View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Mitchell Hamline School of Law

MITCHELL | HAMLINE School of Law

William Mitchell Law Review

Volume 36 | Issue 4 Article 6

2010

Off the Tracks: How a Train Accident Derailed Article III Power

Kevin M. Decker

Jonathan Schmidt

Christine Hinrichs

Follow this and additional works at: http://open.mitchellhamline.edu/wmlr

Recommended Citation

Decker, Kevin M.; Schmidt, Jonathan; and Hinrichs, Christine (2010) "Off the Tracks: How a Train Accident Derailed Article III Power," *William Mitchell Law Review*: Vol. 36: Iss. 4, Article 6.
Available at: http://open.mitchellhamline.edu/wmlr/vol36/iss4/6

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.
© Mitchell Hamline School of Law

MITCHELL | HAMLINE School of Law OPEN ACCESS

mitchellhamline.edu

OFF THE TRACKS: HOW A TRAIN ACCIDENT DERAILED ARTICLE III POWER

Kevin Decker,[†] Jonathan Schmidt,[††] and Christine Hinrichs[†††]

I. INTRODUCTION 1435
II. THE DERAILMENT AND ENSUING JUDICIAL AND CONGRESSIONAL ACTIONS 1436
A. *The Accident* 1436
B. *Federal Railroad Safety Act Preemption* 1437
C. *FRSA Preemption is Brought to Bear* 1437
1. Allende v. Soo Line Railroad Co. 1438
2. Mehl v. Canadian Pacific Railway Ltd. 1439
3. Lundeen v. Canadian Pacific Railway Co. 1439
a. Initial District Court Proceedings 1439
b. The First Lundeen *Appeal* 1440
*4. District Court Proceedings Post-*Lundeen I 1442
D. *Congress Makes a Play* 1442
E. *The Eighth Circuit's Decision and Rationale* 1444
III. THE SEPARATION OF POWERS CONFLICT 1446
A. *Historical Underpinnings* 1446
1. Hayburn's Case 1448
2. United States v. Klein 1449
3. Plaut v. Spendthrift Farm, Inc. 1452
B. *The Eighth Circuit Stands in Conflict of Supreme Court and Circuit Precedent* 1453
1. Lundeen II *Runs Afoul of Supreme Court "Final" Decision Precedent* 1453

† Mr. Decker is a shareholder at Briggs and Morgan, P.A., with a focus on complex business litigation. He graduated from William Mitchell College of Law in 2001.

†† Following graduation from William Mitchell College of Law where he served as the Law Review's Editor-in-Chief for Volume 29, Mr. Schmidt clerked at the Minnesota Court of Appeals and the Eighth Circuit Court of Appeals. He is now an associate at Briggs and Morgan, P.A., where his practice focuses primarily on state and federal appeals as well as business litigation.

††† Ms. Hinrichs graduated *summa cum laude* from William Mitchell College of Law in 2009. She is currently clerking at the Minnesota Court of Appeals.

Published by Mitchell Hamline Open Access, 2010

2. Lundeen II *Conflicts With Circuit Authority* 1455
a. *Circuit Courts Protecting Article III Prerogative* 1455
i. *First Circuit* 1455
ii. *Fifth Circuit* 1456
iii. *Seventh Circuit* 1457
iv. *Ninth Circuit* 1457
b. Lundeen II *Stands in Conflict* 1458
IV. IMPLICATIONS 1458
A. Lundeen, Plaut, *and the Collateral Order Doctrine* 1459
B. *Illustrations* 1461
1. *Jurisdiction* 1461
2. *Immunity* 1462
3. *Other Examples* 1464
C. *Tipping the Balance—Congress and the Judiciary* 1464
V. CONCLUSION 1466

I. INTRODUCTION

> *It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that . . . [none] of them ought to possess directly, or indirectly, an overruling influence in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.*[1]

Since the dawn of the country, the judiciary's *raison d'etre* has been to interpret and declare the law.[2] In *Lundeen v. Canadian Pacific Railway Co.*,[3] however, the Eighth Circuit concluded that Congress may statutorily reverse a final court judgment so long as other aspects of the case remain pending.[4] *Lundeen* exacerbates a circuit conflict regarding the permissibility of legislative encroachments on final judicial judgments.

The immediate result of *Lundeen* was to strip federal jurisdiction over hundreds of lawsuits destined for dismissal and place the litigation back in a state court where the cases would head for trial. The lasting effect of this breach of separation of powers could be far

1. THE FEDERALIST NO. 48 (James Madison).
2. U.S. CONST. art. III.
3. 532 F.3d 682 (8th Cir. 2008).
4. *Id.* at 691.

more penetrating; Congress may now be emboldened to usurp judicial prerogative over specific declarations of law whenever other issues in a litigated dispute persist. Final rulings on jurisdiction, injunctive relief, and other interlocutory matters are now fair game for legislative meddling. This is not your Founding Fathers' separation of powers.

II. THE DERAILMENT AND ENSUING JUDICIAL AND CONGRESSIONAL ACTIONS

A. *The Accident*

Lundeen traces its origins to a train accident on January 18, 2002, outside of Minot, North Dakota, where a Canadian Pacific Railway (CP) freight train derailed thirty-one of its 112 cars.[5] According to the National Transportation Safety Board:

> Five tank cars carrying anhydrous ammonia, a liquefied compressed gas, catastrophically ruptured, and a vapor plume covered the derailment site and surrounding area. The conductor and engineer were taken to the hospital for observation after they complained of breathing difficulties. About 11,600 people occupied the area affected by the vapor plume. One resident was fatally injured, and 60 to 65 residents of the neighborhood nearest the derailment site were rescued. As a result of the accident, 11 people sustained serious injuries, and 322 people, including the 2 train crewmembers, sustained minor injuries. Damages exceeded $2 million, and more than $8 million has been spent for environmental remediation.[6]

Within one week of the accident, a class action suit was filed in North Dakota federal district court on behalf of all Minot residents.[7] Several hundred individual lawsuits were later filed in Hennepin County, Minnesota.[8] All of these cases invoked common law negli-

5. NAT'L TRANSP. SAFETY BD., DERAILMENT OF CANADIAN PACIFIC RAILWAY FREIGHT TRAIN 292‑16 AND SUBSEQUENT RELEASE OF ANHYDROUS AMMONIA NEAR MINOT, NORTH DAKOTA JANUARY 18, 2002, at vi (Mar. 9, 2004), *available at* http://www.ntsb.gov/publictn/2004/RAR0401.pdf.

6. *Id.*

7. Mehl v. Can. Pac. Ry. Ltd., 227 F.R.D. 505, 507–08 (D.N.D. 2005).

8. *In re* Soo Line R.R. Co. Derailment of Jan. 18, 2002, No. MC 04-007726, 2006 WL 1153359, at *1, n.3 (Minn. Dist. Ct. Apr. 24, 2006). Presumably, the Minnesota-based cases sought to escape North Dakota tort reform legislation, but the Hennepin County court ultimately ruled that North Dakota law would govern all substantive issues. *See id.* at *7.

gence claims to focus upon the railroad's inspection and maintenance practices and performance.[9]

B. Federal Railroad Safety Act Preemption

At the heart of the state-law-based lawsuits were questions regarding the scope of federal preemption under the Federal Railroad Safety Act (FRSA).[10] At the time, § 20106 of the FRSA provided that state law is preempted whenever the subject matter is "covered" by federal standards:

> Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order *covering the subject matter of the State requirement.*[11]

This preemption clause posed two significant complications for the Minot-derailment plaintiffs. First, the U.S. Supreme Court broadly read the preemption scheme to extend to state-law-based common law claims.[12] Thus, "covered" state law causes of action were subject to dismissal.[13] And in addition to precluding "covered" state law claims on the merits, the FRSA had been read by certain courts as giving rise to "complete" preemption so as to afford federal jurisdiction over "covered" actions.[14] Having to proceed in federal court would likely heighten the evidentiary burdens for toxic tort plaintiffs like the Minot residents.

C. FRSA Preemption is Brought to Bear

Through a series of separate—yet related—decisions, both the jurisdictional and defensive attributes of FRSA preemption took

---

9. *See, e.g.*, Lundeen v. Can. Pac. Ry. Co., 507 F. Supp. 2d 1006, 1010 (D. Minn. 2007) (considering plaintiffs' claims of negligent inspection, negligent construction and maintenance, negligent hiring and training, and negligent operation).

10. 49 U.S.C. §§ 20101–20120 (Supp. 2007 and West 2009).

11. *Id.* § 20106 (Supp. 2007) (emphasis added).

12. Norfolk So. Ry. Co. v. Shanklin, 529 U.S. 344, 359 (2000); CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 658 (1993).

13. *In re* Derailment Cases, 416 F.3d 787, 793–94 (8th Cir. 2005).

14. *See, e.g.*, Peters v. Union Pac. R.R. Co., 80 F.3d 257, 262 (8th Cir. 1996).

center stage in the Minot derailment litigation, culminating in Congress legislatively reversing the Eighth Circuit's *Lundeen* decision.

1. Allende v. Soo Line Railroad Co.[15]

CP invoked "complete" FRSA preemption to remove to federal court all then-pending Hennepin County cases.[16] The railroad cited regulations like 49 C.F.R. § 213.233 (track inspection standards) as "covering" the plaintiffs' claims; plaintiffs responded that the railroad failed to comply with federal standards and thus could not invoke preemption. Due to the volume and relatedness of the removed lawsuits, the parties stipulated that *Allende* would be the jurisdictional test case.[17]

The *Allende* court read the applicable precedents as requiring a federal remedy to substitute for a state cause of action before jurisdictional preemption could be recognized.[18] Because the FRSA provided for civil penalties enforced by the Federal Railway Administration (FRA), but made no provision for private recourse for a railroad's noncompliance with inspection and maintenance standards, *Allende* and all other Minot derailment cases were sent back to state court.[19] And because the remand order was based upon a lack of federal jurisdiction, CP could not appeal.[20]

Back in state court, CP moved to have the cases dismissed on FRSA preemption grounds.[21] After the state court denied CP's motion, the railroad admitted liability for the *Allende* case and two other related lawsuits slated for trial.[22] A Hennepin County jury subsequently returned damages verdicts for the plaintiffs.[23] The other cases moved up the queue for trial.

---

15. No. 03-3093, slip op. (D. Minn. Jan. 29, 2004).

16. *See, e.g.*, Lundeen v. Can. Pac. Ry. Co., 447 F.3d 606, 614–15 (8th Cir. 2006) [hereinafter *Lundeen I*].

17. *See* Lundeen v. Can. Pac. Ry. Co., 342 F. Supp. 2d 826, 828 n.2 (D. Minn. 2004) (noting prior removal and remand history).

18. *Allende*, No. 03-3093, slip op. at 19–20.

19. *Id.* at 32–33.

20. *See* 28 U.S.C. § 1447(d) (2006) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . .").

21. *See In re* Soo Line R.R. Co. Derailment of Jan. 18, 2002 in Minot, ND, No. MC-04-007726, 2006 WL 1153359, at *2 (Minn. Dist. Ct. Apr. 24, 2006).

22. *Id.* CP appealed the order denying preemption to the Minnesota Court of Appeals. *Id.*

23. *Id.*

2. Mehl v. Canadian Pacific Railway Ltd.[24]

While the Hennepin County cases were proceeding toward trial in waves, the first filed case—the *Mehl* class action—came to an abrupt end in the federal district court for North Dakota. CP had filed a motion to dismiss that was substantively identical to the pleadings in the Hennepin County court, and the federal court granted its motion.[25] The district court, in a decision written by then-Chief Judge Daniel Hovland, rejected the conclusion of the state court. The district court held that claims arising out of the Minot derailment were "covered" by federal regulations and therefore preempted by § 20106 of the FRSA.[26] The *Mehl* court was "convinced the dismissal of Plaintiffs' claims is inevitable under the current state of federal law in the Eighth Circuit."[27]

The *Mehl* court specifically rejected the plaintiffs' contention that § 20106's "coverage" mandate does not reach claims regarding a railroad's failure to comply with (1) the federal standard of care established by a "covering" regulation or order; (2) its own plan, rule, or standard created pursuant to a "covering" regulation or order; or (3) a state law, regulation, or order not incompatible with federal railroad policy.[28] The *Mehl* plaintiffs appealed to the Eighth Circuit.[29]

3. Lundeen v. Canadian Pacific Railway Co.

a. *Initial District Court Proceedings*

Both before and after *Mehl* and *Allende*, Minot residents continued to file claims against CP. After the first lawsuit was filed in federal district court in North Dakota, nearly every subsequent lawsuit was filed in Minnesota state court in Hennepin County. Moreover, after the *Allende* court found that the claims did not pique federal court jurisdiction, almost all of the successive lawsuits parroted those causes of action.

In the fall of 2004, a group of Minot residents led by the Tom Lundeen family filed complaints in Hennepin County substantially similar to their predecessors. But the Lundeens went one step further

24. 417 F. Supp. 2d 1104 (D.N.D. 2006).
25. *Id.* at 1113–15.
26. *Id.* at 1109–19.
27. *Id.* at 1120.
28. *Id.* at 1108–09, 1115–16.
29. *See* Lundeen v. Canadian Pac. Ry. Co., 507 F. Supp. 2d 1006, 1010 (D. Minn. 2007) (noting Mehl appeal pending before Eighth Circuit Court of Appeals).

Decker et al.: Off the Tracks: How a Train Accident Derailed Article III Power

and asserted a violation of federal environmental law, enabling the railroad to remove to federal court.[30] CP invoked federal question grounds and prevailed against the Lundeens' motion for remand.[31]

In response, the Lundeens moved to amend the complaints to delete the federal allegations.[32] The district court allowed the amendment and then granted remand.[33] Because the court had found the complaints as initially pled invoked federal jurisdiction, the remand was discretionary and CP was able to appeal to the Eighth Circuit.[34]

b. *The First* Lundeen *Appeal*

The *Lundeen* appeal initially focused on forum shopping.[35] Subsequent to oral argument, however, the panel ordered additional briefing on the questions of whether complete preemption or underlying substantial federal questions afforded jurisdiction.[36] Despite the non-appealability of the earlier *Allende* decision, CP would get its "complete" preemption appeal after all.

The Eighth Circuit ultimately held that "coverage" alone determines the § 20106 preemption analysis.[37] Consequently, even claims about non-compliance with "covering" federal standards were foreclosed:

> [F]ederal regulations establish a specific inspection protocol including how, 49 C.F.R. § 213.233(b), when, §§ 213.233(c) & .237(a)–(c), and by whom, §§ 212.203, 213.7 & .233(a), track inspections must be conducted; the regulations establish a national railroad safety program intended to promote safety in all areas of railroad operations, § 212.101(a); federal and state inspectors determine the extent to which the

30. *See* Lundeen v. Can. Pac. Ry. Co., 342 F. Supp. 2d 826, 828–31 (D. Minn. 2004).

31. *Id.*

32. *Lundeen v. Can. Pac. Ry. Co.*, No. 04-3220, 2005 WL 563111, at *1 (D. Minn. Mar. 9, 2005).

33. *Id.* at *3.

34. *Id*; *see also* Lindsey v. Dillard's, Inc., 306 F.3d 596, 598–600 (8th Cir. 2002) (discretionary remand not affected by § 1447's bar on appeals).

35. *Lundeen I*, 447 F.3d 606, 611 (8th Cir. 2006); *see also* Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988) (stating federal courts should consider whether improper forum shopping is afoot when motions to amend and remand are presented).

36. Docket, *Lundeen I*, 447 F.3d 606 (No. 05-1918) (see Judge's Order, dated Feb. 13, 2006).

37. *Lundeen I*, 447 F.3d at 612–13.

> railroads, shippers, and manufacturers have fulfilled their obligations with respect to, among other things, inspection, § 212.101(b)(1); and railroads face civil penalties for violations, § 213 App. B. It is clear the FRA regulations are intended to prevent negligent track inspection and there is no indication the FRA meant to leave open a state law cause of action.[38]

Critically, the appellate court confirmed the statute's "complete" preemption of "covered" claims so as to give rise to federal jurisdiction:

> [W]here we find the Lundeens' negligent inspection claims preempted . . . and where it is both clear the regulations at issue are intended to prevent negligent track inspection nationally and contain no savings clause (so there is thus no indication the FRA meant to leave open a state law cause of action), absent en banc review we are bound by our decision in *Peters* to find complete, jurisdictional, preemption.[39]

Impliedly rejecting the earlier *Allende* rationale, the Eighth Circuit disclaimed an alternative federal remedy as the *sine qua non* of "complete" preemption:

> The issue of whether complete preemption exists is separate from the issue of whether a private remedy is created under a federal statute. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 391 n. 4, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). Complete preemption can sometimes lead to dismissal of all claims in a case. Although courts may be reluctant to conclude that Congress intended plaintiffs to be left without recourse, *see M. Nahas & Co., Inc. v. First National Bank of Hot Springs*, 930 F.2d 608, 612 (8th Cir. 1991), the intent of Congress is what controls. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 45, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) (citations omitted).[40]

Like *Mehl*, *Lundeen* rejected assertions that § 20106 did not extend to allegations that the railroad failed to comply with (1) the federal standard of care established by a "covering" regulation or order; (2) its own plan, rule, or standard created pursuant to a "covering" regulation or order; or (3) a state law, regulation, or order not incompatible with federal railroad policy.[41]

---

38. *Id.* at 614.
39. *Id.* at 614–15.
40. *Id.* at 613 n.4 (quoting Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 547 (8th Cir. 1996)).
41. *Lundeen I*, 447 F.3d at 611–15.

En banc[42] and certiorari review were denied.[43] Direct review was thus exhausted and the jurisdictional decision was final. Or so it seemed.

4. *District Court Proceedings Post*-Lundeen I

On remand to the district court, the Chief Judge for the District of Minnesota joined his colleague to the north, and the court found every Minot derailment cause of action to be preempted.[44] The Minnesota Court, in a decision written by then–Chief Judge James Rosenbaum, concluded that the statute preempts all "covered" claims—even those based upon accusations that the railroad failed to comply with (1) the federal standard of care established by a "covering" regulation or order; (2) its own plan, rule, or standard created pursuant to a "covering" regulation or order; or (3) a state law, regulation, or order not incompatible with federal railroad policy.[45]

The Lundeens appealed the dismissal order to the Eighth Circuit. The world of railroad law would be turned on its head between the filing of the appeal and the appellate court's ultimate answer.

D. *Congress Makes a Play*

While the appeal of the *Lundeen* dismissal was pending, Congress entered the litigation fray. Congress tucked a proposed FRSA amendment into a bill implementing the recommendations of the National Commission on Terrorist Attacks Upon the United States.[46] In substance, the 9/11 legislation added new paragraphs (b) and (c) to 49 U.S.C. § 20106 to adopt the arguments made by Minot plaintiffs that had been rejected by two district court judges in the Eighth Circuit, then–Chief Judge Hovland and then–Chief Judge Rosenbaum:

> (b) Clarification regarding State law causes of action.
>
> (1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging

42. Lundeen v. Can. Pac. Ry. Co., No. 05-1918, 2006 WL 4671149 (8th Cir. July 18, 2006).

43. Lundeen v. Can. Pac. Ry. Co., 549 U.S. 1179 (2007) (mem).

44. Lundeen v. Can. Pac. Ry. Co., 507 F. Supp. 2d 1006 (D. Minn. 2007).

45. *Id.* at 1016–17.

46. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1528, 121 Stat. 266, 453 (codified at 49 U.S.C. § 20106 (Supp. 2007)).

> that a party—
>
> (A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;
>
> (B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or
>
> (C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).
>
> (2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.
>
> (c) Jurisdiction.—Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.[47]

The legislators decreed that the substantive effect of § 20106 as it existed when *Mehl* and *Lundeen I* were decided had not been changed: "Subpart (a) of the Conference . . . contains the exact text of 49 U.S.C. § 20106 as it existed prior to enactment of this Act. It is restructured for clarification purposes; however, the restructuring is not intended to indicate any substantive change in the meaning of the provision."[48] The Chairman of the House Transportation and Infrastructure Committee made no bones about the law's purpose:

> The bill does not change any of the current law, but only adds to it to clarify the meaning of what is already in public law.
>
> * * *
>
> The situation that needs to be cured is not that the statute preempts negligence claims requiring a change. The situation needing remedy is the misinterpretation of the statute by some courts [e.g., the Eighth Circuit]. That is precisely what this clarifying language is intended to accomplish.[49]

47. 49 U.S.C. § 20106 (b)–(c) (Supp. 2007).

48. 153 CONG. REC. H8589 (daily ed. July 25, 2007).

49. 153 CONG. REC. H3109–10 (Mar. 27, 2007) (comments of Rep. James

In other hearings, congressmen from North Dakota and Minnesota made clear that the new language was intended to reverse the Minot derailment precedents:

> Mr. Pomeroy: [W]ill you continue to work with us to take the steps necessary to ensure that courts construe this amendment only as a clarification of Congress' original intent?
>
> Mr. Oberstar: We will pursue this issue in future hearings of the subcommittee of relevance.
>
> Mr. Pomeroy: Is it also your understanding that the same Federal court that dismissed those claims urged the Congress to remedy this situation and the language in section 3 does precisely what the court said needed to be done?
>
> Mr. Oberstar: The situation that needs to be cured is not that the statute preempts negligence claims requires a change. *The situation needing remedy is the misinterpretation of the statute by some courts.* That is precisely what this clarifying language is intended to accomplish.[50]

The Rubicon had been crossed: Congress was expressly trying to reverse judicial pronouncements that had run the course of Article III review.

E. The Eighth Circuit's Decision and Rationale

Even though the final jurisdictional ruling was not on appeal, a split appellate panel construed Congress's clarification as requiring the re-opening and vacatur of *Lundeen I*'s final judgment.[51] A prospective application of the law would have avoided separations of powers implications by leaving intact the final *Lundeen I* judgment. Instead, the majority retroactively applied the jurisdictional edict even though Congress excluded the jurisdictional language from the previous subsection directing that the compliance "clarification" shall apply as of the date of the Minot derailment.[52] The majority sent the cases back to the district court for a jurisdictional disposition giving effect to Congress's perceived intent.

In dissent, Judge C. Arlen Beam looked to settled Supreme Court

---

Oberstar, D–MN).

50. 153 CONG. REC. H3109–10 (comments of Rep. Earl Pomeroy, D–ND and Rep. James Oberstar, Chair, D–MN) (emphasis added).

51. Lundeen v. Can. Pac. Ry. Co., 532 F.3d 682, 688–92 (8th Cir. 2008) [hereinafter *Lundeen II*].

52. *Id; see* 49 U.S.C. § 20106 (b)–(c) (Supp. 2007).

precedent and concluded that "[a]ny congressional attempt to reverse *Lundeen I* . . . presents an insurmountable separation of powers problem" because "the jurisdictional finding of *Lundeen I* was a final judgment that cannot constitutionally be reopened or reversed."[53] The dissent invoked *Plaut v. Spendthrift Farm, Inc.*,[54] to explain that "once the time for appeal has expired, the word of the last court in the hierarchy that ruled on the case is final, and not pending."[55] Judge Beam ultimately observed,

> [T]his panel's unanimous judgment in *Lundeen I* based upon a then-valid preemption mandate, that has not been retroactively disturbed by statutory language and has been fully vetted by the court en banc and the Supreme Court, is not subject to congressional disposition. It is a final judgment that may not be upset by an inapplicable portion of subsequent legislation. The majority errs in its ruling to the contrary.[56]

Judge Beam noted that the separation of powers' entanglements could have been avoided if the majority had recognized the jurisdictional subsection to have prospective-only effect.[57] Reading the statutory "clarification" as written, the dissent observed that "Congress addressed no issue of retroactivity except that found in subsection (b)(2), which by its language applies only to subsection (b)."[58] Since subsection (c)—the jurisdiction provision—does not call for retroactive application, Judge Beam acknowledged that "none of the issues decided by . . . this panel in *Lundeen I* are reached by the language of [the clarification]."[59]

The Eighth Circuit denied CP's petition for rehearing.[60] Judge Beam again dissented, noting that the panel "sidestepp[ed] what has actually happened in this litigation" because the exercise of federal jurisdiction was no longer "on appeal."[61] The dissent faulted the majority for interpreting the clarification's language—which contains "[n]o words of retroactivity"—to strip federal jurisdiction.[62]

---

53. *Lundeen II*, 532 F.3d at 701–02.
54. 514 U.S. 211 (1995).
55. *Lundeen II*, 532 F.3d at 702.
56. *Id.*
57. *Id.* at 695–700.
58. *Id.* at 701.
59. *Id.*
60. Lundeen v. Can. Pac. Ry. Co., 550 F.3d 747 (8th Cir. 2008).
61. *Id.* at 751.
62. *Id.* at 752.

The Supreme Court denied a petition for a writ of certiorari.[63]

III. THE SEPARATION OF POWERS CONFLICT

Congress's conspicuous rebuke to the federal courts placed the separation of powers front and center for the *Lundeen* panel. Nonetheless, the majority looked the other way. Numerous compelling precedents suggest that, in the process, Congress was allowed to march past a fundamental judicial defense against overreaching by the other branches.

A. *Historical Underpinnings*

The genesis of the separation of powers long pre-dates the debating and signing of the Constitution. The Framers lived among "the ruins of a system of intermingled legislative and judicial powers."[64] Legislatures would frequently set aside judgments and order new trials or appeals.[65] Lawmakers were all-too ready to "decide[] rights which should have been left to judiciary controversy."[66] In the year proceeding the Constitutional Convention, this "legislative interference in judicial matters had intensified as never before in the eighteenth century."[67]

This ever-expanding pattern of legislative intrusion provided the Framers ample incentive to institute appropriate safeguards.[68] "Madison, Jefferson, and Hamilton each wrote of the factional disorders and disarray that the system of legislative equity had produced in the years before the framing; and each thought that the separation of the legislative from the judicial power in the new Constitution would cure them."[69]

Madison observed that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[70] This "Father of the

63. Lundeen v. Can. Pac. Ry. Co., 549 U.S. 1179 (2007) (No. 06-528).
64. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995).
65. *See* MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 49–51 (1943) (discussed in *Plaut*).
66. THE FEDERALIST NO. 48 (James Madison).
67. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 454 (1969) (discussed in *Plaut*).
68. *See* Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 514–17 (1925).
69. *Plaut*, 514 U.S. at 221.
70. THE FEDERALIST NO. 47 (James Madison).

Constitution" summoned the renowned French political commentator Charles-Louis de Secondat, Baron de La Brede et de Montesquieu: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator."[71]

Jefferson was equally concerned about the potential for legislative overreaching:

> Nor should our assembly be deluded by the integrity of their own purposes, and conclude that these unlimited powers will never be abused, because themselves are not disposed to abuse them. . . . The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.[72]

The Framers therefore concluded that a judicial department must be constitutionally independent of the legislative branch. These fundamental aspirations of the Constitutional Convention manifested themselves in Article III: "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."[73]

As envisioned by the Framers, the legislature is empowered to prescribe "the rules by which the duties and rights of every citizen are to be regulated," but the prerogative of "[t]he interpretation of the laws" is "the proper and peculiar province of the courts."[74] This separation of governmental power is fundamental to liberty and justice because judicial independence is compromised whenever the legislative or the executive interferes with the courts' "province and duty . . . to say what the law is."[75] Decisions immediately following the Constitution's ratification confirm the Article III obligation to protect against Article I excesses.[76]

The spirit and effect of the separation of powers were aptly summed up by Thomas Cooley, whom the Supreme Court regards as a "great constitutional scholar":

71. *Id.* (quotation omitted).

72. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 246 (Penguin Group 1999) (1748).

73. U.S. CONST. art. III, § 1; *Plaut*, 514 U.S. at 221..

74. THE FEDERALIST NO. 78 (Alexander Hamilton).

75. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

76. *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 398 (1798) ("The power [to grant new trials] is judicial in its nature; and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative, authority.").

> [T]he legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which the parties might appeal when dissatisfied with the rulings of the courts.
>
> As the legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts for the future to adopt a particular construction of a law which the legislature permits to remain in force. To declare what the law is, or has been is a judicial power; to declare what the law shall be, is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separate from the judicial. If the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and cannot be done by a mandate to the courts, which leaves the law unchanged, but seeks to compel the courts to construe and apply it, not according to the judicial, but according to the legislative judgment.[77]

"After the States ratified the Constitution, it did not take long for the fears of legislative encroachment on the judiciary's sphere of action to be realized."[78] Article III judges stood their ground, remaining ever-vigilant against attempted legislative interference.

1. Hayburn's Case[79]

In 1791, Congress enacted legislation permitting disabled Revolutionary War veterans to apply for pensions.[80] A claimant would petition the federal circuit court, which would accept (or reject) the applicant's eligibility and then award a pension judgment commensurate with the veteran's disability.[81] Congress, however, empowered the secretary of war to deny the pension judgment when he suspected

77. THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 112–13 (6th ed. 1890); *see Plaut*, 514 U.S. at 224–25 (relying upon Cooley's propositions as good authority).

78. Plaut v. Spendthrift Farm, Inc., 1 F.3d 1487, 1493 (6th Cir. 1993), *aff'd* 514 U.S. 211 (1995).

79. 2 U.S. (2 Dall.) 409 (1792).

80. 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3529.1 at 302 (1984) (describing the factual background of *Hayburn's Case*).

81. *Id.*

"imposition or mistake."[82]

In these early days of the republic, the Supreme Court justices still "rode the circuit" and sat with the district court judges.[83] Five justices were confronted with the pension act while sitting with district court judges on circuit court panels in New York, Pennsylvania, and North Carolina.[84] "Each panel independently and unanimously declined to hear the veterans' petitions, reasoning that for the courts to render judgments subject to review by the Congress was violative of the separation of powers."[85]

The Pennsylvania panel concluded that a ruling on the applications could subject court judgments to being "revised and controlled by the legislature, and by an officer in the executive department."[86] The potential for such interference was regarded as "radically inconsistent with the independence of that judicial power which is vested in the courts."[87]

The North Carolina circuit summed up the problem as follows: "[N]o decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the constitution, be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested."[88]

This first invalidation of congressional enactments confirmed the constitutional wall erected to shield the judiciary against legislative interference and to establish Article III courts as an independent and co-equal branch of the government. The courts had no choice but to repulse the attempted legislative attack upon judicial autonomy. Unfortunately, this legislative incursion would not be the last; stronger and higher walls needed to be built.

2. United States v. Klein[89]

Klein arose when former citizens of the Confederacy attempted to

---

82. *Id.*
83. *Plaut*, 1 F.3d at 1492.
84. *Id.*
85. *Id.*
86. *Id.* at 1493 (quoting *Hayburn's Case*, 2 U.S. at 410). The quotation, as recited in *Plaut*, varies slightly from the original as stated in *Hayburn's Case*, although the meaning remains the same. *See Hayburn's Case*, 2 U.S. at 410.
87. *Plaut*, 1 F.3d at 1493 (quoting *Hayburn's Case*, 2 U.S. at 410).
88. *Id.* (quoting *Hayburn's Case*, 2 U.S. at 410). Again, this quotation differs slightly from the original as stated in *Hayburn's Case*, but the meaning remains the same. *See Hayburn's Case*, 2 U.S. at 410.
89. 80 U.S. (Wall.) 128 (1871).

retrieve property the Union had confiscated.[90] A statute forfeited all property of persons engaged in or aiding the rebellion, as well as appropriated all property abandoned or captured in the insurrectionist states.[91] Former owners were, however, enabled to make claims on lost property "on proof to the satisfaction of [the Court of Claims] . . . that he has never given any aid or comfort to present rebellion."[92]

One such property owner—V.F. Wilson—lost his cotton but was subsequently pardoned.[93] Wilson died before perfecting his claim; his estate's administrator, Klein, continued the proceedings.[94] The Court of Claims ultimately awarded $125,300 in compensation.[95] The government appealed to the Supreme Court.[96]

Prior to hearing that appeal, the high court decided an identical action involving a claimant named Padelford who had (1) participated in the rebellion, (2) abandoned his property, (3) obtained a pardon, and (4) pursued a claim under the act.[97] The Court of Claims found the pardon to have "cured his participation in the rebellion," entitling Padelford to compensation.[98] The Supreme Court agreed, concluding that for the purposes of this statute Padelford had been exonerated.[99]

Congress was not happy. Between the *Padelford* decision and the *Klein* hearing, angry lawmakers attempted to reverse the judicial application of the act by specifying that pardons would not be admissible in forfeited property claims proceedings.[100] Congress viewed such an interpretation to be "the true intent and meaning of" the acts.[101] The Supreme Court was directed to decline jurisdiction over any case in which a claimant had prevailed below by proving loyalty with presidential pardon.[102]

When called upon to decide Klein's appeal, the Court acknowledged general congressional power over appellate jurisdiction, but held:

---

90. *Id.* at 136–41.
91. *Id.* at 130.
92. *Id.* at 131.
93. *Id.* at 131–37.
94. *Id.* at 132.
95. *Id.*
96. *Id.*
97. *Id.* at 132–33.
98. *Id.*
99. *Id.* at 133.
100. *Id.* at 133–34.
101. *Id.* at 134.
102. *Id.*

> [T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided [in the *Padelford* matter] that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty.[103]

The Supreme Court sized up the constitutional transgression as follows: "What is this but to prescribe a rule for the decision of a cause in a particular way?"[104] If given effect the supposed clarification of congressional intent would "allow[] that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it."[105] The Constitution was read to preclude such legislative interloping.

The Court distinguished an earlier case—*Pennsylvania v. Wheeling Bridge Co.*— which had condoned an effective reversal of precedent by Congress.[106] The *Wheeling* court found a bridge to be a nuisance, but a statute subsequently legalized the structure by designating the river crossing as a post-road.[107] The Court distinguished the *Klein* situation because, unlike the response to the *Wheeling* decision, Congress did not enact new legislation; instead, Congress dictated how the existing property reclamation act must be applied.[108] The Constitution did not countenance such meddling because "the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary."[109] By so instructing the judiciary, "Congress has inadvertently passed the limit which separates the legislative from the judicial power."[110]

In sum, the Court held that Congress cannot "prescribe a rule for [a] decision of a cause in a particular way" when "no new circumstances have been created by legislation."[111] Legislatively-imposed "rules of decision" are thus unconstitutional because such enact-

---

103. *Id.* at 145.
104. *Id.* at 146.
105. *Id.*
106. *Id.* at 146–47 (citing 59 U.S. (18 How.) 421, 429 (1855)).
107. *Id.* at 146.
108. *Id.* at 146–47.
109. *Id.* at 147.
110. *Id.*
111. *Id.*

ments would empower Congress to usurp judicial prerogative by interpreting, rather than passing, the laws. Since "[i]t is of vital importance that these powers be kept distinct," statutes mandating how existing law must be interpreted cannot pass constitutional muster.[112]

3. Plaut v. Spendthrift Farm, Inc.[113]

Much more recently, the Court again affirmed the separation of powers dichotomy that condemns congressional directives for the application of pre-existing law but permits an enactment that actually amends the law.[114] The constitutional determination thus turns upon whether the law has, in fact, been changed.

Plaut arose out of the legislative response to a statute-of-limitations determination in a securities fraud case.[115] As with the supposed FRSA "clarification," Congress slid the attempt to reverse jurisprudence into a completely unrelated bill.[116]

For cases that had been pending, Congress directed that the applicable statute of limitations should be drawn from state law.[117] The change was made retroactive to the day before the precedent it sought to attack, allowing for the revival of final judgments.[118]

When the Supreme Court weighed in, Congress's incapacity to "prescribe rules of decision to the Judicial Department of the government in cases pending before it" was reaffirmed.[119] The opinion surveyed the long history of judicial vigilance against legislative encroachment, and noted that this country had been founded upon the principle that "'[t]he interpretation of the laws'" was "'the proper and peculiar province of the courts.'"[120] The maintenance of that separation depends upon "high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of inter-branch conflict."[121] The Court reminded, however, that the *Klein* prohibition against Congress influencing the outcome of litigation "does not take hold when

112. *Id.*
113. 514 U.S. 211 (1995).
114. *Id.*
115. *Id.* at 214–15.
116. *Id.* at 214.
117. *Id.*
118. *Id.* at 214–15.
119. *Id.* at 218 (quoting United States v. Klein, 80 U.S. 128, 146 (1871)).
120. *Id.* at 222 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).
121. *Id.* at 239.

Congress 'amend[s] applicable law.'"[122] Importantly, the statute of limitations "fix" in *Plaut* did change applicable law.[123]

Despite the change in law, the statute transgressed the separation of powers by directing the judiciary to reopen final judgments.[124] "When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than 'reverse a determination once made, in a particular case.'"[125] Thus, the statute offended the Constitution by requiring the federal courts to act "in a manner repugnant to the text, structure, and traditions of Article III."[126]

B. The Eighth Circuit Stands in Conflict of Supreme Court and Circuit Precedent

1. Lundeen II *Runs Afoul of Supreme Court "Final" Decision Precedent*

As seen from the preceding discussion, the essence of judicial power is the authority to render final decisions.[127] Hence, the *Plaut* court endorsed Alexander Hamilton's conclusion that the Constitution does not tolerate a legislative reversal of "'a determination once made, in a particular case.'"[128]

For separation of powers purposes, "[f]inality of a legal judgment is determined by statute."[129] In a similar vein, the Supreme Court has carefully distinguished constitutional and unconstitutional interventions based upon whether the judicial determination to be altered is "still on appeal" or instead deemed "final."[130]

"Finality" should not be limited to decisions disposing of an entire case. The circumstances in which *Plaut* arose strongly suggests the precedent's applicability to final judgments on particular issues on interlocutory appeal as long as core elements are satisfied. In *Plaut*, the statute-of-limitations ruling in question was a final appealable order under § 1291 and appellate review had run its course. These

122. *Id.* at 218 (quoting Robertson v. Seattle Audobon Soc., 503 U.S. 429, 441 (1992)).
123. *Id.*
124. *Id.* at 217–18.
125. *Id.* at 225 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)).
126. *Id.* at 217–18.
127. *See id.* at 218–19.
128. *Id.* at 222 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)).
129. *Id.* at 227.
130. *Id.* at 226–27.

circumstances precluded Congress from compelling reversal of a "final" judicial determination by operation of a new law. Notably, however, "final" did not mean "never again to be revisited." For instance, the judiciary could have revisited the "final" limitations ruling through collateral review.[131] Based on *Plaut,* the factors rendering a decision "final" are whether the judgment is final pursuant to 28 U.S.C. § 1291 and direct judicial review has been exhausted;[132] just because a court may later take a second look after direct review does not make the decision any less "final."[133]

In *Lundeen II, Plaut*'s applicability should have been readily apparent.[134] *Lundeen I*'s exercise of federal jurisdiction was "final" pursuant to § 1291.[135] The Supreme Court's rejection of a certiorari review exhausted the statutory process for direct judicial review of the remand.[136] Moreover, the *Lundeen* plaintiffs did not appeal or otherwise question federal jurisdiction when filing the notice of appeal that produced *Lundeen II*; hence, jurisdiction was not even the subject of appellate review when Congress intervened.[137]

The fact that *Lundeen I* was a jurisdictional ruling is no excuse for *Lundeen II.* Once decided, jurisdiction is just as "final" as any other judicial determination.[138] *Plaut* safeguards Article III power against

131. *See, e.g.*, FED. R. CIV. P. 60(b) (permitting a court to relieve a party from a final judgment or order under certain circumstances).

132. Plaut, 514 U.S. at 226–27.

133. *See also* Teague v. Lane, 489 U.S. 288, 299–310 (1989) (determining that an issue on collateral review is not subject to retroactive application of a new legal standard); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376 (1940) ("[Judicial] determinations of [jurisdictional] questions, while open to direct review, may not be assailed collaterally."); Hernandez-Rodriguez v. Pasquarell, 118 F.3d 1034, 1042 (5th Cir. 1997) ("When a case achieves finality under a statutory scheme that precludes direct review by an Article III court, the judicial interest in finality is also substantial.").

134. 532 F.3d 682 (8th Cir. 2008).

135. 447 F.3d 606 (8th Cir. 2006). *See* Cunningham v. Hamilton County, 527 U.S. 198, 202–04 (1999) (acknowledging that § 1291 can take hold of a single issue in a case that "resolve[s] important questions separate from the merits" (quoting Swint v. Chambers County Comm'n, 514 U.S. 35, 42 (1995))); Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 714–15 (1996) (stating that a remand order is "final" for purposes of § 1291).

136. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 227 (1995) (distinguishing between "judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed)"); Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.9 (1982) ("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment.").

137. *See Lundeen II*, 532 F.3d at 695.

138. *See Quackenbush*, 517 U.S. at 714–15 (stating that a remand order appealable

Article I interference, and that power should have been no less paramount over the single, final determination in *Lundeen I* than a final determination over the entire case as in *Plaut.*[139]

2. Lundeen II *Conflicts With Circuit Authority*

Prior to the Eighth Circuit's *Lundeen II* decision, several circuit courts accepted and enforced the Supreme Court's directive that new rules of law do not affect judicial determinations for which direct review has been exhausted.[140] With the Eighth Circuit's ruling, an act of Congress will now have different effects for identical cases depending upon whether the litigants are lucky (or unlucky, as the case may be) to be in a compliant circuit.

a. *Circuit Courts Protecting Article III Prerogative*

i. *First Circuit*

The First Circuit rejected Congress's efforts to change a final ruling regarding statutory meaning while a case was still pending.[141] In a first appeal from a conviction for rape and carjacking, the First Circuit concluded that the "serious bodily injury" prong of 18 U.S.C. § 2119 had not been satisfied to enhance the sentence by ten additional years in prison.[142] The case was remanded for resentencing.[143]

After remand, but before resentencing, "Congress's attention was momentarily focused on [the First Circuit's] decision."[144] Congress passed the so-called Carjacking Correction Act of 1996 to rectify the First Circuit's interpretation of the term "serious bodily injury" and to clarify that the term should be interpreted to include "sexual

---

as "final" decision under § 1291); *Ins. Corp. of Ir.*, 456 U.S. at 702–03 n.9 (noting that a jurisdictional decision cannot be reopened once direct review exhausted).

139. Hayburn's Case, 2 U.S. (2 Dall.) 408, 410 n.* (1792) ("[N]o decision of any court of the United States can, under any circumstances . . . be liable to a revision, or even suspension, by the [l]egislature itself, in whom no judicial power of any kind appears to be vested.").

140. *Plaut*, 514 U.S. at 217–19; *see also* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993) (noting that judicial statutory interpretations are afforded retroactive effect "in all cases still open on direct review").

141. United States v. Vasquez-Rivera, 135 F.3d 172, 177 (1st Cir. 1998).

142. *Id.* at 173–74 (discussing United States v. Vasquez-Rivera, 83 F.3d 542 (1st Cir. 1996)).

143. *Id.* at 174–75.

144. *Id.* at 174.

abuse."[145]

In resentencing the defendant, the district court ruled that the congressional amendment was a "'mere clarification' to the original legislation, and thus was applicable to [the] remanded sentencing."[146] The district court again imposed an enhanced sentence.[147]

On the second appeal, the First Circuit rejected the legislative infringement on *Plaut* grounds because "post hoc statements regarding the original legislative intent do not affect this court's previous, and final, finding as to what that intent was."[148] Since the First Circuit's judicial decision had achieved finality, Congress lacked the power "'to declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was.'"[149] "Finality" for purposes of cutting off congressional action attached even though the case was still pending and the judiciary could have reversed itself on collateral review of the first decision.

ii. Fifth Circuit

The *Hernandez-Rodriguez v. Pasquarell* court was similarly confronted with the issue of whether the rules could change after direct review had been exhausted.[150] The Board of Immigration Appeals had denied a motion to reopen a deportation order.[151] As a result, the order of exclusion became final.[152] The matter was appealed to the Fifth Circuit in habeas proceedings.[153]

As the appeal was pending, the attorney general amended the rule under which the petitioner sought relief.[154] The petitioner sought the benefit of the changed rule, but the appellate court demurred on *Plaut* grounds because the order of exclusion had become "final" upon exhaustion of direct review.[155] Upon achieving finality, the order could not be affected by a subsequent change in the law.[156] The court noted that when a judicial decision becomes final

145. *Id.* at 173–75.
146. *Id.* at 175.
147. *Id.* at 172.
148. *Id.* at 177 (discussing *Plaut*, 514 U.S. at 227).
149. *Id.* (quoting *Plaut*, 514 U.S. at 227).
150. 118 F.3d 1034 (5th Cir. 1997).
151. *Id.* at 1040.
152. *Id.* at 1036.
153. *Id.*
154. *Id.*
155. *Id.* at 1042.
156. *Id.* ("When a case achieves finality under a statutory scheme that precludes direct review by an Article III court, the judicial interest in finality is also substan-

"'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.'"[157]

iii. Seventh Circuit

In *Lindh v. Murphy*,[158] the Seventh Circuit Court of Appeals analyzed a petition for habeas corpus stemming from felony murder convictions.[159] Judge Easterbrook explained that Congress is precluded from "limiting the interpretive power of the courts."[160] Thus, lawmakers "cannot tell courts how to decide a particular case . . . Congress cannot say that a court must award Jones $35,000 for being run over by a postal truck . . . or provide that victims of torts by federal employees cannot receive punitive damages."[161] The Seventh Circuit concluded that "[o]nce the judicial power is brought to bear by the presentation of a justiciable case or controversy within a statutory grant of jurisdiction, the federal courts' independent interpretive authority cannot constitutionally be impaired."[162]

iv. Ninth Circuit

The Ninth Circuit similarly refused to apply a new precedent to an issue for which direct review had been exhausted.[163] In *Alvarenga-Villalobos v. Ashcroft*, the Ninth Circuit reviewed an appeal regarding an alien who was deported for crimes "involving moral turpitude," reentered the United States illegally, and then filed a habeas petition after his prior deportation order was reinstated.[164] The district court denied the habeas petition, and the petitioner appealed to the Ninth Circuit.[165]

The petitioner urged that a new interpretive rule "must be given full retroactive effect in all cases still open on direct review."[166] The petitioner's direct appeal rights, however, had already been ex-

---

tial.").

157. *Id.* (quoting Rivera v. I.N.S., 810 F.2d 540, 541–42 (5th Cir. 1987)).
158. 96 F.3d 856 (7th Cir. 1996), *rev'd on other grounds*, 521 U.S. 320 (1997).
159. *Id.* at 872–75.
160. *Id.* at 872.
161. *Id.*
162. *Id.*
163. Alvarenga-Villalobos v. Ashcroft, 271 F.3d 1169, 1172 (9th Cir. 2001).
164. *Id.* at 1171.
165. *Id.*
166. *Id.* at 1172 (citing Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993)).

hausted.[167] In the appeal before the Ninth Circuit, the petitioner sought "to apply to his prior order of deportation a new rule that did not take effect until two-and-a-half years after he had been deported."[168] Since direct review of that issue had been exhausted, the "'general rule of nonretroactivity for cases on collateral review'" applied.[169] Final civil judgments, such as the one the petitioner sought relief from, "'may withstand subsequent judicial change in that rule.'"[170]

b. Lundeen II *Stands in Conflict*

By allowing a legislative clarification to supplant the final jurisdictional decision in *Lundeen I*, the *Lundeen II* majority departed from the other circuits that have refused to apply new rules to final decisions for which direct review has been exhausted. This conflict threatens the sound administration of justice because the various circuit courts will afford dramatically different deference to congressional "clarifications": some courts like the First, Fifth, Seventh and Ninth circuits will adhere to the majority rule and reject new rules of decisions intended to change finally-decided issues. The Eighth Circuit, however, will stand down to congressional revision. As a result, congressional action that has one effect in one jurisdiction may have the opposite effect in another.

IV. IMPLICATIONS

The Eighth Circuit's ultimate decision in the *Lundeen* litigation reaches far beyond the Minot derailment and the FRSA. In addition to circuit conflicts and the erosion of separation of powers, the *Lundeen* holding should be of concern to those arguing cases in federal courts, particularly the Eighth Circuit.[171] *Lundeen* leaves all decisions made on interlocutory appeals open for reinterpretation

---

167. *Id.*

168. *Id.*

169. *Id.* (quoting Teague v. Lane, 489 U.S. 288, 307 (1989) (plurality)).

170. *Id.* (quoting *Teague*, 489 U.S. at 308).

171. One commentator further suggests that Congressional action such as that upheld in *Lundeen* violates separation of powers principles because judicial decisions may be classified as advisory opinions. "The important concern is that courts not be required to render decisions that, without more, can be set aside in the discretionary exercise of executive or legislative power. . . . A judicial declaration subject to discretionary suspension by another branch of government may easily be characterized as an advisory opinion." 13 CHARLES A. WRIGHT ET. AL., FEDERAL PRACTICE AND PROCEDURE § 3529.1 (3d ed. 2008).

until the time for appeal expires on the *entire* case. Practically speaking, an interlocutory decision can be attacked by congressional action at any stage in the proceeding even if the entire judiciary has said its piece. This unsettling result from *Lundeen* should make practitioners wary—the time, expense, frustration, and effect on clients that would occur if Congress is emboldened to reopen interlocutory judgments could be dramatic.

A. Lundeen, Plaut, *and the Collateral Order Doctrine*

The *Lundeen* majority held that applying the FRSA amendment to the current litigation does not violate the U.S. Constitution because "when the amendment became effective these cases were on appeal and had not reached final judgments."[172] But, as also recognized by the majority, the *Lundeen* case had gone through the entire appeal process on the issue of jurisdiction, and the court had previously decided that the Lundeens' cause of action was preempted.[173] The issue of jurisdiction had been appealed through the hierarchy of the judiciary as a collateral order, and the time for appeal had passed before the legislature enacted the statute at issue here.[174]

It has long been held that 28 U.S.C. § 1291's "final decision" standard permits appeals from certain interlocutory orders and judgments before the conclusion of a proceeding. In *Cohen v. Beneficial Industrial Loan Corp.*, the Supreme Court recognized that there exists a "small class [of cases] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[175] In defining the cases that fit within this class, the Court distinguished between those issues that would be merged into the final judgment and appealable with the entire case, and those issues that would lose their appealable nature when the case was finally decided.[176] For the latter category, by the time of final judgment the rights asserted would be lost,[177] or the issue would be

172. *Lundeen II*, 532 F.3d 682, 689 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 2379 (2009) (mem.).

173. *Id.* at 687.

174. *Id.* at 702 (Beam, J. dissenting) ("*Lundeen I*'s jurisdictional judgment has been fully appealed, including a writ of certiorari to the Supreme Court, and any appeal day has long since passed.").

175. 337 U.S. 541, 546 (1949).

176. *Id.*

177. *Id.*

rendered moot. The implications of the Eighth Circuit's decision to open this small class of issues to subsequent congressional review are evident upon a brief summary of the collateral order doctrine.

To be appealable under the collateral order doctrine, a litigant must demonstrate three criteria. First, the district court's decision on the issue must be effectively unreviewable on appeal from a final judgment.[178] For example, in a case where a claim of absolute immunity is denied, proceeding with the action without allowing an immediate appeal would ignore the essence of absolute immunity—the right not to answer for conduct in a court proceeding.[179]

Second, the interlocutory decision must "conclusively determine the disputed question."[180] If there is the possibility that the district court could change or alter its decision on the issue, it should not be immediately appealed under this doctrine. As the Court stated in *Cohen*, "[a]ppeal gives the upper court a power of review, not one of intervention."[181]

And finally, the "question must involve a claim of right separable from, and collateral to, rights asserted in the action."[182] In other words, the decision cannot be a step toward the final judgment. It must be wholly independent from the merits of the case. This requirement helps protect the courts from engaging in multiple reviews of the same issues.[183]

Overall, the collateral order doctrine—both the requirements and the justifications—are important to understanding the implications of *Lundeen*. The doctrine has been fashioned to give litigants the opportunity to appeal immediately under § 1291, meaning that the decisions on these issues are, and should be, considered "final decisions" under that section. The requirements of the collateral order doctrine make that clear. Appeal is only permitted from those decisions that are separate from the merits, finally determined, that would be lost after final judgment. Thus, collateral appeals may properly be characterized as their own, separate cases embedded in a larger case. The decision on appeal from these issues does not affect the merits of the larger case, but it does impact the character of the larger case. It would seem a fruitless endeavor to permit an appeal

178. Mitchell v. Forsyth, 472 U.S. 511, 527 (1985).

179. *Id.* at 525 (citing Nixon v. Fitzgerald, 457 U.S. 731 (1982)).

180. *Id.* at 527 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).

181. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

182. *Mitchell*, 472 U.S. at 527 (quotation omitted).

183. 15A CHARLES A. WRIGHT ET. AL, FEDERAL PRACTICE AND PROCEDURE § 3911 (2d ed. 1992).

from these collateral orders under the justifications above, only to allow the decisions to be reopened and subject to a different disposition later in the case. But this is what *Lundeen* accomplishes with its holding.

B. Illustrations

The Eighth Circuit held that even those collateral orders that achieve finality are still subject to retroactive review by Congress.[184] It is not difficult to imagine another scenario like *Lundeen* in the context of federal jurisdiction litigation. The following examples illustrate the wide-ranging effect this decision could have on federal litigation.

1. Jurisdiction

Lundeen involved the assertion of federal jurisdiction. Because the Eighth Circuit held that federal jurisdiction existed due to preemption, the case went back to the district court for proceedings consistent with that opinion[185]—namely, dismissal. But federal jurisdiction may exist on multiple grounds, each one subject to interlocutory appeal under § 1291.[186] Abstention is one such example.

Abstention exists in several varieties, but at its core the doctrine enables a litigant to remove a case from federal court to state court.[187] The Supreme Court has held that remand orders based on abstention principles are subject to immediate review under § 1291.[188] In *Quackenbush v. Allstate Insurance Co.*, the Court recognized that an abstention order surrenders federal jurisdiction of the lawsuit and sends it to state court.[189] If a litigant cannot appeal that order immediately, the party loses the possible right to have a federal court entertain the cause of action.

Under the *Lundeen* line of reasoning, abstention remains subject to change until the entire case has reached final judgment. A party unhappy with a federal district court's determination on abstention

184. *See Lundeen II*, 532 F.3d 682, 687 (8th Cir. 2008).

185. *Id.* at 686.

186. *See* 28 U.S.C. § 1291 (2008) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions . . . .").

187. *See* BLACK'S LAW DICTIONARY 9 (9th ed. 2009).

188. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712–15 (1996) (holding that a remand order on "*Burford* abstention" grounds was immediately appealable); Moses H. Cone Mem'l Hosp. v. Mercury Constr., 460 U.S. 1, 8–9 (1983) (holding that a "*Colorado River* abstention" order was immediately appealable as a final decision).

189. *See Quackenbush*, 517 U.S. at 714.

could lobby Congress for a legislative reversal of that determination that would apply even if the circuit court and the Supreme Court affirmed the original district court's decision. For sake of illustration, consider a case where the federal district court determines that remand to state court is not appropriate on abstention grounds. The circuit court and the Supreme Court agree. The case continues in federal court and a proceeding on the merits begins.

Meanwhile, Congress passes a piece of legislation that essentially reverses the district court's determination on abstention—the legislation informs the court that, in fact, the elements of abstention do exist in this case and it must be remanded to state court. The previously-unhappy litigant now moves for remand. Despite the fact that all of the courts in the Article III hierarchy have examined the law and determined that abstention does not exist, and the fact that the case has proceeded in federal court and, perhaps, has almost reached a conclusion, the logic of *Lundeen* permits a legislative reversal to affect this case. What was once certain is no longer. After *Lundeen*, jurisdiction remains up for grabs.

2. *Immunity*

In *Nixon v. Fitzgerald*, the Court held that the president is entitled to absolute "immunity from damages liability for acts within the 'outer perimeter' of his official responsibility."[190] In this same case, the Court held that an order denying a claim of absolute immunity is immediately appealable under the logic of *Cohen* and § 1291.[191] Because a claim of absolute immunity from civil suit raises a "serious and unsettled question" of law, the Court recognized that an immediate appeal from an order denying the president absolute immunity is necessary.[192]

The same logic follows when a litigant asserts the defense of qualified immunity. Qualified immunity protects government agents from civil liability for damages resulting from their conduct.[193] Like absolute immunity, qualified immunity enables the government agent to avoid standing trial for his or her actions.[194] Thus, an order denying a claim of qualified immunity is also immediately appealable

190. 457 U.S. 731, 756 (1982).
191. *Id.* at 742–43.
192. *Id.* at 742 (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 547 (1949)).
193. Harlow v. Fitzergerald, 457 U.S. 800, 818 (1982).
194. *See id.*

under *Cohen* for the same reasons as articulated in *Nixon*.[195] It would be foolish to require the agent to proceed with the case only to dismiss it after final judgment upon a finding of qualified immunity.[196]

Denial of Eleventh Amendment immunity[197] is likewise immediately appealable as a collateral order,[198] as is denying a claim of foreign sovereign immunity.[199] The essence of all immunity is the ability to avoid litigation, especially the demands of discovery. Under the logic of *Lundeen*, a determination of immunity is still subject to congressional review.

For illustrative purposes, consider the following hypothetical: a group of plaintiffs files a lawsuit against a foreign nation for damages. This nation attempts to dismiss the case under the theory of foreign sovereign immunity, but the plaintiffs successfully argue to the district court that the "terrorism exception" to foreign sovereign immunity applies. The foreign nation appeals and the court of appeals reverses, holding that the country does not fall under the exception and foreign sovereign immunity applies to this country. The case is remanded to the district court.

The district court, now sure that immunity applies, enters a dismissal order, which the plaintiffs appeal. Enter Congress. Congress amends the Foreign Sovereign Immunity Act[200] to clarify the exception, bringing the nation back within the sphere of possible suit. The case, again before the circuit court on appeal from the dismissal order, looks at *Lundeen*, looks at the statute, and decides that it must reopen the original ruling on immunity despite the fact that it had been clearly determined that the nation should not be subject to a lawsuit. The plaintiffs are now able to bring the claim.

This example reflects the character of the *Lundeen* decision. A

195. Mitchell v. Forsyth, 472 U.S. 511, 525–26 (1985).

196. Not to mention the difficulty in explaining to one's client why the damages they won are actually not retrievable.

197. Under the Eleventh Amendment, a state is immune from suit in federal court brought by a citizen of another state. U.S. CONST. amend. XI. The doctrine of sovereign immunity extends the state's immunity to suits by citizens of that state. Edelman v. Jordan, 415 U.S. 651, 662–63 (1974).

198. *See* P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144–45 (1993) (permitting the petitioner, who claimed Eleventh Amendment immunity because it was an arm of the Puerto Rican government, to immediately appeal the district court's denial of its immunity claim).

199. *See* Republic of Iraq v. Beaty, 129 S. Ct. 2183, 2188 (2009) (noting that Iraq "invoked the collateral order doctrine" to appeal the district court's denial of Iraq's motion to dismiss, which invoked foreign sovereign immunity).

200. *See* 28 U.S.C. § 1605 (2006) (listing the exceptions to foreign sovereign immunity).

decision on immunity is no longer safe from the legislative acts of Congress. If Congress does not agree with a court's decision on the applicability of immunity, a simple amendment occurring after the immunity determination is final can reopen and re-adjudicate the order. While the plaintiffs who had an issue with the foreign nation are happy, the principles of our Constitution are unsettled. Uncertainty in federal litigation is the unfortunate consequence of *Lundeen*.

3. Other Examples

The collateral order doctrine, despite its "small class,"[201] encompasses quite a few issues that may entice congressional review. Orders allocating the expenses of identifying class members are immediately appealable.[202] A district court's denial of a motion to modify a protective order is immediately appealable.[203] Pre-trial orders forcing medication are also seemingly appealable under § 1291.[204] The latter example could present the most interesting results under the *Lundeen* line of reasoning. An individual forced to be medicated pre-trial may suddenly, in the midst of trial, be permitted to discontinue those medications, resulting in undue mental or physical health ramifications. While these examples are by no means exhaustive, they present a sampling of the types of "final decisions" that can still be reopened and reversed by Congress.

C. Tipping the Balance—Congress and the Judiciary

Beyond the implications of *Lundeen* to the practicalities of litigation, a broader consequence of this decision involves the essence of our constitutional dynamic. The powers between the branches of government may ebb and flow over time,[205] but congressional usurpation of the judiciary's primary function of decision making could lead to incremental, yet drastic, shifts in power.

---

201. Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 610-11 (2009) (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).

202. *See* Oppenheimer Fund, Inc. v. Janders, 437 U.S. 340, 347–48 (1978).

203. *See* Shigara v. Skiles, 420 F.3d 301, 305 (3d Cir. 2005).

204. *See, e.g.*, United States v. Morgan, 193 F.3d 252, 258–59 (4th Cir. 1999); United States v. Brandon, 158 F.3d 947, 950–51 (6th Cir. 1998).

205. The recent struggles between the branches of government following 9/11 and national security issues are one example of this ebb and flow. *See, e.g.*, Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1, 1 (2004) ("[I]t is a recurring theme in history that in times of war, armed conflict, or perceived national danger, even liberal democracies adopt measures infringing human rights in ways that are wholly disproportionate to the crisis.").

Lundeen II comes on the heels of *Miller v. French*, where the Supreme Court held that the legislature did not disrupt fundamental separation of powers with a provision in the Prison Litigation Reform Act (PLRA).[206] The section at issue in *Miller* concerned the "automatic stay provision," which automatically stays a court's grant of prospective relief for a period of time while a defendant's motion to terminate the relief is pending.[207] A group of prisoners challenged this provision, arguing it violated separation of powers principles by "legislatively suspending a final judgment of an Article III court in violation of *Plaut* and *Hayburn's Case*."[208] While the Seventh Circuit agreed with the prisoners, holding that the statute operates as "a self-executing legislative determination that a specific decree of a federal court . . . must be set aside at least for a period of time,"[209] the Supreme Court disagreed. The high court held that the automatic stay provision helps implement the new standards of law articulated by Congress in the PLRA, and the prospective relief ordered by federal courts in a consent decree is not a final order, as the decree remains subject to continuing supervision by those courts.[210] Thus, the Court permitted Congress to control consent decrees issued by federal courts in prison litigation.[211]

Commentators argue that *Miller v. French* represents a step toward Congress having the power to legislatively dictate the outcome in pending cases without amending the applicable law.[212] *Lundeen* and the failure of the Supreme Court to correct the Eighth Circuit's error represent yet another step in that direction.

206. 530 U.S. 327, 348 (2000); *see generally* Prison Litigation Reform Act, 18 U.S.C. § 3626(e)(2) (2006) (enacting an "automatic stay" provision that would set aside a federal court decision for a period of time).

207. § 3626(e)(2).

208. *Miller*, 530 U.S. at 342.

209. *Id.* at 335.

210. *Id.* at 347–48.

211. *But see* Taylor v. Ariz., 972 F. Supp. 1239, 1245 (D. Ariz. 1997) (finding the PLRA unconstitutional under separation of powers principles because "where 'Congress subjects the judgment to a reopening requirement which did not exist when the judgment was pronounced,' it violates the separation of powers." (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 234 (1995))).

212. *See, e.g.*, Lloyd C. Anderson, *Congressional Control Over the Jurisdiction of the Federal Courts: A New Threat to James Madison's Compromise*, 39 BRANDEIS L.J. 417, 443–44, 446–47 (2000–2001); Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 191 (2001) (describing the holding in *Miller v. French* as a quiet acquiescence to congressional efforts to control the judicial-making process).

V. CONCLUSION

Allowing Congress to alter a final decision simply because other parts of the case are pending is just one step away from Congress acting as an adjudicator. But why do we care? The governmental balance struck in the Constitution represents the Framer's fear of legislative control over the judiciary.[213] And rightly so, considering the fact that the legislature remains subject to the political will of the people, whereas the judiciary is supposed to decide the law without regard to momentary societal pressures. If these two branches become more and more intertwined, and the courts continue to permit congressional regulation of the core functions of the judiciary, Congress will be able to legislatively dictate the outcome in cases of interest to constituents. As a result, the people may be more inclined to use Congress, as opposed to the courts, to obtain a more desirable outcome in a given case.[214] Not only does *Lundeen* represent the challenges practitioners may face in federal court, the case also represents the continued, and successful, attempts of Congress to encroach on the powers of the judiciary.

---

213. Linda D. Jellum, *"Which is to be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 859 (2009) (noting that the Framer's feared the legislature because in the English system of government the legislative and judicial functions had little separation).

214. *See* Paramount Health Sys., Inc. v. Wright, 138 F.3d 706, 710 (7th Cir. 1998).