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## The Irrepressible Myth of Klein

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## THE IRREPRESSIBLE MYTH OF *KLEIN*

Howard M. Wasserman\*

### I. INTRODUCTION

Law is steeped in myth.<sup>1</sup> So, too, are many judicial decisions in the legal canon.<sup>2</sup>

One such mythical decision is *United States v. Klein*.<sup>3</sup> In that Reconstruction-era decision, the Supreme Court invalidated a congressional attempt to dictate the judicial and evidentiary effect of presidential pardons in Court of Claims actions brought by Southern property owners to recover proceeds on property confiscated by Union agents during the Civil War.<sup>4</sup> *Klein* is canonical as much for its purported indeterminacy as for its principles of separation of powers.<sup>5</sup>

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\* Associate Professor of Law, FIU College of Law. Various versions of this paper were presented at faculty workshops at Florida State University College of Law in February 2010, FIU College of Law and Rutgers School of Law–Camden in March 2009, and at PrawfsFest! in November 2008; thanks to all participants for their comments and suggestions. Special thanks to Michael Allen, William Araiza, Elizabeth Foley, Todd Pettys, Martin Redish, Michael Solimine, Allan Stein, Amanda Tyler, William Van Alstyne, Steve Vladeck, and Gordon Young for comments and suggestions on research and early drafts.

1. See, e.g., Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519 (2008); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003); Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601 (2002); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991 (2009); see also Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 972 (2009) [hereinafter Bloom, *Noble Lie*].

2. Scholars have described the “myth” of three other canonical cases: *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). See John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706 (2003) [hereinafter Paulsen, *Myth*]; Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens on the Twenty-fifth Anniversary of the Trilogy*, 63 WASH. & LEE L. REV. 81 (2006).

3. 80 U.S. (13 Wall.) 128 (1871).

4. *Id.* at 145–47. See Evan Caminker, *Schiavo and Klein*, 22 CONST. COMMENT. 529, 571–72 (2005); Edward A. Hartnett, *Congress Clears its Throat*, 22 CONST. COMMENT. 553, 570–73 (2005); Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437, 438 (2006); Lawrence G. Sager, *Klein's First Principle*, 86 GEO. L.J. 2525, 2525–26 (1998); Gordon G. Young, *Congressional Regulations of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1189, 1192–94.

5. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (expressing uncertainty as to the “precise scope of *Klein*”); *Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001) (“*Klein*’s exact meaning is far from clear.”); see also Sager, *supra* note 4, at 2525 (labeling

The case is of “substantial significance,” although “no one is exactly sure how or why.”<sup>6</sup>

In fact, *Klein* is more relevant today than it has been in its 140-year history.<sup>7</sup> In the past decade, Congress has considered, and occasionally enacted, laws that have at least triggered *Klein*-based separation of powers objections or arguments. These laws broadly fall in three areas: (1) tort reform efforts to prohibit particular classes of state-law tort claims;<sup>8</sup> (2) attempts to control so-called judicial activism, such as by overriding state court decisions on controversial issues<sup>9</sup> or prohibiting federal-court use of foreign and international law in constitutional interpretation;<sup>10</sup> and (3) laws enacted as part of the Global War on Terror, such as granting retroactive immunity to telecommunications providers who assisted the Bush Administration in arguably unlawful domestic wiretap operations<sup>11</sup> or establishing adjudicative mechanisms for dealing with terror detainees.<sup>12</sup> All of these laws, particularly those dealing with the War on Terror, return *Klein* and the limits it purportedly imposes on Congress and the executive to the center of the constitutional

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*Klein* as “deeply puzzling”).

6. Redish & Pudelski, *supra* note 4, at 437.

7. Two things demonstrate *Klein*'s rebirth in doctrinal prominence. First, one Federal Courts casebook now gives *Klein* and its subsequent evolution substantial play. See PETER W. LOW ET AL., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 103-13 (6th ed. Supp. 2009). Other casebooks continue to give the case note status. See, e.g., DONALD L. DOERNBERG ET AL., FEDERAL COURTS, FEDERALISM AND SEPARATION OF POWERS: CASES AND MATERIALS (4th ed. 2008); RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (6th ed. 2009); MARTIN H. REDISH & SUZANNA SHERRY, FEDERAL COURTS: CASES, COMMENTS, AND QUESTIONS (6th ed. 2007). Second, the new “Federal Courts Stories” book, telling the underlying stories of significant Federal Courts cases, includes a chapter on *Klein*. Amanda L. Tyler, *The Story of Klein: The Scope of Congress' Authority to Shape the Jurisdiction of the Federal Courts*, in FEDERAL COURTS STORIES (Vicki C. Jackson & Judith Resnik eds., 2009).

8. See, e.g., Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 395-96 (2d Cir. 2008); Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. (as passed in the House of Representatives); see also WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 228 (2004) (coining term “third world of torts” to describe class-action litigation to recover for mass-tort conduct causing latent injuries, labeling it a “harbinger of future development of social policy torts involving gun manufacturers [and] fast food producers”). See *infra* notes 269-276 and accompanying text.

9. See An Act for the Relief of Parents of Theresa Marie Schiavo, Pub. L. No. 109-8, 119 Stat. 25 (2005).

10. See Constitution Restoration Act of 2005, S.520, 109th Cong. § 201 (as introduced in the Senate) (prohibiting federal courts from considering foreign and international law in interpreting U.S. Constitution). See *infra* notes 182-200 and accompanying text.

11. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, § 802, 122 Stat. 2436 (codified at 50 U.S.C.A. § 1885a (West 2010)); *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d 949, 956-57 (N.D. Cal. 2009) (upholding immunity provision as against *Klein* challenge).

12. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

debate.<sup>13</sup>

The problem is that *Klein* is a myth. Actually, *Klein* is two related myths. The first is the myth of meaninglessness—that *Klein* does not obviously stand for anything because no one knows what the case means or says. To be sure, the opinion by Chief Justice Chase is “opaque,” “deeply puzzling,” “disjointed,” “delphic,” “generally difficult to follow,” and contains broad language and exaggerated rhetorical flourishes, with statements of principles that cannot literally be true and often are dead wrong.<sup>14</sup> That perceived opacity lends *Klein* indeterminacy, an all-things-to-all-people quality.<sup>15</sup> The result is a “cult of *Klein*,” a reverence that prompts parties and scholars to seize on the perceived lack of clarity to argue for broad *Klein*-derived limits on congressional control over federal law and courts.<sup>16</sup> If *Klein* has no discernible meaning, there is at least a plausible argument that it applies to any objectionable situation.

This leads to the second, more fundamental myth of vigor—the false belief that *Klein* is strong precedent imposing genuine, unique limitations that an overreaching Congress realistically might transgress and that a court might wield to invalidate congressional action. Consider that in almost 140 years, the only case to strike down a law explicitly on *Klein* grounds was *Klein* itself; every *Klein*-based challenge to federal legislation has, quite appropriately, failed.<sup>17</sup> *Klein*

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13. I consider the effect of *Klein* on War on Terror legislation in the follow-up to this Article. See Howard M. Wasserman, *Constitutional Pathology, the War on Terror, and United States v. Klein*, 5 J. NAT'L SEC. L. & POL'Y (forthcoming 2011).

14. See William D. Araiza, *The Trouble with Robertson: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1074 (1999); Frederic M. Bloom, *Unconstitutional Courses*, 83 WASH. U. L.Q. 1679, 1718 (2005) [hereinafter Bloom, *Unconstitutional Courses*]; Hartnett, *supra* note 4, at 572; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 34 (2002) (“*Klein* is sufficiently impenetrable that calling it opaque is a compliment”); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2549 (1998) (“Much that it said in the opinion is exaggerated if not dead wrong . . .”); Sager, *supra* note 4, at 2525 (arguing that, while not exactly Fermat’s Last Theorem, *Klein* is “deeply puzzling”); Young, *supra* note 4, at 1193, 1195 (describing opinion as “confusing” and criticizing “excessively broad and ambiguous statements” in majority opinion); *id.* at 1212 (labeling opinion “disjointed, ambiguous, and generally difficult to follow”).

15. See Young, *supra* note 4, at 1195.

16. *Id.*

17. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995); *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 439–41 (1992); *Ileto v. Glock, Inc.*, 565 F. 3d 1126, 1139 (9th Cir. 2009); *City of New York v. Beretta Corp. U.S.A.*, 524 F.3d 384, 396 (2d Cir. 2008); *Ecology Ctr. v. Castaneda*, 426 F.3d 1144, 1148 (9th Cir. 2005); *Nat’l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001); *In re Nat’l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d 949, 961–64 (N.D. Cal. 2009); see also Caminker, *supra* note 4, at 542 (stating that courts “work very hard to avoid *Klein*”); Sager, *supra* note 4, at 2525 (“*Klein* typically is invoked as good law but not applicable to the case before the Court . . .”).

arguments rarely gain traction with anyone other than entrepreneurial litigants, scholars, and the occasional stray judge.<sup>18</sup>

In speaking of the myth of *Klein*, we must understand the paradoxical meanings of “myth” in law. Most commonly, myth is a synonym for fiction, describing a false idea or premise.<sup>19</sup> But myth also describes a story or belief that, although false in some respects, nevertheless is accepted and celebrated in the legal community because it “encapsulate[s] a community’s perceptions of its origins, its identity, or its commitments, and thereby advance[s] the lives of its members.”<sup>20</sup> Both meanings are in play here. Calling *Klein* a myth suggests that our common judicial and scholarly understanding is wrong (false). But it also suggests that this wrong (false) understanding is fundamental or necessary to the understanding and functioning of the political-legal community.<sup>21</sup>

Both of *Klein*’s twin myths are false—the precedent is neither meaninglessly indeterminate nor vigorous.

However inartfully written, the “doctrine” of *Klein* is not indeterminate. Read historically with subsequent elaboration, limitation, and application, *Klein* readily admits of several related, clearly identifiable constitutional principles. Once past the sweeping and inaccurate rhetoric of the opinion itself, three core principles<sup>22</sup> emerge: (1) Congress cannot dictate to courts the outcome of particular litigation or command how courts should resolve particular legal and factual questions in a case;<sup>23</sup> (2) Congress cannot compel courts to speak a “constitutional untruth” by dictating how to understand and apply the Constitution where courts’ independent judgment compels a different understanding or conclusion;<sup>24</sup> and (3) Congress cannot enact legislation depriving individuals of their constitutional rights.<sup>25</sup> The problem is that none of these principles is groundbreaking; all are common ideas,

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18. Compare, e.g., Sager, *supra* note 4, at 2532–33, with Meltzer, *supra* note 14, at 2543. Compare *Schiavo ex rel Schindler v. Schiavo*, 404 F.3d 1270, 1274–75 (11th Cir. 2005) (Birch, J., specially concurring in denial of rehearing *en banc*), with Hartnett, *supra* note 4, at 580–81.

19. Pettys, *supra* note 1, at 992–93.

20. *Id.* at 993.

21. *Id.* Fred Bloom captures the same idea in his concept of the “noble lie.” Bloom, *Noble Lie*, *supra* note 1, at 975.

22. Because the statute at issue in *Klein* targeted the Supreme Court’s jurisdiction, *infra* notes 61–65 and accompanying text, a fourth reading of the case treats it as about “fundamental and timeless constraint on Congress’ otherwise broad authority to control the jurisdiction of the federal courts.” Tyler, *supra* note 7, at 88. The jurisdictional point largely has fallen away in *Klein* discussions, however.

23. *Infra* Part III.A.

24. Meltzer, *supra* note 14, at 2545; Sager, *supra* note 4, at 2529; *infra* Part III.B.

25. Hartnett, *supra* note 4, at 580; *infra* Part III.C.

reflected in other precedents and constitutional doctrines. Moreover, they do little to provide a judicial basis for invalidating overreaching legislation.

Even if false, however, *Klein's* twin myths nevertheless remain fundamental to our community's constitutional self-understanding.<sup>26</sup> *Klein* is a product of a unique time—the Civil War and Reconstruction—and a unique set of political and constitutional pathologies.<sup>27</sup> That pathology included Union efforts to bring rebellious states and citizens back into the fold; a unique class of confiscated enemy property and efforts by property owners to recover proceeds;<sup>28</sup> and a three-way power struggle among Radical Republicans dominating Congress, Democratic President Andrew Johnson (and his non-Radical Republican successor, Ulysses S. Grant), and the Supreme Court.<sup>29</sup> *Klein* suggests that the Court can and will, in the extreme case, protect itself from the encroachment of other branches. Alternatively, *Klein* works to keep Congress from pursuing its worst excesses in enacting legislation that genuinely might so invade the judicial province. With *Klein* in the background, Congress dare not approach the constitutional line or engage in extreme separation-of-powers brinksmanship.

At least not in ordinary times. If *Klein* is a product of constitutional pathology, it does its constitutional heavy lifting only in similar periods. Genuinely *Klein*-violative legislation—in which Congress truly oversteps the limits of separation of powers—thus arises only in the worst of times.<sup>30</sup> This perhaps justifies the “cult of *Klein*,” reverence for a tool that the Court uses to defend itself and the public against congressional overreaching in most-desperate times. If that is *Klein's* purpose, a fully contextualized understanding of the case and its resulting doctrine is necessary. Whatever the socio-legal benefits the legal community derives from holding on to the myth of *Klein* and maintaining its cult as a separation-of-powers bulwark, its practical use and strength as a judicial tool to invalidate real, even pathological, legislation is a falsehood.

Instead, recent *Klein*-vulnerable legislation and proposals are

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26. Pettys, *supra* note 1, at 993.

27. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 459 (1985) (defining pathology as “the phenomenon of an unusually serious challenge to one or more of the central norms of the constitutional regime”).

28. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 136–37 (1871).

29. *Infra* notes 53–58, 216–221 and accompanying text.

30. Although Vincent Blasi's seminal work on constitutional pathology focuses on the role of the First Amendment in pathological times, he speaks in terms of constitutionalism generally and the need for stability as to basic structural arrangements. Blasi, *supra* note 27, at 453. This logically includes separation of powers and the arrangements of power among the three branches. *Id.*; *infra* Part IV.

criticized and objected to as politically regrettable or unwise congressional enactments, especially for those who want to see private litigation used to enforce accountability on government and its officers. The instinct towards broad judicial independence and supremacy leads to a visceral sense that Congress overstepped its bounds, even if only as a policy matter. But there is a central distinction between bad or unwise public policy and unconstitutional action.<sup>31</sup> Couching policy preferences in constitutional *Klein* terms does not change this.

This article proceeds in four steps. Part II examines *Klein* in its full historical and political context, looking particularly at the Court's sweeping, although largely inaccurate, rhetoric. This overbroad language reveals much of how the myth of *Klein* and the cult surrounding that myth was born and has evolved.

Part III identifies three core principles associated with *Klein*, subsequent case law, and commentary. This Part shows *Klein* as a fiction, revealing that there are clear principles and ideas discernable from the case and that it is neither as opaque or as meaningless as many suggest, but that the principles are not unique, groundbreaking, or meaningfully constraining on Congress. In other words, *Klein* is not as vigorous as many believe.

Part IV considers the historic pathological context of *Klein* and how that context affects the doctrine's current understanding and use. In particular, it examines why extreme legislation that would violate *Klein* has not been enacted, perhaps suggesting that *Klein* plays a slightly more vigorous role outside the courts, as an *ex ante* check, keeping Congress from following its worst populist instincts. Of course, pathological periods, such as those giving rise to the legislation at issue in *Klein*, occur precisely when that legislative check is most likely to be ignored.

Part V examines the problem of conflating bad policy with unconstitutional policy, a conflation to which *Klein* contributes. With its broad language, apparent indeterminacy, purportedly empty core, and perceived historical pedigree as a separation-of-powers, judicial-independence trump card—that is, in light of the twin myths of opacity and vigor—*Klein* takes on an all-things-to-all-people quality.<sup>32</sup> It becomes the ideal vehicle for constitutionalizing those ordinary policy preferences, however inappropriate such constitutionalization might be.

*United States v. Klein* is a myth in both senses of the word—a source of rarely used and genuinely ineffectual constitutional principles, but principles on which we continue to place great rhetorical weight and

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31. Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 898 (1984).

32. Young, *supra* note 4, at 1195.

through which we define our legal convictions and constitutional culture.

## II. A BRIEF HISTORY OF *KLEIN*

*Klein* arises out of the historical milieu of the Civil War and its aftermath and the unique political and inter-branch pathologies accompanying that time. The false belief in *Klein*'s vigor and in *Klein* as a significant tool for judicially enforcing the limits on congressional power too readily ignores that historical context.

During the Civil War, Congress enacted a series of laws to address the unique legal problem of abandoned and confiscated property in the South. Congress particularly targeted cotton, the sale of which financed the Confederate war effort.<sup>33</sup> The first law, enacted in 1861, provided for forfeiture of all property used in aiding, abetting, and promoting the insurrection.<sup>34</sup> In 1862, a second statute empowered the President to make a public warning to those engaged in or aiding the rebellion to cease on threat of forfeiture of property.<sup>35</sup>

The central act was passed in 1863.<sup>36</sup> Congress empowered the Secretary of the Treasury to appoint agents to receive abandoned and captured property, sell it, and deposit proceeds into the general treasury.<sup>37</sup> The 1863 Act also established procedures through which the owner of abandoned or captured property could bring a claim to recover proceeds in the Court of Claims:

[A]ny person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds . . . .<sup>38</sup>

At the same time, Congress laid the groundwork for bringing Confederate sympathizers back into the Union. An 1862 law had invited

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33. Tyler, *supra* note 7, at 88–89; Young, *supra* note 4, at 1203–04.

34. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 130 (1871) (citing Act of Aug. 6, 1861, 12 Stat. 319 (1861)).

35. *Id.* at 130 (citing Act of July 17, 1862, 12 Stat. 589 (1862)).

36. Young, *supra* note 4, at 1197–98.

37. *Klein*, 80 U.S. (13 Wall.) at 131, 138; Tyler, *supra* note 7, at 89; Young, *supra* note 4, at 1198.

38. *Klein*, 80 U.S. (13 Wall.) at 131 (emphasis omitted) (quoting Abandoned Property Collection Act, ch. 120, § 3, 12 Stat. 820 (1863)); Young, *supra* note 4, at 1198.



the President to extend pardon and amnesty<sup>39</sup> to all persons who had participated in the rebellion on terms and conditions “expedient for the public welfare.”<sup>40</sup> President Lincoln did so in December 1863, granting a full blanket pardon to all who had engaged in rebellion as participants or aiders-and-abettors, restoring all of their property rights, except as to slaves, upon the taking and keeping of a prescribed oath to support the Union, the Constitution, and all acts and proclamations regarding slaves.<sup>41</sup> Lincoln defended the oath requirement:

Laws and proclamations were enacted and put forth for the purpose of aiding in the suppression of the rebellion. To give them their fullest effect there had to be a pledge for their maintenance. In my judgment they have aided, and will further aid, the cause for which they were intended. . . . [I]t is believed the Executive may lawfully claim it in return for pardon and restoration of forfeited rights . . . .<sup>42</sup>

In July 1863, following Grant’s victory at Vicksburg, Union agents, acting under authority of the 1863 Act, seized six hundred bales of cotton belonging to V.F. Wilson; Wilson had marked the cotton “C.S.A.” to ensure its safe passage through the South.<sup>43</sup> The cotton was sold for more than \$125,000, and the proceeds were deposited in the Union general treasury.<sup>44</sup> Wilson had acted as a surety on bonds for Confederate officers.<sup>45</sup> In February 1864, following Lincoln’s pardon proclamation, Wilson took the required oath and received a pardon.<sup>46</sup>

In 1865, Klein, the executor of Wilson’s estate, successfully petitioned the Court of Claims to recover proceeds from the sale of the cotton. The court initially found that Wilson had been loyal in fact because he had given no aid or comfort to the rebellion. The government subsequently presented evidence that Wilson had acted as a surety—a fact to which Klein stipulated—an act which the Supreme Court had held constituted giving aid and comfort to the rebellion. Nevertheless, the Court of Claims reaffirmed its judgment, finding the subsequent pardon removed the consequences of any actual disloyalty

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39. Formally the law “authorized” the pardon. *Klein*, 80 U.S. (13 Wall.) at 139. But the President believed he held and could exercise the pardon power without congressional authorization. *Id.*; Tyler, *supra* note 7, at 90.

40. *Klein*, 80 U.S. (13 Wall.) at 139–40.

41. *Id.* at 140; Tyler, *supra* note 7, at 89–90.

42. *Klein*, 80 U.S. (13 Wall.) at 140 (quoting President Abraham Lincoln, State of the Union Address (Dec. 8, 1863)). This was the first of several blanket pardons issued over the next several years. *Id.* at 140–42.

43. Young, *supra* note 4, at 1192.

44. *Id.* at 1198.

45. *Klein*, 80 U.S. (13 Wall.) at 132; Young, *supra* note 4, at 1199.

46. *Klein*, 80 U.S. (13 Wall.) at 132; Tyler, *supra* note 7, at 91–92; Young, *supra* note 4, at 1199.

and rendered him legally, if not factually, loyal.<sup>47</sup>

While the government's appeal was pending, the Supreme Court decided *United States v. Padelford*,<sup>48</sup> a factually similar claim to recover proceeds on confiscated-and-sold property by a former Confederate surety who had taken the required oath and received a pardon.<sup>49</sup> Padelford had been disloyal in fact by acting as a surety for a Confederate officer.<sup>50</sup> Reading the 1863 Act authorizing payment of proceeds to those who could prove loyalty in conjunction with the 1862 law inviting presidential pardon reveals congressional intent to permit recovery by those who were factually loyal and by those rendered legally loyal by pardon.<sup>51</sup> The pardon rendered Padelford innocent in law—as though he never had given aid and comfort—and purged his property of any taint.<sup>52</sup>

Radical Republicans in Congress were outraged with the *Padelford* decision because it appeared to let off the hook the wealthy cotton growers who had financed the southern insurrection and who Republicans sought to sanction.<sup>53</sup> Congressional objections to *Padelford* and to the Court of Claims decision in *Klein* were part of broader discontents. In 1867, Congress statutorily removed the invitation or authorization for presidential pardon in confiscated-property cases,<sup>54</sup> likely as part of a broader, ongoing battle with President Andrew Johnson.<sup>55</sup> *Padelford* was one of a series of Supreme Court decisions that rejected, narrowed, or interfered with the Republicans' Reconstruction agenda.<sup>56</sup> Congressional disaffection with the decision, and subsequent efforts to undo its effects,<sup>57</sup> were part of

47. *Klein*, 80 U.S. (13 Wall.) at 132; Tyler, *supra* note 7, at 93; Young, *supra* note 4, at 1199.

48. 76 U.S. (9 Wall.) 531 (1870).

49. *Id.* at 539–42; Young, *supra* note 4, at 1201–03. One difference, ultimately irrelevant, was that Padelford took the oath and received the pardon before his property was seized, while Wilson came forward for the pardon only after the seizure. *Id.* at 1201 n.62. See Hartnett, *supra* note 4, at 573.

50. *Padelford*, 76 U.S. (9 Wall.) at 539; Young, *supra* note 4, at 1201–02.

51. *Padelford*, 76 U.S. (9 Wall.) at 543; Young, *supra* note 4, at 1202–03.

52. *Padelford*, 76 U.S. (9 Wall.) at 543.

53. Tyler, *supra* note 7, at 94–95; Young, *supra* note 4, at 1193, 1204.

54. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 141–42 (1871).

55. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 247–48 (1988); Laura F. Edwards, *The Civil War and Reconstruction*, in 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 329 (Michael Grossberg & Christopher Tomlins eds., 2008). Johnson was impeached a year later. See BRUCE ACKERMAN, WE THE PEOPLE, VOL. 2: TRANSFORMATIONS 18–20 (1998) [hereinafter ACKERMAN, VOL. 2]; FONER, *supra*, at 333–35; Edwards, *supra*, at 329–30.

56. See BRUCE ACKERMAN, WE THE PEOPLE, VOL. 1: FOUNDATIONS 101 (1991) [hereinafter ACKERMAN, VOL. 1]; FONER, *supra* note 55, at 529; Edwards, *supra* note 55, at 335; see also, e.g., *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873); *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1872).

57. When Senator Drake took to the Senate floor and introduced legislation to undo *Klein* and

broader political jockeying among Congress, the President, and the Court regarding the direction of the post-bellum nation, particularly on matters of national power and the reintegration of southern states and citizens into the Union.<sup>58</sup>

Congress' response reflected an unabashed attempt to undo the lower court judgment in *Klein* and to ensure that no future cases resulted in judgments for claimants relying on pardons. Two parts of the legislative response, contained in a proviso to an 1870 spending bill, achieved that result. First, Congress provided that

[N]o pardon or amnesty granted by the President . . . nor any acceptance of such pardon or amnesty, nor oath taken . . . shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence in support of any claim against the United States . . . but the proof of loyalty required [by the 1863 Act] shall be made by proof of the matters required, irrespective of the effect of any executive proclamation, pardon, amnesty, or other act of condonation or oblivion.<sup>59</sup>

Further, the proviso deemed that when a claimant had received a pardon

[A]nd such pardon shall recite in substance that such person took part in the late rebellion . . . or was guilty of any act of rebellion . . . and such pardon shall have been accepted in writing by the person to whom the same issued without an express disclaimer of, and protestation against, such fact of guilt contained in such acceptance, such pardon and acceptance shall be taken and deemed . . . conclusive evidence that such person did take part in, and give aid and comfort to, the late rebellion[.]<sup>60</sup>

The question remained of what to do in pending cases such as *Klein*, where the Court of Claims had rendered judgment in favor of the claimant based on his having been made legally innocent by virtue of the pardon. The original Senate bill would have required the Supreme Court to reverse any judgments for pardoned claimants that were pending on appeal, presumably resulting in a remand and a new determination by the Court of Claims, with the likely result that the claimant would lose on remand under the new legal rule that an uncontested pardon was conclusive proof of disloyalty.<sup>61</sup> During the Senate debates, support

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similar decisions, he waved a copy of *Padelford*. See Young, *supra* note 4, at 1204.

58. See ACKERMAN, VOL. 2, *supra* note 55, at 123, 199–200, 209; FONER, *supra* note 55, at 183–84, 237–38, 250–51; Edwards, *supra* note 55, at 327–29; *infra* notes 216–221 and accompanying text.

59. *Klein*, 80 U.S. (13 Wall.) at 133–34, 143 (quoting Act of July 12, 1870, ch. 251, 18 Stat. 230 (1870)); Young, *supra* note 4, at 1207–08.

60. *Klein*, 80 U.S. (13 Wall.) at 134 (quoting Act of July 12, 1870, ch. 251, 18 Stat. 230 (1870)), 143–44.

61. Tyler, *supra* note 7, at 95–96; Young, *supra* note 4, at 1204–05, 1210.

shifted to reliance on congressional power over the Supreme Court's appellate jurisdiction.<sup>62</sup> The bill stripped the Court of appellate jurisdiction over all cases in which a pardon had been used as evidence of loyalty, requiring the Court to dismiss "the cause" for want of jurisdiction.<sup>63</sup> Importantly, Republicans intended this to mean dismissal of "the case—everything."<sup>64</sup> It was not enough to have the appeal to the Supreme Court dismissed, which would have left the Wilson Estate with its Court of Claims judgment in tact; Congress wanted the lower-court judgment undone and the entire lawsuit dismissed where the claim was based on a pardon.<sup>65</sup>

The *Klein* Court struck back, invalidating the proviso and its purported limits on appellate jurisdiction. First, the Court rejected the argument that the proviso was a permissible exercise of congressional power under the Exceptions Clause.<sup>66</sup> The proviso did not withhold appellate jurisdiction "except as a means to an end" of denying presidential pardons the effect that the Court adjudged them to have in *Padelford*.<sup>67</sup> Rather, the purpose of the law was to "deny to pardons granted by the President the effect which this court had adjudged them to have."<sup>68</sup>

The denial of jurisdiction to the Supreme Court was "founded solely on the application of a rule of decision, in causes pending, prescribed by Congress."<sup>69</sup> Congress was not appropriately regulating appellate jurisdiction, but "prescrib[ing] a rule for the decision of a cause in a particular way."<sup>70</sup> This was "not an exercise of the acknowledged power of Congress" over the Court's appellate jurisdiction.<sup>71</sup> The Court was required to dismiss the appeal, even if it believed the judgment below should be affirmed by virtue of the pardon.<sup>72</sup> Such a requirement was problematic in two respects: (1) it allowed the government, as a party to the case, to decide in its own favor; and (2) it allowed Congress to prescribe rules of decision to the judiciary in pending cases.<sup>73</sup>

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62. Young, *supra* note 4, at 1207–08. See U.S. CONST. art. III, § 2.

63. *Klein*, 80 U.S. (13 Wall.) at 134.

64. Young, *supra* note 4, at 1208 (quoting legislative debates and statements of Senator Edmunds, sponsor of the final measure).

65. *Klein*, 80 U.S. (13 Wall.) at 134; Young, *supra* note 4, at 1210, 1221–22.

66. *Klein*, 80 U.S. (13 Wall.) at 145.

67. *Id.*

68. *Id.*

69. *Id.* at 146.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

The *Klein* Court distinguished its own decision in *Pennsylvania v. Wheeling Bridge Company*.<sup>74</sup> After a court had decreed that a particular bridge was a public nuisance and ordered its abatement, Congress re-designated the bridge as a post road, eliminating the need for abatement.<sup>75</sup> The Supreme Court held that the original nuisance decree no longer was enforceable because the bridge had, by virtue of the new law and new legal designation, ceased to be a nuisance and ceased to require abatement.<sup>76</sup> The difference between *Klein* and *Wheeling Bridge* was that in the latter Congress had not prescribed any “arbitrary” rule of decision.<sup>77</sup> Rather, Congress had created new legal circumstances to which the Court simply applied ordinary rules.<sup>78</sup> By contrast, in *Klein* Congress had forbidden the Court to give the pardon the evidentiary effect the Court, in its own judgment, believed it should have, instead directing the Court to give it the precisely contrary effect.<sup>79</sup>

The second, seemingly separate basis for rejecting the legislation was that it impaired the effect of a presidential pardon. By requiring the Court to view pardons as evidence of disloyalty, it functionally required the Court to treat them as null and void, without legal effect.<sup>80</sup> This infringed the Executive’s constitutional power.<sup>81</sup> More problematically, it compelled the courts to be instrumental in that infringement.<sup>82</sup>

The recognized defects in the proviso dictated the result in *Klein* itself—deny the government’s motion to dismiss the appeal and to reverse the Court of Claims decision awarding proceeds to Wilson’s Estate. The more difficult question is what to do with *Klein*, specifically its broad language and established principles. We turn to that question next.

### III. THREE JUDICIALLY ENFORCEABLE PRINCIPLES

It is an article of academic faith that *Klein* is, at best, lacking clarity and, at worst, opaque.<sup>83</sup> But calling it opaque lends indeterminacy, and

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74. 59 U.S. (18 How.) 421 (1855).

75. *Id.* at 429. See also *Klein*, 80 U.S. (13 Wall.) at 146; Redish & Pudelski, *supra* note 4, at 446–47.

76. *Klein*, 80 U.S. (13 Wall.) at 146 (discussing *Wheeling*, 59 U.S. (18 How.) at 421).

77. *Id.* at 146–47; Hartnett, *supra* note 4, at 579.

78. *Klein*, 80 U.S. (13 Wall.) at 147.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*; Araiza, *supra* note 14, at 1075 (describing problem that proviso made courts into Congress’ “constitutional puppet”).

83. See sources cited *supra* notes 14–16.

a presumed meaninglessness, to the resulting doctrine that allows *Klein*-based arguments to at least be raised against all manner of laws.<sup>84</sup> In fact, careful reading of *Klein*, in light of its evolution in subsequent—and more recent—cases, reveals three clear, somewhat related judicially enforceable constitutional principles. Paradoxically, however, avoiding indeterminacy and revealing core principles runs headlong into the doctrine’s lack of vigor. The identifiable principles are neither exceptional nor particularly powerful limits on Congress that can be wielded to invalidate likely or significant legislation.

In other words, the twin myths of *Klein* stand and fall together. Wading through the case and its progeny reveals a core meaning; finding that core meaning shows that the underlying principles lack real doctrinal force.

#### A. Congressional Control over Fact-Finding and Litigation Outcomes

One potential principle of *Klein* is that there are limits on congressional control over substantive legal rules and litigation outcomes under those rules.

##### 1. Dictating Substantive Rules of Decision

Oft-cited language in *Klein* prohibits Congress from prescribing rules of decision for cases in federal courts. The Court criticized the 1870 proviso as denying jurisdiction “solely on the application of a rule of decision, in causes pending, prescribed by Congress.”<sup>85</sup>

Importantly, however, no act of Congress—other than the proviso in *Klein* itself—has been deemed unconstitutional under that principle.<sup>86</sup> Moreover, that statement cannot literally be true.<sup>87</sup> Congress prescribes rules of decision whenever it enacts substantive law that controls primary conduct and establishes the legal rules courts apply to resolve disputes under that substantive law. Consider, for example, the Civil Rights Act of 1964.<sup>88</sup> In prohibiting employers from firing people “because of” race and other characteristics, Congress established a rule of decision that courts apply in resolving discrimination claims under the

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84. See Young, *supra* note 4, at 1195. See also Tyler, *supra* note 7, at 103–04.

85. United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871); Hartnett, *supra* note 4, at 577; Redish & Pudelski, *supra* note 4, at 444–45.

86. Hartnett, *supra* note 4, at 581.

87. Meltzer, *supra* note 14, at 2549; Redish & Pudelski, *supra* note 4, at 446 (labeling the Court’s statement “wrong”); Tyler, *supra* note 7, at 105 (“This proposition cannot be reconciled with the settled principle that courts are obliged to apply otherwise valid law as they find it.”).

88. 42 U.S.C. § 2000e-2(a) (2006).

statute; the rule requires a court to find in favor of, and grant relief to, a plaintiff who can present evidence showing that he was fired because of racial animosity.<sup>89</sup>

The *Klein* Court seemed to recognize the literal incoherence of that language, as indicated by its efforts to distinguish *Wheeling Bridge*.<sup>90</sup> By redefining the bridge as a post road under federal law, Congress imposed a new rule of decision to be applied by the Court—the bridge took on its congressionally defined status and the Court was bound by that status. The Court distinguished *Wheeling Bridge* on the ground that Congress had not prescribed an “arbitrary rule of decision,” but simply had left courts to “apply its ordinary rules to the new circumstances created by the act.”<sup>91</sup> But those new circumstances properly included a new rule of decision: the bridge was a federally designated post road and could not be a public nuisance as a matter of federal law.

Subsequent cases have reconciled *Klein* and *Wheeling Bridge* by recognizing that Congress remains free to amend generally controlling substantive law, even as that change affects litigation by establishing a new rule of decision.<sup>92</sup> Congress can change substantive law prospectively, retrospectively, or both. Although *Klein* twice emphasized the problem of the proviso applying to pending cases,<sup>93</sup> courts regularly apply valid law in effect at the time a case is being decided, even where controlling law has changed during pendency of a case or between trial court judgment and appeal.<sup>94</sup> Congress only needs to make its retroactive intent plain.<sup>95</sup> Lower courts have become highly deferential to such changes in law, so long as Congress changes the overall substantive legal landscape—the new legal circumstances<sup>96</sup>—in

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89. Hartnett, *supra* note 4, at 577–78. See also Araiza, *supra* note 14, at 1059 (“[A]ll legislation amounts to the imposition of legal liability on individuals involved in certain fact patterns.”).

90. *Klein*, 80 U.S. (13 Wall.) at 146–47 (discussing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851)); Redish & Pudelski, *supra* note 4, at 446–47.

91. *Klein*, 80 U.S. (13 Wall.) at 146–47; Redish & Pudelski, *supra* note 4, at 446–47.

92. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995); *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 440–41 (1992); *Ecology Ctr. v. Castaneda*, 426 F.3d 1144, 1149 (9th Cir. 2005); *Nat’l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1096–97 (D.C. Cir. 2001); Redish & Pudelski, *supra* note 4, at 456–57; Sager, *supra* note 4, at 2527.

93. *Klein*, 80 U.S. (13 Wall.) at 146 (stating that the government argument “is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress” and questioning, “[c]an 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?”).

94. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994); Hartnett, *supra* note 4, at 578; Redish & Pudelski, *supra* note 4, at 446; Tyler, *supra* note 7, at 105; Young, *supra* note 4, at 1240 n.238.

95. *Plaut*, 514 U.S. at 226; *Landgraf*, 511 U.S. at 270.

96. *Klein*, 80 U.S. (13 Wall.) at 147.

some “detectable way.”<sup>97</sup> So narrowed, this principle does not impose meaningful limits on congressional power. It holds *Klein* in check, keeping it from imposing overbroad restrictions on Congress’ essential ability to legislate in beneficial and necessary ways.<sup>98</sup>

Another explanation for the outcome in *Klein* is that the proviso targeted specific, pending litigation. Congress was aware that the government’s appeal in *Klein* was pending and that *Padelford* controlled, which meant the government likely would lose on appeal. In his comprehensive history of *Klein*, Gordon Young demonstrates that Senate Radical Republicans knew it would be insufficient merely to control the evidentiary effect of pardons prospectively because that would leave in place judgments already rendered by the Court of Claims.<sup>99</sup> It was thus necessary for Congress specifically to target cases pending on appeal, whether by requiring the Court to reverse judgments based on pardons, as initially proposed by Senator Drake, or by stripping the Court of appellate jurisdiction over such appeals with a requirement to dismiss “the cause,” as ultimately enacted.<sup>100</sup>

But even this anti-targeting principle does not do much work. The closest call was *Robertson v. Seattle Audubon Society*.<sup>101</sup> The case arose out of an ongoing controversy over Northwest timber harvesting and its effect on the habitat of the spotted owl.<sup>102</sup> Two lawsuits by environmental groups challenged the government’s management of thirteen national forests and Bureau of Land Management lands in Oregon and Washington as being contrary to five separate federal statutes.<sup>103</sup> In the Northwest Timber Compromise of 1990, Congress established comprehensive new rules governing timber harvesting for a limited period of time, expanding harvesting in some areas while prohibiting it in others.<sup>104</sup> At the heart of the controversy was a provision stating:

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97. *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1569–70 (9th Cir. 1993).

98. See Araiza, *supra* note 14, at 1075 (“In a very real sense, any conventional statute ‘directs results,’ yet the enactment of statutes remains the quintessential legislative function.”); Hartnett, *supra* note 4, at 577–78; Redish & Pudelski, *supra* note 4, at 448 (“[T]here exists no reason, in constitutional theory or doctrine, why Congress may not enact subconstitutional, generally applicable rules of decision . . .”).

99. Young, *supra* note 4, at 1210, 1221–22.

100. *Id.* at 1208, 1210.

101. 503 U.S. 429 (1992).

102. *Id.* at 431–32; Araiza, *supra* note 14, at 1065; Redish & Pudelski, *supra* note 4, at 455–56; Sager, *supra* note 4, at 2527.

103. *Robertson*, 503 U.S. at 432; Araiza, *supra* note 14, at 1065; Redish & Pudelski, *supra* note 4, at 456; Sager, *supra* note 4, at 2527.

104. *Robertson*, 503 U.S. at 433; Araiza, *supra* note 14, at 1065; Redish & Pudelski, *supra* note 4, at 456; Sager, *supra* note 4, at 2527.



Congress hereby determines and directs that management of areas according to [provisions of the Compromise] on the thirteen national forests in Oregon and Washington . . . is adequate consideration for the purpose of meeting the statutory requirements that are the basis for [the two pending district court cases, mentioned by name].<sup>105</sup>

The Supreme Court upheld the compromise as a permissible alteration of substantive law.<sup>106</sup> The targeted lawsuits initially would have succeeded if the challenged harvesting violated any of five statutes, but those claims now failed so long as the harvesting did not violate either of the two relevant provisions in the amending statute.<sup>107</sup> The Court was not troubled by the explicit statutory reference to pending litigation, which simply was generalized shorthand for identifying the five previous statutory requirements that formed the basis for the lawsuits and that functionally had been amended by the Compromise. Instead of naming each statutory provision amended, Congress named the litigation in which the now-amended provisions were in play.<sup>108</sup> Any effect on the two pending cases still resulted from the modification of applicable substantive law.

*Robertson* marked the closest Congress has come to violating the principle of *Klein* and many commentators argue that the Court was wrong not to strike down the law.<sup>109</sup> Paradoxically, *Robertson* makes it easier for courts to reject constitutional challenges to future legislation—after all, if the legislation at issue in *Robertson* did not violate *Klein*, nothing will.<sup>110</sup> Consider the D.C. Circuit’s decision in *National Coalition to Save Our Mall v. Norton*.<sup>111</sup> The plaintiffs brought an action seeking to enjoin construction of the World War II Memorial on the National Mall, alleging that various federal agencies and officials had violated a host of federal statutes in approving the Memorial design

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105. *Robertson*, 503 U.S. at 434–35 (quoting Department of the Interior and Related Agencies Appropriations Act, 1990, § 318(b)(6)(A), 103 Stat. 745 (1990)); Sager, *supra* note 4, at 2527.

106. *Robertson*, 503 U.S. at 438, 440–41.

107. *Id.* at 438. See Araiza, *supra* note 14, at 1059, 1072; Redish & Pudelski, *supra* note 4, at 457; Sager, *supra* note 4, at 2527. See also Araiza, *supra* note 14, at 1071 (“The key to the Court’s conclusion . . . seems to have been its observation that . . . [the amended law] would operate to change defendants’ duties under statutes . . .”).

108. Araiza, *supra* note 14, at 1058; Redish & Pudelski, *supra* note 4, at 456; Sager, *supra* note 4, at 2527.

109. Araiza, *supra* note 14, at 1059 (“[I]t is hard to avoid the feeling that there is something inappropriately non-legislative about this statute.”); Redish & Pudelski, *supra* note 4, at 455 (arguing that *Robertson* shows the Court playing “fast and loose” with this principle); Sager, *supra* note 4, at 2527.

110. Nat’l Coal. to Save Our Mall v. Norton, 269 F.3d 1092, 1097 (D.C. Cir. 2001) (rejecting *Klein* argument as to statute that “presents no more difficulty than the statute upheld” in *Robertson*).

111. 269 F.3d 1092 (D.C. Cir. 2001).

and construction.<sup>112</sup> While litigation was pending, Congress enacted a law requiring expeditious construction of the Memorial, “notwithstanding any other provision of law.”<sup>113</sup> Again, Congress used generalized blanket language to functionally amend any and all laws that might have been used to block construction. Congress did not identify the overridden statutory provisions by name, but left it for the courts to ascertain that all laws in play in the pending case had been superseded.

*Save Our Mall* captures the emptiness of the argument that legislation is invalid if too litigation-specific. First, it was clear under *Wheeling Bridge* that Congress could have imposed new standards in identifiable cases that already had proceeded to judgment and to issuance of an injunction. Congress thus can impose new substantive rules in pending actions for injunctive relief where no injunction had been issued at the time of the legislative change.<sup>114</sup> Second, plaintiffs in *Save Our Mall* conceded during oral argument that the new legislation would have been a valid amendment to substantive law had it been enacted prior to commencement of the lawsuit, even if enacted in explicit anticipation of that particular lawsuit.<sup>115</sup> Given that concession, the court rejected the idea that specificity became fatal merely because the legislation was enacted against a pending, rather than anticipated, lawsuit that had not yet proceeded to judgment.

## 2. Dictating Facts and Outcomes

Rhetoric aside, Congress has power to prescribe non-rights-infringing rules of decision that bind courts, even through retroactive amendments to existing rules made applicable to pending cases.<sup>116</sup> Establishing and amending legal rules entails determining legal standards, identifying the significant legal and factual issues that courts must apply to a set of circumstances, and dictating the legal consequences that flow from the courts’ application of the legal standards to a set of facts.<sup>117</sup>

What really is going on under *Klein* is a prohibition on Congress using its legislative power to predetermine litigation outcomes through explicit commands to courts as to how to resolve particular factual and

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112. *Id.* at 1093–94.

113. *Id.* at 1094 (quoting Approval of World War II Memorial Site and Design, Pub. L. No 107-11, § 1, 115 Stat. 19 (2001)).

114. *Id.* at 1097.

115. *Id.*

116. Araiza, *supra* note 14, at 1075 n.97; Hartnett, *supra* note 4, at 578; Tyler, *supra* note 7, at 106; *supra* notes 92–98 and accompanying text.

117. Araiza, *supra* note 14, at 1059 (“[A]ll legislation amounts to the imposition of legal liability on individuals involved in certain fact patterns.”).

legal issues or telling courts who should prevail on given facts under existing law.<sup>118</sup> This knocks out blatant examples—such as a law stating “In the case of *A v. B*, pending in the United States District Court for the Southern District of Florida, *A* shall prevail,” or “In all cases filed, courts shall find that no federal environmental laws were violated in the management of national forest lands.”<sup>119</sup>

But such blatantly violative enactments seem unlikely, which perhaps explains why no actual laws have been invalidated under this principle.<sup>120</sup> Consider *Robertson* again. Although the 1990 law explicitly referenced pending litigation, it did not dictate which party should prevail, did not dictate findings of fact, and did not command a conclusion that any particular timber harvests or sales violated federal law. The amended law merely established new legal standards to be applied in determining the validity of sales and harvests; it did not dictate how to apply those legal standards. The court still determined whether those standards had been satisfied and decided the case accordingly.<sup>121</sup>

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118. *Id.* at 1079, 1088 (describing distinction between Congress changing law and Congress directing results in particular cases, although recognizing the difficulty courts have had in drawing the line); Caminker, *supra* note 4, at 539 (calling this the “narrower and more traditional understanding of the *Klein* principle”); Redish & Pudelski, *supra* note 4, at 445 (“If Congress may not itself resolve individual litigations, its direction to the courts as to how to resolve specific disputes is constitutionally problematic.”); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 718 (1995) (“Congress may not, through legislation, dictate the resolution of a particular litigation”); Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 979 (2003) (arguing that best reading of *Klein* is “prohibition against Congress dictating specific results or interpretations of laws and facts”).

119. *See Araiza*, *supra* note 14, at 1125 (“[A] statute deeming pre-existing law to be satisfied is analogous to a judicial decision reaching the same conclusion . . . .”); Gunther, *supra* note 31, at 910; Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1373 (1953) (“I can easily read into Article III a limitation on the power of Congress to tell the court *how* to decide it.”); Redish & Pudelski, *supra* note 4, at 457 (“Any legislation that directs findings in specifically referenced litigation should categorically be deemed to violate *Klein*.”); Redish, *supra* note 118, at 718 (arguing that “every observer reasonably” can understand that “Congress may not adjudicate individual litigations”).

120. The Court has invalidated similar laws without relying on *Klein*. This arguably is the case with *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987). The Court struck down a federal statute that prohibited collateral challenges to the constitutionality of a prior administrative order of deportation where that order was an element of a subsequent crime, unlawful reentry after deportation, prosecuted in federal court. *Id.* at 837–39. Although the context was different, functionally the statute forced courts to accept a non-judicial factual determination and prohibited courts from engaging in independent analysis about the constitutionality of the underlying order, which is—what this principle of *Klein* purports to invalidate. Yet the Court never mentioned *Klein*. *See also* *Estep v. United States*, 327 U.S. 114, 123–25 (1946) (reading statute to permit judicial review of constitutionality of draft board order in subsequent prosecution for refusing induction, without citing *Klein*). Thanks to Gordon Young for raising this point.

121. *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 438–39 (1992); *see Ecology Ctr. v.*

Consider *Plaut v. Spendthrift Farms*,<sup>122</sup> where the Supreme Court addressed congressional creation of a new, potentially longer limitations period for certain securities fraud claims.<sup>123</sup> The new provision stated that any claims previously dismissed as time-barred under the old limitations rule should be reinstated if the claim would have been timely under the new rule.<sup>124</sup> The new limitations period “indisputably does set out substantive legal standards for the Judiciary to apply, and in that sense changes the law (even if solely retroactively).”<sup>125</sup> Yet the Court rejected a *Klein* challenge. The law did not dictate to courts how to decide the facts underlying the limitations issue or whether to conclude that a particular claim was timely under the controlling period. The law only told courts the length of the new period and the legal consequences of judicially determined conclusions in a case involving particular factual circumstances.

Of course, all legislation “directs results” and imposes legal liability on certain fact patterns.<sup>126</sup> Congress thus does not impermissibly dictate outcomes so long as it merely identifies the relevant legal and factual issues that dictate outcomes. *Klein* only requires that courts be left a role; courts must retain the power to exercise their independent best judgment to find facts, to apply the legal standard to those facts, to decide whether the congressionally dictated rule of decision has been satisfied or violated, and to decide the outcome of the case before the court.

Accepting that legal rules direct results presents a wrinkle: Congress designs legal rules, either in the first instance or through an amendment to the substantive legal landscape, with the “hope” that rules produce certain outcomes on certain facts. This is always Congress’ purpose in enacting or modifying the law—to achieve substantive policy goals through the operation and judicial enforcement of legal rules.<sup>127</sup> Liability rules seek to protect and incentivize conduct deemed socially beneficial while sanctioning or deterring conduct deemed socially

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Castaneda, 426 F.3d 1144, 1149 (9th Cir. 2005) (stating that *Klein* is not violated where Congress changed the underlying law but left to the courts the role of determining whether new legal criteria had been met); Sager, *supra* note 4, at 2534.

122. 514 U.S. 211 (1995).

123. In *Lampf, Pleva, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991), the Court had held that the limitations period on securities fraud claims expired one year after discovery of facts showing the violation and within three years of the violation. Congress provided that, for all actions filed on or before June 19, 1991 (the day *Lampf* was decided), district courts should adopt the limitations period of the state in which they sat. 15 U.S.C. § 78aa-1 (2006); *Plaut*, 514 U.S. at 214–15.

124. § 788aa-1(b); *Plaut*, 514 U.S. at 214–15.

125. *Plaut*, 514 U.S. at 218.

126. Araiza, *supra* note 14, at 1059, 1075.

127. *See id.* at 1072.

destructive.<sup>128</sup> When Congress prohibited racial discrimination in employment in Title VII, it “hoped” that plaintiffs who could prove they had been fired under certain circumstances would prevail in their subsequent civil actions. When Congress enacted the 1990 Northwest Timber Compromise, it hoped that some timber harvesting could go forward under the more-relaxed standards and that a litigation effort to stop harvesting would fail. Congress viewed the construction of the World War II Memorial as a socially beneficial activity and altered rules to eliminate legal barriers to that construction.<sup>129</sup>

This is particularly true when Congress amends the legal landscape. Congress has seen how courts have applied existing legal rules and it has seen the outcomes of cases under those rules. Dissatisfied with those results, Congress changes the legal rule and legal circumstances so that future cases come out differently on similar facts.<sup>130</sup>

But hoping for an outcome in a particular case under its legal rules is not dictating that outcome. If it were, all legislative-override amendments would be invalid, which clearly is not the case.<sup>131</sup> Moreover, legislative intent remains the touchstone for determining statutory meaning.<sup>132</sup> Courts must account for substantive legislative goals reflected in the statute when applying the law to a set of facts in litigation; legislative “hope” plays a necessary role in judicial understanding and application of statutes. Nevertheless, it remains the judicial domain to apply congressionally dictated legal standards to a set of facts and to reach independent conclusions in a particular case.

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128. See S. Jay Plager, *Challenges for Intellectual Property Law in the Twenty-first Century: Indeterminacy and Other Problems*, 2001 U. ILL. L. REV. 69, 70; Richard A. Epstein, *The Tort/Crime Distinction: A Decade Later*, 76 B.U. L. REV. 1, 4 (1996).

129. See Approval of World War II Memorial Site and Design, Pub. L. No. 107-11, 115 Stat. 19 (2001); Nat'l Coal. to Save Our Mall v. Norton, 269 F.3d 1092, 1093-94 (2001).

130. See Caminker, *supra* note 4, at 532-33; Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 520, 525 (2009); see also Araiza, *supra* note 14, at 1127 (“Congress should be able to ensure that its understanding of pre-existing law controls, by enacting a subsequent statute enshrining explicitly that understanding.”).

131. See Widiss, *supra* note 130, at 525-26 (discussing statistics on frequency of congressional overrides of judicial interpretations of federal statutes). For a recent example, see the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, which overrode the Court’s decision on calculating the limitations period on statutory equal-pay claims in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

132. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 596 (2007) (Stevens, J., dissenting) (“[C]ongressional intent should guide us in matters of statutory interpretation.”); *United States v. Rosenbohm*, 564 F.3d 820, 823 (7th Cir. 2009); James Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets* (Ctr. for Interdisciplinary Law & Policy Studies, Working Paper No. 123), available at <http://ssrn.com/abstract=1597260>.

### 3. *Klein* as Drafting Rule

Unfortunately, this sounds like a dispute over legislative format, turning *Klein* into nothing more than a drafting guide.<sup>133</sup> Congress can avoid the force of *Klein* by its choice of statutory language and form. By avoiding obviously problematic language—“A shall prevail against B” or “The court shall find that federal rights were not violated”—Congress preempts most *Klein* challenges.

There still will be close cases. Imagine that Congress wanted to suspend the limitations period for a class of cases through a law providing that certain claims may be brought “without regard” to the statute of limitations. This statute admits of two readings. We might read it to change the law to eliminate the statute of limitations as an applicable defense and as an issue for the court to deal with; alternatively, we might read it as Congress telling the court that, when the limitations defense is raised, the court must reject the defense and find the claim timely.<sup>134</sup> From the standpoint of protecting Congress’ ability to draft substantive law, the former is the better and necessary reading.<sup>135</sup>

Larry Sager and Evan Caminker recognize that this basic principle of *Klein* can be overcome through alternative drafting.<sup>136</sup> But they reach different conclusions about that fact. Sager argues that no-dictating-outcomes cannot be the core principle of *Klein* because such an understanding “threatens to exalt form over substance.”<sup>137</sup> In fact, the Court did just that in *Robertson*, paying nominal obeisance to *Klein* but discarding any meaningful distinction in the form that amending legislation takes.<sup>138</sup> The principle does no meaningful constitutional work; Congress can draft around it and courts look for ways to uphold laws that come close to the line.<sup>139</sup>

Caminker counters that even if only a drafting rule, it remains a rule that matters.<sup>140</sup> Language is what law does. Statutory language makes a difference to public understanding of potential conflicts between the

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133. Caminker, *supra* note 4, at 542 (stating that *Klein* arguments “boil[] down to the question whether the *Klein* rule is in practice nothing more than a trivial rule of drafting etiquette”).

134. *Compare id.* at 541 with *id.* at 540.

135. *See Araiza, supra* note 14, at 1133 (emphasizing propriety of Congress amending substantive law by providing that new legal rule applies “notwithstanding” any other legal provisions).

136. *See Caminker, supra* note 4, at 541–42; Sager, *supra* note 4, at 2526–27. *See also Araiza, supra* note 14, at 1134 (questioning whether a principle similar to *Klein* “may be problematic at its core: easily evadable by expedients of unquestioned constitutionality”).

137. Sager, *supra* note 4, at 2526 (calling it “a relic of a more formalistic era”).

138. *Id.* at 2527.

139. *See Araiza, supra* note 14, at 1088–89.

140. Caminker, *supra* note 4, at 542.

legislative and judicial branches, should Congress be tempted to cross the line and encroach on norms of judicial independence and the rule of law.<sup>141</sup> This is formalism, but perhaps a good kind of formalism, preserving the realm in which judiciary exercises its prerogatives.<sup>142</sup> Nevertheless, as Caminker acknowledges, his point is limited by repeated judicial rejections of *Klein* arguments and the often-extreme judicial efforts to avoid *Klein* problems.<sup>143</sup>

If the prohibition on dictating outcomes is a rigid one that cannot be drafted around, *Klein* itself was correct. Perhaps it is only the subsequent softening of the rule—by recognizing an ethereal line between amending substantive law and dictating outcomes—that gets it wrong.<sup>144</sup> Thus *Robertson*, with a statute imposing a blanket alteration of five different environmental statutes affecting the outcome of two specifically identified cases about the spotted owl habitat, was a categorical violation of *Klein*.<sup>145</sup> The same is true of *Save Our Mall*, where Congress similarly undermined specific litigation affecting the Memorial with a blanket amendment of all potentially applicable law.<sup>146</sup> This broad reading of the prohibition on dictating outcomes justifies *Klein*'s mythic, cult-like status—it is a precedent that should and would possess significant force but for its subsequent watering-down.<sup>147</sup>

But it also dramatically narrows Congress' power ever to amend substantive law. It calls *Wheeling Bridge*—the precedent the *Klein* Court expressly reaffirmed and distinguished—into question because Congress similarly altered the applicable legal rule to be applied to an ongoing prospective remedy.<sup>148</sup> And it calls into question Congress' recognized power to make new law applicable to pending cases.<sup>149</sup>

Martin Redish and Christopher Pudelski offer another way around the nothing-but-a-drafting-rule problem. They argue that *Klein* prohibits

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141. *Id.*

142. See Araiza, *supra* note 14, at 1090, 1134; Caminker, *supra* note 4, at 542.

143. Caminker, *supra* note 4, at 542. See *supra* notes 92–115 and accompanying text.

144. See Araiza, *supra* note 14, at 1089.

145. See *id.* at 1059 (“[I]t is hard to avoid the feeling that there is something inappropriately non-legislative about this statute.”); Redish & Pudelski, *supra* note 4, at 455 (arguing that *Robertson* shows the Court playing “fast and loose” with this principle); Sager, *supra* note 4, at 2527; *supra* notes 101–110, 121 and accompanying text.

146. See *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1096–97 (D.C. Cir. 2001).

147. Cf. Bloom, *Unconstitutional Courses*, *supra* note 14, at 1720–21 (“*Klein* is far from jurisprudentially trivial, even if the facts seem historically quaint.”); Meltzer, *supra* note 14, at 2549 (“*Klein* should not be discarded as a badly-reasoned relic with no contemporary significance.”).

148. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146–47 (1871); Redish & Pudelski, *supra* note 4, at 446–47; *supra* notes 74–79, 90–98, and accompanying text.

149. See *supra* notes 92–98 and accompanying text. But see Araiza, *supra* note 14, at 1130; Young, *supra* note 4, at 1248–49.

Congress from deceiving the public about the true state of substantive law.<sup>150</sup> The problem with the 1870 proviso was that it left the 1863 Act in full force—all property owners could recover on proof of ownership and loyalty—but altered the evidentiary rules related to pardons to prevent a class of owners from recovering under the 1863 Act.<sup>151</sup> Congress deceived the public about the true state of the law by manipulating evidentiary and procedural rules; while substantive law appeared to the public to go one way, procedural law commanded different results in the case at hand.<sup>152</sup>

This focus on deception resolves the statute-of-limitations hypothetical previously offered. If Congress must be clear, open, and honest to the public about the state of substantive law, it must make clear that the limitations period has been eliminated as an applicable defense in all cases. It would impermissibly deceive the public for Congress to appear to leave the defense in place but compel courts to reject the defense in every case. The no-deception principle functions as an interpretive guide for statutes that authorize claims “notwithstanding” or “without regard to” some other statute or legal rule, compelling the conclusion that Congress replaced prior law with a new rule of decision rather than dictating an outcome.

Finally, consider the possibility that *Klein* was wrong—the Court misapplied the no-dictating-outcomes principle and the result in *Klein* was entirely a product of poor legislative drafting. The 1870 proviso arguably did not dictate outcomes beyond what legislation normally does. Congress did not declare that the United States must prevail in these cases, nor did it tell courts to decide that Wilson or any claimant had or had not been loyal, in fact or in law. Congress simply changed the legal effect of a pardon for all cases going forward—an uncontested pardon could not establish loyalty.<sup>153</sup> Courts retained independent judgment to resolve these cases, guided by the amended law.<sup>154</sup> It remained with the court to examine the claimant’s pardon and decide whether he properly contested the recitation of crimes, whether he had been loyal in law or fact, and whether he was entitled to proceeds under that new law.

Senator Drake’s original proposal required the Supreme Court to “reverse” any Court of Claims judgment based on a pardon and,

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150. See Redish & Pudelski, *supra* note 4, at 440.

151. *Id.* at 447, 461.

152. *Id.* at 450–51.

153. *Id.* at 445.

154. To the extent the law amended was the constitutional law of pardons, that raises a distinct *Klein* problem, discussed *infra* Part III.B.



presumably, remand to the Court of Claims for a new determination under the amended law.<sup>155</sup> One might argue that this “dictates” an outcome on appeal—the Supreme Court must reverse if an uncontested pardon had been relied on below. But again, the Court retained an independent role. It would decide whether the pardon had been relied on below and whether that pardon had been contested; Congress merely established the consequence of that finding. And this brings us back to inherent formalism. Congress could have achieved its preferred result simply by imposing the ordinary rule that the appellate court applies the law as of the time of the appeal. The Supreme Court thus would have recognized that the Court of Claims judgment based on an uncontested pardon could not stand under the amended law; the judgment would have been reversed even without a legislative command.

### *B. Speaking Untruths and Dictating Meaning*

The second express holding in *Klein* was that the proviso had the effect of impairing a presidential pardon, thereby infringing on the constitutional authority of the President by making acceptance of an uncontested pardon *per se* proof of disloyalty.<sup>156</sup> And by requiring courts to give the pardon the congressionally determined effect, Congress directed the court to be an instrument of that impairment.<sup>157</sup> Congress overstepped its constitutional authority *viz a viz* the judiciary by attempting to dictate to the judiciary the scope and meaning of the constitutional presidential pardon power and the effects of the exercise of that power. That restraint on congressional control over judicial constitutional analysis need not and should not be limited only to the pardon power and not other parts of the Constitution.<sup>158</sup>

Sager labels this *Klein*'s true first principle:

The judiciary will not allow itself to be made to speak and act against its own best judgment on matters within its competence which have great consequence for our political community. The judiciary will not permit its articulate authority to be subverted to serve ends antagonistic to its actual judgment; the judiciary will resist efforts to make it seem to support and regularize that with which it in fact disagrees.<sup>159</sup>

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155. See Tyler, *supra* note 7, at 95–96; Young, *supra* note 4, at 1204–05, 1210; *supra* notes 61–65 and accompanying text.

156. United States v. Klein, 80 U.S. (13 Wall.) 128, 147–48 (1871). See Meltzer, *supra* note 14, at 2538–39, 2549; Sager, *supra* note 4, at 2531.

157. *Klein*, 80 U.S. (13 Wall.) at 148; Sager, *supra* note 4, at 2531.

158. Tyler, *supra* note 7, at 107.

159. Sager, *supra* note 4, at 2529.

Put succinctly, Congress may not compel courts to speak a “constitutional untruth.”<sup>160</sup>

There are two ways to understand this idea. A broader, judicial-supremacy-centered take is that courts, not Congress, determine constitutional meaning. *Klein* then becomes unexceptional, a straightforward assertion that it is not for the majoritarian legislature to declare the meaning of the counter-majoritarian Constitution.<sup>161</sup> A narrower, departmentalist take is that while Congress can interpret the Constitution,<sup>162</sup> it cannot insist that the judiciary adopt the congressional interpretation as its own and it cannot compel the judiciary to apply that interpretation within the adjudicative process.<sup>163</sup> Either leads to the same point: the Constitution is violated by a statute that “will implicate the judiciary in misrepresentation of matters of constitutional substance.”<sup>164</sup>

Whether this is *Klein*’s true first principle, it may be its most enduring. It converges somewhat with the prohibition on Congress predetermining rules and case outcomes, as both demand an unimpeded realm for independent judicial analysis and best judgment.<sup>165</sup> But courts and Congress both can interpret around the latter limits by drafting and interpreting legislation as a permissible amendment to substantive law.<sup>166</sup> By contrast, courts cannot read around this principle where Congress and the courts disagree on constitutional meaning. If a law redefines a constitutional provision and commands courts to apply that

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160. Meltzer, *supra* note 14, at 2545. See Bloom, *Unconstitutional Courses*, *supra* note 14, at 1721–22 (arguing that *Klein* means courts should not be forced to reach or validate incorrect or unconstitutional outcomes); Tyler, *supra* note 7, at 109 (“Congress may not compel the courts to enforce an unconstitutional law . . .”).

161. Redish & Pudelski, *supra* note 4, at 443; Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 774 (2002). See Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1737 (2006) (“The central question in constitutional adjudication is the degree of deference, if any, that courts give to constitutional interpretation by other governmental actors.”); Whittington, *supra*, at 778 (“[T]he debate over judicial supremacy focuses more squarely on . . . who should make the final decision concerning contested [constitutional] interpretations.”). See also *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997).

162. See Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1269–70 (1996); Paulsen, *Myth*, *supra* note 2, at 2709; Whittington, *supra* note 161, at 781.

163. Sager, *supra* note 4, at 2533.

164. *Id.* See Bloom, *Unconstitutional Courses*, *supra* note 14, at 1721–22; Tyler, *supra* note 7, at 109.

165. See Bloom, *Unconstitutional Courses*, *supra* note 14, at 1721 (arguing that *Klein* prevents Congress from threatening courts’ autonomy and power to decide cases independently, finally, and effectively); *supra* Part III.A.

166. See Araiza, *supra* note 14, at 1133; Caminker, *supra* note 4, at 542; Sager, *supra* note 4, at 2534; *supra* notes 92–98, 133–155 and accompanying text.

definition despite judicial disagreement, *Klein* requires that courts exercise their best judgment as to the Constitution, necessarily disregarding any statute compelling the contrary.

But while enduring, the principle as stated may be of relatively limited application. Congress does not often enact statutes expressly redefining or reinterpreting the Constitution or telling courts what the Constitution means. To be sure, this principle unquestionably was violated in *Klein* itself—the 1870 proviso stripped an uncontested presidential pardon of any effect and dictated that point to the courts. But it is difficult to find examples of Congress enacting a law that tells courts “the First Amendment shall mean X” or “the Equal Protection Clause is violated by Y.”

Sager argues that a present-day Congress violated this principle with the Religious Freedom Restoration Act (RFRA),<sup>167</sup> which sought to override by statute a judicial interpretation of the First Amendment’s Free Exercise Clause. In *Employment Division v. Smith*,<sup>168</sup> the Court held that the Free Exercise Clause is not violated by a neutral law of general applicability that incidentally regulates religiously motivated conduct in the same way it regulates identical conduct committed for non-religious reasons.<sup>169</sup> The Court rejected the argument that laws incidentally infringing on religiously motivated conduct should be subject to strict scrutiny,<sup>170</sup> which would have forbidden incidental regulation of religiously motivated conduct unless the regulation was the least restrictive means to serve a compelling government interest.<sup>171</sup> RFRA was an express congressional reaction to *Smith*.<sup>172</sup> It provided that any state or federal law that “substantially burdened” religious activity, even incidentally, must satisfy strict scrutiny as the least restrictive means to serve a compelling interest.<sup>173</sup> Congress made unquestionably clear that it believed *Smith* had been wrong and that it was seeking to legislatively undo that constitutional decision.

Sager insists this violates *Klein*. In applying RFRA, courts would conduct a familiar constitutional analysis—determining whether a plaintiff’s religiously motivated conduct was substantially burdened, then applying “exquisitely constitutional” compelling-interest

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167. 42 U.S.C. §§ 2000bb–2000bb-4 (2006).

168. 494 U.S. 872 (1990).

169. *Id.* at 878–79. See also Sager, *supra* note 4, at 2532.

170. *Smith*, 494 U.S. at 882–84. This contrasts with laws that only target religiously motivated conduct. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

171. *Smith*, 494 U.S. at 885–88.

172. 42 U.S.C. § 2000bb(a), (b) (2006).

173. 42 U.S.C. § 2000bb-1(a), (b) (2006); *City of Boerne v. Flores*, 521 U.S. 507, 513 (1997); Sager, *supra* note 4, at 2532.

analysis.<sup>174</sup> But this is not the analysis a court, left to its independent First Amendment judgment and following *Smith*, would have applied; the statute compelled the court to speak an untruth as to the appropriate constitutional standard for evaluating the religion-burdening law.<sup>175</sup> And it likely pushed courts to different outcomes because strict scrutiny obviously invalidates many laws that survive less rigorous review.

RFRA should not be invalid under the no-constitutional-untruths principle, however. The statute did not tell courts what the First Amendment means or how it should apply; it did not say “X violates the First Amendment” or “the First Amendment shall mean X.” Instead, RFRA created a new, distinct statutory right to be asserted in lieu of or supplemental to a First Amendment claim that would be governed by *Smith*.<sup>176</sup> Congress frequently legislates against a constitutional background, creating statutory rights and duties different from existing constitutional rights and duties, intended to be either complementary or exclusive of constitutional rights regarding the same conduct.<sup>177</sup> True, RFRA adopted a now-defunct constitutional standard that the Court did not view as the best understanding of the First Amendment.<sup>178</sup> But, as Daniel Meltzer correctly argues, any statutory rule of decision must come from somewhere and it arguably is better for Congress to borrow an outdated constitutional standard than to blindly use whatever standard lobbyists create.<sup>179</sup> Congress may adopt a statutory standard different than the constitutional standard so long as the underlying rule is within Congress’ legislative power.<sup>180</sup> Whatever the merits of no-constitutional-untruths as *Klein*’s first principle, RFRA did not compel courts to support and regularize a constitutional standard that ran against their independent judgment as to proper resolution of a claim for relief under the Constitution itself; it only required courts to apply a statutory standard that was different than the controlling constitutional standard. Whatever the validity of RFRA as a matter of congressional power, that constitutional issue has nothing to do with *Klein*.<sup>181</sup>

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174. Sager, *supra* note 4, at 2532.

175. *Id.* at 2533. See also Tyler, *supra* note 7, at 109.

176. Meltzer, *supra* note 14, at 2545.

177. *Id.* at 2545–46. See, e.g., *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 794 (2009).

178. Meltzer, *supra* note 14, at 2543–44.

179. *Id.* at 2544.

180. *Id.* at 2546.

181. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court unanimously struck down RFRA as to a local ordinance, although for a non-*Klein* reason. The Court held that RFRA exceeded Congress’ power under § 5 to enforce the Fourteenth Amendment, including incorporated Bill of Rights provisions. *Id.* at 536. The power to “enforce” meant Congress only could create statutory rights that were “congruent and proportional” to rights established under the Constitution, with the Court wielding sole power to determine the scope of the Constitution. *Id.* at 530–31. See also Sager, *supra* note 4, at 2532.

So what might violate the no-constitutional-untruths principle, if not RFRA? Consider recently threatened, but never enacted, legislation prohibiting federal courts from using foreign or international law in interpreting and applying the Constitution.<sup>182</sup> Such a prohibition operates one step removed from Sager's core principle—rather than dictating the appropriate constitutional standard, Congress dictates the legal sources and ideas that courts use in identifying, defining, and applying the appropriate constitutional standard. But the effect is the same. By limiting the sources to which courts might turn in elucidating constitutional ideas and meaning—sources to which judges might be inclined to turn if left to their best independent constitutional judgment—the prohibition necessarily compels courts to understand the Constitution in a way different than the judge deems appropriate and to announce that different understanding as a constitutional rule.

But we should not read this one example as indicating real practical vigor. Congress never has come close to enacting this or any similar bill, so the force of this “first principle” of *Klein* remains hypothetical. In fact, enactment is highly unlikely, given that the strongest judicial opponent of the use of foreign and international law in U.S. constitutional interpretation is also the strongest judicial proponent of the *Klein* argument against such efforts: Justice Scalia. Scalia has criticized the practice of using foreign law in several dissents<sup>183</sup> and in

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RFRA's statutory rule of strict scrutiny went too far beyond *Smith*'s constitutional rule of, essentially, rational basis review. *Flores*, 521 U.S. at 531.

On first glance, this looks similar to Sager's no-constitutional-untruth principle, and Amanda Tyler argues that the analysis in *Boerne* “echoed” *Klein*. Tyler, *supra* note 7, at 107. But *Klein* and *Boerne* target different concerns. *Boerne* does not suggest that any statutory right utilizing a standard different than the current constitutional rule is always invalid. The problem with RFRA arose from unique limits on the scope of statutory rights that Congress can create acting under § 5 as a particular power grant. But acting under a different, less-limited source of prescriptive jurisdiction, Congress remains free to adopt different statutory standards—even standards the courts have rejected for constitutional rules. For example, lower courts have upheld RFRA as a valid limitation on otherwise-neutral federal enactments, enacted under Congress' Article I powers rather than under § 5, that substantially burden religion. See, e.g., *Kaemmerling v. Lappin*, 553 F.3d 669, 677–78 (D.C. Cir. 2008) (stating that RFRA offers protection from religion-neutral federal laws); *In re Young*, 141 F.3d 854, 860–61 (8th Cir. 1998) (holding that RFRA is constitutional as applied to federal bankruptcy law).

182. See, e.g., Constitution Restoration Act of 2005, S. 520, 109th Cong. § 201 (as introduced in the Senate). The proposal was motivated by several decisions in which the Court looked to principles of international law and the law of other nations in defining constitutional meaning. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 575–76 (2005) (death penalty for juveniles); *Lawrence v. Texas*, 539 U.S. 558, 560 (2003) (criminalization of same-sex sodomy); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing to foreign nations views of executing mentally handicapped).

183. See *Roper*, 543 U.S. at 624 (Scalia, J., dissenting) (“[T]he basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.”); *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (labeling citation to foreign law “dangerous dicta”).

public debates with Justice Breyer.<sup>184</sup> But Scalia insists that the sources of law that federal judges use in making constitutional decisions are none of Congress' business: "No one is more opposed to the use of foreign law than I am, but I'm darned if I think it's up to Congress to direct the court how to make its decisions."<sup>185</sup> This is a *Klein* no-untruths argument. And it seems unlikely that even a strongly Republican Congress would enact that prohibition in the face of vocal objections from a well-regarded conservative Justice.

The no-untruths principle also creates gaps between constitutional rules and sub-constitutional rules.<sup>186</sup> It limits congressional power to define for courts the meaning and interpretation of constitutional provisions and it prohibits congressional efforts to limit courts' interpretive authority on matters of "constitutional substance."<sup>187</sup> Congress cannot tell courts what the pardon power means or what the Free Exercise Clause means, nor can Congress dictate the appropriate standard of review or methods and sources of constitutional analysis.

Congress, however, remains master of the meaning of statutes and statutory legal rules.<sup>188</sup> There is no such thing as Congress compelling a court to speak a "statutory untruth"—no such thing as limiting or controlling judicial interpretive authority or independent judgment on matters of statutory substance. The "truth" of the statutory rule, and what the court always is bound to wield its independent judgment to find and apply, is whatever Congress deems the truth.

Congress wields potentially broad discretion in determining statutory truth.<sup>189</sup> Nicholas Quinn Rosenkranz argues that Congress can define and dictate to courts everything about statutory meaning, including how

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184. See Antonin Scalia & Stephen Breyer, Debate, *Constitutional Relevance of Foreign Court Decisions* (Jan. 13, 2005), available at <http://www.freerepublic.com/focus/news/1352357/posts>.

185. Charles Lane, *Scalia Tells Congress to Mind its Own Business*, WASH. POST, Mar. 19, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/18/AR2006051801961.html>.

186. See Meltzer, *supra* note 14, at 2549 (emphasizing the "importance and transparency of a formal distinction between statutory prescription and purported constitutional revision"); Redish, *supra* note 118, at 715 (arguing that the purported limits on congressional authority fall away with respect to congressional control over sub-constitutional rules).

187. Sager, *supra* note 4, at 2533.

188. Brudney, *supra* note 132, at 33–34; Howard M. Wasserman, *Jurisdiction, Merits, and Non-Extant Rights*, 56 U. KAN. L. REV. 227, 243, 270 (2008); Widiss, *supra* note 130, at 518. See *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting) ("In the domain of statutory interpretation, Congress is the master."), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 113, 105 Stat. 1071 (codified at 42 U.S.C. § 1988 (2006)).

189. Tyler, *supra* note 7, at 106. See Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2041 (2002) ("[T]he whole reason for having a political process for enacting statutes is to determine what the 'right' thing is by assuring that, within constitutional bounds, political preferences are reflected in statutory results.").

a statute should be understood and how it should be applied in reaching decisions; this includes definitions of terms,<sup>190</sup> legal standards, interpretive instructions, interpretive and constructive rules, permissible sources of legislative history and interpretive guidance, and even interpretive methodology.<sup>191</sup> Courts in statutory cases are bound to respect Congress' lawmaking supremacy, regardless of how Congress chooses to exercise and express that authority.<sup>192</sup> On this view, Congress could prevent courts from looking to foreign and international law as guides in interpreting a statutory rule.

Bill Araiza and Linda Jellum both agree that Congress can establish statutory rules, standards, and even definitions.<sup>193</sup> But both distinguish drafting statutes from interpreting statutes, arguing that Congress crosses a separation of powers barrier when it ventures into the latter by commanding courts how to interpret the language that Congress has written and defined.<sup>194</sup> Both commentators presumably would reject a rule prohibiting courts from using foreign and international law in interpreting federal statutes.

But it is not clear what is sacred about statutory interpretation, as opposed to statutory drafting. Both are "inescapably a kind of legislation," ways to identify statutory rules of decision.<sup>195</sup> Identification, elaboration, and construction of those rules is a joint venture between Congress and the courts. Congress has final say as to the best way to express the meaning of the legal rule it creates in the legislation itself. Sometimes specific definitions of each term and provision will be possible.<sup>196</sup> Other times, given the inherent limits of language, Congress may find it more effective or feasible to write in broad strokes and dictate the manner in which courts interpret and understand those strokes, such as rules about interpretive methodology or permissible sources of authority, a more flexible, open-ended way to create statutory rules as part of a broader, cohesive, coherent statutory

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190. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2127 (2002).

191. *Id.* at 2108, 2140, 2152. See Elhauge, *supra* note 189, at 2040–41 ("[T]he legislature can also try to reestablish the supremacy of democratic choice by enacting statutes that specify statutory default rules that maximize political satisfaction.").

192. Brudney, *supra* note 132, at 23.

193. See Araiza, *supra* note 14, at 1131; Linda D. Jellum, "Which is to Be the Master," *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 880, 882 (2009); see also Rosenkranz, *supra* note 190, at 2127 ("[D]efining terms is, in the first instance, an inherent incident of the legislative power.").

194. Araiza, *supra* note 14, at 1120, 1127; Jellum, *supra* note 193, at 882–83.

195. Widiss, *supra* note 130, at 519.

196. See Rosenkranz, *supra* note 190, at 2142; see also Brudney, *supra* note 132, at 23.

regime.<sup>197</sup>

Moreover, Congress unquestionably can trump judicial interpretations of statutes through overriding legislation—new or amended statutes superseding judicial interpretations of statutory language where the legislature disagrees with the judiciary’s understanding.<sup>198</sup> There is no reason Congress cannot statutorily direct courts as to the proper interpretation of its legal rules in the original statute, rather than waiting for courts to get it wrong (in Congress’ view) and having to go back and enact new legislation to correct that erroneous interpretation.<sup>199</sup>

What is uniquely judicial is not interpretation but application. Courts alone wield power to take a statutory rule as written and interpreted by all possible interpreters and apply it to a particular set of facts and circumstances to resolve a specific dispute between specific parties. Within constitutional bounds, Congress has free reign to define those sub-constitutional legal rules, including the means of identifying them. What Congress cannot dictate is the application of those sub-constitutional legal rules to those particular facts or the outcome of the case on those facts; that must remain within the courts’ independent judgment.

But this simply collapses the no-untruths principle into the earlier *Klein* prohibition on legislative dictation of case outcomes, at least where statutory or sub-constitutional rules are concerned.<sup>200</sup> Congress retains power and discretion to establish the statutory rule and the methods for divining that rule. Courts merely must have free reign to apply the rule and resolve the legal and factual dispute as to the parties before them.

### *C. Dictating Unconstitutional Rules of Decision*

Edward Hartnett suggests a very different, but arguably more straight-

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197. Rosenkranz, *supra* note 190, at 2143 (arguing that congressionally adopted interpretive rules could form a true interpretive regime, a set of background principles with internal coherence).

198. See John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1020 (2002); Widiss, *supra* note 130, at 520.

199. Recognizing broad legislative freedom to control all manner of statutory interpretation at the outset avoids three problems in the statutory creation and interpretation dance between legislature and judiciary. The first problem is figuring out when an amendment is an improper interpretation. See Araza, *supra* note 14, at 1127. Second, courts often continue to follow statutory precedent even in the face of new, overriding legislation. See Widiss, *supra* note 130, at 515. Finally, Congress does not and realistically cannot review most of the body of statutory decisions or take steps to override those with which its current members disagree. See Ferejohn & Kramer, *supra* note 198, at 974 n.25; Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1409–10 (2005).

200. See *supra* Part III.A.



forward, constitutional principle that emerges from the overall context of *Klein*, if not from the convoluted language of the opinion itself. According to Hartnett, it is not that Congress lacks authority to prescribe rules of decision,<sup>201</sup> only that Congress lacks authority to prescribe “arbitrary” rules of decision.<sup>202</sup> In other words, Congress cannot prescribe unconstitutional rules of decision—rules that violate constitutional rights. The problem with the 1870 proviso, at least as applied in *Klein*, was that Wilson had received and accepted his pardon; certain rights vested the moment he received it and he could not be stripped of those rights.<sup>203</sup>

On this view, neither of the explicit independent holdings in *Klein* or the principles derived from them are truly central. For example, a law establishing a new rule of decision applicable to a pending case would not have raised constitutional problems so long as it did not strip vested constitutional rights. Hartnett imagines that congressional preferences in 1870 ran the other way—that while *Klein* was pending on appeal, Congress enacted a statute overturning the *Padelford* rule that serving as a Confederate surety was an act of disloyalty, such that all those who had acted as sureties could recover proceeds under the 1863 Act.<sup>204</sup> Wilson’s estate would have been entitled to recover proceeds, regardless of the content or status of the pardon, because Wilson must be found loyal-in-fact as he never gave aid and comfort. Such a law would have established a rule of decision in a pending cause, but it would not strip any individual vested constitutional rights, making it likely to survive constitutional scrutiny.

*Klein* becomes not about a pending/non-pending distinction, but about altering the effect of the pardon after the pardon had been accepted and the rights vested. The 1870 proviso would have been invalid even in cases brought after its enactment; regardless of timing, it still would have made acceptance of the pardon proof of guilt, undoing the pardon’s effect and stripping vested rights emanating from it. *Klein* becomes not a separation of powers case, but an individual rights case. And it becomes more than a pardon case.<sup>205</sup> That Wilson’s vested rights came from a pardon was mere fortuity; the outcome would be the same if a

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201. Hartnett, *supra* note 4, at 578; *supra* notes 69–73, 85–98 and accompanying text.

202. Hartnett, *supra* note 4, at 579; *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871).

203. Hartnett argues that the concept of vested rights was a dominant feature of 19th century general constitutional law, which recognized limits on any laws or legal rules that stripped rights once they had vested with the rights-holder. Under then-existing constitutional understandings, vested rights became constitutionally protected against congressional infringement. Hartnett, *supra* note 4, at 579–80.

204. *Id.* at 579.

205. Tyler, *supra* note 7, at 107 (arguing that it is a mistake to under-read *Klein* as speaking exclusively to the pardon power).

law interfered with any vested rights emanating from any constitutional source.

But this reading nevertheless renders *Klein* unexceptional and undeserving of its cult status. For one thing, the concept of vested rights no longer forms a prominent part of modern constitutional analysis, leaving the case without much current force. For another, to the extent *Klein* becomes about basic constitutionalism, it is well-established that the Constitution imposes internal and external limits on the statutory rules Congress can enact. It is well-established that courts cannot enforce statutes that exceed Congress' power.<sup>206</sup> It is also well-established that a legal rule that infringes on constitutional rights does not exist as enforceable law; the rights such a rule creates and duties it imposes do not exist and cannot be enforced or vindicated.<sup>207</sup> *Klein* does no more than *Marbury* and dozens of cases in which the Court has struck down substantive federal statutory law as violating individual constitutional rights.<sup>208</sup> We do not need *Klein* and it adds nothing meaningful to the judicial canon.

#### *D. Concluding Thoughts*

This Part reveals the full folly of the connected myths of *Klein*. *Klein* has core meanings. Congress cannot tell courts how to decide particular legal and factual issues or the outcome to reach in specific litigation. Congress cannot tell courts how to understand, interpret, and apply the Constitution or compel them to pronounce a "constitutional untruth," a constitutional view with which the court disagrees. And Congress cannot enact a law that violates individual rights.

But, as shown, none of these principles is groundbreaking or exceptional. Nor do any carry significant doctrinal force. Congress never has enacted, nor is it likely to enact, laws that genuinely violate these principles. *Klein*'s myth in the first sense of falsehood is exposed. Its myth in the second sense, of a culturally beneficial falsehood, becomes both unwarranted and unnecessary.

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206. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Tyler, *supra* note 7, at 109 ("Congress may not compel the courts to enforce an unconstitutional law.").

207. See Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1120, 1155 (2003); Wasserman, *supra* note 188, at 253–54.

208. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001); *Dickerson v. United States*, 530 U.S. 428 (2000); *Reno v. ACLU*, 521 U.S. 844 (1997); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

IV. THE PATHOLOGY OF *KLEIN* AND THE MEANING OF MYTH

Constitutionalism, Vincent Blasi argues, “derives from a view regarding the various objectives that are served by constraining representative institutions by means of the device of constitutional limitations.”<sup>209</sup> Constitutionalism depends “on the existence of a considerable measure of continuity and stability regarding the most basic structural arrangements and value commitments of the constitutional regime.”<sup>210</sup> Constitutionalism is essential in what Blasi calls a pathological period, one reflecting “an unusually serious challenge to one or more of the central norms of the constitutional regime.”<sup>211</sup> Such a period is marked by a “sense of urgency stemming from societal disorientation if not panic.”<sup>212</sup> Its defining feature is “a shift in basic attitudes, among certain influential actors if not the public at large,” about central constitutional commitments.<sup>213</sup> That panic affects structural features and arrangements, such as formal and informal separation of powers and checks and balances.<sup>214</sup> Constitutionalism and judicial review exist precisely to respond to and enable the system to survive these pathological periods.<sup>215</sup>

Reconstruction qualifies as a pathological period under Blasi’s conception, particularly the politically tumultuous period from 1869 to 1871 that produced *Padelford*, the proviso, and *Klein*. The Thirteenth and Fourteenth Amendments had been enacted, but their effect on congressional power and on federal–state balance remained unclear.<sup>216</sup> Tensions between Congress and President Andrew Johnson began as early as 1867 and bubbled over into Johnson’s 1868 impeachment and near-removal from office.<sup>217</sup> In the meantime, Congress had statutorily removed the invitation (or authorization) for presidential pardon in confiscated-property cases.<sup>218</sup> *Padelford* had outraged congressional Republicans, who believed the decision interfered with efforts to punish the cotton growers who had been essential in funding the Confederate

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209. Blasi, *supra* note 27, at 453.

210. *Id.*

211. *Id.* at 456, 459 (“In pathological periods, at least some of the central norms of the constitutional regime are indeed scrutinized and challenged.”).

212. *Id.* at 468.

213. *Id.* at 467.

214. *Id.* at 468.

215. *Id.* at 453; *see supra* note 30.

216. *See* ACKERMAN, VOL. 2, *supra* note 55, at 100–19; 122–24; FONER, *supra* note 55, at 257–58; Edwards, *supra* note 55, at 327–28.

217. *See* ACKERMAN, VOL. 2, *supra* note 55, at 18–20; FONER, *supra* note 55, at 333–35; Edwards, *supra* note 55, at 329–30.

218. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 141–42 (1871); Tyler, *supra* note 7, at 90.

war effort.<sup>219</sup> Efforts to undo *Padelford*, and with it the then-pending Court of Claims decision in *Klein*, were part of a broader three-way federal-government power struggle as to the direction of the postbellum nation, particularly on matters of national power and the reintegration of southern states and citizenry into the Union.<sup>220</sup> In that sense, *Padelford* and *Klein* are two of a series of judicial decisions rejecting, narrowing, or otherwise interfering with the Republicans' Reconstruction agenda.<sup>221</sup>

Blasi's theory is that rigorous constitutional judicial review should be reserved for the "worst of times," those periods of "increased urgency" when traditional checks on the political branches and the public have been rendered ineffective to restrain political officials and citizens, leaving the Constitution as the only bulwark against overreaching officials and citizens.<sup>222</sup> To the extent Reconstruction was a period of Congress overstepping its constitutional bounds, the *Klein* Court did precisely what Blasi's constitutionalism expects the judiciary to do—it invalidated the law because it recognized the need for judicial action in these worst of times and in light of "the reduced effectiveness of traditional checks."<sup>223</sup> The Court responded to the unique circumstances of Reconstruction and a visceral sense that Congress was "cooking" the law to achieve its desired result in a time of uniquely sharp three-way inter-branch conflict.<sup>224</sup> But the Court did so with a judicial doctrine intended and designed for the worst of times, not for ordinary times.

This perspective ties *Klein* to its historical context.<sup>225</sup> Certainly we have encountered subsequent pathological periods in which "central norms of the constitutional regime" have been "scrutinized and challenged" to the same extent as during Reconstruction.<sup>226</sup> And certainly Congress and the President have overstepped constitutional bounds—including bounds of separation of powers—since then.<sup>227</sup>

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219. See *supra* notes 53–58 and accompanying text.

220. See ACKERMAN, VOL. 2, *supra* note 55, at 123, 199–200, 209; FONER, *supra* note 55, at 183–84, 237–38, 250–51; Edwards, *supra* note 55, at 327–29.

221. See ACKERMAN, VOL. 1, *supra* note 56, at 101; FONER, *supra* note 55, at 529; Edwards, *supra* note 55, at 335; see also *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1872).

222. Blasi, *supra* note 27, at 453, 468.

223. Of course, it arguably was for one of the rare times in history. See generally Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 378–79, 383–86 (1992).

224. See Bloom, *Unconstitutional Courses*, *supra* note 14, at 1720 ("Klein may now seem almost trifling, a relic of zealous postbellum politicking.").

225. See *id.*; Meltzer, *supra* note 14, at 2549.

226. See Blasi, *supra* note 27, at 459.

227. See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); see also Rosenberg, *supra* note 223, at 379 tbl.I (noting multiple periods

Perhaps this demonstrates the myth of *Klein*'s vigor—*Klein* simply is not strong enough as a judicially enforceable constitutional doctrine to invalidate even genuinely pathological legislation. Thus courts have not seen an opportunity to wield it.

Alternatively, the problem may not be *Klein* itself, but the subsequent watering down of *Klein* in modern cases, where courts have backed off the strict prohibition on Congress prescribing rules of decision in favor of recognizing the need for Congress to create and amend the substantive statutory legal landscape.<sup>228</sup> The idea of “dilution” of constitutional principles is important to the pathological perspective on *Klein*. Blasi specifically warns against overuse of constitutional rules in normal times, fearing that regular use dilutes constitutional principles and doctrines, leaving them narrow, weak, and unavailable when truly pathological legislation arises and the principles are needed.<sup>229</sup> This might explain *Plaut*, *Robertson*, *Save Our Mall*, and other recent cases rejecting *Klein* arguments against fairly ordinary, non-pathological legislation enacted in fairly normal times.<sup>230</sup> The problem, Blasi might argue, is that those cases weakened the constitutional rule by rejecting these challenges, leaving a non-vigorous *Klein* that will be less available if a genuinely pathological period returns to produce genuinely pathological legislation.

At the same time, recent history shows that the extreme laws that would violate *Klein*—“in *A v. B* pending in the District Court, B shall prevail,” “the federal courts shall understand the First Amendment to mean X,”<sup>231</sup> or “federal courts may not consider or cite foreign and international law in interpreting the Constitution”<sup>232</sup>—never are or come close to being enacted.

It is possible (although not provable) that *Klein* itself deters Congress from testing the limits of its lawmaking powers, avoiding laws that cross or draw too close to the line.<sup>233</sup> In other words, Congress, presumed to know the state of the law,<sup>234</sup> does not go too far because it is aware of *Klein*. If so, perhaps we can modify the assertion that *Klein* does no

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of congressional attacks on independence of federal courts).

228. See *supra* notes 92–98 and accompanying text.

229. Blasi, *supra* note 27, at 457, 487 (“The strength of the political community’s commitment to those norms is tested, and it may matter a great deal how well the central norms were nurtured in the periods of calm that preceded the pathology.”).

230. See *supra* notes 101–115, 122–125 and accompanying text.

231. As discussed previously, *supra* notes 167–181 and accompanying text, I do not believe RFRA dictated to courts the meaning of the First Amendment.

232. See *supra* note 182–200.

233. Cf. Gunther, *supra* note 31, at 911; Rosenberg, *supra* note 223, at 373–74.

234. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988).

meaningful constitutional work to say that, even if it does no meaningful judicial work in *ex post* judicial challenges to actual litigation, it does meaningful *ex ante* legislative and political work by controlling Congress' and the President's baser instincts and helping avoid the worst populist excesses.<sup>235</sup> Congress has bought into the myth that *Klein* vigorously limits its powers and that myth guides its conduct and understanding of what it can, should, and will do. And if congressional belief in the myth of *Klein* deters potential abuses of legislative power and checks inter-branch conflict before it occurs, the American politico-legal community is advanced and important politico-legal objectives achieved—just as all myths form a significant part of our constitutional identity.<sup>236</sup>

This ideal of *Klein*-in-Congress fits well with a fourth principle derivable from *Klein*, proposed by Redish and Pudelski: Congress cannot cook procedural and evidentiary rules to achieve desired substantive outcomes without fully changing and publicly acknowledging the state of substantive law.<sup>237</sup> Representative democracy obligates elected representatives to make clear policy choices on behalf of their constituents and prohibits legislators from deceiving constituents about the true policies they support. Congress cannot play a “legislative shell game” of purporting to leave substantive law in place, then eviscerating its legal and practical effect by manipulating procedural and evidentiary rules to defeat the operation of that law.<sup>238</sup> This is elusive and difficult to apply as judicial principle and it will be difficult to prove in a given case that the public was in fact deceived as to the state of the law by a particular enactment.<sup>239</sup> Congress arguably got away with just such legislative deception in *Robertson*, when the Court validated functional congressional alteration of foundational environmental statutes without expressly and publicly amending them.<sup>240</sup>

*Klein* thus becomes about congressional self-enforcement. It strengthens representative democracy by imposing on Congress and on individual legislators a constitutional obligation of openness and

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235. Blasi, *supra* note 27, at 453 (“The willingness of those who exercise political power to recognize superior constitutional authority may derive from perceptions of past commitment, calculations of reciprocal advantage, or loyalties born of a sense of common endeavor.”). Of course, it is empirically unprovable to what extent members of Congress or Congress as a whole actively think in *Klein* terms when deciding what legislation they can or should enact.

236. See Pettys, *supra* note 1, at 993; *supra* notes 19–21 and accompanying text.

237. *Supra* notes 150–152 and accompanying text.

238. Redish and Pudelski, *supra* note 4, at 440.

239. *Id.* at 458–59.

240. Araiza, *supra* note 14, at 1065–66.

forthrightness about the state of the law, the legal rules they enact, and the policies to which they have committed. Even if *Klein* will not judicially invalidate whatever laws Congress enacts, it provides political and prudential reasons for Congress not to exercise the full limits of its powers, especially when the exercise of power may infringe on the judicial domain.<sup>241</sup> Congress preemptively avoids potential *Klein* controversies by not enacting odd-looking, judiciary-intruding or judiciary-limiting laws that might draw objections, even if those objections would prove ultimately meritless in court.

Of course, the essential characteristic of a truly pathological period is that internal constraints fall away and legislative self-enforcement will be insufficient, necessitating strong judicial enforcement of meaningful constitutional limitations.<sup>242</sup>

The pathological perspective on *Klein* is important to understanding the case's continued vitality because we arguably find ourselves in a new pathological period, triggered by the terrorist attacks of September 11 and the subsequent Global War on Terror. The period has been defined by two foreign wars, ongoing efforts against terrorism, and a host of controversial domestic and foreign measures by the federal government, especially the executive, on matters related to terrorism and national security.

Our current historical period exemplifies Blasi's conception of a period of "unusually serious challenge to one or more of the central norms of the constitutional regime."<sup>243</sup> We have seen a significant shock to, and arguably a breakdown of, structural and individual rights features of the constitutional and political system.<sup>244</sup> President George

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241. Michael J. Gerhardt, *What's Old is New Again*, 86 B.U. L. REV. 1267, 1280 (2006) (describing the congressional "constitutional norm against legislation that would directly interfere with judicial decisions or decision making"); Gunther, *supra* note 31, at 911 (arguing that the consequences "have no doubt helped inhibit Congress from resorting" to its full powers); Rosenkranz, *supra* note 190, at 2147 (arguing that congressional hesitancy in controlling all aspects of legislative meaning "may stem from an inchoate concern about separation of powers"). See also Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. (forthcoming 2011), available at <http://ssrn.com/abstract=1585973> (arguing that this hesitancy is a result not only of legislative prudence, but of structural protections built into the Article I lawmaking process that enable minorities to block legislation that infringes on federal jurisdiction).

242. See Blasi, *supra* note 27, at 453 ("[U]nless the appeal to constitutionalism evokes genuine sentiments of long-term commitment or aspiration, officials and citizens cannot be expected to forego their preferences of the moment in deference to the claims of the constitutional regime.").

243. *Id.* at 459.

244. See, e.g., JACK L. GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 114–15 (2007); ERIC LICHTBLAU, *BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE* 4, 137–39 (2008); JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 52 (2008); Paul M. Schwartz, *Warrantless Wiretapping, FISA Reform, and the Lessons of Public Liberty: A Comment on Holmes's Jorde Lecture*,

W. Bush claimed broad executive powers to act in the interest of national security, often to the exclusion of Congress and the courts.<sup>245</sup> There has been a renewed three-way dance among the branches to assert power for themselves and to limit or eliminate the power of the other branches, particularly the courts.<sup>246</sup> At issue in all of this was the government's fundamental approach to an existential crisis and the balance between security and individual liberty. This dynamic is remarkably similar to the one during Reconstruction that produced the 1870 proviso and *Klein*. If there is a pathological historical period likely to produce genuinely *Klein*-violative legislation, this is it. And if *Klein* is ever to exert meaningful judicial doctrinal force, it would be in these worst of times.

Yet consider one significant piece of War on Terror legislation—the Foreign Intelligence Surveillance Act (FISA) Amendments Act of 2008.<sup>247</sup> Sometime after the 9/11 attacks, the Bush Administration established a classified intelligence-gathering program to wiretap overseas calls to and from U.S. residents, without a warrant and outside procedures established in FISA.<sup>248</sup> All but one major telecommunications company, Qwest, assisted the NSA with the program. Cooperating companies allowed the government to install surveillance equipment in their calling stations, agreed to route overseas calls through domestic switching stations, and helped the NSA pour through the vast communications flowing between the United States and countries in the Middle East.<sup>249</sup> After sitting on the story for approximately a year, *The New York Times* reported it in late 2005.<sup>250</sup>

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97 CAL. L. REV. 407, 412–13 (2009); *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d 949, 955 (N.D. Cal. 2009); *see also* *Boumediene v. Bush*, 553 U.S. 723 (2008) (rejecting limitations on habeas corpus for enemy combatants); *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009) (permitting claim by detainee against government lawyer who promulgated detention and interrogation policies leading to alleged constitutional violations).

245. GOLDSMITH, *supra* note 244, at 124; LICHTBLAU, *supra* note 244, at 7–9; MAYER, *supra* note 244, at 49–51; Schwartz, *supra* note 244, at 423–26. *See also* GOLDSMITH, *supra* note 244, at 123 (describing Bush Administration's "go-it-alone route").

246. *See* GOLDSMITH, *supra* note 244, at 123, 205–07 (discussing consequences of Bush Administration's decision to pursue anti-terrorism policies unilaterally); Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1839, 1847 (2009) [hereinafter Paulsen, *Constitutional Power*] (arguing that Congress repudiated the Court's understanding and reinstated the executive view); *see also* *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) (arguing that the President must consult with Congress, absent an emergency); Paulsen, *Constitutional Power*, *supra*, at 1835. *Compare Hamdan*, 548 U.S. at 567 (holding that presidentially established military commissions for terror suspects violate federal law), with *Military Commissions Act of 2006*, Pub. L. No. 109-366, 120 Stat. 2600, and *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008).

247. Pub. L. No. 110-261, 122 Stat. 2436 (2008) (codified at 50 U.S.C.A. § 1885a (West 2010)).

248. LICHTBLAU, *supra* note 244, at 9; Schwartz, *supra* note 244, at 412.

249. LICHTBLAU, *supra* note 244, at 149–50, 153–54.

250. *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d 949, 955 (N.D. Cal.



President Bush quickly acknowledged the existence of the program and defended it as necessary for national security and preventing a repeat of 9/11.<sup>251</sup>

Lawsuits followed against the NSA and various government agencies and officials, as well as against the telecom companies.<sup>252</sup> Plaintiffs alleged the telecoms had conspired with the government to operate a surveillance program that violated the Fourth Amendment prohibition on unreasonable searches and seizures and the First Amendment freedom of speech, as well as various federal statutory provisions.<sup>253</sup>

While defending the program, President Bush and administration officials also argued that warrant requirements and FISA procedures were outdated and ill-suited to the threats of modern terrorism and that the wiretap program was necessary to prevent new terrorist attacks.<sup>254</sup> The administration also sought to codify the program already pursued, broadening executive surveillance powers.<sup>255</sup> As part of that codification, the Administration sought retroactive immunity for the telecoms for their role in assisting the NSA.<sup>256</sup> The final measure included a retroactive grant of immunity to the telecoms from all civil liability for their conduct in support of any national-security-related program,<sup>257</sup> along with legislative history showing that Congress specifically targeted the then-pending lawsuits against the telecoms.<sup>258</sup> Yet in June 2009, the district court handling all the telecom lawsuits through multi-district litigation<sup>259</sup> upheld § 802 against a variety of constitutional arguments, including *Klein*, and dismissed the constitutional claims against the telecoms.<sup>260</sup>

Once more, rigorous judicial enforcement of *Klein*'s principles is lacking even in the face of a pathological enactment.<sup>261</sup>

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2009); LICHTBLAU, *supra* note 244, at 193–94, 209–11, 212–13; Schwartz, *supra* note 244, at 413.

251. LICHTBLAU, *supra* note 244, at 212–13; Schwartz, *supra* note 244, at 412–13.

252. See *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d at 955; Schwartz, *supra* note 244, at 413.

253. *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d at 955.

254. LICHTBLAU, *supra* note 244, at 308.

255. *Id.* at 307–08; Schwartz, *supra* note 244, at 414–15.

256. Schwartz, *supra* note 244, at 417.

257. 50 U.S.C. § 1885a (Supp. II 2008); *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d at 956; Schwartz, *supra* note 244, at 417.

258. *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d at 959.

259. 28 U.S.C. § 1407 (2006).

260. See *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d at 955. The case is pending in the Ninth Circuit as of this writing.

261. In the second piece in this series, I argue that the district court's conclusion as to *Klein* was correct. See Wasserman, *supra* note 13.

## V. CONSTITUTIONALIZING POLICY PREFERENCES

Given *Klein*'s lack of genuine judicial force, the question remains why and how the Cult of *Klein* developed and why it continues. Put differently, why does *Klein* remain a myth in the second sense of a legal narrative, otherwise false, that is fundamental to the self-understanding and commitments of the politico-legal community?

Ultimately, *Klein* arguments reduce to an instinctive belief in broad judicial supremacy and suspicion that Congress overstepped its bounds. The contours of *Klein*-centered cases often are quite similar. Congress appears to have manipulated the rules governing issue in court. Challenged laws appear to affect the judicial function, threatening the vaunted, if undefined, judicial independence and rule of law.<sup>262</sup> Congress appears to be “cooking” legal rules to achieve certain outcomes in identifiable pending or anticipated cases, with laws that presumably disadvantage plaintiffs, particularly plaintiffs seeking to vindicate rights against government or against big business. They are strange-looking laws, politically distasteful to many commentators.

For example, a prohibition on foreign and international law in constitutional interpretation is viewed as disadvantaging rights claimants by narrowing the scope of U.S. constitutional rights relative to similar rights elsewhere, resulting in a clear political or ideological divide among judges and scholars.<sup>263</sup> That has, in fact, proven true for recent cases.<sup>264</sup> But it need not be true across the board; for example, using foreign law might produce much narrower understandings of the First Amendment freedom of speech, resulting in courts upholding more legislative limits on expression than without the use of foreign law.

With its broad language, apparent indeterminacy, purportedly empty core, and historical perception as a separation-of-powers, judicial-independence trump card, *Klein* has an all-things-to-all-people quality.<sup>265</sup> If *Klein* defines a legal-political community and reflects core constitutional values—if *Klein* is a myth in the second sense of the word—it should to do some constitutional heavy lifting and provide a

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262. See Caminker, *supra* note 4, at 542 (grounding strong *Klein* principle in need to “generate sufficient norms of independence and, frankly, essentiality, to safeguard long-term fidelity to the rule of law”). But see Shugerman, *supra* note 118, at 979 (arguing for narrow understanding of *Klein* to keep from “turning it into a Frankenstein of judicial independence”).

263. See Antonin Scalia & Stephen Breyer, Debate, Constitutional Relevance of Foreign Court Decisions (Jan. 13. 2005), available at <http://www.freerepublic.com/focus/news/1352357/posts>.

264. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 575–76 (2005) (execution of juveniles); *Lawrence v. Texas*, 539 U.S. 558, 560 (2003) (criminalization of same-sex sodomy); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (execution of mentally handicapped).

265. Young, *supra* note 4, at 1195.

doctrinal tool with which courts can push back against Congress. The twin myths of opacity and vigor together cause commentators and advocates to assert constitutional defects far more frequently than *Klein*'s principles, properly and narrowly understood, would otherwise suggest. Any unwise, strange-looking, judiciary-affecting law must violate the Constitution.

*Klein* thus becomes the ideal vehicle for constitutionalizing those ordinary policy preferences. But morphing political distaste into unconstitutionality blurs a central distinction.<sup>266</sup> Conflation of wisdom and constitutionality is quite common in disputes over the limits of congressional and executive authority with respect to the judiciary. Gerald Gunther identified the problem in an earlier academic controversy over a different judicial-independence fault line: congressional power to strip federal courts of jurisdiction to hear and resolve particular classes of constitutional cases. Gunther argued that jurisdiction-stripping proposals were neither desirable as a matter of policy nor likely to be effective.<sup>267</sup> But Gunther also rejected most constitutional arguments against jurisdiction stripping, arguing that they confused "what the Constitution authorizes" with "sound constitutional statesmanship."<sup>268</sup>

Much the same is at work with many *Klein* arguments: the laws at issue may be unwise, but *Klein* is not so broad or powerful as precedent to render unwise laws constitutionally defective. *Klein* imposes narrow constitutional limits on Congress; it says nothing about what Congress should do with its power within those limits. *Klein* cannot convert normative policy objections into constitutional defects.

Consider one category of *Klein*-vulnerable enactment: recent congressional efforts to override state common law and bar certain mass-tort claims. In 2005, Congress enacted the Protection of Lawful Commerce in Arms Act (PLCAA), which prohibited, and required dismissal of, any "qualified civil liability action," defined as a pending or future action against a member of the gun industry for any relief, including injunctions and nuisance abatement, resulting from criminal or unlawful misuse of firearms by third persons.<sup>269</sup> The law was a direct response to several state-law public nuisance actions by states, municipalities, and individuals against gun manufacturers, gun sellers, and gun trade associations for failing to limit the movement of firearms in illegal markets and into the hands of those who use firearms for

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266. Gunther, *supra* note 31, at 898.

267. *Id.* at 898, 921.

268. *Id.* at 898.

269. Protection of Lawful Commerce in Arms Act, Pub. L. No. 100-92, 119 Stat. 2095 (2005).

unlawful purposes. That same year, the House passed the Personal Responsibility in Food Consumption Act (widely known as the “Cheeseburger Bill”), a structurally identical piece of legislation that would have prohibited and required dismissal of several actions by consumers against the fast-food industry for damages resulting from obesity, weight gain, and other health problems associated with fast food.<sup>270</sup>

In *City of New York v. Beretta*,<sup>271</sup> the Second Circuit rejected a broad constitutional challenge to the PLCAA, including *Klein* arguments. The court properly focused on the no-dictating outcomes principle, then recognized that the PLCAA permissibly amended substantive law—it established a new federal legal standard to be applied in all defined civil actions.<sup>272</sup> But Congress did not dictate findings or case outcomes; the court was left to exercise independent judgment as to whether a particular claim was a qualified civil action that must be dismissed. And given the substantive and structural identity between the PLCAA and the Cheeseburger Bill, the same analysis would have prevailed had the latter been enacted.

Congress obviously wanted to protect particular industries from civil litigation and obviously “hoped” that any such actions would be dismissed, which is why it changed applicable law. But Congress remains free to amend substantive law in a way likely to produce desired outcomes, depending on the application of new law to the facts of a case. Both the PLCAA and the Cheeseburger Bill altered the state of the law in all defined cases and dictated a new consequence—dismissal of the action—based on the application of new law to fact. But the judiciary retained its essential role. It remained for the court to decide, in the exercise of its independent judgment, whether the particular action meets the statutory definition making it subject to the affirmative defense and ripe for dismissal.

David Kairys criticized the PLCAA<sup>273</sup> based on a distrust of legislatures. Legislatures, he argued, are at the mercy of powerful litigants who, given the option, ignore the litigation process and send lobbyists into legislative halls seeking exemption from legal rules that apply to everyone else and from which the less powerful cannot gain

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270. Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. The Senate never acted on the bill.

271. 524 F.3d 384 (2d Cir. 2008).

272. *Id.* at 395–96. Because only sub-constitutional law was involved, Congress could not be understood as having attempted to dictate constitutional meaning or to declare constitutional untruths.

273. Kairys’s criticism would be equally applicable to the Cheeseburger Bill.

similar immunity.<sup>274</sup> Both laws immunize industry from ordinary state tort analysis, thus both “undercut coherent and consistent rules and sacrifice basic fairness for the expediency of the well-connected.”<sup>275</sup> Of course, in proposing and enacting the PLCAA, Congress expressed its own distrust—of “maverick” judges and juries sustaining these claims and expanding civil liability in ways never anticipated by the Framers, Congress, or state legislatures.<sup>276</sup>

But this is not a constitutional argument; it is an argument that Congress has enacted a scheme that does not produce just legal outcomes in certain cases. Kairys rejects the congressional goal of protecting particular industries from civil litigation. He objects to legislative politics and priorities and the way powerful interests manipulate legislative and political processes to their benefit. His argument also is a paean to the judiciary as the great leveler, more resistant than legislatures to the abuses of powerful interests. It is, in other words, an objection sounding entirely in political and policy concerns. The PLCAA establishes (what Kairys views as) sub-optimal legal rules. So would the Cheeseburger Bill. But there simply is nothing unconstitutional about legislative politics or about sub-optimal legal rules.

## VI. CONCLUSION

At the end of the day, *Klein* is a venerable case and an increasingly common part of the constitutional conversation. But it does little or no work, certainly not in non-pathological times. However worshipful one wishes to be of *Klein*, however much one may want to be part of its cult, *Klein* exerts no meaningful doctrinal or jurisprudential force.

Recognizing the twin myths of *Klein*—that the doctrine is not meaningless or indeterminate, but also not constitutionally vigorous—marks a big step toward clearing up much constitutional confusion. That clarity is necessary as Congress continues to consider and enact *Klein*-suspect or *Klein*-vulnerable laws, so we can recognize that such laws are, in the end, neither constitutionally suspect nor constitutionally vulnerable.

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274. David Kairys, *Legislative Usurpation: The Early Practice and Constitutional Repudiation of Legislative Intervention in Adjudication*, 73 UMKC L. REV. 945, 946 (2005).

275. *Id.* at 950.

276. 15 U.S.C. § 7901(a)(7).