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Congress and Terri Schiavo: A Primer on the American Constitutional Order

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CONGRESS AND TERRI SCHIAVO: A PRIMER ON THE AMERICAN CONSTITUTIONAL ORDER?

Michael P. Allen*

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INTRODUCTION

A private tragedy was played out for a national and international audience earlier this year when it seemed as if every media outlet in operation brought us nearly non-stop coverage of the life and death struggle of Theresa Marie Schiavo.1 Ms. Schiavo died on March 31, 2005, but the controversy that surrounded her is likely to live on.2 There is much that could be written about Ms. Schiavo’s situation, ranging from the role of religion in end-of-life matters to the fundamental question about how society should deal with the wishes of citizens concerning the time and manner of their death. This Article deals with another aspect of the matter, the federal intervention in this end-of-life drama. Whatever one might believe about the wisdom of that intervention, there is no question that it provides a rare opportunity to consider some fundamental issues concerning the American constitutional order. What is the extent of Congressional authority under the Constitution to confer jurisdiction on the federal courts? What obligation does Congress have, if any, to “respect” state court judgments? May Congress specify the manner in which a federal court is to exercise its jurisdiction? In sum, the strange interaction of Congress and Terri Schiavo allows one to consider issues that go to the core of the system of government established under the Constitution.

In this Article, I consider these issues both in the context of the specific law Congress passed concerning Ms. Schiavo as well as more broadly. I argue that the statute Congress passed allowing federal court intervention in the Schiavo end-of-life drama might have been unwise, but it was constitutional. Moreover, I ultimately suggest that a consideration of Congressional action concerning Ms. Schiavo can tell one a great deal about the structures of government in the United States and the power entrusted to the federal government under the Constitution.

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1 There were literally thousands of media stories about Terri Schiavo during the month of her death, March 2005. For example, a search on the LEXIS/NEXIS “news and business” database for March 2005 using the word “Schiavo” yields over 3000 results. Attention came from everything from international newspapers, see, e.g., Editorial, No place for politics in right-to-die case, S. CHINA MORNING POST, Mar. 23, 2005, at 12, to prominent American media outlets, see, e.g., Editorial, A Blow to the Rule of Law, N.Y. TIMES, Mar. 22, 2005, at A22; Laura Parker et al., Does Congress seek due process or political gain?, USA TODAY, Mar. 21, 2005, at 1A, to local papers, see, e.g., Carl Hulse, Basic rights, due process, politics mingle, VENTURA COUNTY STAR, Mar. 19, 2005, at 1; Opinion, Critical Condition; Schiavo law puts Constitution on life support, THE RECORD, Mar. 22, 2005, at L14.

No matter how one looks at the situation, what Ms. Schiavo and her family endured was tragic. Most people who watched any television or read any newspapers in the first part of 2005 are aware of the basic facts of the Schiavo saga.3 For present purposes it suffices that in 1990, twenty-seven year old Terri Schiavo lost consciousness for unknown reasons and, as a result, her brain was deprived of oxygen for several minutes.4 For several years, Terri’s husband (Michael Schiavo), who was appointed her guardian under Florida law, and her parents (Bob and Mary Schindler) were united in their approach to Terri’s medical treatment.5 Eventually, however, dissention engulfed the family.6 Michael Schiavo, as Terri’s guardian, requested that a Florida state court decide whether his wife would have wished to continue receiving nutrition and hydration in her then-current condition, which had been diagnosed as a persistent vegetative state.7

Amazingly contentious litigation followed Michael Schiavo’s petition. Applying well-established Florida constitutional and statutory law, every court to consider the issue ruled both that Terri Schiavo was in a persistent vegetative state and that she would not have wished to continue receiving artificial nutri-

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4 See In re Guardianship of Schiavo, 780 So. 2d 176, 177 (Fla. Dist. App. 2001). At the time of this decision, everyone involved worked under the assumption that Ms. Schiavo “suffered a cardiac arrest as a result of a potassium imbalance.” Id. An autopsy indicated that, in fact, Ms. Schiavo had not suffered a cardiac arrest. See Report of Autopsy of Theresa Marie Schiavo (June 13, 2005), available at http://www.miami.edu/ethics2/Schiavo/061505-autopsy.pdf. The cause of Ms. Schiavo’s 1990 collapse remains unknown.


6 See Wolfson Report, supra note 5, at 12.

7 In re Guardianship of Schiavo, 780 So. 2d at 177.
tion and hydration given that fact. After years of litigation (including one countermanded order directing the removal of the feeding tube), Ms. Schiavo’s feeding tube was removed pursuant to a court order on October 15, 2003. In a preview of what would happen later on the national level, matters then took a remarkable turn when the Florida Legislature enacted what popularly became known as “Terri’s Law.” Under Terri’s Law, the feeding tube was reinserted and additional litigation began.

It was clear to many observers from the very start that Terri’s Law was unconstitutional and the Florida Supreme Court so held in Bush v. Schiavo. After the Florida high court’s decision, the process began again to carry out

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8 See, e.g., In re Guardianship of Schiavo, 851 So. 2d 182 (Fla. Dist. Ct. App. 2003); In re Guardianship of Schiavo, 792 So. 2d 551 (Fla. Dist. Ct. App. 2001); In re Guardianship of Schiavo, 780 So. 2d 176.

9 See In re Guardianship of Schiavo, 792 So. 2d at 561-62.


12 Florida’s version of Terri’s Law was a brazen attempt by Florida’s Legislature and Governor to reverse the rulings of Florida’s judicial branch concerning Terri Schiavo’s end-of-life wishes. The law granted Governor Jeb Bush unfettered discretion to “stay” a court order directing the withdrawal of nutrition and hydration from a patient if the patient had no advance directive, a court had found the patient to be in a persistent vegetative state, nutrition and hydration had, in fact, been withheld from the patient, and a member of the patient’s family had challenged that withdrawal. See Fla. STAT. § 744.3215(1). The Governor’s authority under the act expired fifteen days after the act became a law, but any stays he issued remained in place. § 744.3215(2). The Legislature and the Governor were successful in their efforts. After the passage of the law, Governor Bush immediately issued a “stay” of the court order in place and Terri Schiavo’s feeding tube was reinserted. See Fla. Gov. Exec. Order No. 03-201 (Oct. 21, 2003), available at http://news.findlaw.com/hdocs/docs/schiavo/flagovexord03201.html; Smith, supra note 11.

13 See, e.g., Michael P. Allen, Terri’s Law and Democracy, 35 STETSON L. REV. (forthcoming 2005); Barbara A. Noah, Politicizing the End of Life, 59 U. MIAMI L. REV. 107, 114-26 (2004); but see Thomas C. Marks, Jr., A Dissenting Opinion, Bush v. Schiavo, 885 So. 2d 321 (2004), 35 STETSON L. REV. (forthcoming 2005) (suggesting grounds upon which the Florida Supreme Court could have upheld Terri’s Law); Snead, supra note 3 (arguing that Terri’s Law was constitutional).

14 885 So. 2d 321 (Fla. 2003). The Florida Supreme Court held that Terri’s Law was unconstitutional under the Florida Constitution’s explicit guarantee of separation of powers. Id. First, the court concluded that the law was a legislative encroachment on the judicial branch. Id. at 329-32. Second, it held that Terri’s Law amounted to an unconstitutional delegation of legislative power to the executive branch. Id. at 332-36. The Florida Supreme Court declined to reach other arguments that Terri’s Law was unconstitutional, in particular those concerning the act’s effect on Terri Schiavo’s right to refuse medical treatment under the Florida Constitution. See id. The lower court had based its decision declaring the law unconstitutional on such personal liberty grounds as well as separation of powers. See Schiavo v. Bush, No. 03-008212-CI-20, 2004 WL 980028 (Fla. Cir. Ct. May 5, 2004). For a comprehensive consideration of Terri’s Law and the decision in Bush v. Schiavo, see Symposium, Reflections on and Implications of Schiavo, 35 STETSON L. REV. (forthcoming 2005).

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Terri Schiavo's end-of-life wishes as they had been determined in the state courts. The culmination of these events was yet another court order, affirmed on appeal, directing that Ms. Schiavo's feeding tube be removed, this time on March 18, 2005.\textsuperscript{15} That order was carried out and the feeding tube was, once again, removed from Ms. Schiavo's body.\textsuperscript{16} But then matters took yet another unexpected turn, one that in many respects made the Florida Legislature's interference seem ordinary, as Congress and President Bush became fully involved in the matter.

This Article focuses on that federal intervention, passage of Public Law 109-3, "An Act for the relief of the parents of Theresa Marie Schiavo."\textsuperscript{17} In brief, the Act created a means by which Ms. Schiavo's parents could seek federal court review of whether their daughter's federal constitutional or statutory rights had been violated as a result of the Florida courts' orders concerning the withdrawal of nutrition and hydration.\textsuperscript{18} The Act applied only to Ms. Schiavo's parents. In addition to establishing federal jurisdiction, it also removed various procedural barriers that might otherwise have precluded any federal review of the matter (other than by the United States Supreme Court).\textsuperscript{19}

Ms. Schiavo's parents commenced a federal lawsuit under the Act, which eventually led to two opinions of a district judge in the Middle District of Florida,\textsuperscript{20} two panel opinions of the United States Court of Appeals for the Eleventh Circuit,\textsuperscript{21} five opinions concurring in or dissenting from two separate


\textsuperscript{16} See John-Thor Dahlburg and Richard Simon, \textit{Schiavo Taken Off Food Supply}, L.A. TIMES, Mar. 19, 2005, at A1. Congressional interference with Terri Schiavo's death actually began here, before the passage of the Act that is the principal subject of this Article. Two Congressional committees issued subpoenas designed to derail the implementation of the withdrawal of the feeding tube. See id.; Adam Liptak, \textit{With Schiavo Subpoenas, Lawmakers Leap Into Contested Territory}, N.Y. TIMES, Mar. 19, 2005, at A12. The Florida trial judge presiding over the guardianship case ruled that these subpoenas were without effect. See Norman Ornstein, \textit{Opportunism Run Amok: Congress and The Schiavo Case}, N.Y. TIMES, Mar. 28, 2005. The Congressional Committees thereafter unsuccessfully sought to overturn that order, an effort that ended when the United States Supreme Court rejected a request to enjoin the lower court's rejection of the subpoenas. Comm. on Gov't Reform of the U. S. House of Representatives v. Schiavo, 125 S. Ct. 1622 (2005). The use of Congressional committee subpoenas is a complicated one deserving of study. It is, however, beyond the scope of this Article.

\textsuperscript{17} Pub. L. No. 109-3, 119 Stat. 15 (2005) (the full text is included as an appendix to this Article). I often refer to it in this Article as the "Act."

\textsuperscript{18} Pub. L. No. 109-3, § 1. I discuss the Act's terms in greater detail below. See infra Part I.


\textsuperscript{21} Schiavo \textit{ex rel.} Schindler v. Schiavo, 403 F.3d 1289 (11th Cir. 2005); Schiavo \textit{ex rel.} Schindler v. Schiavo, 403 F.3d 1223 (11th Cir. 2005).
refusals to grant en banc review at the circuit court level,\textsuperscript{22} and two denials of requests for a stay or other extraordinary relief by the United States Supreme Court.\textsuperscript{23} Amazingly, all of this activity occurred within the span of \textit{nine} days.\textsuperscript{24} No one involved in the struggle was satisfied with the result. Many saw the Act as unwarranted federal interference in a deeply personal matter. Thus, the process was seen as illegitimate from the start. For those in favor of the Congressional action, the dissatisfaction arose from the "failure" of the federal courts to "save" Terri Schiavo by ordering the reinsertion of the feeding tube. And underlying all of this activity were the profound constitutional questions going to the very heart of the American constitutional form of government the Act raised.\textsuperscript{25}

Before turning to those constitutional matters, it is important to recognize that the Act also clearly raises important questions of public policy. As a \textit{policy} matter, it seems fair to say that the Congressional interference in the Terri Schiavo situation was not only unprecedented but also unwarranted. After all, there had been over eight years of litigation in both state and federal courts concerning Ms. Schiavo's end-of-life wishes.\textsuperscript{26} One could be forgiven for believing that the national government had more pressing matters with which to deal in March 2005 than the end-of-life wishes of one person when there had already been such intense litigation. Moreover, the federal intervention appeared to be founded largely on a combination of political opportunism and political cowardice instead of rational policy determinations. The political opportunism came largely from those on the right of the political spectrum who seized on the issue as a means to divert attention from other unwelcome matters, such as grand jury

\textsuperscript{22} See Schiavo \textit{ex rel.} Schindler v. Schiavo, 404 F.3d 1270 (11th Cir. 2005) (in which Circuit Judges Carnes and Hull wrote a joint concurrence, Circuit Judge Birth submitted his own concurrence, and Circuit Judge Tjoflat wrote a dissent in which Circuit Judge Wilson concurred); \textit{Schiavo ex rel. Schindler}, 403 F.3d 1261 (11th Cir. 2005) (in which Circuits Judges Tjoflat and Wilson each submitted opinions dissenting from rehearing en banc).


\textsuperscript{24} The Act became law on March 21, 2005 and the last action by the Supreme Court was on March 30, 2005. \textit{See Schiavo \textit{ex rel. Schindler}}, 125 S. Ct. 1722.


\textsuperscript{26} \textit{See}, e.g., \textit{In re Guardianship of Schiavo}, 2005 Fla. App. LEXIS 3574, at *1 n.1 (Fla. Dist. Ct. App. Mar. 16, 2005) (listing reported decisions concerning Terri Schiavo in state and federal courts through the date of the opinion). In addition, Ms. Schiavo's situation received yet another full review through the investigation performed by guardian ad litem Jay Wolfson under the terms of the later invalidated Florida Terri's Law. \textit{See Wolfson Report, supra} note 5.
investigations, or to advance broader political goals, such as restrictions on abortion rights or assent to higher office.\textsuperscript{27} Political cowardice came largely from the left. Very few people were willing to take a stand against the political grandstanding, apparently fearing reprisals at the polls.\textsuperscript{28} The ultimate result was federal interference in a basic, personal decision, something that seems quite difficult to justify.\textsuperscript{29}

But the question of the \textit{constitutionality} of Congressional action concerning Terri Schiavo is a distinct matter.\textsuperscript{30} The potential constitutional difficul-

\textsuperscript{27} Similar sentiments were also evident in the media. \textit{See, e.g.,} Laura Parker \textit{et al.}, \textit{Does Congress Seek Due Process or Political Gain?}, \textit{USA TODAY}, Mar. 21, 2005, at 1A (“The activity in Congress reflects how the Schiavo case has become an emotional cause for anti-abortion conservatives who regard it as part of a broader effort to sustain life.”); \textit{A Nod for States’ Rights}, \textit{HERALD-SUN}, Mar. 22, 2005, at A8 (“We will reserve judgment on the morality of removing Terri’s feeding tube. But we will say that we find all the grandstanding by conservatives on this sensitive and deeply personal matter offensive. And the general silence by the majority of Democrats has been equally disappointing”); Ross K. Baker, \textit{Congress’ Actions Not Sustained by Constitution}, \textit{NEWSDAY}, Mar. 23, 2005 at A35 (“By succumbing to the hysteria over the Schiavo case that was fanned by Senate Majority Leader Bill Frist, in the interests of his presidential ambitions, and House Majority Leader Tom DeLay, in the interests of diverting public attention from his ethical lapses, both houses of Congress intruded into the sacredness of a family’s private grief.”); \textit{No Place for Politics in Right-to-Die Case}, \textit{S. CHINA MORNING POST}, Mar. 23, 2005, at 12 (“The case provides an opportunity for the Republicans to pander to religious conservatives – a strong source of support in last year’s presidential election.”).

\textsuperscript{28} Ironically, that political calculation seemed to misread the public’s mood. Polling showed that the overwhelming majority of Americans disapproved of Congressional interference in the Schiavo matter. \textit{See, e.g.}, PollingReport.com, http://pollingreport.com/news.htm (last visited May 19, 2005) (listing numerous polls in which all demographic components of the U.S. population surveyed opposed federal intervention in the Schiavo matter).

\textsuperscript{29} One could also rightly be critical of the manner in which Congress legislated. Congress convened on a Sunday in special session to pass the legislation. There were no hearings on the bill, which had only been introduced earlier that day. \textit{See “Bill Summary and Status”} for Public Law 109-03, http://thomas.loc.gov?cvi-bin/bdquery?z%d109:SN00686:@@X[TOM:hss/d109query.html (last visited May 24, 2005). Only three senators were present when the measure passed that body by voice vote on Sunday afternoon. \textit{See Gwyneth K. Shaw, Lawmakers Send Schiavo Case on to U.S. Court, BALT. SUN}, Mar. 21, 2005, at 1A. The House passed the bill in an extraordinary session lasting past midnight. \textit{See id.} And then the President signed the bill after “cut[ting] short a stay at his Texas ranch and rac[ing] back to the White House.” \textit{See William Neikirk, House Argues Schiavo Bill: In late-Night Session, Lawmakers Debate Intervention in Florida case, CHI. TRIB.}, Mar. 21, 2005, at 1. In short, the passage of Public Law 109-03 is not the way in which many citizens would hope or expect their government to form policy. \textit{See generally George J. Annas, “I Want to Live”: Medicine Betrayed in the Political Battle Over Terri Schiavo}, 35 \textit{STETSON L. REV.} (forthcoming 2005) (critically discussing passage of Public Law 109-03).

\textsuperscript{30} The lower federal courts assumed the Act was constitutional for purposes of the litigation Ms. Schiavo’s parents filed. \textit{See, e.g.,} Schiavo \textit{ex rel.} Schindler \textit{v.} Schiavo, 403 F.3d 1223, 1227 (11th Cir. 2005); Schiavo \textit{ex rel.} Schindler \textit{v.} Schiavo, 357 F. Supp. 2d, 1378, 1382-83 (M.D. Fla. 2005). \textit{But see} Schiavo \textit{ex rel.} Schindler \textit{v.} Schiavo, 404 F.3d 1270 (11th Cir. 2005), 2005 U.S. App. LEXIS 5073 at *2 (Birch, J., concurring in denial of rehearing en banc) (concluding that the Act is unconstitutional). I discuss the salient points of Judge Birch’s opinion below. \textit{See generally infra Part II.}
ties with the Act fall into three broad categories. First, the Act raises important questions concerning the power of the federal government versus that of the several states, a federalism-based objection. Second, the “procedures” the federal courts are to follow as set forth in Act raise a separation of powers concern regarding the proper allocation of authority between Congress and the federal judiciary. Finally, the Act raises concerns regarding the power of Congress concerning the individual liberties of the People. While I will mention individual liberties from time to time, the principal focus of this piece is the structural separation of powers and federalism-based objections.

As I discuss in depth below, while the answer to the structural constitutional queries is by no means clear, I ultimately conclude that what Congress did may have been unwise, but it was not unconstitutional. Indeed, Congressional action in the Schiavo saga, however misguided, ultimately serves as an example of how the American constitutional structure – involving state and national authorities and the coordinate branches of the federal government – can operate under the plan devised several hundred years ago. A review of this Congressional action ultimately yields four overarching lessons. First, the Constitution allows for wide-ranging oversight of state court decisionmaking, at least with respect to matters arising under the Constitution and other federal law. Second, Congress has broad authority under the Constitution with respect to the federal courts. That authority includes both the power to prescribe the courts’ jurisdiction as well as to control the manner of judicial decisionmaking. Third, while Congress has such broad authority concerning the federal courts, its power is not absolute. Congress may not intrude on the core function of the judiciary – to adjudicate cases – nor may it arrogate to itself such an adjudicatory role. And finally, taken in its totality, the Constitution provides a broad array of means by which Congress can legislate ranging from the purely substantive invocation of its Article I powers to the more subtle use of its powers in connection with Article III courts. That span of power yields many possibilities for Congressional action in areas far beyond Terri Schiavo.

The Article proceeds as follows. Part I lays out in some detail what Congress did (and by implication, did not do) in the Act. It is not possible to consider the constitutional issues seriously without this initial statutory work. Part II identifies, describes and ultimately rejects the potential federalism and separation of powers-based constitutional challenges to the Act. Part III pulls back from a consideration of the Act itself to discuss the broader lessons about the scope of federal power in our constitutional order that may be drawn from Congressional involvement in Terri Schiavo’s life and death. Finally, Part IV

31 I discuss the federal constitutional issues in detail below. See infra Part II.
32 I am not suggesting here that the Framers intended to have the system operate in a certain manner. Rather, I assert that they created a system in which it is permissible for Congress to have acted as it did in connection with Ms. Schiavo. See also infra note 124 (further discussing the Framers’ intent).
33 I discuss these lessons in more detail below. See infra Part III.
provides some concluding thoughts concerning the fragility of the American constitutional structure of government, even when it works as intended.

I. THE SUBSTANTIVE CONTOURS OF THE ACT

Congressional action in the Schiavo matter was widely reported and discussed in the media. That reporting included discussions of the Act’s constitutionality but it often was not tethered closely to the Act’s language. Instead, there were broad statements concerning the Act’s derogation of general principles of federalism, separation of powers, or individual rights. Such generalized criticism might be useful as a rhetorical matter, but it does little to deal with the weighty constitutional issues at play. This section of the Article reviews the Act’s text, as well as court decisions interpreting it, to establish its scope. Thereafter, Part II surveys and ultimately rejects the potential structural constitutional objections to the Act.

34 For example, a search of the LEXIS/NEXIS news database for Monday March 21, 2005 (the day on which the Act became law shortly after midnight) for stories containing the words “Schiavo” and “Congress” yields over 350 results.

35 See, e.g., *An Abuse of Federal Power*, CHATTANOOGA TIMES FREE PRESS, Mar. 22, 2005, at B6 (asserting that passage of the Act “goes against all principles of respect for states’ rights and an independent judiciary” and that “[i]t was an abuse of congressional power to direct further, federal review of” the Schiavo case); *Congress Oversteps: Schiavo Feeding-Tube Case Belongs Not in Capitol but in Florida Court*, NEWSDAY, Mar. 22, 2005, at A36 (“Our problem is not with lawmakers’ discomfort over the state court’s order, which would lead inexorably to Schiavo’s death, but with Congress’ outrageous leap over the boundaries that separate state powers from federal ones.”); *A Blow to the Rule of Law*, N.Y. TIMES, Mar. 22, 2005, at A22 (“The new law tramples on the principle that this is ‘a nation of laws, not of men,’ and it guts the power of the states. When the commotion over this one tragic woman is over, Congress and the president will have done real damage to the founders’ careful plan for American democracy.”); *Critical Condition; Schiavo Law Puts Constitution on Life Support*, THE RECORD, Mar. 22, 2005, at L14 (“The House and Senate worked feverishly over the weekend and the president cut short his vacation to create a law that violates fundamental principles of our government. It tramples on the separation between the legislative and judicial branches, and it ignores the limits on federal power to intrude in state matters.”). A similar approach was taken by several academic commentators. See, e.g., William Allen, *Erring Too Far on the Side of Life: Deja Vu All Over Again in the Schiavo Saga*, 35 STETSON L. REV. (forthcoming 2005) (describing the Act as “blatantly unconstitutional”); Lawrence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291, 299 (Spring 2005) [hereinafter *Treatise*] (characterizing the Act as pushing aside “deeply-settled rule-of-law, separation-of-powers, and federalism principles”).
The Act is a narrowly drawn piece of legislation. While it was certainly passed hurriedly, substantial thought appears to have gone into its drafting. At its core, the Act is a grant of subject matter jurisdiction to the federal courts as to certain issues “arising under” the Constitution or laws of the United States. Specifically, it grants jurisdiction with respect to claims “under the Constitution or laws of the United States related to the withholding or withdrawal of food, fluids, or medical treatment.” But the jurisdiction so granted is limited only to a suit brought by a parent of Terri Schiavo.

There are two critical things that the Act does not do. First, it does not create any substantive law. Any claim that might be filed would, therefore, be decided under preexisting doctrine and precedent. Second, the Act does not instruct the district court as to the ultimate outcome of any litigation Ms.

36 The Act was not the only piece of Congressional legislation considered in connection with the Schiavo drama. Some of that other legislation was sweeping in its potential application. For example, legislation was introduced in and passed by the House of Representatives that would have allowed the removal of any case from state to federal court in which any state court had ordered or allowed the withholding of nutrition, hydration or medical treatment from an incapacitated person. See The Protection of Incapacitated Persons Act of 2005, H.R. 1332, 109th Cong., (2005), available at http://thomas.loc.gov. Whatever else one might say about the Act, there is no doubt that H.R. 1332 would have had a far more dramatic effect on end-of-life issues in the United States, including but not limited to a potential reallocation of a great many end-of-life cases from the states to the federal court system.

37 The same cannot be said of some other proposed federal legislation. For example, Florida Senator Mel Martinez introduced a bill in the Senate entitled the Incapacitated Persons Legal Protection Act of 2005. See S. 539, 109th Cong. (2005), available at http://thomas.loc.gov. The basic thrust of this proposal would have amended the federal habeas corpus statute in such a way that Ms. Schiavo’s parents would have been able to seek such a writ in federal court on their daughter’s behalf. See S. 539 § 3. The parents had actually attempted to do so under existing law, but their case had been dismissed. See Schiavo ex rel. Schindler v. Greer, 2005 U.S. Dist. LEXIS 4182 (M.D. Fla. Mar. 18, 2005). Senator Martinez’s proposal, however, was not particularly well-considered. While it sought to amend the relevant federal statutes to allow the parents to bring a claim, it did nothing to alter the substantive law of habeas corpus. Id. And that law, enacted by many of the same Republican legislators now pushing federal action to “save” Terri Schiavo, greatly restricted the ability of the federal courts to grant the writ with respect to state court decisions. See 28 U.S.C. § 2254(d) (2000) (limiting authority of court to grant writ). See also Erwin Chemerinsky, FEDERAL JURISDICTION 872-73 (4th ed. Aspen 2003) (discussing limitations on federal habeas review of state court conviction brought about by the 1996 enactment of the Anti-terrorism and Effective Death Penalty Act); infra note 170 (discussing certain aspects of current habeas law). Needless to say, the situation is filled with irony.


40 Pub. L. No. 109-03, §§ 1-2. The jurisdiction is also limited in that any suit under the Act could only be brought in the United States District Court for the Middle District of Florida. Pub. L. No. 109-03, § 1.

Schiavo’s parents should file.\textsuperscript{42} Indeed, the Act expressly states that the jurisdiction conferred on the district court is “to hear, determine, and render judgment” of a proper claim.\textsuperscript{43} Thus, the Act is best read to leave to the judiciary the power to “say what the law is” by applying existing law to Terri Schiavo’s situation.\textsuperscript{44}

But the Act certainly does dictate some important things about the manner in which the district court is to resolve any claim. First, the Act eliminates certain threshold barriers that \textit{might} have prevented Ms. Schiavo’s parents from proceeding with any litigation under the Act, even with its jurisdictional grant. Specifically, it expressly: (1) purports to grant “standing” to Ms. Schiavo’s parents to bring a claim; (2) instructs the district court not to abstain from deciding any case that the parents might bring, and (3) relieves the parents of any obligation that might have existed to exhaust state court remedies.\textsuperscript{45} In addition, through its express grant of jurisdiction, the Act implicitly repeals the so-called \textit{Rooker/Feldman} doctrine for any action the parents brought, which might otherwise have prohibited a federal district court from considering the merits of such a claim because it would be the functional equivalent of an appeal of a state court judgment.\textsuperscript{46}

Second, Section 2 instructs the district court as to the impact of prior state court proceedings concerning Terri Schiavo:

In such a suit, the District Court shall determine de novo any claim of a violation of any right of Theresa Marie Schiavo within the scope of this Act, notwithstanding any prior State court determination and regardless of whether such a claim has previously been raised, considered, or decided in State court proceedings.\textsuperscript{47}

\textsuperscript{42} Even one of the Act’s principal supporters, Senate Majority Leader Frist, acknowledged this point quite clearly. He said unequivocally that “[t]he bill guarantees a process to help Terri but does not guarantee a particular outcome.” 151 CONG. REC. S3099, 3101 (daily ed. Mar. 20, 2005). To be sure, Senator Frist also made clear that he “would expect that a Federal judge would grant the stay.” \textit{Id}. But those expectations were not the law.

\textsuperscript{43} Pub. L. No. 109-03, \S\ 1.

\textsuperscript{44} \textit{See} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

\textsuperscript{45} Pub. L. No. 109-03, \S\ 2.

\textsuperscript{46} I discuss the \textit{Rooker/Feldman} doctrine below. \textit{See infra} Part II.C.2.c. Ms. Schiavo’s parents had filed previous suits in federal court that had been dismissed pursuant to the doctrine. \textit{See}, e.g., Schiavo \textit{ex rel}. Schindler v. Greer, 2005 U.S. Dist. LEXIS 4182 (Mar. 18, 2005). I discuss the potential implication of these dismissals under the Act below. \textit{See infra} Part II.B.3 and Part II.C.2.d.

\textsuperscript{47} Pub. L. No. 109-03, \S\ 2.
At a minimum, this language eliminates principles of claim and issue preclusion as barriers to the parents’ suit.\textsuperscript{48} The question is what more the Act’s reference to “de novo” review might imply.

In the litigation actually filed, one judge in dissent argued that the reference to “de novo” review required the district court to hold an evidentiary hearing. Thus, the argument continued, the district court’s refusal to grant an injunction requiring the reinsertion of the feeding tube without such a hearing was legal error.\textsuperscript{49} The majority of the Eleventh Circuit panel rejected this reading of the statutory language. It held first that the Act did not alter the traditional standards for granting injunctive relief.\textsuperscript{50} Accordingly, the parents needed to establish, among other things, that they had a likelihood of succeeding on the merits of their claims.\textsuperscript{51} Because the parents had not done so, they were not entitled to any relief regardless of the Act’s “de novo” language.\textsuperscript{52}

\textsuperscript{48} \textit{Id.} Issues of claim and issue preclusion in federal court are generally governed by 28 U.S.C. § 1738, which is implicitly repealed as to jurisdiction granted under the Act. I discuss issues concerning claim and issue preclusion in greater detail below. \textit{See infra} Part II.C.2.d.

\textsuperscript{49} \textit{See} Schiavo \textit{ex rel.} Schindler v. Schiavo, 403 F.3d 1223, 1239 (11th Cir. 2005) (Wilson, J., dissenting).

\textsuperscript{50} \textit{Id.} at 1225 n.1, 1226-27; \textit{see also} Schiavo \textit{ex rel.} Schindler v. Schiavo, 357 F. Supp. 2d 1378, 1383 n.2 (M.D. Fla. 2005) (reaching same conclusion). The panel majority put great emphasis on legislative history indicating that Congress did not intend the Act to include a direction that the state court order be stayed pending the resolution of any federal litigation. \textit{Schiavo ex rel. Schindler}, 403 F.3d at 1227-28. Several members of Congress later filed a brief with the Supreme Court arguing that the lower courts had thwarted Congressional intent. \textit{See}, e.g., Abby Goodnough, \textit{Supreme Court Refuses to Hear the Schiavo Case}, \textit{N.Y. Times}, Mar. 25, 2005, at A1. The Eleventh Circuit’s holding is also be supported by two other arguments. First, there are additional comments by the Senate Majority Leader in which he stated his understanding that “[d]e novo review means the judge must look at the case anew. The judge need not rely on or defer to the decision of previous judges.” 151 \textit{CONG. REC.} S3099, 3103 (daily ed. Mar. 20, 2005). At the very least this statement is a far cry from the position that the lower federal courts had ignored the will of Congress. Second, Section 3 of the Act concerns “Relief” and specifically mentions injunctions. \textit{See} Pub. L. No. 109-03, § 3. However, nowhere in that section or elsewhere does Congress instruct a court to use something other than existing law concerning the availability of equitable relief. \textit{Id.}

\textsuperscript{51} \textit{Schiavo ex. rel. Schindler}, 403 F.3d at 1226.

\textsuperscript{52} \textit{Id.} It is also worth noting that the various opinions reaching this conclusion are skewed due, in large part, to the parents’ litigation strategy. The parents’ original complaint in federal court was based primarily on claims that Terri Schiavo’s procedural due process rights had been violated as a result of the manner in which the various state court litigations had proceeded. \textit{See} Schiavo \textit{ex rel. Schindler}, 357 F. Supp. 2d at 1383-84 (describing parents’ claims). As the district court noted, because the parents elected to base their claims on the state court proceedings, they essentially asked the court to consider what the state court had done. \textit{See id.} The parents eventually filed amended complaints asserting claims including those based on substantive due process. \textit{See} Schiavo \textit{ex rel. Schindler} v. Schiavo, 358 F. Supp. 2d 1161, 1166-68 (M.D. Fla. 2005). By this time, however, the basic interpretation of the statute had been established and was binding on both the district and circuit courts under the law of the case doctrine. \textit{See} Schiavo \textit{ex rel. Schindler} v. Schiavo, 403 F.3d 1261,1291-92 (M.D. Fla. 2005).
In sum, then, and assuming the Eleventh Circuit was correct – as I will do, Congress used the Act to create a federal forum for Terri Schiavo’s parents to litigate (and even re-litigate) any federal constitutional or statutory issues raised by the order to withdraw their daughter’s feeding tube. The Act did not dictate any particular result in such litigation, either as to the ultimate constitutional and statutory questions or the preliminary procedural issues concerning injunctive relief. Finally, Congress specifically relaxed certain procedural rules that could have precluded a federal court from reaching the merits of any lawsuit the parents filed. With this understanding of what the Act did, the next section of this Article provides a survey of potential structural constitutional issues the legislation raises.

II. A STRUCTURAL CONSTITUTIONAL ANALYSIS OF THE ACT

This part of the Article catalogues the major constitutional issues under the Act concerning, broadly speaking, separation of powers and federalism. There are also potential constitutional objections to the Act focused more on individual liberty concerns. While my discussion will touch on some of these issues as they relate to the separation of powers and federalism concerns, most of them are beyond the scope of this Article.

For discussion purposes, I have divided the federalism and separation of powers concerns into four discrete topics. I first discuss the argument that the Act founders as an inappropriate application of federal power against the sovereignty of the states. Second, I address the related, but distinct concern that the Act is unconstitutional as an attempt by Congress to reverse a final court judgment. Thereafter, I consider whether Congress’s detailed directions as to the manner in which a federal court was to resolve any challenge by Ms. Schiavo’s

53 As I mention below, in addition to the fact that the analysis is persuasive, there is another reason for accepting the Eleventh Circuit’s interpretation. Court’s are loath to interpret a statute in such a way as to raise a constitutional infirmity, which would have been present under an alternate interpretation of the Act. See infra note 146.

54 Because the court concluded – and I accept – that the Act did not purport to alter the standards by which injunctive relief is granted, this Article does not address the scope of Congressional authority to do so.

55 For example, one could argue that the Act infringed Ms. Schiavo’s right to refuse medical treatment. But that argument could face serious obstacles not the least of which is that the Supreme Court has been remarkably coy in explaining if such a right is protected by the Constitution. See, e.g., Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261, 279 (1990) (describing the right in conditional terms); see also Michael P. Allen, Threshold of Life and Death, supra note 3, at 981-87 (discussing in detail the Supreme Court’s position concerning the status of a constitutional right to refuse medical treatment). Moreover, even if such a right does exist, there is no guarantee that it was infringed in this case, at least not as a result of Congressional action. These statements are not meant to refute an argument that there was a violation of Ms. Schiavo’s federal constitutional rights, but rather to suggest that the issue is by no means clear.

56 See infra Part II.A.

57 See infra Part II.B.
parents renders the Act unconstitutional.\textsuperscript{58} Finally, I analyze whether Congress’s focus on only Ms. Schiavo’s situation is constitutionally problematic.\textsuperscript{59} As I will explain, none of these issues – alone or in combination – renders the Act unconstitutional. Nevertheless, a consideration of these matters leads to a number of conclusions about Congressional power concerning both the states and the federal courts. It is to those matters I turn in Part III.

A. A Potential Intrusion on State Sovereignty

An often-voiced objection to the Act was that Congress had crossed a constitutional line separating national power from that of the states by allowing federal court review of the Schiavo matter.\textsuperscript{60} This “federalism” based objection certainly has some facial appeal. By the time Congress acted there had been years of state court litigation concerning Terri Schiavo in which numerous state judges had made factual findings and legal conclusions.\textsuperscript{61} Based on these court rulings, a judicial order had been enforced after all the then-proper appeals had been exhausted. It seems intuitively suspect that after all of this activity, Congress could provide for federal court review of what had transpired in the Florida state court system. Such an intuitive judgment about the federal-state balance, however, is not supported by constitutional text, precedent, or even good “constitutional policy.”

Far from showing an unconstitutional exercise of authority, what the Schiavo legislation illustrates is one of Congress’s most significant, but often overlooked, powers: the ability to grant jurisdiction to the federal courts. Among other things, Article III of the Constitution vests the “judicial Power of the United States”\textsuperscript{62} in the Judicial Department and describes the jurisdiction of the federal courts.\textsuperscript{63} The Supreme Court has consistently held that, under Article III, the lower federal courts “are ‘courts of limited jurisdiction. They pos-

\textsuperscript{58} See infra Part II.C.

\textsuperscript{59} See infra Part II.D.

\textsuperscript{60} This point was asserted as a reason not to pass the Act during Congressional debates. See, e.g., 151 CONG. REC. S3099, 3100 (daily ed. Mar. 20, 2005) (Statement of Senator Warner: Quoting the Tenth Amendment and stating that “[i]t is a principle of Federalism which, I believe, is not being followed by Congress in enacting this legislation.”). It was also widely present in media statements concerning the Act. See, e.g., supra note 27 (cataloguing reaction in the media to passage of the Act). Moreover, certain academic commentators have also mentioned federalism-based concerns regarding the Act. See, e.g., Allen, supra note 35; Treatise, supra note 35, at 299.

\textsuperscript{61} See, e.g., In re Guardianship of Schiavo, 2005 Fla. App. LEXIS 3574 at *1 n.1 (Fla. Dist Ct. App. Mar. 16, 2005) (listing reported decisions concerning Terri Schiavo in state (and federal) courts through the date of the opinion).

\textsuperscript{62} U.S. CONST. art III, § 1. The content of the “judicial Power” is not defined expressly in the Constitution. I discuss the appropriate meaning of this phrase and its importance in the Schiavo matter below. See infra Parts II.B.1 and II.C.1.

\textsuperscript{63} U.S. CONST. art III, § 2.
sess only that power authorized by Constitution and statute." Thus, Article III sets the limits of potential federal jurisdiction, with actual jurisdiction within those bounds brought to life via Congressional statutes.

There is a lively and long-running academic debate concerning the extent of Congress’s power to control the jurisdiction of the federal courts. With respect to the "inferior" federal courts, most of the debate centers on the extent to which Congress may constitutionally restrict that jurisdiction. Thus, the


65 See generally Chemerinsky, supra note 37, at § 5.1, 260-61 (describing interplay of constitutional and statutory provisions).


67 A largely distinct issue concerns Congressional power to control the jurisdiction of the Supreme Court. See generally HART & WECHSLER, supra note 66, at 337-342 (providing an overview of the matter). The Act does not raise this issue and I do not address it in this Article.

68 See supra note 66 (collecting representative commentary).
issue is usually debated in the context of whether Congress may preclude the litigation of certain claims in a federal district court without violating the separation of powers principles at the heart of the constitutional structure. As the sheer breadth of the academic controversy over this matter suggests, the answer to the proper scope of Congressional authority in this regard is by no means clear.

The Schiavo legislation does not raise the jurisdiction-restriction issue with all its complex jurisprudential questions. Instead, it implicates the less discussed, but no less important, question of Congress’s power to bestow jurisdiction affirmatively. This constitutional question bears on federalism. The Act would be unconstitutional with respect to the granting of jurisdiction itself only if there were some constitutional limitation on Congress’s authority to do so. That power is textually restricted only by the definition of the upper limit of the jurisdiction of the judicial department under Article III, Section 2.

The federalism-based objection to the Act appears to be based primarily, if not exclusively, on a belief that there is an objectively correct allocation of judicial authority under the Constitution between state and federal courts that transcends the specific text of Article III. This view is incorrect; the Constitution creates no such allocation. Instead, within the confines of Article III, Section 2, the “proper” allocation of judicial authority in our federal system is left to the discretion of Congress. It is essentially a political judgment.

Not only is the federalism-based objection to the Act bereft of support in the Constitution’s text (or Supreme Court precedent), it is also not a matter of good “constitutional policy.” If one were to take the federalism objection seri-

69 See, e.g., id. There are exceptions to this general observation, but they are few and far between. See, e.g., Friedman, supra note 66, at 4-8 (discussing the connections between Congressional restriction and conferal of jurisdiction); Judith Resnik, The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations, 86 Geo. L. J. 2589, 2593-96, 2613-27 (1998) (discussing issues related to Congressional conferal of subject matter jurisdiction in the federal courts).

70 I do not consider here whether some other basis exists for Congressional action in the Schiavo matter such as one of its Article I powers or authority under Section 5 of the Fourteenth Amendment. While arguments could be made for power under either or both of these parts of the Constitution, the Act is best read as an implementation of Congressional power to control the jurisdiction of the federal courts.

71 I consider below whether the Act’s focus on a single case alters the analysis. See infra Part II.D. This part considers jurisdictional grants more generally.

72 U.S. CONST. art III, § 2, cl. 1. The Court has long taken this position. See, e.g., Mayor of Nashville v. Cooper, 73 U.S. 247, 251-52 (1867); Sheldon v. Sill, 49 U.S. 441, 448-49 (1850); Turner v. Bank of North America, 4 U.S. 8, 9 (1799) (opinion of Chase, J.). There are academic debates concerning the meaning of the jurisdictional grant in Article III. See supra note 66 (collecting various academic writings on the scope of Article III’s jurisdictional provisions). It is not necessary to take a position concerning these debates in connection with the Act. Under any reading of the clear text of Article III, Congress at a minimum has the authority to bestow jurisdiction on the inferior federal courts so long as that jurisdictional grant comes within the ambit of the terms of Section 2.
ously, it would mean that Congress was precluded from providing any federal review of federal constitutional or statutory issues (beyond the Supreme Court) if those issues were adjudicated originally in a state court. Such a rule could have dramatic consequences. First, it would limit the ability of the federal legislature to act to protect federal rights. One need not take a position on whether the state or federal courts are objectively “better” at protecting such rights in order to assert that Congress should at a minimum have the ability to conclude for itself that federal courts should play a role in the interpretation of federal rights.

Second, it is well-established that Congress may create exclusive federal jurisdiction for certain matters. In such situations state courts are entirely foreclosed from engaging in the adjudicatory process. It would seem odd if, consistent with principles of federalism, Congress could totally divest the states from acting but could not take the relatively less-intrusive step of providing for federal review (either by direct appeal or collaterally) of state action. If there is a silent federalism restriction in Article III, one would not expect it to work in this way.

Third, the hypothesized federalism restriction would seriously undermine the authority of Congress to provide federal habeas corpus review of state court criminal convictions. Such relief is currently available and has been for quite some time. There are certainly differences between the Terri Schiavo

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73 There is much discussion in the academic literature termed the “parity debate” concerning whether the state or federal courts are better at protecting federal rights. See Hart & Wechsler, supra note 66, at 322-25 (providing an overview of the parity debate).

74 Exactly how this argument might play out for those aspects of federal jurisdiction that go beyond pure federal rights guaranteed by the Constitution or federal statutes is more complicated. For example, would Congress have the ability to provide for federal review of state court decisions if the requirements of diversity of citizenship in Article III, Section 2 were satisfied? This question goes beyond the scope of this Article and so I will not attempt to address it here. However, much of the logic counseling in favor of a broad power of Congress to allocate jurisdiction within the confines of Article III supports an affirmative answer to the question.


76 One might argue that the review situation is actually more problematic as a matter of federalism because the state courts could in some manner be “offended” by federal oversight of their actions in a way that would not apply when state courts have never acted. Such an argument, however, does not square well with precedent. The Court essentially rejected it in 1816 when it upheld its own ability to review a state supreme court judgment for constitutional error. See Martin v. Hunter’s Lessee, 14 U.S. 304 (1816). Moreover, even if one assumes that state courts have such “feelings,” I am not sure that being totally foreclosed from an entire area of the law would, in fact, be less offensive.

77 See 28 U.S.C. § 2254(a) (2000); see also Chemerinsky, supra note 37, at § 15.2 (setting for a “brief history of habeas corpus in the United States”). I discuss the current status of habeas law below. See infra note 167.
situation and the circumstances of persons convicted of crimes by state courts. Nonetheless, it is difficult to see how any of those differences are useful in drawing a constitutionally mandated line between appropriate and inappropriate federal oversight. There might be policy reasons for drawing that line, but, as discussed above, that would be a question committed to Congress.

In sum, the framers and ratifiers of the Constitution essentially set the limits to which Congress could "intrude on" state judicial decision-making through the specification of the potential jurisdictional limit of the federal courts. The Act comfortably fits within those limits. Congress had the authority under the Constitution to provide for federal jurisdiction in the Schiavo matter so long as doing so was consistent with Article III. It was, and federalism-based arguments against the Act should be rejected.78

B. Attempted Reversal of a Final Court Decision

The second potential constitutional objection to the Act is that it is an attempt by Congress to reverse the final judgment of a court. Lawyers opposing Ms. Schiavo's parents' lawsuit made this point vigorously79 as have certain academic commentators.80 It was also raised as a ground for opposition the legislation in Congress.81 Once again, despite its surface appeal, this objection lacks merit.

I assume that had Congress actually dictated the substantive result in any litigation the Act would be unconstitutional.82 As described above, the Act

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78 The Act restricts jurisdiction to "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 life." Pub. L. No. 109-03, § 1. This section of the Act comes within the Article III grant of power concerning matters "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. CONST. art III, § 2.

79 See, e.g., Opposition to Motion for Injunction at 19, filed in Schiavo ex rel Schindler v. Schiavo, Civ. Act. No. 8:05-CV-530-T-27TBM (M. D. Fla.) (March 21, 2005), available at http://www.miami.edu/ethics2/Schiavo/032105-%20fed%20dist%20oct.%20response.pdf ("The statute also directly violates core notions of separation of powers and federalism by effectively suspending a final court judgment that adjudicated Mrs. Schiavo's state and federal constitutional rights.").

80 See, e.g., Dorf, supra note 25 (noting that "[p]erhaps [the Act] ran afoot of the constitutional doctrine forbidding Congress from changing the outcome in a litigated case in which there has been a final judgment."); Hudson, supra note 25 (quoting Professor Chemerinsky as saying: "This is Congress attempting to determine the outcome of a specific case.").

81 See, e.g., 151 CONG. REC. H1700, 1710 (daily ed. Mar. 20, 2005) (Statement of Representative Davis including the comment that: "This Congress is on the verge of telling States and judges and juries that their laws, their decisions do not matter.").

82 See United States v. Klein, 80 U.S. 128, 146-47 (1872). In fact, Klein may not be so well-defined. The modern day Supreme Court has been remarkably unwilling to define Klein's actual holding, stating repeatedly that the "precise scope" of Klein is not clear. See, e.g., Miller v. French, 530 U.S. 327, 348-49 (2000); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995); Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 436, 441 (1992). The Court has indicated that https://researchrepository.wvu.edu/wvlr/vol108/iss2/4
was interpreted not to do so and this Article proceeds on that basis. But even if that is the case, the Act could still be unconstitutional if it seeks to overturn a judicial determination after it had become final. This argument potentially operates on two separate constitutional axes in Ms. Schiavo’s case because there are two court systems implicated by Congress’s action. First, there is yet another federalism concern because the Act could be seen to reverse (or at least affect) the judgment entered in the Florida State court system. Second, there is also a potential separation of powers issues because, while less discussed, there were also two federal court cases filed by Ms. Schiavo’s parents before the Act became law. The Act raises distinct issues with respect to each of these two court systems. I address them separately below. Before doing so, this Part first sets out the basic law on which critics of the Act rely when making constitutional arguments based on the reopening and/or reversal of a final court decision.

1. Reopening Final Judgments of the Judiciary: The Basic Law

In 1991, the Supreme Court held that “litigation instituted pursuant to [certain federal securities laws for which there was exclusive federal jurisdiction] . . . must be commenced within one year after the discovery of the facts

Congress may constitutionally dictate the “rule of decision” in a case if Congress amends substantive law while the case is pending on direct appeal. See, e.g., Plaut, 514 U.S. at 218 (noting that Klein “refused to give effect to a statute that was said to prescribe rules of decision to the Judicial Department of the government in cases pending before it. Whatever the precise scope of Klein, however, later decisions have made clear that its prohibition does not take hold when Congress amends applicable law.”) (internal quotation marks and citations omitted). Klein’s opacity is only reinforced by considering much academic commentary on the decision, an exercise that yields numerous “meanings” of the decision. See, e.g., 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, 815-23 (1998) (arguing, in essence that Klein is best understood as making the same point, less clearly, than Marbury does); Martin H. Redish, Federal Judicial Independence: Constitutional and Political Perspectives, 46 MERCER L. REV. 697, 718-21 (1995) [hereinafter Judicial Independence] (attempting to reconcile Klein and later cases); Lawrence G. Sager, Klein’s First Principle: A Proposed Solution, 86 GEO. L.J. 2525, 2528-29 (1998) (arguing that Klein stands for the proposition that Congress cannot force a federal court “to speak and act against its own best judgment on matters within its competence which have great consequence for our political community”); Gordon G. Young, Congressional Regulation of Federal Courts’ Jurisdiction and Processes: United States v. Klein Revisited, 1981 WIS. L. REV. 1189, 1260 (“The particular holding in Klein prohibits Congress from using its jurisdictional powers to manipulate federal courts so as to reach decisions which, if addressed in terms of substantive law, would be forbidden by the Constitution.”).

Eleventh Circuit Judge Birch has undertaken the most sustained attack on the constitutionality of the Act. See Schiavo ex rel. Schindler v. Schiavo, 404 F.3d 1270, 1272-76 (11th Cir. 2005) (Birch J., concurring in denial of rehearing en banc). In that indictment, Judge Birch relies on Klein by arguing that the rule from that case renders the Act unconstitutional because the detailed procedures specified in Section 2 of the Act essentially prescribe the equivalent of a “rule of decision.” Intel. at 1274-76. I discuss, and reject, this argument below. See infra Part II.C.2.
constituting the violation and within three years after such violation." Pursuant to that decision, the federal courts dismissed as untimely lawsuits not commenced within this period. Congress was displeased with the Court's decision and took steps to provide for a longer statute of limitations. In addition to applying to all suits in which judgment had not yet become final, Congress also sought to have its longer statute of limitations apply to cases that had been dismissed under the Court's ruling and for which those dismissals had become final judgments with all avenues of appeal exhausted. It did so by purporting to allow litigants who had been thrown out of court to reopen their cases and proceed under the new time limitation.

In Plaut v. Spendthrift Farm, Inc., the Supreme Court considered whether Congress's action allowing the reopening of these dismissed cases was permissible under the Constitution. The Court held that it was not. The Court eschewed reliance on due process principles and instead confined its discussion to the constitutional separation of powers. The Court reasoned that Congress's actions had "exceeded its authority by requiring the federal courts to exercise 'the judicial Power of the United States,' . . . in a manner repugnant to the text, structure, and traditions of Article III." Several points from Plaut are useful when considering the Act. First, on its terms, Plaut is confined to the relationship between Congress and Article III courts. Thus, to the extent one uses the decision to address Congressional power with respect to state courts, one must do so by extension or analogy.

Second, the Court's focus is essentially on the meaning of the undefined phrase the "judicial Power of the United States." It is the "judicial Power" that the Constitution vests in the federal judiciary. And the Court identified two central ingredients of the power: (1) "the Federal Judiciary [has] the power, not merely to rule on cases, but to decide them," and (2) the decisions of Article

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86 Id. at 214-15.
88 Id.
90 Id. at 218-40.
91 Id. at 217.
92 Id. at 217-18 (internal citation omitted).
93 Id.
94 See U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). The content of the "judicial Power" that is vested in the judicial department is a matter of dispute. I discuss this issue in more detail below when considering the extent of Congressional authority to prescribe the manner of judicial decisionmaking. See also infra Part II.C.1.
95 Plaut, 514 U.S. at 218-19.

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III courts are "subject to review only by superior courts in the Article III hierarchy . . . ." 96

Third, and related, the Court was concerned with protecting the finality of judicial decisions, not for the sake of the parties (although the due process issue could come into play here) but rather out of concern for the roles of the respective branches of the federal government. 97 To the Court, allowing Congress to reverse a final determination of the Article III judiciary would violate the constitutional separation of powers because it would intrude on the exercise of a coordinate branch of government of its constitutionally bestowed authority. 98

Finally, the Court attempted to distinguish final judgments involving money judgments from those mandating prospective injunctive relief. 99 As the Court explained in a later decision "We emphasized [in Plaut] that 'nothing in our holding today calls . . . into question' Congress' authority to alter the prospective effect of previously entered injunctions. Prospective relief under a

96 Id. This point concerning appellate review is usually attributed to Hayburn's Case, 2 U.S. 409 (1792), which the modern Court has described as "stand[ing] for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." Plaut, 514 U.S. at 218.

97 Plaut, 514 U.S. at 227. The Court recognized that the legislature could affect the outcome of a case by amending the applicable law so long as all direct appeals had not been exhausted. Id. at 226-27 ("It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must 'decide according to existing laws.'" (quoting United States v. Schooner Peggy, 5 U.S. 103, 109 (1801)). But after those appeals were complete, the judicial branch had finally spoken and legislative power was no longer effective. Id. at 227 ("Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was.") (emphasis in original).

98 A similar violation occurs when instead of inhibiting another branch in the exercise of its constitutional authority Congress takes that authority upon itself. I discuss this issue below in connection with the Act's singular focus on Terri Schiavo. See infra Part II.D. While not entirely equivalent, these two ways of viewing the issue (i.e., Congress impeding the judiciary in its function and Congress acting like the judiciary) are similar to the functionalist and formalist conceptions of separation of powers. In simplistic terms, the formalist conception finds a constitutional violation when one branch of government acts outside its constitutional boundaries whether or not such action intrudes on the functions of another branch. See Judicial Independence, supra note 82, at 709-11 (discussing formalism). The functionalist approach identifies a violation when a branch unduly interferes with another branch's core function whether or not that first branch is acting within its constitutional boundaries. Id. at 711-12 (discussing functionalism). The Court has been inconsistent in its articulation of the "proper" view of this question. At times it has used a formalist approach. See, e.g., Bowsher v. Synar, 478 U.S. 714 (1986). At others, it has adopted a more functionalist attitude. See, e.g., Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986). In my estimation, the formalist and functionalist conceptions are simply two means by which there can be a violation of the constitutional guarantee of separation of powers. Accordingly, I proceed on that assumption for the balance of this Article.

99 Plaut, 514 U.S. at 232-33.
continuing, executory decree remains subject to alteration due to changes in the underlying law.  
Having set forth the basic rules governing Congressional power to order the reopening of judicial decisions, this Part now turns to an application of those principles to the Act. I first consider the impact of the Act on Florida state court decisionmaking. Thereafter, I turn to its impact on certain federal court decisions.

2. The Act and Florida State Court Decisions

The most obvious application of the Act is with respect to the numerous decisions of the Florida state courts concerning Terri Schiavo’s end-of-life wishes. Indeed, Section 2 specifically refers to the state court proceedings six times. Thus, one must confront the argument that Congress has overstepped some constitutional boundary by allowing review of those state court proceedings in federal court. As discussed above, there is no credible federalism-based objection to Congressional power to bestow jurisdiction on the federal courts. As discussed below, there is similarly no constitutional defect in the Act based on improper Congressional interference with a state court in particular.

A direct appeal to *Plaut* as controlling precedent is not helpful in attacking the Act. As described above, that case dealt with Article III courts and separation of powers concerns. But there remains the question whether the underlying principles of *Plaut* should apply with respect to a Congressional action vis-à-vis a state court. They should not.

The central focus of *Plaut* was the relationship between the coordinate legislative and judicial branches of the federal government. The Court’s concern in striking down Congressional action in that case was that Congress was altering the power balance between the branches in a manner that was inconsistent with the constitutional design. As such, too much power was potentially

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102 I am assuming for purposes of this discussion that the state court judgment at issue is a "final judgment" for purposes of *Plaut*. That point is not necessarily correct. It is true that the Florida Supreme Court has held that the order directing the withdrawal of Ms. Schiavo's feeding tube, even though executory, was a final judgment. See *Bush* v. Schiavo, 885 So. 2d 321, 329-32 (Fla. 2004). But there is no guarantee that a federal court would be bound by such a finding. Cf. *Castle Rock v. Gonzales*, 2005 U.S. LEXIS 5214 at *15-*16 (June 27, 2005) (discussing the fact that a state law determination that something is a property interest will not bind the Supreme Court when determining whether such a property interest rises to the level that it is protected by the Due Process Clause).
103 See *supra* Part II.A.
104 See *supra* Part II.B.1.
105 See, e.g., *Plaut*, 514 U.S. at 218-19.
being concentrated in a single branch of government, something that the Framers feared would erode individual liberty.106

The relationship between the national government and those of the states in our federal system is also a complex one. However, it does not operate on the same level as the one between and among the branches of the federal government. It is hackneyed but accurate to describe the power of the national government in our constitutional system as limited when compared to the power held by the states. Yet, in those situations in which the national government has been granted power under the Constitution, it is supreme.107 One such area of supremacy is the exercise of the "judicial Power of the United States" in those matters within the scope of Article III of the Constitution. The federal judiciary may exercise the "judicial Power" only with respect to the nine categories of actions set forth in Article III.108 But within those categories, a judgment is reflected in the Constitution itself that federal authority may "intrude" on that of the several states. Thus, unlike the concern in the separation of powers context regarding the preservation of the spheres of authority of the respective branches of the federal government, the constitutional text moots a similar worry in terms of the national/state balance of authority with respect to the specifically defined potential scope of federal subject matter jurisdiction.

This same constitutional reality makes the Plaut Court's subsidiary reasoning inapplicable. The concern expressed in that case for the finality of

106 See, e.g., THE FEDERALIST NO. 47, at 249 (James Madison) (George W. Carey & James McClellan eds., 2001) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."); see also Clinton v. New York, 524 U.S. 417, 449-50 (1998) (Kennedy, J., concurring) (discussing impact of separating government power on liberty); Myers v. United States, 272 U.S. 52, 293 (1926) (Holmes J., dissenting) ("The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."); Bruce G. Peabody & John D. Nugent, Toward a Unifying Theory of the Separation of Powers, 53 AM. U. L. REV. 1, 12 (2003) (describing that in the scholarly community "the dominant view holds that these institutional divisions [separating government power] were intended to serve the 'negative' purpose of creating multiple and mutual checks to avoid the tyrannical accumulations of power."); Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory, 41 DUKE L.J. 449, 451 (1991) ("By simultaneously dividing power among the three branches and institutionalizing methods that allow each branch to check the others, the Constitution reduces the likelihood that one faction or interest group that has managed to obtain control of one branch will be able to implement its political agenda in contravention of the wishes of the people.").

107 See, e.g., U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

108 U.S. CONST. art. III, § 2, cl. 1. See also supra Part II.A (discussing limited nature of potential federal subject matter jurisdiction).
judgments and the protection of Article III decisionmaking from non-Article III entities simply does not fit within the structure of the Constitution. Under that structure, Congress may constitutionally authorize a reopening of the state court judgments for the purpose of allowing federal review of matters within Article III because doing so implements the constitutional design, not subverts it.  

In the final analysis, Plaut's rationale simply does not apply in the context of Congressional authorization of the re-opening of state court decisions. As such, the Act does not run afoul of Plaut or any similar principle of constitutional law.

3. The Act and Federal Court Decisions

The Plaut issue is a bit more complicated because, in addition to the state court decisions, there were also two federal court cases that Ms. Schiavo's parents had brought in the United States District Court for the Middle District of Florida before the Act became law. Both of these cases sought injunctive

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109 As mentioned above, federal habeas corpus concerning state court convictions is the prototypical implementation of this constitutional design. See supra Part II.A. There is no readily apparent constitutional reason, however, that it is or should be limited to that context. I return briefly to this suggestion below. See infra Part III.D.

110 There is still the possibility held out in Plaut that due process principles could act as an independent check on Congressional reopening of final court judgments. See Plaut, 514 U.S. at 217 (declining to address the due process issue). I believe that there are situations in which Congressional exercise of its powers concerning federal court jurisdiction could run afoul of constitutional liberty guarantees. An exploration of the contours of this issue, however, is largely beyond the scope of this Article, although I do make a brief reference to these points below. See infra Part III.C. Other commentators have suggested possible individual liberty checks on Congressional power in this area, usually focused on limits imposed on federal court jurisdiction. See, e.g., Gerhardt, supra note 66, at 348; Gunther, supra note 66, at 916-22; Hart, supra note 66, at 1372-73; Same-Sex Marriage, supra note 66, at 368-69; New Synthesis, supra note 66, at 76-81; Rotunda, supra note 66, at 851-54; Forward, supra note 66, at 78-80; Disfavored Rights, supra note 66, at 139-46.

111 If one concluded that Plaut did apply, Congress could not take refuge in Plaut's assurance that the case did not affect Congress's power to alter the prospective effect of equitable relief. See supra Part II.B.1. The Plaut Court was referring to situations in which an injunction or other equitable relief was premised on certain principles of substantive law that had now been changed. See, e.g., Miller v. French, 530 U.S. 327, 346-50 (2000) (discussing the principle in connection with certain provisions of the Prison Litigation Reform Act of 1995); Pennsylvania v. Wheeling and Belmont Bridge Co., 59 U.S. 421, 431-32 (1856) (concerning Congressional action dealing with an injunction preventing construction of a bridge that was thought to be a hindrance to navigation and a burden on interstate commerce). Congress's actions concerning Terri Schiavo do not fit this mold. It is true that the state court action led to an injunction. See In re Guardianship of Schiavo, 780 So. 2d 176, 176-77 (Fla. Dist. Ct. App. 2001). But the Act did not change any substantive law, even assuming that Congress had the power to do so. See, e.g., Pub. L. No. 109-3, § 5. Thus, Congressional action would not be protected by the equitable-relief exception Plaut contemplates.

relief reinserting Ms. Schiavo’s feeding tube. Both of them were dismissed on the ground that the suit would contravene the Rooker/Feldman doctrine by having a federal district court consider the functional equivalent of an appeal from a state court decision.\textsuperscript{113} One of the Act’s procedural requirements overrode the Rooker/Feldman doctrine.\textsuperscript{114} It would appear that Plaut would be implicated by at least the earlier of these decisions.\textsuperscript{115}

Congress may very well have been aware of this potential difficulty. At the very least, the Act – by design or perhaps serendipity – avoids this serious potential issue under Plaut. The Act removes procedural impediments such as res judicata only with respect to state court decisions.\textsuperscript{116} At no point does Congress instruct the federal courts to ignore prior federal decisions. Thus, those federal decisions could have provided a basis upon which to challenge the propriety of the parents’ later lawsuit. Such a claim may not have been successful, but the Act did not foreclose it. No party requested, and no court discussed, those prior federal decisions. Nonetheless, the precise language of the Act avoided any Plaut issue with respect to an Article III court.

C. Control of the Manner of Judicial Decisionmaking

United States Circuit Judge Stanley Birch mounted the most sustained constitutional critique of the Act.\textsuperscript{117} Judge Birch focused on what he saw as the Act’s violation of fundamental principles of separation of powers.\textsuperscript{118} More concretely, his claim was that because it “constitute[s] legislative dictation of how a federal court should exercise its judicial functions (known as a ‘rule of decision’), the Act invades the province of the judiciary and violates the separation of powers principle.”\textsuperscript{119} Judge Birch was concerned not that Congress had expressly directed the federal courts to rule in a certain substantive way. Rather, his point was that Congress had somehow inappropriately dictated the manner in which the federal courts would rule on challenges under the Act.\textsuperscript{120} In this Part, I consider the merits of the fundamental thrust of Judge Birch’s argument.


\textsuperscript{114} See supra Part I (discussing the Act’s structure).

\textsuperscript{115} The later decision would probably not be problematic. The time to appeal had not yet expired. Therefore, Congress retained the ability to alter the substantive law – here the impact of the statutory Rooker/Feldman doctrine -- so that an appellate court would apply the then-current rule. See Plaut, 514 U.S. at 227.

\textsuperscript{116} See Pub. L. No. 109-3, § 2. I discuss the res judicata issue in more detail below. See infra Part II.C.2.d.

\textsuperscript{117} See Schiavo ex rel. Schindler v. Schiavo, 404 F.3d 1270, 1272-76 (11th Cir. 2005) (Birch, J., concurring in denial of rehearing en banc). Judge Tjoflat responded to Judge Birch’s constitutional arguments. Id. at 1280-81 (Tjoflat, J., dissenting from denial of rehearing en banc).

\textsuperscript{118} Id. at 1273-76.

\textsuperscript{119} Id. at 1273-74.

\textsuperscript{120} Id. at 1273-76.
1. "The Judicial Power of the United States"¹²¹

Judge Birch's assessment of the Act raises a critical question under our Constitution's structure: what exactly is the content of the "judicial Power of the United States" that is vested in federal courts.¹²² The answer to that question is important because that power belongs to the judicial branch and under separation of powers principles its exercise may not be impeded by another branch.¹²³ This sub-part lays out my vision of this important question. I then apply it to the Act.¹²⁴

The concept of constitutional "judicial Power" can be thought of in three distinct parts.¹²⁵ First, there are those attributes that are essential to the

¹²¹ U.S. CONST. art. III, § 1.
¹²² Dean Caminker has written an interesting article in which he argues that the full "judicial Power of the United States," whatever it may be, need not vest in every individual federal court so long as it is fully vested in the judicial department as a whole. See Caminker, supra note 66, at 1515-17. I need not address Dean Caminker's thesis here because the Act concerns all Article III courts. Thus, should one conclude that it removes some aspect of the "judicial Power" it does so for the entire judicial department.
¹²³ See supra note 98 (discussing functional and formalist views of separation of powers).
¹²⁴ What did the Framers intend to be encompassed in the "judicial Power of the United States?" First, the historical record is not particularly helpful in addressing this query. See, e.g., Gary Lawson, Controlling Precedent: Congressional Regulation of Judicial Decision-Making, 18 CONST. COMMENT. 191, 202 (2001) ("Historical research tells us almost nothing about what this 'judicial Power' was likely to entail in 1789."); Michael L. Wells & Edward J. Larson, Original Intent and Article III, 70 Tul. L. Rev. 75, 77 (1995) (noting that "the materials bearing on the origins of the [federal court] system are fragmentary, ambiguous, and contradictory . . ."). Even Professors Lieberman and Ryan, who have conducted the most thorough review of the historical records, recognize the limitations of the historical record. See, e.g., Lieberman & Ryan, supra note 82, at 708-09 (noting that the points they have distilled from the records "arise[] not from what little was said and recorded about the various proposals and counterproposals, drafts and redrafts, but from the consistent patterns that the contending texts reveal - most notably, the subtle but steady shift from reliance on the quantity to the quality of federal judging to maintain federal legal supremacy.") (emphasis in original). More fundamentally, however, I am by no means convinced that the intentions of the Framers should bind the People today, at least not as to the meaning of Article III. See generally Kent S. Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 COLUM. L. REV. 888, 893-94 (1998) (raising doubts about the validity of relying on the Framers intentions); Wells & Larson, supra this note, at 94-95 (arguing that "originalism" is misplaced in debates concerning federal court jurisdiction). Of course, neither should we cavalierly reject "original meaning" or "original understanding" simply because it is "original." Cf. Amar, supra note 66, at 208 n.7 (discussing different ways in which to use evidence concerning the intent of the Framers). This is not the place to engage in a debate about the place of intention in constitutional interpretation. Suffice it to say that the historical record in this case, even if relevant, is sufficiently sparse to undercut its usefulness.
¹²⁵ Many commentators discuss the jurisdictional grants in Article III, Section 2 as being part of the "judicial Power" that is vested pursuant to Article III, Section 1. See, e.g., Amar, supra note 66, at 215, 233, 239-40; Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures From the Constitutional Plan, 86 COLUM. L. REV. 1515, 1516-17 (1986); Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. PA. L. REV. 741, 753-54 (1984); Gunther, supra note 66, at 899-90; Forward, supra note 66, at 2330-31; Wieman, supra note 66, at https://researchrepository.wvu.edu/wvlr/vol108/iss2/4

https://researchrepository.wvu.edu/wvlr/vol108/iss2/4
functioning of an Article III court. With respect to those features, Congress may not legislate because doing so would upset the constitutional balance by undermining the ability of the judicial department to operate as a co-equal branch of the federal government. I refer to these attributes as “core” elements of the “judicial power.” Second, are those areas that are simply beyond the power of the courts to address. These are “excluded” features in terms of the “judicial Power.” Finally, there are powers that are not core ones but that are also not excluded. I refer to these elements as “ancillary.” As to these ancillary matters, the courts may act. But if Congress has acted with respect to such ancillary matters, the courts must yield and follow that Congressional direction, at least so long as doing so would not undermine a core element of the “judicial Power.”

1683-84. I believe that the two sections of Article III are designed to deal with two distinct issues. Section 1 bestows the power on Article III courts that is automatically vested under the constitutional structure. In other words, whenever such a tribunal has jurisdiction in a case or controversy, the essential attributes of the “judicial Power” must be present. Section 2 defines the discrete areas over which the federal courts may exercise the “judicial Power,” whatever its contours. Some of the academic commentators have also proceeded on this assumption. See, e.g., Caminker, supra note 66, at 1514-17; Harrison, supra, note 66, at 210-11, 215; Liebman & Ryan, supra note 82, at 700-04. The resolution of this issue is not critical to a consideration of the Act. It becomes so when one confronts jurisdiction-stripping proposals, something beyond the scope of this Article.

Other commentators have also approached the problem of Article III’s meaning by positing that there is some irreducible set of attributes that is captured by the phrase the “judicial Power of the United States.” See, e.g., David E. Engdahl, Intrinsic Limits of Congress’ Power Regarding the Judicial Branch, 1999 BYU L. Rev. 75, 79-84 (discussing what he terms “judicial potency”); Liebman & Ryan, supra note 82, at 768-71 (discussing the mandated attributes of “the judicial Power”); Judicial Independence, supra note 82, at 698-99 (outlining four elements of judicial independence that Article III courts must possess). I discuss many of these commentators’ views in more detail throughout this section of the Article.

Examples of such excluded powers are varied, ranging from enacting legislation to issuing advisory opinions. The former is a power unambiguously assigned to another branch of government. See U.S. Const. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”). The latter limitation is derived from an interpretation of constitutional text informed by history and prudence. See HART & WECHSLER, supra note 66, at 78-82 (discussing the asserted prohibition on advisory opinions); Liebman & Ryan, supra note 82, at 769 (grounding the prohibition on issuing advisory opinions in the need to keep the judiciary independent of political disputes).

Professor Redish has referred to something akin to my core attribute as “decisional independence.” See Judicial Independence, supra note 82, at 707. He also describes “lawmaking independence” that “concerns a judge’s ability to fashion general substantive rules of decision or rules of procedure that are designed to govern not only the case before her but future similarly situated cases as well.” Id. This later category overlaps in some respects with what I refer to as the ancillary powers of the judiciary.

The idea of concurrent powers concerning rule-making has a long pedigree. See, e.g., A. Leo Levin & Anthony G. Amsterdam, Legislative Control over Judicial Rule-making: A Problem in Constitutional Revision, 107 U. Pa. L. Rev. 1, 3 (1958) (“For decades, if not for centuries, control over practice and procedure has been the subject of a concurrent jurisdiction. There were the courts with an alleged inherent power to engage in rule-making, and there were the legislatures...
The core attribute of the "judicial Power" is to adjudicate cases or controversies. Indeed, the Supreme Court told us as much when it chastised Congress for legislating in such a manner as to undermine the judicial department's "power, not merely to rule on cases, but to decide them . . ." But one can do better than this description because the power to adjudicate may itself be broken down into subsidiary elements that, taken together, comprise the core of the "judicial Power." First, and perhaps most importantly, an Article III court must have the power to resolve the dispute between the parties before it. I refer to this element as "actual effectiveness" because it includes two related, but distinct sub-attributes. The court must have the ability to actually decide the dispute, meaning that it must be able to apply reasoned judgment to reach appropriate conclusions. This feature explains why Congress may not constitutionally direct a court how to rule in a given case, at least not without amending the substantive law. In my view, it also encompasses the notion of judicial review from Marbury v. Madison because a court must have the ability to define the law as part of its reasoning. The court's ruling, however, must also be effective, meaning that the court must possess sufficient discretion to impose an appropriate remedy in the case. Thus, this part of the core element of "the judi-

which in fact exercised and were, with but rare dissent, conceded ultimate authority over virtually the entire procedural area.

130 Plaut v. Spendthrift Farm, Inc, 514 U.S. 211, 218-19 (1995) (emphasis in original). Academic commentators have similarly recognized this fundamental point. See, e.g., Caminker, supra note 66, at 1519 (describing the adjudicatory powers of the courts as "core"); Theodore K. Cheng, Invading an Article III Court's Inherent Equitable Powers: Separation of Powers and the Immediate Termination Provisions of the Prison Litigation Reform Act, 56 WASH. & LEE L. REV. 969, 1006-07 ("Thus, the Framers intended that the judiciary's core adjudicative function be free from legislative alteration. Decisionmaking, an essential element of the judiciary's adjudicatory powers, was to be left within the province of the Article III courts.").

131 See supra note 82 (discussing this principle). Professor Gary Lawson has also recognized the importance of reasoning in the context of Article III decisionmaking. See Lawson, supra note 124, at 210 ("The judicial power of course includes the power to reason to the outcome of a case.").

132 See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803). Professor Redish has argued that the power of judicial review does not, in fact, flow from such a private rights model. See Martin H. Redish, THE FEDERAL COURTS IN THE POLITICAL ORDER 5, 83, 90-92 (1991). I am not asserting, however, that this rationale is the only one supporting judicial review. This Article it not the place to enter the more general debate about the propriety and source of the power of judicial review. Rather, my point is the modest one that whatever else its source might be, judicial review is supported by this sub-prong of the "judicial Power."

133 Other scholars, in a number of contexts, have noted the importance of such remedial discretion. See, e.g., Hart, supra note 66, at 1366-70; Forward, supra note 66, at 80-89.
cial Power” is focused less on inter-branch relations and more on the relationship between the judicial branch and the People.\textsuperscript{134}

Second, once it has spoken, the judicial department’s decision is final, at least as to past matters, although the continuing effects of equitable decrees can, in certain cases, be altered by the legislative branch.\textsuperscript{135} This sub-attribute of the “judicial Power” implicates both the relationship between the co-equal federal branches as well as the relationship between the judiciary and the People. As to the former, the judiciary would not be sufficiently independent in the constitutional structure if its decisions could be revised or reversed by the other branches. As to the latter, the litigants, at least the ones who prevailed, have a strong interest in preserving their victory.

Finally, the judicial department must ultimately be responsible for superintending itself and its decisions. In other words it must have “institutional responsibility.”\textsuperscript{136} Thus, the responsibility for policing judgments for error should be maintained within the Article III hierarchy.\textsuperscript{137}

\textsuperscript{134} In their historical study, Professors Liebman and Ryan set out a core set of “qualitative” features that they assert are implicit in Article III’s “judicial Power.” See Liebman & Ryan, supra note 82, at 696. This study is an impressive one by impressive scholars. However, its ultimate definition of the “qualitative” attributes of Article III courts seems to have been driven in many respects by the authors’ particular concern with addressing then-recent changes in federal habeas corpus law. The effect of this focus is that much of the discussion of Article III, including the definition of the core elements of judging, appears to be skewed to reflect a habeas corpus take. This comment is not meant to downgrade the work that Professors Liebman and Ryan have done. It is amazingly thorough and insightful in many respects. Rather, I merely suggest that the conclusions they draw may need to be filtered through the habeas lens. In any event, among the qualitative attributes identified by Liebman and Ryan are three that are, in at least some respect, captured by my notion of “actual effectiveness.” Id. (“An Article III court must decide (1) the whole federal question . . . based on (4) the whole supreme law, and (5) impose a remedy that, in the process of binding the parties to the court’s judgment, effectuates supreme law and neutralizes contrary law.”). These attributes are not necessary co-extensive with my actual effectiveness prong. I do not, however, explore the differences in my conception as part of this Article.

\textsuperscript{135} See \textit{Plaut}, 514 U.S. at 218-19. Liebman and Ryan also recognize finality as an element of the core judicial function. See Liebman & Ryan, supra note 82, at 696.

\textsuperscript{136} \textit{Plaut}, 514 U.S. at 218 (citing \textit{Hayburn’s Case}, 2 U.S. 409 (1792)). This notion may be captured in part by Professors Liebman and Ryan in their reference to the core requirement of judicial independence. See Liebman & Ryan, supra note 82, at 696. Judicial independence is clearly important because, without it, the third branch of government would in reality be little more than a puppet. However, I believe judicial independence is guaranteed less by the vesting of the “judicial Power” and more by the specific independence guarantees in the balance of Article III, Section 1. See \textit{U.S. CONST.} art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for Their Services a Compensation, which shall not be diminished during their Continuance in Office.”); see also \textit{Judicial Independence}, supra note 82, at 700-06 (discussing these guarantees of what he terms the “institutional independence” of the federal judiciary).

\textsuperscript{137} This core function is unique in that the constitutional structure specifically allows some Congressional involvement. See \textit{U.S. CONST.} art. III, § 2, cl. 2 (allowing Congress to regulate the appellate jurisdiction of the Supreme Court). There is fierce debate about the meaning of the Exceptions Clause. See James E. Pfander, \textit{Jurisdiction-Stripping and the Supreme Court’s Power Published by The Research Repository @ WVU, 2005}
When evaluating whether a given piece of legislation concerning the judiciary is unconstitutional as a matter of separation of powers, one should use as the polestar whether the legislative action expressly or implicitly undermines actual effectiveness, finality or institutional responsibility with respect to the adjudication of a matter within a federal court’s subject matter jurisdiction. The answer to this query will at times be a universal and easy one. A law instructing the federal judiciary to rule against the plaintiff in all cases would be unconstitutional in all situations because it would trench upon the principle of actual effectiveness; there would be nothing to “decide” and thus the judgment would not be the result of a reasoned judgment. On the other hand, legislation specifying “procedures” to be followed by a court might undermine the decisional process in some situations but not in others depending on the nature of the legislative command. Accordingly, in order to assess whether a given piece of legislation purporting to be procedural in fact undermines the core adjudicatory power of the judicial branch, it is necessary to get into the details. I conduct such an inquiry in the balance of this section with respect to the Act. Along the way, I expand on my conception of the nature of the “judicial Power” in the context of the specific statutory provisions at issue.¹³⁸

2. The Procedural Directions in the Act are Consistent with the Constitutional Separation of Powers

Section 2 of the Act sets forth the potentially constitutionally offensive procedural dictates: (1) Granting Ms. Schiavo’s parents standing; (2) removing restrictions on the application of abstention and exhaustion doctrines; (3) removing the Rooker/Feldman restriction on inferior federal court review of state court decision; and (4) specifying a “de novo” standard of review, effectively negating principles of res judicata.¹³⁹ Each of these matters standing alone is an entirely proper subject with respect to which Congress may legislate; none of them implicates core values under the “judicial Power.” Moreover, there is

¹³⁸ Professor Gerhardt has recently argued that the “judicial Power” should also be understood historically “to include a power to create precedents of some degree of binding force.” Gerhardt, supra note 66, at 351. He made this argument in connection with Congressional attempts to undermine Supreme Court decisions with which the legislative branch disagreed. Id. I believe Professor Gerhardt’s argument sweeps too broadly. There are situations in which Congress could take an action concerning precedent that would be unlawful. For example, Congress could seek to pass a statute reversing the judgment in the case in which the Court had rendered its decision. Of course, Congress could also express its disapproval of a precedent by passing legislation dealing only with prospective matters. In that regard, the disrespect for precedent would not be constitutionally suspect. Nor would it raise a suspicious constitutional eyebrow if Congress were to use its jurisdictional powers in such a way as to undercut the utility of precedent if it did not transgress some other constitutional boundary.

nothing about the combination of procedural directions that changes this conclusion. As such, they relate—separately and together—to ancillary matters with respect to which Congress may act.

a. Standing

Standing requirements fall into two groups: those that are "constitutional"—or mandated by Article III's case or controversy requirement—and those that are prudential.140 Congress may not override the prerequisite that a plaintiff in federal court satisfy the constitutional requirements for standing.141 Those requirements are part and parcel of the limitation on the matters over which a federal court may be given jurisdiction.142 The standard structural explanation for standing doctrine is that it is "built on a single basic idea—the idea of separation of powers."143 That is certainly true, but one can also see the constitutional foundation of the doctrine as serving an important part of the allocation of responsibility between the state and federal governments, a federalism objective. In other words, the allowed "intrusion" on matters that would otherwise be heard in state courts is restricted by the constitutional elements of standing doctrine. But whatever the doctrinal foundation, there are certain elements of standing over which Congress has no power.

Prudential standing exists on a different level. The Court has been unequivocal in its assertion that Congress has the power to overcome such non-constitutional restrictions on a litigant's standing.144 An independent assessment leads to the same conclusion.145 The elimination of a bar to hearing a claim

140 See Chemerinsky, supra note 37, at 59-61 (providing an overview of constitutional and prudential standing requirements).
142 See id. at 818.
144 Raines, 521 U.S. at 820 n.3. Judge Tjoflat also recognized this point in his debate with Judge Birch. Schiavo ex rel. Schindler v. Schiavo, 404 F.3d 1270, 1280-81 (11th Cir. 2005).
145 Professor David Engdahl has argued strongly that Congress does not have power to abrogate prudential standing requirements, at least not in all situations. See Engdahl, supra note 126, at 164-67. For him, "[p]rudence is part of what judging is about, and the power to make judgments about cases and controversies within the parameters of Article III—including whether it is prudent to hear them—is constitutionally confided to the judiciary as an aspect of 'the judicial Power.'" Id. at 165 (emphasis in original). Professor Engdahl goes on to explain that, in his view, there is nothing in the Constitution that gives Congress the authority to legislate concerning prudential standing requirements in most cases due to the limited nature of legislative power delegated to Congress under Article I. Id. at 166-67. To begin with, as described in the text, Professor Engdahl's approach finds no support in precedent. More importantly, however, I disagree with his assessment concerning the fundamental nature of the "judicial Power." Prudence is certainly important, as my requirement of actual effectiveness captures. However, the prudence protected by Article III goes to the ability to make reasoned decision in cases before the court and not to the selection of cases to be heard. To grant this power to the judicial branch would place in one entity the choice of what matters it hears as well as the power to finally resolve those disputes largely
does not undermine any of the three sub-elements of a federal court’s core adjudicatory function. In fact, if anything it enhances the court’s actual effectiveness by allowing adjudication to take place at all. Thus, Congress was well within its authority to waive any prudential standing requirements that might have prevented Ms. Schiavo’s parents from pursuing a claim under the Act.\textsuperscript{146}

b. Abstention

The same effect results concerning Congress’s abrogation of the various abstention doctrines. These judicially crafted doctrines have at their core an affirmative decision by a federal court to \textit{not} decide a case that is unquestionably within its jurisdiction.\textsuperscript{147} There are different forms of abstention dealing insulated from revision. Such a concentration of power is unwise and antithetical to the system established by the Constitution.

I also disagree with Professor Engdahl concerning the scope of Congressional power more generally. He argues that there is no clause in the Constitution granting Congress the legislative power to enact rules such as those concerning prudential standing. \textit{See id. at 166-167.} He specifically rejects the Necessary and Proper Clause (U.S. CONST. art. I, § 8, cl. 18) in combination with either what is commonly referred to as the Tribunals Clause of Article I (U.S. CONST. art. I, § 8, cl. 9) or Congressional power to create inferior Article III courts (\textit{see} U.S. CONST. art. III, § 1). \textit{Id.} His argument is essentially that both the Tribunals Clause and Article III concern the bringing into existence in an \textit{effective} way of a court. \textit{See id. at 104-119.} The Necessary and Proper Clause cannot be used to augment power under these other provisions, he asserts, unless that use is to bring into execution the judicial power. \textit{Id.} at 166-67. Because he sees prudential standing as being a core feature of “the judicial Power,” Congressional legislation on that subject would not be “proper” because it would not be designed to bring into effect the “judicial Power.” \textit{Id.} Thus, in reality Professor Engdahl and I have a disagreement not so much over Congressional power per se but rather over the scope of the “judicial Power.”

\textsuperscript{146} The Act’s requirement granting the parents “standing” should be interpreted to mean prudential standing. Such an interpretation is in keeping with the maxim of statutory construction that a statute should be interpreted to avoid rendering it unconstitutional. \textit{See Ernest A. Young, Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review, 78 Tex. L. Rev. 1549} (2000) (providing an excellent overview of the doctrine concerning “constitutional avoidance”). In addition, it does not appear that any waiver of constitutional standing requirements would have been necessary in this case. While the point is not without doubt, it seems that Mr. and Mrs. Schindler meet the three constitutional standing requirements, something no court has ever questioned. At a minimum, there is a strong argument that they do. First, it would seem that they have suffered an “injury in fact” through the withholding of nutrition and hydration from their daughter. Indeed, Florida law recognizes that parents are “interested persons” in guardianship cases giving them certain procedural rights that strangers to the controversy do not have. \textit{See In re Guardianship of Schiavo, 792 So. 2d 551, 557} (Fla. Dist. Ct. App. 2001). The parents’ injury was unquestionably caused by the action of which they complained, and it would be redressed by the remedy they sought. \textit{See generally} Chemerinsky, \textit{supra} note 37, at 61-83 (discussing the three elements of constitutional standing doctrine).

\textsuperscript{147} \textit{See generally} Chemerinsky, \textit{supra} note 37, at 761-763 (providing overview of abstention doctrines). There is a long-running academic debate concerning whether the abstention doctrines themselves are a violation of separation of powers principles on the ground that an Article III court cannot decline to exercise jurisdiction conferred by Congress. \textit{See, e.g.,} Martin H. Redish, \textit{Abstention, Separation of Powers, and the Limits of the Judicial Function,} 94 Yale L.J. 71 (1984) (arguing that abstention is unconstitutional); Michael Wells, \textit{Why Professor Redish is Wrong about the Constitutionality of Abstention}}
with matters such as (1) a desire to avoid an unnecessary resolution of a federal constitutional issue,148 (2) a lack of clarity in relevant state law,149 (3) the need to defer to a state administrative proceedings in a complex area of state law,150 (4) the desire to respect the coordinate decisionmaking of state courts by not interfering in certain types of pending matters in which there is a significant state interest,151 and (5) in certain limited circumstances, a desire to avoid duplicative litigation.152 Abstention is a prudential matter not one the Constitution requires.153 Thus, as with the prudential standing requirements, Congress may abrogate the abstention doctrines without offending the Constitution.154 There simply is no interference with the core adjudicatory function of the court.155


153 See, e.g., Schiavo ex rel. Schindler v. Schiavo, 404 F.3d 1270, 1274 (11th Cir. 2005) (Birch, J., concurring) (describing abstention as a doctrine of "prudential decisionmaking" and citing supporting cases). Professor Chemerinsky notes that with respect to so-called Younger abstention there is some uncertainty whether the doctrine is entirely prudential. See Chemerinsky, supra note 37, at 802-03. But even if this abstention doctrine were constitutionally-based the Act would not be rendered unconstitutional. As mentioned above, a court should interpret the Act in a manner to sustain its constitutionality. See supra note 146. Thus, any constitutionally-mandated abstention doctrines should not be included within the ambit of Section 2 of the Act. Moreover, it is not at all clear that Younger abstention would apply to the Schiavo situation. First, there is no pending Florida state criminal proceeding, the heart of Younger abstention. See, e.g., Chemerinsky, supra note 37, at 799-801 (discussing Younger). In addition, it is not clear that there exist any circumstances in the Florida state proceedings that correspond to the extension of the Younger doctrine to civil matters. See id. at 817-24 (discussing the application of Younger to civil matters). In this case, Congress has used its constitutional power to confer jurisdiction on a federal court specifically to consider federal constitutional issues implicated in a state court proceeding. See supra Part II.A (discussing jurisdictional issues). This is not a situation where a private party takes it on itself to use a general jurisdictional statute to trump – not really review – an ongoing state action. See, e.g., Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987).


155 Once again, Professor Engdahl reaches an opposite conclusion. See Engdahl, supra note 126, at 168-70.
c. The Rooker/Feldman Doctrine

By virtue of its clear jurisdictional grant combined with its recognition that there were underlying state proceedings, the Act allows a federal court to, in some sense, sit as an appellate tribunal concerning those state proceedings.\(^\text{156}\) Without the Act, a federal district court would be prohibited from considering such a suit under the Rooker/Feldman doctrine. That doctrine precludes "state-court losers from complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."\(^\text{157}\) The doctrine is a statutory one based on the Court’s interpretation of 28 U.S.C. § 1257 that grants appellate jurisdiction concerning state-court judgments to the Supreme Court, not district courts.\(^\text{158}\) As the Court recently recognized, because the doctrine is statutory, Congress may – and has – altered it.\(^\text{159}\)

One reaches the same conclusion from first principles. Removing a barrier to inferior federal court review of state court cases does not compromise any core adjudicatory function of the federal judicial branch. The federal court system maintains its institutional responsibility for its own decision – it will be final and the court can engage in an actually effective review of the merits of the issue. Thus, the removal of the Rooker/Feldman limitation enhances the "judicial Power" if it has any impact on it whatsoever.\(^\text{160}\)

d. De Novo Review and Res Judicata

The final potentially questionable procedural direction in the Act is Congress’s specification that a federal court evaluate any challenge "de novo" and "notwithstanding any prior State court determination."\(^\text{161}\) The effect of

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\(^{156}\) See Pub. L. No. 109-3, §§ 1, (2). It is more accurate to consider the federal court to occupy a position similar to that of a court considering a petition for a writ of habeas corpus. In this context, the court is engaged in collateral review not direct appellate review. This distinction would not matter for purposes of the Rooker/Feldman doctrine because the effect of appellate review is present. The collateral/direct review distinction might very well be critical in other contexts. See, e.g., Jordan Steiker, Habeas Exceptionalism, 78 Tex. L. Rev. 1703, 1708-09 (2000) (discussing potential differences in applying separation of powers challenge to certain aspects of habeas corpus law). A serious exploration of this issue is beyond the scope of this Article.


\(^{158}\) Id. at 1521.

\(^{159}\) Id. at 1526 n.8 ("Congress, if so minded, may explicitly empower district courts to oversee certain state-court judgments and has done so, most notably, in authorizing federal habeas review of state prisoners’ petitions.").

\(^{160}\) To the extent such things matter, inferior federal court review of state decisions also appears to be consistent with the original understanding of the Constitution. See The Federalist No. 82 (Alexander Hamilton) ("I perceive at present of no impediment to the establishment of an appeal from the state courts to the subordinate national tribunals.").

these provisions is to both establish the standard of review the court will use and simultaneously eliminate any res judicata bar that might have prevented the parents from pursuing relief in federal court under the Act. The issue is whether Congress’s specification of a standard of review or abrogation of res judicata is a violation of separation of powers principles.

The issue of providing the appropriate standard of review for federal court litigation can be a complicated one depending upon the particular circumstances. However, the Act represents the situation in which there is the least difficulty. Congress specified that the federal court should exercise a “de novo” standard of review. That standard of review provides the widest possible consideration of relevant material — both factual and legal. There is no serious argument that any core attribute of the “judicial Power” is compromised when the court is commanded to consider all evidence and relevant legal principles.

162 As the Court recently reaffirmed:

Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of that issue in a suit on a different cause of action involving a party to the first case.

San Remo Hotel, L.P. v. City and County of San Francisco, 125 S. Ct. 2491, 2005 U.S. LEXIS 4848 at *27 (June 20, 2005) (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)).

163 Given the focus of the Article, I do not purport to evaluate whether a party could mount a successful argument that Congressional abrogation of res judicata was a violation of due process or equal protection. Also, I do not address in this sub-part the impact of Congress’s focus on a single case. I deal with that issue below. See infra Part II.D.


165 See BLACK’S LAW DICTIONARY 106 (8th ed. 2004) (defining “appeal de novo” as “[a]n appeal in which the appellate court uses the trial court’s record but reviews the evidence and law without deference to the trial court’s ruling”); cf. id. at 864 (defining “de novo judicial review” as “[a] court’s nondeferential review of an administrative decision, usu. through a review of the administrative record plus any additional evidence the parties present”).

Such a direction enhances the court’s actual effectiveness by allowing a greater (or at least not restricting) source material from which to reason. It also makes institutional responsibility for that decision greater by creating the opportunity for more meaningful appellate review within Article III. Moreover, it does all of this without having any impact on finality, the third key feature of the courts’ core adjudicatory role. Accordingly, while there may be situations in which the specification of a standard of review is constitutionally problematic, this is not one of them.167


167 One area meriting further discussion in this regard is Congress’s power to restrict the range of what a federal court may consider in its adjudicatory role. The issue is currently presented in one form by Congressional efforts to restrict the availability of federal habeas corpus with respect to state convictions. In 1996 Congress enacted the Antiterrorism and Effective Death Penalty Act (“AEDPA”). One portion of AEDPA prohibits a federal court from granting a writ of habeas corpus to a state prisoner on a claim adjudicated in state court unless the state court process “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 22541(d)(1) (2005). Thus, a federal court cannot look to circuit precedent as a source of relevant authority and must show a great deal of deference to the state court adjudication. See generally Williams v. Taylor, 529 U.S. 362 (2000) (discussing AEDPA but declining to address any constitutional issues). In other words, AEDPA in many respects represents the converse of the situation under the Act in which Congress instructed the federal courts to broadly review state court decisions.

A panel of the United States Court of Appeals for the Ninth Circuit has recently instructed the parties to a habeas proceeding to brief the question whether “AEDPA 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.” See Order in Irons v. Carey, 408 F.3d 1165 (9th Cir. 2005). Other circuit courts have rejected constitutional challenges to AEDPA on such grounds. See, e.g., Green v. French, 143 F.3d 865, 874-75 (4th Cir. 1998), overruled on other grounds by Williams v. Taylor, 529 U.S. 362 (2000); Lindh v. Murphy, 96 F.3d 856, 869-70 (7th Cir. 1996). Not surprisingly, these provisions of AEDPA have also spawned academic commentary. See, e.g., Ira Bloom, Prisons, Prisoners, and Pine Forests: Congress Breaches the Wall Separating Legislative from Judicial Power, 40 ARIZ. L. REV. 389, 414-23 (1998); Liebman & Ryan, supra note 82, at 864-884; Note, Powers of Congress and the Court Regarding the Availability and Scope of Review, 114 HARV. L. REV. 1551 (2001); Scheidegger, supra note 124, at 945-60; Steiker, supra note 156, at 1724-28; Symposium, Congress and the Courts: Jurisdiction and Remedies, 86 GEO. L.J. 2445-2636 (1998).

On the one hand, such restrictions might be consistent with the principles I have articulated above, if, for example, there is a constitutionally meaningful difference in collateral and direct review. On the other hand, it might be that Congress simply does not have the power to restrict the legal or factual materials an Article III court considers without undermining the “judicial Power.” In any event, the resolution of this issue bears watching. This is especially so because, in addition to the
The question concerning res judicata can be similarly complex. To answer the question, one first needs to step back and review one point we have already covered: Congress may not constitutionally order a federal court to reopen one of its final judgments. If that is a constitutional principle rooted in Article III, one can see that power vested in Congress to abrogate res judicata with respect to a prior federal decision that could very well raise concerns of a constitutional magnitude. And the Court has appeared to accept the proposition that in order to preserve the balance of power between the courts and the political branches of government, the Article III judiciary must retain a measure of control over the application of res judicata doctrine.

The same logic does not apply when the subject of Congressional action is a prior state court decision. In this context, there are no Article III concerns at play. Instead, the central constitutional issue is Congressional power to confer jurisdiction on the federal courts within the limitations of Article III. If Congress’s power to confer jurisdiction to provide protection for federal rights is to be given meaningful effect, that body must have the power to specify the exclusive effect, if any, of prior litigation in state courts.

In addition to the power to confer jurisdiction under Article III, Congressional authority to remove res judicata bars finds support in Article IV of the Constitution that confers on Congress the power to specify the effect of prior


168 See supra Part II.B.

169 The Court dealt with the issue in Plaut v. Spendthrift Farm, Inc. 514 U.S. 211. In its attempt to sustain the statute there at issue, the government had argued that a Congressional direction to reopen dismissed claims under the federal securities laws was akin to Congress’s power to direct that res judicata not apply in certain cases. Id. at 230-32. The government relied on an earlier Supreme Court decision that had sustained a Congressional statute directing the Court of Claims to consider a takings claim of the Sioux Nation without regard to the Tribe’s prior litigation against the United States. Id. (discussing United States v. Sioux Nation, 448 U.S. 371 (1980)). The Plaut Court rejected the government’s argument. First, the Court made the commonsense point that Sioux Nation dealt with the waiver of the res judicata defense with respect to the United States as a litigant. Id. More importantly for present purposes, the Court went on to note that even if that were not the case, the essential Article III-based concerns that underlay the Court’s holding in Plaut led to the conclusion that Congress did not have unchecked power to order relitigation of matters previously decided by Article III courts merely by suspending the rules of res judicata. Id. at 231-32. Instead, the Court opined that the Article III judiciary needed to maintain discretion in the matter. In the words of the Court, “[w]aiver [of the res judicata defense] subject to the control of the courts themselves would obviously raise no issue of separation of powers . . . .” Id. That holding is entirely consistent with my articulation of the “judicial Power” because allowing Congress to regulate res judicata in the manner argued in Plaut would undermine the finality of Article III judgments.

170 I discussed these principles in depth above. See supra Part II.A.
Congress has exercised its power under this constitutional provision by enacting 28 U.S.C. § 1738, which "has long been understood to encompass the doctrines of res judicata . . ." Thus, as far as state court judgments are concerned, the appropriate role of res judicata is statutory, unchecked by underlying Article III concerns that would be present with former federal litigation. As such, Congress has the power to specify by statute the impact of former state court litigation, a direction that the federal courts are not free to ignore.  

The Act is consistent with these various principles. It legislates concerning res judicata as far as the Florida state court litigation is concerned. This is legislation the federal courts are duty-bound to honor. At the same time, the Act does not purport to instruct the federal courts as to a waiver of res judicata principles for any prior federal court litigation. In that respect, Article III courts retain the discretion to deal with the defense, discretion the Court correctly has indicated is essential to the proper relationship among the federal branches.

e. The Generalized Deliberative Process

Finally, one might argue that the sum of the Act’s procedural parts simply intrudes too deeply on the deliberative process of the federal courts. Such an argument is no more sustainable than is an attack on the Act’s procedural

171 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 Effects thereof.").

172 San Remo Hotel, L.P. v. City and County of San Francisco, 125 S. Ct. 2491, 2500 (2005).

173 The Court recently reaffirmed this principle. Id. In San Remo Hotel, citizens argued that the Court should adopt an exception to res judicata under Section 1738 with respect to takings claims that, for various reasons, required prior state court proceedings. Id. at 2502. The Court rejected the argument by noting that "[f]ederal courts, moreover, are not free to disregard 28 U.S.C. § 1738 simply to guarantee that all takings plaintiffs can have their day in federal court." Id. Later in the opinion, the Court also discussed one of its earlier decisions in which it had held that Section 1983 did not abrogate principles of res judicata. Id. at 2505 (discussing Allen v. McCurry, 449 U.S. 90 (1980)). In particular, the Court quoted McCurry’s statement that "[t]here is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court . . . ." Id. (quoting Allen, 449 U.S. at 103-04). The implication of these decisions is that had Congress intended to allow such unrestricted relitigation it would have been a federal court’s duty to follow that intention. See id.


175 Id. (providing no instruction concerning any prior federal court litigation). Once again, none of the parties and no court raised the possible implication of Ms. Schiavo’s parents’ prior federal lawsuits.


177 This is the tone of much of Judge Birch’s constitutional argument. See, e.g., Schiavo ex rel. Schindler v. Schiavo, 404 F.3d 1270, 1274 (11th Cir. 2005).
requirements individually. First, a blanket assertion that Congress is without power to affect the manner of a court’s deliberative process is not supported by, and in fact is contrary to, well-established law. In addition to the points made concerning each of the procedural directions in the Act taken separately, the Supreme Court has long recognized the power of Congress to control the manner of Article III decisionmaking. For example, nearly 140 years ago the Court stated that Article III’s broad grant of power to create (or not to create) inferior federal courts carried with it the power to establish “the manner of procedure in its exercise after it has been acquired . . . .” And, the Court continued, this power was “remitted without check or limitation to the wisdom of the legislature.”

The modern Court makes the same point albeit with an important caveat. In 1996, Congress passed the Prison Litigation Reform Act of 1995 (“PLRA”). The statute dealt with a number of matters concerning prisoner litigation related to conditions of confinement, including the ability of prisons to seek relief from consent decrees or other types of existing equitable relief. An important feature of the scheme Congress developed in the area was that a prison could seek a judicial determination whether an existing injunction should continue given the change in substantive the PLRA represented. To do so, the prison was to file a motion with the appropriate court. If the court did not rule on the motion within 30 days (extendable to 90 days in certain situations) the existing injunction would be automatically stayed. One aspect of the constitutional challenge to the PLRA was the assertion that “because it places a deadline on judicial decisionmaking, [it] thereby interfer[es] with core judicial functions.”

Importantly for present purposes, the Court rejected this challenge to the PLRA. The Court’s central reason was that the “core function” of the judiciary was “to decide ‘cases and controversies properly before [it].’” Thus, it is fair to say that the Court does not view the judicial branch as having a core institutional interest in the way in which it decides cases; the core departmental value

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178 Each procedural direction Congress set forth in Section 2 of the Act was considered separately above. See supra Part II.C.1.
179 Mayor v. Cooper, 73 U.S. 247, 251-52 (1867).
180 Id. at 252.
182 Id.
183 18 U.S.C. § 3626(a)(3)
185 Miller v. French, 530 U.S. 327, 349 (2000). In addition to rejecting this challenge, the Court also rejected an argument that the PLRA unconstitutionally reversed an Article III judgment. The Court concluded that Congress had amended existing law dealing with a prospective, continuing injunction, which was entirely proper. Id. at 336-44.
186 Miller, 530 U.S. at 349-50 (quoting United States v. Raines, 362 U.S. 17, 20 (1960)).

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is in actually deciding those matters within its jurisdiction.\textsuperscript{187} That is not to say the courts have no power concerning the timing of their decision. In the absence of an applicable Congressional rule, they have the power to regulate in this ancillary area. But once Congress speaks, the courts defer. In my terminology, it is an ancillary function.

The modern Court, compared to its Nineteenth Century precursor, has intimated that there is some limit on Congressional action. The Court in \textit{Miller v. French} reserved the question whether Congress could go too far in mandating the manner of judicial decisionmaking.\textsuperscript{188} This caveat is important because without it the balance of power between the branches could be skewed too much in favor of Congress. However, it does not render the Act unconstitutional. In their totality, Congress’s procedural prescriptions in no way restrict the information a federal court may consider. Indeed, Congress’s directions confirm broad power in the courts to consider a wide array of information as part of what the Supreme Court has termed the Article III “adjudicatory role.”\textsuperscript{189} Thus, while there would unquestionably be a point at which Congress, under the guise of mandating a “procedure,” could intrude on the core judicial function of adjudication, that threshold is not implicated in terms of the Act.

In sum, if a core function of the federal judiciary included exclusive control over the manner of decisionmaking, the judicial branch would wield enormous power. First, the courts would continue to have the strong power of judicial review most often associated with \textit{Marbury v. Madison}.\textsuperscript{190} Second, Congress would continue to be precluded from directing (1) a substantive result in a case (at least without amending applicable law)\textsuperscript{191} or (2) the reopening of final judgments of Article III courts.\textsuperscript{192} But in this new world Congress would also be without power to specify the manner in which the courts decide cases, including setting a standard of review and presumably other types of procedural rules.\textsuperscript{193} While Congress would retain significant authority under Article III

\textsuperscript{187} See also Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995) (noting that the federal judiciary has the power “not merely to rule on cases, but to decide them”) (emphasis in original).

\textsuperscript{188} \textit{Miller}, 530 U.S. at 350 (“In this action, we have no occasion to decide whether there could be a time constraint on judicial action that was so severe that it implicated these structural separation of powers concerns.”). For a general discussion of this issue, see William F. Ryan, \textit{Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions}, 77 B.U. L. Rev. 761 (1997).

\textsuperscript{189} \textit{Miller}, 530 U.S. at 350.

\textsuperscript{190} 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{191} See United States v. Klein, 80 U.S. (13 Wall) 128, 146 (1872).

\textsuperscript{192} See Plaut, 514 U.S. at 218-19.

\textsuperscript{193} Yet another implication of a narrow view of Congressional power over procedure would be the ability of Congress to control aspects of the Federal Rules of Civil Procedure. There has already been debate about the wisdom, and even the authority, of Congressional involvement in this area. See generally Engdahl, \textit{supra} note 126, at 172-74; Linda S. Mullenix, \textit{Judicial Power and the Rules Enabling Act}, 46 MERCER L. Rev 733 (1995); \textit{Judicial Independence, supra} note 82, at
with respect to the judiciary, there is no denying that adoption of this view would yield an important increase in power for the judicial branch and disrupt the balance of the federal government’s coordinate parts.

D. The Singular Focus of the Act

Even if everything discussed up to this point is taken as established, there remains a final question: Consistent with separation of powers principles, may Congress legislate with reference to a single case as it did in the Act? This sub-part addresses the serious structural constitutional issues implicated by the Act’s singular focus on Terri Schiavo and her family.

There is nothing per se unconstitutional about Congress legislating with respect to a single individual. As the Court recognized, “[w]hile legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action.” The Constitution most certainly limits certain types of individualized lawmaking, but it does not ban the general practice.

In the same way that Congress may go too far in individualized lawmaking and thus violate some individual right, it can also violate separation of powers principles by such action. It is not so much that Congress is intruding on a core judicial function, the argument at the heart of much of the criticism directed against the Act and that was addressed at length in early Parts of this Article. Rather, the concern is that Congress is acting in a fundamentally non-legislative manner by engaging in this specific type of individualized lawmaking. To simplify matters somewhat, the argument is that Congress acted as a court when it passed the Act.

724-25. Such continued debate is somewhat perplexing given the Supreme Court’s clear approval of such Congressional action. See, e.g., Hanna v. Plumer, 380 U.S. 460, 471-72 (1965).

194 For example, Congress would retain the power to confer subject matter jurisdiction and even abolish the federal courts (at least under the plain language of U.S. CONST. art. III, § 1).

195 See Plaut, 514 U.S. at 239 n.9 (“The premise that there is something wrong with particularized legislative action is of course questionable.”).

196 Id.

197 For example, the Constitution expressly prohibits bills of attainder and ex post facto laws. See U.S. CONST. art. I, § 9, cl. 3. In addition, the Fifth Amendment’s Due Process Clause, including its equal protection component, can serve to check certain instances of individualized lawmaking. U.S. CONST. amend. V.

198 See, e.g., supra Part II.C.

199 An example of what may be seen as Congress acting inappropriately as a court is I.N.S. v. Chadha, 462 U.S. 919 (1982). In Chadha, the Supreme Court held that the “legislative veto” was unconstitutional on the ground that it violated the Constitution’s mandate that all laws be presented to the President of the United States. Id. at 956-58. Justice Powell agreed that the legislative veto was unconstitutional, but he based his conclusion on substantially different grounds than did the majority. Id. at 965-66. For Justice Powell, the constitutional defect was that Congress had assumed what amounted to a judicial function in the particular situation before the Court. Id.
There is no question that it would seriously undermine the foundation of separation of powers if Congress were allowed to assume the powers of a court under the cloak of its Article I authority. The difficult task becomes drawing the line that separates legitimate, though individualized, lawmaking from illegitimate legislative judging. Placing the line incorrectly in either direction will upset the delicate balance of power on which the constitutional order is built in the United States.

Terri Schiavo’s situation is actually an easy one in terms of marking the boundary between the legislative and judicial powers. While Congress acted only with respect to her, it did so in a manner entirely consistent with its legislative role. It used its powers under Articles I and III to allow for litigation of a claim on Ms. Schiavo’s behalf, but it did not directly, or by necessary implication, dictate or preordain how any such claim would be resolved.\textsuperscript{200} It was the judicial branch that was to do the work of resolving that claim. Congress set the rules and the judiciary served as the umpire.

Indeed, Congress’s actions concerning Terri Schiavo pale in comparison to legislation the Court has upheld as consistent with separation of powers principles. In the late 1980s, litigation began in federal courts in the United States District Courts for the Western District of Washington and for the District of Oregon concerning the federal government’s regulation of timber sales from old-growth forests in the northwestern part of the United States.\textsuperscript{201} An issue in these cases was whether certain agencies had given adequate consideration to the potentially adverse impact of logging on the Northern Spotted Owl.\textsuperscript{202} During the pendency of this litigation, Congress passed legislation containing the following provision:

Congress hereby determines and directs that management of . . . [lands at issue in certain environmental statutes] . . . on the thirteen national forests in Oregon and Washington and Bureau of Land Management in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases [pending in the two district courts].\textsuperscript{203}

Relying on\textit{ United States v. Klein}, the United States Court of Appeals for the Ninth Circuit struck down the Congressional action on the ground that Congress had inappropriately directed an outcome in a pending case without altering the substantive law.\textsuperscript{204} The Supreme Court unanimously reversed the

\begin{flushleft}
\textsuperscript{200} See supra Part I (discussing the structure and operation of the Act).
\textsuperscript{202} Id.
\textsuperscript{203} Id. at 434-35.
\textsuperscript{204} Id. at 436 (citing 914 F.2d 1311 (9th Cir. 1990)).
\end{flushleft}
Ninth Circuit holding that Congress had amended substantive law, even if it had done so for only a single set of cases.\footnote{Robertson, 503 U.S. at 437-41.} As such, the Court reasoned that Congress acted legislatively and the courts were required to apply the “new” law Congress had put into place.\footnote{Id. Professor Noah has recently discussed a similar situation, this one concerning Congressional legislation apparently focused on a single child custody dispute pending in the local courts of the District of Columbia. See Noah, supra note 13, at 122-23 (discussing Congressional legislation concerning Dr. Elizabeth Morgan).} If the \textit{Robertson} Court was not persuaded of a separation of powers violation in that case, it strikes me as highly unlikely that there would be a violation in terms of the Act.\footnote{Robertson, 503 U.S. at 437-41. The Court did not rule on an issue it deemed to have been waived in the case, namely whether “a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications in pending cases.” Id. at 441. I think there is much to be said for the argument that what Congress did in \textit{Robertson} was on the judicial side of the divide. I discuss this issue below when considering lessons that might be taken from Congressional involvement in the Terri Schiavo affair. See infra Part III.C.} Simply put, in \textit{Robertson} Congressional action decided a case while in \textit{Schiavo} the law merely provided a forum for federal courts to engage in their usually activities.

III. LESSONS TO BE DRAWN FROM CONGRESS AND TERRI SCHIAVO

Consideration of Congressional intervention concerning Terri Schiavo and the response of the federal courts yields interesting insights into the power structures established under the Constitution. Indeed, it might be said that a benefit of Congress’s action, sordid though it may have been, is the opportunity to reconsider some of the fundamental principles underlying the nature of American government. Many of these points were discussed in the context of rejecting specific challenges to the Act. This Part collects and discusses these issues, divided into four “lessons.”

A. \textit{Article III Reflects a Broad Grant of Authority to the Federal Government to “Intrude on” State Sovereignty}

The first lesson to be drawn from Congressional involvement in the Terri Schiavo matter is that \textit{Article III} of the Constitution is more than a blueprint for the role of the federal judiciary, in other words something concerning the separation of powers. That Article is also a dramatic example of the extent of latent federal power over state affairs, a federalism concept. In Section 2 of Article III, the Framers simultaneously capped the extent to which Congress could authorize the federal courts to “intrude” on state matters while simultaneously defining the significant extent to which such intrusion was permitted. Thus, those who argue for a broad conception of state sovereignty somehow implicit in the constitutional fabric will need to deal with the explicit power
allocating devices in Article III. Recognition of this function of Article III opens a range of possibilities for federal action. I discuss these matters below.\textsuperscript{208}

B. Article III Also Reflects Broad Congressional Power over the Federal Courts

The second "lesson" is that the Constitution grants Congress broad powers with respect to the federal court system.\textsuperscript{209} First, within the confines of Article III's definition of the "judicial Power of the United States," Congress has textually unrestricted authority to confer jurisdiction on the inferior federal courts.\textsuperscript{210} That power can be used in a gross fashion such as the general grant of federal question jurisdiction.\textsuperscript{211} It can also be exercised in more targeted ways such as the recently enacted "Multiparty, multiforum jurisdiction" statute dealing with an accident in which at least 75 people are killed and in which there is diversity of citizenship between at least one plaintiff and one defendant.\textsuperscript{212} And it can be used in the laser-like manner illustrated by the Act.

This power to regulate jurisdiction is a critical one in the American constitutional order. As mentioned above, that authority is part of the allocation of governmental authority between the federal and state systems.\textsuperscript{213} It is also an important part of the separation of powers at the federal level. It allows Congress to articulate the contours of the cases and controversies that will be heard in the federal courts. Given the power inherent in judicial review, such a check

\textsuperscript{208} See infra Part III.D.

\textsuperscript{209} Of course, those powers are not unrestricted, but I deal with those restrictions separately See infra Part III.B. One can divide Congress's power vis-à-vis the federal courts into several types. I focus on the two matters directly implicated in the Schiavo case, although I also mention several others briefly at the end of this sub-part.

\textsuperscript{210} I do not address here the related questions involving Congress's ability to restrict the jurisdiction of the lower federal courts once given. As a general matter, however, it seems that the same logic underlying broad Congressional authority to grant jurisdiction would also support broad power to restrict it. I leave that debate for another day. I also do not address here the distinct issues raised by Congressional attempts to restrict the jurisdiction of the Supreme Court.

\textsuperscript{211} 28 U.S.C. § 1331 (2005) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").


\textsuperscript{213} See supra Part III.A.

https://researchrepository.wvu.edu/wvlr/vol108/iss2/4
on the front end – that is controlling the cases that get into the system in the first place – helps keep the entire system in balance.

A second example of Congressional authority concerning the federal courts is the power to control the procedures under which the judiciary operates. There is no doubt that there is a core judicial function into which Congress may not constitutionally intrude.214 Stated simply, that function is to “decide” cases,215 although as I have described above, this concept is better thought of as containing three distinct attributes: actual effectiveness; finality; and institutional responsibility.216 But the core judicial function does not extend to the manner in which the federal courts decide cases. So long as Congress does not legislate in such a way as to impede the judiciary’s core adjudicatory function, it may prescribe the rules by which a court is to operate.217

One can see the power in the control of procedure clearly under the Act. Congress removed a number of procedural impediments that could have precluded Ms. Schiavo’s parents from proceeding with their claims.218 The effect of Congressional action was to clear a path for the federal courts to perform their adjudicatory role and to provide a broader array of factual material for the courts to consider in that role.219 Congress did not impede the judicial function, but it was able to set the stage on which it was to be performed. Again, such coordination among the branches is a key ingredient in the American system of governmental checks and balances.

Finally, there are other substantial means by which Congress maintains a check on the judicial branch that bear mention even though none is directly implicated in the Schiavo matter. First, Congress retains the power, within Arti-

214 I discuss this point in more detail below. See infra Part III.C.
216 See supra Part II.C. (laying out conception of the meaning of the “judicial Power of the United States”).
217 Such an impediment, for example, could be the specification of a time in which a decision is to be made that is inconsistent with the ability to decide a case under the “actual effectiveness” criterion. Cf. Miller v. French, 530 U.S. 327, 349-50 (2000) (rejecting a challenge to a rule requiring a decision within 30 days but leaving open whether there could be a shorter time that would impair the core judicial function). Another example might be a procedural rule the effect of which is to either mandate the meaning of evidence, cf. United States v. Klein, 80 U.S. (13 Wall) 128, 143-44 (1872) (discussing Congressional specification of meaning to be accorded a presidential pardon), or to restrict the ability of the court to consider certain evidence. The Act suffers from none of these infirmities. See supra Part II.C. (discussing procedural issues under the Act).
218 See Pub. L No. 109-3, § 2. See also supra Part II (discussing structure of the Act).
219 Perhaps the real power of procedural control, and where most of the inter-branch disputes will occur, is a situation in which Congress attempts to limit the materials the courts may consider or otherwise procedurally restricts a court’s deliberations. One such example is the disputed provisions of the “Antiterrorism and Effective Death Penalty Act” (“AEDPA”). See supra note 167. While the issue is more complicated, the manner in which to evaluate these procedural directives remains the same as that employed when analyzing the Act. One should consider whether the requirements – in isolation or in total – impede the three features comprising the core adjudicatory function of the “judicial Power of the United States.”
Article I limits, to amend the substantive law and, thereby, affect the outcome of a pending matter before final judgment. Second, and related, Congress may alter the substantive law in such a way as to make the continued enforcement of equitable relief unwarranted. Both of these points at their heart go to the ability of Congress to exercise its lawmaking function to its full extent up to the point at which doing so would undermine the coordinate core judicial role.

C. Congressional Power Over Federal Courts is Not Without Limits

The concern with maintaining a balance of power in the constitutional structure also means that the authority of Congress over the federal courts has limits. These boundaries come in two generic varieties. First, there are direct structural restrictions on what Congress may do when exercising its powers concerning the judiciary. In this category fall several of the constitutional challenges to the Act discussed, but ultimately rejected, in Part II of this Article. Some of these restrictions are well-established. For example, Congress may not direct the outcome in a pending case without amending applicable law; it may not direct the reopening of the final judgments of Article III courts; and it may not place review of Article III judgments in non-Article III entities.

There are also additional structural limitations that I believe should be recognized. One such limitation concerns the issue the Court avoided in Robertson. There, the Court declined to consider whether Congress exceeds its powers when it amends substantive law in such a way that the change affects only a single — or perhaps a hand full — of pending cases. There is a powerful structural reason to adopt a rule prohibiting Congress from legislating in such a way, at least with respect to lawsuits focused on past activity. Fundamentally, allowing Congress to direct the outcome in a single case through such a targeted change in the law would place Congress in what amounts to an adjudicatory role in all but name. The lines between the branches would, accordingly, be

221 See, e.g., Miller, 530 U.S. at 347-48; Pennsylvania v. The Wheeling and Belmont Bridge Co., 59 U.S. 421, 431-33 (1856) (Act of Congress declaring a bridge built by defendants was lawful in its present position and elevation upheld as constitutional exercise of Congressional authority).
222 Congress is also limited by the more generic structural requirement that it must have the power to legislate in the first place. See, e.g., U.S. CONST. art. I, § 8; U.S. CONST. amend. XIV, § 5.
223 See Plaut, 514 U.S. at 218.
224 Id. at 218-19.
225 Id. at 218.
227 Professor Gary Lawson has raised, but not discussed in depth, a similar issue. See Lawson, supra note 124, at 207-10.
blurred to the detriment of the balance of power at the heart of the federal government. Such focused Congressional action appears rare. Time will tell how the Court views the matter should it arise again.\textsuperscript{228}

A second type of limitation on Congress's power is an indirect one flowing from the various protections of individual liberty under the Constitution. To be sure, the principal focus of the protections of individual rights is on the safeguarding of the People's liberty and not on the preservation of the appropriate governmental structure.\textsuperscript{229} Nevertheless, a by-product of such protections is an additional check on Congressional transgressions of the separation of powers. So, for example, the fact that due process and equal protection principles might preclude certain Congressional legislation aimed at a single individual would not only protect that individual's personal rights but also buttress the demarcation between the legislative and judicial functions.

In the end, none of the limitations on Congress's powers were implicated by the Terri Schiavo legislation.\textsuperscript{230} Recognition of those limitations, however, is a reminder of the intricate interrelation of the branches.

D. The System the Framers Established Provides Congress with Amazingly Subtle Ways in which to Legislate

Under Article I of the Constitution, Congress is given a wide variety of powers that it may utilize to enact substantive legislation.\textsuperscript{231} Acting under these provisions Congress can have a powerful impact on American life. But an important lesson to be drawn from the interaction of Terri Schiavo and Congress is that Congressional power under the Constitution can be wielded in ways far more subtle that Article I, Section 8 lawmaking. In this particular case, for example, Congress was able to combine its powers to confer subject matter jurisdiction and specify court procedures to provide a forum for federal review of

\textsuperscript{228} Other commentators have been critical of Robertson and the Court's unwillingness to address the issue of Congressional action designed to dictate the result in a single case. See, e.g., Bloom, supra note 167, at 395-98; Amy D. Ronner, 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, 1053-54 (1993).

\textsuperscript{229} See, e.g., Robertson, 503 U.S. at 350 ("In contrast to due process, which principally serves to protect the personal rights of litigants to a full and fair hearing, separation of powers principles are primarily addressed to the structural concerns of protecting the role of the independent Judiciary within the constitutional design.").

\textsuperscript{230} See supra Part II (discussing and rejecting various structural constitutional challenges to the Act).

\textsuperscript{231} See U.S. CONST. art. I, § 8. There are important additional avenues for substantive lawmaking such as Congressional power to enact "appropriate legislation" under Section 5 of the Fourteenth Amendment. See U.S. CONST. amend. XIV, § 5. While these fonts of legislative authority are different in certain respects, the distinctions I draw here between enacting substantive legislation on the one hand and providing for federal jurisdiction or specific rules for adjudication on the other are no different.
federal rights. All of this was done without the invocation of any substantive Article I legislative power.\textsuperscript{232}

There are also other illustrations of such subtle Congressional actions. To take just one recent example, consider the Class Action Fairness Act of 2005 enacted into law in February 2005.\textsuperscript{233} While the specifics of this legislation are complex and subject to interpretation, its basic thrust is to provide federal jurisdiction over, and a means of removal of, certain class actions in which only minimal diversity of citizenship is present.\textsuperscript{234} Congress did not enact substantive legislation concerning the subject of class actions. Rather, it sought to achieve its objectives, dealing with purported class action "abuses"\textsuperscript{235} by using its jurisdictional powers, apparently with the desire that doing so would have an impact on the substantive outcome of this class of litigation. The jury remains out as to whether Congress will be successful in addressing class action "abuses" in this manner, but the means it chose to deal with the perceived issue are similar in fundamental respects to the procedure employed concerning Terri Schiavo.

The potential implications of this more subtle form of lawmaker are immense. For example, Congress could decide that there is a class of litigation about which it is suspicious for either legitimate policy reasons or crass political ones. Medical malpractice claims might be in this category. One option concerning these claims would be to attempt to enact substantive legislation under its Article I powers, perhaps based on Congressional power "[t]o regulate Commerce . . . among the several States."\textsuperscript{236} But such substantive legislation could face serious hurdles including challenges to the scope of Congressional power or political opposition to "federalizing" state tort law. Facing such potential obstacles, Congress might decide that it was better to create federal jurisdiction in at least a portion of these cases with the belief that a perceived conservative federal judiciary would be more favorable to Congress’s desired substantive outcome.\textsuperscript{237} Such a course would not be the most direct route to reach the de-
sired Congressional result, but it might be deemed most expedient in a given political landscape.\(^{238}\)

Similarly, one could imagine that Congress could enact a broader regime of collateral review of federal rights that had been adjudicated in state court. So, for example, Congress could expand the basic idea of habeas corpus to consider matters such as civil rights litigation in state court or even state awards of punitive damages.\(^{239}\) A full articulation of this concept (including its desirability) is beyond the scope of this paper, but the discussion thus far supports the general outlines of Congressional power to enact such a regime.\(^{240}\)

My point here is not necessarily to encourage Congress to legislate in any of these ways. Rather, I wish to highlight the point that the Act reflects a type of often overlooked method of looking at Congressional power; it is a reflection of the subtlety of our Constitution.

IV. SOME CONCLUDING THOUGHTS

Congressional involvement in the tragic story of Theresa Marie Schiavo provides fodder for much discussion. This Article has focused on only one aspect of the Congressional/Schiavo interaction, the power of Congress to legislate as it did within structural constitutional bounds. Despite the loud criticism to the contrary, the Act is a well-crafted example of Congress using its constitutional powers in a subtle, yet powerful way. An analysis of the various constitutional objections to the Act not only demonstrates that those objections are unfounded but also serves to underscore some important lessons about the American constitutional order.

But there is also an important cautionary lesson to be taken from the Schiavo episode. The American constitutional system is robust. If one were limited to the design of that system on paper, there would be little cause for

\(\text{affect interstate commerce.}^\) A complete discussion of this suggestion is not my purpose. I merely wish to sketch the possibilities.

\(^{238}\) Federal courts would be required to apply state law under the *Erie* doctrine. *See* Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). However, federal procedural rules would govern. *See*, e.g., Hanna v. Plumer, 380 U.S. 460 (1965).

\(^{239}\) The Court has indicated that such awards now raise federal due process concerns. *See*, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (reversing judgment of the Supreme Court of Utah that upheld the jury’s award of $145 million as punitive damages); BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) (holding that petitioner, distributor’s, conduct was not particularly reprehensible and reversing the lower court’s denial of a motion to set aside the $2 million punitive damages award).

concern. In reality, however, that system is also quite delicate. In order for the elaborate system of checks and balances to work, we must ultimately rely on the women and men who actually serve as part of the government, including as federal judges.\textsuperscript{241}

The Schiavo situation provides a prime example of the system's fragility. The Act Congress passed was carefully drafted to avoid constitutional infirmity while exercising Congressional power to near its fullest. Congress was cautious about not directing the courts to rule in a specific way even while conferring jurisdiction and removing a number of procedural hurdles to substantive consideration of any claim.\textsuperscript{242} But the public rhetoric of Congressional leaders did not match the careful contours of the Act.\textsuperscript{243} The pressure on the federal judges hearing the case must have been enormous.

In order for the system to work – which it did – those individual federal judges needed to have the courage to stand-up to Congressional pressure apparently designed to violate the separation of powers in deed if not word. In this case, the country was lucky to have dedicated people such as United States District Court Judge James Whittemore who were willing to play their part in enforcing the rule of law even at the risk of personal sacrifice.\textsuperscript{244} Thus, while the system the Framers established over two centuries ago provides the mechanism for balancing the powers of the branches, it ultimately comes down to the people in government to ensure that the Framers' vision endures. That is a lesson worth taking to heart as much as the more academic insights into the structure of the Constitution itself.

\section*{APPENDIX}

Public Law 109-3

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

\textsuperscript{241} It is of course true that there are strong institutional safeguards meant to ensure the independence of the judiciary. These safeguards include life-tenure and salary protection. See U.S. CONST. art. III, § 1. The Framers recognized those protections as an integral part of the constitutional system. See, e.g., THE FEDERALIST No. 78 (Alexander Hamilton) (discussing life tenure), No. 79 (Alexander Hamilton) (discussing salary protection). But institutional safeguards go only so far. One still must rely on the people who bring Article III's judicial department to life.


\textsuperscript{243} See supra note 50 (discussing critical Congressional commentary concerning actions taken by the federal courts).

\textsuperscript{244} See Schiavo ex rel. Schindler v. Schiavo, 357 F.Supp. 2d 1378, 1388 (M.D. Fla. 2005) ("This court appreciates the gravity of the consequences of denying injunctive relief. Even under these difficult and time strained circumstances, however, and notwithstanding Congress' expressed interest in the welfare of Theresa Schiavo, this court is constrained to apply the rule of law.").
SECTION 1. RELIEF OF THE PARENTS OF THERESA MARIE SCHIAVO.

The United States District Court for the Middle District of Florida shall have jurisdiction to hear, determine, and render judgment on 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.

SEC. 2. PROCEDURE.

Any parent of Theresa Marie Schiavo shall have standing to bring a suit under this Act. The suit may be brought against any other person who was a party to State court proceedings relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain the life of Theresa Marie Schiavo, or who may act pursuant to a State court order authorizing or directing the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life. In such a suit, the District Court shall determine de novo any claim of a violation of any right of Theresa Marie Schiavo within the scope of this Act, notwithstanding any prior State court determination and regardless of whether such a claim has previously been raised, considered, or decided in State court proceedings. The District Court shall entertain and determine the suit without any delay or abstention in favor of State court proceedings, and regardless of whether remedies available in the State courts have been exhausted.

SEC. 3. RELIEF.

After a determination of the merits of a suit brought under this Act, the District Court shall issue such declaratory and injunctive relief as may be necessary to protect the rights of Theresa Marie Schiavo under the Constitution and laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

SEC. 4. TIME FOR FILING.
Notwithstanding any other time limitation, any suit or claim under this Act shall be timely if filed within 30 days after the date of enactment of this Act.

SEC. 5. NO CHANGE OF SUBSTANTIVE RIGHTS.

Nothing in this Act shall be construed to create substantive rights not otherwise secured by the Constitution and laws of the United States or of the several States.

SEC. 6. NO EFFECT ON ASSISTING SUICIDE.

Nothing in this act shall be construed to confer additional jurisdiction on any court to consider any claim related--

(1) to assisting suicide, or

(2) a State law regarding assisting suicide.

SEC. 7. NO PRECEDENT FOR FUTURE LEGISLATION.

Nothing in this Act shall constitute a precedent with respect to future legislation, including the provision of private relief bills.

SEC. 8. NO EFFECT ON THE PATIENT SELF-DETERMINATION ACT OF 1990.

Nothing in this Act shall affect the rights of any person under the Patient Self-Determination Act of 1990.

SEC. 9. SENSE OF THE CONGRESS.

It is the Sense of the Congress that the 109th Congress should consider policies regarding the status and legal rights of incapacitated individuals who are incapable of making decisions concerning the provision, withholding, or withdrawal of foods, fluid, or medical care.