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Schiavo and Klein (Symposium)

Evan H. Caminker
University of Michigan Law School, caminker@umich.edu

SCHIAVO AND *KLEIN*

*Evan Caminker**

When teaching federal courts, I sometimes find that students are slow to care about legal issues that initially seem picayune, hyper-technical, and unrelated to real-world concerns. It takes hard work to engage students in discussion of *United States v. Klein*,[1] notwithstanding its apparent articulation of a foundational separation of powers principle that Congress may not dictate a "rule of decision" governing a case in federal court.[2] A Civil War-era decision about the distribution of war spoils, one the Supreme Court has hardly ever cited since and then only to distinguish it, in cases involving takings and spotted owls? Yawn.

I've tried in the past to grab students' attention by conjuring up far-fetched hypotheticals designed to make something unassailably significant turn on whether a statute dictates a rule of decision in violation of *Klein*. I can now rest my imagination; *Schiavo v. Schiavo* presents the issue in a life-or-death scenario.

And life-or-death describes not just the stakes for Terri Schiavo herself, but also for the traditional understanding of *Klein*. In this brief essay I explain why, if the federal statute in question doesn't violate *Klein* by impermissibly dictating to the federal courts a rule of decision, then *Klein* must be virtually impossible to violate.

I

I will not belabor here the background or resolution of the Schiavo litigation; they are well known and discussed in some detail in other contributions to this symposium. It is sufficient for my purposes to state the following. Terri Schiavo required a feeding tube after a medical incident left her in a permanent vegetative state.[3] Her family disagreed as to whether this form of

* Dean and Professor of Law, University of Michigan.

1. 80 U.S. 128 (1871).
2. *Id.* at 146.
3. Bush v. Schiavo, 885 So. 2d 321, 324 (Fla. 2004).

life support should be terminated, with ex-husband Michael Schiavo favoring termination and parents Robert and Mary Schindler favoring continuation.[4] The issue was brought to the state courts of Florida and, in many proceedings spanning many years, a final state judgment emerged to authorize the withdrawal of Terri's feeding tube.[5]

But Congress had other ideas. After heated debate capturing national attention, Congress decided that Terri's parents ought to have another opportunity to make their case—this time in federal court. Congress passed "An Act for the Relief of the Parents of Theresa Marie Schiavo" (the "Schiavo Relief Act") designed to let the parents file a federal lawsuit to mandate continued tube feeding wholly unencumbered by their loss in the state court proceedings.[6] Terri's parents did indeed file such a lawsuit, but the suit was unsuccessful.[7] Terri's feeding tube was ultimately removed, and she eventually passed away.

For purposes of this litigation, federal courts generally assumed the constitutionality of the Schiavo Relief Act. Judge Birch of the United States Court of Appeals for the Eleventh Circuit, however, concurred in a denial of rehearing en banc on the ground that the Act violated the separation of powers.[8] Perhaps because of the frenetic pace of the litigation, Judge Birch's opinion did not emerge as a model of clarity. Citing *Klein* as well as other separation of powers cases, Judge Birch concluded that the Act "invades the province of the judiciary"[9] because it "attempt[s] to 'direct[] what particular steps shall be taken in the progress of a judicial inquiry.'"[10] Judge Birch's precise reasoning leading to this conclusion is not entirely clear.[11] But in my view

4. *Id.* at 325.

5. *Id.* at 325-28; Schiavo *ex rel.* Schindler v. Schiavo, 403 F.3d 1223, 1225–26 (11th Cir. 2005).

6. Pub. L. No. 109-3, 119 Stat. 15 (2005).

7. Schiavo *ex rel.* Schindler v. Schiavo, 403 F.3d 1223 (11th Cir. 2005), *application for stay of enforcement denied*, 544 U.S. 945 (2005); Schiavo *ex rel.* Schindler v. Schiavo, 404 F.3d 1270 (11th Cir. 2005), *application for stay of enforcement denied*, 544 U.S. 957 (2005).

8. Schiavo *ex rel.* Schindler v. Schiavo, 404 F.3d 1270, 1271 (11th Cir. 2005).

9. *Id.* at 1274.

10. *Id.* (quoting Plaut v. Spendthrift Farm. Inc., 514 U.S. 211, 225 (1995)).

11. Judge Birch cites *Klein* along with a host of other separation of powers cases, but he never clearly pegs the Act's constitutional defect specifically to *Klein*, nor does he convincingly demonstrate what the *Klein* problem would be. At one point he suggests that the Act's problem is that it purports to regulate a set of legal principles, including the standard of review and other doctrines traditionally calling for judicial judgment. *See Schiavo*, 404 F.3d at 1274 ("By setting a particular standard of review in the district court, Section 2 of the Act purports to direct a federal court in an area traditionally left to the

he is on to something that can, in fact, be spelled out in quite simple and straightforward terms.

II

In *Klein*, the Supreme Court invalidated a congressional statute for transgressing the boundary between legislative and judicial power.[12] The plaintiff in *Klein*, the executor of the estate of a Confederate supporter, sought to recover the value of the decedent's cotton, which was seized by treasury agents of the United States during the Civil War.[13] The executor brought suit under the Abandoned and Captured Property Act, which authorized noncombatant confederate landowners to recover seized property upon proof of loyalty to the federal government.[14] While in fact the landowner had been disloyal, he had previously received a Presidential pardon by taking an oath to support the Constitution and the union of the states. In *United States v. Padelford*, the Supreme Court had held that a Presidential pardon would suffice as proof of "loyalty" for purposes of the seizure statute.[15] Based on the pardon, the court of claims in the *Klein* proceedings awarded the landowner recovery.[16] But pending the government's appeal from that decision, Congress passed an appropriations proviso declaring that pardons were inadmissible as proof of loyalty to the federal government and that acceptance of a pardon, under most circumstances, was conclusive evidence of disloyalty requiring dismissal of the suit.[17] The proviso further directed the Supreme Court to dismiss any case in which a claimant had prevailed in the court of claims if

federal court to decide. . . . By denying federal courts the ability to exercise abstention or inquire as to exhaustion or waiver under State law, the Act robs federal courts of judicial doctrines long-established for the conduct of prudential decisionmaking."). This is the defect Judge Tjoflat believes Judge Birch has identified, as evidenced by the former's response. *See id.* at 1280 (Tjoflat, dissenting from denial of rehearing en banc) ("I believe that it is fully within Congress's power to dictate standards of review and to waive in specific cases nonconstitutional abstention doctrines."). Later, Judge Birch suggests that the problem is more limited: "[I]t is the abrogation of such standards [of review] in a *single* case, not in a category of cases . . . ." *Id.* at 1275 n.4. Later still, Judge Birch finally focuses on the core concern of *Klein*, noting that in the Act "the federal judiciary is instructed as to how to conduct this specific case." *Id.* at 1275 n.5.

12. 80 U.S. 128 (1871).
13. *Id.* at 132.
14. Ch. 120, 12 Stat. 820 (1863).
15. 76 U.S. (9 Wall.) 531, 543 (1870).
16. *Klein*, 80 U.S. at 143.
17. Act of July 12, 1870, ch. 251, 16 Stat. 235.

the claimant prevailed upon proof of loyalty by Presidential pardon.[18]

In *Klein*, the Supreme Court recognized that the "great and controlling purpose [of the proviso] is to deny to pardons granted by the President the effect which this court had adjudged them to have [in *Padelford*]."[19] As such, the proviso violated separation of powers principles on two independent grounds. First, the proviso "passed the limit which separates the legislative from the judicial power."[20] As the Court explained, the proviso dictated the outcome of federal adjudication "solely on the application of a rule of decision, in causes pending, prescribed by Congress."[21] This, the Court held, Congress could not do:

> It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power. The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it? We think not . . . .[22]

To clarify its ruling the Court distinguished its previous decision in *Pennsylvania v. Wheeling and Belmont Bridge Co.*,[23] in which the Court held that Congress could change the outcome of a dispute by enacting new legislation changing the substantive law applicable to that dispute.[24] The two differed in a critical as-

18. *Id.*
19. *Klein*, 80 U.S. at 145.
20. *Id.* at 147.
21. *Id.* at 146.
22. *Id.* at 146.
23. 59 U.S. 421 (1855).
24. The Court had originally held that a bridge was an obstruction. Subsequent legislation, however, made the bridge a post-road for passage of the United States mail and required that navigation not interfere with the bridge. The Court concluded in *Wheeling Bridge* that this new statute changed the previous law and thereby dictated a different adjudicatory outcome: "[A]lthough [the bridge] still may be an obstruction in fact, [it] is

pect: "No arbitrary rule of decision was prescribed in [*Wheeling Bridge*], but the court was left to apply its ordinary rules to the new circumstances created by the act. In [*Klein*], no new circumstances ha[d] been created by legislation."[25]

After concluding that the proviso governing the evidentiary significance of pardons infringed upon the judicial power, the *Klein* Court went on to determine that "[t]he rule prescribed is *also* liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive"[26] because it purported to affix the meaning of a presidential pardon in a manner contrary to the intention of the issuing President. Some, perhaps unsure of the footing of the judicial power analysis, have suggested *Klein* is best understood as hinging on this executive power infringement claim.[27] But the structure and language of the Court's opinion make clear that the two separation of powers principles discussed in *Klein* operate in the disjunctive: The proviso governing pardons was unconstitutional because it independently transgressed the judicial and "also" the executive power.

Since *Klein* was decided, the Court and most federal courts scholars have taken its seemingly central language concerning the line between legislative and judicial power at face value: Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it."[28] While Congress can of course add to or modify the substance of the law (within its limited constitutional authority) and thereby influence the outcome of litigation interpreting and applying that law, Congress may not leave the law unchanged but simply order the courts to decide a specific case under that preexisting law in a particular manner.

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not so in the contemplation of law." 59 U.S. at 430.

25. *Klein*, 80 U.S. at 146–47.

26. *Id.* at 147 (emphasis added).

27. *See, e.g.*, RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 369 n.22 (4th ed. 1996); Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 922 (1998).

28. *Id.* at 146; *see also* Plaut v. Spendthrift Farm, Inc, 514 U.S. 211, 218 (1995) (describing *Klein* as a case in which "we 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'") (citation omitted); United States v. Sioux Nation of Indians, 448 U.S. 371, 405 (1980) ("[T]he proviso at issue in *Klein* [was unconstitutional because it] had attempted 'to prescribe a rule for the decision of a cause in a particular way.'") (citation omitted).

III

The Schiavo Relief Act states very clearly that it does not add to or modify the substance of any federal law claims that Terri might have against any of the authorized defendants.[29] Nor does the Act tell courts how to address or resolve any such substantive claims. At first glance, therefore, the Act does not seem to tell federal courts how any cases should be decided.

But let's take a closer look at what the Act does do. Section I simply grants federal jurisdiction over the case.[30] In fact, for these purposes Section I is redundant with the basic grant of jurisdiction in 28 U.S.C. § 1331, which already grants jurisdiction for claimed violations of federal constitutional or statutory law.[31] In effect, then, Section I is essentially a redundant predicate to the real operative provisions of the Schiavo Relief Act, which follow in Section II entitled "Procedure." Section II states as follows:

> 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

29. Pub. L. No. 109-3, § 5, 119 Stat. 15 (2005) ("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.").

30. *See* Section 1, 119 Stat. 15 ("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.").

31. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The fact that Section I of the Schiavo Relief Act specifies that jurisdiction lies in the Middle District of Florida might possibly be read as trumping 28 U.S.C. § 1391 for Schiavo Relief Act suits, such that they may be brought only in this district notwithstanding the broader array of venues that would otherwise have been appropriate.

> State court proceedings, and regardless of whether remedies available in the State courts have been exhausted.

What does all this mean? The point of Section II, simply put, is to clear away some procedural hurdles that almost certainly would otherwise trip up Schiavo's parents as they entered the federal courthouse. The first hurdle involves prudential (non-Article III) limitations on standing in federal court. While this hurdle and the Act's override of it raise some interesting questions, they are not my primary focus here, and I will largely put them aside.[32]

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32. Typically, when a person possessing Article III standing attempts to assert the rights of another person in federal court (here, Terri's parents asserting Terri's rights), the federal court assesses the propriety of so-called "third-party standing" by engaging in a contextualized inquiry of both the rightholder's ability to assert her own rights and her relationship with her would-be representative. *See, e.g.,* Singleton v. Wulff, 428 U.S. 106 (1976). Terri's parents might have faced difficulty qualifying for standing under existing prudential standing doctrine. Whether Terri could have litigated her own rights is a tricky question, as one might plausibly say she could do so—through her guardian for these purposes, ex-husband Michael; whether the parents had a sufficiently close relationship to Terri to represent her interests is also tricky, precisely because their view of her interests was directly at odds with her guardian's view of her interests. But the Supreme Court has held that Congress can authorize third-party standing in these circumstances by express provision. *See, e.g.,* Bennett v. Spear, 520 U.S. 154, 163 (1997) ("Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated."), and the first sentence of Section II clearly does so here.

There is a separate and I think interesting question of law lurking here: When Congress provides an express grant of standing clearly designed to overcome prudential standing concerns (third-party concerns or otherwise), does such congressional provision mean that the prudential inquiry disappears and the federal court *must* entertain the claim (assuming Article III standing exists)? Or does it mean that, as a matter of Article III judicial power, the federal court still retains the discretion to decide on all-things-considered prudential grounds whether the particular plaintiff has standing, such that in theory the court could still say "while the congressional grant of standing has mitigated the concerns that counsel restraint, this court does not believe the concerns have been eliminated entirely, and therefore standing is still denied on prudential grounds"? Judge Tjoflat seems to embrace the former, mandatory view. *See Schiavo*, 404 F.3d at 1280 (Tjoflat, J., dissenting from denial of rehearing en banc) (asserting Congress may "require" federal courts to grant standing despite prudential reasons for hesitation). And I know of no case denying standing on prudential grounds despite an express grant of standing, or even asserting that the court could still deny standing if it believed doing so would be appropriate under the circumstances. That said, this latter possibility might reflect the better understanding. Presumably the prudential standing inquiry is an exercise of judicial discretion over whether to exercise the jurisdiction afforded by the Constitution and federal statutes; it is not clear that Congress should be able to "order" the court how to exercise this discretion. Indeed, one might also distinguish between the two primary "prudential" reasons to deny standing. The "generalized grievance" prudential concern reflects a judicial desire to defer certain types of decisionmaking to the political branches. A congressional grant of standing intended to overcome this prudential concern arguably functions as a congressional waiver of its institutional interest in resolving the matter through a political response. *See* Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) ("Congress' decision to grant a particular plaintiff the right to challenge an Act's constitutionality . . . eliminates any prudential standing limitations and significantly lessens the

The other hurdles all involve different doctrines that I will collectively refer to as "restraint doctrines" in that they are designed to mandate or encourage federal court restraint in deference to state court decisionmaking. These doctrines include preclusion, abstention, and exhaustion. Preclusion doctrine would normally bar federal court relitigation of cases and issues finally decided in state court;[33] abstention doctrine could in theory have counseled federal court restraint in deference to ongoing state proceedings (a doctrine that could have been triggered if Schiavo's parents filed a new case concerning Terri's feeding and treatment in state court);[34] and exhaustion doctrine could in theory have precluded Schiavo's parents from bringing claims in federal court that had not yet been fully litigated in state court.[35] Now, federal courts scholars have long debated the source and

risk of unwanted conflict with the Legislative Branch when that plaintiff brings suit."). The "third-party" prudential concern reflects a judicial desire to protect the interests of the real rightholder. Here one could imagine a court, even in the face of a congressional grant of standing intended to overcome the third-party prudential concern, concluding that it can assess the rightholder's interests better than can Congress and thus it ought not blindly to defer to Congress' judgment about the matter.

33. With respect to claims brought under 42 U.S.C. § 1983 (the logical pre-Schiavo Relief Act source of a federal cause of action to relitigate the feeding tube issue), see, for example, Migra v. Warren City School District, 465 U.S. 75 (1984), which held that state court litigation has a claim preclusion effect in subsequent § 1983 litigation, and Allen v. McCurry, 449 U.S. 90 (1980), which held that state court litigation has an issue preclusion effect in subsequent § 1983 litigation. It has also been assumed by many that the so-called *Rooker-Feldman* doctrine would have barred a federal court suit, which precludes district courts from exercising essentially "appellate" jurisdiction over "cases brought by state-court losers 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." Exxon Mobil Corp. v. Saudi Basic Indust. Corp., 544 U.S. 280, 284 (2005); *see* District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). *But see* Lance v. Dennis, 126 S. Ct. 1198, 1201 (2006) ("[O]ur cases since *Feldman* have tended to emphasize the narrowness of the *Rooker-Feldman* rule.").

34. One might imagine situations in which either the so-called *Pullman* abstention or *Younger* abstention doctrines might have influenced federal court proceedings. *See* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (extending Younger abstention principles in certain circumstances to state civil proceedings); Younger v. Harris, 401 U.S. 37 (1971) (asserting that in certain circumstances federal courts should abstain pending conclusion of state criminal proceedings); Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941) (asserting that under certain circumstances federal courts should abstain from federal constitutional rulings where clarification of state law might make such rulings unnecessary). It strikes me as unlikely that these abstention doctrines would actually have been called into play in a federal suit over Terri's feeding tube, but Congress apparently wanted to cover all the bases.

35. In fact, the Supreme Court has already established that plaintiffs in § 1983 cases need not previously have exhausted available state judicial or administrative remedies. *See, e.g.*, Patsy v. Board of Regents, 457 U.S. 496, 516 (1982) (finding no administrative exhaustion requirement); Monroe v. Pape, 365 U.S. 167, 183 (1961) (finding no judicial exhaustion requirement). Again, Congress appears to have been overcautious on this point.

legitimacy of these "restraint doctrines." There is some disagreement as to whether some of these doctrines are better understood as being grounded in congressional edicts or judge-made common law, as well as disagreement as to whether some of these doctrines are good law or good policy.[36] But for purposes of exploring the *Klein* issue, such debates need not be engaged today. For better or worse these restraint doctrines must be acknowledged to exist in current law, whatever the statutory or judicial source. And under the law as it preexisted the Schiavo Relief Act, one or more of these doctrines would have precluded federal court review of federal law challenges to the termination of Terri Schiavo's life support.

IV

Of course, nothing said so far would preclude Congress from eliminating or modifying any or all of these restraint doctrines through appropriately prospective and general legislation, so long as the specific modification lies within Congress' limited realm of legislative authority.[37] But the question remains whether the Schiavo Relief Act qualifies as appropriately prospective and general legislation.

Now, the notions of generality and prospectivity must be unpacked in order to distinguish between two possible readings of the *Klein* prohibition, one focusing on the legislation's scope and the other on its form.

A. *KLEIN* AS A CONSTRAINT ON LEGISLATIVE SCOPE

Some have suggested that, according to the principle established in *Klein*, Congress simply cannot dictate the resolution (in whole or in part) of a single dispute, whether it does so by changing the content of applicable law *or* by directing the judicial im-

36. *See, e.g., Symposium, The Rooker-Feldman Doctrine*, 74 NOTRE DAME L. REV. 1081 (1999) (discussing the source and the propriety of doctrine); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (challenging the propriety of judge-made abstention law).

37. Congressional power to dictate procedures for entertaining and adjudicating federal statutory claims would seem both to be "necessary and proper" for the power to enact the substantive statutory claim in question, and also incident to the express and implied powers to regulate the jurisdiction of the Supreme and lower federal courts, respectively. Congressional power to dictate procedures for entertaining and adjudicating federal constitutional claims would seem to fall into this latter category of jurisdiction-regulating powers as well. I am assuming here that none of the restraint doctrines in question are constitutionally mandated, such that Congress could not alter them under any circumstances.

plementation of existing law.[38] Put differently, congressional directives influencing federal court adjudication—of any form—must at least apply to more than n=1 cases. Such a rule would resonate with equal protection principles, with the point being that Congress will less likely impose unfairly or unreasonably onerous burdens on a party to an ongoing legal dispute if its legislative prescriptions must necessarily apply (at least until repealed or re-amended) to a class of disputes, all the more so if some within that class are as-yet unknown disputes.

Others have suggested that any such principle of legislative generality or prospectivity might more appropriately be grounded in equal protection (or sometimes bill of attainder) doctrine than be viewed as a directive of *Klein* under separation of powers principles.[39] There is certainly something to this sentiment. While it might violate these other doctrines, it is unclear why Congress would be arrogating to itself the "judicial power" if it changed the law even only for a specific case because the federal courts would be asked to do only that which they routinely do: apply the (concededly narrowly applicable) governing law to adjudicate the case at hand. And the one irrefutable statement about the Klein rule is that it was announced in the *Klein* case, which involved legislation theoretically and practically applicable to multiple disputes.

I leave for another day the questions whether the Constitution precludes n=1 legislation and, if so, whether the source of that constraint is best understood as the *Klein* separation of powers principle or the equal protection clause or some other constitutional provision or doctrine.[40] It shall suffice for now to make the following observation: If there is such a constraint and it stems from *Klein*, then the Schiavo Relief Act clearly violates it—and that is true whether one views the Act as amending current law or as directing the district court's application of existing law, a question to which I am about to turn. Whatever else one can say, clearly this Act is designed to govern one and only one dispute.[41] That, in fact, is one reason many critics decried Con-

38. Judge Birch uses language suggestive of this view. *See* Schiavo *ex rel.* Schindler v. Schiavo, 404 F.3d 1270, 1274 n.4 (11th Cir. 2005) (stating that the problem "is the abrogation of such standards [of review] in a *single* case, not in a category of cases like *habeas corpus* cases") (emphasis in original).

39. *See, e.g.*, Scheidegger, *supra* note 27, at 922; Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 594-95 (1983).

40. This question was expressly identified but left unaddressed in Robertson v. Seattle Audubon Society, 503 U.S. 429, 441 (1992).

41. One might object that the Act seems to authorize more than one suit; standing

gress' intervention as political grandstanding, a transparent act of "symbolic legislation" designed to score easy political points rather than to address a serious and ongoing problem concerning confusion over end-of-life decisionmaking norms in our society.[42]

B. *KLEIN* AS A CONSTRAINT ON THE MEANS BY WHICH CONGRESS MAY INFLUENCE ADJUDICATION

As explained previously, the narrower and more traditional understanding of the *Klein* principle is this: While Congress may add to or eliminate or amend the applicable law governing a single dispute, Congress may not leave existing law unchanged and yet direct a federal court to interpret or apply that law to a dispute in any particular manner. But herein lies the problem. Can it plausibly be said that Congress in fact amended or superseded the existing law with respect to these restraint doctrines? Can it be said that a district court entertaining a suit by Terri's parents has simply been directed to apply "new laws" governing preclusion, abstention, and exhaustion—and under those new laws there are no such restraints applicable to the case? If *Klein* is to mean anything anymore, I think the answer has to be no.

It is worth recalling again the precise language of the statute:

> [T]he District Court shall determine de novo any claim [under 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

is granted to "[a]ny parent of Theresa Marie Schiavo," Pub. L. No. 109-3, § 1, 119 Stat. 15 (2005), and depending on whether "parent" is limited to biological relations, this grant of standing clearly encompasses at least two people, if not more under imaginable circumstances. But while Section II grants multiple individuals statutory standing, Section I makes clear that any suit or claim shall be brought "by or on behalf of Theresa Marie Schiavo," § 1, 119 Stat. 15. It seems to me that if Terri's parents brought two suits in serial fashion, the second would be barred by principles of preclusion. So the Act itself is designed to govern n=1 disputes even though it authorizes multiple parties to litigate that dispute.

42. Of course, if such was truly Congress' motive, the effort clearly backfired with respect to popular opinion. Moreover, it would not surprise me if the courts eventually hearing the case were *less* rather than more inclined to stay the termination of Terri's life support based on a subconscious recognition that their independence was being challenged.

courts have been exhausted.[43]

There is no affirmative statement in these provisions that any law or legal standards have been changed, even narrowly or temporarily. Rather, the Act simply directs the District Court to apply these bodies of restraint law in a particular way, and that particular way is to ignore them as potential barriers to said suit.

In fact, when I have taught *Klein* in the classroom, I have offered hypotheticals pretty close to this in an effort to demonstrate language that Congress might use if it were, for some perverse reason, *trying* to violate *Klein*. I suppose I could imagine worse: The Act could have said "if, in a suit brought by Terri's parents, the defendants raise as defenses to the suit the legal doctrines of preclusion, abstention, or exhaustion, the District Court shall resolve each of these legal doctrines in favor of the plaintiff parents." But the actual statutory language amounts essentially to the same thing: The district court is told that, as it "determines" the resolution of any claim of Terri's on the merits, the court must simply close its eyes to these defenses and adjudicate the case as if these restraint doctrines did not exist and hence were unavailable for the defendants to invoke.[44]

Finally, heretofore unnoticed is a striking fact: The Act's mandate that the district court "determine" Terri's claims without recourse to the listed restraint doctrines is directed specifically and solely to the "District Court" alone, and *not* more broadly to the federal courts. The most straightforward reading of the statutory language would thus mean that, on appeal, neither the Eleventh Circuit Court of Appeals nor the Supreme Court would be precluded from dismissing the parents' lawsuit on the basis of these restraint doctrines. Of course, perhaps one could infer from the language directed to the district court that Congress would have intended the appellate courts similarly to close their eyes to these putative defenses. But the mere fact that

43. Schiavo Relief Act, Pub. L. No. 109-3, § 2, 119 Stat. 15 (2005).

44. The doctrines being pretended away in the Schiavo Relief Act could help only one party, the defendant. But I don't mean to suggest that the result would be different were this not the case. Suppose the Act said "the District Court shall not consider any legal issues concerning the timeliness of the filing of motions under the Rules of Civil Procedure." That directive might assist either the plaintiffs or defendants (or at different times both) depending on context, but it would still be a legislative directive that the district court "close their eyes on the constitution, and see only the law." Marbury v. Madison, 5 U.S. 137 (1 Cranch) 137, 178 (1803). But on a spectrum surely the concerns underlying *Klein* should be at their zenith when Congress "disappears" one or more legal doctrines that, in the context of a particular case, could be invoked *only* by and to the advantage of one of the two parties.

the Act says the "District Court shall determine"[45] Terri's claims, as opposed to that "the federal courts shall determine," seems highly revealing. One would obviously expect Congress to use the latter locution were it consciously intending to amend the applicable federal law. To my mind, Congress' oddly exclusive reference to the "District Court" makes it even more reasonable to describe the Act as imposing a "rule of decision" on the district court rather than as changing the law applicable to this (let alone any other) case.

In sum, if the Schiavo Relief Act does not violate the principle established in *Klein*, then that case is essentially confined to its facts (and, indeed, probably wrongly decided on those facts).

Now, I can imagine the following response to the foregoing conclusion:

> So what? OK, the Schiavo Relief Act's language indicates that Congress either lacked a good federal courts scholar on staff or rushed this bill through so quickly that it either failed to ask or failed to care about the considered views on the *Klein* issue. But Congress *could* have used different and better language to get to the same place, by clearly amending or superseding the law governing these restraint doctrines applicable directly to the specific lawsuit contemplated by Terri's parents. The Act might, for example, have addressed the restraint doctrines using language similar to that used in the provision governing standing,[46] or in Section 3 "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."[47] Section 3 supersedes the running of any other statute of limitations, and it does so clearly by specifying a new limitations period applicable to all suits under this new federal statute. In parallel form, Section 2 could have said something like the following: "Notwithstanding any other provision of law, any suit or claim under this Act shall be governed by the following rules of procedure: neither claim nor issue preclusion shall attach to any prior state court proceeding or judgment; the existence of any ongoing or new claim filed in state court shall not affect the timing of federal court resolution of the claim; and the claim need not have been litigated in state court proceedings as a prerequisite to its filing in federal court under this Act." Given this alternative possibility, what's the harm in letting

45. Section 2, 119 Stat. 15.
46. *See supra* note 32.
47. Section 4, 119 Stat. 15.

Congress get away with the loose language it actually used? Again, so what?

Well, this is a fair question, boiling down to the question whether the *Klein* rule is in practice nothing more than a trivial rule of drafting etiquette. Perhaps the Court thinks so, as evidenced by its distinction of *Klein* in *Robertson v. Seattle Audubon Society*.[48] There, the Court struggled mightily, to my mind, to reach the conclusion that language that seemed to direct courts in specified cases to deem satisfied certain regulatory requirements governing timber harvesting[49] actually amended the substantive law.[50] The Court's apparent willingness to work very hard to avoid *Klein* might suggest its lack of regard for the principle it supposedly espouses, an attitude reinforced by its refusal even to confirm the principle's continuing vitality.[51]

In my view, however, even if *Klein* is reducible in operation to a rule of drafting etiquette, it remains a rule that can matter. It strikes me as important that federal courts always maintain their proper self-understanding of being neutral and final arbiters of what the law is and how it applies to specific cases—even if and when the law applies only to single cases. Only this self-understanding can generate sufficient norms of independence and, frankly, essentiality, to safeguard long-term fidelity to the rule of law. Widespread public understanding that courts play this independent role is necessary to building long-term public support for it in the face of periodic congressional temptation to cross the line. And linguistic formulations contained in statutes may make a difference to these understandings. For these reasons, it is perfectly sensible for courts to continue enforcing the

48. 503 U.S. 429, 441 (1992).

49. The pertinent statutory provision provided in part: "[T]he Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for [three pending cases identified by name]. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States." *Id.* at 435 n.2.

50. *See id.* at 438 (concluding the statute "compelled changes in law, not findings or results under old law").

51. *Id.* at 441 ("The Court of Appeals held that subsection (b)(6)(A) was unconstitutional under *Klein* because it directed decisions in pending cases without amending any law. Because we conclude that subsection (b)(6)(A) *did* amend applicable law, we need not consider whether this reading of *Klein* is correct.") (emphasis in original); *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) ("Whatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'").

Klein principle, even if Congress can usually or perhaps always achieve its desired ends by actually changing the law.[52]

But as explained above, Congress simply did not do this in the Schiavo Relief Act. A fair reading of the Act suggests that Congress dictated judicial application of existing law, rather than changed the law to be applied. As such, the Act violates the separation of powers—unless, as I now explore, there are heretofore unarticulated limits to the principle.

V

A. *KLEIN* AND THE SUBSTANCE/PROCESS DISTINCTION

If it is clear by now (as I think it is) that there is a *Klein* violation—or at the very least a serious *Klein* issue to be addressed—then why is Judge Birch virtually alone in assailing the Schiavo Relief Act on these grounds?[53] I wonder if this reflects an intuitive distinction between substance and process: Congress may have tinkered with the application of some procedural doctrines, but Congress did not tell the federal courts how to rule on the *substantive merits* of the parents' claims and therefore, in a plausibly relevant sense, did not tell the courts how to "decide the case." Indeed, at first glance, one might characterize Congress as trying to *un*decide the case (as it then stood after the state court proceedings had run their course) so as to ensure a fresh and neutral hearing of the claims in a federal court.[54] Isn't this a far cry from congressional arrogation of the judicial power to resolve the competing federal law claims in the dispute?

Well, yes and no. If one views the federal court adjudication in a vacuum, starting with commencement of the federal suit,

52. *Cf.* United States v. Lopez, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (referring to federal commandeering of state officials as violating the "etiquette of federalism").

53. There were a number of conversations on academic scholar-driven list serves concerning the constitutionality of the Schiavo Relief Act, but to the best of my recollection only Professor Doug Laycock and I contemporaneously articulated the *Klein* problem. Others seemed quickly dismissive of this concern and took more seriously other possible justifications for Judge Birch's conclusion, including a violation of *Plaut*, 514 U.S. 211, through congressional reopening of a final state court judgment, and a violation of equal protection or bill of attainder principles for the n=1 reason discussed above.

54. Judge Tjoflat obliquely hints at this distinction in his reply to Judge Birch. *See* Schiavo *ex rel.* Schindler v. Schiavo, 404 F.3d 1270, 1281 n.5 (11th Cir. 2005) (dissenting from denial of rehearing en banc) ("The rules Congress has established here go to the extent of our authority to assess the merits of claims, without authorizing any new claims or elements thereof to guide our determination of federal questions.").

then yes, it seems difficult to contend that Congress interfered with judicial independence to say what the law is.

But, of course, the federal adjudication should not be viewed in a vacuum precisely because preexisting procedural doctrines make the prior state proceedings relevant data for the federal adjudication. Put differently, Congress turned what under preexisting law was a clear loser for Terri's parents (independent of the merits of their substantive claims) into a potential winner (depending on the merits of their claims). To be sure, perhaps a "paradigmatic" *Klein* violation (if there is such a thing) turns a dispute for which either party might win (depending on the merits of the claims) into a clear winner for a particular party. But both moves involve telling the court how to articulate "what the law is"—in the former case, how the laws of preclusion, abstention, and exhaustion apply to the claims, and in the latter case, how the laws defining substantive rights apply to the claims. And more importantly, to my mind (since federal courts adjudicate cases rather than merely articulate "what the law is"), both moves directly influence which party wins and loses without changing the content of the law being applied. It is not clear to me why it should matter whether the law whose application is being congressionally directed is deemed procedural rather than substantive, so long as it potentially disposes of the claims one way or the other.[55]

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55. It is true that, in United States v. Sioux Nation of Indians, the Court upheld a statute authorizing relitigation of a case brought years ago against the Government and distinguished *Klein* with language suggestive of a procedure/substance distinction. 448 U.S. 371, 405 (1980) ("The amendment at issue in the present case . . . waived the defense of res judicata so that a legal claim could be resolved on the merits. Congress made no effort in either instance to control the Court of Claims' ultimate decision of that claim."). But the holding in *Sioux* is better understood as turning on the particularized principle, well-established in prior cases, that Congress may waive affirmative defenses *of the United States* to legal claims, such as res judicata here. *See id.* at 397–402 (discussing such cases); *id.* at 430 (Rehnquist, J., dissenting) ("The fact that Congress did not dictate to the Court of Claims that a particular result be reached does not in any way negate the fact it has sought to exercise judicial power. This Court and other appellate courts often reverse a trial court for error without indicating what the result should be when the claim is heard again."); *see also Plaut*, 514 U.S. at 230 ("[O]ur holding [in *Sioux*] was as narrow as the precedent on which we had relied . . . ." To wit, "Congress has the power to waive the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States."). In *Schiavo*, of course, the restraint doctrines are waived in favor of Terri's parents, not the Government as a litigant as in *Sioux*.

Interestingly, I recently heard Senator Carl Levin (D. MI) describe a pre-enactment battle in Congress over whether the Schiavo Relief Act should include a provision directing the district court, immediately upon a suit under the Act being filed, to stay any efforts to remove Teri's feeding tube pending resolution of the merits. Senator Levin and others objected to such a provision, and he ultimately brokered an agreement that left the issue unaddressed in the final version of the statute. His objection, he explained, re-

B. *KLEIN* AND CONGRESS' SECTION 5 AUTHORITY TO ENFORCE THE FOURTEENTH AMENDMENT

Perhaps the fact that hardly anyone voiced an objection to the Schiavo Relief Act on *Klein* grounds reflects a heretofore unarticulated view that the Act is Section 5 legislation that is exempt from *Klein* scrutiny under these unique circumstances.[56] Here would be the argument.

Section 5 of the Fourteenth Amendment[57] authorizes Congress to "enforce" the substantive protections secured by that Amendment by deterring or remedying unconstitutional state behavior. One can imagine that Terri could claim a Fourteenth Amendment liberty interest in maintaining her life, or a liberty interest in enjoying food (perhaps as a form of medical care) when someone is willing to provide it to her. And one can imagine Terri claiming that one or both of these liberty interests were wrongly denied to her, either as a matter of "substantive due process" (meaning they were denied to her without a sufficiently strong governmental interest in doing so),[58] or as a matter of "procedural due process" (meaning they were denied to her without a sufficiently fair process for determining the propriety of that denial).[59] One can also imagine that the denial of her substantive or procedural rights came at the hands of a state actor, either a state court or some other state actor involved somehow in the process of removing or ordering removed Terri's feeding tube. Whether any combination of these arguments constitutes a persuasive constitutional claim on the merits is beyond my focus in this essay; I will leave it to others contributing to this collection of essays to evaluate the merits of these or other potential constitutional claims. For now let's just assume that Terri has one or more such non-frivolous claims to raise.

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flected his view that Congress could not constitutionally tell a federal court whether or not to issue a stay. Rather, he said, separation of powers principles meant that the court must be left free to apply the preexisting law governing the issuance of stays based on the court's own independent judgment. Whether the district must or should or may stay the termination of life support pending adjudication of the merits is quintessentially a procedural issue, albeit a potentially dispositive one (as the absence of a stay could preclude ultimate relief for Terri's parents). But I do not recall anyone dismissing Senator Levin's professed concern about the stay provision on the ground that procedural rules are somehow exempt from *Klein*'s reach.

56. I credit my colleague Rich Friedman for stating this position to me, prompting these reflections.

57. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

58. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965).

59. *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976).

May the Schiavo Relief Act be viewed as a valid Section 5 enforcement measure to safeguard Terri's rights? Seems likely. First, take the claim that a state actor's authorization of the removal of Terri's feeding tube, or a state actor's would-be involvement in the execution of that removal, is about to violate Terri's Fourteenth Amendment rights—and the state court proceedings simply got the merits wrong. The Schiavo Relief Act essentially allows the claim to be relitigated de novo in the federal court and provides the rightholder with a new opportunity for a neutral tribunal to safeguard her rights. No concrete "relief" is issued unless the federal court finds a constitutional violation, which is to say that the remedial scheme seems perfectly tailored to safeguarding Terri's rights. Just like 42 U.S.C. § 1983, the scheme seems not even to implicate the "congruence and proportional" standard the Court now applies to remedial schemes that prohibit some conduct that is not unconstitutional and thus are "prophylactic" in nature.[60]

The Section 5 justification seems a bit more complicated under the scenario where Terri claims that the state court ruling itself violated either her substantive or procedural constitutional rights. The Schiavo Relief Act "remedies" this prior unconstitutional behavior by inviting Terri's parents to relitigate the case in federal court, in essence circumventing the unconstitutional state proceedings. The Act thus renders (at Terri's parents' election) the state court proceedings null and void, whether or not there will eventually be a determination by the federal court that the state proceedings actually violated Terri's rights. Indeed, it seems doubtful that the federal court would *ever* actually adjudicate whether the state court violated procedural due process in determining Terri's putative wishes concerning the feeding tube: The federal court would simply employ whatever process *it* believes is due as it adjudicates the question of Terri's desires, without having to decide whether any different state court process rose to the level of an independent constitutional violation.

Under these circumstances, the Schiavo Relief Act would appear to operate in a prophylactic manner, in the sense that the

60. *See* Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1157–58 (2001) ("It is important to note that language in Boerne's progeny suggests that the proportionality analysis applies, at least in full dress, only to 'prophylactic' Section 5 measures that are overinclusive in that they sweep into their prohibitory scope some constitutional state conduct. By contrast, if a Section 5 measure regulates only conduct judicially defined to violate the Constitution and merely supplements the judicial remedies therefor, then Congress would appear not to have to justify the measure with the same demonstration of need.").

state court proceedings would be rendered void (when Terri's parents file suit) even absent any finding, let alone reality, that the state proceedings were unconstitutional. If so, the Act would be subject to the "congruence and proportionality" standard.[61] On the one hand, under this standard the Court typically insists that Congress have some evidentiary basis for presuming that the state action being regulated is actually unconstitutional,[62] and I don't believe the legislative record in this case (as opposed to numerous press releases and media statements) would provide much if any support for such a conclusion. On the other hand, the burden imposed by the Act would appear to be exceedingly slight—no state court is actually enjoined to do or not do anything at all, and any relief that ultimately flows to Terri would be awarded directly by the federal court, completely bypassing the state system. While the issue is not free of doubt, let's assume for present purposes that, under these circumstances, the Act should be viewed as an appropriate Section 5 enforcement measure to the extent it authorizes relitigation of federal constitutional claims against state actors. It is worth noting that Section 5 could not authorize federal statutory claims brought pursuant to the Schiavo Relief Act (such as the claim Terri's parents brought against Terri's hospice under the Religious Land Use and Institutionalized Persons Act[63]), nor any claims brought against private actors (such as the claims they brought against the hospice and against Michael Schiavo).[64]

But let's return to the focus of this essay, for which the relevant question is this: Does the assumption that the Schiavo Relief Act falls within Congress' legislative jurisdiction as an enforcement measure under Section 5 somehow make the *Klein*-based separation of powers argument disappear? I don't think a persuasive case can be made for this conclusion.

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61. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997) (stating that, for prophylactic Section 5 legislation to be valid, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."); Caminker, *supra* note 60, at 1153–58 (elaborating the meaning of this test).

62. *See, e.g.*, Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 639 (1999) ("For Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.").

63. 42 U.S.C. § 2000cc (2000).

64. *See* United States v. Morrison, 529 U.S. 598, 625–27 (2000) (stating that Section 5 legislation must be directed at state officials rather than private wrongdoers). *But see* Evan Caminker, *Private Remedies for Public Wrongs Under Section 5*, 33 LOYOLA L.A. L. REV. 1351 (2000) (arguing that under certain circumstances a remedy against private actors might well constitute an appropriate means of deterring or remedying unconstitutional state action).

First, there is no good reason to view Section 5's independent grant of legislative authority to Congress as somehow uniquely trumping all other constitutional restrictions on congressional action. Rather, like other independent grants of power such as, say, the power to regulate interstate commerce, as a prima facie matter Section 5 power is subject to limitations imposed elsewhere in the Constitution, be they procedural (e.g., Section 5 legislation is valid only upon presentment to the President),[65] protective of individual rights (e.g., Section 5 legislation cannot authorize the imposition of cruel and unusual punishments),[66] or structural (e.g., Section 5 legislation cannot issue or annul pardons).[67] The Court has endorsed this general principle with respect to Section 5 by making clear that Congress cannot invoke this power in order to "restrict, abrogate, or dilute" constitutional guarantees.[68] Moreover, one might plausibly argue this constraint is internal to the language of Section 5 itself. The Supreme Court has taken the position that legislation that violates structural constitutional principles cannot constitute "proper" legislation under the Necessary and Proper Clause.[69] If

65. U.S. CONST. art. I, § 7, cl. 2.

66. U.S. CONST. amend. XIII.

67. U.S. CONST. art. II, § 2, cl. 1.

68. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) ("We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws."). I believe Justice Brennan's explanation of his so-called "ratchet theory" in terms of whether a rights-violating application of Section 5 would qualify as "enforcement" raises some difficult questions. *See* Caminker, *supra* note 60, at 1176. Rather, I think the "ratchet theory" is alternatively and perhaps better understood in terms of cross-cutting constitutional restrictions. The reason a Section 5 statute mandating segregated school systems is impermissible is because it would constitute federal legislation violating the equal protection principle held to be implicitly embedded within the Fifth Amendment's Due Process Clause applicable to *all* federal legislation.

This may be a good space in which to point out that the legitimacy of the Act as Section 5 legislation and the procedure/substance distinction explored earlier are complementary. Suppose Congress had provided that, as a remedy to what it perceived as unconstitutional state court decisionmaking, Terri's feeding tube simply shall not be removed. Such a federal edict might well violate her right to refuse medical treatment, as the state courts themselves found. By contrast, a purely procedural remedy ("disappearing" procedural doctrines that would otherwise insulate the state court decision from federal review) that entitles Terri (at her parents' election) to a new judicial proceeding consistent with constitutional principles to determine her wishes cannot violate the ratchet theory—assuming we take as tautologically true that the federal court gets the constitutional arguments right.

69. *See, e.g.*, Printz v. United States, 521 U.S. 898, 923–24 (1997) ("When a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier,

one accepts this argument,[70] it seems a short step to conclude that the same would be true of "appropriate" legislation under Section 5.

So we reach a more focused question: Is there any reason to believe that, while exercises of Section 5 power are not categorically exempt from constitutional scrutiny, such exercises are appropriately exempt from some specific constitutional constraints, including the *Klein* prohibition? Well, the Supreme Court has held that Congress may employ its Section 5 authority to overcome certain federalism constraints that remain applicable to other grants of congressional power.[71] But this is because the whole point of Section 5 was to enable Congress to enforce a new conception of federalism, and thus the supersession of otherwise-applicable federalism constraints was considered inherently bound up in the very grant of power. Put differently, there might be certain contexts in which it makes sense to read a specific grant of congressional power as *implicitly* authorizing Congress to override structural constraints that would otherwise throttle the essential function of the grant of power.[72]

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it is not a 'La[w]... proper for carrying into Execution the Commerce Clause....'") (citations omitted) (citing Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993) (arguing that a law is not "proper" if it violates separation of powers principles, federalism principles, or individual rights)).

70. I personally do not. *See* Caminker, *supra* note 60, at 1138–39 n.47 (explaining why this interpretation of "proper" is unpersuasive).

71. *See, e.g.,* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996) (holding that Congress may not do the same pursuant to the commerce clause); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that Congress may override state sovereign immunity and authorize private damages suits against states pursuant to Section 5). *See generally* City of Rome v. United States, 446 US 156, 179 (1980) ("[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'").

72. For my previous consideration of another such example, see Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 238–42. In Printz v. United States, the Court held that congressional commandeering of state officials to implement federal law impermissibly infringed on the President's Article II prerogatives to oversee all federal law execution. 521 U.S. 898, 922–23 (1997). But the Court approved Congress's long-standing conscription of state executives to extradite fugitives from justice as a "direct implementation... of the Extradition Clause of the Constitution itself, see Art. IV, § 2." *Id.* at 909. The Militia Clauses appear to authorize Congress to conscript the states' primary military institutions for certain national purposes—including to "execute the Laws of the Union," U.S. CONST. art I, § 8, cls. 15 & 16; and the Article I, Section 4 power to regulate state elections of federal officials seems to entail commandeering. These specific grants of power to Congress to commandeer state officials would essentially be rendered a nullity if they were subject to the same Article II constraint on commandeering the Court invoked to invalidate commerce clause-based legislation in *Printz*. It thus seems reasonable to read these specific grants as implicitly overriding the Article II constraint.

It might be tempting to conclude that the Schiavo Relief Act should be immune from *Klein* scrutiny following this line of reasoning. By hypothesis, Congress had sufficient reason to believe that Terri's federal constitutional rights were either violated by or at least left unprotected by the Florida state courts. Invoking Section 5 to protect Terri's rights by affording her an adjudicatory "do-over," by giving her representatives access to federal district court and by freeing the federal court from the otherwise disabling effects of the prior state court proceedings, seems like a surgical-strike solution to the problem. Indeed, it is difficult to imagine an alternative remedial scheme that is any less intrusive on or disrespectful of state authority. One might even characterize the Schiavo Relief Act as the most desirable enforcement measure possible—on federalism grounds.

But I fail to see why this conclusion that the Act is particularly federalism-friendly should free Congress from its obligation to respect separation of powers principles as well—especially because the two principles are not irreconcilable or even in conceptual conflict, contrary to the examples provided above. If I am correct in assuming that Congress could have paved the way for federal adjudication by prospectively amending the existing restraint doctrines rather than dictating a rule of decision as to their application to Terri's case,[73] then Congress could have surgically excised the restraint doctrines from the case without running afoul of *Klein*. And, at the risk of being accused of nitpicking here, it seems worth noting that, as a textual matter, Section 5 itself authorizes Congress to enforce the Fourteenth Amendment's provisions by "appropriate *legislation*," undermining any suggestion that Section 5 implicitly authorizes Congress to pass "the limit which separates the legislative from the judicial power."[74] The fact that directing the District Court to ignore inconvenient legal doctrines that might preclude it from reaching the merits is an efficient and federalism-respecting response to a perceived state constitutional violation shouldn't permit Congress to usurp judicial power, any more than the fact that Terri might have been about to die would have justified a congres-

73. *See supra* at Part IV B. Note that, if the assumption is false because Congress cannot resolve n=1 disputes either by changing the law or imposing a rule of decision, *see supra* at Part IV A., then the Section 5 defense of the Act would fail in any case—unless one can persuasively explain why Section 5 should be understood as implicitly overriding the generality principle undergirding the n=1 prohibition.

74. United States v. Klein, 80 U.S. 128, 147 (1871).

sional decision to bypass presentment to the President while ordering Terri's feeding tube to be maintained.

It thus seems to me clear that, while Congress can invoke Section 5 to provide remedies for victims of unconstitutional state behavior, Congress must still do so by acting as a legislature. Congress can protect federal constitutional rights by enacting new law or changing existing law, but not by simply directing federal courts to ignore existing and unchanged bodies of procedural law in the course of adjudicating constitutional claims.

VI

The fact that Judge Birch stands virtually alone in decrying the Schiavo Relief Act on the ground that it impermissibly dictates a rule of decision for federal adjudication seems telling. As I outlined in Part IV, if the traditional view of *Klein* remains good law, then there is a very strong prima facie case that the Schiavo Relief Act contravenes it. And as I explained in Part V, I don't think the challenge to the Act can be dismissed either on the ground that Congress ordered federal courts to apply a procedural rather than a substantive rule of decision or on the ground that Section 5 uniquely empowers Congress to dictate a rule of decision in this context. If the Schiavo Relief Act does not contravene separation of powers principles, then *Klein* has essentially become immune from violation—and perhaps it's time that we all say so.