CONGRESS CLEARS ITS THROAT

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The Schiavo case involved many difficult issues including diagnosis, prognosis, causation, intent, procedural due process, substantive due process, and litigation strategy. This article does not address any of those complex issues,[1] but instead discusses the Act of Congress providing for federal jurisdiction and the remarkable opinion issued by Judge Stanley F. Birch, Jr., finding that Act unconstitutional. Although not a single one of the other ten circuit judges who participated in the case joined his opinion—and two specifically rejected it—Judge Birch's opinion attracted considerable attention. Andrew Cohen of CBS News, for example, praised Judge Birch as "the only true unvarnished hero" in the case.[2]

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1. Other than to note the one thing in these difficult issues that seems simple to me: if a person has a substantive due process right against the state forcing her to eat, *see* Cruzan v. Dir. Mo. Dep't of Health, 497 U.S. 261 (1990), she must have a substantive due process right against the state forcing her *not* to eat, just as if a person has a substantive due process right against the state forcing her to carry a pregnancy to term, *see* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), she must have a substantive due process right against the state forcing her *not* to carry a pregnancy to term, *see, e.g.*, Arnold v. Board of Educ. of Escambia County, 880 F.2d 305, 311 (11th Cir. 1989); *cf.* Casey, 505 U.S. at 980 n.1 (Scalia, J., dissenting) (noting that there is "no comparable tradition barring recognition of a 'liberty interest' in carrying one's child to term free from state efforts to kill it" and that the notion that "the only way to protect childbirth is to protect abortion . . . drives one to say that the only way to protect the right to eat is to acknowledge the constitutional right to starve oneself to death").

2. Andrew Cohen, CBS News: *Terri Schiavo and the Constitution*, (CBS television broadcast March 31, 2005), *available at* http://www.cbsnews.com/stories/2005/03/31/opinion/courtwatch/main684181.shtml. *See also* Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2d 291, 300 (2005) (describing Judge Birch as "an Establishment Republican" who "went out of his way to criticize Congress and the second President Bush for flagrantly violating" the "usual formulas of federalism, separation of powers, and the rule of law").

After this article was submitted, but before it went to press, two papers defending the constitutionality of the Act appeared in print. *See* Steven G. Calabresi, *The Terri Schiavo Case: In Defense of the Special Law Enacted by Congress and President Bush*, 100 NW. U. L. REV. 151 (2006); Michael P. Allen, *Congress and Terri Schiavo: A Primer*

The opinion is remarkable in a number of ways. It decries judicial activism, but goes out of its way to conclude that an Act of Congress is unconstitutional. It emphasizes judicial duty to the law, but neither discusses the legal standard applicable to the decision then before the court nor even supports the vote that Judge Birch casts on that decision. It makes far-ranging and unsupportable legal assertions, but takes nearly all of them back in response to Judge Tjoflat's dissent. Despite its remarkable flaws, Judge Birch's opinion nevertheless does serve to bring into focus significant concerns about singling out for federal jurisdiction an individual case already decided in state court.

On March 21, 2005, the President signed into law an Act for the Relief of the Parents of Theresa Marie Schiavo.[3] That act did not create any substantive rights, but instead provided for federal jurisdiction in the United States District Court for the Middle District of Florida over "a suit or claim by or on behalf of Theresa Marie Schiavo for the alleged violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life."[4] The act also provided standing for Schiavo's parents, called for a de novo determination notwithstanding state proceedings, and prohibited delay, abstention, or imposition of an exhaustion requirement.[5]

On March 22, the District Court denied a motion for a temporary restraining order, and a panel of the Court of Appeals for the Eleventh Circuit affirmed the next day.[6] On March 25, the District Court denied a second motion for a temporary restraining order, and a panel of the Court of Appeals again affirmed.[7] Schiavo's parents petitioned for rehearing en banc, and on March 30, the Court of Appeals denied the petition.[8] Judge Birch concurred in the denial of rehearing en banc and wrote an opinion concluding that the Act for the Relief of the Parents of

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on the American Constitutional Order?, 108 W.VA. L. REV. 309 (2005).

3. Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. 109-3, 119 Stat. 15 (2005).

4. *Id.* § 1, 119 Stat. 15.

5. *Id.* § 2.

6. Schiavo ex rel. Schindler v. Schiavo, 357 F. Supp. 2d 1378 (M.D. Fla. 2005), *aff'd*, 403 F.3d 1223 (11th Cir. 2005).

7. Schiavo ex rel. Schindler v. Schiavo, 358 F. Supp. 2d 1161 (M.D. Fla. 2005), *aff'd*, 403 F.3d 1289 (11th Cir. 2005).

8. Schiavo ex rel. Schindler v. Schiavo, 404 F.3d 1270 (11th Cir. 2005).

Theresa Marie Schiavo, signed into law nine days earlier, was unconstitutional.[9]

I. JUDICIAL ACTIVISM

When courts of appeals deny rehearing en banc, they rarely issue opinions. Indeed, they rarely even report individual votes, instead simply reporting that the requisite majority did not vote in favor. In the Schiavo case, five of the eleven participating judges revealed and explained their votes. Three of them explained why they did not vote in favor of rehearing en banc;[10] two explained why they did vote in favor.[11] The majority of judges, as is traditional, neither revealed nor explained their vote. Judge Birch spoke out.[12]

Judge Birch begins and ends his opinion with a discussion of judicial activism, and defends his actions as avoiding judicial activism. For some, the term "judicial activism" is an empty epithet, meaning little more than that the one who hurls the term disagrees with a particular decision or line of decisions.[13] While there is little doubt that some use the term this way,[14] it is nevertheless "a helpful category" if used with some care because "it focuses attention on the judiciary's institutional role rather than the merits of particular decisions."[15]

Judge Birch defines a judicial activist as "one who decides the outcome of a controversy before him or her according to

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9. 404 F.3d at 1271 (Birch, J., concurring in the denial of rehearing en banc).

10. *See* 404 F.3d at 1271 (Birch, J., concurring in the denial of rehearing en banc); 404 F.3d at 1278 (Carnes, J., joined by Hull, J., concurring in the denial of rehearing en banc).

11. 404 F.3d at 1279 (Tjoflat, J., joined by Wilson, J., dissenting from denial of rehearing en banc).

12. *Cf.* 20 Questions for Circuit Judge Stanley F. Birch, Jr., of the U.S. Court of Appeals for the Eleventh Circuit, *available at* http://howappealing.law.com/20q/2003_10_01_20q-appellateblog_archive.html:

> Judge [Sidney] Smith displayed to himself a plaque on his desk and on his bench bearing the acronym "KYDMS." After a while I inquired as to its meaning. "Keep your damn mouth shut" was his answer and his approach—one that many judges should embrace.

13. *See, e.g.*, Randy E. Barnett, *Is the Rehnquist Court an "Activist" Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1276 (2002) (noting his belief that the term "while clearly pejorative, is generally empty" and "usually refers to an action taken by a court of which the speaker disapproves").

14. *See* Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2019 (2002) ("I often have the sense that judicial activism is simply the label used for decisions one does not like.").

15. Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1141 (2002).

personal conviction, even one sincerely held, as opposed to the dictates of the law as constrained by legal precedent and, ultimately, our Constitution."[16] The contrast between personal conviction and law is not a very helpful definition of judicial activism, for few (at least among those who think that such a distinction can be drawn at all) would defend judges deciding cases on the basis of personal conviction rather than law.[17] Indeed, decision according to personal conviction rather than law may be more properly characterized as lawlessness rather than activism. (And who would possibly defend judges deciding cases on the basis of *insincere* personal convictions?)

The emphasis on precedent is more helpful: one dimension of judicial activism is a lack of deference to the legal interpretations of other judges.[18] But activism is better understood more generally as a lack of deference to the legal interpretations of others. As Professor Ernest Young has put it, the "common thread" that links the various forms of judicial activism is that "they all involve a refusal by the court deciding a particular case to defer to other sorts of authority at the expense of its own judgment about the correct legal outcome."[19] Probably the most widely noted form of judicial activism involves a lack of deference to elected representatives.[20]

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16. Schiavo, 404 F.3d 1270, 1271 (11th Cir. 2005) (Birch, J., concurring in denial of rehearing en banc).

17. *See, e.g.*, Rosemary Barkett, *The Tyranny of Labels*, 38 SUFF. U. L. REV. 749, 757 (2005) ("Indeed, how many opinions acknowledge that a judge is refusing to apply the law?"). *But see* TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (1999).

18. *See* Young, *supra* note 15, at 1144, 1149–51.

19. *Id.* at 1145. *See also* William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1232–36 (2002).

20. Marshall, *supra* note 19, at 1223 ("The term judicial activism is most often associated with judicial invalidation of decisions by elected representatives."). *See* Young, *supra* note 15, at 1144–47 (listing as his first category of judicial activism the "second-guessing [of] the federal political branches or state governments"); Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARV. J.L. & PUB. POL'Y 293, 295 & n.11 (1996) ("By judicial activism I mean, quite simply and specifically, the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit"); *id.* at n.11 ("If democracy is the norm, the view of the legislature, correctable by the people, should prevail over the view of the judiciary when the issue is in doubt."); Michael C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 FORDHAM L. REV. 2161, 2177 n.91 (2001) (noting that while there "are numerous definitions of judicial activism," he was "using the term . . . to mean any view of judicial review that leads to substantially more frequent counter-majoritarian decision-making that one would expect under an approach like the one described in James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129 (1893)").

It is remarkable that in an opinion framed by criticism of judicial activism, Judge Birch concludes that an Act of Congress is unconstitutional without so much as mentioning the presumption that Acts of Congress are constitutional or addressing whether a court owes any deference to the constitutional interpretation of Congress and the President.[21] Instead, he contrasts the fervor and passion of Congress and the President to his own "dispassionate discharge of duty."[22] Yet as Professor Richard Freer has noted, the decision to write the opinion at all suggests that Judge Birch "feels very strongly."[23]

Perhaps still more remarkable in an opinion that decries judicial activism is the vision of the judicial role the opinion trumpets: far from the modest (and correct) judicial duty of deciding particular cases, Judge Birch proclaims that "when the fervor of political passions moves the Executive and the Legislative branches to act in ways inimical to basic constitutional principles, it is the duty of the judiciary to intervene."[24]

II. THE QUESTION BEFORE THE EN BANC COURT

The question before the full Court of Appeals was whether to order rehearing en banc. The question to be decided on a petition for rehearing en banc is not whether the district court judgment was correct—that is the question to be decided by the en banc court if the petition is granted. Thus by reaching out to decide the constitutional issue, Judge Birch was engaged in another form of judicial activism: reaching out to decide an issue not yet before him.[25]

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21. He does criticize both the district court and the court of appeals for "indulg[ing]" a very different kind of presumption of constitutionality: presuming, *without deciding*, that the Act of Congress is constitutional while denying relief on other grounds. *See* Schiavo, 404 F.3d at 1272 (arguing that the district court and court of appeals thereby exercised an illegitimate hypothetical jurisdiction).

22. *Id.* at 1271, 1276.

23. Elaine Silvestrini, *Judge Assails Schiavo Law*, TAMPA TRIBUNE, Apr. 1, 2005, *available at* http://www.tampatrib.com/MGBILZGIY6E.html. *See also* Tribe, *supra* note 2, at 300 (noting that Judge Birch "went out of his way to criticize Congress and the second President Bush").

24. Schiavo, 404 F.3d 1270, 1276 (11th Cir. 2005).

25. *See* Young, *supra* note 15, at 1152:

> When we call the Court "activist" because it "reaches out" to decide an issue not strictly before it . . . we are complaining about judicial maximalism. This form of activism shares with the other types . . . a refusal to defer to other actors in the system. A court that habitually reaches out to decide constitutional issues unnecessary to the resolution of the particular case before it . . . will tend to increase the occasions for invalidation of political-branch decisions. A court that tends to announce sweeping rules . . . is refusing to defer to future courts in

> Rule 35 of the Federal Rules of Appellate Procedure states:
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> An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
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> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
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> (2) the proceeding involves a question of exceptional importance.

Despite intoning that "the time has come for dispassionate discharge of duty,"[26] Judge Birch never mentions this standard.

Nor does he apply it. Judge Birch concurs in the denial of rehearing en banc, but his explanation has nothing to do with the applicable legal standard. On the contrary, to the extent that his opinion is relevant to the question before him at all, it supports the opposite conclusion: that the case "involves a question of exceptional importance"—whether an Act of Congress creating federal jurisdiction is unconstitutional—and therefore *should* be reheard en banc.

Indeed, if Judge Birch were correct in his constitutional analysis, then the panel decision was *wrong*: it should not have affirmed the District Court's order. Instead, it should have vacated the District Court's order with instructions to dismiss the case for lack of jurisdiction. Judge Birch seems to think that when a court of appeals determines that federal jurisdiction is lacking it should not take "any further action."[27] But this is clearly wrong.[28] The point becomes obvious when one considers a case in which a district court granted relief in the absence of jurisdiction. Surely a court of appeals should not refuse to take "any further action" in such a case, thereby leaving the district court decision in place. Instead, when a court of appeals decides

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much the same way that courts departing from precedent have refused to defer to past tribunals.

26. Schiavo, 404 F.3d at 1271.

27. *Id.*

28. *See* U.S. Bancorp v. Bonner Mall, 513 U.S. 18, 21 (1994) ("Of course, no statute could authorize a federal court to decide the merits of a legal question not posed in an Article III case or controversy. For that purpose, a case must exist at all the stages of appellate review. But reason and authority refute the quite different notion that a federal appellate court may not take any action with regard to a piece of litigation once it has been determined that the requirements of Article III no longer are (or indeed never were) met. That proposition is contradicted whenever an appellate court holds that a district court lacked Article III jurisdiction in the first instance, vacates the decision, and remands with directions to dismiss.") (citations omitted).

that federal jurisdiction never existed in a case, it should vacate prior decisions in the case and order the dismissal of the case for lack of jurisdiction.

Judge Birch's opinion is remarkable, then, both in reaching out to decide a constitutional issue not before him and in presenting an argument that the panel was wrong as an explanation for why he concurs is declining to disturb what the panel did.

III. TREATING STATUTORY AND COMMON LAW DOCTRINES AS CONSTITUTIONAL REQUIREMENTS

Judge Birch makes a number of startling arguments that seek to elevate statutory and common law principles into constitutional principles. He claims that the Rooker-Feldman doctrine,[29] which bars inferior federal courts from exercising appellate jurisdiction over state court judgments, should have been applied.[30] The problem with this claim is that the Rooker-Feldman doctrine is not a constitutional doctrine at all. Instead, that doctrine is a product of statutory interpretation. As a unanimous Supreme Court reiterated on the very day that Judge Birch issued his opinion, "the District Courts in *Rooker* and *Feldman* lacked subject matter jurisdiction" because the statute governing the Supreme Court's jurisdiction, "as long interpreted, vests authority to review a state court's judgment solely in this Court."[31] To conclude, as the text of his opinion suggests, that the Rooker-Feldman doctrine provides a basis for holding a statute unconstitutional would be a plain misreading of *Rooker* and *Feldman*.

Nor is there any basis for concluding, apart from *Rooker* and *Feldman*, that Congress lacks the constitutional power to give inferior federal courts appellate jurisdiction over state court judgments. Alexander Hamilton suggested not only the constitutionality of such an arrangement, but also its advisability.[32] The

29. *See* Rooker v. Fidelity Trust Co., 263 U.S 413 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983).

30. Schiavo, 404 F.3d at 1272.

31. Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 292 (2005).

32. THE FEDERALIST NO. 82, at 420 (Alexander Hamilton) (G. Wills ed., 1982) ("I perceive at present no impediment to the establishment of an appeal from the state courts to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the supreme court. The state tribunals may then be left with a more entire charge of federal causes; and appeals in most cases in which they may be deemed proper instead of being carried to the supreme court, may be made to lie from the state courts to the dis-

Supreme Court in *Martin v. Hunter's Lessee* treated removal as a form of appellate jurisdiction.[33] And it is commonplace to conceive of federal habeas for those in custody pursuant to a state court judgment of conviction as effectively a form of appellate review of state judgments. As a unanimous Supreme Court noted in *Exxon*, "Congress, if so minded, may explicitly empower district courts to oversee state court judgments and has done so, most notably, in authorizing federal habeas review of state prisoners' petitions."[34] Federal habeas for those in state custody pursuant to a judgment of conviction is plainly inconsistent with any notion that the constitution precludes inferior federal courts from revisiting determinations made by state courts.

Despite what he says in text, Judge Birch acknowledges in a footnote that Congress has the constitutional power to "authorize[] federal appellate review of final state court decisions."[35] In the footnote, the Rooker-Feldman doctrine is not presented as an argument for finding the Act unconstitutional, but instead

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trict courts of the union.").

33. 14 U.S. (1 Wheat.) 304, 347–51 (1816). Thus Congress could have provided for the removal of the Schiavo case from state court into federal district court for trial. Although current removal statutes operate pre-judgment, see 28 U.S.C. §§ 1441–1453 (2002), this was not always the case and there is no general constitutional bar to post-judgment removal. *See* Georgia v. Rachel, 384 U.S. 780, 795 (1966) (noting that the Civil Rights Act of 1866 provided for post-judgment removal but that "Congress eliminated post-judgment removal when it enacted § 641 of the Revised Statutes of 1874"); *cf.* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 917–18 (5th ed. 2003) (asking whether Congress may have inadvertently resurrected post-judgment removal of some criminal cases in 1977).

Post-judgment removal is limited by the Seventh Amendment, which prohibits re-examination of facts found by a jury except in accordance with the rules of the common law, The Justices v. Murray, 76 U.S. 274 (1869), but there is no similar constitutional bar to re-examination of facts found by a judge. *See* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2572, at 483 (1995) ("The Seventh Amendment applies only in cases at common law tried to a jury. If there is no jury, either because there was no right to a jury trial or because the right has been waived, the constitutional bar against reexamination has no application.")

Although the Court once stated that post-judgment removal would require "setting aside the trial and judgment of the State court as of no validity" and that under *Murray*, "legislation directed to that end, where, at least, the trial has been by jury, would be of doubtful validity," Stevenson v. Williams, 86 U.S. 572, 576 (1873), it gave no reason at all to suggest that *Murray* should reach beyond jury trials. *See* Robert D. Goldstein, *Blyew: Variation on a Jurisdictional Scheme*, 41 STAN. L. REV. 469, 514 (1989) (pointing out that *Murray* "was of no consequence" to cases outside the scope of the Seventh Amendment, such as equity cases, and criticizing the Commission on Revision and Consolidation of the Statutes of the United States for eliminating "the important provision for postjudgment removal," perhaps because "it was influenced, and overly so," by Murray).

34. Exxon Mobil, 125 S. Ct. at 1526 n.8.

35. Schiavo, 404 F.3d at 1272 n.3.

merely the doctrine that remains after concluding that the Act is unconstitutional on other grounds not yet explained.[36]

And what are those other grounds? Judge Birch argues that the Act is unconstitutional because it sets a standard of review, provides for federal adjudication notwithstanding prior state court determinations, and eliminates judicial power to abstain or require exhaustion of state remedies.[37]

As Judges Tjoflat and Wilson note, "to hold that Congress may not establish or alter standards of review would wreak havoc on dozens of federal statutes that do just that in numerous contexts."[38] The landmark and pervasive Administrative Procedure Act, for example, provides that the "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be —arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] unsupported by substantial evidence."[39] Consider, too, the statute establishing a standard of review of decisions by United States Magistrate Judges,[40] the statute establishing a standard of review after court-annexed arbitration,[41] the statute establishing a standard of review after contractual arbitration,[42] the statute establishing a standard of review of evidentiary rulings,[43] and the statute establishing a standard of review of district court sentencing decisions.[44] Indeed, where "a statute . . . does not *explicitly* set

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36. *Id.*

37. *Id.* at 1273-77. This aspect of Judge Birch's opinion is itself activist. *See* Young, *supra* note 15, at 1144 (listing as one category of activism "issuing broad or 'maximalist' holdings rather than narrow or 'minimalist' ones").

38. Schiavo, 404 F.3d at 1280 n.5 (Tjoflat, J., dissenting from denial of rehearing en banc).

39. 5 U.S.C. § 706 (2000).

40. 28 U.S.C. § 636(b)(1)(A) (2000) ("A judge of the court may reconsider any pretrial matter . . . when it has been shown that the magistrate's order is clearly erroneous or contrary to law."); 28 U.S.C. 636(b)(1) (2000) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.").

41. 28 U.S.C. § 657(c) (2000) (providing that "any party may file a written demand for trial de novo in the district court").

42. 9 U.S.C. § 10(a) (2002) (providing that the award may be vacated if it was procured by "corruption, fraud, or undue means," if an arbitrator demonstrated "evident partiality," or engaged in certain enumerated forms of "misconduct" or "misbehavior").

43. FED. R. EVID. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ."); FED. R. EVID. 103(d) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."). *See also* 28 U.S.C. § 2105 (2000) ("There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.").

44. 18 U.S.C. § 3742(e) (2002) (providing that the "court of appeals shall determine whether the sentence—(1) was imposed in violation of law; (2) was imposed as a result of

forth a standard of review [it] may nonetheless do so *implicitly*."[45] Establishing a standard of review is necessary and proper for carrying into execution the judicial power. And the Constitution gives Congress, not the judiciary, the power to make all laws that are necessary and proper for carrying into execution the judicial power.[46]

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an incorrect application of the sentencing guidelines; (3) is outside the applicable guideline range . . . ; or (4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable."). *See also id.*:

> The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and . . . shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

Cf. United States v. Booker, 543 U.S. 220, 261–62 (2005) (relying on inferences from this statute to determine a standard of review after concluding, on jury trial grounds, that the provision could not stand as written).

45. Booker, 543 U.S. at 259–61.

46. U.S. CONST. art. I, § 8 (providing Congress with the power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"). *See, e.g.*, Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1582–90 (2000) (noting numerous "longstanding, accepted statutes carrying into execution the federal judicial power under the Necessary and Proper Clause").

One could take a radically narrow view of the Necessary and Proper Clause so as to call the Schiavo legislation into question, but such a view would not only sweep away all of the statutes noted above, but would also sweep away the full faith and credit statute, Act of May 26, 1790, ch. 11, 1 Stat. 122, which has governed proceedings in federal courts since 1790. *See* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191 (2001). Lawson concedes that his approach is both an "'extraordinary challenge to congressional power'" and "'an extraordinary departure from settled law.'" *Id.* at 226 (quoting Paulsen *supra*, at 1590).

To appreciate just how extraordinary the challenge and the departure, consider that Lawson relies on the capacious claim that, under the Necessary and Proper Clause, Congress "can pass substantive laws, but it cannot tell the courts how to identify, construe, and apply them." *Id.* at 211. Thus his principle would invalidate statutes calling for liberal construction of their provisions, e.g., 25 U.S.C. § 458aaa-11 (2000) ("Each provision of this part and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance and any ambiguity shall be resolved in favor of the Indian tribe."); the Dictionary Act, 1 U.S.C. § 1 (2000) (providing that, unless the context indicates otherwise, singular includes the plural, masculine includes the feminine, and "person" includes corporations); *id.* § 2 (providing that "county" includes parish); the statutes making the Statutes at Large and the United States Code evidence of the law, 1 U.S.C. § 112 (2000) ("The United States Statutes at Large shall be legal evidence of laws, concurrent resolutions, treaties, international agreements other than treaties, proclamations by the President, and proposed or ratified amendments to the Constitution of the United States therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States."); 1 U.S.C. § 204 (2000) ("In all courts, tribunals, and public offices of the United States, at home or abroad, of the District of Columbia, and of each State, Territory, or insular possession of the United States . . . The matter set forth in the edition of the Code of Laws of the United States current at any time shall . . . establish

While there are colorable arguments that when Congress gives a federal court jurisdiction, it cannot require the court to defer to another's interpretation of federal law,[47] it is particularly odd for an opinion proclaiming judicial independence to assert the unconstitutionality of a statute requiring a federal court to decide a federal claim independently.

Judge Birch similarly claims, with little elaboration, that it was unconstitutional for Congress to provide for federal adjudication of federal claims notwithstanding prior state court decisions and proceedings.[48] He never identifies, however, the source

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prima facie the laws of the United States"); or even, it would seem, definitional sections of statutes. *See, e.g.*, 5 U.S.C. § 551 (2000) (defining "agency" for purposes of the Administrative Procedure Act).

Lawson concedes that, under the Necessary and Proper Clause, Congress can enact laws governing judicial procedure, Lawson, *supra*, at 224. Thus, he agrees that the Necessary and Proper Clause empowers Congress to enact *both* substantive laws and procedural laws. In a sign of just how far awry he has gone, however, he somehow carves out something that, in his view, is apparently *neither* substantive nor procedural. While the line between substance and procedure is notoriously fuzzy, and while a particular law might be classified as partaking of *both* substance and procedure, Lawson effectively declares a broad swath of law—including the law of evidence and the law of remedies—to be *neither* substantive nor procedural, and thereby outside congressional control. *Cf.* D. Michael Risinger, *"Substance" and "Procedure" Revisited, With Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions,"* 30 UCLA L. REV. 189, 190–204 (1982–83) (tracing the development of the substance/procedure distinction from the right/remedy distinction and stating that a legal provision declaring the appropriate remedy, "reflecting and conditioning the value judgment behind the definition of the right," is substantive). On Lawson's view, as he acknowledges, the venerable Anti-Injunction Act, Act of March 2, 1793, § 5, 1 Stat. 335, is unconstitutional, as are the Federal Rules of Evidence, with the Rules of Decision Act, Judiciary Act of 1789, § 34, 1 Stat. 73, saved only by treating it as "an exhortation rather than a regulation, along the lines of 'decide cases correctly,' or 'observe National Vinegar Month.'" Lawson, *supra*, at 217, 224, 226. His approach is, if possible, even more radical than he acknowledges, for if the law of remedies is outside Congressional control, then *all* statutes that establish and define rights of action are unconstitutional.

47. *See* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998). *Cf.* Irons v. Carey, 408 F.3d 1165 (9th Cir. 2005) (ordering supplemental briefing regarding whether the Antiterrorism and Effective Death Penalty Act of 1996, which provides for federal habeas relief if a state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," "unconstitutionally prescribes the sources of law that the Judicial Branch must use in exercising its jurisdiction or unconstitutionally prescribes the substantive rules of decision by which the federal courts must decide constitutional questions that arise in state habeas cases"). It is far from obvious, however, that Congress may not create some statutory remedies—not themselves constitutionally required—that are available only for some subset of constitutional violations. *See* FALLON ET AL., *supra* note 33, at 1350–51 (noting that Liebman and Ryan's analysis, though "rich and complex," also "bristles with difficulties," including tensions with doctrines ranging from qualified immunity to res judicata).

48. Schiavo ex rel. Schindler v. Schiavo, 404 F.3d 1270, 1271 (11th Cir. 2005) (Birch, J., concurring in the denial of rehearing en banc).

of the ordinary obligation of a federal court to give preclusive effect to a state court judgment: the full faith and credit statute enacted by Congress.[49] The Full Faith and Credit Clause of the Constitution,[50] by contrast, does not require federal courts to give full faith and credit to state court judgments, for the crucial reason that if it did, federal supremacy would be at an end—or very nearly so.[51] It is not simply that statutes providing federal habeas for those in state custody pursuant to a state court judgment would be unconstitutional if the Constitution required that federal courts give preclusive effect to state court judgments, so too would statutes providing for Supreme Court review of state court judgments.[52]

Judge Birch also contends that the Act is unconstitutional in "denying federal courts the ability to exercise abstention or inquire as to exhaustion," thereby "rob[bing] federal courts of ju-

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49. 28 U.S.C. §1738 (2000) (providing that judicial proceedings of any court of any State "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken").

50. U.S. CONST. art. IV, § 1 ("Full faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

51. *See* John J. Gibbons, *Federal Law and the State Courts 1790-1860*, 36 RUTGERS L. REV. 399, 399 (1984) (noting that Supreme Court "review of state final judgments rejecting federal law claims" is "the bare minimum essential for the preservation of the supremacy of national law").

52. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–51 (1816) (upholding the constitutionality of § 25 of the Judiciary Act of 1789).

For the same reason, the holding of Plaut v. Spendthrift Farm, 514 U.S. 211 (1995), cannot sensibly be applied to protect state court decisions in federal court. Indeed, Plaut specifically distinguished prior "decisions upholding legislation that altered rights fixed by the final judgments of non-Article III courts." *Id.* at 232. *See, e.g.*, Sampeyreac v. United States, 32 U.S. 222 (1833) (upholding statute permitting a previously time-barred appeal to the Supreme Court from a territorial court); Freeborn v. Smith, 69 U.S. 160 (1864) (same); Paramino Lumber Co. v. Marshall, 309 U.S. 370, 374–76 (1940) (upholding a private act directing review of an order under the Longshoremen's and Harbor Workers' Compensation Act passed nearly five years "after there had been a final award by the deputy commissioner and after the time for review of the award had expired," where it was subsequently discovered that the claimant's disability continued longer than expected). *See also* Stephens v. Cherokee Nation, 174 U.S. 445 (1899) (upholding statute permitting Supreme Court review of otherwise final decision of the United States Court in Indian Territory and noting that "while it is undoubtedly true that legislatures cannot set aside the judgments of courts, compel them to grant new trials, order the discharge of offenders, or direct what steps shall be taken in the progress of a judicial inquiry, the grant of a new remedy by way of review has been often sustained under particular circumstances"); 1 THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 193, n.4 (8th ed., 1927) (noting state cases upholding "a statute allowing an appeal in a particular case" as well as a "retroactive statute, giving the right of appeal in cases in which it had previously been lost by lapse of time," while also noting conflicting state authority).

dicial doctrines long-established for the conduct of prudential decisionmaking."[53] Here he has things exactly backwards. The key separation of powers problem with "judicial doctrines" of abstention and exhaustion is the legitimacy of courts creating such doctrines in the first place.[54] As John Marshall put it, "We have no more right to decline the exercise of a jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."[55] The best defense of such judicially-created common law doctrines is that they are permissible so long as they are, among other things, subject to "continued oversight by the legislative branch."[56]

In each instance, Judge Birch treats statutory or common law doctrines as if they were constitutional requirements.[57] While it is always tempting to assume that what is familiar is somehow required by the constitution,[58] to do so is a fundamental error.

IV. THE RETREAT TO A MUCH NARROWER CLAIM

In a footnote responding to Judge Tjoflat's dissent, Judge Birch narrows his argument considerably. He explicitly concedes that it is constitutionally permissible for Congress to enact standards of review, and seems to concede that Congress can withdraw the ability to use doctrines of abstention, exhaustion, and

53. Schiavo, 404 F.3d at 1274.

54. *See* Martin Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

55. Cohens v. Virginia, 19 U.S. 264, 404 (1821). *Cf.* U.S. CONST. art. I, § 4 (providing that "all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason . . . ."); U.S. CONST. art. III, § 3 ("Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort.").

56. David Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 589 (1985).

57. Indeed, at one point, he appears to suggest that the pre-existing statutory allocation of federal jurisdiction is somehow of constitutional stature. Schiavo, 404 F.3d at 1273 ("If the Act only provided for jurisdiction consistent with Article III and 28 U.S.C. § 1331, the Act would not be in violation of the principles of separation of powers.").

58. *See* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 905 (1984) (noting that the "main question" raised by a claimed "essential functions" limitation on Congressional power to make regulations and exceptions to the Supreme Court's appellate jurisdiction is whether it "confuses the familiar with the necessary, the desirable with the constitutionally mandated"); Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (stating that "the accident of our finding certain opinions natural and familiar or novel or even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States").

waiver so long as it does so "in a category of cases like habeas corpus," rather than "in a *single* case."[59]

Judge Birch seems to think that Congress engaged in the judicial task of applying existing law in a particular case rather than the legislative task of making new law. But Congress did not dictate how the existing law of preclusion, abstention, or exhaustion applied in a particular case; it simply made new law. Congress did not "invite"[60] the courts to change the law of jurisdiction, preclusion, abstention, or exhaustion—Congress established the governing law in those areas itself. While the line between these two may not be perfectly clear, particularly in cases where Congress writes narrowly-focused laws, a comparison with cases in which the Supreme Court found Congressional action to be legislative rather than judicial—to be making new law rather than applying existing law—demonstrates that Congressional action much closer to applying existing law has nevertheless been understood as making new law.

In *Robertson v. Seattle Audubon Society*,[61] Congress responded to environmental litigation then pending in the federal courts by "determin[ing] and direct[ing]" that management of specified lands in specified ways

> is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society, et al. v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manual Lujan, Jr., Civil No. 87-1160-FR.[62]

The Supreme Court unanimously concluded that the statute "compelled changes in law, not findings or results under old law."[63] It found "nothing . . . that purported to direct any particular findings of fact or applications of law, old or new, to fact."[64]

Similarly, in *INS v. Chadha*, Justice Powell concluded that the House of Representatives had acted judicially rather than

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59. Schiavo, 404 F.3d at 1275 n.4.
60. *Id.* at 1276.
61. 503 U.S. 429 (1992).
62. *Id.* at 435 n.2.
63. *Id.* at 438.
64. *Id.*

legislatively in resolving that Chadha should be deported.[65] The majority, however, explicitly rejected Justice Powell's view, finding it "clear" that the House action "was an exercise of legislative power."[66] It explained that the House action "had the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the legislative branch."[67] Indeed, the Court stated that unless "other constitutional principles place substantive limitations," Congress would "presumably retain the power . . . to enact a law . . . mandating a particular alien's deportation."[68] Judge Birch's approach is much like that of Justice Powell—indeed, Judge Birch cites Justice Powell's opinion.[69] But Judge Birch does not mention that at least seven (and probably eight) members of the Supreme Court disagreed with Justice Powell.[70] (And this in a paean to the duty of judges to follow precedent.)

Judge Birch criticizes Congressional action that does not apply to a "category of cases" as "lack[ing] the generality and prospectivity of legislation that comports with the basic tenets of the separation of powers."[71] However much ideal-typical legislation may be general and prospective, the United States Constitution does not contain a blanket prohibition on special or retroactive legislation.[72] The relevant prohibitions in the United States

65. 462 U.S. 919, 964–65 (1983) (Powell, J., concurring in the judgment) (stating that "the House's action appears clearly adjudicatory" because it "did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria").

66. *Id.* at 957; *see id.* at n.22 ("We are satisfied that the one-House veto is legislative in purpose and effect . . . .").

67. *Id.* at 952.

68. *Id.* at 935 n.8.

69. Schiavo ex rel Schindler v. Schiavo, 404 F.3d 1270, 1275 (11th Cir. 2005).

70. *See* Chadha, 462 U.S. at 957 (six justice majority opinion); *id.* at 1001 (White, J., dissenting) ("Nor does § 244 infringe on the judicial power, as Justice Powell would hold."). Justice Rehnquist's dissent does not mention Justice Powell's argument at all. He instead relies entirely on a disagreement with the majority's severability analysis, explaining, "Because I do not believe that § 244(c)(2) is severable, I would reverse the judgment of the Court of Appeals." *Id.* at 1016 (Rehnquist, J., dissenting). This statement only makes sense on the assumption that he found the legislative veto contained in § 244(c)(2) to be unconstitutional, although he did not explain why. Perhaps Justice Rehnquist agreed with Justice Powell, or perhaps he had other unmentioned reasons for this conclusion of unconstitutionality. However, given that his opinion is directed to the majority's severability analysis, his failure to explain the basis for his conclusion of unconstitutionality is best understood to reflect agreement with the majority (including the majority's rejection of Justice Powell's approach) except regarding severability.

71. *Id.*

72. *See* Paramino Lumber Co. v. Marshall, 309 U.S. 370, 380 (1940) ("Private acts, as such, are not forbidden by the Constitution. That instrument contains no provision against private acts enacted by the federal government except for a prohibition of bills of attainder and grants of nobility.") (footnote omitted). "The constitutions of many of the

Constitution are much narrower: bills of attainder and titles of nobility are unconstitutional, as are ex post facto laws.[73] Just as the ex post facto clause is not a blanket prohibition on retroactive legislation, but rather "has long been recognized" to apply "only to penal statutes which disadvantage the offender affected by them,"[74] so, too, the attainder clause is not a blanket prohibition on special or private legislation, but instead "prohibits legislatures from singling out disfavored persons and meting out summary punishment for past conduct."[75] Accordingly, Congress has regularly enacted special or private legislation from the founding to the present day.[76] Of course, other constitutional limitations apply to such legislation, but an Act of Congress is

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states, unlike the federal, forbid private legislation." *Id.* at 380 n.24 (noting that there "are restrictions against the enactment of special legislation in the constitutions of all the states except Connecticut, Massachusetts, New Hampshire and Vermont").

73. U.S. CONST. art., I § 9 ("No Bill of Attainder or ex post facto Law shall be passed."); *id.* ("No Title of Nobility shall be granted by the United States."). *See also* U.S. CONST. art. IV, § 1 ("Full faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."). The prohibition against takings without just compensation can similarly be understood as a limitation on one kind of special law: a law that takes a particular person's property for a public purpose. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

In addition, some laws must be "uniform" in some sense. *See* U.S. CONST. art. I, § 8 ("Duties, Imposts and Excises shall be uniform throughout the United States"); *id.* ("uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcy throughout the United States").

74. Collins v. Youngblood, 497 U.S. 41 (1990); *see* California v. Morales, 514 U.S. 499 (1995); Republic of Austria v. Altmann, 541 U.S. 677, 692–93 (2004) ("in most instances, the antiretroactivity presumption is just that—a presumption rather than a constitutional command").

75. Landsgraf v. USI Film Products, 511 U.S. 244, 266 (1994).

76. *See, e.g.*, 6 Stat. (1846) (entire volume devoted to private laws); *id.* at 40 (discharging Robert Sturgeon from prison); INS v. Chadha, 462 U.S. 919, 954 (noting "long experience" of Congress with "private bill procedure"); Floyd D. Shimamura, *The History of Claims Against the United States: The Evolution From a Legislative to a Judicial Model of Payment*, 45 LA. L. REV. 625, 644 (1985) ("By 1832, half of Congress' time was consumed with such private business—Friday and Saturday being fully set aside for such purposes.").

As the Supreme Court explained in Plaut v. Spendthrift Farm:

> While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action. Private bills in Congress are still common, and were even more so in the days before establishment of the Claims Court. 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 Attainder Clause, including cases which say that it requires not merely "singling out" but also punishment, see, e.g., United States v. Lovett, 328 U.S. 303, 315-318 (1946), and a case which says that Congress may legislate "a legitimate class of one," Nixon v. Adm'r of Gen. Services, 433 U.S. 425 (1977).

514 U.S. 211, 239 n.9 (1995).

not unconstitutional on separation of powers grounds for lack of "generality and prospectivity."

Indeed, some Congressional powers pointedly envision individualized legislation.[77] For example the power to "pay the Debts"[78] of the United States is the power to pay particular debts,[79] just as the power to "establish Post Office and post Roads"[80] is the power to establish particular offices and roads.[81] Similarly, the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"[82] is the power to issue particular patents and copyrights.[83] The power to admit new States into Union,[84] is the power to admit particular States.[85] Of course, the power to "declare War"[86] is the power to declare particular wars between the United States and particular enemies.[87]

Consider, too, the canonical example of an implied power of Congress—the power to create a corporation.[88] Congress has never passed a general incorporation law. Instead, it has incorporated particular corporations, ranging from the Bank of the United States to the American Red Cross.[89]

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77. *See* Lawson, *supra* note 46, at 210 (2001) (noting that some congressional powers "seem to require by their terms some measure of generality" while "others contemplate highly specific legislation").

78. U.S. CONST. art. I, § 8.

79. *See, e.g.*, An Act for the relief of Robert Buntin, ch. LX, 6 Stat. 262 (1821) (directing payment of particular individual for surveys he made under the authority of the United States).

80. U.S. CONST. art. I, § 8.

81. *See e.g.*, Act of Feb. 20, 1792, 1 Stat. 232 (establishing various postal roads, including one from "Wisscassett in the district of Maine, to Savannah in Georgia" and specifying the route); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421, 428 (1855) (reciting Act of Congress of August 31, 1852 declaring two particular bridges to be post-roads).

82. U.S. CONST. art. I, § 8.

83. *See, e.g.*, An Act authorizing the Secretary of State to issue a Patent to Thomas Oxley, ch.LVII, 6 Stat. 261 (1821). *See generally* Tyler T. Ochoa, *Patent and Copyright Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC'Y U.S.A. 19, 46–51, 58–84 (2001) (describing various private acts creating or extending copyrights and trademarks).

84. U.S. CONST. art. IV, § 3.

85. *See, e.g.*, Act of Feb. 18, 1791, ch. VII, 1 Stat. 191 (admitting Vermont to Union).

86. U.S. CONST. art. I, § 8.

87. *See, e.g.*, Declaration of State of War Between Imperial German Government and United States, 40 Stat. 1 (April 6, 1917).

88. *See* McCulloch v. Maryland, 17 U.S. 316 (1819); Act of Feb. 25, 1791, ch. X, 1 Stat. 191.

89. *See id.*; An Act to incorporate the American National Red Cross, ch. 23, 33 Stat. 599 (1905); Am. Nat'l Red Cross v. S.G., 505 U.S. 247 (1992).

V. THE CULT OF *KLEIN*

But what of *United States v. Klein*?[90] Didn't it hold, as Judge Birch said, that it is unconstitutional for Congress to "prescribe a 'rule of decision' for a particular case"?[91] In short, no. Unfortunately, the explanation for this short answer is a bit longer.

Some twenty-five years ago, Professor Gordon Young observed

> the development among judges and scholars of an uncritical devotion which resembles a cult of the *Klein* case. As with the object of most cults, the *Klein* opinion combines the clear with the delphic. Chief Justice Chase's excessively broad and ambiguous statements for the majority provide the delphic elements in *Klein*. His statements have permitted *Klein* to be viewed as nearly all things to all men.
>
> Viewed as a source of principles protecting the judiciary from the other branches, *Klein* is often stretched extraordinarily beyond its facts by advocates and judges.[92]

Klein involved a claim for compensation in the Court of Claims in the wake of the Civil War. Victor Wilson's cotton had been seized by Union agents after the fall of Vicksburg and sold.[93] Pursuant to an Act of Congress, the owner of such property could obtain the proceeds of the sale in the Court of Claims "on proof . . . of his ownership . . . and that he has never given any aid or comfort to the present rebellion."[94] John Klein, as the administrator of Wilson's estate, sought relief under this Act in the Court of Claims.

Wilson had been a surety on the bonds of two Confederate officers. In *United States v. Padelford*,[95] the Supreme Court held such a suretyship constituted giving comfort to the rebellion.[96]

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90. 80 U.S. 128 (1871).

91. Schiavo ex rel. Schindler v. Schiavo, 404 F.3d 1270, 1274 (11th Cir. 2005).

92. Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States v. Klein *Revisited*, 1981 WIS. L. REV. 1189, 1195. For a recent example, see Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 Nw. U. L. Rev. 437, 440 (2006) (gleaning from Klein the principle that the judiciary should "polic[e] the legislative process to eliminate . . . legislative deception"); *but see id.* at 458-59, n. 78-79 (acknowledging that there may have been no actual deception involved in Klein).

93. Young, *supra* note 92, at 1192, 1190.

94. The Abandoned Property Collection Act, ch. 120, § 3, 12 Stat. 820 (1863).

95. 76 U.S. (9 Wall.) 531 (1870).

96. 76 U.S. at 539; *see* Young, *supra* note 92, at 1202.

Both Wilson and Padelford, however, had been pardoned by President Lincoln in accordance with the Presidential proclamation of December 8, 1863.[97] That proclamation granted to a wide range of rebels "a full pardon . . . with restoration of all rights of property, except as to slaves, and in property cases where rights of third parties shall have intervened" upon the taking of an oath of allegiance.[98] The required oath promised support of the Constitution, the Union, and the wartime actions of both Congress and the President regarding slaves.[99]

While *Padelford* viewed suretyship as giving comfort to the rebellion, it also held that the recipient of a Presidential pardon—at least one who took the required oath prior to the seizure of his property—"was purged of whatever offence against the laws of the United States . . . and relieved from any penalty which he might have incurred."[100]

After the Court of Claims held that Wilson's estate was entitled to recover,[101] and while the government's appeal to the Supreme Court was pending, Congress attempted to change the significance of a Presidential pardon by attaching a rider to an appropriations bill. As originally proposed on the floor of the Senate, the rider made a pardon inadmissible in the Court of Claims to prove loyalty, acceptance of a pardon (without protesting innocence) conclusive evidence of disloyalty, and provided that the Supreme Court, in cases where the Court of Claims had already decided in favor of the claimant based on a pardon, "shall, on appeal, reverse such judgment."[102] Some objected that this was an unconstitutional attempt to restrict the effect of a presidential pardon.[103] Others objected that Congress should not say that the Supreme Court "shall reverse the judg-

97. *See* 80 U.S. at 132.

98. Proclamation No. 11, 13 Stat. 737 (Dec. 8 1868).

99. *Id.* at 738.

100. 76 U.S. at 543.

101. Professor Young explains, with references not only to the generally cited 1868 opinion of the Court of Claims, but also to a less-noticed addendum to that opinion and the record of the case, that the Court of Claims had found Wilson to be loyal in fact, but when the government later discovered that Wilson had been a Confederate surety, changed the ground of its decision. See 4 Ct. Cl. 559, 567 (1868), modified, 7 Ct. Cl. vii (1871); Young, *supra* note 92, at 1199 n.55 (explaining that the "only plausible explanation for the Court of Claims, on rehearing, finding that Wilson's pardon excused disloyalty is the decision in United States v. Padelford"). While the original decision of the Court of Claims was rendered before *Padelford*, its decision on reconsideration was rendered after *Padelford*.

102. Cong. Globe, 41st Cong., 2d Sess. 3809 (1870); *see* Young, *supra* note 92, at 1205.

103. Cong. Globe, 41st Cong., 2d Sess. 3821 (1870).

ment."[104] To meet the latter objection, the words "reverse such judgment" were replaced by the words "have no further jurisdiction thereof, and shall dismiss the cause for want of jurisdiction," with Senator Edmund explaining that this language "accomplishes the same purpose," and was preferable "as a matter of taste, though not as a matter of law."[105] The Senate adopted the rider by a vote of 34 to 19, with 19 absent, and the appropriations bill, with the rider included, was ultimately adopted by the Senate and the House, and signed by the President.[106]

In *Klein*, the Supreme Court refused to dismiss the case, but instead affirmed the judgment of the Court of Claims.[107] It concluded that the rider was "not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power," but instead that its "great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have."[108] Indeed, all members of the court agreed, as Justice Miller put it in his dissenting opinion, that the rider was "unconstitutional, so far as it attempts to prescribe to the judiciary the effect to be given to an act of pardon or amnesty by the President."[109]

Given the unanimous agreement on this straightforward proposition, it might be best to treat this as the narrow holding of the case that is obscured by the majority's "confusing" opinion.[110] So understood, *Klein* would stand for (1) the proposition

104. Cong. Globe, 41st Cong., 2d Sess. 3824 (1870).

105. *Id.*

106. *See* Act of July 12, 1870, ch. 251, 16 Stat 230, 235. Why would a President sign such a bill? The proviso was bundled with an appropriations bill, and any President may be reluctant to veto a bill that contains an unconstitutional provision if the bill as a whole is sufficiently important. Indeed, to my mind, a significant comparative competence held by the judiciary regarding constitutional interpretation is its ability to unbundle, that is, to address particular applications of particular provisions in particular cases rather than whole bills. See Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. Rev. ___ (forthcoming 2006).

107. United States v. Klein, 80 U.S. 128, 148 (1871).

108. 80 U.S. at 145–46.

109. 80 U.S. at 148 (Miller, J., joined by Bradley, J., dissenting).

110. *See* Young, *supra* note 15, at 1193 (describing the opinion as "confusing"); FALLON ET AL., *supra* note 33, at 339 (noting that the opinion is "hardly a model of clarity" and "raises more questions than it answers"); Liebman & Ryan, *supra* note 47, at 815 (describing the opinion's analysis as "unruly"); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 34 (2002) (stating that the opinion is "sufficiently impenetrable that calling it opaque is a compliment"); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2549 (1998) ("I do not think that there is an entirely tidy account of the Klein opinion. Much that is said in the opinion is exaggerated if not dead wrong . . . .").

that Congress cannot require the judiciary to adhere to Congress' interpretation of the Constitution and (2) the proposition that the Supreme Court interprets the Constitution to require the recipient of a pardon to be treated as if he had never committed the crime.[111]

But there are two difficulties with this approach. First, although discussion of the presidential pardon is woven throughout the opinion, a brief passage near the end of the opinion appears to treat the infringement of the President's power to grant pardons as an independent ground for decision.[112] Second, the case involved a claim against the United States, and some additional explanation is required to justify affirming a judgment against the United States, despite sovereign immunity, in the face of an apparent Congressional desire to deny recovery.[113]

A fuller understanding of the majority opinion appears by focusing on the disagreement between the majority and the dissent. For the dissenters, there was a crucial difference between a case such as *Padelford*, in which the rebel took the oath and was pardoned prior to the seizure of his property, and *Klein*, in which the rebel took the oath after the seizure of his property. As Justice Miller explained:

> [A]s long as the possession or title of property remains in the party, the pardon or amnesty remits all right in the govern-

111. *See* FALLON ET AL., *supra* note 33, at 340 (claiming that the "judgment is adequately supported by . . . the clear holding that the rule of decision prescribed by Congress in *Klein* abridged the President's pardon power"). Under this approach, *Klein* would also stand for the proposition that a statute that purports to give the Supreme Court jurisdiction to reverse, but not jurisdiction to affirm, regardless of what judgment the Supreme Court believes is constitutionally required, is "not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power," 80 U.S. at 146; *see also* FALLON ET AL., *supra* note 33 at 339 (suggesting that *Klein* is "surely right . . . that invocation of the language of 'jurisdiction' is not a talisman"). *See also* Meltzer, *supra* note 110, at 2538–39 (suggesting that *Klein* could be read as positing "that a straightforward rule denying compensation to recipients of pardons would unconstitutionally infringe the President's authority under Article II, and that Congress may not use jurisdictional limits to achieve the same result" or that "Congress may not give courts jurisdiction on the condition that they refrain from reaching a result that the Constitution may demand"); *id.* at 2549("whatever the breadth of Congress's power to regulate federal court jurisdiction, it may not exercise that power in a way that requires a federal court to act unconstitutionally").

112. 80 U.S. at 147. *See* Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2526 (1998) (describing this aspect of Klein as an "alternate ground . . . plainly of secondary importance"); Meltzer, *supra* note 110, at 2539 n.12 (noting objections to the narrow reading).

113. *Cf.* Liebman & Ryan, *supra* note 47, at 822 (claiming that "[a]ssertions of sovereign immunity are sufficiently like denials of jurisdiction that an Article III analysis of the latter applies as well to the former").

> ment to forfeit or confiscate it. But where the property has already been seized and sold, and the proceeds paid into the treasury, and it is clear that the statute contemplates no further proceeding as necessary to divest the right of the former owner, the pardon does not and cannot restore that which has thus completely passed away.[114]

In light of this ground of dissent, the majority was at pains at the outset of its opinion to emphasize that the category of "captured and abandoned property" was a "peculiar" one, "known only in the recent war," and with no precedent in history.[115] Such property, as the majority saw it, was not "divested absolutely out of the original owners," but instead went "into the treasury without change of ownership."[116] As to such property, the "government constituted itself the trustee for those . . . entitled to the proceeds."[117]

From this perspective, once the property owner took the required oath, "the pardon and its connected promises took effect. The restoration of the proceeds became the absolute right of the persons pardoned."[118] Indeed, to fail to restore the property to its owner as promised would be a "breach of faith not less 'cruel and astounding' than to abandon the freed people whom the Executive had promised to maintain in their freedom."[119]

The reference to the Emancipation Proclamation is revealing,[120] for it helps us to understand that the pardon plays two distinct roles in the majority opinion. One role is as the basis for concluding that the rider "impair[ed] the effect of a pardon, and thus infring[ed] the constitutional power of the Executive."[121] It has another role, however, as the mechanism by which a right was vested. In this role, there is nothing particularly distinctive about a pardon. Other legal instruments, such as the Emancipation Proclamation or a simple deed, also created vested rights.[122]

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114. 80 U.S. at 150 (Miller, J., dissenting).
115. *Id.* at 136, 138.
116. *Id.* at 138.
117. *Id.*
118. *Id.* at 142.
119. *Id.* The internal quotation is from President Lincoln's message to Congress explaining his reasons for the required oath in connection with the pardon. *See id.* at 140 (providing excerpts from the message).
120. The Emancipation Proclamation declared that "all persons held as slaves" in certain designated areas in rebellion "are, and henceforth shall be, free." Proclamation No. 17, 12 Stat. 1268, 1269 (Jan 1, 1863).
121. 80 U.S. at 147.
122. *Cf.* Young, *supra* note 92, at 1214 n.136 (suggesting that a due process argument may "have been accepted sub silentio," helping to explain "why Chase took pains to ar-

The language of vested rights has largely fallen from our federal constitutional discourse. But it was a dominant feature of general constitutional law for decades. For example, in Fletcher v. Peck, the Supreme Court found Georgia's attempt to rescind a land grant unconstitutional, explaining that "if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates."[123] As Chancellor Kent put it, "A retrospective statute, affecting and changing vested rights, is very generally considered, in this country, as founded on unconstitutional principles, and consequently inoperative and void."[124]

The Supreme Court of the United States plainly took account of such general constitutional law precepts when reviewing cases on appeal from the inferior federal courts, even though, due to statutory limitations on its jurisdiction, it did not do so on review of state court judgments.[125] Moreover, it also took account of such precepts when deciding cases involving federal statutes, although it tended to blur the distinction between constitutional and statutory analysis.[126] *Klein*, which was on appeal from a lower federal court, the Court of Claims, displays such blurring of constitutional and statutory analysis. While it speaks

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gue that Wilson had retained a property interest in the proceeds").

123. 10 U.S. (6 Cranch) 87, 135 (1810).

124. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 455 (12th ed., 1873) (O.W. Holmes, ed.). *See also* 2 THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 749-50 (8th ed., 1927) (quoting Kent's statement and explaining that a "mere expectation of property in the future is not considered a vested right").

125. *See* Davidson v. City of New Orleans, 96 U.S. 97, 105 (1877) ("It may possibly violate some of those principles of general constitutional law of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States as we were in Loan Association v. Topeka [87 U.S. 655 (1874)]."). *See generally* Michael G. Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263 (2000); *id.* at 1304 ("Although these general constitutional law precepts could provide a rule of decision in a given case when the federal courts had jurisdiction, it is important to recall that they could not confer federal question jurisdiction, either originally (in the lower federal courts) or on direct review of the state courts (in the Supreme Court)").

126. *See* Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73, 87–88, 94–96 (2000) (discussing cases). *Cf.* John Copeland Nagle, *Delaware & Hudson Revisited*, 72 NOTRE DAME L. REV. 1495, 1497, 1499 (1997) (describing a nineteenth century practice whereby a "court first decided that a statute was unconstitutional, and then . . . proceeded to adopt an interpretation of the statute that avoided the constitutional problem altogether," that is, "a court would announce that because interpretation *x* of a statute was unconstitutional, interpretation *y* should be adopted instead").

of a constitutional violation, it also views the violation as "inadvertent[]," [127] states that the rider had "perhaps little consideration in either House of Congress," [128] and concludes as follows:

> We repeat that it is impossible to believe that this provision was not inserted in the appropriation bill through inadvertence; and that we shall not best fulfill the deliberate will of the legislature by DENYING the motion to dismiss and AFFIRMING the judgment of the Court of Claims. [129]

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127. 80 U.S. 128, 147 (1871).

128. *Id.* at 143.

129. *Id.* at 148. The emphasis on Congressional intent may also reflect an approach akin to a severability analysis: If Congress had known that the Supreme Court would hold that it was unconstitutional to provide compensation to the loyal without treating those who have been pardoned as loyal, *see* Young, *supra* note 92, at 1230 ("Congress is not free to open the courts to truly innocent plaintiffs while closing them to those whose innocence comes by way of pardon"), Congress would have preferred to do without the unconstitutional proviso, leaving the pre-existing compensation scheme (including both Court of Claims jurisdiction and Supreme Court appellate review) intact rather than have the entire compensation scheme held unenforceable. See Armstrong v. United States, 80 U.S. (13 Wall.) 154 (1872) (relying on *Klein* to direct Court of Claims to consider a claim based on a pardon). *See generally* United States v. Booker, 543 U.S. 220, 246 (2005) ("We seek to determine what 'Congress would have intended' in light of the Court's constitutional holding.") (citation omitted).

Note that this view is not dependent on an anachronistic notion that an equal protection component of the due process clause prohibits invidious discrimination against the pardoned. *See* Meltzer, *supra* note 110, at 2539 n.12 (noting this possibility as an "attractive modern reading[]" while not "the most accurate reconstruction of what the *Klein* Court had in mind a century and a quarter ago"). Instead, it depends on an understanding of the Constitution that, in the eyes of the law, a person who has been pardoned must be treated as if he had never committed the offense, so that if Congress wants to provide compensation to those who did not engage in rebellion, it must treat the pardoned as if they had not engaged in rebellion.

Using a severability analysis, one might also examine the narrower question whether the restriction on the Supreme Court's appellate jurisdiction could be severed from the rest of the compensation scheme, thereby saving at least part of the proviso. There is, however, little reason to think that Congress would have preferred to save this aspect of the proviso alone, since it would result in the dismissal of the appeal to the Supreme Court, leaving the Court of Claims judgment in place. Thus it is easy to conclude that the restriction on the Supreme Court's appellate jurisdiction should fall along with the rest of the proviso.

This approach may help explain more than simply how the Court could claim to "best fulfill the deliberate will of the legislature" by exercising jurisdiction. *Klein*, 80 U.S. at 148. It may also help explain how it could simultaneously acknowledge that if the statute "simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction as should seem to it expedient,'" while exercising jurisdiction because "the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end," that is, "to deny to pardons granted by the President the effect which this court had adjudged them to have." 80 U.S. at 145. In other words, if the restriction on the Supreme Court's jurisdiction stood alone, it would be perfectly constitutional. *Cf.* Young, *supra* note 92, at 1221 (*Klein* "can not be interpreted as holding unconstitutional a pure withholding of appellate jurisdiction"). But since the restriction on the Supreme Court's jurisdiction served no Congres-

While the *Klein* opinion is undoubtedly unclear, approaching it from the perspective of the general constitutional law principle of vested rights does help to overcome the two difficulties with reading the opinion as limited to the pardon power. First, it reveals that the pardon is relevant both as an independent ground of decision and as one means of creating vested rights. Second, it gives some insight into the sovereign immunity problem: If the claimant had a vested property right and Congress constituted the United States as trustee of that property, it might be thought that Congress could not (or could not have deliberately intended to) subsequently divest that vested right—just as if Congress had previously granted a vested right in some lands, it could not (or could not have deliberately intended to) subsequently divest the title.[130]

This perspective also helps in understanding the passages in *Klein* complaining that the rider involved "a rule of decision, in causes pending, prescribed by Congress," and asking rhetorically, "What is this but to prescribe a rule for the decision of a cause in a particular way?" and "Can we [follow the rider] without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?"[131]

These passages cannot be understood to broadly condemn any Act of Congress prescribing a rule of decision, for most *any*

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sional purpose separate from the unconstitutional rule of decision, it would fall along with the rest of the proviso. It is not that the Congressional motive invalidates the restriction on jurisdiction. *See* Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1869) ("We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction is given by express words."); *cf.* Friedman, *supra* note 110, at 35 (finding these passages from *McCardle* and *Klein* difficult to reconcile). Rather, the restriction on the Supreme Court's appellate jurisdiction in the proviso was inseparable from the rest of the proviso because the restriction on the Supreme Court's appellate jurisdiction served no Congressional purpose "except as a means" of implementing the unconstitutional rule of decision.

130. *See* Rice v. R.R. Co., 66 U.S. (1 Black) 358, 374 (1862) (relying on Fletcher v. Peck for the proposition that "if the legal effect of the act of Congress" at issue "was to grant to the Territory a beneficial interest in the lands, then it is equally clear that it was not competent for Congress to pass the repealing act, and divest the title," but concluding that this was not the legal effect of the act); Graber, *supra* note 126, at 82 (discussing Rice). *Cf.* Klein, 80 U.S. at 144 ("It was urged in argument that the right to sue the government in the Court of Claims is a matter of favor; but this seems not entirely accurate. It is as much the duty of the government as of individuals to fulfill its obligations."). This approach is also less anachronistic than the suggestion that the Just Compensation Clause creates an express constitutional remedy. *See* Meltzer, *supra* note 110, at 2539 n.12 (noting this possibility as an "attractive modern reading[]" while not "the most accurate reconstruction of what the *Klein* Court had in mind a century and a quarter ago").

131. 80 U.S. at 146.

law that comes into play in litigation—whether or not directly addressed to courts—prescribes a rule of decision.[132] For example, the Civil Rights Act of 1964 (as amended) prescribes numerous rules of decision for courts to use when an employee complains of being fired, ranging from the rule of decision that racial animosity is not a legitimate basis for the firing[133] to the rule of decision that makes the presence of such a motivating factor sufficient for an employee to prevail, subject to an employer avoiding damages by proving that it would have fired the employee for other reasons anyway.[134] Indeed, one of the earliest and still enduring Acts of Congress is called the Rules of Decision Act, first enacted as part of the Judiciary Act of 1789.[135] As its name indicates, it explicitly directs the federal courts to apply certain rules of decision.[136]

Nor can these passages in *Klein* be understood in a slightly more limited way to condemn any Act of Congress prescribing a rule of decision for a pending case. Long before and long after *Klein*, the Supreme Court has adhered to the principle that a court must apply the law as it finds it at the time of decision, including statutory changes made while the case is pending.[137]

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132. *See* Liebman & Ryan, *supra* note 47, at 775 n.362 ("Contrary to the common 'qualitative' reading of *Klein* to forbid Congress to 'prescribe rules of decision to the Judicial Department . . . in cases pending before it,' Congress routinely establishes standards of relief that prescribe rules of decision, and has even been permitted to command Article III judges to decide particular pending cases in particular ways.") (citations omitted); FALLON ET AL., *supra* note 33, at 99 ("How broadly can this language sensibly be read?"); *see also* Lawson, *supra* note 46, at 208 ("Many statutes effectively preordain the outcomes of litigation; there is little point in passing the statutes if they do not."). *Cf.* Sosa v. Alvarez-Machain, 542 U.S. 692, 713 (2004) (noting that Congressman Fisher Ames distinguished between jurisdiction and rules of decision); *Schiavo*, 404 F.3d at 1280, n.5 (Tjoflat, J., dissenting) (finding no basis in case law for treating standards of review as rules of decision).

133. 42 U.S.C. § 2000e-2(a) (2000).

134. 42 U.S.C. § 2000e-2(m) (2000); 42 U.S.C. § 2000e-5(g)(2)(B) (2000).

135. Rules of Decision Act, Judiciary Act of 1789, § 34, 1 Stat. 73.

136. *Id.* (providing that "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply").

137. *See* United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) ("if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties . . . ."); Miller v. French, 530 U.S.. 327, 344 (2000) (adhering to *Schooner Peggy*); FALLON ET AL., *supra* note 33, at 99 (surely *Klein* "does not cast general doubt on the principle . . . that the courts are obligated to apply law (otherwise valid) as they find it at the time of their decision, including, when a case is on review, new statutes en-

To see this point in the context of *Klein*, imagine if Congress in 1870 had been in the hands of the Democrats rather than the Republicans. (As it happened, Democrats next obtained a majority of the House in the election of 1874, and of the Senate in the election of 1878.[138]) And suppose further that they believed, contrary to *Padelford*, that a person, otherwise loyal to the Union, who merely signed a surety bond for a Confederate officer, should be treated as loyal and entitled to the proceeds of his captured and abandoned property. If Congress had amended the law so as to permit such a person to recover, and made that amendment applicable to pending cases, is it conceivable that the Supreme Court would have found it unconstitutional?

What the Court in *Klein* rejected was an *unlimited* power of Congress to dictate rules of decision. In particular, it rejected a power of Congress to proscribe what it called an "arbitrary rule of decision,"[139] such as a rule of decision that violated the general constitutional law principle of vested rights.[140] Seen in this light, *Klein* bears striking parallels to a case decided a few years earlier, *Gelpcke v. Dubuque*,[141] where the Court refused to follow a state court's interpretation of state law. In *Gelpcke*, a city had issued municipal bonds in accordance with the then-current understanding of state law. Subsequently, the state Supreme Court overruled its earlier decisions and held that the city lacked

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acted after the judgment below."); *id.* at 339 (stating that it "seems doubtful . . . that this language can be taken at face value"); Young, *supra* note 92, at 1238 (stating that it "is impossible to know whether Chase and those who joined in his opinion took such passages seriously").

Nor can *Klein* stand for a principle that any law enacted by Congress must sweep more broadly than a particular case, for the law in *Klein* did sweep more broadly than a particular case. *See* Sager, *supra* note 112, at 2528 n.143 (questioning the statute in *Robertson* for "calling out two specific lawsuits" but noting that "despite *Klein*'s suggestive language about the prescription of a rule of decision 'in a pending case,' *Klein* itself does not share with *Robertson* this questionable feature" because the statute in *Klein* "had the structural qualities of a general rule for the decision of all claims based on a presidential pardon"). *See also* text accompanying notes 72 to 89, *supra* (arguing that there is no broad constitutional requirement that Congress act by general laws).

138. *See* Political Divisions of the House of Representatives, http://clerk.house.gov/histHigh/Congressional_History/partyDiv.html; Political Divisions of the Senate, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv. htm.

139. 80 U.S. 128, 146 (1871).

140. The contrast that *Klein* draws with *Wheeling Bridge* also illustrates this "vested rights" approach. *See id.* at 146 (distinguishing *Wheeling Bridge*). In *Wheeling Bridge*, the Court said, in traditional vested rights language, that when "private rights" "have passed into judgment the right becomes absolute," but held that the rights at stake in that case were public rights. 59 U.S. 421, 431 (1855).

141. 68 U.S. (1 Wall.) 175 (1864). *Cf.* Young, *supra* note 92, at 1244 (noting that "the Supreme Court may well have made its decision with no basis other than its own view of natural law") (citing *Gelpke*).

the authority to issue the bonds. The Supreme Court of the United States insisted that the bondholders be paid, explaining that the state court decision "can have no effect on the past."[142] The Supreme Court adhered to "the law of this court," which rested "upon the plainest principles of justice," reasoning that to destroy rights acquired under a contract, valid when made, "would be as unjust as to hold that the rights acquired under a statute may be lost by its repeal."[143] Although state court rules of decision regarding state laws and constitutions were ordinarily to be followed in federal court, the Supreme Court declared, "We shall never immolate truth, justice, and the law, because a state tribunal has erected the altar and decreed the sacrifice."[144]

Thus the Supreme Court rejected rules of decision, whether created by state courts (as in *Gelpcke*) or by Congress (as in *Klein*), that violated the principle of general constitutional law that vested rights could not be destroyed. *Klein* does not hold that Congress lacks the authority to prescribe rules of decision; it holds that Congress lacks the authority to prescribe *unconstitutional* rules of decision.[145] *Klein* does nothing, then, to support Judge Birch's opinion.[146]

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142. 68 U.S. at 206.

143. *Id.*

144. *Id.* at 206–07. *See also id.* at 206-207 ("We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts, giving constructions to the laws and constitutions of their own States. It is the settled rule of this court in such cases, to follow the decisions of the State courts. But there have been heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases.").

145. *See* Meltzer *supra* note 110, at 2540 (agreeing with Professor Sager that "Congress may not compel the courts to speak a constitutional untruth," but rejecting Sager's broader reading and application of *Klein*); *cf.* Sager, *supra* note 112, at 2529 (claiming that *Klein*'s "first principle" is that the "judiciary will not allow itself to be made to speak and act against its own best judgment on matters within its competence which have great consequence for our political community").

146. Judge Birch does not claim that Michael Schiavo had a vested right to the state court judgment, nor attempt more generally to resurrect the vested rights approach to constitutional law. Even in the heyday of vested rights jurisprudence, the Supreme Court distinguished between laws that affected the right and laws that affected the remedy, permitting retroactive remedial laws. *See, e.g.*, Sampeyreac v. United States, 32 U.S. 222 (1833) (upholding statute permitting a previously time-barred appeal to the Supreme Court from a territorial court over a "vested rights" objection and explaining that "such retrospective effect is of no unusual course, in laws providing new remedies"); Freeborn v. Smith, 69 U.S. 160, 174 (1864) (upholding statute permitting a previously time-barred appeal to the Supreme Court from a territorial court over a "vested rights" objection and explaining that it "is well settled that where there is no direct constitutional prohibition, a state may pass retrospective laws [that] remove an impediment in the way of legal proceedings"). *See also* Paramino Lumber Co. v. Marshall, 309 U.S. 370, 374–76 (1940) (rejecting due process challenge to private act directing review of an order under the Longshoremen's and Harbor Workers' Compensation Act passed nearly five years "after

Nor can Judge Birch take refuge in the fact that Supreme Court opinions sometimes describe *Klein* as finding the rider unconstitutional because "it prescribed a rule of decision in a case pending before the courts."[147] None finds an Act of Congress unconstitutional on that basis.

Moreover, one of those decisions specifically distinguishes *Klein* in a way that also applies to *Schiavo*: "Congress made no effort . . . to control the [court's] ultimate decision" but rather acted to permit the claim to be "resolved on the merits."[148] Recall that Congress, in the Schiavo legislation, did not attempt to dictate the federal judiciary's decision on the merits—or even to require a stay pending decision on the merits[149]—but simply cleared the way for the federal judiciary to exercise its independent judgment in resolving the case on the merits.

VI. THE RULE OF LAW, FEDERALISM, AND THE SUPREME COURT

Simply because Judge Birch's opinion was wrong in many ways does not mean that the Schiavo legislation is untroubling. Those concerns, however, sound more in federalism and rule of law than in separation of powers.[150]

A group of officials in Washington determined that a particular state court case was important and, suspecting that it had been wrongly decided, singled it out from the thousands of cases

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there had been a final award by the deputy commissioner and after the time for review of the award had expired," where it was subsequently discovered that the claimant's disability continued longer than expected); 1 KENT *supra* note 124, at 455 (noting that the doctrine of vested rights "is not understood to apply to remedial statutes, which may be of a retrospective nature, provided that they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy of curing defects and adding to the means of enforcing existing obligations").

147. United States v. Sioux Nation, 448 U.S. 371, 404 (1980); *see also* Glidden v. Zdanok, 370 U.S. 530, 568 (1962).

148. *Sioux Nation*, 448 U.S. at 405. *Sioux Nation* is not on all fours with *Schiavo*, however, because it also involved the government's waiver of its own res judicata defense. *See also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995) ("Whatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law'").

149. *Cf.* Fed. R. Crim. P. 38(a) ("A sentence of death shall be stayed if an appeal is taken from the conviction or sentence."); 28 U.S.C. § 2262(a) (2000) (mandating stay of execution in certain state habeas proceedings); *see also* Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 678 (2002) (advocating enactment of a statutory provision requiring a stay of a death sentence if the Supreme Court grants certiorari).

150. *Cf.* Tribe, *supra* note 2, at 300 (describing Judge Birch as going "out of his way to criticize Congress and the second President Bush for flagrantly violating" the "usual formulas of federalism, separation of powers, and the rule of law").

decided in state court and provided for its adjudication in a federal court unburdened by the preclusive effect of the state court judgment. Moreover, those officials went out of their way to declare that their decision to single out this case was not to be understood as establishing a precedent.[151] Even if this is not unconstitutional, isn't it an affront to important values of federalism and the rule of law?

Perhaps. But notice that this is what the Supreme Court does routinely in deciding to grant certiorari to review state court judgments. A group of officials in Washington decides that a particular state court case is important and (at least frequently), suspecting that it had been wrongly decided, singles it out from the thousands of cases decided in state court and provides for its adjudication in a federal court (the Supreme Court) unburdened by the preclusive effect of the state court judgment.[152] Moreover, the Supreme Court goes out of its way to de-

151. *See* Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. 109-3, § 7, 119 Stat. 15, 16 (2005) ("Nothing in this Act shall constitute a precedent with respect to future legislation, including the provision of private relief bills.").

152. It might be tempting to distinguish Supreme Court review of state court judgments from the Schiavo legislation by noting that the Schiavo legislation envisioned a federal court redetermining the facts. But while the Supreme Court's practice is not to take evidence itself, it does sometimes insist on independently determining the facts. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254, 285 (1964); Norris v. Alabama, 294 U.S. 587 (1935); *see generally* Henry Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985). Indeed, except as limited by the Seventh Amendment, Congress could readily use its power of making regulations of the Supreme Court's appellate jurisdiction to require the Supreme Court to redetermine the facts. At the founding, an appeal—as opposed to a writ of error—subjected the facts to review and retrial. As Chief Justice Ellsworth explained regarding the Judiciary Act of 1789, the "Judicial Statute of the United States speaks of an Appeal and of a Writ of Error; but it does not confound the terms, nor use them promiscuously. They are to be understood, when used, according to their ordinary acceptation, unless something appears in the act itself to controul, modify, or change, the fixed and technical sense which they have previously borne. An appeal is a process of civil law origin, and removes a cause entirely; subjecting the fact as well as the law, to a review and re-trial: but a writ of error is a process of common law origin, and it removes nothing for re-examination but the law." Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 327 (1796).

Moreover, the Supreme Court sometimes even insists on independently determining state law. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 112–15 (2000) (Rehnquist, C.J., concurring); *see generally* Henry Monaghan, *Supreme Court Review of State Court Determinations of State Law*, 103 COLUM. L. REV. 1919 (2003). The Schiavo legislation did not specifically address whether the federal courts could redetermine state law determinations, and the case as presented did not require deciding this question. *See* Schiavo ex rel. Schindler v. Schiavo, 404 F.3d 1270, 1282 (11th Cir. 2005) (Tjoflat, J., dissenting) ("Separate questions might arise if, upon reviewing the merits of the case, we determined that the parties had called upon the district court to review a state court judgment of state law."); *cf.* 28 U.S.C. § 1367 (2000) ("Except . . . as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the

clare that its decision whether or not to single out a case is not to be understood as a establishing a precedent.[153]

Those who find themselves appalled by the Schiavo legislation should ask themselves why they are so unconcerned by the routine practice of the Supreme Court.[154]

We have already seen that Congress did not attempt to decide the merits of the Schiavo case. Notice another thing that Congress did not do in the Schiavo legislation. It did not do anything about the Supreme Court's jurisdiction.

It did not do what Congress had done in *Klein*. It did not use the phrase "shall dismiss the cause for want of jurisdiction," to mean "shall, on appeal, reverse such judgment." It did not tell the Supreme Court to decide a case without regard to the judiciary's understanding of the Constitution.

It also did not exercise what *Klein* itself described as the "acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."[155] It did not require the Supreme Court to exercise "appellate Jurisdiction, both as to Law and Fact,"[156] in the Schiavo case.[157] Instead, while Congress provided for jurisdiction in the United States District Court for the Middle District of Florida (and therefore, under preexisting statutes, appellate jurisdiction in the United States Court of Appeals for the Eleventh Circuit), it left the Supreme Court with the unfettered discretion to choose whether or not to exercise jurisdiction.

* * *

Frequently, before a person speaks, he clears his throat. The resulting sound may not be particularly pleasant—radio station

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same case or controversy under Article III of the United States Constitution.").

153. *See, e.g.*, Singleton v. Comm'r of Internal Revenue, 439 U.S. 940 (1978) (Stevens, J., respecting the denial of certiorari).

154. *Cf.* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000).

155. 80 U.S. 128, 146 (1871).

156. U.S. CONST. art. II, § 2.

157. Beginning with the Judiciary Act of 1789, the Supreme Court has viewed statutes that by their terms purport to confer appellate jurisdiction on the Supreme Court as an exercise of the power to make exceptions to that jurisdiction, by impliedly withdrawing jurisdiction in the cases not expressly conferred. Durousseau v. United States, 10 U.S. (6 Cranch) 307 (1810). An alternative formulation which Congress could use to compel the Supreme Court to exercise appellate jurisdiction would be to repeal pro tanto all statutes that permit the Supreme Court to decline jurisdiction or limit its extent, thereby leaving the Court obligated to exercise appellate jurisdiction, both as to law and to fact, in the case.

microphones generally have a button the speaker can press to prevent the sound from reaching the audience[158]—but it is sometimes the only way for the speaker to find his voice. Other times, the throat clearing is not a prelude to speech, but rather is itself a means of sending a message. And sometimes there is just something that sticks in the craw and needs to be cleared.

In enacting the Schiavo legislation, perhaps Congress was simply trying to do something about a particular tragedy that stuck in its craw. Or perhaps it was sending a message to federal courts. If so, it is clear that Judge Birch, at least, did not get the message. But perhaps Congress was doing something more: maybe it was beginning to find its voice to assert control over the jurisdiction of federal courts.

158. Elle James, *Let's Visit a Radio Station: KFAN Radio Station Field Trip*, available at http:// www.sararwa.com/articles/radio.html; Susan Huff, *It's a Classic*, TENN. ALUMNUS ONLINE, *available at* http://pr.utk.edu/alumnus/summer97/j2.html.