *Klein* violation regarding change in law affecting final judgments); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992) (finding no *Klein* violation regarding change in law affecting outstanding injunctions).

168. *Plaut*, 514 U.S. at 218 (quoting *Robertson*, 503 U.S. at 441).

of the change.¹⁶⁹ When altering the statutes underlying a decree, Congress may also use shorthand. In *Robertson*, the Court had no difficulty construing the Northwest Timber Compromise, which created an alternative means of “meeting the statutory requirements that are the basis for [three named] consolidated cases,” as an amendment to the five statutes underlying those cases.¹⁷⁰ Despite the absence of any express reference to those statutes, the Court concluded the Compromise “operat[ed] . . . [to] modif[y] the old provisions.”¹⁷¹

The Ninth Circuit upheld an even more obscure “shorthand” amendment to the law underlying an injunction in *Mount Graham Coalition v. Thomas*.¹⁷² In that case, a group of environmentalists had obtained an injunction barring the University of Arizona from constructing a telescope atop a mountain in Arizona. In response, Congress enacted the Arizona-Idaho Conservation Act of 1988 (“AICA”)¹⁷³ and specified that the requirements of the National Environmental Protection Act of 1969 (“NEPA”) and the Endangered Species Act (“ESA”) “shall be deemed satisfied” by the University if it constructed the telescope within a specified area.¹⁷⁴ When the University changed its mind and proposed a new site outside of the area specified by the AICA, Congress again stepped in and enacted a statute that declared that the University’s new proposal would be deemed to satisfy the AICA.¹⁷⁵ The court of appeals found the second amendment constitutional as a shorthand means of amending the environmental statutes underlying the original suit.¹⁷⁶ Judge Noonan wrote separately to note that “[a] more explicit intervention of Congress into a judicial proceeding would be difficult to imagine,” but he concurred in the result because Congress had in

169. See 364 U.S. at 650-52.

170. *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 435 (1992) (quoting Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 101-121, sec. 318(b)(6)(A), 103 Stat. 701, 747 (1989)).

171. *Id.* at 438. There is some scholarly dispute over whether the Rescissions Act, Pub. L. No. 104-19, 109 Stat. 194 (1995), which purported to modify any number of unspecified environmental statutes, would be constitutional under *Robertson*. Professor Bloom states that the Rescissions Act “sweeps much further than the provisions of the Northwest Timber Compromise sustained in *Robertson* because of its impact upon the permanent injunctions previously issued and its derogation of unspecified environmental laws.” Bloom, *supra* note 54, at 401. Whether or not this is a valid observation (which it appears to be), it is unlikely to be implicated when Congress retakes a field because in that case Congress will be earnestly attempting to create a scheme of federal regulation and would accordingly have no need to resort to a blunderbuss approach affecting untold numbers of unspecified statutes.

172. 89 F.3d 554 (9th Cir. 1996).

173. Pub. L. No. 100-696, 102 Stat. 4571.

174. *Mount Graham Coalition*, 89 F.3d at 556 (quoting AICA, 102 Stat. at 4597, 4599).

175. See *id.*

176. See *id.* at 557.

substance amended the NEPA and ESA, which was within its power to do.¹⁷⁷

The applicable law that may be constitutionally amended extends far beyond the statutes underlying the prospective relief, however. In *Wheeling*, for instance, the Court did not require Congress to amend the common law of public nuisance, which was the basis for the injunction barring the maintenance of the bridge.¹⁷⁸ Congress was instead permitted to amend the law governing post roads so as to make the bridge a post road and thus no longer a public nuisance.¹⁷⁹

Congress also appears to be able to limit its amendment of applicable law to certain cases. In *Robertson*, the Supreme Court purported to reserve judgment on the constitutionality of this practice,¹⁸⁰ but the Court's prior precedent gives a strong indication as to how the Court may rule when squarely confronted with the issue. In *Wheeling*, the Court allowed Congress to enact a statute that reached no further than the bridge at issue in the underlying litigation.¹⁸¹ Similarly, the Court in *Robertson* itself upheld the Northwest Timber Compromise that amended the five environmental statutes only as they applied to certain forests in Oregon and Washington,¹⁸² which not coincidentally were the same forests at issue in the consolidated lawsuits named in the amendment. The lower federal courts have read this precedent to allow such targeted statutory amendments. In *Mount Graham*, both the AICA and the law amending the AICA amended the NEPA and ESA only as those statutes applied to the particular dispute in question; the Ninth Circuit still upheld the statutes.¹⁸³

177. *Id.* at 558-59 (Noonan, J., concurring).

178. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 521 (1851) (original injunction based on public nuisance law).

179. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 430-32 (1855) (allowing modification of injunction through legislation declaring that bridge was post route).

180. *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992) (reserving judgment on whether "a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases").

181. *See* 59 U.S. (18 How.) at 432; *accord* *BellSouth Corp v. FCC*, 162 F.3d 678, 693 (D.C. Cir. 1998) (upholding, against a separation of powers challenge, section 271 of the Telecommunications Act of 1996 because "the [Supreme] Court upheld precisely this type of specificity in *Wheeling*").

182. The amending provision in *Robertson* read:

[T]he Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned [listing cases].

Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 101-121, sec. 318(b)(6)(A), 103 Stat. 701, 747 (1989) (emphasis added), *quoted in Robertson*, 503 U.S. at 434-35.

183. *Mount Graham Coalition v. Thomas*, 89 F.3d 554 (9th Cir. 1996). The initial AICA provision "specified that, for the portion of the project within [the specified area], the requirements of Section 7 of

Congress's broad authority to amend statutory law that affects consent decrees is entirely consistent with the purposes animating the separation of powers guarantee. The primary aim of this guarantee, as discussed above, is to "guard against 'encroachment or aggrandizement' by [one branch] at the expense of the other branches."¹⁸⁴ Article I vests Congress with "[a]ll legislative Powers herein granted"¹⁸⁵ and specifically enumerates the subjects over which this power may be exercised.¹⁸⁶ As long as the law Congress amends falls within the language of Article I, Congress is doing no more than exercising its constitutionally granted powers. That the amendment happens to affect consent decrees does not mean that Congress has encroached upon the judicial branch, for the Judiciary, as noted above, has no constitutionally cognizable interest in seeing that statutory law is not changed. Indeed, a separation of powers violation would arise if Congress did not have the power to amend statutory law that affects consent decrees because in that situation the Executive (by proposing a decree) and the Judiciary (by approving it) would be able to prevent the Legislature from exercising its law-making authority over an area otherwise within Article I. This would permit these two branches to encroach on the legislative power reserved exclusively to Congress.¹⁸⁷

Once it is established that Congress may amend the particular statute underlying a consent decree, it follows that the separation of powers guarantee does not place any constraints on which statute Congress may amend to affect the decree as long as that statute is within the power of Congress to amend. Nor would separation of powers seem to place any constraints on the targeting of these amendments to particular cases, although the Equal Protection Clause, as discussed more fully below, might do so.¹⁸⁸

the Endangered Species Act 'shall be deemed satisfied,' as shall the requirements of Section 102(2)(c) of NEPA." *Id.* at 556 (quoting AICA, 102 Stat. at 4597, 4599). The amendment to the AICA stated, "The United States Forest Service approval of alternative site 2 . . . is hereby authorized and approved and shall be deemed to be consistent with, and permissible under, the terms of [AICA]." *Id.* (quoting the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 335, 110 Stat. 1321).

184. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982) (Brennan, J., plurality opinion) (internal citation omitted); *see also supra* notes 39-43 and accompanying text.

185. U.S. CONST. art. I, § 1.

186. *See* U.S. CONST. art. I, § 8.

187. In *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1997), the First Circuit made the same observation. The court noted that if Congress was barred from amending statutes that happened to underlie a consent decree, Congress would be deprived to its legislative power. Nor would it be an answer to say that Congress could still amend the law as to persons not governed by a decree, for that would permit the outstanding consent decrees to remain valid even though Congress had done everything in its power to eliminate the law underlying them.

188. *See infra* Part I.C.1.

Reading the separation of powers guarantee to permit congressional modification of statutory law underlying consent decrees is also consistent with the current understanding of why the Framers drew the lines they did between the legislative and judicial powers. Prior to the ratification of the Constitution, state legislatures often functioned as “courts of equity of last resort” by passing “special bills or other enacted legislation” to overturn court decisions with which they disagreed.¹⁸⁹ This practice, known as “legislative equity,” fell into disfavor in the years immediately preceding the Constitutional Convention and was repeatedly denounced in the *Federalist Papers*.¹⁹⁰ In *Federalist No. 48*, in particular, Madison expressed concern with how, by engaging in legislative equity, “[t]he legislative department [of the States] is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”¹⁹¹ To solve this unsavory problem, Hamilton later wrote in *Federalist No. 81*, limits would have to be placed on the power of the Federal Legislature: “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.”¹⁹² Drawing upon these writings, the Framers separated the judicial power to decide cases from the legislative power to enact laws and, in Article III, vested the former solely in the hands of the Judiciary.¹⁹³

As one might expect, the Constitution’s newly created division of authority precluded Congress from engaging in the practice of legislative equity: The Article III courts have the power to finally decide cases, so that once a case is finally decided, it cannot be overturned by Congress’s exercise of its legislative power.¹⁹⁴ The Framers’ desire to stamp out legislative equity on the federal level would not, however, seem to prohibit Congress from exercising its legislative power to make statutory law when those laws affect cases that are still before the federal courts. In that class of cases, which would seem to include those in which prospective relief has already been awarded, the federal courts are still in the process of applying federal statutory law. In that respect, the cases are “future cases,” for which even Hamilton himself acknowledged that Congress

189. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (citing GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 154-55 (1969)).

190. *See Plaut*, 514 U.S. at 219-23 (collecting sources).

191. *THE FEDERALIST NO. 48*, at 147 (James Madison) (Roy P. Fairfield ed., 2d ed. 1966).

192. *THE FEDERALIST NO. 81*, at 245 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1966).

193. *See U.S. CONST.* art. III, § 1.

194. The Supreme Court recognized as much in its precedent stretching from *Hayburn’s Case* in 1792 to *Plaut* in 1995. *See supra* notes 92-96 and accompanying text.

could “prescribe . . . new rule[s].”¹⁹⁵ As a result, allowing Congress to modify statutory law underlying consent decrees is entirely consistent with the Framers’ desire to end the practice of legislative equity.

Even if the Framers envisioned a broader role for the separation of powers guarantee, it is doubtful that the guarantee would reach so far as to prohibit congressional displacement of regulatory consent decrees. It was not until the 1930s that Congress began to use the Commerce Power as a means of greatly expanding the number of industries subject to federal regulation. It was not until even more recently that judicial consent decrees came to be used as a tool for settling lawsuits between the United States and industry participants subject to federal law, thereby involving the federal courts in the business of developing and administering federal law—in other words, the business of legislating.¹⁹⁶ While such judicial regulation of an industry is undoubtedly within the Article III power of the federal courts, because it involves the resolution of a “Case or Controversy,”¹⁹⁷ it nevertheless seems to be far from the core duty of the courts because it entails far more than the resolution of a dispute between parties. As a result, a law that displaces a regulatory decree does not interfere with an exclusively judicial function so much as it transfers the quasi-legislative function performed by regulatory decrees back to Congress, the entity charged by the Constitution with the development of federal statutory law. For these reasons, laws that modify or eliminate consent decrees are consistent with the separation of powers guarantee.

4. *The PLRA and the Telecommunications Act of 1996*

The above analysis suggests that neither the PLRA nor the Telecommunications Act of 1996 violates the separation of powers guarantee. Section 3626 of the PLRA requires any consent decree dealing with prison administration to be terminated unless the court is able to make three findings: that the relief is narrowly drawn, extends no further than is necessary to correct a violation of a federal right, and is the least intrusive means of correcting the

195. THE FEDERALIST NO. 81, *supra* note 192, at 245.

196. As the Fifth Circuit recently observed, “the [AT&T Consent Decree] was far from a final resolution of the nation’s telecommunications dilemma. Its enforcement and alteration in the light of technological progress and changing market circumstances ultimately required substantial monitoring on the part of the district court, and the extensive judicial tinkering that resulted prompted many pundits to dub District Judge Greene the country’s ‘telecommunication’s czar.’” *SBC Communications, Inc. v. FCC*, 154 F.3d 226 (5th Cir. 1998) (citation omitted), *cert. denied*, 119 S. Ct. 889 (1999).

197. U.S. CONST. art. III, § 2.

violation.¹⁹⁸ The split among the courts of appeals over the constitutionality of this provision can be traced to a disagreement over which “law” the PLRA purports to change. The vacated Ninth Circuit panel, based on its belief that the only applicable law that could be amended by Congress was the law underlying the decree itself, found the PLRA unconstitutional because the applicable law underlying most prison decrees is the Constitution, which is beyond the power of Congress to amend.¹⁹⁹ The premise of the Ninth Circuit’s argument—that the only applicable law that may be amended is the substantive law underlying a decree—is at odds with the Supreme Court’s decision in *Wheeling*, which takes a broader view of which laws Congress may amend. The other circuits to consider the issue took this broader view of the applicable law and characterized the PLRA as an amendment to the law governing the remedial authority of the federal courts.²⁰⁰ Because this characterization of the PLRA is consistent with *Wheeling*, and because Congress clearly has the authority to control the federal courts’ remedial authority, the PLRA’s termination provision is consistent with the separation of powers guarantee.

This conclusion is not without its critics, however. Professor Bloom contends that the PLRA violates the separation of powers guarantee because it “virtually compel[s] a decision favorable to the governmental entity involved.”²⁰¹ For the reasons noted above, however, the basis of a separation of powers violation is not that Congress dictates a particular result in a case, but that it does so in an improper manner—that is, by tampering with the jurisdiction of the federal courts so as to make continued jurisdiction contingent upon a certain substantive outcome.²⁰² Because the PLRA effects a bona fide change in the law governing the federal courts’ remedial authority, it does not commit the sin condemned in *Klein* for, as the Court in *Plaut* observed, “[*Klein*’s] prohibition does not take hold when Congress ‘amend[s] applicable law.’”²⁰³

198. See 18 U.S.C. § 3626(b)(2) (Supp. II 1996).

199. See *Taylor v. United States*, 143 F.3d 1178, 1183 (9th Cir.), *withdrawn*, 158 F.3d 1059 (9th Cir. 1998).

200. See *Hadix v. Johnson*, 133 F.3d 940, 942-43 (6th Cir.), *cert. denied*, 118 S. Ct. 2368 (1998); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 657 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2366 (1998); *Benjamin v. Jacobson*, 124 F.3d 162, 174 (2d Cir. 1997); *Gavin v. Branstad*, 122 F.3d 1081, 1086-87 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 2374 (1998); *Dougan v. Singletary*, 129 F.3d 1424 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 2375 (1998); *Plyler v. Moore*, 100 F.3d 365, 372 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2460 (1997).

201. Bloom, *supra* note 54, at 410.

202. See *supra* text accompanying notes 87-89.

203. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (quoting *Robertson v. Seattle*

The Telecommunications Act of 1996 is also a permissible exercise of Congress's power under the separations of power guarantee. The Act itself supersedes three decrees—the AT&T Consent Decree, the GTE Consent Decree, and the McCaw Consent Decree—each based on antitrust law.²⁰⁴ The Telecommunications Act does not amend antitrust law, however.²⁰⁵ It amends the Communications Act of 1934. Congress's decision to amend the narrower subset of laws governing telecommunications instead of changing the antitrust laws governing all industries is of no consequence. Under the Court's separation of powers jurisprudence, Congress is not obligated to amend the antitrust laws in order to affect decrees based on that law. Moreover, regulation of the telecommunications industry is within Congress's Article I power.

The courts of appeals appear to have reached the same conclusion, although their specific holdings are a bit baffling. The Fifth Circuit held that under *Wheeling* and *Robertson*, "Congress may change the law underlying ongoing *equitable* relief, even if . . . the change is specifically targeted at and limited in applicability to a particular injunction."²⁰⁶ In a similar vein, the D.C. Circuit held that under *Wheeling*, Congress could "eliminate the prospective effects of the [AT&T Consent Decree] and provid[e] new restrictions to govern the future acts of the [Bell companies] in its place."²⁰⁷ What is baffling is that these courts were not examining section 601(a)(1)—the provision that repealed the AT&T Consent Decree and thus the provision most relevant to a separation of powers inquiry (because it is the provision actually affecting the prior judicial decrees). Instead, they were analyzing whether the *replacement scheme* Congress enacted to fill the void created by section 601(a)(1) violated the separation of powers guarantee. It is difficult to see how the replacement legislation could abrogate the power of the Judiciary since it does not affect the Judiciary or any of its orders. That the courts analyzed the wrong provisions is understandable,

Audubon Soc'y, 503 U.S. 429, 441 (1992)).

204. See *United States v. AT&T*, 552 F. Supp. 131, 139, 226-34 (D.D.C. 1982) (AT&T Consent Decree settling Sherman and Clayton Act lawsuits), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. GTE Corp.*, 603 F. Supp. 730 (D.D.C. 1984) (GTE Consent Decree settling Clayton Act lawsuit); *United States v. Western Elec. Co.*, 158 F.R.D. 211, 213 n.4 (D.D.C. 1994), *aff'd*, 46 F.3d 1198 (D.C. Cir. 1995) (AT&T-McCaw consent decree settling Clayton Act lawsuit).

205. Indeed, Congress expressly provided that, with a few narrow exceptions, "nothing in th[e] [new] Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(b)(1), 110 Stat. 61, 143.

206. *SBC Communications, Inc. v. FCC*, 154 F.3d 226, 245 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 889 (1999).

207. *BellSouth Corp. v. FCC*, 162 F.3d 678, 693 (D.C. Cir. 1998).

however, because the plaintiffs in those suits (the Bell operating companies) intentionally framed the issue that way—had the plaintiffs framed the issue properly, they would have been asking the Court to reinstate the AT&T Consent Decree, a result they clearly did not want.

These cases aside, the Telecommunications Act raises one further issue, however, for section 601(a) of the Act might be read as a self-executing termination of the three outstanding consent decrees. There is a strong argument that such a congressional directive to dissolve a decree encroaches upon the power of the Judiciary, which retains sole control over its docket. To be sure, Congress does not implicate this potential limitation when it changes the law but says nothing to the courts, effectively leaving it to the parties to bring the statutory amendment to the courts' attention. This is essentially what happened in *Wheeling*, where Congress declared the Ohio River bridge to be lawful but relied upon the parties to plead the change in law to the courts. This is clearly acceptable because Congress does not even purport to tell the courts what to do.

Nor would Congress seem to cross the line by exercising judicial power when it changes the law and instructs the courts to modify outstanding decrees to the extent the courts find the decrees inconsistent with the new law. This is essentially what the PLRA requires because it orders the federal courts, upon motion of the parties, to terminate any consent decree unsupported by the proper findings.²⁰⁸ Even though Congress is more expressly telling the courts what to do, the effect of that command is no different from the first scenario: The court is obligated to modify the decree in light of the change in law²⁰⁹ but is still the entity responsible for performing the judicial function of actually modifying the decree.²¹⁰ The courts' power remains intact, so there is no separation of powers violation here. But when Congress declares an outstanding decree null and void, it may cross the line of permissible activity by negating a judicial order and encroaching upon the prerogative of the Judiciary to render dispositive judgments.²¹¹

Section 601(a) of the Telecommunications Act of 1996, while implicating this possible additional limitation, probably does not violate it. The language in section 601(a) can be read as an instruction to the district court to dissolve the

208. See 18 U.S.C. § 3626(b)(2) (Supp. II 1996).

209. See *supra* notes 143-64 and accompanying text.

210. See *Jensen v. County of Lake*, 958 F. Supp. 397, 404 (N.D. Ind. 1997) (upholding termination provision of PLRA because it “does not mandate the courts to terminate cases without review by the courts”).

211. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995).

prior antitrust decrees in light of the change in statutory law, and probably should be read that way given the maxim against construing statutes to be unconstitutional.²¹² Indeed, the district court itself seemed to read section 601(a) that way when it dissolved the AT&T Decree in response to the Act.²¹³

This review of the relevant case law indicates that Congress may, without violating the separation of powers guarantee, enact statutes that change the law affecting outstanding consent decrees in order to replace those decrees with federal legislation. The twin limits on this power are narrow: Congress may not alter constitutional law and Congress may not directly declare the previous decrees null and void.

B. Contract-Based Claims

Although the separation of powers guarantee poses the largest potential constitutional impediment to congressional efforts to replace federal consent decrees with legislation, it is far from the only potential roadblock. A consent decree, as noted above, “ha[s] attributes both of contracts and of judicial decrees.”²¹⁴ To the extent a consent decree prescribes no more relief than that to which the parties are entitled by statute, it is arguably indistinguishable from an injunction. While it is true that even this type of consent decree is a contract insofar as its specific terms are agreed to by the parties and not dictated by the court,²¹⁵ the terms are nevertheless within the bounds of what could have been ordered by the court and thus within the contemplation of the statute underlying the order. As such, the parties should have no contractual or property rights in the decree in light of the general “presumption . . . that ‘a law is not intended to

212. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”).

213. See *United States v. Western Elec. Co.*, No. 82-0192 (HHG), 1996 WL 255904 (D.D.C. Apr. 11, 1996) (“the Court will enter an order terminating the [AT&T Consent] decree, nunc pro tunc, as of February 8, 1996”). The same district court also lifted the GTE Decree at the Justice Department’s request. See *Order Lifting GTE Decree*, *United States v. GTE Corp.* (D.D.C. 1996) (No. 83-1298) (on file with author). Because the AT&T-McCaw Decree had not yet been formally entered by the district court when the Telecommunications Act became law (only an interim stipulation was in effect), there was no decree to dissolve, although the interim stipulation was eliminated when the Justice Department moved to voluntarily dismiss the underlying Clayton Act suit. See *Notice of Dismissal*, *United States v. AT&T*, (D.D.C. 1996) (No. 94-01555) (on file with author).

214. *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 519 (1986) (quoting *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 n.10 (1975)); see also *supra* text accompanying notes 139-40.

215. See *Local No. 93*, 478 U.S. at 519.

create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.”²¹⁶

The Supreme Court relied upon this general rule in *Bowen v. Public Agencies Opposed to Social Security Entrapment*.²¹⁷ At issue in that case was a congressional repeal of a provision of the Social Security Act. Years before, Congress had given the states the option of entering into contracts with the Federal Government to bring their employees within the folds of the Social Security Act.²¹⁸ The State of California had done so and, as permitted by federal law, had reserved the right to withdraw from the contract upon two years’ notice.²¹⁹ In 1983 Congress repealed the statute insofar as it authorized withdrawal by the states. California sued, claiming that the amendment interfered with its contractual rights under its agreement with the Federal Government.²²⁰ The Supreme Court rejected the argument, noting that the contractual language regarding withdrawal “exactly tracked the language of the statute, conferring no right on the State beyond that contained in [the statute] itself.”²²¹

Of course, a consent decree may afford the parties greater relief than a statute would allow a court to award on its own after trial.²²² To assess the constitutionality of legislation that supersedes such a decree, it is necessary to know whether a decree that awards more relief than the law itself would enable a court to award creates a contractual or property interest in that relief sufficient to trigger the constitutional provisions designed to protect such interests—the Takings Clause, the Due Process Clause, and the Contracts Clause.

It is possible to argue that no property interest exists in these decrees because they are in many respects indistinguishable from decrees that a court could award. To begin with, these broader decrees are still court orders: “[A] judgment upon consent is [still] ‘a judicial act.’”²²³ As such, they must be

216. *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 466 (1985) (quoting *Dodge v. Board of Ed.*, 302 U.S. 74, 79 (1937)); *see also Wisconsin & Michigan Ry. v. Powers*, 191 U.S. 379, 386-87 (1903) (Michigan statute exempting from taxation railroads operating in Michigan above 44th parallel does not create contract with carriers that is breached upon repeal of statute); *Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1104 (7th Cir. 1995) (“[A] statute is presumed not to create contractual rights.”).

217. 477 U.S. 41 (1986).

218. *See id.* at 45.

219. *See id.* at 48.

220. *See id.* at 49-50.

221. *Id.* at 55.

222. *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 525 (1986).

223. *Pope v. United States*, 323 U.S. 1, 12 (1944) (quoting *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932)).

approved by a court before they acquire the force of law. Indeed, the approval process itself is subject to significant judicial oversight,²²⁴ particularly as to decrees falling under the Antitrust Procedures and Penalties Act (or “Tunney Act”), which obligates the court to find that approval of the decree will be “in the public interest.”²²⁵ In all cases, however, a court can make its approval of the decree contingent on modifications to the decree’s terms. Decrees awarding greater relief than the statute allows are not immune from subsequent modification when a “significant change either in factual conditions or in law” occurs.²²⁶ Finally, noncompliance with these decrees, as with all other judicial orders, “is enforceable by citation for contempt of court.”²²⁷

This argument is not entirely persuasive, however. While it is true that consent decrees going beyond what the law requires are treated similarly to decrees within the law’s contemplation once they obtain court approval, this merely confirms the undisputed fact that these decrees are court orders. The more salient point is that some of those decrees’ terms are simply beyond the power of the court to award. Because the authority to impose those additional terms does not come from the court, it necessarily comes from the parties’ mutual assent to those terms. While the parties, for the reasons noted above, may not have any property interest in those terms of the decree within the court’s authority to grant, the parties would seem to have a property interest in those terms included solely by virtue of their private agreement, which is essentially a contract over and above the requirements of the law. This Article will now explore whether the parties’ interest is cognizable by any of the

224. For example, most courts will review the decree to assure that it is not unreasonable, inequitable, unlawful, or unconstitutional. *See, e.g.,* *Stovall v. City of Cocoa*, 117 F.3d 1238, 1242 (11th Cir. 1997); *Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995); *United Black Firefighters Ass’n v. City of Akron*, 976 F.2d 999, 1004 (6th Cir. 1992); *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 921 F.2d 1371, 1383 (8th Cir. 1990); *United States v. City of Alexandria*, 614 F.2d 1358, 1361 (5th Cir. 1980).

225. 15 U.S.C. § 16(e) (1994); *see* *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982) (conducting Tunney Act review of consent decree between AT&T and United States governing breakup and subsequent regulation of Bell companies), *aff’d sub nom.* *Maryland v. United States*, 460 U.S. 1001 (1983). Some members of the Court have opined that the authority granted to federal courts by the Tunney Act comes at the expense of the executive branch and thus raises a colorable separation of powers issue. *See Maryland*, 460 U.S. at 1005 (Rehnquist, J., dissenting); *see also* Justin Lilley, Comment, *A Judicial Role for Proceedings Involving Uncontested Modifications to Existing Consent Decrees*, 41 CATH. U. L. REV. 665, 690-92 (1992) (further exploring this argument).

226. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992); *see also* *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) (“A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. . . . The result is all one whether the decree has been entered after litigation or by consent.”).

227. *Local No. 93*, 478 U.S. at 518.

property clauses of the Constitution.

1. The Takings Clause

The Takings Clause of the Fifth Amendment provides: “[N]or shall private property be taken for public use, without just compensation.”²²⁸ Thus, legislation superseding a consent decree, which presumably does not provide any compensation, will violate the Takings Clause if (i) the decree is “private property” and (ii) the legislation effects a “taking” of the decree within the meaning of the Clause.²²⁹

a. Private Property

Those provisions of a consent decree beyond the power of the court to award are supported solely by agreement of the parties and, for that reason, most closely resemble a contract. Ever since *Lynch v. United States*,²³⁰ the Supreme Court has recognized that “[v]alid contracts are property [for Takings Clause purposes].”²³¹ A contract exists even when the decree is regulatory and one of the parties to the decree is the executive branch because the *Lynch* rule applies “whether the obligor be a private individual, a municipality, a State or the United States.”²³²

Just last Term, however, a majority of the Court cast significant doubt on whether *Lynch* should continue to apply to contracts not involving real or personal property. In *Eastern Enterprises v. Apfel*,²³³ a plurality of the Court held that the Coal Industry Retiree Health Benefit Act of 1992 (“Coal Act”)

228. U.S. CONST. amend. V.

229. In the typical Takings Clause case, it is also necessary to show that the taking is uncompensated in order to establish a constitutional violation. That is because the Takings Clause “does not prohibit the taking of private property” but requires that any taking be justly compensated. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987). Because the type of property interference occasioned by legislation that retakes a field is unlikely to afford compensation, any such legislation is likely to violate the Constitution if it effects a taking of property. *See Eastern Enters. v. Apfel*, 118 S. Ct. 2131, 2145 (1998) (plurality opinion) (assuming “the lack of a compensatory remedy” with respect to legislation that imposed monetary liability on certain employers of coal miners); *id.* at 2154-57 (Kennedy, J., concurring in part and dissenting in part) (relying on plurality’s observation as reason not to review this type of legislation under Takings Clause); *id.* at 2161-62 (Breyer, J., dissenting) (same).

230. 292 U.S. 571 (1934).

231. *Id.* at 579; *see* Kris Kobach, *Contingency Fees May Be Hazardous to Your Health: A Constitutional Analysis of Congressional Interference with Tobacco Litigation Contracts*, 49 S.C. L. REV. 215, 231 (1998).

232. *Lynch*, 292 U.S. at 579.

233. 118 S. Ct. 2131 (1998).

violated the Takings Clause because it required mining companies to contribute millions of dollars to fund the health benefits of certain retired employees notwithstanding that some of those companies had never contractually promised such benefits and had not been in the mining business for decades. Justice Kennedy disagreed with the plurality. He understood the Coal Act to “simply impose an obligation to . . . pay[] . . . benefits,”²³⁴ which was solely a monetary liability that “neither target[ed] a specific property interest nor depend[ed] upon any particular property for the operation of its statutory mechanisms.”²³⁵ Because, in his view, “the Government’s imposition of an obligation between private parties, or destruction of an existing obligation, must relate to a specific property interest to implicate the Takings Clause,”²³⁶ Justice Kennedy concluded that the Act did not “take” “private property.” Justice Breyer, in a dissent joined by Justices Stevens, Souter, and Ginsburg, agreed with Justice Kennedy on this point: “The ‘private property’ upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property.”²³⁷ In the dissenters’ view, the Coal Act did not take any such property: “This case involves, not an interest in physical or intellectual property, but an ordinary liability to pay money”²³⁸

Under the reasoning employed by Justice Kennedy and the dissenters, contracts not affecting rights in specific property would seem to fall outside the ambit of private property protected by the Takings Clause. No Justice contested that the Coal Act retroactively reallocated liability for health benefits, or that the effect of the Act could be viewed in one of two ways—either as a seizure of the mining companies’ money or as an abrogation of the contracts the mining companies had entered into with their employees regarding health benefits. As a result, if those two characterizations are interchangeable, the five Justices’ rejection of Takings Clause claims based on seizure of money would necessarily imply their rejection of Takings Clause claims involving contracts not affecting specific property rights.

The Supreme Court previously found two similar characterizations

234. *Id.* at 2154 (Kennedy, J., concurring in the judgment and dissenting in part).

235. *Id.* at 2156 (Kennedy, J., concurring in the judgment and dissenting in part).

236. *Id.* at 2156 (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy nevertheless concurred in the judgment, finding that the Coal Act’s imposition of health benefits liability on mining companies as to their long-retired employees was so arbitrary as to violate the Due Process Clause.

237. *Id.* at 2161 (Breyer, J., dissenting).

238. *Id.* at 2162 (Breyer, J., dissenting).

interchangeable in *Connolly v. Pension Benefit Guaranty Corp.*²³⁹ In that case, the Court considered a Takings Clause challenge to the Multiemployer Pension Plan Amendments Act of 1980.²⁴⁰ The Act required employers withdrawing from multiemployer pension funds to pay a withdrawal fee. Because a number of the employees had previously signed contracts limiting their fund liability to regular contributions (which ostensibly foreclosed the imposition of additional withdrawal liability), the Act both imposed a monetary obligation and abrogated contracts. The Court noted this fact but went on to uphold the Act.²⁴¹

Indeed, Justice Kennedy in his *Apfel* concurrence seemed to recognize the applicability of his rule to contracts not involving specific property, for in support of his rule he distinguished the Court's decisions in *United States v. Security Industrial Bank*²⁴² and *Louisville Joint Stock Land Bank v. Radford*.²⁴³ Each of those decisions held that statutes interfering with contracts involving specific property, while “fit[ing] but awkwardly into the analytic framework” of the Takings Clause, nevertheless did fit.²⁴⁴ Thus, under this rule, which five Justices—a majority of the Court—endorsed, contracts that do not involve specific property are not private property within the meaning of the Takings Clause. Accordingly, regulatory consent decrees, which by definition are more often directed toward regulation of behavior than toward disposition of specific property, would not be considered private property.

b. Taking

Assuming for the moment that consent decrees are private property, the next question is whether legislation that supersedes those decrees and thus interferes with the contractual rights contained therein amounts to a taking. It is hornbook law that “not every destruction or injury to property by governmental action has been held to be a ‘taking’ in the constitutional sense.”²⁴⁵ Indeed, until 1922, it was not even possible to take property except by physically invading real

239. 475 U.S. 211, 221, 223 (1986) (discussing plaintiff's dual arguments that payment of money and interference with prior contractual obligations constituted basis for Takings claim).

240. 29 U.S.C. §§ 1381-1453 (1994).

241. See *Connolly*, 475 U.S. at 223.

242. 459 U.S. 70 (1982).

243. 295 U.S. 555 (1935).

244. *Apfel*, 118 S. Ct. at 2156 (Kennedy, J., concurring) (quoting *Security Indus. Bank*, 459 U.S. at 75).

245. *Armstrong v. United States*, 364 U.S. 40, 48 (1960); see also *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-09 (1923) (“There are many laws and governmental operations which injuriously affect the value of or destroy property . . . but for which no remedy is afforded [under the Takings Clause].”).

property. The Court's decision in *Pennsylvania Coal Co. v. Mahon*²⁴⁶ changed this by recognizing that property can also be taken if it is subjected to excessive regulation: "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."²⁴⁷

A number of the Court's "regulatory takings" cases have examined whether legislation that interferes with contracts between private parties constitutes a taking.²⁴⁸ *Omnia Commercial Co. v. United States*²⁴⁹ is one of the earliest cases to do so. In that case, the United States Government had requisitioned one manufacturer's entire 1918 production of steel plate, thereby vitiating a contract Omnia had to purchase that manufacturer's steel. The Court acknowledged that Omnia's contract with the manufacturer was "property within the meaning of the Fifth Amendment"²⁵⁰ but declined to hold that the Government's actions constituted a taking of Omnia's contract: "The conclusion to be drawn . . . is, that for consequential loss or injury resulting from lawful governmental action, the law affords no remedy."²⁵¹

The Court revisited this issue more extensively in *Connolly v. Pension Benefit Guaranty Corp.*²⁵² In that case, the Court considered a facial Takings Clause challenge to the Multiemployer Pension Plan Amendments Act of 1980. The Act required any employer participating in a multiemployer pension benefit plan to pay the plan an amount of money sufficient to cover its share of the plan's unfunded liabilities if it withdrew from the plan, even if the particular plan's Trust Agreement limited that employer's obligation under the plan to the amount of its periodic benefits contributions.²⁵³ The Court rejected the argument

246. 260 U.S. 393 (1922).

247. *Id.* at 415.

248. These cases are to be distinguished from those cases in which federal legislation interferes with a contract concerning a property right specifically guaranteed by state law. For example, in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935), the Court examined the constitutionality of the Frazier-Lemke Act, which in the name of giving relief to debt-ridden farmers altered the rights accorded a mortgagee under state law. The Court found the Act to constitute a taking, not because it interfered with the "personal [contractual] obligation" of the mortgagee, but because it eliminated "substantive rights [created by Kentucky law] in specific property acquired by the Bank prior to the Act." *Id.* at 589-90. Similarly, the Court in *Armstrong* concluded that a taking occurred when the Government refused to recognize mechanic's lien rights created by Maine law when it exercised its contractual rights and seized a ship having such liens upon it. 364 U.S. at 48-49. Unlike *Radford* and *Armstrong*, the cases discussed in the text do not involve contracts whose terms implicate state property rights.

249. 261 U.S. 502 (1923).

250. *Id.* at 508.

251. *Id.* at 510. The steel manufacturer had already been properly compensated by the Government. *See id.* at 507.

252. 475 U.S. 211 (1986).

253. *See id.* at 216-17.

that the Act violated the Takings Clause simply because it required “one person to use his or her assets for the benefit of another.”²⁵⁴ The Court also found the fact that the Act vitiated the contractual terms of individual trust agreements unconvincing: “[T]he fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking.”²⁵⁵ The Court found the contractual argument particularly weak because the provisions of the Act that interfered with those trust agreements were “within the power of Congress to impose”.²⁵⁶

Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.²⁵⁷

The Court nevertheless analyzed the Act under the regulatory takings framework it developed in *Penn Central Transportation Co. v. New York City*.²⁵⁸ The *Penn Central* case identified three factors that have “particular significance” in determining “whether a particular [legislative] restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it”: (i) “the economic impact of the regulation on the claimant”; (ii) “the extent to which the regulation has interfered with distinct investment-backed expectations”; and (iii) “the character of the governmental action.”²⁵⁹

The Court in *Connolly* concluded that the traditional *Penn Central* regulatory takings analysis “reinforce[d]” its initial conclusion that the Act’s withdrawal liability provisions were constitutional.²⁶⁰ The Act undeniably had an economic impact because it permanently deprived the withdrawing employer of the money the Act obligated it to pay. But the Court found that this impact was in large part mitigated by a number of the Act’s other provisions that at times exempted or reduced this withdrawal liability and by the fact that the residual liability was often proportional to the employer’s experience with the

254. *Id.* at 223.

255. *Id.* at 224 (citing *Bowles v. Willingham*, 321 U.S. 503, 517 (1944)).

256. *Id.*

257. *Id.* at 223-24 (quoting *Norman v. Baltimore & Ohio R.*, 294 U.S. 240, 307-08 (1935)).

258. 438 U.S. 104 (1978).

259. *Id.* at 124.

260. 475 U.S. at 225.

plan.²⁶¹ The Court also concluded that the Act's imposition of withdrawal liability did not upset any reasonable, investment-backed expectations because pension plans had been "the objects of legislative concern long before the passage of [the Employee Retirement Income Security Act ("ERISA")]."²⁶² The Court also pointed to the common sense notion that "[t]hose who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."²⁶³ With respect to *Penn Central's* last factor, the nature of the government action, the Court concluded that the Act's interference with employer's contractual interests "arises [more] from a public program that adjusts the benefits and burdens of economic life to promote the common good"²⁶⁴ than from a "physical invasion by government."²⁶⁵ As a result, the Court felt that this factor weighed against a finding that the Act constituted a taking.²⁶⁶ The Court reaffirmed this Takings analysis in a subsequent as-applied challenge to the same Act in *Concrete Pipe & Products v. Construction Laborers Pension Trust for Southern California*.²⁶⁷

The *Apfel* decision draws on both *Connolly* and *Concrete Pipe*. The *Apfel* plurality examined the three *Penn Central* factors as it had done in *Connolly* and *Concrete Pipe*. The plurality reaffirmed those cases insofar as they acknowledged that "Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties."²⁶⁸ In the plurality's view, the Coal Act was unconstitutional because it exceeded this leeway by "impos[ing] severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability [was] substantially disproportionate to the parties' experience."²⁶⁹

Although *Omnia*, *Connolly*, *Concrete Pipe*, and *Apfel* each dealt with

261. *See id.* at 225-26.

262. *Id.* at 226.

263. *Id.* at 227 (quoting *FHA v. Darlington, Inc.*, 358 U.S. 84, 91 (1958)); *see also* Kobach, *supra* note 231, at 237 ("Prior Congressional regulation of an area can also defeat a property owner's assertions of investment-backed expectations."); Jan G. Laitos, *Legislative Retroactivity*, 52 WASH. U. J. URB. & CONTEMP. L. 81, 100 (1997) ("Expectations are said to be unreasonable if parties holding the expectation either had a duty to take future changes into account in their decisions, or somehow had notice of the likelihood that there would be a change in the applicable law.")

264. *Connolly*, 475 U.S. at 225.

265. *Penn Central*, 438 U.S. at 124.

266. *See Connolly*, 475 U.S. at 225.

267. 508 U.S. 602, 641-46 (1993).

268. *Apfel*, 118 S. Ct. at 2149.

269. *Id.*

legislation that affected contracts between private parties, their analyses should apply with equal force to regulatory consent decrees to which the United States is a party. To be sure, the fact that the Government is a party to the decree has some effect on its authority to coopt the decree with legislation. If, for example, the executive branch has explicitly agreed in the decree that Congress will not modify the decree by changing the underlying law, it will be held to that promise and will be estopped from exercising its sovereign power to enact legislation affecting the underlying statutory law as to the parties to the decree.²⁷⁰ Alternatively, Congress may become financially liable if in the decree it promised not to modify the underlying law.²⁷¹ Neither of these consequences, however, affects the constitutionality of these statutory amendments.

Under the *Penn Central* factors, as interpreted in *Connolly*, *Concrete Pipe*, and *Apfel*, federal legislation that eliminates or modifies regulatory consent decrees is not likely to violate the Takings Clause. To begin with, displacement of a regulatory consent decree is unlikely to have a significant economic impact. Any economic impact would likely be confined to the difference in the costs of complying with the two regulatory schemes. This impact should be far more modest than the impact of the Coal Act in *Connolly*, which imposed monetary liability. Legislation displacing federal regulatory decrees also would not appear to upset any reasonable, investment-backed expectations of the parties. Regulatory decrees, like all decrees, are themselves subject to modification under Rule 60(b) and *Rufo*. Further, the parties to those decrees are by definition “do[ing] business in [a] regulated field” and thus, under *Connolly*, “cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.”²⁷² Indeed, some regulatory decrees, the Florida and Texas tobacco decrees in particular, expressly acknowledge the effect of superseding legislation.²⁷³ Finally, this superseding legislation is more in the

270. “[I]t is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights.” *United States v. Winstar Corp.*, 116 S. Ct. 2432, 2455 (1996).

However, a contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power.

Id. at 2456. This presumption *against* such terms is known as the “unmistakability doctrine.” See *Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146-48 (1982).

271. See *Winstar*, 116 S. Ct. 2432 (Souter, J., plurality opinion).

272. 475 U.S. at 227 (internal quotations and citation omitted).

273. See Settlement Agreement at ¶ II(B)(5), *Florida v. American Tobacco Co.* (Fla. Cir. Ct. Aug. 25, 1997) (No. 95-1466 AH), available at <<http://stic.neu.edu/FL/flsettle.htm>>; Comprehensive Settlement Agreement and Release at ¶ 12, *Texas v. American Tobacco Co.* (E.D. Tex. Jan. 16, 1998),

nature of a “public program adjusting the benefits and burdens of economic life to promote the common good” than “a physical invasion by the government.”²⁷⁴

Therefore, congressional legislation that modifies or eliminates the terms of outstanding regulatory consent decrees is unlikely to constitute a taking under the Fifth Amendment.

2. *The Contracts Clause*

The Contracts Clause provides that “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts.”²⁷⁵ By its terms, this Clause does not directly place any constraints on congressional efforts to influence federal or state consent decrees.²⁷⁶ In its stead, the Supreme Court has examined federal legislation that impairs private contracts under the rubric of the Due Process Clause.²⁷⁷

3. *The Due Process Clause*

The Due Process Clause of the Fifth Amendment guarantees that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”²⁷⁸ Legislation that modifies or supersedes regulatory consent decrees might violate the Due Process Clause in one of two ways.

First, the Due Process Clause may preclude Congress from enacting legislation that impacts a regulatory consent decree to which the United States is a party if, in the decree, the Government had promised expressly not to enact such legislation. The first instance in which the Supreme Court recognized that a government might contract away its sovereign power to change the law involved a Contracts Clause challenge to a state law that abrogated a prior

available at <<http://stic.neu.edu/Tx/Texas-Settlement.htm>>; Memorandum of Understanding at ¶ 5, In re Moore *ex rel.* Mississippi Tobacco Litig. (Chancery Ct. July 2, 1997) (No. 94-1429), available at <<http://stic.neu.edu/MS/mssettle.htm>>.

274. *Penn Central*, 438 U.S. at 124.

275. U.S. CONST. art. I, § 10, cl. 1.

276. The Supreme Court has long recognized this fact. *See, e.g., Winstar*, 116 S. Ct. at 2455 (“[T]he Contract Clause has no application to acts of the United States . . .”); *Radford*, 295 U.S. at 589 (“Congress . . . is not prohibited from impairing the obligations of contracts.”).

277. *See* National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry., 470 U.S. 451, 472 & n.25 (1985) (noting that Due Process Clause requires Congress to justify as rational any “substantial” impairment of contractual obligations caused by federal legislation); Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984) (same).

278. U.S. CONST. amend. V.

bequest of land by the state legislature.²⁷⁹ The Supreme Court has subsequently held that the Due Process Clause imposes a similar constraint on congressional action. One Congress might contractually bind future Congresses by creating a “vested right” in the current state of the law which, if abrogated by later modification of the law, deprives the contracting party of his property without due process.

In *Lynch v. United States*,²⁸⁰ for example, the Court struck down a federal law that repealed all of the War Risk Insurance policies the Government had entered into with veterans. “As Congress had the power to authorize the Bureau of War Risk Insurance to issue [the policies],” the Court reasoned, “the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power.”²⁸¹ Because no such supervening congressional power was at work, the Court found “Congress [to be] without power to . . . abrogat[e] contractual obligations of the United States.”²⁸²

The Court relied on much the same reasoning in *Perry v. United States*,²⁸³ where it found unconstitutional a law that abrogated a contractual term contained in all previously issued United States bonds that made the bonds redeemable “in U.S. gold coin of the present standard of value.”²⁸⁴ The Court recognized that “[t]he argument in favor of [upholding the abrogating law], as applied to government bonds, is in substance that the Government cannot by contract restrict the exercise of a sovereign power.” But the Court found that “the right to make binding obligations is a competence attaching to sovereignty.”²⁸⁵ Because Congress “ha[d] not been vested with authority to alter or destroy those obligations,” the Court found the act unconstitutional.²⁸⁶

Because this particular due process limitation constricts Congress’s sovereign power, the Supreme Court is not anxious to find that the Government

279. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (holding that State of Georgia may not repeal land grant it had previously awarded); *Winstar*, 116 S. Ct. at 2454-55 (detailing evolution of this doctrine).

280. 292 U.S. 571 (1932).

281. *Id.* at 579.

282. *Id.* at 580. The exception for police powers was implicated in *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934), where the Court upheld a Minnesota law that temporarily extended the period of redemption on mortgages (to forestall foreclosure) in light of the economic “emergency” of the Great Depression.

283. 294 U.S. 330 (1935).

284. *Id.* at 347.

285. *Id.* at 353.

286. *Id.* at 353-54.

has ceded that power in a contract or decree. Toward that end, the Court has developed a canon of contractual construction that is known as the “unmistakability doctrine”: “[A] contract . . . will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power.”²⁸⁷ As a result, this due process limitation will not usually be implicated by legislation that modifies or eliminates a regulatory consent decree unless the Federal Government expressly covenanted in the decree not to modify the relevant law.²⁸⁸

The second way that the Congress might violate the Due Process Clause is if, in displacing a regulatory consent decree, it impairs the contractual terms of the decree in an irrational way. As noted above, this guarantee is analogous to that afforded by the Contracts Clause to similar legislation by the States.²⁸⁹ The Court has been careful to stress, however, that “the limitations imposed on States by the Contract Clause” are greater than “the less searching standards imposed on [federal] economic legislation by the Due Process Clauses.”²⁹⁰ Under the Due Process Clause, this type of legislation “come[s] to the Court with a presumption of constitutionality,” so “the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.”²⁹¹

Legislation modifying or eliminating existing regulatory consent decrees is likely to be rational and is therefore likely to pass muster under this rather deferential standard. In some extreme cases, laws might be deemed irrational because they apply “retroactively.”²⁹² While it is possible to view legislation that

287. *Winstar*, 116 S. Ct. at 2456; *Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986) (“[W]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign’s jurisdiction, and will remain intact unless surrendered in unmistakable terms.” (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982))); *cf. Merrion*, 455 U.S. at 146 (rejecting argument that “the Tribe has abandoned its sovereign powers simply because it has not expressly reserved them through a contract”).

288. What follows from violation of this limitation is not clear. While some of the Court’s opinions indicate that the legislation itself would be invalidated, *see Lynch*, 292 U.S. at 586-87, other cases seem to indicate that Congress would be liable for breach of contract. *See Perry*, 294 U.S. at 354-58 (discussing, but rejecting, award of damages for breach of contract).

289. *See National R.R. Passenger Corp. v. Atchinson, Topeka & Sante Fe Ry.*, 470 U.S. 451, 472 (1985); *see also Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984).

290. *Pension Benefit Guar. Corp.*, 467 U.S. at 733.

291. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

292. *See, e.g., Eastern Enters. v. Apfel*, 118 S. Ct. 2131, 2158-59 (1998) (Kennedy, J., concurring) (finding Coal Act’s retroactive imposition of health benefits liability on mining companies as to their long-retired employees so arbitrary as to violate Due Process Clause).

displaces decrees as retroactive insofar as it alters the terms of the already existing decree, this is not the type of retroactivity that would of its own force invalidate such legislation. To begin with, legislation that displaces a regulatory consent decree does not impose liability after the fact for actions a party took in the past (as the laws in *Connolly*, *Concrete Pipe*, and *Apfel* did). At most, this legislation negates the applicability of a consent decree's terms in the future.²⁹³ But it is hardly arbitrary—and is in fact necessary—for Congress to modify the prospective effect of prior decrees in order for its new regulatory scheme to apply to the parties subject to those decrees. Thus, legislation that retakes the field will probably pass muster under the Due Process Clause.

C. Remaining Constitutional Claims

There are a handful of other constitutional objections that might be raised against legislation that eliminates or modifies federal or state consent decrees, although none are likely to be meritorious.

1. Equal Protection Guarantee

The guarantee of equal protection,²⁹⁴ which applies directly to the states via the Fourteenth Amendment and has been indirectly applied to the Federal Government via the Fifth Amendment's Due Process Clause,²⁹⁵ ensures that Congress acts rationally when it enacts economic legislation that treats similarly situated groups differently.²⁹⁶ Because an equal protection violation presupposes that persons are being treated differently, such a violation would only occur if Congress decides to eliminate or modify some decrees but not others, or decides to eliminate or modify a particular decree but only as to certain parties to the decree.

Congress has not drawn such lines often, however. With the

293. See 47 U.S.C. § 152 (Supp. II 1996) (historical and statutory notes containing section 601(a)(1) of the Telecommunications Act) (modifying prospective effect of the three consent decrees previously regulating the field).

294. “[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

295. See *supra* note 37.

296. See *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). The Supreme Court applies greater level of scrutiny to “suspect” and “quasi-suspect” classes, such as race and gender, requiring the government to make a stronger showing of justification for treating similarly situated groups differently. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (applying “strict scrutiny” to distinctions legislature draws on basis of race); see *United States v. Virginia*, 518 U.S. 515, 533 (1996) (applying “intermediate scrutiny” to distinctions legislature draws on basis of gender).

Telecommunications Act of 1996, for instance, Congress eliminated all three consent decrees that regulated the telecommunications industry—the AT&T Decree, the GTE Decree, and the AT&T-McCaw Decree.²⁹⁷ Similarly, in the Prison Litigation Reform Act, Congress prescribed that all institutional reform decrees were subject to the Act's termination provision.²⁹⁸ In both cases, Congress treated all decrees in the relevant industry similarly, and thus never triggered the primary concern animating the equal protection guarantee.

Even when Congress elects to regulate a subset of an “industry,” it will probably be able to justify the differential treatment. In *Robertson*, for example, the Northwest Timber Compromise only provided an alternative means of satisfying five environmental statutes as those statutes applied to the forests at issue in three cases with outstanding injunctions. In effect, the Compromise modified only those injunctions even though it is likely that other injunctions relying upon the same statutes were outstanding at that time.²⁹⁹ Although the equal protection issue was not presented to the Supreme Court in that case, the Compromise likely did not violate the equal protection guarantee. The Court has long recognized that Congress rationally may solve a problem one step at a time or, in this case, one geographic area or controversy at a time.³⁰⁰

Thus, while it is possible for Congress to transgress the equal protection line by selectively modifying or eliminating consent decrees in an irrational way, this situation is not very likely to arise.

2. *Bill of Attainder Clause*

The Bill of Attainder Clause provides that “[n]o Bill of Attainder . . . shall be passed [by Congress].”³⁰¹ A bill of attainder is defined as a “statute[] that inflict[s] punishment on [a] specified individual or group.”³⁰² The only way this Clause might possibly be implicated by legislation that modifies or eliminates consent decrees is if the Legislature declined to modify some decrees while

297. See 47 U.S.C. § 152 (Supp. II 1996) (statutory and historical notes containing section 601(a)(1) of the Telecommunications Act).

298. See 18 U.S.C. § 3626(b)(2) (Supp. II 1996).

299. See *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 433-36 & n.1 (1992).

300. “Legislatures may implement their program step by step in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.” *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (internal citation omitted); see also *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955).

301. U.S. CONST. art. I, § 9, cl. 3. A similar limitation constrains the states. See U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder . . .”).

302. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 851 (1984).

eliminating or favorably modifying others. In that situation, parties to the unmodified decrees might argue that they were punished relative to those whose decrees were favorably modified. This argument is unlikely to succeed, however, because the Court judges whether a party is punished within the meaning of this Clause by comparing a person's position before the law in question was enacted to her position afterwards—not by comparing the postenactment positions of various parties.³⁰³ Thus, persons whose decrees were not modified could not claim they were punished because the legislation in question did not change their position at all. The Bill of Attainder Clause therefore poses no impediment to legislation that abrogates consent decrees, although it may play a greater role when evaluating that portion of the legislation that replaces the superseded decrees.

3. *Ex Post Facto* Clause

The Constitution also bars Congress from enacting any *ex post facto* laws³⁰⁴—laws that “appl[y] . . . any new punitive measure to a crime already consummated.”³⁰⁵ The *Ex Post Facto* Clause applies only to penal legislation, however.³⁰⁶ Because most legislation that supersedes regulatory consent decrees is economic and therefore not criminal, this Clause will rarely be implicated by such legislation.

II. THE ELIMINATION AND MODIFICATION OF STATE CONSENT DECREES

Congressional legislation that eliminates or modifies state consent decrees faces a slightly different set of constitutional hurdles from legislation that replaces federal consent decrees. As discussed above, both types of legislation implicate the Constitution's property clauses (and some of its other clauses) in much the same way.³⁰⁷ But whereas legislation that displaces federal consent

303. See *infra* text accompanying notes 387-88.

304. U.S. CONST. art. I, § 9, cl. 3 (limitation on congressional action); U.S. CONST. art. I, § 10, cl. 1 (limitation on states).

305. *California Dep't of Corrections v. Morales*, 514 U.S. 499, 505 (1995) (citation and internal quotations omitted).

306. See *Kansas v. Hendricks*, 117 S. Ct. 2072, 2086 (1997) (“The *Ex Post Facto* Clause . . . has been interpreted to pertain exclusively to penal statutes.”). Just last Term, however, Justice Thomas expressed some interest in reconsidering this limitation. See *Eastern Enters. v. Apfel*, 118 S. Ct. 2131, 2154 (1998) (Thomas, J., concurring).

307. If anything, legislation affecting state consent decrees is even more likely to be constitutional. For instance, parties subject to a state consent decree would have even less of a vested property interest under the Due Process or Takings Clauses in their decree given that a *state* has no authority to preclude

decrees implicates the separation of powers guarantee, legislation that displaces state consent decrees raises issues of preemption under the Supremacy Clause and of federalism under the Tenth Amendment. It is to these issues unique to state consent decrees that the Article turns next.

A. Preemption and the Supremacy Clause

One of the fundamental tenets of our system of dual sovereignty is that the laws of the Federal Government take precedence over the laws of a state when they conflict or overlap. This tenet is ingrained in the Supremacy Clause of the Constitution, which provides that “the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”³⁰⁸ Thus, Congress may, by enacting federal legislation on any subject properly within its enumerated powers, displace, or “preempt,” the state law on that subject.³⁰⁹ Congress’s exercise of “[p]re-emption [power] may be either expressed or implied, and ‘is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.’”³¹⁰ Accordingly, whether Congress may preempt regulatory consent decrees entered by state courts depends upon whether those decrees are considered “a state law” subject to preemption.³¹¹

State statutes are clearly state law that can be preempted by federal

federal intervention in a field; the most a state could do is make itself contractually liable for any changes in regulation, as the Federal Government did to itself in *Winstar*, but that would not raise any *constitutional* concerns.

308. U.S. CONST. art. VI, cl. 2.

309. “[S]ince our decision in *McCulloch v. Maryland*, it has been settled that state law that conflicts with federal law is ‘without effect.’” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (Stevens, J., plurality opinion) (citations omitted); *see also Gade v. National Solid Waste Management Ass’n*, 505 U.S. 88, 108 (1992) (“But under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.” (citations and quotations omitted)); *Missouri Pac. Ry. v. Porter*, 273 U.S. 341, 346 (1927) (“[Congress’s] power to regulate [interstate] commerce and all its instrumentalities is supreme; and, as that power has been exerted, state laws have no application.”).

310. *Gade*, 505 U.S. at 98 (quotation omitted). There are two types of “implied” preemption: (i) field preemption and (ii) conflict preemption. Field preemption occurs when the scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 330 (1947). Conflict preemption occurs when either “compliance with both federal and state regulations is a physical impossibility,” *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

311. *See Cipollone v. Liggett, Inc.*, 505 U.S. 504, 521 (1992).

legislation. In fact, the very first preemption case, *McCulloch v. Maryland*,³¹² held that federal legislation preempted a Maryland statute imposing a tax on the Bank of the United States. The common-law rules developed by the state courts also fall within the definition of state law for the purposes of the Supremacy Clause.³¹³ Thus, the Court in *Cipollone v. Liggett Group, Inc.*³¹⁴ was able to conclude that the Federal Cigarette Labeling and Advertising Act and Public Health Cigarette Smoking Act of 1969 preempted a number of state causes of action (for example, failure to warn and fraudulent misrepresentation) that had been recognized by the common-law jurisprudence of a number of states' courts.³¹⁵

Congress's authority to preempt the orders of state courts, as opposed to the common-law rules they follow, is not well established. It is fairly clear that a state court order may be preempted if it does no more than give effect to the state's statutory or common law by awarding relief within its contemplation. The handful of cases that have dealt with preemption of state court orders seem to accept this proposition without much discussion. In *Ridgway v. Ridgway*,³¹⁶ for example, the Court examined whether the Serviceman's Group Life Insurance Act ("SGLIA"), which granted an insured the right to designate the beneficiaries of his policy at any time, preempted a state divorce decree in which the insured had agreed to designate his children as the beneficiaries and not to change that designation.³¹⁷ The lawsuit arose when the insured violated the decree by designating his second wife as the policy's sole beneficiary. The Court, after finding that Congress had intended the SGLIA to have preemptive force, ruled in favor of the second wife on the ground that "a state divorce decree, like other law governing the economic aspects of domestic relations,

312. 17 U.S. (4 Wheat.) 316 (1819). There, the court stated:

[T]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. We are unanimously of opinion, that *the law passed by the legislature of Maryland*, imposing a tax on the Bank of the United States, is unconstitutional and void.

Id. at 436 (emphasis added).

313. See *Cipollone*, 505 U.S. at 522 (Stevens, J., plurality) ("At least since *Erie R. Co. v. Tompkins*, we have recognized the phrase 'state law' to include common law as well as statutes and regulations." (citation omitted)).

314. 505 U.S. 504 (1992).

315. See *id.* at 530-32; accord Peter D. Enrich & Patricia A. Davidson, *Local and State Regulation of Tobacco: The Effects of the Proposed National Settlement*, 35 HARV. J. ON LEGIS. 87 (1998) (taking as given that Congress has power to preempt state and local regulation of tobacco industry, but arguing that doing so may not be prudent as matter of public policy).

316. 454 U.S. 46 (1981).

317. See *id.* at 47.

must give way to clearly conflicting federal enactments.”³¹⁸ A few years later, in *Rose v. Rose*,³¹⁹ the Court reaffirmed its unspoken assumption that Congress could preempt state decrees, even though it rejected the specific preemption argument in *Rose*.³²⁰ Congress has also operated on this assumption by enacting legislation that preempts state court orders.³²¹

It makes sense for Congress to have the power to preempt orders of state courts that do no more than give effect to state statutory or common law. Congress clearly has the authority to preempt the statutory or common law itself, which would require modification of any orders giving effect to that prior law. Whether Congress modifies those orders indirectly by preempting the underlying law or directly by preempting the decrees themselves should not matter under the Supremacy Clause. The Clause simply establishes the supremacy of federal law over state law regardless of which branch of the state government gives it effect.³²²

Nor does preemption of state court orders fail to accord them the full faith and credit they are due under the Constitution and federal law. The Constitution’s Full Faith and Credit Clause is inapplicable. By its own terms, it only assures that the states respect one another’s court judgments: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”³²³ It does not obligate the Federal Government to do so. Congress nevertheless placed a similar obligation on the

318. *Id.* at 55.

319. 481 U.S. 619 (1987).

320. *See id.* at 628. The lower federal courts and state courts seem to be in agreement on this point. *See Metropolitan Life Ins. Co. v. Christ*, 979 F.2d 575, 578 (7th Cir. 1992) (holding that provision of Federal Employees Group Life Insurance Act (“FEGLIA”) designating order of beneficiaries preempts a state divorce decree requiring a different order of distribution on the ground that “a state divorce decree . . . must give way to clearly conflicting federal enactments” (quoting *Ridgway v. Ridgway*, 454 U.S. 46, 55 (1981))); *Dean v. Johnson*, 881 F.2d 948 (10th Cir. 1989) (same); *Prudential Ins. Co. v. Hinkel*, 121 F.3d 364, 367 (8th Cir. 1997) (holding that SGLIA preempted a state divorce decree, reasoning that “[i]t has been consistently held in regard to FEGLIA that a divorce decree cannot operate as a waiver or restriction of an insured’s right to change the beneficiary when federal regulations conflict”), *cert. denied*, 118 S. Ct. 693 (1998); *Boulter v. Boulter*, 930 P.2d 112, 113 (Nev. 1997) (concluding that federal Social Security law preempts divorce decree that required each spouse to pay other one-half of social security benefits).

321. *See* 12 U.S.C. § 1715z-18(e) (1994) (granting shared appreciated mortgages issued under this section immunity from any “State constitution, statute, court decree, common law, rule, or public policy”); *id.* § 1715z-17(d) (same); *id.* § 1715z-10(e) (granting same immunity to graduated payments and indexed mortgages).

322. While the separation of powers guarantee concerns interbranch conflicts, it only applies among branches of the *Federal* Government, and not between one branch of the Federal Government and another branch of the state government. *See supra* text accompanying notes 39-43.

323. U.S. CONST. art. IV, § 1.

Federal Government by statute:

The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken.³²⁴

Although this statute applies to “every court within the United States,” it does not prevent Congress from giving state court orders less than full faith and credit.³²⁵ Even if the statute did apply to Congress, its constraints could be easily overcome by inserting a provision in any subsequent legislation excepting that legislation from the application of the earlier full faith statute (since Congress may amend one statute with another).³²⁶

The validity of legislation that preempts consent decrees that do no more than give effect to state statutory or common law does not necessarily mean that Congress may preempt all state court consent decrees because consent decrees can embody agreements that go beyond the requirements of state law. On the one hand, it may not be appropriate to segregate state consent decrees on the basis of whether all of their terms are within the power of the state courts to award, at least where the decrees are regulatory and joined by the state. After all, even those decrees with terms that exceed the dictates of state statutory or common law ostensibly reflect the will of the state’s executive. These decrees thus reflect the will of the state, just as state statutes or common law do. It is therefore difficult to defend differential treatment because the decree in either case reflects the sovereign will.³²⁷

Even if one drew a distinction among regulatory consent decrees based on

324. 28 U.S.C. § 1738 (1994).

325. *Id.*

326. *See, e.g.,* Metropolitan Life Ins. Co. v. Pressley, 82 F.3d 126, 130 n.3 (6th Cir. 1996) (concluding that life insurance plan which was covered by Employee Retirement Income Security Act of 1974 (“ERISA”) and which thus preempted a divorce decree with conflicting beneficiary designation clause posed no problem under section 1738 because “nothing in [section 1738] purport[ed] to do away with ERISA’s preemption of state law”).

327. Drawing such a distinction would seem to make more sense when the decree is between private parties and especially when the court’s role in reviewing the decree’s terms is rather passive, for in that situation, the court order is more likely to be a “rubber stamp” of what is essentially a private contract. The wisdom of drawing a distinction even in this situation is not beyond question, however. In *Boulter v. Boulter*, 930 P.2d 112, 114 (Nev. 1997), the Nevada Supreme Court held that a private property settlement contract between divorcing spouses was preempted by the federal Social Security Act. Once the contract was incorporated into their divorce decree, the court reasoned, it became part of the court order, which the court held was “state action” subject to preemption. *See id.* at 113.

whether they do more than give effect to state law, that distinction would seem to be irrelevant for purposes of the Supremacy Clause. In fact, the Supreme Court has yet to find this distinction relevant for these purposes. In *Ridgway*, the Court held that a state divorce decree was preempted by the SGLIA without asking whether any of the decree's terms were beyond the state court's power to dictate on its own under state law.³²⁸ The Court's later opinion in *Rose* is also silent on this point.³²⁹

Precedent aside, it makes no sense to hinge Congress's power to preempt regulatory consent decrees on whether those decrees award more than state law requires. As an initial matter, Congress's unquestioned ability to impair, and thereby preempt, private contracts (subject, of course, to the constraints imposed by the Takings and Due Process Clauses discussed above) would seem to significantly undermine the logic supporting such a distinction. If Congress may preempt a wholly private contract, surely it must be able to preempt a consent decree that is in part based on a private contract and in part based on state statutory or common law, which is itself unquestionably preemptible.

Moreover, recognizing that Congress has the power to preempt all state regulatory decrees would create the semblance of parity among the various branches of state government. Under the Court's precedent, Congress clearly has the power to preempt state statutes, which are the product of the state's legislative branch. Congress also has the power to preempt state common law, which is the product of the state's judicial branch. Indeed, Congress even has the power to preempt state regulations, which are often the product of the state's executive agencies.³³⁰ Recognizing that Congress may preempt state regulatory decrees, which are often the product of the State's executive and judicial branches, is consistent with the Court's view that the laws promulgated by all three branches of the state are equally subject to the Supremacy Clause's mandate.

The consequences of limiting Congress's preemptive power to decrees that simply give effect to state law vividly illustrate why Congress must possess the authority to preempt all regulatory consent decrees. If Congress could preempt only those decrees implementing state statutory or common law, the states would in essence have the power to circumvent the Supremacy Clause by opting to regulate an industry through expansive consent decrees instead of by

328. 454 U.S. 46 (1981).

329. 481 U.S. 619 (1987); *see also supra* text accompanying note 320.

330. *See supra* note 313.

legislation. The creation of such a “no preemption” zone is, first and foremost, at odds with the command of the Supremacy Clause, which makes “the Laws of the United States . . . the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”³³¹ Qualifying Congress’s preemptive power would also effectively confer upon the states the power to contract away the Federal Government’s sovereign right to amend federal law, which is a power that only the Federal Government possesses and which only it can exercise using the most “unmistakable” terms.³³²

Accordingly, Congress should, and does, have the authority under the Supremacy Clause to enact legislation that preempts regulatory consent decrees issued by state courts.

331. U.S. CONST. art. VI, § 2.

332. *See supra* text accompanying notes 287-88. To be sure, a state may through its actions cede its right to amend its own *state* law. *See* U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139 (1810) (holding that Georgia may not nullify land grant issued by previous state legislature). But that rule does not allow states to cede Congress’s right to amend federal law.

B. *The Tenth Amendment*

The other potentially significant impediment to congressional legislation that displaces state regulatory consent decrees is the Tenth Amendment, which provides that: “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.”³³³

In determining whether a particular congressional enactment runs afoul of this Amendment, the Court has at times asked “whether [the] Act of Congress [at issue] is authorized by one of the powers delegated to Congress in Article I of the Constitution.”³³⁴ At other times, it has inquired into “whether [the] Act . . . invades the province of state sovereignty reserved by the Tenth Amendment.”³³⁵ The Court recognizes, however, that “the two inquiries are mirror images of each other,” both aimed at delineating “the division of authority between federal and state governments.”³³⁶ Regardless of how the Tenth Amendment inquiry is framed, the Court has held that the Amendment imposes a few, specific limitations on Congress’s power to legislate, even on matters otherwise within its enumerated powers.

The first major limitation is on Congress’s authority to subject States to generally applicable federal laws. For a brief period, this limitation was a significant one, effectively granting states immunity from federal legislation that without sufficient justification “regulate[d] the States as States” and “address[ed] matters that [were] indisputably attribute[s] of state sovereignty.”³³⁷ In *Garcia v. San Antonio Metropolitan Transit Authority*,³³⁸ however, the Court overruled its prior *National League of Cities v. Usery*³³⁹ decision and greatly curtailed the extent of immunity the states enjoy from

333. U.S. CONST. amend. X.

334. *New York v. United States*, 505 U.S. 144, 155 (1992) (citing *Perez v. United States*, 402 U.S. 146, 146 (1971); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 319 (1819)).

335. *Id.* at 155-56 (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71 (1869)).

336. *Id.* at 156.

337. *Garcia*, 469 U.S. at 537 (citation and quotations omitted). The decision that gave rise to this immunity was *National League of Cities v. Usery*, 426 U.S. 833 (1976). The immunity existed from 1976, when *National League of Cities* overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968), until 1985, when the Court in *Garcia* overruled *National League of Cities*. As Justice O’Connor observed with more than a trace of understatement, “[t]he Court’s jurisprudence in this area has traveled an unsteady path.” *New York*, 505 U.S. at 160.

338. 469 U.S. 528 (1985).

339. 426 U.S. 833 (1976).

generally applicable federal legislation.³⁴⁰ The *Garcia* majority felt that the “structural protections of the Constitution [would] insulate the States from federally imposed burdens.”³⁴¹ The Tenth Amendment would be necessary as an independent check on Congress’s power to enact generally applicable laws only when those laws were “destructive of state sovereignty or violative of [a] constitutional provision.”³⁴²

Legislation that preempts state regulatory decrees does not appear to run afoul of this first limitation under *Garcia*. Such legislation has no more adverse effect on state sovereignty than any other congressional act that preempts state legislation. In other words, legislation that retakes a field affects state sovereignty only insofar as it displaces prior state regulation. Unless the Tenth Amendment is construed to trump the Supremacy Clause, federal legislation that displaces—or as it is commonly called, preempts—state law does not destroy state sovereignty under *Garcia*. Indeed, such legislation would pass muster even under the stricter test espoused in *National League of Cities*, since it does not “address matters that are indisputably ‘attribute[s] of state sovereignty.’”³⁴³ Accordingly, the first limitation does not preclude congressional efforts to legislate in a field already regulated by state consent decrees.

The second major limitation the Tenth Amendment imposes on congressional action arises when Congress tries to regulate the states in their sovereign capacity with legislation that is not “generally applicable.” Admittedly, Congress has some latitude in this area. It may, for instance, induce states to voluntarily exercise their sovereign power to legislate by making the receipt of federal funds contingent on the states’ willingness to exercise that power in a way Congress finds desirable, as Congress did when it withheld federal highway funds from states that refused to enact laws that mimicked the congressionally preferred speed limit or legal drinking age.³⁴⁴ Alternatively, Congress may induce states to voluntarily regulate an activity as Congress would like by “offer[ing] States the choice of regulating that activity according

340. See *Garcia*, 469 U.S. at 546-47.

341. *Id.* at 555.

342. *Id.* at 554.

343. *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981) (alteration in original) (quoting *National League of Cities*, 426 U.S. at 845).

344. See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987); see also *New York v. United States*, 505 U.S. 144, 167 (1992); *Fullilove v. Klutznick*, 448 U.S. 448, 478-80 (1980); *Massachusetts v. United States*, 435 U.S. 444, 461-62 (1978); *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974); *Oklahoma v. United States Civil Serv. Comm’n*, 330 U.S. 127, 142-44 (1947).

to federal standards or having state law pre-empted by federal regulation,” as Congress did with the Clean Water Act and the Occupational Safety and Health Act.³⁴⁵

But Congress unconstitutionally infringes upon the state sovereignty secured by the Tenth Amendment when it “command[s] a state government to enact *state* legislation.”³⁴⁶ The Court has expounded upon this limitation in a number of its recent cases. In *New York v. United States*,³⁴⁷ the Court considered the constitutionality of the “take title” provision of the Low Level Radioactive Waste Policy Amendments Act of 1985. That provision “offer[ed] state governments a ‘choice’ of either accepting ownership of [low-level radioactive] waste or [enacting] regula[tions] according to the instructions of Congress.”³⁴⁸ The Court concluded that both alternatives were beyond the power of Congress. Requiring states to take ownership of, and to assume the liability for, radioactive waste amounted to a “congressionally compelled subsidy from state governments to radioactive waste producers.”³⁴⁹ At the same time, requiring states to promulgate regulations “present[ed] a simple command to state governments to implement legislation enacted by Congress.”³⁵⁰ The latter alternative violated the Tenth Amendment because Congress was “commandeer[ing] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”³⁵¹

In *Printz v. United States*,³⁵² the Court expanded *New York*’s holding when examining the interim provisions of the Brady Handgun Violence Prevention Act.³⁵³ These temporary provisions required a prospective gun buyer to complete a “Brady Form,” which requires disclosure of personal information and a sworn statement that the buyer is not among any of the classes of persons prohibited from owning handguns. At issue in *Printz* was the provision that required a state law enforcement officer to receive the Brady Forms, to “make a reasonable effort to ascertain within 5 business days whether receipt or possession [of the handgun] would be in violation of the law,” and to destroy the

345. *New York*, 505 U.S. at 167 (citing *Hodel*, 452 U.S. at 288); see also *FERC v. Mississippi*, 456 U.S. 742, 764-65 (1982).

346. *New York*, 505 U.S. at 178.

347. 505 U.S. 144 (1992).

348. *Id.* at 175; see 42 U.S.C. § 2021e(d)(2)(C) (1994).

349. *New York*, 505 U.S. at 175.

350. *Id.* at 176.

351. *Id.* at 161 (quoting *Hodel*, 452 U.S. at 288).

352. 117 S. Ct. 2365 (1997).

353. 18 U.S.C. § 922(s) (1994).

Forms if no basis for objection arose.³⁵⁴ The Court found this provision amounted to “the forced participation of the States’ executive in the actual administration of a federal program.”³⁵⁵ Consistent with its prior holding in *New York* that congressional efforts to commandeer a state’s legislature violated the Tenth Amendment, the Court in *Printz* held that Congress’s attempt in the Brady Act to commandeer a state’s executive officers ran afoul of the Tenth Amendment.³⁵⁶

Legislation that displaces state regulatory consent decrees does not in any way “compel the States to implement, by legislation or executive action, [a] federal regulatory program[]” for the simple reason that such a law is aimed at regulating individuals, not states.³⁵⁷ In fact, the Court in *New York* expressly distinguished this type of legislation from the type of legislation that improperly tramples upon the sovereignty of the states. The Court observed: “No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the states to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation.”³⁵⁸

On the basis of this language, the Court observed that Congress would have raised no Tenth Amendment issue had the Radioactive Amendments Act “address[ed] the problem of waste disposal by directly regulating the generators and disposers of waste . . . [instead of] impermissibly direct[ing] the States to regulate in this field.”³⁵⁹

Given this discussion, legislation that displaces state decrees would not seem to violate the Tenth Amendment because it constitutes a direct regulation of the private parties in the regulated field and does not command the state to exercise its sovereign powers in a particular way.

III. THE STATUTORY REPLACEMENT FOR THE DECREES

That the Constitution does not prohibit Congress from eliminating or modifying regulatory consent decrees does not mean that congressional efforts to retake a field are in the clear, however. As noted above, retaking the field is a

354. *Printz*, 117 S. Ct. at 2369 (quoting 18 U.S.C. § 922(s)(2)).

355. *Id.* at 2376.

356. “[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.” *Id.* at 2380.

357. *Id.*

358. *New York v. United States*, 505 U.S. 144, 178 (1992).

359. *Id.* at 160.

two-step process: Congress must first eliminate or modify the prior decrees and then enact a new federal scheme of legislation to take their place.³⁶⁰ The manner in which this new legislative scheme accounts for the prior scheme of judicial regulation may itself raise additional constitutional issues.

Congress can elect to ignore that the individuals or firms subject to its new legislative scheme were treated differently by the courts—either because some were subject to decrees while others were not, or because they were treated differently under the same decree. As noted above, the PLRA fits within this model, for it requires all prison reform decrees, whether old or new, to adhere to its new standard.³⁶¹ With this type of legislation, Congress's attempt to retake the field raises no additional constitutional issues.

Alternatively, Congress can elect to carry forward into its new regulatory scheme some (or all) of the distinctions previously drawn by the state or federal court decrees. Congress did this in the Telecommunications Act when it treated the Bell operating companies differently from other carriers as to the circumstances under which they could offer long-distance telephone service.³⁶² Of course, drawing distinctions is not in itself unconstitutional, for the equal protection guarantee contemplates that Congress has the power to do so. But the Equal Protection guarantee also requires that Congress exercise that power in a rational manner.

When distinctions are drawn on the basis of prior decrees, moreover, Congress is likely to refer to the decree—or the parties subject to the decree—specifically by name. The Telecommunications Act did thus when it referred to the Bell operating companies by name and required them (and only them) to obtain FCC approval before entering much of the long-distance telephone market.³⁶³ When Congress names specific persons and subjects them to regulatory burdens not faced by others, the resulting law less clearly resembles traditional legislation, which draws distinctions based on general characteristics and leaves it to the courts to decide who has those characteristics.³⁶⁴ Instead, it

360. See *supra* text accompanying notes 24-25.

361. See 18 U.S.C. § 3626(a) (Supp. II 1996) (requiring all new decrees to be preceded by certain findings); *id.* § 3626(b)(2) (requiring termination of prior decrees unless judge makes required findings).

362. See 47 U.S.C. §§ 271-272 (Supp. II 1996).

363. See 47 U.S.C. § 271(a) (noting that no “Bell operating company” could provide long-distance telephone service except as provided in that section, which outlined FCC approval process); *id.* § 153(4)(A),(B) (defining “Bell operating company” as one of 20 named companies and “any successor or assign of any such company”). The Telecommunications Act places similar restrictions on the Bell companies' ability to enter other markets. See 47 U.S.C. § 273 (equipment manufacturing); *id.* § 273 (electronic publishing); *id.* § 275 (alarm monitoring).

364. “It is the peculiar province of the legislature to prescribe general rules for the government of

looks more like a bill of attainder, which is a legislative act that singles out certain persons for punishment.

This Article next discusses whether legislation that borrows the distinctions drawn by prior decrees violates the Bill of Attainder Clause or the Equal Protection guarantee.

A. *The Bill of Attainder Clause*

Although the Constitution explicitly prohibits Congress from enacting a bill of attainder,³⁶⁵ it does not define what one is. Originally, the term was reserved for “parliamentary Act[s] sentencing a named individual or identifiable members of a group to death.”³⁶⁶ The Supreme Court, however, has refused to read the Constitution’s Bill of Attainder Clause as such “a narrow, technical (and therefore soon to be outmoded) prohibition.”³⁶⁷ Instead, it has viewed the Clause “as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.”³⁶⁸ Accordingly, the Court has given the term bill of attainder a more expansive meaning that encompasses any “statute[] that inflict[s] punishment on [a] specified individual or group.”³⁶⁹ Thus, a statute will qualify as a bill of attainder if: (i) it specifies, or singles out, certain individuals or groups³⁷⁰ and (ii) it “punishes” them.³⁷¹ Given this definition, federal regulatory legislation that retakes the field will probably not violate the Bill of Attainder Clause.

1. *Specificity*

society; the application of those rules to individuals in society would seem to be the duty of other departments.” *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810); *see also* *United States v. Brown*, 381 U.S. 437, 454 n.29 (1965) (“a legislature can provide that persons possessing certain characteristics must abstain from certain activities, but must leave to other tribunals the task of deciding who possess those characteristics”).

365. *See* U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder . . . shall be passed.”).

366. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 473 (1977).

367. *Brown*, 381 U.S. at 442.

368. *Id.*

369. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 851 (1984).

370. The Supreme Court has yet to rule that the Clause applies to corporations, although it has hinted in dicta that it might. *See, e.g.,* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995) (observing that “[e]ven laws that impose a duty or liability upon a single individual *or firm* are not on that account invalid—or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause.” (emphasis added)).

371. *See BellSouth Corp. v. FCC*, 144 F.3d 58, 62 (D.C. Cir. 1998), *petitions for cert. filed*, 67 U.S.L.W. (U.S. Dec. 28, 1998) (No. 98-1046), 67 U.S.L.W. 3484 (U.S. Jan. 19, 1999) (No. 98-1153).

For a statute to be “specific” within the meaning of the Bill of Attainder Clause, it need not name a particular person or group. The Supreme Court rejected any such stringent requirement in its first bill of attainder case, *Cummings v. Missouri*.³⁷² In that case, the Court evaluated an amendment to the Missouri Constitution that prohibited any person from practicing law, or from serving in the clergy or in public office, unless he took an oath swearing that he had not been a Confederate sympathizer.³⁷³ The Court recognized that “bills [of attainder] are generally directed against individuals by name; but they may be directed against a whole class.”³⁷⁴

The Court followed the same reasoning in the companion case to *Cummings*, *Ex parte Garland*.³⁷⁵ There, the Court held that a federal statute that barred all Confederate sympathizers from practicing law in the federal courts was specific enough to constitute a bill of attainder.³⁷⁶ Looking back, it is easy to understand why the Court was willing to loosen the specificity requirement in those cases. If it had not, it would have been unable to strike those laws down because in 1866 the most logical tool for striking down legislation drawing irrational distinctions—the Fourteenth Amendment’s Equal Protection Clause—had not yet been enacted. But whatever the Court’s initial reason for defining the specificity requirement so broadly, the definition was never subsequently narrowed. The definition has been relied upon as recently as 1965 when the Court struck down a statute that made it a crime for persons recently associated with the Communist party to serve as an officer or employee of a labor union.³⁷⁷

Because the specificity element is so easy to satisfy, however, the Court has been careful to stress that specificity alone does not make a law a bill of attainder: “[S]imple reference to the breadth of the Act’s focus cannot be determinative of the reach of the Bill of Attainder Clause as a limitation upon legislative action that disadvantages a person or group.”³⁷⁸ On that basis, the Court in *Nixon v. Administrator of General Services*³⁷⁹ sustained a law that required President Nixon (but no other former President) to turn over his

372. 71 U.S. (4 Wall.) 277 (1866).

373. *See id.* at 281 (reproducing section 9 of Article 2 of the Missouri Constitution).

374. *Id.* at 323.

375. 71 U.S. (4 Wall.) 333 (1866).

376. *See id.* at 377-78.

377. *See United States v. Brown*, 381 U.S. 437 (1965).

378. *Nixon*, 433 U.S. at 470 n.31; *see also* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995) (“The premise that there is something wrong with particularized legislative action is of course questionable.”).

379. 433 U.S. 425 (1977).

Presidential papers to the Administrator of General Services for archiving. Although the statute applied to only one person, the Court ultimately concluded that it was not a bill of attainder because the burdens it imposed on him did not rise to the level of punishment.³⁸⁰

Such targeted legislation is not unique and has been sustained by the Court in numerous other decisions not involving a bill of attainder challenge. In the *Regional Rail Reorganization Act Cases*,³⁸¹ for instance, the Court found the Rail Act consistent with the Uniformity Clause of the Constitution,³⁸² even though the law detailed a mandatory bankruptcy program for eight railroads.³⁸³ Similarly, in *Robertson*, the Court found no constitutional infirmity with a statute that changed the meaning of five environmental statutes only as they applied to the parties involved in three named lawsuits.³⁸⁴

As this precedent implies, the power to decide that certain persons be treated differently—even if they are named—is not an inherently judicial power. Thus, Congress may choose to name specific persons in a statute without violating the separation of powers guarantee.³⁸⁵ That Congress might choose these particular persons because they were subject to a decree does not change the fact that

380. *See id.* at 472-84; *see also* *BellSouth Corp. v. FCC*, 162 F.3d 678 (D.C. Cir. 1998) (upholding section 271 of the Telecommunications Act, which bars the Bell operating companies from participating in most of the long-distance market without first obtaining FCC approval); *SBC Communications, Inc. v. FCC*, 154 F.3d 226 (5th Cir. 1998) (upholding sections 271 through 275 of Telecommunications Act, which bar the Bell operating companies from participating in certain markets, even though statute specifically named 20 companies), *cert. denied*, 119 S. Ct. 889 (1999); *BellSouth Corp. v. FCC*, 144 F.3d 58 (D.C. Cir. 1998) (upholding section 274 of the Telecommunications Act of 1996, which bars Bell operating companies from directly offering electronic publishing services until February 8, 2000), *petitions for cert. filed*, 67 U.S.L.W. (U.S. Dec. 28, 1998) (No. 98-1046), 67 U.S.L.W. 3484 (U.S. Jan. 19, 1999) (No. 98-1153); *Dehainaut v. Peña*, 32 F.3d 1066 (7th Cir. 1994) (holding that Government's policy that permanently barred FAA employees who had gone on strike in 1981 from future employment with the FAA or related agencies was not a bill of attainder, despite its specificity, because it did not constitute punishment).

381. 419 U.S. 102 (1974).

382. U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.").

383. 419 U.S. at 159-60.

384. *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992). The lower federal courts have sustained similar legislation. In *Maine Central Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 813 F.2d 484 (1st Cir. 1987), the First Circuit sustained a federal law that extended the normal cooling-off period prescribed by federal labor law as to one particular labor dispute. The court reasoned that "[a] classification does not become irrational or unconstitutional solely because it is specific." *Id.* at 490. The Ninth Circuit in *Mount Graham Coalition v. Thomas*, 89 F.3d 554 (9th Cir. 1996), upheld a law that redefined the requirements of the National Environmental Policy Act and Endangered Species Act for the purposes of one lawsuit.

385. "Nothing in the Constitution says that a statute must be general in form to be legislative in nature." *Maine Cent. R.R.*, 813 F.2d at 493.

Congress's exercise of that power does not encroach upon the judicial branch.³⁸⁶ It is only when Congress names these people and punishes them that it exercises a judicial power and offends the separation of powers guarantee and the Bill of Attainder Clause that gives it effect. Accordingly, whether a statute that retakes a field is constitutional under the Bill of Attainder Clause turns on whether the burdens it imposes on the named individuals constitute punishment.

386. *See, e.g.*, *BellSouth Corp. v. FCC*, 162 F.3d 678, 689 (D.C. Cir. 1998) (finding that “[i]t was perfectly proper for the legislature to look at [a prior consent decree]” when retaking telecommunications field).

2. *Punishment*

The Bill of Attainder Clause is a prohibition on the power of Congress only insofar as Congress attempts to express its condemnation of certain persons by subjecting them to burdens they did not previously bear. At a very minimum, therefore, a statute cannot be a bill of attainder unless it makes the persons it specifies worse off than they were before the law's enactment. If, for example, Congress passed a law conferring a new benefit on a group of persons, but withheld that benefit from a subset of that group, the subset of persons has not been punished, or even burdened, by Congress's refusal to extend the new benefit to them. The Supreme Court recognized this in *Cummings*, when it held that the universe of potential punishments included "[t]he deprivation of any rights, civil or political, *previously enjoyed*."³⁸⁷

This threshold requirement—that the statute imposes a burden upon specified persons—is of particular significance when examining the constitutionality of congressional legislation that retakes a field. If the replacement legislation does no more than maintain the status quo by codifying the displaced consent decrees, it would not deprive the parties previously subject to those decrees of any rights they previously enjoyed. For that reason, it would not punish or even burden them within the meaning of the Bill of Attainder Clause. The same conclusion follows when the replacement legislation relieves the parties of some of the prior decrees' restrictions and thereby benefits them.³⁸⁸ Thus, it is only when the replacement legislation changes the status quo in such a way as to make the specified parties worse off that the Bill of Attainder Clause is even implicated. In such a case, it becomes necessary to determine whether the newly imposed burdens qualify as punishment.

The Court has been rather liberal in defining the burdens that might be punishment within the meaning of the Bill of Attainder Clause. As early as

387. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1866) (emphasis added).

388. The D.C. Circuit recognized as much when it concluded that the provisions of the Telecommunications Act of 1996 that replaced the AT&T Consent Decree were not bills of attainder. *See BellSouth Corp. v. FCC*, 162 F.3d 678, 691 (D.C. Cir. 1998) (finding comparison of "a party's status before and after the enactment of regulatory legislation" "relevant" to analysis of "whether the legislation inflicts punishment"); *BellSouth v. FCC*, 144 F.3d 58, 66 (1998) (giving weight to fact that Act "as a whole relieves the [Bell companies] of several of the burdens imposed by the [AT&T Consent Decree]"), *petitions for cert. filed*, 67 U.S.L.W. (U.S. Dec. 28, 1998) (No. 98-1046), 67 U.S.L.W. 3484 (U.S. Jan. 19, 1999) (No. 98-1153). Federal statutes that lessen burdens previously imposed by a consent decree certainly do not punish.

1810, the Court in *Fletcher v. Peck*³⁸⁹ acknowledged that punishment under the Clause reached beyond the punishment of death that accompanied classic bills of attainder: “A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.”³⁹⁰ Fifty years later, in *Cummings v. Missouri*, the Court expanded the range of possible punishments to include “[t]he deprivation of any rights, civil or political, previously enjoyed . . . the circumstances attending and the causes of the deprivation determining this fact.”³⁹¹ Thus, it would seem that many categories of legislatively imposed burdens could qualify as punishment as long as they deprive a person of a right previously enjoyed.

Nevertheless, the Court has kept the universe of burdens that qualify as punishment rather small. The Court has made clear that “[f]orbidden legislative punishment is not involved merely because the Act imposes burdensome consequences.”³⁹² Indeed, if it was, the Bill of Attainder Clause would become the weapon of choice among litigants seeking to strike down any law that imposed burdens. Given the Clause’s lax specificity requirement, the Bill of Attainder Clause would likely render the equal protection guarantee a dead letter. A plaintiff suing under the Equal Protection Clause would have to prove that a burden-imposing law was irrational, while a plaintiff suing under the Bill of Attainder Clause would only have to show that the law imposed a burden—rational or not.³⁹³ To avoid this result, the Court has developed a three-part test assessing whether a particular legislatively imposed burden constitutes punishment. Under this test, the Court asks: “(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, ‘viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes’; and (3) whether the legislative record ‘evinces a congressional intent to punish.’”³⁹⁴

Few burdens have satisfied the test’s first prong. The punishments

389. 10 U.S. (6 Cranch) 87 (1810).

390. *Id.* at 138. In England a bill that confiscated property or imposed other penalties short of death on specific persons was called a “bill of pains and penalties.” *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 474 (1977).

391. 71 U.S. at 320.

392. *Nixon*, 433 U.S. at 472 (1977).

393. “However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress or the states that legislatively burdens some persons or groups but not all other plausible individuals.” *Nixon*, 433 U.S. at 471 (footnotes omitted).

394. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984) (quoting *Nixon*, 433 U.S. at 473, 475-76, 478).

accompanying classic bills of attainder and bills of pains and penalties—death, banishment, imprisonment, and confiscation of property—certainly satisfy this prong.³⁹⁵ In *Cummings v. Missouri*, the Court added to this short list “[d]isqualification from the pursuits of a lawful avocation,” which it acknowledged “often has been, imposed as punishment,” at least where the basis for disqualification had “no possible relation to [the disqualified party’s] fitness for those pursuits and professions.”³⁹⁶ The Court has subsequently declined to recognize any further forms of historical punishment.³⁹⁷

Each of the five laws the Court has struck down as a bill of attainder imposed the same type of burden that the Court in *Cummings* found was a historical form of punishment. In *Cummings* itself, and in its companion case *Ex parte Garland*, the Court struck down laws that barred previously qualified lawyers and clergymen who were Confederate sympathizers from again practicing law or participating in the clergy.³⁹⁸ In *United States v. Lovett*,³⁹⁹ the Court drew upon *Cummings* and *Ex parte Garland* to invalidate a federal law that barred three named federal employees from any further Government employment after Congress determined they were Communist subversives.⁴⁰⁰ The statute in *Lovett* punished the named persons because it “‘operate[d] as a legislative decree of perpetual exclusion’ from a chosen vocation.”⁴⁰¹ Similarly,

395. See *Nixon*, 433 U.S. at 473-74.

396. 71 U.S. at 319-20. There is a strong argument that foreclosing corporations from certain lines of business should not be considered punitive at all because at the time the Constitution was ratified, states had plenary control over whether a corporation could continue to exist and over the lines of business in which it engaged. See Stephen A. Siegel, *Understanding the Nineteenth Century Contracts Clause: The Role of the Property-Privilege Distinction and “Takings” Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 94-95 (1986) (noting that, in 1800s, “state power to amend corporate charters was a most potent technique for gaining effective, but uncompensated, control of a corporation and its assets”); see also *Locker v. American Tobacco Co.*, 195 N.Y. 565, 566 (1909) (Cullen, C.J., concurring) (noting how, at turn of century, “control of the [state] legislature over [foreign corporations] is fully as plenary as in the case of domestic corporations”), quoted in James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis 1880-1918*, 50 OHIO ST. L.J. 257, 380-81 (1989).

397. See, e.g., *Flemming v. Nestor*, 363 U.S. 603 (1960) (holding that denial of Social Security benefits payable to aliens who are deported on certain enumerated grounds did not qualify as punishment); *Nixon*, 433 U.S. at 473-75 (holding that withholding custody of Presidential records did not qualify as historical punishment); *Selective Serv. Sys.*, 468 U.S. at 852-53 (holding that failure to provide financial loans to students who failed to sign up for draft did not qualify as historical punishment).

398. *Cummings*, 71 U.S. 277 (1866); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866). The Court invalidated a similar West Virginia law on the same grounds in *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1872).

399. 328 U.S. 303 (1946).

400. See *id.* at 315-18.

401. *Id.* at 316 (quoting *Ex parte Garland*, 71 U.S. at 377).

in *United States v. Brown*⁴⁰²—the most recent Supreme Court case to strike down a law as a bill of attainder—the Court concluded that section 504 of the Labor-Management Reporting and Disclosure Act of 1959 punished former Communist Party members by making it illegal for them to continue to serve as an officer or employee of a labor union for five years after their involvement with the Party.⁴⁰³ The Court found that the statute punished the Party members by disqualifying them ““from the pursuits of a lawful avocation””—in that case, active participation in a labor union.⁴⁰⁴

Not every law that bars a person from a certain profession qualifies as historical punishment, however. Where the reason for the bar has a rational “connection with [the] profession,” it is not punishment but a valid regulation of the profession.⁴⁰⁵ In *Hawker v. New York*,⁴⁰⁶ for example, the Court held that New York could bar felons from practicing medicine because it could rationally require good character as a qualification for practicing medicine and could view a felony conviction as evidence of the lack of such character.⁴⁰⁷ Similarly, the Court in *DeVeau v. Braisted*⁴⁰⁸ upheld a law that effectively forbid dockside unions from employing convicted felons as officers or agents, after noting that such restrictions “insure against corruption in specified, vital areas.”⁴⁰⁹

Line-of-business restrictions, for the same reasons, are usually not punishment. The Court implied as much in *Brown* when it cited with approval its prior decision in *Board of Governors v. Agnew*,⁴¹⁰ which had upheld on other grounds a conflict-of-interest statute that precluded employees of securities underwriting firms from working for banks that belong to the Federal Reserve System.⁴¹¹ As a result, legislation like the Glass-Steagall Act⁴¹² that precludes commercial banks from entering the business of investment banking, or agency regulations like the FCC’s rules that preclude broadcasters from entering the same community’s newspaper business,⁴¹³ do not qualify as

402. 381 U.S. 437 (1965).

403. *See id.* at 456-62.

404. *Id.* at 448 (quoting *Cummings*, 71 U.S. at 320).

405. *Dent v. West Virginia*, 129 U.S. 114, 128 (1889) (upholding state’s power to prescribe qualifications to practice medicine, notwithstanding *Cummings* and *Ex parte Garland*).

406. 170 U.S. 189 (1898).

407. *See id.* at 195-97.

408. 363 U.S. 144 (1960) (Frankfurter, J., plurality opinion).

409. *Id.* at 158-59.

410. 329 U.S. 441 (1947).

411. *See Brown*, 381 U.S. at 453-54 (citing *Agnew*, 329 U.S. at 449).

412. *See* 12 U.S.C. §§ 24, 78 (1994).

413. *See* 47 C.F.R. § 73.3555 (1997).

punishment.⁴¹⁴

The court's inquiry into punishment does not end when it finds that a burden resembles a historical form of punishment, although there is some disagreement among federal circuit court judges on this point.⁴¹⁵ The court must still ask whether the burden, "viewed in terms of [its] type and severity . . . , reasonably can be said to further nonpunitive legislative purposes."⁴¹⁶ The Supreme Court implicitly engaged in this inquiry in *Cummings*, *Lovett*, and *Brown* when it examined whether the vocational exclusions had any relation to the legitimate regulation of the vocation.⁴¹⁷ If resemblance to historical punishment was enough in itself to compel the conclusion that a burden is punishment, the Court would have had no reason in those cases to inquire into the purpose of those burdens. Thus, under the Court's precedent, a court must examine the reasons animating even those burdens that resemble historical punishment. The court must also ask this question when considering burdens that do not resemble historical punishment to account for "the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee."⁴¹⁸

During this second inquiry, a law will be deemed to have a nonpunitive legislative purpose if its ultimate goal is legitimate and nonpenal, and the burdens it imposes reasonably can be said to further that goal.⁴¹⁹ This test reflects the common sense notion that a law that lacks a legitimate goal or imposes burdens that fail to reasonably achieve that goal is more likely to be serving an ulterior, and potentially punitive, end.⁴²⁰ This is not a particularly

414. See *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (upholding FCC broadcasting regulations, but not addressing Bill of Attainder Clause).

415. See *SBC Communications, Inc. v. FCC*, 154 F.3d 226, 242 (5th Cir. 1998) ("Nothing in *Selective Service* suggests that the historical punishment test is ever dispositive on its own."), *cert. denied*, 119 S. Ct. 889 (1999); *Dehainaut v. Peña*, 32 F.3d 1066, 1071 (7th Cir. 1994) ("Even where a fixed identifiable group . . . is singled out and a burden traditionally associated with punishment . . . is imposed, the enactment may pass scrutiny under bill of attainder analysis if it seeks to achieve legitimate and non-punitive ends and was not clearly the product of punitive intent."). *But see SBC Communications*, 154 F.3d at 200 (Smith, J., dissenting) ("Once a court determines that Congress has imposed a burden historically deemed punitive . . . that is the end of the analysis.").

416. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 475-76 (1977).

417. See *supra* notes 396-404 and accompanying text.

418. *Nixon*, 433 U.S. at 475; accord *BellSouth v. FCC*, 162 F.3d 678, 686 (D.C. Cir. 1998).

419. The D.C. Circuit recently adopted what might be considered a more stringent test, insisting that "the non-punitive aims of an apparently prophylactic measure [be] sufficiently clear and convincing." *BellSouth Corp. v. FCC*, 144 F.3d 58, 65 (D.C. Cir. 1998), *petitions for cert. filed*, 67 U.S.L.W. (U.S. Dec. 28, 1998) (No. 98-1046), 67 U.S.L.W. 3484 (U.S. Jan. 19, 1999) (No. 98-1153). Because the statutes under consideration passed muster, it is difficult to know whether the difference in standards is anything more than semantic.

420. See *Nixon*, 433 U.S. at 476.

difficult standard to meet. To be sure, the laws in *Cummings* and *Ex parte Garland* failed to pass muster, but those laws, which precluded Confederate sympathizers from acting as lawyers and clerics, bore little to no relation to fitness to practice in those professions. The Court seemed to apply a greater level of scrutiny in *Brown* when it struck down the law that precluded Communist Party members from actively participating in labor unions.⁴²¹ The Court found that the ban did not sufficiently serve the admittedly legitimate goal of screening from union jobs those persons most likely to instigate political strikes.⁴²² The Court suspected that Congress's willingness to generalize that all Party members would have a predilection to strike, while no others would, revealed that the law really served a different, less legitimate purpose—to “inflict[] [a] deprivation upon the members of a political group thought to present a threat to the national security.”⁴²³

The Court's other decisions have given Congress seemingly greater leeway than given in *Brown*. In *Flemming v. Nestor*,⁴²⁴ the Court concluded that a law terminating the payment of Social Security benefits to aliens deported on certain grounds (including membership in the Communist Party) rationally served the legitimate goal of stopping payments to persons who were outside the country.⁴²⁵ In *Nixon*, the Court concluded that the burden imposed by Congress's decision to grant temporary custody of President Nixon's presidential papers to the Administrator of General Services was justified because it served the legitimate purpose of safeguarding the papers, both for history and as evidence for Watergate-related proceedings.⁴²⁶ In *Selective Service System v. Minnesota Public Interest Research Group*,⁴²⁷ the Court found that the denial of federal financial assistance to college students who failed to register for the draft served the legitimate, nonpunitive goal of encouraging compliance with the registration laws.⁴²⁸

As a final matter, a law that serves a legitimate, nonpunitive purpose may still be considered punishment if the legislative history indicates that Congress intended the burden to be punitive. Invalidation on the basis of illicit congressional motive is rare, however, because “unmistakable evidence of

421. *United States v. Brown*, 381 U.S. 437 (1965).

422. *See id.* at 455-56.

423. *Id.* at 453.

424. 363 U.S. 603 (1960).

425. *See id.* at 617.

426. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 476-77 (1977).

427. 468 U.S. 841 (1984).

428. *Id.* at 853-56.

punitive intent . . . is required before a Congressional enactment of this kind may be struck down.”⁴²⁹ In fact, the only case to place much weight upon such evidence was *Lovett*.⁴³⁰ In that case, the Court reviewed a federal statute that effectively barred three named persons from further federal employment. The statute was passed after the congressional Committee on Un-American Activities “conducted a series of investigations and made lists of people and organizations it thought ‘subversive.’”⁴³¹ The House Report accompanying the legislation stated that the “views and philosophies” of the three individuals “constitute[d] subversive activity.”⁴³² In striking down this legislation, the Court stated:

No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd, and Watson “guilty” of the crime of engaging in “subversive activities,” defined that term for the first time, and sentenced them to perpetual exclusion from any government employment. Section 304, while it does not use that language, accomplishes that result.⁴³³

It is fair to say that few pieces of legislation will again be accompanied by such unmistakable evidence of illicit congressional motive.

Under this tripartite definition of punishment, economic legislation that distinguishes among specific persons on the basis of whether they were previously subject to a consent decree is unlikely to be struck down as a bill of attainder unless there is no rational reason to treat the persons differently. This is because any legislation that imposes burdens on the named parties is likely to rationally serve a legitimate, nonpunitive motive. Thus, this legislation will fail to meet the second test for punishment, even if the burden itself happens to resemble a historical form of punishment.

3. Application of These Principles

The recent flurry of litigation over the constitutionality of the Special Provisions of the Telecommunications Act of 1996⁴³⁴ has involved this precise bill of attainder issue. These Provisions impose a number of restrictions on the

429. *Flemming v. Nestor*, 363 U.S. 603, 619 (1960).

430. *United States v. Lovett*, 328 U.S. 303 (1946).

431. *Id.* at 308.

432. *Id.* at 312.

433. *Id.* at 316.

434. 47 U.S.C. §§ 271-275 (Supp. II 1996).

ability of the Bell operating companies to enter the markets of long-distance telephone service,⁴³⁵ equipment manufacturing,⁴³⁶ electronic publishing,⁴³⁷ and alarm monitoring.⁴³⁸ These restrictions more or less track those contained in the AT&T Consent Decree that the Act superseded.⁴³⁹

In the first of these cases, SBC, one of the five regional conglomerates of Bell operating companies, brought a facial challenge to the five Special Provisions.⁴⁴⁰ SBC argued that the Provisions amounted to an unconstitutional bill of attainder because they singled out the Bell companies by name and punished them by placing restrictions on their participation in certain markets. Judge Kendall, a district court judge in the Northern District of Texas, agreed with SBC's argument that these Provisions were bills of attainder because the burdens they imposed amounted to punishment under the Court's three-part test.⁴⁴¹

Judge Kendall first found that the Special Provisions' market entry restrictions resembled historic punishment because, like the law in *Cummings*, they "prevent the [Bell companies] from engaging in a lawful business."⁴⁴² The court then concluded that the restrictions served no legitimate, nonpunitive purpose. The Government had argued that the restrictions were little more than line-of-business restrictions justified in light of findings in the AT&T Decree that the Bell companies might use their monopoly in the local telephone market to impede competition in other markets. The court rejected this argument, finding instead that Congress's reliance on the prior decree tainted the subsequent legislation. In the court's view, "Congress independently has adjudicated the [Bell companies] guilty of antitrust violations"⁴⁴³ and punished them for "the sins of the parent, AT&T."⁴⁴⁴ The court also found that the

435. *See id.* §§ 271-272.

436. *See id.* § 273.

437. *See id.* § 274.

438. *See id.* § 275.

439. *See United States v. AT&T*, 552 F. Supp. 131, 226-34 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

440. *SBC Communications, Inc. v. FCC*, 981 F. Supp. 996 (N.D. Tex. 1997), *rev'd*, 154 F.3d 226 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 889 (1999).

441. *See id.* at 1004-07. The court had little trouble concluding that sections 271 through 275 satisfied the specificity element, given that they applied to the 20 Bell companies by name. *See id.* at 1003-04; *see also* 47 U.S.C. §§ 271-275 (Supp. II 1996) (referring to "a Bell operating company"); *id.* § 153(4) (listing 20 Bell companies by name).

442. *SBC Communications*, 981 F. Supp. at 1005. The court did not consider whether these were lines of business in which the Bell companies previously had enjoyed a right to participate.

443. *Id.* at 1007.

444. *Id.* at 1005.

legislative history of the Act revealed an intent on the part of Congress to punish the Bell companies because some of the legislators referred to the AT&T Decree in their comments.⁴⁴⁵

On appeal, the Fifth Circuit reversed, holding that the Special Provisions did not constitute punishment.⁴⁴⁶ The court agreed with Judge Kendall insofar as he noted that the Act's market entry restrictions resembled the vocational bars that previous Supreme Court decisions found to be a historical form of punishment.⁴⁴⁷ But the court did not find that resemblance dispositive. Instead, the court drew upon language in *Cummings* and *Garland* and the Supreme Court's holdings in *Dent* and *Hawker* to conclude that "a properly crafted prophylactic measure could survive attainder analysis, even where the finding of a propensity for future conduct was based solely on past acts, and the result was a bar from future employment."⁴⁴⁸ The court found the Special Provisions to be just such a measure—"a prophylactic, compromise regulation of the [Bell operating companies'] local market power to ensure greater competition in all of the nation's telecommunications markets."⁴⁴⁹ The court held that this fit within what it loosely referred to as the "'prophylactic' exception to the Bill of Attainder Clause."⁴⁵⁰ This conclusion, along with the fact that none of the market restrictions were permanent, led the court to further conclude that the Special Provisions were not historical punishment, that they served a legitimate, nonpunitive purpose, and that they were not enacted to punish.⁴⁵¹

Judge Smith dissented.⁴⁵² To him, the fact that the Telecommunications Act's market restrictions resembled the historical punishment of an employment bar was the end of the inquiry.⁴⁵³ He rejected as irrelevant the temporary duration of the Special Provisions⁴⁵⁴ and disagreed with the majority's conclusion that the Supreme Court's precedent admitted of any prophylactic

445. *See id.* at 1007. Curiously, Judge Kendall also concluded that section 601(a)(1) of the 1996 Act, which effectively terminated the AT&T Consent Decree, was severable from sections 271 through 275 without any discussion of whether section 601(a) was itself constitutional under the separation of powers guarantee. *See supra* Part I.

446. *See SBC Communications, Inc. v. FCC*, 154 F.3d 226 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 889 (1999).

447. *See id.* at 236-37.

448. *Id.* at 237.

449. *Id.* at 243-44.

450. *Id.* at 237.

451. *See id.* at 241-44.

452. *See id.* at 247-53 (Smith, J., dissenting).

453. *See id.* at 250 (Smith, J., dissenting).

454. *See id.* at 248-49 (Smith, J., dissenting).

exception.⁴⁵⁵ Judge Smith further concluded that the Special Provisions offended the separation of powers concerns underlying the Bill of Attainder Clause because the Provisions imposed punishment on specific persons, in derogation of Congress's limited power to "legislate in general terms."⁴⁵⁶

At the same time that SBC pressed its bill of attainder challenge in the Texas district court, BellSouth, another of the Regional Bell conglomerates, brought similar challenges in the D.C. Circuit to sections 271 and 274 of the Act. In the first case, the court rejected the argument that section 274 constituted punishment, notwithstanding the fact that its four-year ban on Bell company participation in the electronic publication market effectively reimposed one of the Consent Decree's terms that had been previously lifted.⁴⁵⁷ The two-judge majority acknowledged that section 274 resembled historical punishment insofar as it precluded the Bell companies from entering a certain occupation. Nevertheless, the court found the analogy not entirely accurate because section 274 still permitted the Bell companies to participate in the market through a joint venture or a structurally separate affiliate.⁴⁵⁸ The majority stated that it would have found no fault with section 274 even if it had imposed an absolute bar because the burden was "nothing more than a line-of-business restriction."⁴⁵⁹

The *BellSouth* majority also concluded that section 274 served a nonpunitive purpose. To begin with, section 274 "has the earmarks of a rather conventional response to commonly perceived risks of anticompetitive behavior."⁴⁶⁰ The majority refused to infer punitive intent from the fact that section 274 reimposed a restriction previously lifted by the district court at the behest of the Justice Department. In the court's view, Congress was free to read the evidence warranting the need for the restriction differently than the district court.⁴⁶¹ The reimposition of the electronic publishing restriction was, moreover, placed "in an Act that as a whole *relieves* the [Bell companies] of several of the burdens

455. *See id.* at 249-50 (Smith, J., dissenting).

456. *Id.* at 252 (Smith, J., dissenting).

457. *See BellSouth Corp. v. FCC*, 144 F.3d 58 (D.C. Cir. 1998), *petitions for cert. filed*, 67 U.S.L.W. (U.S. Dec. 28, 1998) (No. 98-1046), 67 U.S.L.W. 3484 (U.S. Jan. 19, 1999) (No. 98-1153).

458. *See id.* at 64-65.

459. *Id.* at 65.

460. *Id.*

461. "Congress's reading of the evidence in 1996 was different from the one arrived at by the Department of Justice in 1987—or by this court in 1993 for that matter. It does not follow from these conflicts between branches, however, that Congress cannot rationally be said to have pursued nonpunitive purposes in enacting § 274." *Id.* at 66.

imposed by the [AT&T Consent Decree].”⁴⁶² The majority also found nothing “suggestive of punitive purpose nor particularly suspicious” in Congress’s decision not to subject GTE, another large but more diffuse conglomerate of local telephone companies, to a similar electronic publishing restriction in light of differences between GTE and the Bells.⁴⁶³ As a final matter, the majority saw insufficient evidence of a punitive motive in the legislative history.⁴⁶⁴

Judge Sentelle dissented.⁴⁶⁵ He noted that “[m]ere specificity may not make an act a bill of attainder, but in most cases the [Supreme] Court has required little more.”⁴⁶⁶ In his view, the only thing that prevented all laws that impose burdens on named persons from being bills of attainder was the Supreme Court’s decision in *Nixon*, a decision he felt was unique and therefore usually distinguishable.⁴⁶⁷ Not surprisingly, Judge Sentelle’s conclusion that section 274 punished the Bell companies hinged primarily on the fact that it specifically named them. He first cited the “history of treating line-of-business restrictions as punishment” and concluded that section 274 therefore met the first test of punishment.⁴⁶⁸ He then registered his disagreement with the majority’s finding that section 274 resembled a legitimate line-of-business restriction that served a nonpunitive purpose, finding instead that “[b]y naming the companies . . . it seems apparent that Congress aimed, not at protecting present and future markets from potential abuse of monopoly power, but at punishing those named companies’ *past* anticompetitive behavior.”⁴⁶⁹ As for the final step, he found that “when Congress define[s] the burdened class by name rather than by characteristic or future action, I can discern no other motive than an intent to react to (read ‘punish’) the past conduct of those named persons.”⁴⁷⁰

Seven months later, the D.C. Circuit rejected the challenge to section 271 of the Act, which precluded the Bell companies from entering much of the long-distance telephone market until they first obtained regulatory approval from the FCC.⁴⁷¹ Because section 271, like section 274, applied only to the Bell

462. *Id.*

463. *Id.* at 67.

464. *See id.*

465. *See id.* at 71-74 (Sentelle, J., dissenting). Judge Sentelle agreed with the majority’s conclusion that section 274 did not violate the First Amendment rights of the Bell companies. *See id.* at 71 (Sentelle, J., dissenting).

466. *Id.* at 72 (Sentelle, J., dissenting).

467. *See id.* at 72 (Sentelle, J., dissenting).

468. *Id.* at 73 (Sentelle, J., dissenting).

469. *Id.* at 73 (Sentelle, J., dissenting).

470. *Id.* (Sentelle, J., dissenting).

471. *See BellSouth Corp. v. FCC*, 162 F.3d 678 (D.C. Cir. 1998).

companies by name, the court found that section 271 was “specific,” but observed that “satisfaction of the specificity prong alone is *not* sufficient to find that a particular law implicates the bill of attainder clause, let alone violates it.”⁴⁷² The court went on to conclude that section 271 did not impose any “punishment.” As it did with regard to section 274, the court held that section 271 fell outside the historical definition of punishment. The court found that the employment bars historically regarded as punishment were so regarded because they “violated the fundamental guarantees of political and religious freedom” and were, in most cases, permanent.⁴⁷³ Because section 271 is a “run-of-the-mill business regulation[]” that keeps the Bell companies out of the long-distance market only until they obtain FCC approval, the court held that section 271 bore little resemblance to “punitive” employment bars. The majority also found “sufficiently clear and convincing evidence” that section 271 was a prophylactic measure serving a nonpunitive purpose—that is, opening all telecommunications markets to competition. The court also noted that, to achieve that goal, Congress could legitimately treat the Bell companies differently from other companies due to “the infrastructure they control” and their “dominance in the market.”⁴⁷⁴ Lastly, the court found it relevant that section 271 made the Bell companies no worse off—and probably better off—than they had been under the AT&T Consent Decree.⁴⁷⁵ Judge Sentelle concurred in the result in deference to the prior *BellSouth* precedent but reiterated the criticisms he voiced in his dissent in the section 274 litigation.⁴⁷⁶

Of these opinions, the D.C. Circuit’s majority opinions upholding sections 271 and 274 of the Telecommunications Act are the ones most consistent with the Supreme Court’s bill of attainder jurisprudence. Both Judge Sentelle’s and Judge Smith’s dissents misapprehend the Supreme Court’s precedent. Judge Sentelle’s position that an otherwise legitimate burden becomes punitive when it applies only to named persons is inconsistent with the *Nixon* rationale, which the Court did not purport to confine to the narrow situation before it. Given the breadth of the Court’s definition of specificity, Judge Sentelle’s position also would have the effect of making the equal protection guarantee irrelevant. This is neither wise as a policy matter nor required (or indeed permitted) by precedent. Judge Smith’s position is also inconsistent with precedent. As

472. *Id.* at 684.

473. *Id.* at 686.

474. *Id.* at 689-90.

475. *See id.* at 690-91.

476. *See id.* at 694-97 (Sentelle, J., concurring).

discussed above, the Supreme Court has never found a burden's resemblance to a historical form of punishment dispositive. Since *Cummings*, there has always been a further inquiry into whether the burden serves a rational, nonpunitive purpose.⁴⁷⁷ Whether the Court undertakes that inquiry as part of the analysis of whether the burden is a historical form of punishment (*Selective Service's* first prong) or as part of the analysis of whether the burden serves a legitimate, nonpunitive goal (*Selective Service's* second prong), the Supreme Court has never held that a burden's resemblance to historical punishment is enough in itself to condemn the law imposing the burden as a bill of attainder. Judge Smith's subsequent conclusion that the Special Provisions offend the separation of powers concerns underlying the Bill of Attainder Clause fails for much the same reason: Legitimate market entry restrictions are not punishment, and Congress may apply nonpunitive restrictions to specific individuals without offending the separation of powers rationale underlying the Clause. The Clause is not meant to "[limit] Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all."⁴⁷⁸

The Fifth Circuit's majority opinion also has its flaws. First, the court held that the temporary duration of a burden precludes its classification as historical punishment.⁴⁷⁹ This would not seem to be true, as it is possible to imagine a law imposing temporary burdens that still punishes in a historical sense. For instance, Congress could pass a law requiring named political dissidents to be imprisoned until they swore allegiance to the United States or until a date certain. It is nevertheless the case, however, that the "escapability" of a burden weighs against a finding that the particular burden is punishment. This is particularly so when the escapability is tied to the legitimate, nonpunitive reason the burden was imposed in the first place. For example, under the Telecommunications Act, the Bell companies are free to enter the long-distance and equipment manufacturing markets once they open their local markets to competition and thereby lose their ability to unfairly dominate those other related markets.⁴⁸⁰

Second, the Fifth Circuit read the Supreme Court's precedent as creating "a

477. See *supra* text accompanying notes 416-20.

478. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 471 (1977).

479. See *SBC Communications, Inc. v. FCC*, 154 F.3d 226, 242-43 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 889 (1999).

480. See 47 U.S.C. §§ 271, 273 (Supp. II 1996). The D.C. Circuit in its section 271 decision followed this reasoning in concluding that section 271 did not resemble a historical form of punishment. See *BellSouth Corp. v. FCC*, 162 F.3d 678, 685 (D.C. Cir. 1998).

‘prophylactic’ exception to the Bill of Attainder Clause.”⁴⁸¹ This is inaccurate, even accounting for the fact that language in many of the Court’s opinions is open-ended and vague. As discussed more fully above, the Court in *Cummings*, *Dent*, and *Hawker* did not purport to create any exception. Rather it seemed to conclude that the vocational bars in those cases were not historical punishment at all because those bars were regulating a profession and not punishing individuals.⁴⁸² While this distinction between exception and definition may, once applied, turn out to be little more than a semantic one, it is an important one in theory, one that Judge Smith had some basis for criticizing in his dissent.⁴⁸³

The D.C. Circuit’s majority opinions, which concluded that sections 271 and 274, and by implication the remaining Special Provisions, did not punish the Bell companies, are the opinions that seem to hew most closely to the Supreme Court’s precedent. Although, as Judges Sentelle, Kendall, and Smith point out, the line-of-business restrictions in sections 271 through 275 resemble the vocational bar in *Cummings*, *Cummings* itself made clear that even vocational restrictions are not punishment unless they have “no possible relation to [one’s] fitness for those pursuits and professions.”⁴⁸⁴ The Special Provisions were enacted because, in Congress’s view, the Bell companies were particularly well situated to exploit their monopoly power in the local markets so as to adversely affect competition in the other related markets covered by the Special Provisions. As *Nixon* and *Brown*’s citation to *Agnew* establish, it is permissible for Congress to presume that certain persons are more likely to engage in inappropriate behavior without that presumption being punitive. Indeed, if such a presumption was punitive, just about every conflict-of-interest statute would be a bill of attainder. The fact that the Telecommunications Act applies such a presumption to specific corporations does not (as Judge Sentelle contends) transform the otherwise unremarkable market restriction into punishment. To be sure, the underinclusiveness of a burden’s reach is relevant and may warrant greater judicial scrutiny,⁴⁸⁵ but even laws that are underinclusive can serve legitimate, nonpunitive purposes.⁴⁸⁶ The Supreme Court recognized as much in

481. *SBC Communications*, 154 F.3d at 237.

482. See *supra* text accompanying notes 396-414.

483. See *SBC Communications*, 154 F.3d at 249-50 (Smith, J., dissenting).

484. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 319 (1866).

485. See *United States v. Brown*, 381 U.S. 437, 449 n.23 (1965) (“Although it may be that underinclusiveness is a characteristic of most bills of attainder, we doubt that it is a necessary feature.”).

486. As the Court in *Plaut* stated:

Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid—or else we would not have the extensive jurisprudence that we do concerning the Bill of

Nixon, which remains good law. Thus, the Special Provisions are not a historical form of punishment and rationally serve a legitimate, nonpunitive economic goal. Finally, the Act's legislative history contains only a smattering of references to the AT&T Consent Decree, which was itself an economic (and not punitive) decree. These references would seem to be unremarkable given that the Act was replacing the Decree. Therefore, there is no unmistakable evidence of punitive motive.

There is an additional, and more fundamental, reason why the Special Provisions do not amount to a bill of attainder: they in large measure maintain the status quo by carrying forward many of the market restrictions already contained in the AT&T Consent Decree. As such, these provisions do not in any meaningful way make the Bell companies worse off than they were before the Telecommunications Act and, for that reason, do not burden—let alone punish—those companies.⁴⁸⁷ In short, they do not rob the Bell companies of any rights they previously enjoyed.⁴⁸⁸ To be sure, section 274 reimposes a restriction previously lifted and in that sense makes the Bell companies worse off. But as the D.C. Circuit noted, section 274 was part of a package that also included provisions that benefitted the Bell companies by relieving them of some of the Consent Decree's restrictions.⁴⁸⁹ Section 271, as the D.C. Circuit pointed out, lifted the Consent Decree's effectively absolute bar on the Bell companies' entry into the long-distance market by immediately permitting them to offer long-distance service in some states and to provide such service in other states once they obtained FCC approval.⁴⁹⁰ Thus, the Special Provisions do not burden the Bell companies and surely do not punish them.

It is therefore safe to say that when the Supreme Court's precedent is properly applied, a congressional law that retakes a field will not usually constitute a bill of attainder simply because its new legislative scheme relies in

Attainder Clause, including cases which say that it requires not merely 'singling out' but also *punishment*.

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 n.9 (1995); *see also* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 471 n.33 (1977) ("the mere specificity of a law does not call into play the Bill of Attainder Clause").

487. *See supra* text accompanying notes 388-90.

488. *See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320 (1866); *see also supra* text accompanying note 387.

489. *See* BellSouth Corp. v. FCC, 144 F.3d 58, 66 (D.C. Cir 1998), *petitions for cert. filed*, 67 U.S.L.W. (U.S. Dec. 28, 1998) (No. 98-1046), 67 U.S.L.W. 3484 (U.S. Jan. 19, 1999) (No. 98-1153).

490. *See* 47 U.S.C. § 271 (Supp. II 1996); *see also* BellSouth Corp. v. FCC, 162 F.3d 678, 691 (D.C. Cir. 1998) ("[T]he BOCs are no worse off under [section] 271 than they were under the [AT&T Consent Decree]; and there are many who think their position has vastly improved.").

part upon distinctions drawn by the earlier decrees—particularly where the new law in some measure maintains the status quo by mimicking restrictions contained in the displaced decrees. But this general rule may not hold true if these distinctions are no longer rational because a distinction that fails to rationally serve a nonpunitive purpose may be understood as a facade for a law that punishes. Because the rationality of legislation is assessed most often under equal protection analysis, however, it will be discussed separately below even though it is also relevant in the bill of attainder analysis.

B. The Equal Protection Guarantee

Legislation that distinguishes among persons on the basis of whether they were previously subject to a consent decree, like every other law that draws a distinction, implicates the Constitution's guarantee of equal protection. The Court's modern equal protection scrutiny is quite deferential: The Court will "presume the constitutionality of the statutory discriminations [drawn in economic legislation] and require only that the classification challenged be rationally related to a legitimate state interest."⁴⁹¹

The Court has consistently upheld legislation that discriminates against specific—and even named—individuals, as long as the distinction rationally serves a legitimate purpose. In *City of New Orleans v. Dukes*,⁴⁹² for instance, the Court affirmed the constitutionality of a New Orleans ordinance that banned from the City's French Quarter all push-cart vendors except those who had been in business continuously for more than eight years. The Court had no problem finding that the ordinance, which had the effect of allowing only two vendors to remain, "rationally further[ed]" the City's goal of "'preserv[ing] the appearance and custom valued by the Quarter's residents and . . . tourists."⁴⁹³ The Court reached a similar conclusion in *Nixon* when it stated that "mere underinclusiveness is not fatal to the validity of a law under the equal protection component of the Fifth Amendment . . . even if the law disadvantages an individual or identifiable members of a group."⁴⁹⁴ In light of this, the Court voiced its agreement with President Nixon's earlier decision to abandon his equal protection challenge to the portion of the Presidential Recordings and Materials Preservation Act that required only him to hand over his papers to the Administrator of General Services. In the Court's view, the Act served the legitimate purpose of preserving President Nixon's papers for posterity and for use in possible criminal investigations.⁴⁹⁵

Given this precedent, there appears to be nothing unconstitutional with a statute that borrows its distinctions from prior consent decrees as long as the distinctions are reasonable. To be sure, it may be insufficient to treat persons differently just because they were once subject to a consent decree because that

491. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

492. 427 U.S. 297 (1976).

493. *Id.* at 304 (quoting *Dukes v. City of New Orleans*, 501 F.2d 706, 709 (5th Cir. 1974)).

494. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 471 n.33 (1977) (citations omitted).

495. *See id.*

class of persons might have little more in common than that they were the only ones who happened to be sued by the executive branch. In such a case, future distinctions based on this ground may not be rational. But if the distinction reflected in the new legislative scheme is rational, the fact that it coincides with a distinction drawn in prior judicial decrees does not undercut its rationality. If anything, it seems to reinforce its rationality because the executive and judicial branches drew the same distinction. Thus, congressional legislation that distinguishes among persons based on their prior regulation under consent decrees will be consistent with the equal protection guarantee as long as that distinction is rational.⁴⁹⁶

IV. CONCLUSION

As this Article illustrates, congressional efforts to retake a field previously occupied by federal or state consent decrees are subject to constitutional restrictions that are not present when Congress legislates on a clean slate. These constraints are not insurmountable, however. As long as Congress changes the law underlying the decree—whether by amending federal law or preempting state decrees under the Supremacy Clause—its actions are likely to be constitutionally unobjectionable. When displacing federal decrees, Congress must be careful not to overstep the boundaries placed on it by the separation of powers guarantee by conditioning the continued jurisdiction of the courts on particular substantive outcomes or by attempting to dissolve the decrees itself. But these pitfalls are relatively easy to avoid. Thus, should Congress wish to continue the trend it started with the PLRA and Telecommunications Act, the Constitution is unlikely to stand in its way.

496. The Fifth and D.C. Circuits reached this same conclusion. *See* *BellSouth Corp. v. FCC*, 162 F.3d 678, 691-92 (D.C. Cir. 1998); *SBC Communications, Inc. v. FCC*, 154 F.3d 226, 246 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 889 (1999).