Peannt Butter and Politics: An Evaluation of the Separation-of-Powers Issues in Section 802 of the Prison Litigation Reform Act

JENNIFER A. PUPLAVA*

> Substantively, this would do violence to the obvious intention of the parties that the decretal obligations assumed by the state were not confined to meeting minimal constitutional requirements. Procedurally, it would make necessary, as this case illustrates, a constitutional decision every time an effort was made either to enforce or modify the decree by judicial action.[1]

INTRODUCTION

In a roundabout way, the debate over crunchy-versus-smooth peanut butter helped bring about the Prison Litigation Reform Act of 1995.[2] The increasing concern with institutional reform has caused an uproar over frivolous civil rights lawsuits brought by inmates, coming to a head with inmates suing for "rights" such as the enforcement of a preference for creamy instead of chunky peanut butter.[3] Proponents of the PLRA praised it as the necessary cure for the increasing number of frivolous civil rights lawsuits brought by inmates, and claimed that this Act would further the goals of institutional reform. However, the problems with the PLRA, its enactment, and its effects reach much farther than a debate about peanut butter.

Although there is little legislative history concerning the PLRA, the *Congressional Record* shows that the proponents of the PLRA proposed and supported it hoping that it would curb abuses in inmate litigation. Senator Dole,

---

* J.D. Candidate, 1998, Indiana University School of Law—Bloomington; B.A. *magna cum laude*, 1995, Saint Mary's College. I would like to thank Professor Lauren Robel for her guidance in selecting this topic and her helpful comments on the first draft of this Note. This Note is dedicated to my parents, Thomas and Diane Puplava, for their unceasing support.

1. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 390 (1992) (citation omitted) (quoting Plyler v. Evatt, 924 F.2d 1321, 1327 (4th Cir. 1991) (denouncing the position of an institution attempting to argue that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree)).

2. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C., and 42 U.S.C. (1996)) ("PLRA" or "Act").

3. *See* 141 CONG. REC. S14,413 (daily ed. Sept. 27, 1995) (statement of Sen. Robert Dole). Senator Dole provided other examples of the frivolous litigation which he felt the PLRA was needed to cure: "insufficient storage locker space, a defective haircut by a prison barber, [and] the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee." *Id.*

who introduced the PLRA as a bill to the Senate on May 25, 1995,[4] claimed that the PLRA was necessary "to provide for appropriate remedies for prison condition lawsuits, to discourage frivolous and abusive prison lawsuits, and for other purposes."[5] Supporters such as Senator Dole also felt that the PLRA, by limiting the availability of caps on prison population as a remedy to civil rights claims, would avoid putting criminals back on the street. Dole further asserted that the PLRA would solve the problem of the "revolving prison door" by requiring federal courts to meet and decide the issue before a prison cap order is issued.[6]

The proponents of the PLRA stressed that their main concern was with the frivolity of lawsuits brought by inmates. Senator Dole claimed that the time and money which the State expends defending against frivolous lawsuits could be used instead to fight crime.[7] Senator Orrin Hatch also supported the PLRA, stating that "[j]ailhouse lawyers with little else to do are tying our courts in knots with an endless flood of frivolous litigation."[8] In an attempt to drive their point home, the proponents of the PLRA submitted two "top ten" lists to Congress which were printed in the *Congressional Record.* One, which was titled "Top 10 Frivolous Inmate Lawsuits Nationally," read:

> (10) Inmate claimed $1 million in damages for civil rights violation because his ice cream had melted. The judge ruled that the "right to eat ice cream . . . was clearly not within the contemplation" of our Nation's forefathers.
>
> (9) Inmate alleged that being forced to listen to his unit manager's country and western music constituted cruel and unusual punishment.
>
> (8) Inmate sued because when he got his dinner tray, the piece of cake on it was "hacked up."
>
> (7) Inmate sued because he was served chunky instead of smooth peanut butter.
>
> (6) Two prisoners sued to force taxpayers to pay for sex-change surgery while they were in prison.
>
> (5) Inmate sued for $100 million alleging he was told that he would be making $29.40 within three months, but only made $21.
>
> (4) Inmate claimed that his rights were violated because he was forced to send packages via UPS rather than U.S. mail.

---

4. *See id.* at S7524 (daily ed. May 25, 1995).

5. *Id.* at S14,413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole).

6. *See id.* at S14,414 (statement of Sen. Dole). These cap orders place limits on the maximum population in a prison.

7. *See id.* at S14,413 (statement of Sen. Dole).

8. *Id.* at S14,418 (statement of Sen. Hatch).

> (3) Prisoner sued demanding L.A. Gear or Reebok "Pumps" instead of Converse.
>
> (2) Prisoner sued 66 defendants alleging that unidentified physicians implanted mind control deviees in his head.
>
> (1) Death row inmate sued corrections officials for taking away his Gameboy electronic game.[9]

Despite the humor inherent in the submission of this list to the Senate floor, the proponents of the PLRA campaigned in all seriousness that the bill would serve as the cure for time and money wasted in courts on such trivial litigation.[10]

However, the enactment of the PLRA did not occur without opposition, for while all agreed that such frivolous inmate litigation needed to be curbed, some disagreed with the way in which the PLRA attempted to attain that goal. After the PLRA's enactment, the U.S. Department of Justice disagreed with the purported effects the Act would have on the management of prisons, and developed legal theories to support "indefinite judicial supervision of prisons for the benefit of prisoners."[11] Associate U.S. Attorney General John Schmidt spoke at the hearing in front of the Senate Judiciary Committee, questioning specific provisions in the PLRA bill. While Schmidt supported the basic objective of the PLRA, he stressed that "it is necessary to recognize that there is nevertheless a need for effective safeguards against inhuman conditions in prisons and other facilities."[12] Schmidt recognized and discussed potential separation-of-powers and due process concerns with the PLRA.[13] Moreover, several U.S. senators voiced their concerns about the bill. Senator Ted Kennedy asserted that the bill, as an attempt to strip federal courts of their remedial power, is "patently unconstitutional, and a dangerous legislative incursion into the work of the judicial branch."[14] Senator Simon also raised concerns that a balance of governmental powers, which he felt the PLRA failed to accomplish, was needed to prevent the deprivation of individuals' basic civil rights.[15] Additionally, Senator Biden, while acknowledging the problems resulting from frivolous litigation, also called

---

9. *Id.* at S14,629 (daily ed. Sept. 29, 1995) (citations omitted).

10. Despite these assertions, the enactment of the PLRA seems to reflect different policy concerns. *See infra* text accompanying notes 139-45.

11. 142 CONG. REC. S10,577 (daily ed. Sept. 16, 1996) (statement of Sen. Abraham).

12. *Id.* at S2298 (daily ed. Mar. 19, 1996) (testimony of Associate U.S. Attorney General John Schmidt).

13. *See id.* at S2299 (discussing not only due process concerns but also recognizing that if the rule of final judgments in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995), is found to apply in full force to relief in prison condition cases, serious constitutional problems would surface). For further discussion, see *infra* Part I.

14. *Id.* at S2296 (statement of Sen. Kennedy). Despite Senator Kennedy's disagreement with the bill, he did not offer an amendment to it.

15. *See id.* at S2297 (statement of Sen. Simon).

attention to the problems with the PLRA: namely, the prevention of meritorious lawsuits from reaching the courts, and the greater burden which would be placed on the courts to litigate and relitigate inmate lawsuits.[16]

As a result of the vehement support of institutional reform, and in a purportedly hopeful attempt to attain the goals of such reform, Congress enacted the PLRA on April 26, 1996 with the "Commerce, Justice, State and the Judiciary" portion of the Omnibus Consolidated Rescissions and Appropriations Act of 1996.[17] The first nine sections of the Act modified inmate litigation in some manner,[18] and therefore changed several laws concerning inmate litigation. Not only does the PLRA make it more difficult for an indigent inmate to file a civil rights complaint, but it also makes it more difficult for an inmate to receive judgment on his or her claim. The proponents of the PLRA purported that these effects would solve the problem of frivolous inmate litigation. Section 802, codified at 18 U.S.C. § 3626, the focus of this Note, deals with the appropriate remedies for suits brought concerning prison conditions, by placing limitations on the relief available to the inmates bringing these civil rights suits. Section 802 limits the relief available to inmates by declaring that:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.[19]

Through this provision, the PLRA permits remedies for constitutional violations of inmates' rights which pass the scrutiny of this test, but limits the availability

---

16. *See* 141 CONG. REC. S14,628 (daily ed. Sept. 29, 1995) (statement of Sen. Biden).

17. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified at 18 U.S.C.A. § 3626 (West Supp. 1997)).

18. *See id.*, 110 Stat. at 1321-66. The entire Act was comprised of ten sections which amended several different statutes dealing with inmate litigation. Section 802, which is discussed in the remainder of this Note, was instituted to develop appropriate remedies for prison conditions. Section 803 amended the Civil Rights of Institutionalized Persons Act. Section 804 placed stricter restraints on the requirements for inmates who wished to proceed in forma pauperis with their civil rights claims by amending 28 U.S.C. § 1915. Section 805 provided a screening provision, allowing an inmate's civil complaint to be dismissed if that suit is "frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C.A. § 1915A (West Supp. 1997). Section 806 amended the approach taken to inmates' federal tort claims by prohibiting inmates from bringing an action against the United States for mental or emotional injury unless they first showed physical injury. Section 807 added a provision concerning payment of a damage award pending restitution orders, and § 808 provided for notice given to crime victims of pending damage awards. Section 809 provided for the revocation of earned release credit in certain circumstances. *Id.*

19. 18 U.S.C.A. § 3626(a)(1)(A).

of relief for other violations by its language. The PLRA also directs reviewing courts to follow its provisions before entering judgment by dictating that "[i]n any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a) [of § 3626]."[20] These provisions allow a defendant in a civil rights suit brought by an inmate to contest a consent decree or judgment entered previously. Moreover, the PLRA allows retroactive application of the Act to consent decrees through its immediate termination provision, which states that:

> In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.[21]

Moreover, the PLRA provides for an automatic stay of relief of the terms of the consent decree pending the reviewing court's decision.[22]

Part I of this Note will evaluate the argument that consent decrees are not equivalent to final judgments for purposes of constitutional analysis, and will argue that consent decrees are final judgments and that the PLRA violates the Constitution by vacating them. Part II will discuss the effects of the PLRA on automatic stays and will show that the Act impermissibly prescribes a rule of decision without changing the underlying law. Finally, this Note concludes by speculating as to the actual policies behind the enactment of the PLRA as it is written.

I. DOES THE PLRA REOPEN FINAL JUDGMENTS?

The separation-of-powers principle concerning final judgments arose as a response to congressional abuses of powers which belonged to the judiciary. The framers of the U.S. Constitution feared the power which the legislature might gain by possessing the power to reopen final judgments of the courts. Such actions would destroy res judicata effects and render some judgments unenforceable. Pursuant to this fear, the framers expressed that "[a] legislature, without exceeding its province, cannot reverse a determination once made in a particular

---

20. *Id.* § 3626(c)(1).

21. *Id.* § 3626(b)(2). A court's characterization of "prospective relief" can lead to differing results as to the constitutionality of the Act. See *Benjamin v. Jacobson*, 124 F.3d 162 (2d Cir. 1997), where the court found the PLRA to be constitutional only where the Act is construed as "barring only prospective relief in the federal courts, rather than as nullifying the Decrees themselves." *Id.* at 172. However, the effects of the PLRA are not purely prospective, because they affect consent decrees which have already received judicial approval.

22. *See* 18 U.S.C.A. § 3626.

case; though it may prescribe a new rule for future cases."[23] Because the power of review is vested in the judiciary, "Congress also may not exercise an appellate-type review of judicial judgments, either altering the judgment's terms or ordering new trials in cases where final judgments have been issued."[24] Some exceptions to this rule, all pursuant to compelling policy reasons, exist, permitting a court to reopen a final judgment. For example, Federal Rule of Civil Procedure 60(b) provides that a party may obtain relief from a court order when "it is no longer equitable that the judgment should have prospective application."[25] Also, the legislature may prescribe a new rule for *future* cases which amends current law, without unconstitutionally reopening final judgments.[26] However, before determining whether the rule concerning final judgments applies, a court must determine whether it is dealing with a final judgment.

Constitutional prohibitions on reopening final judgments would normally protect against retroactive application of a statute to judgments which have already been determined final. However, the nature of the consent decrees which the PLRA affects has caused argument among courts who disagree as to whether a consent decree is a final judgment for purposes of separation-of-powers principles.[27] With respect to the PLRA, proponents of the Act oppose normal application of these long-standing constitutional principles, claiming that consent decrees are not final judgments.[28] Hypothetically, if consent decrees are not final judgments, the PLRA could apply retroactively to consent decrees without violating constitutional principles. However, both the treatment of consent decrees in the courts and the PLRA's effects on these decrees show that these decrees should fall within the protection of separation-of-powers law because such decrees are final judgments.

A. Consent Decrees as Final Judgments

Due to the recency of the enactment of the PLRA, few courts have considered the constitutionality of the Act with respect to its effects upon consent decrees. The courts considering the separation-of-powers issues which arise from § 3626 have not reached a consensus. Instead, these courts depend on their interpretation

---

23. THE FEDERALIST NO. 81, at 245 (Alexander Hamilton) (Roy P. Fairfield ed., 1981).

24. Heidi J. Goldstein, Note, *When the Supreme Court Shuts Its Doors, May Congress Re-Open Them?: Separation of Powers Challenges to § 27A of the Securities and Exchange Act*, 34 B.C. L. REV. 853, 867 (1993); *see also infra* text accompanying notes 61-63.

25. FED. R. CIV. P. 60(b).

26. *See, e.g.*, Hadix v. Johnson, 947 F. Supp. 1100 (E.D. Mich. 1996). However, because the immediate termination provisions apply retroactively to consent decrees which have already been entered, the exception allowing a new rule for future cases does not apply to judgments affected by the PLRA. *See* discussion *infra* Part I.B.

27. *See infra* Part I.A.

28. *See infra* Part I.A.

of previous separation-of-powers cases, their conceptualization of the goals relating to institutional reform, and their determination of whether the PLRA furthers these goals without frustrating the policy and doctrine behind separation-of-powers issues.

In *Pennsylvania v. Wheeling & Belmont Bridge Co.*,[29] the Supreme Court first dealt with the issue of which judgments are capable of becoming final. The litigation in *Wheeling & Belmont* developed after a plaintiff contested an act of Congress by arguing that the enactment, which stated that bridges across the Ohio River are lawful structures, directly contradicted a prior judicial decree that had declared a specific bridge across the Ohio River an obstruction of the river and therefore against the law.[30] Pursuant to this contradiction and relying on existing separation-of-powers principles, the plaintiff in the action maintained that the act of Congress was unconstitutional because it reopened a final judgment.[31] In its decision of this issue, the Supreme Court restated the "general proposition" that "the Act of Congress cannot have the effect and operation to annul the judgment of the court already rendered," reasserting that where these rights "have passed into judgment the right becomes absolute."[32] The Court further held that where a decree is executory, requiring a continuing decree to preserve public rights which were granted through an act of Congress, Congress may enact legislation which has the effect of reopening a final judgment.[33] The Court claimed that this power is given to Congress because "[the] right has been modified by the competent authority, so . . . it is quite plain the decree of the court cannot be enforced."[34]

---

29. 59 U.S. (18 How.) 421 (1856). Although this case was one of the Court's first attempts to define which judgments were final judgments for separation-of-powers purposes, the Court's interpretation has been modified by courts since that decision. *See infra* text accompanying notes 35-56.

30. *See Wheeling & Belmont*, 59 U.S. (18 How.) at 431.

31. *See id.* at 429-31.

32. *Id.* at 431. The Court also engaged in an analysis of the final nature of public-versus-private rights. Despite this distinction, much of its analysis hinged on whether the right was executory or fixed. For example, in making the public/private distinction, the Court observed that:

> [A] private party sustaining special damage by the obstruction may, as has been held in this case, maintain an action at law against the party creating it, to recover his damages; or, to prevent irreparable injury, file a bill in chancery for the purpose of removing the obstruction. In both cases, the private right to damages, or to the removal, arises out of the unlawful interference with the enjoyment of the public right, which, as we have seen, is under the regulation of congress.

Id. The Court then held that if the remedy had been an action at law where the defendant received damages, Congress would have no power to reopen that final judgment because the right would have depended upon the judgment of the court and not of the public right of free navigation of the river. *See id.*

33. *See id.* at 431-32.

34. *Id.* at 432.

In *Rufo v. Inmates of Suffolk County Jail*,[35] the Supreme Court held that "a consent decree is a final judgment that may be reopened only to the extent that equity requires."[36] It elaborated on its explicit statement by explaining that a consent decree is enforceable as "a judicial decree that is subject to the rules generally applicable to other judgments and decrees."[37] According to the express designation in *Rufo*, which narrows and limits the holding in *Wheeling & Belmont*, consent decrees are final judgments despite their executory nature.[38] As a result, although consent decrees in the prison system are indeed executory, their mere nature as executory decrees does not render them as being other than a final judgment.[39]

Several federal district courts have acted consistently with *Rufo*, and have held that consent decrees are final judgments for separation-of-powers purposes. The district courts for both the Eastern and the Western Districts of Michigan have held that because consent decrees are final judgments, the PLRA cannot vacate existing consent decrees without frustrating separation-of-powers principles.[40] Furthermore, in its analysis of whether a consent decree should be considered a final judgment for separation-of-powers purposes, the U.S. District Court for the Eastern District of Michigan examined the Supreme Court's treatment of consent decrees in an attempt to determine the nature of consent decrees.[41] It explained that the Supreme Court has treated consent decrees as final judgments for separation-of-powers purposes through its changing view of the nature of consent decrees.[42] Again, in *Glover v. Johnson*,[43] the Eastern District of Michigan held

---

35. 502 U.S. 367 (1992).

36. *Id.* at 391.

37. *Id.* at 378.

38. The Supreme Court did not explicitly limit *Wheeling & Belmont* in *Rufo*. However, the Court's determination that executory judgments are final although they may be reopened is an implicit limitation of the determination in *Wheeling & Belmont* that decrees which are executory may be reopened and are therefore not final for separation-of-powers purposes. *See supra* text accompanying notes 32-34.

39. The Court in *Rufo* reconciled the different approaches to dealing with consent decrees which the Court had attempted in the past, which largely dealt with the labeling of consent decrees pursuant to whether that decree specifically would be subject to modification, by acknowledging that consent decrees were final judgments, despite the fact that they could be modified in certain circumstances. For further discussion concerning situations where a consent decree may be modified, see *infra* text accompanying notes 80-87.

40. *See* Hadix v. Johnson, 947 F. Supp. 1100, 1109-12 (E.D. Mich. 1996); Hadix v. Johnson, 933 F. Supp. 1360, 1361-62 (W.D. Mich. 1996); Hadix v. Johnson, 933 F. Supp. 1362, 1367-69 (W.D. Mich. 1996).

41. *See Hadix*, 947 F. Supp. at 1105-07.

42. *Id.* at 1105, 1110-11. The *Hadix* court's analysis of these cases shows that the Supreme Court has always treated consent decrees as final judgments, but has changed in its view of the amount and manner of modification of these consent decrees. This is discussed more fully, *infra*, in Part I.B.

43. 957 F. Supp. 110 (E.D. Mich. 1997).

that the automatic stay provision violated the separation-of-powers by overturning a final judgment.[44] In addition to these courts, the U.S. District Court for the Northern District of Indiana stated that consent decrees are final judgments in *Jensen v. County of Lake*[45] and *James v. Lash*.[46]

On the other hand, several courts have taken the opposite position regarding consent decrees, and have concluded that consent decrees are not final judgments for purposes of such a separation-of-powers analysis, despite the Supreme Court's explicit ruling on this issue. In *Benjamin v. Jacobson*,[47] both the U.S. District Court for the Southern District of New York and the Second Circuit Court of Appeals held that this same immediate termination provision of the PLRA does not violate separation-of-powers.[48] Both courts found that consent decrees are not final for separation-of-powers purposes because a court of equity can change a consent decree after it has become final.[49] These courts also stated that where a court retains supervisory jurisdiction, the judgment's prospective effects are not final, and may therefore be changed.[50]

The Fourth Circuit held in *Plyler v. Moore*[51] that the immediate termination provision of the PLRA does not violate separation-of-powers. The court first held that the term "Federal right" in the PLRA "does not include [those] rights conferred by consent decrees,"[52] calling the inmates' assertion that all rights governed by consent decrees are protected under the Constitution "nonsensical."[53] Next, the court held that consent decrees are not final judgments for separation-

---

44. *See id.* at 112.

45. 958 F. Supp. 397, 403 (N.D. Ind. 1997) (holding that despite a consent decree's nature as a final judgment, "judgments imposing prospective relief are subject to modification . . . in light of new circumstances"); *see also* Inmates of the Suffolk County Jail v. Sheriff of Suffolk County, 952 F. Supp. 869, 882 (D. Mass. 1997) (holding that unless the PLRA is construed to meet the obligations agreed upon in previously entered consent decrees, the effect of the PLRA would be to set aside a final judgment).

46. 965 F. Supp. 1190, 1196-97 (N.D. Ind. 1997) (holding that a consent decree is a final judgment which may be modified in certain circumstances).

47. 935 F. Supp. 332 (S.D.N.Y. 1996), *aff'd in part, rev'd in part*, 124 F.3d 162 (2d Cir. 1997). Although the Second Circuit held that the PLRA does not violate separation-of-powers by opening a final judgment, it limited its decision to applications of the PLRA where the Act limits the jurisdiction of the federal courts to enforce consent decrees and not where the Act destroys the underlying consent decrees at issue. *See Benjamin*, 124 F.3d at 176.

48. *See Benjamin*, 935 F. Supp. at 345.

49. *Id.* The district court was clear to limit its holding to the inmates' claim that § 3626(b) is unconstitutional, and it declined to consider the constitutionality of the other provisions of the PLRA, or the PLRA as a whole. *See id.* at 343.

50. *See id.* at 345.

51. 100 F.3d 365 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2460 (1997).

52. *Id.* at 370.

53. *Id.*

of-powers purposes, so reopening these consent decrees does not violate the Constitution.[54]

The Eighth Circuit Court of Appeals, in *Gavin v. Branstad*,[55] also held that the PLRA does not unconstitutionally reopen final judgments. The court stated that "a consent decree is an executory form of relief that remains subject to later developments," and concluded that consent decrees are not final judgments for separation-of-powers purposes.[56]

The courts in *Benjamin*, *Plyler*, and *Gavin* are incorrect for two reasons. First, the rulings in these cases are inconsistent with prior case law and Supreme Court precedent on point which have established that a consent decree is a final judgment. These cases rely on the analysis used in *Wheeling & Belmont*, a case from 1856.[57] The court in *Benjamin* claimed that the distinction between an action in damages and the equitable decree in *Wheeling & Belmont* has been "consistently followed," and therefore based much of its reasoning on that case's analysis.[58] While it is true that if a court today strictly applied the principles of *Wheeling & Belmont* to the PLRA, it could potentially find that because consent decrees are indeed executory the PLRA passes separation-of-powers scrutiny, giving a modern situation this application of the law is incorrect. A more thorough application, which would be consistent with the current state of the law, could only be given after a consideration of the cases following *Wheeling & Belmont*—namely *Rufo*—which limits the application of *Wheeling & Belmont* and provides guidance for the correct treatment of consent decrees.[59] The approach taken by the court in *Benjamin* speaks to Congress's authority to issue legislation affecting prospective court orders, stating that the modification of these judgments will be allowed. However, in its analysis, the *Benjamin* court interprets these decisions too narrowly because the PLRA has not only prospective effects, but also has retroactive effects.[60] Moreover, this conclusion ignores the treatment of consent decrees by the Supreme Court.

Second, it does not make sense to use an analysis similar to that in *Benjamin*, *Plyler*, and *Gavin* to determine whether a consent decree is a final judgment. The Eighth, Second, and Fourth Circuit Courts of Appeals considered whether a court

---

54. *See id.* at 371.

55. 122 F.3d 1081 (8th Cir. 1997).

56. *Id.* at 1087-88.

57. *See Plyler*, 100 F.3d at 371; Benjamin v. Jacobson, 935 F. Supp. 332, 345 (S.D.N.Y. 1996), *aff'd in part, rev'd in part*, 124 F.3d 162 (2d Cir. 1997).

58. *Benjamin*, 935 F. Supp. at 346.

59. *See supra* text accompanying notes 35-39.

60. The Second Circuit admits interpreting the PLRA in a manner which preserves the constitutionality of the Act. The court reversed the district court's decision that the particular consent decree involved was constitutionally vacated, explaining that *vacating* rather than *modifying* consent decrees *would* unconstitutionally reopen final judgments. *See Benjamin*, 124 F.3d at 180.

would be able to alter a consent decree, and concluded that where a court would be allowed to modify a consent decree, that decree could not be considered a final judgment.[61] However, this is an inquiry separate from that outlined in *Rufo*. "[T]he fact that a court may alter a final judgment . . . does not affect the finality of the judgment, nor does it affect the inability of Congress to do so."[62] Although *Rufo* was clear in its determination that consent decrees are final judgments, these courts have attempted to distinguish those judgments which may be modified, ignoring the idea that "'[t]he fact that a court may exercise an extraordinary power to relieve the parties of a judgment's consequences, either through a modification or a termination of the decree in question, does not make the judgment any less final.'"[63] Therefore, the inquiry into whether a judgment is final is separate from the inquiry into whether that judgment may be modified in certain circumstances.

B. Protections Given to Final Judgments

Because consent decrees are final judgments, they are subject to the constitutional protection placed upon final judgments, namely, that Congress may not reopen final judgments to either alter the judgment's terms or order a new trial where a final judgment has been issued.[64] The Supreme Court clarified the framers' intention to vest judicial powers only in the judiciary by stating that "Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the government."[65] This holding remains the general rule today despite the existence of exceptions to the rule.[66]

The Supreme Court has recently revisited the constitutionality of reopening final judgments in *Plaut v. Spendthrift Farm, Inc.*[67] Congress had enacted § 27A(b) of the Securities Exchange Act of 1934, which provided that any § 10b[68] suit started on or before, and dismissed as time-barred after, June 19, 1991, was to be reinstated upon motion made not later than sixty days after December 19,

---

61. *See id.* at 162; *Gavin*, 122 F.3d 1081; *Plyler*, 100 F.3d 365.

62. Hadix v. Johnson, 933 F. Supp. 1362, 1368 (W.D. Mich. 1996) (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992)).

63. James v. Lash, 965 F. Supp. 1190, 1196 (N.D. Ind. 1997) (quoting Balark v. City of Chicago, 81 F.3d 658, 662 (7th Cir. 1996)); *see also* further discussion *infra* Part I.C.

64. See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 224-25 (1995), for an explanation of the early state and federal understanding of the rule concerning final judgments.

65. United States v. O'Grady, 89 U.S. (22 Wall.) 641, 648 (1874).

66. For a discussion of these exceptions, see *infra* note 73.

67. 514 U.S. 211.

68. Section 10b suits are actions brought pursuant to violations of § 10b of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78j(b) (West 1997), and Rule 10b-5 of the Securities and Exchange Commission, 15 U.S.C.A. § 78aa-1(b) (West 1997). *See Plaut*, 514 U.S. at 213.

1991.[69] The Court stated, therefore, that § 27A(b) directed the reopening of an entire class of cases: namely, all of the cases dismissed due to statute-of-limitations violations under *Lampf*.[70] Because this "legislation requires its own application in a case [that has] already [been] . . . adjudicated," the Supreme Court held that such an action "does no more and no less than 'reverse a determination once made, in a particular case.'"[71] The Supreme Court also stated in *Plaut* that after judicial decisions have achieved finality, "Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was."[72] This ruling, therefore, prevents the relitigation of matters which have already been decided.

Although, as stated in *Plaut*, the general rule is one which forbids Congress to reopen final judgments, the Supreme Court has recognized several exceptions to this rule.[73] These exceptions have generally arisen due to policy concerns which ensure that the rights of the individual who had benefitted from the previous judgment will not be disturbed by the reexamination of that judgment. While the Supreme Court did acknowledge that in certain situations, equity requires that Congress be allowed to reopen final judgments, it also developed limitations to this exception which resulted in a narrow application.[74]

The Supreme Court has allowed an exception to the rule that final judgments shall not be reopened with respect to executory judgments. Because an executory judgment changes in nature, in certain circumstances courts are allowed to modify these judgments. A party moving for modification may attempt to do so under Federal Rule of Civil Procedure 60(b), which states:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for

---

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

70. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991).

71. *Plaut*, 514 U.S. at 225 (quoting THE FEDERALIST NO. 81, at 545 (Alexander Hamilton) (J. Cooke ed., 1961)).

72. *Id.* at 227 (emphasis in original).

73. One such exception to the rule that final judgments may not be reopened is shown in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), where the Supreme Court reviewed a congressional statute which "provided for Court of Claims review of a . . . takings claim without regard to the res judicata or collateral estoppel effects of an earlier claims court decision." Goldstein, *supra* note 24, at 871. The Court held that "Congress' mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the Unitcd States does not violate the doctrine of separation-of-powers." *Sioux Nation*, 448 U.S. at 407. This exception, therefore, only applies where the United States is a party, and is therefore not applicable in cases iuvolving a consent decree between an inmate and an institution. Another example of an exception is in situations "where Congress orders relitigation of a matter previously determined in its favor." Goldstein, *supra* note 24, at 868. Another exception is the modification of situations involving prospective application and changed circumstances.

74. *See infra* text accompanying notes 75-82.

> the following reasons: . . . the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or . . . any other reason justifying relief from the operation of the judgment.[75]

Despite this seemingly lenient approach to modification with respect to executory decrees generally, the Supreme Court put limits on the instances where a court may allow consent decree modification, by reconciling the policies underlying consent decree case law. The Supreme Court has attempted in the past to define situations where a consent decree could be modified without violating constitutional principles. The Court's ever-changing analysis revolved around its attempts to define the nature of the consent decree, and subsequent to that determination, to evaluate in which circumstances modification would be warranted.[76] In *United States v. Swift & Co.*,[77] the Court stated that a consent decree should not be changed absent a "clear showing of a grievous wrong."[78] Later, the Supreme Court held in *System Federation No. 91 v. Wright*,[79] that a consent decree can be modified because adherence to an underlying law required it.[80] In yet another case, *Local Number 93, International Ass'n of Firefighters v. City of Cleveland*,[81] the Supreme Court stated that consent decrees were both judicial and contractual in nature, and found that the consent decree at issue was not an order.

Finally, in *Rufo*, the Court clarified its stance on the modification of consent decrees. The Court first noted that a modification of a consent decree will not be necessary in all circumstances.[82] Next, the Court clarified the test first expressed in Rule 60(b) by stating that "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court

---

75. FED. R. CIV. P. 60(b).

76. *See* Hadix v. Johnson, 947 F. Supp. 1100, 1105 (E.D. Mich. 1996) (reviewing the Supreme Court's treatment of consent decrees in an attempt to determine both the law behind and the nature of consent decrees).

77. 286 U.S. 106 (1932) (rejecting the view that a consent decree is to be treated as a contract and not as a judicial act).

78. *Id.* at 119.

79. 364 U.S. 642 (1961).

80. But compare *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), where the Supreme Court refused to allow the modification of a consent decree—and avoided handling the issues of whether any changed circumstances would warrant modification and whether modifying the decree would constitute a grievous wrong—by grounding its decision in the law on which that particular decree was based.

81. 478 U.S. 501 (1986).

82. *See* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 382 (1992). The Court in *Rufo* effectively took into consideration every facet of a consent decree in making its determination, providing a comprehensive rule which governs these complex situations.

should consider whether the proposed modification is suitably tailored to the changed circumstance."[83] Moreover, it stated that "[t]o hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation."[84] Ironically, the Court wished to avoid situations which now seem analogous to the PLRA:

> [Automatic relitigation of consent decrees] "would necessarily imply that the only *legally enforceable* obligation assumed by the state under the consent decree was that of ultimately achieving minimal constitutional prison standards. . . . Substantively, this would do violence to the obvious intention of the parties that the decretal obligations assumed by the state were not confined to meeting minimal constitutional requirements. Procedurally, it would make necessary, as this case illustrates, a constitutional decision every time an effort was made either to enforce or modify the decree by judicial action."[85]

Moreover, the Supreme Court also established that after a moving party has shown changed circumstances exist, "the district court should determine whether the proposed modification is suitably tailored to the changed circumstance."[86] In clarifying the proper treatment of consent decrees, the Supreme Court gave effect to the policies behind both public reform litigation and the law on final judgments.

> [T]he public's right in maintaining control over its institutions is protected through modification of a consent decree when a change in circumstances so requires. The parties' right to rely on a court order is protected by the limitation precluding a court, or Congress, from stripping a consent decree down to the constitutional floor.[87]

Consent decrees, being final judgments, must then be evaluated pursuant to the Court's rule.[88] The Supreme Court has acknowledged that a flexible approach to consent decree modification is necessary to achieve the ends of reform litigation, and for maintaining the public interest.[89] This public interest, as acknowledged by the Supreme Court, is important in consent decree cases because these decrees "'reach beyond the parties involved directly in the suit and impact on the public's

---

83. *Id.* at 383.

84. *Id.* at 389.

85. *Id.* at 390 (emphasis and omission in original) (quoting Plyler v. Evatt, 924 F.2d 1321, 1327 (4th Cir. 1991)). This language suggests that legislation similar to the PLRA in its harshness would create more problems than it would solve.

86. *Id.* at 391.

87. Hadix v. Johnson, 947 F. Supp. 1100, 1107 (E.D. Mich. 1996).

88. *See Rufo*, 502 U.S. at 378.

89. *See id.* at 381.

right to the *sound and efficient operation of its institutions.*'"[90] This policy behind the approach taken to consent decrees reflects the same concerns involved in general separation-of-powers principles.[91]

C. The Effects of the PLRA on Consent Decrees

In order for the PLRA to avoid frustrating the law of final judgments, it must avoid affecting consent decrees iu a way which reopens final judgments. However, the purported purpose of the PLRA is to change existing consent decrees to give only the minimum amount of relief.[92] Therefore, these changes amount to an unprotected opening of a final judgment. Even though proponents of the PLRA could attempt to argue that such reopening constitutes a justifiable modification under Rule 60 of the Federal Rules of Civil Procedure, this would not be the case in every circumstance affected by the Act. The PLRA allows modification which would not conform with the *Rufo* test.[93] Several provisions within the PLRA have the effect of allowing modification of consent decrees. According to *Rufo*, in order to justify modification, a reviewing court must first determine that the requisite changed circumstances are present to warrant the reopening of a final judgment. However, in disputes arising under the PLRA with

---

90. *Id.* at 381 (emphasis added) (quoting Heath v. De Courcy, 888 F.2d 1105, 1109 (6th Cir. 1989)). However, the Supreme Court's reasoning behind relaxing the standard for modifying consent decrees does not apply to the instant situation due to the fact that the effects of § 3626 run counter to the public's interest in effective operation of its institutions. Section 3626 causes courts to reopen and relitigate matters already resolved, and requires findings to be made on all motions to enter final judgments on proposed consent decrees, and on motions to vacate preexisting consent decrees. *See* 18 U.S.C.A. § 3626 (West Supp. 1997). This increase will cause an escalation in the amount of litigation, which will lessen the efficiency of prisoner litigation, not increase it.

91. The Supreme Court "consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." Mistretta v. United States, 488 U.S. 361, 380 (1989); *see also* Bowsher v. Synar, 478 U.S. 714 (1986). Because the primary rationale of separation-of-powers is "the preservation of individual liberty against governmental tyranny," *The Supreme Court, 1994 Term—Leading Cases*, 109 HARV. L. REV. 111, 230 (1995), and because the judiciary is considered the guardian of individual rights, *see* Amy D. Ronner, Note, *Judicial Self-Demise: The Test of When Congress Impermissibly Intrudes on Judicial Power After* Robertson v. Seattle Audubon Society *and the Federal Appellate Courts' Rejection of the Separation-of-Powers Challenges to the New Section of the Securities Exchange Act of 1934*, 35 ARIZ. L. REV. 1037, 1038 (1993), the separation-of-powers inquiry is especially relevant to the preservation of individual rights under current PLRA litigation.

92. *See supra* text accompanying note 19. One example is the PLRA's direction to the courts to vacate consent decrees formed prior to the Act's enactment. *See* Benjamin v. Jacobson, 124 F.3d 162, 172-73 (2d Cir. 1997).

93. *See supra* text accompanying notes 82-86 for the *Rufo* test.

respect to consent decrees, a civil rights defendant seeking to modify or vacate his consent decree pursuant to the PLRA need not show changed circumstances in order to be successful in his claim. The PLRA contains no provision requiring the reviewing court to make findings as to whether there are changed circumstances in the situation under which the original consent decree was formed.

According to the PLRA, a defendant or intervener to an inmate civil rights suit has the option to seek immediate termination of prospective relief. Section 3626(b)(2) of the PLRA states:

> In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.[94]

Under this section, a reviewing court must reexamine the circumstances behind, and the findings which were present in, the presently-litigated-but-previously-settled civil suit. To stress the importance of these findings, and to facilitate the gathering of these findings, the PLRA provides for the appointment of a special master "who shall be disinterested and objective and who will give due regard to the public safety, to conduct hearings on the record and prepare proposed findings of fact."[95] Moreover, the automatic stay provision in 3626(e) orders a stay on all relief pending such investigation.[96] As a result of these provisions in the PLRA, a reviewing court in essence performs its own investigation of the civil rights claim. The court then makes an independent determination as to whether the terms of the consent decree at issue fall within the limitations provided in the Act. The only requirement for modifying or vacating consent decrees under the PLRA is a determination of whether the relief granted to the plaintiffs in the previous litigation or negotiation is as narrow as the PLRA requires it to be. These findings which the PLRA requires a reviewing court to make need not show changed factual circumstances to allow for modification or termination of the consent decree under the Act, as deemed necessary by the Supreme Court in *Rufo*.

Proponents of the PLRA could potentially argue that the requisite changed circumstance which would warrant modification of any consent decree under the Act is the institution of the PLRA itself. *Rufo* does provide that "modification of

---

94. 18 U.S.C.A. § 3626(b)(2) (West Supp. 1997).

95. *Id.* § 3626(f)(1).

96. *See id.* § 3626(e). "'Congress lacks the power to dictate absolutely that a judgment already rendered by an Article III court be altered or suspended, as the automatic stay might be read to require.'" Glover v. Johnson, 957 F. Supp. 110, 112 (E.D. Mich. 1997) (quoting Memorandum of Law of the United States of America with Respect to the Constitutionality of Certain Provisions of the Prison Litigation Reform Act at 35 (citing Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995))).

a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent."[97] The Supreme Court, however, clarified its position in *Rufo* by stating that a mere clarification in the law does not in itself provide a basis for modifying a decree unless "the parties had based their agreement on a misunderstanding of governing law."[98] In the consent decrees at issue in cases arising under the PLRA, the parties to those decrees had not misunderstood the governing law when they entered into them. The law governing the consent decrees at the time of their formation allowed the parties to reach the results which they desired.

Moreover, the policy behind the lenient modification of consent decrees is not consistent with the policies behind the PLRA, and any modification should therefore not be viewed in the flexible manner outlined in *Rufo*. Proponents of the PLRA claim that it was necessary to further the public interest. While it is true that the PLRA restricts the number of inmates who can successfully be released from prison due to victories on civil rights issues, the Act does not further the "'*sound and efficient operation of . . . institutions.*'"[99] Actually, the Act causes institutions to become less efficient. The PLRA will effectively eliminate inmates' desire to seek out-of-court remedies to their civil rights complaints. Instead of using the negotiation and settlement process, more of these inmates will file formal complaints with the court, flooding the court with these claims, which they must then determine to be viable or not under the PLRA. Also, institutions wishing to escape their obligations under consent decrees entered prior to the PLRA can come to the courts to vacate the decrees. This has the potential to flood the courts with both litigation and relitigation of past consent decrees.

The PLRA reopens final judgments by directing reviewing courts to conduct findings and by implementing an automatic stay which temporarily terminates any relief which had been granted pursuant to the prior consent decree. Congress has chosen, in the PLRA, not to give effect to the law with respect to whether and when final judgments which are executory can be constitutionally reopened. Instead, Congress, through its enactment of the PLRA, has allowed any and all consent decrees which were drafted before the PLRA to be reopened for scrutiny. As a result, any civil rights defendant laboring under a consent decree with an inmate may bring a cause of action in court under the PLRA and demand that the decree be vacated pursuant to this new act. This will cause reviewing courts to

---

97. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 388 (1992).

98. *Id.* at 390 (holding that where a district court's interpretation was contrary to intervening law, a decree may be modified).

99. *Id.* at 381 (emphasis and omission added) (quoting Heath v. De Courcy, 888 F.2d 1105, 1109 (6th Cir. 1989)). See *supra* text accompanying note 84 for further discussion regarding the similar policies behind both the preservation of inmates' rights and separation-of-powers law. See also the discussion *infra* at notes 140-147 for thoughts on the conflict between the policy behind preserving inmates rights and the effects of the PLRA.

relitigate the claims and issues which had already been resolved in an attempt to determine whether these judgments are in conformity with the PLRA. By overreaching with their legislative power in this matter into the realm of the judiciary, Congress not only threatens the power of the judiciary to render effective judgments, but also threatens the preservation of the liberties of those inmates whose only constitutional protection comes through their consent decrees.

II. THE PLRA PRESCRIBES A RULE OF DECISION WITHOUT CHANGING THE UNDERLYING LAW

Consistent with the framers' fear that Congress would gain excessive power if they could reopen final judgments, the framers also feared the power Congress would amass if it were allowed to prescribe decisions without changing the underlying law. Congress's power to make law under Article II remains unchanged. However, that power does not come without restrictions. As a result of this, "Congress may not enact a law that effects a substantive or procedural change but otherwise contravenes Article III."[100] In order to preserve the interpretive power of the judiciary, when "Congress [seeks] to displace the Supreme Court's interpretation of a statute without changing the underlying law," the Court will find they have acted beyond their power."[101] This principle is consistent with the allocation of powers in Article III which delegates the powers of interpreting the laws to the judiciary.[102] Moreover, as a result of this principle, "Congress may not prescribe a rule of decision for the courts to follow without any independent exercise of judicial powers."[103]

The seminal case regarding this principle is *United States v. Klein*.[104] The dispute in *Klein* arose after Congress enacted the Act of July 12, 1870, which provided that a presidential pardon was inadmissible as proof of loyalty to the government. Prior to this enactment, property which was seized or abandoned could be confiscated by the government to support the war effort.[105] The subsequent remedy of this confiscation was proof of loyalty.[106] To aid in the implementation of this recovery process, Congress had authorized the president to extend a pardon to persons who had assisted in and supported the war effort.[107] Therefore, in the Act of July 12, 1870, Congress effectively denied the

---

100. *In re* Brichard Sec. Litig., 788 F. Supp. 1098, 1102 (N.D. Cal. 1992).

101. Bank of Denver v. Southeastern Capital Group, 789 F. Supp. 1092, 1097 (D. Colo. 1992).

102. *See* U.S. CONST. art. III.

103. United States v. Sioux Nation of Indians, 448 U.S. 371, 391-92 (1980).

104. 80 U.S. (13 Wall.) 128 (1871).

105. *See id.* at 137-38.

106. *See id.* at 139.

107. *See id.* at 140-41.

president's power to pardon, and ignored the prior Supreme Court judgment that presidential pardons have effect.[108] The Supreme Court therefore held that by ignoring this judicial mandate, "Congress has inadvertently passed the limit which separates the legislative from the judicial power" by directing the disposition in the case.[109] *Klein* also distinguished itself from *Pennsylvania v. Wheeling & Belmont Bridge Co.*[110] The Supreme Court explained that in *Wheeling & Belmont*, Congress, by passing the Act yet leaving the court to apply its ordinary rules to the new circumstances created by the Act, did not violate separation-of-powers by unconstitutionally prescribing a rule of decision.[111] However, in the situation in *Klein*, the court was "forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and [was] directed to give it an effect precisely contrary."[112]

The Ninth Circuit considered both *Klein* and *Wheeling & Belmont* and those cases' interpretation of separation-of-powers doctrine in *Seattle Audubon Society v. Robertson.*[113] The court stated that *Klein* and *Wheeling & Belmont* "delineate[] limits of congressional power to control litigation through legislation. Congress can amend or repeal any law, even for the purpose of ending pending legislation."[114] The Ninth Circuit also stated that the standard for determining whether a law has been amended is whether the law has been actually repealed or amended, or rather directs a particular decision in a case without repealing or amending the law underlying the litigation.[115] Although the Supreme Court reversed the Ninth Circuit's holding that the law in this case violated separation-of-powers, it did not hold that the Ninth Circuit's interpretation of the *Klein* test was incorrect.[116] Instead, the Court merely held that it need not address Article III jurisprudence because the statute in question amended the applicable law, and therefore passed the *Klein* test.[117]

Pursuant to the above analysis of whether a congressional act violates separation-of-powers doctrine, courts have evaluated this issue in a two-fold manner. First, a reviewing court must determine whether the new rule changes or amends the underlying law. If the new rule does change or amend the underlying law, the inquiry for purposes of this particular analysis may end, and separation-of-powers policy is not implicated, because Congress is acting within its

---

108. *See id.*
109. *Id.* at 147.
110. 59 U.S. (18 How.) 421 (1856).
111. *See Klein*, 80 U.S. (13 Wall.) at 146-47.
112. *Id.* at 147.
113. 914 F.2d 1311 (9th Cir. 1990), *rev'd on other grounds and remanded*, 503 U.S. 429 (1992).
114. *Id.* at 1315.
115. *See id.*
116. *See Robertson*, 503 U.S. 429.
117. *See id.* at 441.

prescribed Article II power.[118] However, if the new rule does not change or amend the underlying law, a reviewing court must then ask whether that new rule prescribes a rule of decision which a court applying the rule must follow. If the reviewing court does find that the new congressional rule directs a rule of decision, it must find that Congress has impermissibly invaded upon the judiciary's realm by taking away the judiciary's power to interpret the law. As a result, the new rule must be deemed unconstitutional for violating separation-of-powers.

Several of the courts which have addressed this issue have considered whether individual sections of the PLRA violate separation-of-powers principles by prescribing a rule of decision without amending the underlying law. However, as when dealing with the issue of whether the PLRA unconstitutionally reopens final judgments, these courts have not reached a consensus.[119] Due to the limited treatment given to this issue, not all of the PLRA's provisions have been addressed and examined by these courts, and only a cursory glance has been given to examine whether any or all of the PLRA prescribes a rule of decision without changing the underlying law. However, because the automatic stay provision of the PLRA is functioning as a preliminary injunction of relief, it must be analyzed under the law of preliminary injunctions, and the determination of whether this provision prescribes a rule of decision without changing the underlying law will depend on the effects which it has on the law of preliminary injunctions.[120]

---

118. However, even if this does change the law, it may still unconstitutionally encroach upon Article III power. Under a different separation-of-powers theory, Congress may not enact a law which reverses or allows for review of a final judgment of a court. *See* Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 805, 810 (11th Cir. 1988). Other provisions of the PLRA which also change the remedial jurisdiction of federal courts are also currently being challenged in the courts. *See, e.g.*, Zehner v. Trigg, 952 F. Supp. 1318, 1327 (S.D. Ind. 1997) (holding that 42 U.S.C. § 1917 as applied does not impermissibly exceed the legislative power of Congress by limiting courts' remedial jurisdiction).

119. *Compare* Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996) (holding that the PLRA does not prescribe a rule of decision because it amends the law by changing the power of the district court to approve relief greater than the minimum), *cert. denied*, 117 S. Ct. 2460 (1997), *and* Benjamin v. Jacobson, 935 F. Supp. 332 (S.D.N.Y. 1996) (holding that the PLRA does not prescribe a rule of decision contrary to the constitutional powers of Congress because the Act changes the law governing the district courts' remedial powers), *with* Hadix v. Johnson, 947 F. Supp. 1100 (E.D. Mich. 1996) (holding that the automatic stay provision in the PLRA prescribes a rule of decision without changing the underlying law).

120. For purposes of this Note, only the constitutionality of § 3626 will be evaluated. The Fourth Circuit in *Plyler* held that § 3626(b)(2) changes the law regarding a district court's authority to render remedial relief. *See Plyler*, 100 F.3d at 372.

A. The Law of Preliminary Injunctions

A preliminary injunction is

> [a]n injunction granted at the institution of a suit, to restrain the defendant from doing or continuing some act, the right to which is in dispute, and which may either be discharged or made perpetual, according to the result of the controversy, as soon as the rights of the parties are determined.[121]

Preliminary injunctions "protect plaintiff[s] from irreparable injury and . . . preserve the court's power to render a meaningful decision after a trial on the merits."[122] A party may receive a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure by issuing notice to the adverse party and then participating in a hearing on the merits of the application for injunction.[123] However, the Federal Rules do not define the circumstances in which a preliminary injunction may be granted, so this matter is left to the trial court's discretion. Therefore, preliminary injunctions must be made by courts on a case-by-case determination.[124] The law concerning injunctive relief provides that a preliminary injunction may be granted by summary procedures rather than a full hearing, due to the haste involved in obtaining the injunction.[125] However, an injunction is not given to a movant automatically. The Supreme Court has stated "the party seeking the injunction would bear the burden of demonstrating the various factors justifying preliminary injunctive relief, such as the likelihood of irreparable injury to it if an injunction is denied [and] its likelihood of success on the merits."[126] The Sixth Circuit looks at "whether the injunction would harm others, and whether the public interest would be served."[127] Minimal protections, such as these, are in place because "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits

---

121. BLACK'S LAW DICTIONARY 540 (6th abr. ed. 1991).

122. 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 2947 (2d ed. 1995).

123. FED. R. CIV. P. 65.

124. *See id.*

125. *See* University of Tex. v. Camenisch, 451 U.S. 390, 395 (1981).

126. Granny Goose Foods, Inc. v. Brotherhood of Teamsters, 415 U.S. 423, 441 (1974). Curiously enough, courts have found that the deprivation of constitutional rights is sufficient "irreparable injury" to warrant the imposition of a preliminary injunction. *See, e.g.*, Prescott v. County of El Dorado, 915 F. Supp. 1080 (E.D. Cal. 1996); Olmeda v. Schneider, 889 F. Supp. 228 (D.C.V.I. 1995). *But see* Public Serv. Co. v. Town of W. Newbury, 835 F.2d 380 (1st Cir. 1987) (noting that an infringement upon the assertion of First Amendment rights does not automatically require a finding of irreparable injury). Considering a violation of constitutional rights as grounds for a preliminary injunetion would suggest that the inmates should be rceeiving thc preliminary injunction against the termination of their relief, instead of the termination of their relief pending relitigation of their civil rights claims.

127. *In re* DeLorean Motor Co., 755 F.2d 1223, 1228 (6th Cir. 1985).

can be held."[128] Moreover, even though Congress does have the power to provide automatic stays in some circumstances, it does so only to preserve the parties positions pending the decision of the reviewing court.[129]

B. The Effects of the PLRA on the Law of Preliminary Injunctions

Section 3626(e) of the PLRA, the automatic stay provision, resembles the issuance of a preliminary injunction in that it allows a plaintiff to restrain the inmate from proceeding pending review under the PLRA.[130] This provision precludes a court from finding facts before issuing the stay. This section is therefore counter to, but does not change, the law of preliminary injunctions. Section 3626(e)(2) provides:

> Any prospective relief subject to a pending motion shall be automatically stayed during the period:
> (A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or
> beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and
> (B) ending on the date the court enters a final order ruling on the motion.[131]

Through this provision, Congress has granted civil rights defendants temporary automatic relief with no attempt at providing for case-by-case determination.[132] Therefore, this provision automatically vacates a current consent decree once a challenge to that decree is filed, pending relitigation of the decree. This effect is consistent with the effects of preliminary injunctions. Section 3626(e)(2) does not purport to change the law on preliminary injunctions expressly. No provision in the statute amends Federal Rule of Civil Procedure 65 or purports to overrule case law establishing the law of preliminary injunctions.[133] Additionally, the legislative history of the PLRA does not reveal any intent of Congress to change the existing law on this issue. Moreover, this section does not change the law on

---

128. *Camenisch*, 451 U.S. at 395.

129. *See* Hadix v. Johnson, 933 F. Supp. 1362, 1367 n.3 (W.D. Mich. 1996).

130. *See id.* at 1366.

131. 18 U.S.C.A. § 3626(e)(2) (West Supp. 1997).

132. *See Hadix*, 933 F. Supp. at 1366.

133. Even if proponents of the PLRA could successfully assert that the Act changed the underlying law, such a change would still be constitutionally suspect. Section 3626(e)(2) leaves inmates without protection for their federally granted civil rights for the duration of the automatic stay. This effect, therefore, creates an opportunity for inmates' constitutional rights to be violated through the mandated lifting of relief agreed upon previously in consent decrees to prevent these very abuses.

preliminary injunctions even inadvertently. When examined pursuant to the analysis used by the Ninth Circuit,[134] the Act's automatic stay provision clearly does not change or amend the underlying law. The law regarding preliminary injunctions remains as it has been. Because it merely precludes a court from applying its ordinary rules in determining whether to issue an automatic stay, it directs a rule of decision.

C. Directing a Rule of Decision

Because the automatic stay provision does not amend or repeal the law with respect to preliminary injunctions, the *Klein* test next requires a scrutiny of the effects of this provision to determine whether it directs a rule of decision. Under the law of preliminary injunctions, a reviewing court at a hearing would evaluate the merits of the proposed injunction before ruling on whether to issue the injunction.[135] "'[T]he proper response to a motion to terminate an existing injunction is orderly briefing and presentation of the factual and legal issues, sometimes including an evidentiary hearing' and . . . 'it may in some cases simply be impossible for a court to decide the motion responsibly within thirty days.'"[136] However, the automatic stay provision does not allow such evaluation. Instead, it directs a court to automatically terminate the relief achieved through the consent decree, without a hearing or other consideration, until the decree is relitigated under the Act.[137] *Klein* forbids this action by proscribing a rule of decision, because it precludes a court from applying its ordinary rules in determining whether to issue an injunction or stay.[138] Moreover, this provision directs a decision which could potentially be contrary to that which a court would make under the law of preliminary injunctions.[139] Because an injunction is normally given to prevent irreparable injury, to serve the public at large,[140] and to preserve the parties' positions pending the outcome of the reviewing court, in situations under the PLRA, motions for preliminary injunction would be denied

134. *See supra* text accompanying notes 112-17.

135. *See* Granny Goose Foods, Inc. v. Brotherhood of Teamsters, 415 U.S. 390, 441 (1981).

136. Glover v. Johnson, 957 F. Supp. 110, 112 (E.D. Mich. 1997) (alteration added) (quoting Memorandum of Law of the United States of America with Respect to the Constitutionality of Certain Provisions of the Prison Litigation Reform Act at 36-37).

137. *See* 18 U.S.C.A. § 3626(e) (West Supp. 1997). Even though the Department of Justice urged that the automatic stay provision be read in such a way so as to preserve its constitutionality, doing so would contradict the text of the statute. *See Glover*, 957 F. Supp. at 113.

138. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 146-47 (1871).

139. Under the *Klein* test, a mandate which forbids the court to give effect to evidence and directs a contrary result runs counter to conduct which is constitutionally permissible.

140. *See supra* text accompanying notes 121-27.

because they run counter to the reasons for implementing a preliminary injunction in the first place.

CONCLUSION

The statutory language of the PLRA does not deal effectively with the particular problem it was meant to solve. As discussed in the Introduction to this Note, the legislators who supported the enactment of the PLRA claimed that the Act would facilitate institutional reform by limiting the relief available to inmates.[141] However, the effects of the PLRA do not support the reasons given for its enactment. The disjunction between the reasons for the legislation and the effects of its enactment suggest that the legislators were motivated by policies which they did not acknowledge.

While the proponents of the PLRA support it as a means of expediting prisoners' suits and achieving greater judicial economy, the Act effectively creates *more* prisoner litigation. The PLRA, through its immediate termination provision, allows administrators of institutions who are bound by consent decrees entered before the PLRA's enactment to challenge those consent decrees and subject them to reevaluation.[142] Instead of decreasing the amount of litigation, this will encourage administrators to challenge consent decrees with which they no longer agree or wish to enforce.

Even before the bill was passed, some of the legislators recognized that the effects of the Act were contrary to the policies which the PLRA's supporters purported it would further. Senator Kennedy explained that "[b]oth for reasons of judicial economy, and for the effective protection of constitutional rights, we should aim at the resolution of disputes without unnecessary litigation and periodic disruption of ongoing remedial efforts."[143] Other senators also acknowledged that disputes between inmates and institutions which could be resolved in a mutually agreeable manner should be settled outside of the courts in order to achieve a more prompt resolution.[144] These senators recognized that the PLRA would make it "virtually impossible for states to enter into consent decrees even when the consent decrees may well be in the State's interest for both

141. *See supra* text accompanying notes 5-10. Proponents of the PLRA have expressed their disdain for consent decrees: "Sometimes these decrees are merely a nuisance for state governments, which have to spend money coddling criminals . . . [while] others are positively dangerous." Editorial, *Criminal Oversight*, WALL ST. J., June 10, 1996, at A18.

142. *See* 18 U.S.C.A. § 3626(b)(2).

143. 142 CONG. REC. S2296 (daily ed. Mar. 19, 1997) (statement of Sen. Ted Kennedy).

144. *See id.* at S2297 (letter from Senators Fred Thompson, Jim Jeffords, Ted Kennedy, Joe Biden, and Jeff Bingaman).

fiscal and policy reasons."[145] Senator Biden commented that the PLRA "creates restrictions on the power of those governments . . . [to] voluntarily negotiat[e] their own agreements and . . . place[s] an even greater burden on the courts to litigate and relitigate these suits."[146] A journalist summed up the concerns inherent in the ulterior motives which seemed to be present:

> Congress addressed the problem of prisoner litigation by passing the PLRA and inviting the abandonment of consent decrees in prisons, jails and juvenile facilities throughout the country. Prisoners are always fair game for regressive legislation which slams the door to the federal court, making it difficult to address the violation of basic constitutional rights.[147]

These concerns reveal a policy which the Act does promote: giving administrators permission to undo deals which either they or their predecessors have made. Although there is no legislative history which expressly promotes this policy, the inefficacy of the Act shows that the policy forwarded by those who supported the Act was not the primary motivation behind its enactment. As a result of this questionable policy approach, and in an overzealous attempt to restrict the rights of prisoners, Congress's attempt to curb inmate litigation has gone awry. By ignoring the individual rights of the inmates in an attempt to support the whims of the administrators, Congress has enacted provisions which can be invalidated not only by the constitutional attacks discussed in this Note, but also upon other grounds.[148] An act which was narrowly drawn to curb excessive inmate litigation, with language evidencing that policy and prohibiting effects which would run contrary to that policy, would have been better received and probably would have avoided the many constitutional attacks which the PLRA is sure to endure in the future.

---

145. *Id.* (testimony of Sen. Paul Simon). Others shared Congress's concerns. An attorney representing 20,268 South Carolina inmates also opposed the use of PLRA to vacate a ten-year-old consent decree, stating that the PLRA improperly allowed the revision of an agreement which had been fashioned by the courts. *See Law Frees South Carolina Prisons from Judge's Oversight*, HERALD (Rock Hill, S.C.), Nov. 19, 1996, at 3, *available in* 1996 WL 8279624.

146. 141 CONG. REC. S14,628 (daily ed. Sept. 28, 1996) (testimony of Sen. Joe Biden).

147. Tom Terrizi, *Should Prison Consent Decrees Be Vacated? No.*, N.Y. L.J., Aug. 22, 1996, at 2. For the opposing argument, see Zehner v. Trigg, 952 F. Supp. 1318 (S.D. Ind. 1997) (holding that 42 U.S.C. § 1997 does not violate equal protection); Paul A. Crotty, *Should Prison Consent Decrees Be Vacated? Yes.*, N.Y. L.J., Aug. 22, 1996, at 2. Also, one district court has struck down a different section of the PLRA, § 804(d), for violating inmates' right of access to the courts. *See* Lyon v. Vande Krol, 940 F. Supp. 1433 (S.D. Iowa 1996).

148. For example, opponents to the PLRA have also challenged it on due process and equal protection grounds. *See, e.g.*, Carson v. Johnson, 112 F.3d 818 (5th Cir. 1997) (holding both that the PLRA does not block inmates' access to the courts in violation of the Due Process Clause, and also that because prisoners neither have a fundamental interest at stake nor constitute a suspect class, the PLRA does not violate the Equal Protection Clause). Courts have also considered whether the PLRA's limit on the amount of relief an inmate may obtain violates the Eleventh Amendment. *See e.g.*, Komyatti v. Bayh, 96 F.3d 955 (7th Cir. 1996).