1999

The Trouble with Robertson: Equal Protection, the Separation of Powers and the Line Between Statutory amendment and Statutory Interpretation

William D. Araiza
Brooklyn Law School, bill.araiza@brooklaw.edu

ARTICLES

THE TROUBLE WITH *ROBERTSON*: EQUAL PROTECTION, THE SEPARATION OF POWERS, AND THE LINE BETWEEN STATUTORY AMENDMENT AND STATUTORY INTERPRETATION

William D. Araiza

> The Constitution deals with substance, not shadows. . . . If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.[1]

A fundamental precept of the federal constitutional structure, and of most state constitutional structures as well, is the distinction between a legislature's power to enact laws and a court's authority to interpret them in the course of adjudicating a case.[2] But despite, or perhaps because of, its fundamental nature, this distinction confounds attempts to delineate it with any precision. At base, the problem is that statutory language reflects many choices that could also be made by courts. For example, legislation can define terms or even deem that certain conduct satisfies elements or provisions elsewhere in the statute. In the absence of such definitions or "deeming" clauses, such decisions are made by the courts. Since legislatures and courts share this power, questions will inevitably arise about when one branch—usually the legislature—has unconstitu-

* Associate Professor of Law, Loyola Law School. Thanks are due to Ellen Aprill, Ashutosh Bhagwat, Catherine Fisk, David Leonard, Calvin Massey, Christopher May, Rory Little, and Georgene Vairo for their review of and helpful comments on earlier versions of this Article. Thanks also to Bill Hunter, Lorena Montenegro Madrigal, Nieves Rubio, and Rusty Thomas for fine research assistance.

1. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325 (1866).

2. *Compare* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."), *with id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). *See generally, e.g.*, AL. CONST. art. III, § 42 (establishing legislative, executive and judicial branches, and prohibiting each branch from exercising the powers of either of the others); AZ. CONST. art. 3 (same); TX. CONST. art. 2, § 1 (same); VT. CONST. ch. II, § 5 (same).

tionally encroached on the functions of the other.

Modern jurisprudence on this issue has been bedeviled by the troublesome case of *United States v. Klein*,[3] a Reconstruction-era case where, according to the Court, Congress did in fact "pass[] the limit which separates the legislative from the judicial power."[4] The facts of *Klein* are set forth in greater detail later in this Article;[5] very briefly, the statute struck down in *Klein* purported to instruct courts on how to determine whether a particular element in a statutory claim procedure had been satisfied. The *Klein* Court held that such instruction purported to dictate to the courts a "rule of decision," and thus intruded into the judicial realm.[6]

The problem with this broad reading of *Klein*[7] is that Congress had established the right to recovery in the first place. Given that fact, why could Congress not subsequently explain or make more precise the meaning of a particular element required for recovery? Of course, some congressional "explanations" are clearly inappropriate. For example, Congress may not "explain" the meaning of a constitutional provision; at most, it has the power to "enforce" the provisions of a number of amendments.[8] But that proposition is uncontroversial, because Congress obviously does not have the power unilaterally to amend the Constitution. In addition, Congress may not identify an individual by name and deem her guilty of a particular crime. But that, too, is an easy call, given the explicit prohibition of the Bill of Attainder Clause.[9] Harder questions arise when Congress attempts to explain or make more precise a statutory rule. These are the harder questions because Congress created the rule to begin with, and should be allowed broad leeway to manipulate the rule as it sees fit. At some point, though, such manipulation presumably intrudes on the province of the courts. Where is the line?

In order to examine this question, it may help to consider a situation

---

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

4. *Id.* at 147.

5. *See infra* note 49 and accompanying text.

6. *See* 80 U.S. at 146.

7. There are other ways to read *Klein*, as noted below. *See infra* notes 90-96 and accompanying text (discussing other commentators' interpretations of *Klein*).

8. *See, e.g.*, U.S. CONST. amend. XIV, § 5 (authorizing Congress to "enforce" the provisions of the amendment). This prohibition reflects one of the alternate readings of *Klein*. *See infra* note 93 and accompanying text. On the other hand, there may be situations where Congress has substantial latitude to determine the scope of its own constitutional authority. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 128-29 (1942) (explaining that the proper test for determining whether a statute is a permissible regulation of interstate commerce asks whether Congress had a reasonable basis for believing that the regulated activity had a substantial effect on interstate commerce).

9. *See* U.S. CONST. art. I, § 9, cl. 3.

where Congress enacted, and the courts reviewed, an actual statute that seems intuitively close to whatever line may exist. Such a case study arose out of the controversy over logging in the Pacific Northwest in the late 1980's. In 1989, as part of the annual appropriations bill for the Interior Department, Congress imposed new requirements on the U.S. Forest Service's management of certain old-growth National forests in the Pacific Northwest. That provision, section 318 of the appropriations bill, was intended as a temporary political settlement to the battle that had raged during the previous few years over logging in those forests. Ultimately, that controversy focused on the future of the Northern Spotted Owl, an endangered species native to the area and threatened by the prospect of intensified logging in those forests.[10] The compromise embodied in section 318 essentially was to create new protections for the benefit of the Spotted Owl (namely, the consolidation of protected areas to maximize contiguous owl habitat), while opening up other lands for logging and withdrawing those latter areas from the protection of various environmental statutes.

The substance of this compromise—something for the loggers, and something for the owls—was classic politics, and its enshrining in a statute is usually an accepted result of the political process. What makes this statute unusual is the means Congress used to express this compromise. By the time section 318 was enacted, the battle over logging had reached the federal courts, in the form of two separate lawsuits in which the plaintiffs, the Portland and Seattle Audubon societies, alleged that the Forest Service's management of those forests had violated a variety of federal statutes.[11] Section 318 aimed squarely at those pending suits. After subsections (b)(3) and (b)(5) imposed new protections for the benefit of the owl, subsection (b)(6)(A) "determine[d] and direct[ed]" that implementation of these new protective measures

> is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et

10. During 1989 and 1990 the dispute about the Spotted Owl was the subject of a great deal of controversy. For background information on the political aspects of the controversy, see sources listed *infra* at note 36.

11. Specifically, the plaintiffs alleged violation of five federal statutes: the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4347 (1994); the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703-711 (1994); the National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1600 & 1611-1614 (1994); the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1994); and the Oregon and California Lands Act, 43 U.S.C. § 1181 (1994).

> al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR.[12]

This statute raises immediately significant separation of powers issues. First, it enacts into law a rule that certain conduct satisfies pre-existing law, without explicitly changing that law. Congress has often enacted laws overturning judicial interpretations of previously-enacted statutes that it believes the courts have misinterpreted.[13] But section 318 seems different; rather than enacting a new rule that Congress may have thought was already implicit in the previously-enacted but misinterpreted statute, section 318 explicitly purports to apply law to a hypothetical fact situation. Section 318 imposes the following rule: if the government satisfies the substantive forest management requirements imposed by section 318's other provisions, then subsection (b)(6)(A) deems previously-enacted law to have been satisfied. This format deviates from the classic form of legislation, in which the legislature does not purport to decide whether particular conduct satisfies an existing statutory standard, but uses instead a format that suggests imposition of a new standard. In departing from that classic format, section 318 arguably intrudes on the judiciary's law-interpreting function.

Second, in an even more direct challenge to judicial authority, section 318 explicitly mentions case names—indeed, it even mentions a particular order granting a preliminary injunction. Of course, it does so not as part of a direct command that courts hearing those cases should act in a certain way; rather, it simply uses those cases as a shorthand reference for the statutes section 318 was designed to affect, i.e., all the statutes alleged to have been violated in the *Seattle Audubon* and *Portland Audubon* complaints. Nevertheless, section 318 effectively orders the courts hearing the named cases still pending when section 318 was enacted to conclude that certain conduct must be found to satisfy the pre-existing legal requirements. Thus, in practical effect, subsection (b)(6)(A) does not just use the case names as shorthand references, but decides those cases. It is also worth noting that, because section 318's new substantive requirements deal only with the Northwest forests, few other lawsuits

---

12. Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, § 318 (b)(6)(A), 103 Stat. 701, 745-50 (1989).

13. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(2), 105 Stat. 1071 (1991) (providing additional employment discrimination remedies by modifying *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) and overruling *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991)); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982) (clarifying dates and definitions concerning voting rights by modifying Supreme Court precedent construing the original version of the statute).

would be affected by section 318 (b)(6)(A)'s potentially result-directing mandate. The possibility that subsection (b)(6)(A) might have little effect beyond the two cases it decides heightens the suspicion that it crosses the line from legislation to adjudication.

Thus understood, section 318's significance extends beyond environmental law to implicate the fundamental issue of legislative interference with the judicial function. Courts hearing particular named cases are put on notice that Congress has decided what conduct satisfies the laws alleged to have been violated. Aside from a direct command to enter judgment for a particular party, it is hard to envision a clearer example of legislative interference with the affairs of the courts. More generally, this appears to be, at least at first glance, a case of Congress overstepping its power by attempting to act as something other than a legislature. But even if one is not willing to endorse either of those serious charges, it is hard to avoid the feeling that there is something inappropriately non-legislative about this statute.

A different approach to section 318, however, yields the diametrically opposite conclusion—that it represents a completely unexceptional use of the legislative power. First, it should be fairly clear that Congress could achieve the substance of what it sought to legislate in section 318. Most obviously, it could have amended the pre-existing environmental statutes so as to exempt from their coverage those particular forests, and in their place impose new requirements. Such special treatment for these particular forests might be subject to challenge under the Equal Protection Clause, but the deferential review applied to such legislation strongly suggests that the classification embodied in such exemptions would pass constitutional muster.[14] Second, and more germane to the question of whether section 318 is a legitimately legislative act, it is clear that, in some sense, all legislation amounts to the imposition of legal liability on individuals involved in certain fact patterns. Thus, when a legislature enacts a statute stating that a person shall be guilty of armed robbery if he uses or threatens to use a gun to obtain property not rightfully his, it is essentially saying that certain facts (use or threatened use of a weapon with a particular intention) satisfy the legal standard for armed robbery. Section 318 easily fits into that uncontroversial format; under one very plausible reading, the statute merely amends previously-enacted environmental laws by adding an alternative method of compliance. Such an amendment would be well within the legislative power.

---

14. *See infra* Part IV.C (discussing viability of an equal protection challenge to section 318).

Each of these conceptions of section 318—as an act beyond the legislative power, and as a completely unexceptional piece of legislation—has been embraced by a unanimous federal court. In *Seattle Audubon Society v. Robertson*,[15] a Ninth Circuit panel unanimously struck down section 318 as an unconstitutional congressional infringement on the judicial power. The Supreme Court unanimously rejected that analysis, concluding that section 318 simply amended pre-existing law.[16] Thus, section 318 and these two *Robertson* opinions[17] provide an ideal vehicle for examining the difficult, but fundamental, issue of the relationship between legislative and judicial power.

This Article examines this relationship, through the prism of *Robertson*. Part I sets forth the background to the *Robertson* litigation, and describes the Ninth Circuit and Supreme Court opinions. It leaves us with a tentative conclusion that, while Congress almost certainly should have been able to reach the result it desired, the format of section 318 gives rise to suspicion about Congress' motives and the appropriateness of the format it chose. This discussion sets the stage for the rest of the Article, which focuses on a search for a workable doctrinal response to such actions. In this context, the workability of a doctrine rests on two factors: first, the extent to which it responds to the real concerns triggering our suspicion, as opposed to focusing merely on formalistic concerns about the particular format a statute takes; and second, the extent to which it can be competently applied by courts.

Part II begins this search by considering the position taken by the Ninth Circuit, namely, that section 318 did not change the underlying law but instead sought to dictate results under existing law, and thus is invalid under *United States v. Klein*.[18] This section of the Article considers courts' attempts to apply *Klein*'s possible rule[19] against legislature result directing. Most of the recent attempts have arisen in the course of challenges to two federal statutes: a 1991 amendment to the federal securities

15. 914 F.2d 1311, 1315-16 (9th Cir. 1990), *rev'd*, 503 U.S. 429, 441 (1992).

16. *See* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992).

17. The Ninth Circuit consolidated the *Seattle Audubon* and *Portland Audubon* lawsuits for purposes of answering this constitutional issue. *See Seattle Audubon*, 914 F.2d at 1312-14. This Article will refer to this litigation as the *Robertson* case. Unless otherwise stated, references in this Article to the *Robertson* opinion are to the Supreme Court's opinion. References to the Ninth Circuit's opinion will be identified as such.

18. 80 U.S. (13 Wall.) 128, 148 (1871).

19. As scholars have pointed out, it is open to question whether this "rule" was, in fact, a holding in *Klein*, given the factual circumstances surrounding that case. *See infra* note 69. For convenience, this Article will nevertheless refer to *Klein*'s analysis of Congress' power to direct results in federal court as the *Klein* "rule."

laws[20] and a 1996 law restricting the federal courts' injunctive power over state prison operations.[21] The Supreme Court has not considered *Klein*-based arguments against these statutes;[22] these lower court opinions, however, are useful for the insight they give into the difficulty of applying the *Klein* rule. Given the internal tension in the *Klein* rule, none of the applications is completely satisfactory. Ironically, the most satisfactory attempt to apply *Klein* appears to come in the Ninth Circuit's own opinion in *Robertson*, an opinion which, as noted in Part I, is subject to the very plausible criticisms put forth by the Supreme Court's decision reversing the Ninth Circuit. Part II's brief review of recent attempts to apply *Klein* suggests that the search for constitutional problems with section 318 should focus elsewhere.

Part III begins that search by referring to one of section 318's most striking features—its extreme specificity. Section 318 is clearly aimed at two pending cases (not just because it named them, but more importantly because it limited its effect to only, but all, of the statutory claims made in those cases, and because it purported to affect only certain National forests). This specificity raises concerns associated not only with equal protection,[23] but also with the concept of separation of powers. Part III takes up this idea of "singling out" as a separation of powers issue. Two recent concurring opinions—Justice Breyer's opinion in *Plaut v. Spendthrift Farm*,[24] and Justice Powell's opinion in *Immigration and Naturalization Service v. Chadha*,[25]—base their separation of powers analyses on this singling out concern. The concern is one based on a fundamental political science insight, namely, that a majoritarian legislature cannot be trusted to impose burdens on particularly identified individuals; instead, such particularized application of government power must be entrusted to politically-neutral courts. Of course, sometimes government should

---

20. *See* Special Provision Relating to Statute of Limitations on Private Causes of Action, Pub. L. No. 102-242, 105 Stat. 2387 (1991) (codified as amended at 15 U.S.C. § 78aa-1 (1994)). This Act amended the Securities Exchange Act of 1934.

21. *See* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) (codified at 18 U.S.C. § 3626 (1994)).

22. The Court struck down the securities statute on narrower grounds. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995). The Court has not yet granted certitorari in a case challenging the Prison Litigation Reform Act.

23. *See* U.S. CONST. amend. XIV, § 1 (containing the Equal Protection Clause applicable to the states); *see also* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (holding that the Fifth Amendment's due process clause, a limitation on federal government power, contains an equal protection element analogous to the Fourteenth Amendment's restriction on state power).

24. 514 U.S. 211, 242 (1995) (Breyer, J., concurring in the judgment).

25. 462 U.S. 919, 960-62 (1983) (Powell, J., concurring in the judgment).

be able to single out. For example, a legislature might reasonably conclude that it is dealing with a legitimate class consisting of one person. Justice Breyer's analysis, however, does not provide a complete explanation of when the legislature can appropriately single out.[26] In part because he is dealing with a different fact situation, Justice Powell's analysis does address this issue.[27] Justice Powell suggests that singling out may be a special concern when the action at issue is one sufficiently burdensome on the individual that due process would require procedural protections unavailable in a legislative context.

Justice Powell's analysis leads to a discussion of the relevance of due process analysis to section 318.[28] While due process *per se* does not apply to section 318, the more general foundations of due process jurisprudence do provide some useful insights. Foundational cases from the early part of this century suggest that individuals who do not have a due process right to a hearing must instead protect their interests in the political process. That conclusion suggests that a fair political process, if not an officially recognized constitutional requirement,[29] is at least a goal that should inform other legal doctrines. This idea has come to be known as "due process of lawmaking", to which this Article turns next.

After introducing the concept of due process of lawmaking,[30] Part IV applies it to section 318. Commentators have criticized the appropriations rider process, the process by which section 318 was enacted, as reducing the quality of the resulting legislation and impairing public access to the legislative process. One major concern is that the rider process impairs legislative deliberation. Part IV considers the legislative deliberation argument as applied to section 318, and finds it wanting.[31] It is, at best, unproven that the appropriations rider process caused the legislature to misunderstand or give inadequate thought to what it was doing, especially given the high profile nature of the issue. It is similarly questionable whether the process led to the public being shut out of the legislative process any more so than normal. At best, then, this analysis does not show conclusively that legislative deliberation was impaired by

26. *See infra* Part III.B.1-2 (discussing issues of separation of powers presented by singling out).

27. *See infra* Part III.B.3 (examining Justice Powell's concurrence in Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983)).

28. *See infra* Part III.C (exploring due process implications of section 318).

29. *See infra* note 250 (discussing the federal constitutionality of a state constitutional provision passed through the political process).

30. *See infra* Part IV.A (exploring due process concerns implicated in the political process).

31. *See infra* Part IV.B (discussing due process in the context of section 318).

the section 318 process. Even assuming that the rider process entails these process flaws, it remains unclear how a court would go about determining whether the legislature had given the "proper" amount of deliberation to a given rider.

However, section 318 does give rise to a concern on another front. Section 318's format, a declaration that certain conduct satisfies preexisting law, is arguably inconsistent with the discovery or imputation of a legislative purpose underlying the statute. The purpose requirement is fundamental to equal protection law; without a legislative purpose, it becomes impossible to determine the reasonableness of a statute's classification, the ultimate issue addressed by equal protection analysis. Under the most deferential version of equal protection review, courts often do no more than hypothesize the existence of such a purpose. But even such imputed, or constructive, purposes seem logically beyond the reach of statutes that are phrased, like section 318, as interpretations of preexisting laws. Part IV (C) therefore suggests that section 318 may, after all, violate the Equal Protection Clause.

Since this objection speaks merely to section 318's format, as opposed to the substantive result it attempts to achieve, it is worth asking whether format should matter in this case. This Article suggests that it might.[32] In other doctrinal areas, the Supreme Court has imposed restrictions on the format by which Congress could legislate, even when the substance of the challenged legislative action was also constitutionally questionable. Thus, format seems to have some independent significance for the Court. Moreover, a requirement that statutes be framed as directly regulating conduct, as opposed to providing that certain conduct satisfies preexisting regulation, may prompt legislative debate on the value of the conduct to be regulated, or the efficacy of such regulation in promoting the public good. Thus, both formalistic and pragmatic concerns may be vindicated by a "statutory purpose" rule of the sort suggested by this Article.

Applying this rule requires overcoming two major hurdles.[33] First, Congress often enacts precisely-tailored bills that explicitly command that certain action occur "notwithstanding" the requirements of any other law. Moreover, sometimes, as in a case distinguished by the Ninth Circuit in *Robertson*, the legislative history of such a statute indicates an interpretive intent behind the rule; that is, Congress believed the action it

32. *See infra* Part IV.C.1 (examining the importance of format in the analysis of the statutory purpose of section 318).

33. *See infra* Part IV.C.2 (outlining the legislature's approach to legislating under the statutory purpose rule).

was commanding was legal under pre-existing law, but apparently wanted to ensure that its interpretation ultimately prevailed.[34] Such statutes satisfy the "statutory purpose" rule, but seem virtually indistinguishable from legislation, such as section 318, that this Article suggests fails the rule. Second, sometimes Congress acts by explicitly enacting or amending statutory definitions. Legislative definitions or redefinitions of statutory terms are commonplace and generally quite desirable, as they render the legislature's intent more precise and easily discoverable. Nevertheless, such definitions have an interpretive quality. That quality is especially pronounced in the case of redefinitions, which have the effect of altering the reach of the statute without purporting to change its substance.

But "notwithstanding" clauses and redefinitions can be understood as consistent with the "statutory purpose" rule. In both cases, the key seems to be the plausibility of the statute's interpretation or redefinition. If such interpretive acts reflect plausible readings of the original statute, then the legislature's interpretation or redefinition can be viewed as part of the ongoing dialogue between legislature and court over the original legislation's meaning. To the extent they can be so described, these statutes should be considered part of the string of legislative enactment, judicial interpretation, and legislative correction. As such, they satisfy the "statutory purpose" rule by relating back to the purpose underlying the original statute. Even a statutory redefinition can satisfy the rule, if the redefinition makes the statutory term more precise, or updates it to take account of empirical changes that require a redefinition in order to vindicate the statute's underlying purpose.

However, these explanations come at a price. Part IV of this Article concludes by suggesting that the very success of these attempts to distinguish certain statutory styles effectively limits the scope of the "statutory purpose" rule. In turn, the limitation of the rule's scope, and the ease with which Congress can evade even that limited scope, suggests that the purpose requirement in equal protection law is fundamentally problematic. This conclusion creates a dilemma, as the purpose requirement is a fundamental component of the boundary between legislative and judicial power.

There seems, then, to be no easy way to delineate the legislative/judicial boundary line. Concluding, Part V raises the possibility that, as a practical matter, this part of the border must be left to the legislature's self-

34. *See* Stop H-3 Assoc. v. Dole, 870 F.2d 1419 (9th Cir. 1989); *see also infra* notes 332-38 and accompanying text (discussing *Stop H-3*).

policing. However, the doubtful efficacy of such self-policing, and the importance of the values at stake, suggest that courts should scrutinize suspect legislative action with some care, even if that scrutiny is not perfect. The Court's opinion in *Robertson* shrinks from the task, denying that section 318 even implicates any broad separation of powers issue. In the end, this abdication constitutes *Robertson*'s most troubling failure.

I. THE *ROBERTSON* LITIGATION

A. Introduction

Robertson grew out of litigation in which environmental groups objected to the federal government's logging policies in the National forests of the Pacific Northwest.[35] By 1989, those policies had become quite controversial, and the controversy had focused on the Northern Spotted Owl, an endangered species native to the Northwest forests. The dispute took on the classic form of jobs versus the environment.[36] The particular dispute that led to the *Robertson* decision involved the environmental groups' challenge to the United States Forest Service's adoption of a Record of Decision and Final Supplemental Environmental Impact Statement (FSEIS),[37] which had the effect of allowing logging activities to continue in these National forests. The environmental groups filed suit, alleging that the logging would violate a variety of environmental statutes, including National Environmental Policy Act (NEPA) and the Migratory Bird Treaty Act (MBTA).[38] The district court granted a preliminary injunction forbidding 140 imminent timber sales.[39]

It was at this point that Congress stepped in, enacting section 318. Much of section 318 imposed new requirements on the Forest Service's management of the old-growth Northwest forests, pursuant to the compromise described earlier.[40] For example, subsection (b)(1) required the

35. A fuller discussion of the history of this litigation, told from the perspective of one of the environmental groups' attorneys, can be found in Victor M. Sher, *Travels With Strix: The Spotted Owl's Journey Through the Federal Courts*, 14 PUB. LAND L. REV. 41 (1993).

36. *See, e.g.*, Michael D. Lemonick, *Showdown in the Treetops*, TIME, Aug. 28, 1989, at 58-59; *Owls v. Trees Compromise Grounded*, ST. LOUIS POST-DISPATCH, June 29, 1989, at A9; *For the Birds*, THE ECONOMIST, March 4, 1989, at 26-28.

37. Generation of these documents was required by the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1994).

38. *See supra* note 11 (listing the statutes alleged to have been violated).

39. See Seattle Audubon Soc'y v. Robertson, No. C89-160, 1990 WL 152627 (W.D. Wash. May 11, 1990).

40. *See* discussion *supra* Part I.A.

Service to "minimize fragmentation of the most ecologically significant old growth forest stands."[41] More relevant to the *Robertson* case, subsection (b)(3) prohibited sales of timber from "Spotted Owl Habitat Areas" (SOHAs) identified in the FSEIS,[42] while subsection (b)(5) required the Federal Bureau of Land Management (BLM) to identify additional SOHAs, which would also be off-limits for logging during the next fiscal year.[43]

For our purposes, section 318's key provision is subsection (b)(6)(A), which provided that compliance with the spotted-owl protective provisions of subsections (b)(3) and (b)(5) was to be considered "adequate consideration for the purpose of meeting" the statutory requirements alleged to have been violated in the pending *Seattle Audubon* and *Portland Audubon* litigation.[44] Based on subsection (b)(6)(A), the district court in the *Seattle Audubon* case vacated its preliminary injunction against the planned timber sales,[45] while the court in the *Portland Audubon* suit dismissed the complaint on the same basis.[46] Both of these courts rejected constitutional challenges to section 318, setting the stage for the Ninth Circuit and Supreme Court opinions on the statute's constitutionality.

B. The Ninth Circuit's Opinion

The Ninth Circuit's discussion of the constitutional issue focused almost immediately on the format of the statute, namely, its specification of a particular result in cases identified by name. The first paragraph of the court's analysis makes this clear:

> By section 318, Congress for the first time endeavors to instruct federal courts to reach a particular result in pending cases identified by caption and file number. Subsection (b)(6)(A) raises serious constitutional concerns in light of Article III's stated premise that the judicial power of the United States, encompassing cases and controversies, lies in the federal courts and

41. Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, § 318(b)(1), 103 Stat. 701, 745-46 (1989).

42. *See id.* § 318(b)(3), 103 Stat. at 746.

43. *See id.* § 318(b)(5), 103 Stat. at 746-47

44. *See id.* § 318(b)(6)(A), 103 Stat. at 747.

45. *See Seattle Audubon Soc'y*, No. C89-160, 1990 WL 152627, (W.D. Wash. May 11, 1990), *rev'd*, 914 F.2d 1311 (9th Cir. 1990), *rev'd*, 503 U.S. 429 (1992).

46. *See* Portland Audubon Soc'y v. Lujan, No. 87-1160, 1989 WL 155694 (D. Or. Dec. 21, 1989), *rev'd sub nom.* Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311 (9th Cir. 1990), *rev'd*, 503 U.S. 429 (1992).

not in Congress.[47]

The court then identified the controlling law as the Supreme Court's 1871 opinion in *United States v. Klein*.[48] In *Klein*, the Court struck down a statute prescribing the effect presidential pardons would have in lawsuits brought by pardoned Confederates to recover property seized by federal agents during the Civil War. In addition to simply prescribing that a pardon should not be allowed as evidence of loyalty (a prerequisite to property recovery), the statute directed the Supreme Court to dismiss for want of jurisdiction any case in which the claimant had prevailed in the lower courts based on the claimant's receipt of a pardon. Despite the statute's phrasing of the prohibition as a limitation on jurisdiction, a subject over which the Court had just recently acknowledged Congress' broad power,[49] the *Klein* court concluded that the statute went beyond Congress' jurisdiction-stripping authority to prescribe a rule of decision for the courts. The analogy between the *Klein* statute and section 318 is clear: just as the *Klein* statute purported to require the courts to reach a particular decision on claims founded on a presidential pardon, so section 318 could be viewed as attempting to require the courts to interpret the pre-existing statutes in a particular way, i.e., as being satisfied by compliance with subsections (b)(3) and (b)(5).

In deriving the rule governing the case before it, the Ninth Circuit then noted that *Klein* had distinguished an earlier case, *Pennsylvania v. Wheeling and Belmont Bridge Co.*,[50] where a previous judicial order declaring a bridge to be a nuisance was overturned by a congressional decision to make the bridge a post-road for the United States mail. From these two cases, the Ninth Circuit synthesized the principle that a change in underlying law would have to be given effect by the courts, but that a mere prescription of a rule of decision, without a change in law, violated the separation of powers.[51] The court then distilled this rather abstract concept into an operational rule. According to the court, the "critical distinction"

> is between the actual repeal or amendment of the law underlying the litigation, which is permissible, and the actual direction of a particular decision in a case, without repealing or amending the law underlying the litigation, which is not permissible.[52]

---

47. *Robertson*, 914 F.2d at 1314.
48. *See id.* (citing United States v. Klein, 80 U.S. (13 Wall.) 128 (1871)).
49. *See* Ex Parte McCardle, 74 U.S. (7 Wall.) 506, 512-13 (1868).
50. 59 U.S. (18 How.) 421 (1855).
51. *See* Robertson, 914 F.2d at 1315.
52. *Id.*

The court held that subsection (b)(6)(A) "does not . . . repeal or amend the environmental laws underlying [the] litigation."[53] The court noted specific requirements that the underlying statutes imposed, and then suggested (but did not say explicitly) that these requirements could not be viewed reasonably as having been complied with by virtue of compliance with subsections (b)(3) and (b)(5).[54] As a contrast, the court pointed to another Ninth Circuit decision, *Stop H-3 Ass'n v. Dole*,[55] in which an appropriations bill directed the construction of a particular highway, "notwithstanding" potential violations of environmental statutes.[56]

The Ninth Circuit concluded its analysis by making explicit what its preceding discussion had strongly implied: the fault with subsection (b)(6)(A) lay not in the result Congress was attempting to attain, but in the means Congress employed to attain it. It noted the obvious, that Congress could amend or repeal laws, and suggested that Congress could possibly have written a valid statute, but concluded that it could not fairly interpret subsection (b)(6)(A) as such a valid amendment or re-

---

53. *Id.* at 1316.

54. *See id.* The court opined further that:

> Congress, through section 318, seeks to perform functions reserved to the courts by Article III of the Constitution. For example, if the Secretary follows subsection (b)(3) and (b)(5), then the Secretary will be found to have used the "principles of multiple use and sustained yield" and the "systematic interdisciplinary approach" mandated by the Federal Land Policy and Management Act, 43 U.S.C. § 1712(c)(1) and (2). In addition, the agency will be deemed to have included detailed statements of adverse environmental effects and alternatives required under NEPA, 42 U.S.C. § 4332. Also, there will have been no taking of habitat as proscribed under the Migratory Bird Treaty Act, 16 U.S.C. § 703.
>
> Subsection (b)(6)(A) here at issue does not establish new law, but directs the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court. This is what *Klein* and subsequent cases agree is constitutionally proscribed.

Id.

55. 870 F.2d 1419 (9th Cir. 1989).

56. *Robertson*, 914 F.2d at 1316-17. The court further distinguished the statute litigated in *Stop H-3* from section 318:

> The statute challenged in *Stop H-3* simply ordered construction of the highway and specifically, as a matter of permanent law, *withdrew* the statutory environmental protection provisions underlying the ongoing litigation as to the challenged project by exempting the project from the provisions' requirements. The provision at issue in *Stop H-3* did *not* leave the underlying statute intact (as to the H-3 project), order a course of government action, and then direct a court finding that the environmental statutes' requirements were satisfied by the government action ordered. That is what Congress did when it enacted section 318, at issue in the present case.

Id. (citation and footnote omitted).

peal.[57] Finally, it concluded, almost as an afterthought, that even if such a reading were possible, it would be foreclosed by the fact that it took the form of an appropriations measure, given the court's understanding that implied repeals could not be found in appropriations measures.[58]

C. The Supreme Court Opinion

The Supreme Court reversed the Ninth Circuit and upheld section 318.[59] Writing for a unanimous Court, Justice Thomas adopted an analysis of subsection (b)(6)(A) that, while superficially disagreeing with the appellate court only on the application of the agreed-upon test, in fact adopted a diametrically opposite analytical method.

Most importantly, the Court concluded that subsection (b)(6)(A) "compelled changes in law, not findings or results under old law."[60] To illustrate this point, the Court used the example of the application of the statute to a situation in which the defendant violated the Migratory Bird Treaty Act (MBTA). The Court observed that courts applying subsection (b)(6)(A) in such a case would have to test the defendant's conduct against both the pre-existing MBTA requirements and the new requirements in subsections (b)(3) and (b)(5), and uphold the conduct if it satisfied either. This, of course, describes accurately the effect of subsection (b)(6)(A), but does nothing to support the Court's characterization of the statute. Essentially, the Court viewed subsection (b)(6)(A) as effectuating a change in law because it changed the analysis courts employ when confronted with allegations of violations of laws such as the MBTA.[61]

The Court, turning to the respondents' arguments, then found no significance in section 318's format. First, it dismissed the statute's "determine[s] and direct[s]" language, characterizing it as "an empty phrase."[62] Perhaps more significantly, it attached no importance to the statute's use of language that compliance with the new requirements is adequate consideration for the purpose of meeting the requirements of the pre-

57. *See Robertson*, 914 F.2d at 1317; *see also* Victor M. Sher & Carol Sue Hunting, *Eroding the Landscape, Eroding the Laws: Congressional Exemptions from Judicial Review of Environmental Laws*, 15 HARV. ENVTL. L. REV. 435, 475 (1991) (concluding that the Ninth Circuit's analysis in *Robertson* turned on section 318's format).

58. *See Robertson*, 914 F.2d at 1317 (citing Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978)).

59. *See* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992).

60. *Id.* at 438.

61. *See id.* at 438-39 (noting that section 318 left for the courts the determination of whether subsections (b)(3) and (b)(5) were, in fact, satisfied in particular cases).

62. *Id.* at 439.

existing statutes. Here the Court's approach diverged significantly from the Ninth Circuit's:

> Congress might have modified MBTA directly, for example, in order to impose a new obligation of complying either with the current § 2 [of the MBTA[63]] or with subsections (b)(3) and (b)(5) [of section 318]. Instead, Congress enacted an entirely separate statute deeming compliance with subsections (b)(3) and (b)(5) to constitute compliance with § 2 – a "modification" of the MBTA, we conclude, through operation of the canon that specific provisions qualify general ones. As explained above, each formulation would have produced an identical task for a court adjudicating the MBTA claims – determining either that the challenged harvesting did not violate § 2 as currently written or that it did not violate subsections (b)(3) and (b)(5).[64]

Thus, while the Ninth Circuit focused on the law Congress did in fact write, the Supreme Court focused on the law Congress *could have written*. Since Congress could have achieved the same result through unquestionably constitutional means, Justice Thomas seems to conclude, the Court will not impose a constitutional requirement that particular language be used, but instead will be willing to view a provision such as subsection (b)(6)(A) as an ordinary amendment to the pre-existing law.[65] The Court's focus on the statute Congress could have written was reinforced by its refusal to find significance in subsection (b)(6)(A)'s explicit reference to the *Seattle Audubon* and *Portland Audubon* cases, and its characterization of that reference as merely a shorthand for the provision's identification of the statutes to be amended. Given this characterization of subsection (b)(6)(A), the Court concluded—unsurprisingly—that it did not have to reach the *Klein* issue identified by the Ninth Circuit.

One last matter required the Court's attention. The Court noted an amicus' argument that even a prospectively-applied law should be struck down "if the change [in law] swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases."[66] This theory might justify striking down even a law that, like subsection

63. The Court used section 2 of the MBTA, 16 U.S.C. § 703 (1994), as an example of the pre-existing statutory requirements it found to have been amended by section 318. Section 2 prohibits, among other things, the "taking" or "killing" of any migratory bird. *See* 16 U.S.C. § 703.

64. *Robertson*, 503 U.S. at 439-40 (citations omitted).

65. *See id.* at 438-41; *cf.* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288-89 (1977) (overruling previous precedent that limited state power to tax interstate commerce based on the wording of the particular tax statute, noting the artificiality of distinctions that had no practical significance).

66. *Robertson*, 503 U.S. at 441 (citing brief of amicus Public Citizen).

(b)(6)(A), had been interpreted as a substantive change in law and not a *Klein*-condemned attempt to prescribe a rule of decision in a particular case. The Court refused to consider this theory, however, noting that it had been neither raised nor decided at the appellate level, nor advanced by the respondents before the Supreme Court.[67]

D. The Landscape After the Supreme Court's Opinion

The two *Robertson* opinions reflect starkly different approaches to the problem created by legislation that at least suggests improper legislative direction of judicial results. The Ninth Circuit opinion focused immediately on the statute Congress actually wrote, stressing in its initial characterization of subsection (b)(6)(A), the statute's use of particular case names and file numbers.[68] This focus naturally led that court to focus on *Klein*'s possible holding[69] regarding the constitutionality of congressional attempts to intrude into the judicial function. Further, in applying what it understood to be the *Klein* rule, the Ninth Circuit again focused on subsection (b)(6)(A)'s suspiciously non-legislative format. The first sentence of the opinion after the statement of its conclusion makes this clear: "Section 318 does not, by its plain language, repeal or amend the environmental laws underlying this litigation, even though some subsections add additional requirements."[70]

By contrast, the Supreme Court "conclude[d] that subsection (b)(6)(A) compelled changes in law, not findings or results under old law."[71] The key to the Court's conclusion, the complete opposite of the Ninth Circuit's, seems to have been its observation that, if allowed to stand, subsection (b)(6)(A) would operate to change defendants' duties under statutes such as the MBTA. This observation is certainly correct, as far as it goes, but cannot be seen as a satisfactory answer to the change in the law/outcome prescription issue.

The Supreme Court was perhaps on firmer ground when it considered, and rejected, the arguments offered by the environmental groups in support of the Ninth Circuit's conclusions. Those arguments focused on

---

67. *See id.*

68. *See* Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1314 (9th Cir. 1990).

69. At least one commentator has suggested that *Klein* does not in fact include a holding on the constitutionality of legislative prescriptions of facts. *See* Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States v. Klein *Revisited*, 1981 WIS. L. REV. 1189, 1233-38 (noting that the facts in *Klein* were stipulated by both sides, and thus concluding that *Klein* should be read as offering, at most, useful dicta on this question).

70. *Robertson*, 914 F.2d at 1316 (footnote omitted).

71. *Robertson*, 503 U.S. at 438.

three features of the statute's wording or format: (1) its "determines and directs" language; (2) its command that compliance with subsection (b)(6)(A) "meets" the pre-existing requirements; and (3) its use of the particular names and docket numbers of pending cases. The Court's refusal to find constitutional significance in the first and third of these features sounds convincing: why, the Court asked, should the constitutional inquiry turn on an "empty phrase" such as "determines and directs," or the shorthand use of a case name as a reference to the statutes that subsection (b)(6)(A) was intended to amend?[72] The same dismissive attitude about statutory format also informed the Court's response to the argument grounded in the second feature: the Court "fail[ed] to appreciate the significance" of this argument since Congress might have modified the statutes directly, and since under either format, the result would have been the same.[73] Perhaps these responses do not persuasively explain why subsection (b)(6)(A) was a completely unexceptional use of the legislative power, but they surely go some way toward explaining why it was not clearly unconstitutional. In other words, these responses make the completely valid point that the use of particular phrases, or even particular formats, should be considered only weak support for an argument that the Supreme Court should overturn a statute.

But this analysis still leaves a nagging sense that something is wrong with this statute. The Ninth Circuit seems to have had this sense, too, when it opened its analysis with the observation that subsection (b)(6)(A) specified particular cases.[74] The suspicion seems to involve Congress' intent, and the legitimacy of that intent. Nobody would seriously think that Congress decided to amend a particular set of statutes, then looked around and happened to find a case in which all of those statutes, but only those statutes, were alleged to have been violated, thus providing a convenient shorthand. Instead, it is clear that Congress wanted the named cases, and perhaps every other case dealing with these particular forests, to be decided in favor of the government, as long as it complied with section 318's new substantive provisions.

Thus understood, the Supreme Court's analysis finds a distant echo in *Ex Parte McCardle*,[75] another case in which a statute was clearly understood to have been aimed at a particular fact pattern, or even a particular case, and yet was upheld. But the *McCardle* analogy is incomplete.[76]

72. *See id.* at 439.
73. *Id.*
74. *See Robertson*, 914 F.2d at 1314.
75. 74 U.S. (7 Wall.) 506 (1868).
76. *See id.*

McCardle dealt with Congress' power to control the jurisdiction of the federal courts, a power explicitly given to Congress and one of its crucial constitutionally-based checks on the federal courts.[77] The statute in *Robertson* implicated no such checks. In fact, if anything, the statute at issue in *Robertson* arguably threatened the checks and balances system by usurping courts' fundamental power to decide cases according to their own legal interpretations and factual findings.[78] Moreover, the statute in *McCardle* was evenhanded: the Court was stripped of jurisdiction in all cases of a particular type, regardless of the outcome of the case in the lower courts. By contrast, the statute in *Robertson* was clearly government-defendant friendly: after subsection (b)(6)(A), such a defendant could violate a statute such as the MBTA and still prevail in court, as long as it complied with the requirements of subsections (b)(3) and (b)(5).[79]

Nevertheless, the Ninth Circuit's suspicion seems at least to have been acknowledged by the Supreme Court when it noted an amicus' argument that even a statute that merely amends prior law may nevertheless be unconstitutional "if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases."[80] The concern reflected in this argument—which the Court declined to consider for procedural reasons[81]—seems to be quite similar to that expressed by the Ninth Circuit; namely, that such a statute would amount to legislative decision of particular cases. This Article begins its own analysis at this point of at least potential agreement between the two courts; that is, the separation of powers implications of singling out individuals or individual cases. However, before reaching that analysis in Part III, it is necessary to analyze the doctrinal issue explicitly relied on by the Ninth Circuit; that is, the possible holding of *United States v. Klein*[82] that Congress may not prescribe results to courts.

II. SECTION 318 AND THE DICTATION OF FACTS OR RESULTS

In *Robertson*, the Ninth Circuit struck down section 318 on the ground

77. *See id.* at 507.

78. *See Robertson*, 503 U.S. at 438-39.

79. *Cf.* United States v. Sioux Nation of Indians, 448 U.S. 371, 372 (1980) (rejecting a separation of powers challenge to a statute by which the United States waived a res judicata defense to a compensation claim made by an Indian tribe, when a previous lawsuit had resulted in a judgment against the tribe, in large part based on Congress' power to pay the debts incurred by the United States).

80. *Robertson*, 503 U.S. at 441.

81. *See id.*

82. 80 U.S. (13 Wall.) 128 (1871).

that it compelled Article III courts "to reach a specific result and make certain factual findings under existing law."[83] The Court thus contrasted section 318 to a statute that merely altered the underlying law, which it recognized was well within Congress' power.[84] This distinction reflects the standard reading of *Klein*; however, as commentators[85] and courts[86] have pointed out, it may not have been part of *Klein*'s actual holding. The Supreme Court read section 318 quite differently, concluding that it did nothing more than amend the previously existing environmental statutes at issue.[87] Based on this reading of the statute, the Court concluded that section 318 did not require the Court to consider the scope of any such rule allegedly arising out of *Klein*.[88]

This disagreement, not so much about *Klein*'s meaning, but, instead about the fundamental question whether Klein was even relevant reflects the difficulty courts have had with the *Klein* decision. As many commentators have pointed out, *Klein* is a puzzling case.[89] At least one thorough study of *Klein* has concluded that its law changing/result directing analysis is dicta.[90] Other commentators have characterized the *Klein* analysis as turning on the asymmetrical nature of the statute's manipulation of federal jurisdiction,[91] while others have focused on either the nature[92] or

---

83. Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1316 (9th Cir. 1990).

84. *See id.* at 1315-16.

85. *See, e.g.*, Young, *supra* note 69 at 1237-38 (stating that the Court in *Klein* failed to "strike[] down a congressional attempt to interfere with the Court's evidentiary or fact-finding processes").

86. *See, e.g.*, Rabin v. Fivzar Assocs., 801 F. Supp. 1045, 1053 n.9 (S.D.N.Y. 1992); United States v. Brainer, 691 F.2d 691, 695 (4th Cir. 1982) (suggesting a narrower reading of *Klein*).

87. *See Robertson*, 503 U.S. at 438.

88. *See id.* at 441.

89. *See, e.g.*, David P. Currie, *The Constitution in the Supreme Court: Civil War and Reconstruction, 1865-1873*, 51 U. CHI. L. REV. 131, 158 (1984); Samuel Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 VA. L. REV. 333, 343 n.20 (1982); Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733, 743 n.41 (1995); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 718 (1995). For a thorough examination of *Klein*, see generally Young, *supra* note 69.

90. *See generally* Young, *supra* note 69.

91. *See* 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, 1372-74 (1953).

92. *See, e.g.*, J. Richard Doidge, *Is Purely Retroactive Legislation Limited by the Separation of Powers?: Rethinking* United States v. Klein, 79 CORNELL L. REV. 910, 959-64, 969-70 (1994) (suggesting the importance of the government's proprietary, as opposed to regulatory, role in *Klein*, and on that basis, distinguishing *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), in which the Supreme Court upheld a statute making a bridge a post road, even though the statute had the effect of nullifying a judicial decree that the bridge was a public nuisance for interfering with navigation on the

the constitutional status[93] of the issue whose litigation was being precluded. Others have attempted to deal with the law changing/result directing issue more directly; for example, Professors Eisgruber and Sager have characterized the *Klein* issue as one where Congress attempted to interfere with what they call the "institutional integrity of the courts."[94] Under their reading, the problem with the statute struck down in *Klein* was that it made the courts Congress' "constitutional puppet"[95] by directing the courts to articulate legal conclusions to which they do not subscribe.[96] As already suggested, the reason scholars have had such difficulty with *Klein* is that this supposed distinction is inconsistent with a fundamental feature of our governmental system: a legislature's ability to write statutes that change the law, which then must be given effect by the courts.[97] In a very real sense, any conventional statute "directs results," yet the enactment of statutes remains the quintessential legislative function.

Given the difficulty scholars have had understanding *Klein*, it is no surprise that courts considering *Klein* challenges have failed to offer a convincing explanation and application of the *Klein* rule. The analysis in both of the *Robertson* opinions and in a number of other cases highlight the difficulties inherent in this inquiry.

The law making/result directing distinction has emerged most frequently in cases challenging a 1991 amendment to the 1934 Securities Act. Briefly, in 1991, the Supreme Court, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,[98] imposed a uniform limitations period for a particular implied right of action under the federal securities laws,

---

river traversed by the bridge); Young, *supra* note 69, at 1248 (distinguishing *Klein* from *Wheeling Bridge* on the ground that *Klein* dealt with private rights, while *Wheeling Bridge* dealt with public rights).

93. *See, e.g.*, Redish, *supra* note 89, at 719-20 (suggesting that *Klein* turned on the fact that Congress was usurping the President's pardon power when it purported to dictate to the courts the effect to be given to pardons).

94. *See* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 472 (1994).

95. *Id.*

96. *See id.* at 470-73.

97. The legislature's power to change the law includes the power to change it retroactively. In some cases, a statute's retroactivity may raise constitutional issues of due process, *see infra* note 172, and separation of powers. In *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240-46 (1995) (Breyer, J., concurring in judgment), Justice Breyer considers the effect of retroactivity on a separation-of-powers challenge to a federal law. *See infra* Part III.B.1 (discussing Justice Breyer's singling out analysis in *Plaut*). For a detailed discussion of several separation-of-powers issues raised by retroactivity, see generally Doidge, *supra* note 92.

98. 501 U.S. 350 (1991).

rejecting some lower court decisions that had applied the most analogous state law period.[99] On the same day it decided *Lampf*, the Court held, in *James B. Beam Distilling Co. v. Georgia*,[100] that a new rule of federal law applied to the parties in the case, announcing the rule must also be applied to all cases pending on direct review.[101] Thus, under the *Beam* rule, the new limitations period in *Lampf* had to be applied retroactively to any pending suits brought under the same cause of action. As a result of *Lampf*'s retroactive application, a number of pending—and high-profile—securities fraud suits, which had been considered timely before *Lampf*, were rendered untimely and thus dismissed.

Congress responded to the retroactive application of the *Lampf* rule by enacting section 27A of the FDIC Improvement Act of 1991.[102] Section 27A effectively nullified *Lampf*'s retroactivity by allowing a plaintiff to reinstate, on motion, any suit filed before the *Lampf* decision provided it was timely under the limitations period then controlling, and had been dismissed as time-barred on the authority of *Lampf*. Ultimately, the Supreme Court struck down section 27A on the ground that it violated Article III of the Constitution by directing federal courts to reinstate suits that had proceeded to final judgment.[103] Before the Supreme Court's decision, however, a large number of lower federal courts considered a separate ground for striking the statute. These courts found that section 27A violated the *Klein* rule by compelling them to reach certain results, without changing the underlying law.[104]

These courts' opinions illustrate the extreme difficulty attendant in applying the distinction made in *Klein*. Most courts concluding that section 27A did not violate the *Klein* distinction did so without much analysis, finding simply that the statute imposed a new limitations period for pre-*Lampf* cases, and noting that Congress has the power to set limitations periods for such lawsuits.[105] Courts that reached the opposite conclusion,

---

99. *See id.* at 361-62.

100. 501 U.S. 529 (1991).

101. *See id.* at 540.

102. 15 U.S.C. § 78aa-1 (1994).

103. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995).

104. Theoretically, at least, section 27A remains in force to the extent that it does not purport to require federal courts to reopen final judgments. *See* 15 U.S.C. § 78aa-1. The retroactive application of the pre-*Lampf* rule would thus continue to have force in lawsuits that had not reached final judgment, for example, those pending on appeal, or those which had never been dismissed on statute of limitations grounds. Thus, the *Klein* question raised by these courts remains open despite the Supreme Court's decision in *Plaut*.

105. *See, e.g.*, Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567, 1571-73 (11th Cir. 1992); Lundy v. Morgan Stanley & Co., 794 F. Supp. 346, 347-50 (N.D. Cal. 1992).

however, employed unsatisfactory methods to distinguish legitimate legislative power from illegitimate judicial direction found in section 27A. At least three courts adopted an extremely formalistic analysis, concluding that section 27A did not change the underlying law because on its face it simply instructed the courts not to apply *Lampf* retroactively.[106] These courts viewed that instruction not as amending the *Lampf* rule, but instead, merely and unconstitutionally, directing that courts not apply it in certain cases.

These courts' conclusions appear to rest on two related bases. First, they focus on section 27A's format, namely, that it phrases its rule by expressly commanding, for pre-*Lampf* cases, a return to pre-*Lampf* law (as opposed, presumably, to a statute that announced a particular limitations period).[107] The United States District Court for the District of Colorado asserted that section 27A represents an "interpretive rule,"[108] and suggested that "interpretation" is a function assigned to the courts, not the legislature.[109] This analysis, standing alone, is clearly vulnerable to the *Robertson* Court's analysis of section 318; in that case, the Supreme Court concluded that Congress' power to impose a particular rule means

---

106. *See, e.g., In re* Rospatch Sec. Litig., 802 F. Supp. 110, 114 (W.D. Mich. 1992); Bank of Denver v. Southeastern Capital Group, Inc., 789 F. Supp. 1092, 1094-98 (D. Colo. 1992); *In re* Brichard Sec. Litig., 788 F. Supp. 1098, 1103-04 (N.D. Cal. 1992).

107. *See, e.g., Bank of Denver*, 789 F. Supp. at 1097. The *Bank of Denver* court reasoned that:

> [i]n response [to *Lampf*], Congress did not retroactively amend [section 10(b) of the Securities Act] to state an express limitations period. Rather, Congress selected a discrete category of federal cases, those pending on [the date *Lampf* was decided], and directed federal courts hearing these cases to ignore the Supreme Court's binding interpretation of § 10(b) set out in *Lampf*. Congress thus effectively acted as a "super-appellate court," overturning *Lampf* without replacing that decision with any new law.
>
> . . . If Congress' purpose was to change the law, it could have enacted a retroactive express statute of limitations. . . . Instead, by selecting a discrete body of pending actions for special treatment under § [27A], Congress demonstrated that its sole purpose was to nullify the Supreme Court's interpretation of § 10(b) without amending § 10(b) itself. In so doing, Congress usurped the power set aside to the judiciary by the Constitution.

Id.; *see also Brichard*, 788 F. Supp. at 1103-04. The *Brichard* court concluded that:

> [t]he language of the statute and its legislative history demonstrate . . . that section 27A did not change the underlying *Lampf* rule. The section itself does not codify *Lampf*. Nor does it enact a statute of limitations different from the one announced in *Lampf*. The limitations periods of *Lampf* are impliedly approved by Congress' taking no action to codify or change those rules. Instead, on its face, section 27A only limits the retroactive application of those periods.

Id.

108. *Bank of Denver*, 789 F. Supp. at 1097.

109. *See id.*

that the format chosen by Congress to express that rule should not have constitutional implications.[110] Even without embracing *Robertson*'s broad deference to legislative format, the distinction drawn by these courts appears somewhat tenuous. Nothing prohibits Congress from expressing the content of a rule by reference to a previous court decision,[111] a pending court case, or even to current or future state laws.[112] Forcing Congress to state the actual substance of the rule, as opposed to allowing it to incorporate it by reference, seems extremely formalistic.

One court offered a more abstract version of this rationale. It concluded that section 27A did not constitute a change in law because it merely "overturn[ed] a decision of the Supreme Court [*i.e.*, *Lampf*] interpreting the unchanged language of § 10(b)."[113] For this court, a key factor in its *Klein* analysis seems to have been that section 27A did not directly change the language of the underlying securities law, and thus could be seen only as overruling a judicial interpretation of the statute. This analysis suggests that the underlying law, here section 10(b), implicitly includes a limitations period, one "found" by the Court in *Lampf*. Congress was, of course, free to change that limitations period. In order to do so, however, it would have had to explicitly insert one into the

---

110. *See* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 439-40 (1992). *But see* Johnston v. Cigna Corp., 789 F. Supp. 1098, 1101-02 (D. Co. 1992). The *Johnston* court distinguished section 27A from section 318, as interpreted by the Supreme Court in *Robertson*, on the ground that

> [i]n [*Robertson*] Congress enacted a statute which essentially provided that compliance with the new provisions would constitute compliance with several other previously existing statutes. In effect, Congress rewrote its own statutory framework. In stark contrast, § [27A] attempts to overturn a decision of the Supreme Court interpreting the unchanged language of § 10(b).

Id.

111. *See, e.g.*, Rabin v. Fivzar Assoc., 801 F. Supp. 1045, 1053-54 (S.D.N.Y. 1992). According to the *Rabin* court:

> Though the defendants argue that the absence of provision for an *express* statute of limitations applicable retroactively defeats the conclusion that the law has been "changed," neither they nor any of the cases they cite supply a rationale for holding that a change to a rule that finds its substance in the laws of the circuits is any less a change than one that proclaims a uniform limitations period.

Id.

112. For example, the statute at issue in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), incorporated into federal law all regulations that states had enacted or would thereafter enact dealing with harbor pilots. *See* Act of Aug. 7, 1789, ch. IX, § 4, 1 Stat. 54 ("That all pilots in the bays . . . of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress.").

113. *Johnston*, 789 F. Supp. at 1102.

law.[114] There is a clearly discernible link between this analysis and the Colorado district court's conclusion[115] that section 27A constitutes an "interpretive rule" as opposed to a change in the underlying law.

This conception has some intuitive appeal: if the Court in *Lampf* did in fact "find" a limitations period implicit in section 10(b), then Congress may not simply "overturn" that interpretation by fiat, but must do something that, in some formal sense, "amends" section 10(b). This conception fits neatly into *Klein*'s purported distinction between changing the underlying law and directing results under previous law. Moreover, it is consistent with Professors Eisgruber's and Sager's concept of "institutional integrity,"[116] to the extent that section 27A can be viewed as Congress second-guessing the courts on a matter of statutory interpretation.

The problem, however, lies in the fact that there is really no good way to determine whether section 27A really did amend the underlying law. Indeed, in a very real sense there is no distinction between these two possibilities: if lawmaking is the power to create liability rules and the procedural structure for enforcing those rules, then overturning a statutory interpretation and amending the underlying statute both constitute lawmaking because they both have this effect. As one influential judicial opinion noted, "the prescription of general rules of substantive law lies at the heart of the legislative function, and courts are obliged to apply the positive law in effect at the time of the judgment."[117] Through section 27A Congress simply required that the limitations period for cases filed pre-*Lampf* be decided under the pre-*Lampf* rule, namely, the most analogous state law limitations period. It is thus quite difficult to conclude that, on its face, section 27A directed results as opposed to changing underlying law.

Perhaps recognizing this difficulty, courts employing a *Klein* rationale for striking down section 27A have also relied on the fact that section 27A did not entirely repeal *Lampf*, but instead merely limited its effect to lawsuits filed after the date it was handed down.[118] Indeed, one of

---

114. *See* Rosenthal v. Dean Witter Reynolds, Inc., 811 F. Supp. 562, 565-66 (D. Colo. 1992) (noting that in enacting section 27A, Congress acted as a "super-appellate court" by overturning *Lampf* without establishing any new law).

115. *See supra* note 107 and accompanying text (discussing *Bank of Denver v. Southeastern Capital Group*, 789 F. Supp. 1092 (D. Colo. 1992)). The same judge, District Judge Babcock, decided both *Johnston* and *Bank of Denver*.

116. *See generally* Eisgruber & Sager, *supra* note 94.

117. United States v. Brainer, 691 F.2d 691, 695 (4th Cir. 1982) (citing PAUL BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 316 n.4 (2d ed. 1973)).

118. *See In re* Rospatch Sec. Litig., 802 F. Supp. 110, 114 (W.D. Mich. 1992) (asserting

these opinions uses section 27A's legislative history to demonstrate that Congress was well aware of the targets of this exemption, namely, several high-profile (and, in 1991, very unpopular) financiers-securities lawsuit defendants who stood to benefit from retroactive application of *Lampf*.[119] These courts' rationale appears to be that section 27A did not change the underlying law because Congress exempted only a particular class of cases from *Lampf*'s interpretation of that law. This analysis, however, does not provide a logical link between this classification or singling-out concern and the concerns surrounding *Klein*-type direction of results, aside from the obvious suspicion that Congress may have wanted to "direct results" by ensuring that certain individuals not be allowed to escape securities fraud liability on a technicality such as the untimeliness of the lawsuit. This type of "result direction", however, does not appear any different from that which would occur if Congress created new, even retroactive, liability that effectively targeted only a small class of individuals. There may certainly be equal protection problems with that sort of targeting, and such targeting may even raise separation of powers concerns.[120] However, realistically, the problem cannot be that Congress has unconstitutionally directed a result.

Klein issues have also arisen more recently, though with no more analytical clarity, in opinions considering challenges to the Prison Litigation Reform Act of 1995 (PLRA).[121] The PLRA requires federal courts, on a defendant's motion, to terminate previously-granted prospective relief

---

that Congress did not effect a change in law through section 27A because under that statute, the previous statute of limitations period continues; stating that section 27A instead "merely denies retroactive application of the *Lampf* limitations period); *Bank of Denver*, 789 F. Supp. at 1097-98 (holding that "Congress usurped the power set aside to the judiciary by the Constitution" by targeting several pending actions for legislative treatment under section 27A; finding that section 27A violates the doctrine of separation of powers because it only applies to cases pending on the date *Lampf* was decided.); *see also Rosenthal*, 811 F. Supp. at 565 (same, quoting *Bank of Denver*); *Johnston*, 789 F. Supp. at 1102 (distinguishing *Robertson* on the ground that section 27A serves only to "overturn a Supreme Court decision with which Congress did not agree," while section 318 has "general, prospective application, effecting a comprehensive set of rules to govern timber harvesting within a geographically and temporally limited domain").

The court in *Brichard* suggested that it would have approved a statute that applied equally to cases filed both before and after the *Lampf* decision. *See In re* Brichard Sec. Litig., 788 F. Supp. 1098, 1104 n.5 (N.D. Cal. 1992) ("Without deciding the question, the court believes that if Congress had enacted a statute of limitations period for private § 10(b)-5 actions and had commanded that the new statute was to apply retroactively, Congress would not have overstepped its legislative power.").

119. *See Brichard*, 788 F. Supp. at 1105-06; *see also Rospatch*, 802 F. Supp. at 115.

120. *See infra* Part III.B.1 (discussing the "singling out" rationale offered by Justice Breyer in *Plaut* for striking down section 27A).

121. 18 U.S.C. § 3626 (1994 & Supp. II).

correcting illegal prison conditions, unless the court made or now makes findings that such relief is the minimum necessary to correct a legal violation.[122] Further, such relief is to be stayed automatically within thirty days of the defendant's motion, although the stay can be extended to ninety days for good cause.[123] Prospective relief need not terminate if the relief "remains necessary to correct a current and ongoing violation of the Federal right."[124]

Inmates resisting prisons' motions to terminate relief—usually through a consent decree—have challenged the PLRA on a number of grounds. Most importantly for our purposes, inmates have argued that the termination and automatic stay provisions violate *Klein* by prescribing a rule of decision. Most courts have rejected this argument,[125] although a Ninth Circuit panel struck the termination provision on this ground[126] and at least one district court has accepted a similar argument to strike down the automatic stay provision.[127] Under the majority view, the statute satisfies *Klein* because it changes the underlying law, defined as the district court's power to grant equitable relief in this class of cases.[128] Although its opinion was later withdrawn, a Ninth Circuit panel questioned this analysis in *Taylor v. United States*,[129] suggesting that the relevant "under-

---

122. *See* 18 U.S.C. § 3626(b)(2)-(3).

123. *See* 18 U.S.C. § 3626(e)(2)-(3).

124. 18 U.S.C. § 3626(b)(3).

125. *See, e.g.*, Hadix v. Johnson, 133 F.3d 940 (6th Cir. 1998); Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997); Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997); Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2460 (1997).

126. *See* Taylor v. United States, 143 F.3d 1178 (9th Cir.), *withdrawn*, 158 F.3d 159 (9th Cir. 1998), *and on reh'g en banc aff'd on other grounds*, 1999 WL 402748 (9th Cir. June 18, 1999).

127. *See* Ruiz v. Scott, No. CIV.A.H.-78-987, 1996 WL 932104, *17 (S.D. Tex. 1996). A number of district courts have struck down the automatic stay provision on the related, but distinct, rule prohibiting congressional reopenings of final judgments. *See Hadix*, 947 F. Supp. 1100 (E.D. Mich. 1996), *rev'd*, 133 F.3d 940 (6th Cir. 1998); Glover v. Johnson, 957 F. Supp. 110 (E.D. Mich. 1997). At least two district courts have held that the same anti-reopening rule is violated by the termination provision. *See* Taylor v. Arizona, 972 F. Supp. 1239, 1243-45 (D. Az. 1997), *aff'd sub nom.* Taylor v. United States, 143 F.3d 1178 (9th Cir. 1998), *withdrawn*, 158 F.3d 159 (9th Cir. 1998), *and on reh'g en banc aff'd on other grounds*, 1999 WL 402748 (9th Cir. June 18, 1999); Gavin v. Ray, No. 4-78-CV-70062, 1996 WL 622556, **2-3 (S.D. Iowa Sept. 18, 1996), *rev'd sub nom.* Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997). The relative popularity of this latter ground for striking down the PLRA may be attributable to the fact that the Supreme Court in *Plaut* employed this ground to strike down section 27A, while declining to reach the broader *Klein* argument that some lower courts had employed to reach the same result.

128. *See, e.g.*, *Hadix*, 133 F.3d at 943; *Inmates*, 129 F.3d at 658; *Plyler*, 100 F.3d at 372.

129. 143 F.3d 1178 (9th Cir. 1998), *withdrawn*, 158 F.3d 159 (9th Cir. 1998), *and on reh'g en banc aff'd on other grounds*, 1999 WL 402748 (9th Cir. June 18, 1999). A majority

lying law" was not the law granting the district court particular remedial powers, but instead the constitutional provisions underlying the plaintiffs' legal claims.[130] This disagreement is significant when the underlying legal claim rests on the Constitution: since simple legislation cannot alter the Constitution, courts' willingness to allow Congress to alter the scope of available remedies inevitably affects the ease and completeness with which constitutional rights can be vindicated.[131] However, when the legal claim is based on a statutory right, the disagreement over the PLRA becomes less significant, because the legal right itself would be subject to congressional alteration.[132]

A distinct set of objections to the PLRA centers on the statute's effect on courts' functioning. In *Taylor*, the Ninth Circuit panel relied on the

---

of the Ninth Circuit en banc panel held that the constitutional question did not have to be addressed because the state was asking for modification of an interlocutory judgment that had already expired, and thus was essentially asking for the wrong relief. *See* 1999 WL 402748, at *1. A plurality of the panel nevertheless discussed the constitutional issue, in response to the dissent's constitutional analysis. *See id.* at *6-*9. The plurality concluded that the judgment from which the state was requesting relief was a final judgment that featured no ongoing judicial supervision, and thus, that it would violate the "anti-reopening of final judgments" rule to apply the PLRA to this particular judgment. *See id.* Having expressed its constitutional doubts based on the "anti-reopening" rule, the en banc plurality did not reach the *Klein* issue. References in the text to *Taylor* are to the original three-judge panel opinion, whose constitutional analysis is not the current law in the Ninth Circuit, given the withdrawal of the that opinion. *See* 158 F.3d 1059 (9th Cir. 1998) (withdrawing panel opinion); *see also* 9TH CIR. R 35-3(5) (providing that where an en banc court orders than an opinion be withdrawn, "that opinion shall not be regarded as precedent and shall not be cited in either briefs or oral argument to the Ninth Circuit or any district court in the Ninth Circuit"). Although the panel opinion has been withdrawn, it provides a good example of how a federal court confronted with *Klein* issues has dealt with them.

130. *See Taylor*, 143 F.3d at 1183. The *Taylor* panel reasoned that:

> Congress did not somehow change the applicable law by altering the permissibility of certain types of consent decrees, for the only relevant inquiry is whether it changed the substantive law upon which the parties' consent decree and, more important, the district court's judgment was based. In this case, it clearly did not.

Id.

131. It should be noted that the PLRA does not purport to divest federal courts' of all remedial power when dealing with prison conditions-based violations of constitutional rights; indeed, the statute specifically authorizes the continuance of such relief when courts find it necessary to vindicate those rights. *See* 18 U.S.C. § 3626(b)(3)(1994 & Supp. II); *see also* Benjamin v. Jacobson, 124 F.3d 162, 169-70 n.11 (2d Cir. 1997) (noting that is unnecessary to decide whether Congress has the power to eliminate all federal jurisdiction in a particular area, because the PLRA allowed continued use of injunctive relief to vindicate federal rights).

132. *Cf.* System Fed'n No. 91, Ry. Employes' Dep't, AFL-CIO v. Wright, 364 U.S. 642 (1961) (requiring that courts not continue to enforce previously-imposed injunctive relief after Congress altered the substantive law underlying that relief).

mandatory language of the termination provision,[133] and the likely absence of any of the conditions creating an exception to the termination requirement, to conclude that the provision constituted an unconstitutional legislative direction of a result.[134] The court used similar arguments to find fault with the automatic stay provision. It noted that a court faced with a motion to terminate a consent decree would probably not be in a position to make the findings required to continue enforcing the decree, because there would probably be no record to furnish the basis for such findings.[135] It also concluded that the automatic stay provision's ninety day clock did not provide enough time for courts to make the findings the statute required for the pre-existing relief to continue.[136] Based on these observations, the court concluded that the automatic stay provision effectively directs courts to stay previously-granted relief; as the Ninth Circuit panel put it, the ostensible exceptions to the termination requirement "provide[] no room for judicial decision-making."[137]

This analysis points toward a pragmatic understanding of the *Klein* rule-of-decision prohibition. It asks, given the realities of a particular type of judicial proceeding (say, entry of a consent decree in a complex institutional reform litigation), whether congressional regulation purports to allow a role for judicial discretion (for example, to make findings), but actually forces a particular result with little or no room for that discretion.[138] By contrast, courts upholding the termination and auto-

---

133. The termination provision reads as follows:

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

18 U.S.C. § 3626(b)(2).

134. *See Taylor*, 143 F.3d 1178, 1184 ("Congress directed the outcome of this case and similarly situated pre-PLRA consent decrees . . . . Because the decrees are issued upon consent, no findings of the sort required by § 3626(b)(2) were made, nor would they necessarily have been made, even in a contested case, given the absence in 1973 of such specific requirements.") (citation omitted).

135. *See id.* at 1184-85 (stating that "the court cannot now make the findings required by 18 U.S.C.A. § 3626(b)(3), because no record was made. One of the normal purposes of consent to the judicial decree is to avoid making a record which would lead to such findings.").

136. *See id.* at 1185; *see also* Hadix v. Johnson, 947 F. Supp. 1100, 1364 (E.D. Mich. 1996).

137. *Taylor*, 143 F.3d at 1184.

138. Thus, this understanding of *Klein* goes beyond the more formalistic understanding embraced by the courts that struck down § 27A on the grounds that it simply instructed lower courts not to apply the Supreme Court's *Lampf* decision. *See supra* note

matic stay provisions adopted a more formalistic approach. These courts noted that the statute left courts ostensibly with the task of applying the statute, for example, determining whether the required findings had been made originally, or determining whether those findings could now be made. These courts acknowledged that the task may be difficult, given the PLRA's time constraints and other practical difficulties, but concluded that the statute satisfied *Klein* by leaving formal judicial authority with courts.[139]

The *Taylor* panel's objections to the PLRA, and the pragmatic understanding of *Klein* they reflect, find a distant echo in that same court's analysis, several years earlier, in *Robertson*. Just as *Taylor* found unconstitutional interference with the courts in a statute that directed an outcome absent findings that were unlikely to exist and that could not be made within the time allotted by the statute, so too the Ninth Circuit's *Robertson* opinion found fault with a statute that required findings that seemed simply incorrect as an empirical matter. Recall that section 318 "determine[d] and direct[ed]" that compliance with its new forest management requirements constituted "adequate consideration for the purpose of meeting the statutory requirements" alleged to have been violated in the *Robertson* litigation. The Ninth Circuit's testing of this language against *Klein* focused, quite sensibly, on the fact that those underlying statutes imposed particular requirements whose satisfaction or violation could be determined as an empirical matter. For example, the

---

106 and accompanying text. *Taylor* suggests that the problem is not simply with a legislative directive to a court to take certain action (for example, "reopen cases that you had dismissed on the authority of *Lampf*"). Instead, the problem is with a directive that purports to authorize the court to use its adjudicative skills (for example, to make findings) but then fails to give the courts adequate opportunity to adjudicate. So understood, *Taylor*'s understanding of *Klein* is clearly related to Eisgruber's and Sager's conception of the courts' "institutional integrity." *See supra* note 94 and accompanying text. Under *Taylor*'s analysis, the PLRA usurps that integrity not by commanding the courts to articulate legal conclusions to which they do not subscribe, but instead by purporting to capture the prestige and legitimacy of a judicial proceeding that in fact is not allowed to take place.

139. *See, e.g.*, Gavin v. Branstad, 122 F.3d 1081, 1089 (8th Cir. 1997) ("Congress has left the judicial functions of interpreting the law and applying the law to the facts entirely in the hands of the courts. The PLRA leaves the judging to judges, and therefore it does not violate the *Klein* doctrine."); Jensen v. County of Lake, 958 F. Supp. 397, 404 (N.D. Ind. 1997) ("It is important that section 3626 does not mandate the courts to terminate cases without review by the courts. The section only establishes the standards to follow; the court itself, and not Congress, determines whether a constitutional violation exists and what is necessary to remedy such violation."); Benjamin v. Jacobson, 935 F. Supp. 332, 351 (S.D.N.Y. 1996), *aff'd in part and rev'd in part*, 124 F.3d 162 (2d Cir. 1997) (characterizing section 3626 as restricting courts' discretion but asserting that courts nonetheless "will continue to define the scope of prisoners' constitutional rights, review the factual record, apply the judicially determined constitutional standards to the facts as they are found in the record and determine what relief is necessary to remedy the constitutional violations.")

court noted that one of the underlying statutes, the Federal Land Policy and Management Act,[140] required the Government to use "principles of multiple use and sustained yield" and a "systemic interdisciplinary approach" when managing federal lands.[141] Determination of whether the Government complied with these requirements could be made by the court's examination of facts about the Government's actual management of those lands. Section 318, however, arguably short-circuited that process by requiring a finding that compliance with section 318's requirements constituted compliance with those statutes. Surely, if any statute compels findings under existing law, then the Ninth Circuit demonstrated that section 318 does.[142]

Thus, the *Klein* analysis in both *Taylor* and the Ninth Circuit's *Robertson* opinion respond to similar concerns about the proper functioning of courts as institutions independent from the legislature. Under this conception of *Klein*, courts are bound to apply the law created by the legislature. Their procedural machinery, however, cannot be invoked in a way that either formally leaves room for judicial discretion while realistically excluding the possibility of such discretion (*Taylor*), or requires a court to reach legal conclusions at odds with the court's own understanding of reality (*Robertson*).

Of course, the Supreme Court unanimously disagreed with the Ninth Circuit's reading of section 318, holding that section 318 simply changed the underlying law. As noted above,[143] the Court's conclusion responds to a common-sense conception that constitutional issues concerning the scope of Congress' legislative power should not turn on purely format issues. Simply put, since Congress had the power to amend the underlying environmental statutes by including in each of them an alternative means of compliance (here, by satisfying section 318's forest management requirements), why should the constitutional line be based on the format that Congress uses to impose these alternative means?[144]

---

140. Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1994).

141. 43 U.S.C. § 1712(c)(1)-(2) (1994)

142. *Cf.* Gray v. First Winthrop Corp., 989 F.2d 1564, 1569-70 (9th Cir. 1993) (noting that the Supreme Court's opinion in "*Robertson* indicates a high degree of judicial tolerance for an act of Congress that is intended to affect litigation so long as it changes the underlying substantive law in any detectable way.").

143. *See supra* Part I.C (discussing the Supreme Court's analysis of section 318 in *Robertson*).

144. This is not to suggest that Congress could alter legislatively-granted rights and direct that such alterations be given effect to cases that have already proceeded to final judgment. In *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995), the Supreme Court condemned such attempts as unconstitutional legislative interference with the judiciary. What

The Supreme Court's conclusion is supported by precedent suggesting that, notwithstanding the Ninth Circuit's analysis, Congress can in fact dictate relationships between empirical events and legal conclusions. First, the Court, in *Tot v. United States*[145] recognized Congress' power to prescribe evidentiary presumptions based "upon a view of relation between the fact actually shown and the fact presumed broader than that a jury might take in a specific case."[146] The *Tot* Court did note that this power did not extend to presumptions where there was "no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."[147] However, the Court grounded this limitation in the due process clause.[148] Employing due process rather than separation of powers here makes sense, because a presumption's rationality, or lack thereof, does not affect the degree of legislative intrusion into the judicial domain, the heart of the separation of powers concern with section 318.[149]

Congress has similarly broad power to define statutory terms, even if the definition differs from the ordinary meaning of those words.[150] Federal courts have been generous in construing this power. For example, in *Ace Waterways, Inc. v. Fleming*,[151] a district court enforced a congressional amendment of a statute that expanded the definition of "steam vessel," from "every vessel propelled in whole or in part by steam" to include "[e]very vessel . . . propelled in whole or in part by steam or by any

---

is significant for our purposes, however, is that *Plaut* recognized this type of interference as analytically distinct from *Klein*-condemned legislative attempts to dictate a rule of decision to the courts. *See Plaut*, 514 U.S. at 218 (noting the distinction between these two issues). The PLRA cases also note this distinction, by treating the *Klein* and *Plaut* arguments as two distinct separation of powers arguments. *See, e.g.*, *Gavin*, 122 F.3d at 1085 (distinguishing between the *Klein* and *Plaut* arguments); Plyler v. Moore, 100 F.3d 365, 371-72 (same).

145. 319 U.S. 463 (1943).

146. *See id.* at 468.

147. *Id.* at 467-68 (footnote omitted).

148. *See id.* at 467; *see also id.* at 473 (Black, J., concurring) (basing his concurrence on the requirements of due process).

149. *But cf.* Sager & Eisgruber, *supra* note 94, at 470-73 (arguing that the *Klein* statute suffered a separation of powers flaw because it forced courts to reach legal conclusions to which they did not subscribe).

150. *See* 1A N. SINGER, SUTHERLAND'S STATUTORY CONSTRUCTION § 20.08, at 90 (5th ed. 1993). The challenges to statutory definitions deal with their linguistic rationality, not with whether the classifications they impose violate equal protection. *Cf., e.g.*, Federal Communications Comm'n v. Beach Communications, 508 U.S. 307, 310-13 (1993) (upholding statute's definition of "cable system" under the rational-basis standard embodied in the Due Process Clause's equal protection component).

151. 98 F. Supp. 666 (S.D.N.Y. 1951).

other form of mechanical or electrical power."[152] Despite the court's recognition of the resulting statute's Alice-in-Wonderland quality,[153] it gave effect to the definition, with an analysis as sweeping as it was curt: "Congress[,]" the court stated, "has a right to legislate by definition if it chooses."[154]

It is logical that Congress should have the same broad power to define statutory terms that it has over evidentiary presumptions, since such presumptions, especially if irrebuttable, have exactly the same effect on courts as if the statute had explicitly defined a term to incorporate the presumed conclusion. Indeed, the Supreme Court has made a similar point. In *Usery v. Turner Elkhorn Mining Co.*,[155] the Court considered a statute that required mining companies to pay benefits to miners who were "totally disabled," and enacted an "irrebuttable presumption" that affliction with a certain disease constituted "total disability." The Court rejected a due process claim that the presumption denied companies the right to present evidence on whether a miner with that particular disease was in fact "totally disabled." It pointed out that Congress could have achieved the same result by writing the statute to require explicitly compensation to miners suffering that particular disease (as opposed to using two steps: first, granting the right to "totally disabled" miners and, second, enacting a presumption that a particular disease constituted "total disability"). The court refused to consider as relevant Congress' decision to achieve the desired result by use of an evidentiary presumption, stating that "we do not think that Congress' choice of statutory language can invalidate the enactment when its operation and effect are clearly permissible."[156]

Given the degree of leeway reflected in these cases, the Supreme Court's deference to Congress' choice of format in section 318 appears less extraordinary. If Congress can write a statute that defines "steam vessels" to include vessels not propelled by steam,[157] it should be able to write a statute that, as the *Robertson* Court observed, effectively amended each of the underlying environmental statutes by offering the government a new, alternative, means of compliance, even though this

152. *See id.* at 667; Act of Feb. 28, 1871, ch. 100 § 1, 16 Stat. 440, *amended by* Act of June 13, 1933, ch. 61, 48 Stat. 125, *codified at* 46 U.S.C. § 361, *repealed by* Act of Aug. 26, 1983, Pub. L. 98-89, § 4(b), 97 Stat. 599.

153. *See Ace Waterways*, 98 F. Supp. at 667.

154. *Id.*

155. 428 U.S. 1 (1976).

156. *Id.* at 23-24.

157. *See supra* notes 150-54 and accompanying text.

new means was not a formal amendment to the underlying statutes, and even though the substantive statutory provision, as read in the United States Code, remained seemingly unamended. Thus, while there may be legitimate *Klein*-based concerns with legislative manipulation of judicial processes (the concern identified by the *Taylor* panel),[158] the Ninth Circuit's concern in *Robertson*—that legislatures be limited in their ability to manipulate the substantive relationships between empirical findings and legal conclusions—does not fare so well. Instead, this latter concern encounters a great deal of eminently logical precedent suggesting that Congress has broad power to prescribe those relationships and to do so in whatever manner it chooses.

All told an examination of the *Klein* rule in cases dealing with statutory claims[159] leads to Judge Calabresi's exasperated conclusion, expressed in the Second Circuit's PLRA opinion:

> Whether a statute provides only the standard to which courts must adhere or compels the result that they must reach can be a vexed question in cases in which, as a practical matter, simple adherence to the "new" standard in effect mandates a particular result. Such cases may be plausibly characterized either as validly leading the court to reach a different outcome as a result of a change in the underlying law or as unconstitutionally imposing a different outcome under the previous law.[160]

Thus, the difficulty courts have had drawing a line between result direction and law changing,[161] the ambiguity as to whether *Klein* actually established this line,[162] and the broad reading courts have given to congressional power to prescribe factual presumptions and definitions,[163] to-

158. This is not to suggest that *Taylor*'s analysis is trouble-free. One problem that arises immediately is the difficulty of determining exactly when a time limit restrains unconstitutionally judicial ability to act. For a thorough discussion of this issue, including the possible applicability of *Klein*, see *United States v. Brainer*, 691 F.2d 691, 694-99 (4th Cir. 1982).

159. *See supra* notes 131-32 and accompanying text (suggesting the special problem posed by constitutional claims).

160. Benjamin v. Jacobson, 124 F.3d 162, 174 (2d Cir. 1997). Tellingly, Judge Calabresi followed up this statement with a citation directing readers to compare the Ninth Circuit and Supreme Court decisions in *Robertson*. *See id.*

161. *See supra* notes 98-143 and accompanying text.

162. *See, e.g.*, Gray v. First Winthrop Corp., 989 F.2d 1564, 1570 (9th Cir. 1993) (holding that section 27A satisfies "whatever is left of the *Klein* test"); *Brainer*, 691 F.2d at 695 (suggesting inherent tension in any possible *Klein* holding limiting Congress' ability to prescribe rules of decision to courts); Young, *supra* note 69, at 1233-38 (suggesting that *Klein* did not include a holding about fact dictation).

163. *See supra* notes 145-154 and accompanying text (discussing the presumption in *Tot v. United States*, 319 U.S. 463, 468 (1943), and *Ace Waterways, Inc. v. Fleming*, 98 F.

gether place a heavy burden on those who would find a separation of powers flaw in section 318's seeming usurpation of the judicial function.

Discussion of the two *Robertson* opinions brings us full circle. The above analysis suggests that *Klein*'s distinction between law-making and fact or result-directing does not by itself furnish a satisfying means for evaluating the initial intuition that something is wrong with section 318. When considered against the Supreme Court's *Robertson* analysis and other examples of legislative power to prescribe relationships between fact and law, the judicial opinions concerning section 27A and the PLRA, and the Ninth Circuit's *Robertson* opinion, seem to lack logical standards for distinguishing between legitimate legislative law-changing and illegitimate legislative result-prescribing. As suggested above, these difficulties cast doubt on any attempt to apply *Klein* to regulatory issues otherwise within Congress' legislative power.[164]

In short, *Klein*'s distinction between law-making versus fact or result-directing fails to provide a clear model for evaluating statutes such as section 318. But rejection of the *Klein* analysis does not quell the unease raised by section 318, which led to the examination of *Klein*'s applicability in the first place. Is there another way to analyze the trouble with *Robertson*?

III. SINGLING OUT

A. Introduction

The line the Ninth Circuit drew in *Robertson* between normal congressional legislating and inappropriate congressional result-directing parallels the distinction between the tasks appropriate for a majoritarian institution, such as Congress, and a non-majoritarian institution, such as a court. As a general rule, majoritarian institutions enact rules that apply generally to society, while courts apply those rules to individual litigants.[165] The political science insight behind this division is neither novel

Supp. 666, 667 (S.D.N.Y. 1951), that Congress has broad power to prescribe legal and factual findings).

164. This conclusion does not leave *Klein* without any effect. Instead, it continues to limit congressional ability to interfere with judicial consideration of issues falling with another branch's constitutional responsibility, such as, the pardon power that was at issue in *Klein*.

165. Of course, this is a simplification. Sometimes judicial decisions affect broad classes of individuals, either through devices such as class actions, or by the enunciation of a legal rule applicable to a broad class of individuals, as happens, for example, when the Supreme Court interprets a statutory or constitutional provision. Conversely, legislative acts sometimes affect only a small class of individuals. Nevertheless, the authority for federal courts to hand down broad-ranging decisions stems from their constitutional power to

nor difficult to grasp. By requiring legislatures to act generally, rather than particularly, the rule minimizes the chance of oppressive legislation, as it ensures that everyone in a particular class will be affected by the legislature's rule.[166] Similarly, assignment of the law application function to courts ensures an unbiased, equal application of the general rule to individuals by a politically-insulated institution. Ideally, a politically accountable legislature enacts broad policy applicable to all similarly situated parties, with politically neutral courts ensuring that the legislative policy is applied equally and fairly to all parties.[167] This model of government finds expression in a number of constitutional provisions that attempt to ensure that Congress and state legislatures limit themselves to the enactment of generally applicable rules. The most notable of these provisions is, of course, the Equal Protection Clause;[168] but also speaking to this concern are the Bill of Attainder,[169] Ex Post Facto,[170] and Privi-

---

hear cases and controversies between two parties. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498-502 (1975) (discussing the requirement of standing for justiciability). Conversely, constitutional safeguards exist to guard against inappropriate singling-out by the legislature. *See infra* notes 168-82 and accompanying text (listing bases for constitutional challenges to statutes that single out the targets of legislation).

166. *See, e.g.*, Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring in the judgment) (noting that society's salvation from abuse by the legislature "is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me"); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring) (arguing that to ensure against arbitrary and unreasonable government, laws must be applied generally because "nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected"); *see also* 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.4, at 34-35 (3d ed. 1994) (arguing that this same insight explains the rejection of the "bitter with the sweet" theory of procedural due process, under which government has the power not only to create property interests in government benefits but also to prescribe the procedure for individuals to contest a deprivation of that interest).

167. *See, e.g.*, United States v. Brown, 381 U.S. 437, 445 (1965) (noting, for example, that the Bill of Attainder Clause "reflect[s] the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons"); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810) ("It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.").

168. U.S. CONST. amend. XIV, § 1. While the Equal Protection Clause of the Fourteenth Amendment applies only against the states, the Supreme Court has found in the Due Process Clause of the Fifth Amendment an equal protection principle applicable against the federal government. *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).

169. U.S. CONST. art. I, § 9, cl. 3.

170. *Id.*

leges and Immunities[171] Clauses.[172] Analogously, the Constitution reflects the judicial role sketched above through its limitation of the judicial power to "cases and controversies" in which a plaintiff must show some particularized injury caused by the defendant's action.[173]

The existence of these provisions, and of the model they reflect, obviously does not resolve particular questions about the proper use of the legislative power. It is a fundamental characteristic of legislation that it classifies, either by favoring or disfavoring particular conduct, whose performers thereby become a class, or by identifying pre-existing classes for favorable or unfavorable treatment. The question then becomes the legitimacy of the classification—i.e., is it driven by real differences of relevant characteristics, or is it an attempt at illegitimate singling out, and who has the authority to make that determination? Indeed, it is not necessarily inconsistent with this model for the legislature to create a class consisting of one person.[174] This possibility indicates that the constitutionality of a statutory classification cannot be determined solely by a mechanical inquiry into the size or scope of the affected class, although these characteristics together may play an important role in the constitutional decision. Is there a test for the appropriateness of legislative classification decisions?

---

171. U.S. CONST. art IV, § 2, cl. 1.

172. In addition, the Fifth and Fourteenth Amendments' Due Process Clauses prohibit arbitrary or irrational retroactive application of statutes. *See, e.g.*, United States v. Sperry Corp., 493 U.S. 52, 64-65 (1989); Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 728-31 (1984); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15-17 (1976).

173. U.S. CONST. art. III, § 1. In *Lujan v. Defenders of Wildlife*, the Court relied on a version of this distinction to hold that a provision allowing citizens to bring private suits under the Endangered Species Act did not suffice to provide Article III standing to a plaintiff in the absence of a particularized injury suffered by that plaintiff. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 571-78 (1992). In reaching this conclusion, Justice Scalia, on behalf of the Court, expressed the concern that such an expansion of standing would allow the courts to oversee the executive's administration of the laws—-normally subject only to political checks—without the motivating force of an injured plaintiff seeking the courts' assistance for redress. *See id.* at 576-78. Commentators have disputed this understanding of the judicial role. *See, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166-68 (1992) (arguing that Article III's "case or controversy" limitation should not be read as limiting Congress' power to authorize courts to hear lawsuits where the plaintiff has not suffered a concrete, particularized injury).

174. *See, e.g.*, Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 473-84 (1977) (rejecting bill of attainder challenge to a statute addressed only to the Presidential Papers of President Richard Nixon); *see also* Hercules Inc. v. EPA, 598 F.2d 91, 118 (D.C. Cir. 1978) (upholding agency use of rulemaking, rather than adjudication, procedure despite the fact that the regulation affected only one entity); Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1306-07 (10th Cir. 1973) (same).

B. Singling Out as a Separation of Powers Issue

The problem of legislative singling out is normally addressed under Equal Protection Clause analysis, that is, through an inquiry into whether the classification drawn by the legislature satisfies the appropriate level of scrutiny. In a narrow category of cases, the constitutional inquiry is addressed by the Bill of Attainder Clause, which asks a similar question.[175] At times, however, the singling out concern is addressed through the concept of separation of powers. As might be expected, these situations arise when Congress singles out in a way that appears to suggest a usurpation of the judicial function. Since this is the salient concern with section 318, this Article first examines singling out through the prism of separation of powers.

Commentators[176] and courts[177] noted the importance of the separation of powers principle as a means of protecting individuals, just as such protection is afforded through more direct means such as the Equal Protection and Bill of Attainder Clauses. Of course, often there is no individual right clearly at stake in a separation of powers dispute. For example, a case considering the constitutionality of a deficit-reduction statute that gave quasi-executive power to an individual under the control of Congress might implicate the separation of powers principle without directly raising concerns about individual rights.[178] However, cases where a separation of powers analysis does directly implicate individual rights provide some insight into the separation of powers concerns underlying legislative singling out.

Two modern separation of powers cases directly implicating individual rights have generated concurring opinions that relied on singling out rationales. Most recently, in *Plaut v. Spendthrift Farm Inc.*,[179] Justice Breyer concluded that the Constitution did not allow Congress to enact a

---

175. *See Nixon*, 433 U.S. at 468 (identifying elements of a valid bill of attainder claim). The Bill of Attainder Clause has been interpreted to apply only when legislation specifically identifies the individual allegedly singled out. *See, e.g.*, United States v. Lovett, 328 U.S. 303, 315 (1946).

176. *See generally* THE FEDERALIST NO. 47 (James Madison) (discussing the liberty-enhancing characteristic of separation of powers and noting Montesquieu's analysis of this issue); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991) (analyzing the relationship between the concepts of separated powers and ordered liberty).

177. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 380 (1989) (noting that the Separation of Powers Clause is "essential to the preservation of liberty"); Bowsher v. Synar, 478 U.S. 714, 721-22 (1986) (same).

178. *See Bowsher*, 478 U.S. at 733-34.

179. 514 U.S. 211 (1995).

statute commanding reopening of a class of final judgments, due to the statute's applicability to a closed and relatively small set of cases.[180] A decade earlier, in *Immigration and Naturalization Service v. Chadha*,[181] Justice Powell concluded that a legislative veto of an INS decision to suspend an alien's deportation constituted *de facto* adjudication, and thus was beyond Congress' power.[182] Both of these opinions reflect the concern about a legislature being able to single out individuals for unfavorable treatment and thus, violate their rights to a neutral, unbiased application of law.

1. Justice Breyer's Singling Out Analysis

As noted earlier, in *Plaut* the Court struck down a statute requiring federal courts to reopen final judgments in securities fraud cases where the judgment was based on retroactive application of an intervening Supreme Court opinion shortening the limitations period for such actions.[183] In other words, Congress, unhappy with the fact that retroactive application of a new judicially-crafted limitations period would render untimely suits that had previously been timely, ordered courts to apply the previous (longer) limitations period to suits that had been filed before the announcement of the new (shorter) period. The problem was that this legislative mandate extended to suits that had been dismissed based on the intervening Supreme Court opinion, even if a dismissal had become final. The Supreme Court struck down the statute on this ground, holding that to the extent section 27A purported to require the reinstatement of lawsuits that had proceeded to final judgment, it intruded unconstitutionally into the judicial power to decide cases and controversies.[184]

While the majority in *Plaut* focused on the integrity of final judgments as a component of the judicial power, Justice Breyer applied a broader, but less categorical, separation of powers test. For Justice Breyer, the problem with section 27A was that it applied to a discrete, closed class of

180. *See id.* at 240-41 (Breyer, J., concurring in the judgment).

181. 462 U.S. 919 (1983).

182. *See id.* at 965-66 (Powell, J., concurring in the judgment).

183. *See supra* notes 92 & 97 and accompanying text. The new limitations period was announced in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991). *Lampf* itself did not decide the retroactive application of the new limitations period enunciated in that case. However, the same day the Court decided the limitations period issue in *Lampf*, it also decided a case, *James B. Beam Distilling Co. v. Georgia*, holding that a new rule of federal law applied to the parties to the case announcing the rule must also be applied to all cases pending on direct review. *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 544 (1991). Thus, under the *Beam* rule, the new limitations period in *Lampf* had to be applied to retroactively.

184. *See Plaut*, 514 U.S. at 218-19.

cases, indeed, a class of cases, the particulars of which Congress seemed to be familiar.[185] These characteristics convinced him that there was simply too great a danger that Congress had singled out particular individuals for unfavorable treatment—the resurrection of lawsuits against them.[186] In other words, by legislating so as to affect only a closed, limited, and apparently identified class of individuals, Congress applied law to individuals, thereby acting like a court rather than making law.

Of course, as Justice Breyer himself pointed out, "*sometimes* Congress can enact legislation that focuses upon a small group, or even a single individual."[187] For Justice Breyer, though, prospectivity and generality of application (which he notes flows in part from the prospectivity itself[188]) make statutes "more than simply an effort to apply, person by person, a previously enacted law, or to single out for oppressive treatment one, or a handful, of particular individuals."[189] Thus, he concludes:

> if Congress enacted legislation that reopened an otherwise closed judgment but in a way that mitigated some of the here relevant "separation-of-powers" concerns, by also providing some of the assurances against "singling out" that ordinary legislative activity normally provides – say, prospectivity and general applicability – we might have a different case.[190]

Once he found that section 27A had "no such mitigating features,"[191] the way was open for his conclusion that it violated the separation of powers.[192]

Justice Breyer's analysis reflects the close connection between legislative singling out, the separation of powers doctrine, and *Klein*'s focus on the law-changing/result-directing distinction. Breyer's analysis suggests that singling out is analogous to applying, as opposed to changing, the law.[193] This is a logical relationship, since adjudication can be thought of as singling out individuals and applying the law to them on a case-by-case

185. *See id.* at 243-44 (Breyer, J., concurring in the judgment) (noting evidence suggesting Congress was aware of the particular lawsuits that would be resurrected under section 27A).

186. *See id.*

187. *Id.* at 242.

188. *See id.* at 242-43 (noting that the characteristic of prospectivity means that Congress is not completely able to predict the identity of the individuals who will be affected by the law).

189. *Id.*

190. *Id.* at 243.

191. *Id.*

192. *See id.* at 246.

193. *See id.* at 242-43.

basis. Legislation, on the other hand, can be thought of as the process of prescribing generally applicable rules to an open-ended class.[194] Singling out, then, can be thought of as another way of expressing the *Klein* concern about the appropriate realms of courts and legislatures.

Unfortunately, Justice Breyer's analysis fails to account for much Supreme Court jurisprudence. Indeed, it does not even explain why the Court, in cases he cited, has upheld some laws in the face of singling out challenges. For example, in *Nixon v. Administrator of General Services*,[195] the Court rejected a bill of attainder challenge to a statute that aimed explicitly at the preservation of Richard Nixon's Presidential papers.[196] The statute may have been prospective (although that is not clear) but the separation of powers benefit of prospectivity—that is, leaves Congress not completely sure as to the scope of the statute's application and thus does not allow the legislature to single out particular individuals for burdensome treatment—simply did not exist in that case.[197] The statute dealt with President Nixon's papers, and only his, regardless of whether it did so prospectively or retroactively.[198] While citing such cases for the proposition that sometimes Congress may single out, Justice Breyer fails to explain why the singling out in those cases[199] is appropriate, while it is not in others.

We are back, then, to the issue of classification. In cases cited by Justice Breyer the Court upheld legislation through which Congress placed burdens on narrowly defined groups.[200] The relevance of this issue to *Robertson* is clear: if the trouble with *Robertson* is that Congress, in section 318, was trying effectively to decide particular cases, and if that concern has a well-established structural foundation, then what is the line that separates invalid attempts to accomplish this singling out from valid legislative classifications that simply happen to be extraordinarily narrow?

---

194. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810) (noting that the legislature creates general rules and the courts apply them to individuals).

195. 433 U.S. 425 (1977) (cited at *Plaut*, 514 U.S. at 242 (Breyer, J., concurring in the judgment)).

196. *See id.* at 483-84.

197. *See id.* at 429.

198. *See id.*

199. In addition to *Nixon*, Justice Breyer cites *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984), and *United States v. Brown*, 381 U.S. 437 (1965), both of which concern the Bill of Attainder Clause. *See Plaut*, 514 U.S. at 242. The Court rejected the bill of attainder claim in *Selective Service* but accepted it in *Brown*. *Compare Selective Service*, 468 U.S. at 846, *with Brown*, 381 U.S. at 440.

200. *See Plaut*, 514 U.S. at 242.

2. The Problem of Legislative Specificity

The tension here is between, on the one hand, the above-described model's concern that Congress not be allowed to single out individuals for unfavorable treatment, and on the other hand, the Supreme Court's realization, at least after 1937, that federal courts should generally defer to legislative classification decisions. The clash is brought to a head by statutes that single out, but do so for a plausible reason. If there is to be any content to the singling out prohibition, then there must be judicial review of Congress' rationale for singling out. Other rules may also be used to enforce, at least partially, the singling out prohibition. For example, there could be a *per se* rule, as there is in bill of attainder doctrine, that statutes cannot identify the disfavored individual by name.[201] But because all legislation classifies,[202] at some point courts will have to examine the appropriateness of legislative classifications, at least if they are going to enforce the rule against singling out beyond the extreme cases such as statutes that identify individuals by name.

This conclusion raises the issue of the Court's retreat, since 1937, from stringent judicial review of legislatively-drawn classifications. It is, however, useful to examine the reasons for that development to determine if they would in fact be offended by this type of judicial review in circumstances where the Court suspects singling out. In the immediate post-1937 period, the Court justified its new reticence by embracing the view that political checks furnish a superior method of ensuring appropriate classifications, absent suspicion of a systemic defect in the political process producing those classifications. This view finds its best-known expression in Justice Stone's celebrated footnote four in *United States v. Carolene Products Co.*,[203] although essentially the same point is made in his less-famous contemporaneous footnote in *South Carolina State Highway Department v. Barnwell Bros. Inc.*[204] Today, it is reasonably set-

201. *See, e.g.*, United States v. Lovett, 328 U.S. 303, 316-18 (1946) (striking down as a bill of attainder a statute depriving particular named individuals of their government salary).

202. *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 342-45 (1949).

203. 304 U.S. 144, 152-53 n.4 (1938).

204. 303 U.S. 177, 184-85 n.2 (1938). Justice Stone noted:

> State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted . . . . Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative

tled law that such classifications will be reviewed in the most deferential manner possible, with courts straining to identify plausible reasons for them, even if those reasons were not articulated by the legislature itself.[205] An exception arises only when the classification is based on inherently suspect characteristics, such as race, or restricts the exercise of a fundamental right.[206]

Even here, though, there remains an opening that theoretically could support heightened judicial scrutiny of at least some extremely specific statutes. In attempting to explain a flurry of cases from the early 1980's in which the Court applied what appeared to be a more stringent variety of rationality review, one commentator has suggested that the Court was reviewing the statutory ends/means relationship against a backdrop of the burdened group's relative lack of access to the political process.[207] This explanation essentially views the Court's review as applying stricter review on a case-by-case basis, rather than on a wholesale basis, as is the case when there is involved what the Court has identified as a suspect class or a fundamental right.[208] The analysis is similar to that used to justify identifying a group as a suspect class; just as political powerlessness is a criterion of suspect class status justifying stricter review of all statutes burdening that class,[209] so too, the Court will apply stricter scrutiny in particular cases where the Court suspects the burdened group to have been shut out of the political process.[210]

> action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.

Id. (citations omitted).

205. *See, e.g.*, Nordlinger v. Hahn, 505 U.S. 1, 15, 17-18 (1992) (upholding state property tax assessment scheme resulting in differing property tax liabilities depending on length of ownership). At times, however, the Court has examined legislative classifications more stringently, even while purporting to apply the same rationality review that normally produces the extremely deferential review in cases such as *Nordlinger*. In the early 1970's, for example, the Court's nascent concern for gender equality led some commentators to characterize the Court's rational basis jurisprudence as becoming more strict. *See, e.g.*, Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-20 (1972). Similar signals in the early 1980's suggested to some commentators a reprise of that phenomenon. *See, e.g.*, Brenda Swierenga, Comment, *Still Newer Equal Protection: Impermissible Purpose Review in the 1984 Term*, 53 U. CHI. L. REV. 1454, 1461-68 (1986) (discussing four cases from the Court's 1984 term featuring this heightened rationality review).

206. *See Nordlinger*, 505 U.S. at 10.

207. *See* Swierenga, *supra* note 205, at 1478-81.

208. *See id.* at 1482 (describing the different Supreme Court analyses for suspect classes and non-suspect classes).

209. *See* Bowen v. Gilliard, 483 U.S. 587, 602 (1987) (identifying political powerlessness as a criterion).

210. *See* Swierenga, *supra* note 205, at 1481-83.

It is at least arguable that this sort of political exclusion was present in the process leading to section 318's enactment. As pointed out by the Public Citizen amicus brief filed with the Supreme Court in *Robertson*, the enactment process for many extremely specific statutes leaves much to be desired.[211] With appropriations riders such as section 318, the provision is often not considered by the congressional committee with oversight for that particular subject-matter area. For example, committees concerned with environmental matters did not hold hearings or otherwise consider section 318. Thus, watchdog groups that normally monitor these committees could at least theoretically be taken by surprise when an appropriations rider ends up affecting the substance with which such groups are concerned. Other process problems are also present when the subject-matter is a very precisely-drawn topic. For example, such legislation may not receive full consideration by Congress.[212] In extreme cases, the legislation may not even be printed for legislators to read before a vote is taken.[213]

Thus, process flaws at least suggest the beginnings of a rationale for judicial review of the substantive classifications drawn by legislatures. At the constitutional level, this review can rely either on direct constitutional proscriptions against inappropriate classifications, such as those set forth by the Equal Protection Clause, or else on an indirect proscription against Congress functioning as the decision maker at a particular level of specificity, as in the separation of powers doctrine.[214] So far, section 318 is potentially troublesome on both counts. Clearly, there is concern about the judicial nature of section 318's law-applying character. But also, as noted above, there is at least the suggestion of an argument that political exclusion may justify heightened review of the classification it-

211. *See* Brief for Amicus Curiae Public Citizen at 3, Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1991) (No. 90-1596).

212. Professor Cass Sunstein has argued that legislative processes inhospitable to full congressional legislative deliberation should be subject to judicial limitation, mainly through narrow readings of statutes produced by such processes. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 458, 487-88 (1989) (proposing that courts give narrow construction to substantive provisions in appropriations statutes due to the problematic features of their enactment process, and calling generally for narrow construction of statutes enacted as a result of interest-group pressure).

213. This was the case, for example, with the legislative veto revoking the deportation suspension of Jagdish Chadha, the subject of the case that struck down legislative vetoes. *See* Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 926-27 (1983) (noting that the resolution vetoing suspension of Chadha's deportation was not printed before the House of Representatives voted on it).

214. *Cf.* Sunstein, *supra* note 212, at 457-58 (arguing that non-constitutional doctrines may be employed to limit the effect of such statutes).

self.[215] Justice Breyer's concurrence in *Plaut* recognizes the relationship between these two doctrines but fails to provide criteria that determine when Congress goes too far in singling out.[216] Justice Powell's opinion in *Chadha* may provide us with more guidance.[217]

3. Justice Powell's Chadha *Analysis*

Immigration and Naturalization Service v. Chadha[218] is best known for its holding striking down legislative vetoes[219] of all types[220] as unconstitutional evasions of the lawmaking procedure set forth in the Constitution. Justice Powell, however, concurred on a much narrower ground. He agreed with the majority that the specific veto in that case, which overturned an INS decision suspending the deportation of an alien who had overstayed his visa, was unconstitutional. However, he reached this conclusion on the ground that it constituted an adjudicatory act, and thus violated the separation of powers doctrine.

After Justice Powell explained the concerns about legislative tyranny that drove the framers to craft a system of separated powers, he analyzed the one-House veto at issue in the particular case before the Court. As he put it, "[o]n its face, the House's action appear[ed] clearly adjudicatory."[221] His analysis is set forth here:

> The House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria. It thus undertook the type of decision that traditionally has been left to other branches. Even if the House did not make a *de novo* determination, but simply reviewed the Immigration and Naturalization Service's findings, it still assumed a function ordinarily entrusted to the federal

---

215. *See supra* notes 212-14 and accompanying text.

216. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 242 (1995) (Powell, J., concurring in judgment).

217. *See Chadha*, 462 U.S. at 959 (Powell, J., concurring in judgment).

218. 462 U.S. 919 (1983).

219. Briefly, legislative vetoes are provisions that authorize the legislature to rescind, or "veto," an agency's action by a method that falls short of that required for enactment of a conventional statute. Thus, a provision allowing one legislative committee or one house of Congress to rescind or prevent an agency's action would constitute a legislative veto.

220. *See, e.g.*, Process Gas Consumers Group v. Consumer Energy Council of Am., 463 U.S. 1216 (1983), *aff'g* 673 F.2d 425 (D.C. Cir. 1982) (noting that shortly after *Chadha* was handed down, the Court relied on it to strike down legislative vetoes of agency rulemakings). *Chadha* itself dealt with a legislative veto of an agency adjudication, specifically, a determination that Mr. Chadha qualified for a discretionary waiver of deportability status. However, the analysis in *Chadha* seemed clearly to apply to provisions for legislative vetoes of other types of agency actions as exemplified in *Process Gas*.

221. 462 U.S. at 964 (Powell, J., concurring in the judgment) (footnote omitted).

> courts. Where, as here, Congress has exercised a power "that cannot possibly be regarded as merely in aid of the legislative function of Congress," the decisions of this Court have held that Congress impermissibly assumed a function that the Constitution entrusted to another branch.[222]

Justice Powell then linked this legislative usurpation of judicial functions to the framers' concern about the exercise of unchecked and arbitrary power. He noted the lack of "internal constraints that prevent [Congress] from arbitrarily depriving [Mr. Chadha] of the right to remain in this country,"[223] the lack of "established substantive rules,"[224] and, most importantly for our purposes, the lack of "procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights."[225] Justice Powell concluded by describing the model discussed earlier in this Article: "The only effective constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to the tyranny of a shifting majority."[226] In Mr. Chadha's case, the procedural concerns should have been quite salient: he was under consideration for deportation, an act carrying with it the most serious consequences for an individual's most important interests.[227] These consequences were clearly present in Chadha's own case, as an ethnic Indian facing deportation to Idi Amin's Uganda.[228]

In sum, what troubles Justice Powell about the veto of Chadha's deportation suspension is the lack of formal or political constraints on Congress' action. For our purposes, the important missing safeguards are those that guarantee an individual's right to enjoy procedural protections before the government can impose such a significant deprivation on him. The fact that this analysis is relevant to a separation of powers question suggests the linkage between the separation of powers and due process

---

222. *Id.* at 964-66 (Powell, J., concurring in the judgment) (footnote and citations omitted).

223. *Id.* at 966 (footnote omitted).

224. *Id.*

225. *Id.* (footnote omitted).

226. *Id.* (internal quotation omitted).

227. *Cf.* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (stating that deportation may result "in loss of both property and life; or of all that makes life worth living.").

228. *See generally* BARBARA HINKSON CRAIG, *CHADHA*: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE (1988) (considering the particular facts surrounding Jagdish Chadha's personal situation).

doctrines.[229] Justice Powell's opinion suggests this linkage, not only by raising the issue of procedural safeguards in a separation of powers context,[230] but also by noting his lack of concern with legislative singling out that *benefits* the target.[231] Thus, singling out seems to be a problem not as a general matter, but only when the target suffers what in the due process context would be called a deprivation of a due process interest. Justice Powell's analysis suggests that concerns underlying due process may be of use in examining possible separation of powers problems with section 318.

C. Due Process and Section 318

Due process *per se* does not apply to the analysis of statutes such as section 318. The doctrine indicates that section 318 did not impair interests possessed by individuals such as members of the Seattle Audubon Society[232] with sufficient directness so as to constitute a denial of a due process-protected interest.[233] For example, in *O'Bannon v. Town Court Nursing Center*,[234] the Court held that federally-funded nursing home patients did not suffer a deprivation of a due process-protected interest when government action threatened to decertify the nursing home in

229. *See, e.g.*, Brown, *supra* note 178, at 1535 (stating that "what Montesquieu described as a structural problem translates easily into the concept of due process"); *cf.* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 664 n.4 (2d ed. 1988); *id.* § 17.1, at 1673-87 (discussing the structure of decision making process as related to due process concerns).

230. *See Chadha*, 462 U.S. at 966 (Powell, J., concurring in judgment).

231. *See id.*, at 966 n.9 (Powell, J., concurring in judgment); *see also* TRIBE, *supra* note 229, § 10-6, at 663 n.38 (noting that private bills conferring a benefit are not considered problematic as a separation of powers matter).

232. Identification of the conservation group plaintiffs as the affected parties implicitly puts aside the question whether the spotted owl or the old-growth forests should be conceived of as having due process interests of their own. Such a proposition is analogous to the suggestion that such inanimate objects should be considered to have standing to sue when governmental action threatens their impairment or destruction. *See* Sierra Club v. Morton, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting); *see also* William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, The Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385 (1997) (considering criticism that the public trust doctrine is too vague and that efficiency in resource allocation decision making will be threatened by the doctrine); Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 456 (1972) (proposing that we give legal rights to "natural objects" in the environment).

233. It is possible, though, that a statute that simply directed the dismissal of named lawsuits would violate the due process rights of the plaintiffs in those suits to a fair trial on their claims. However, section 318 did not purport to do that.

234. 447 U.S. 773, 786-87 (1980).

which they lived, even though decertification would require the patients to move to another nursing home. The Court reasoned that any harm to the patients arising out of the government's decertification action would be an indirect result of that action, and thus not a deprivation of any constitutionally-protected interest.[235] Just like the patients in *O'Bannon*, plaintiffs in *Robertson* may have been injured by the government action of enacting section 318. Indeed, if the government's conduct had not injured them sufficiently, then, presumably, they would not have had standing to sue. Yet the injury was not sufficiently direct so as to allow them to claim a deprivation of a due process right.[236]

Even though due process itself does not apply directly, the concerns underlying due process may suggest ways in which a right to be heard may apply to the legislative process. While such a right to political participation itself might not rest on the foundation of due process *per se*, it plays an important supporting role in the foundational cases establishing the scope of the due process guarantee. In the foundational cases of *Londoner v. Denver*[237] and *Bi-Metallic Investment Co. v. State Board of Equalization*[238] the Court distinguished, for due process purposes, between statutes that burden an entire class of persons and those that burden individuals based on their particularized characteristics.[239] Accord-

---

235. *See id.* at 787. The *O'Bannon* Court concluded that:

> [t]he simple distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally, provides a sufficient answer to all of the cases on which the patients rely in this Court.

Id. at 788; *see also id.* at 789 ("Over a century ago this Court recognized the principle that the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action.").

236. Compare *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975), to clarify the relationship between the constitutional requirement that the injury be sufficiently direct, in the sense that the defendant causes it, with the *O'Bannon* requirement that the government action "directly affect[ ] a citizen's legal rights, or impose[ ] a direct restraint on his liberty," 447 U.S. at 788. The standing requirement explicitly leaves open the possibility that allegedly illegal action against one party might sufficiently harm a third party so as to satisfy the constitutional standing requirement. *See, e.g.*, *Warth*, 422 U.S. at 500-501 (third-party standing bar is not a constitutional requirement but can be overcome by judicial or legislatively-enacted exemptions). On the other hand, *O'Bannon* indicates that such a third-party injury scenario is insufficient to sustain an allegation that a due process interest has been violated. *See O'Bannon*, 447 U.S. at 787-89.

237. 210 U.S. 373 (1908).

238. 239 U.S. 441 (1915).

239. *See Londoner*, 210 U.S. at 380 (noting that the plaintiffs challenged a city's refusal to grant a hearing to challenge a special tax assessment based on an individualized determination of each property owner's benefit from a municipal improvement); *Bi-Metallic*, 239 U.S. at 444 (considering the plaintiffs' argument that the absence of a hearing at which

ingly, individuals burdened in their capacity as members of a class must defend their interests in the legislature. Individuals burdened in their capacity as individuals, or on the basis of facts unique to them, cannot be expected to participate effectively in the legislative process, and thus must be allowed a chance to make their case in individualized hearings. In *Bi-Metallic*, Justice Holmes made this distinction clear in the course of distinguishing the earlier *Londoner* case:

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. . . . Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. . . . [In *Londoner v. Denver* a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the [tax] assessments in a county had been laid.[240]

Commentators have identified several rationales for the distinction Justice Holmes drew between *Londoner* and *Bi-Metallic*.[241] The above quotation from *Bi-Metallic* indicates clearly that Justice Holmes relied, at least in part, on the plaintiffs' ability to use the political process to protect their interests.[242] But if those rights can be protected only by recourse to the political process, then judicial scrutiny of the legislative process may be appropriate as a means of ensuring that the only process available to such persons is in fact a fair one. In other words, if the only "process" that such persons are due is the political process, then judicial scrutiny of that process may be the appropriate *quid pro quo* to the denial of an individualized hearing.[243] This theory seems to have played

---

they could contest an across-the-board upward revaluation of all taxable real property in the city violated their due process rights).

240. *Bi-Metallic*, 239 U.S. at 445-46.

241. *See, e.g.*, 2 DAVIS & PIERCE, *supra* note 156, § 9.2, at 6-8 (noting several of these rationales, including 1) concerns over delay and expense that would be entailed in providing hearing rights for individuals affected as members of a large class; 2) the decreased likelihood that individuals would have special access to the legislative facts normally at issue in policy questions, as opposed to the adjudicative facts normally at issue in questions dealing with the application of law to particular individuals; and 3) the political process rationale that individuals affected as members of classes by legislatures have a better chance to protect their interests in the legislative process than do individuals singled out for government coercion).

242. *See id.* § 9.2, at 4 (noting this rationale).

243. *Cf.* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1582 (1988) (arguing that courts in a republican polity should "use [statutory] interpretation to guard against or limit [possible malfunctions in the legislative process]").

some role in the majority's analysis in *Chadha*, which is perhaps the most obvious example of judicial policing of the legislative process. In the course of striking down the legislative veto, the Court noted the troublingly cursory nature of the consideration the House gave to the particular veto challenged in that case,[244] and described the bicameralism and presentment requirements, at least partially, as tools to ensure careful consideration of proposed legislation.[245] Moreover, the Court's explanation of why quasi-legislative action by agencies did not have to satisfy the bicameralism requirement relied in part on the controls that already existed on agency action—controls that include statutory[246] and constitutional[247] restrictions on the process by which the agency acts.[248] Process, then, may be relevant even when due process *per se* is not.

D. Summary

The problems with a *Klein*-based analysis of section 318 have led us to consider the branch of separation of powers analysis concerned with legislative singling out. Justice Breyer's analysis in *Plaut* suggests the close connection between singling out and *Klein*'s concern about legislative direction of judicial results, but leaves us with an unsatisfactory explanation of singling out specifically, why some instances of singling out pass constitutional muster. In *Chadha*, Justice Powell confronted a situation where a singled-out individual was faced with loss of a classic due process

244. *See* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 926-28 (1983).

245. *See id.* at 946-51.

246. *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

247. *See* U.S. CONST. amend. V; *see also, e.g.*, Commodities Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986) (noting the existence of due process-based requirements for Article III review of agency adjudicatory decisions); Bell Lines, Inc. v. United States, 263 F. Supp. 40, 46 (S.D.W. Va. 1967) (holding that "the requirements of the [APA] are fundamental to due process" and that administrative decisions shall include public participation); M. Elizabeth Magill, *Congressional Control Over Agency Rulemaking: The Nutrition Labeling and Education Act's Hammer Provisions*, 50 FOOD & DRUG L.J. 149, 174-75 (1995) (noting possible due process foundation for requirement that individuals be able to participate in at least a notice and comment rulemaking process); Richard J. Wolf, Note, *Judicial Review of Retroactive Rulemaking: Has* Georgetown *Neglected the Plastic Remedies?*, 68 WASH. U. L.Q. 157, 161 n.20 (1990) ("Informal agency action under the APA passes procedural due process muster because its procedural framework provides interested parties with an opportunity to be heard in the notice and comment process of informal rulemaking and a rudimentary opportunity to be heard in case-by-case adjudication.").

248. *See Chadha*, 462 U.S. at 953-54 n.16; *see also id.* at 966 n.10 (Powell, J., concurring) (noting the existence of these controls as an explanation why agency action did not have to satisfy the bicameralism requirement); TRIBE, *supra* note 229, § 10-6, at 658 & n.10 (discussing Justice Powell's footnote 10 from *Chadha*).

interest. Thus, he was able to focus on the sorts of procedural protections the target should enjoy, but could not exercise in the legislative process—most fundamentally, the right to be heard. Justice Powell's analysis suggests that, because due process would require these sorts of procedural protections, and because the legislative process cannot accommodate those protections, the decision is thus one that cannot be made by the legislature.[249] Justice Powell's focus on the procedural protections that the targeted individual should enjoy, and the separation of powers problem that arises when the decision-making entity is incapable of offering that sort of procedure, suggests a line of inquiry into the type of procedure any singled-out individual should be able to enjoy, regardless of whether he is being deprived of a cognizable due process interest. This concern also ties in nicely with the foundational due process cases of *Londoner* and *Bi-Metallic*: if, as Justice Holmes says, an individual affected as a member of a class must find his salvation not in the courts but in the legislature, then should there not be some guarantee of a reasonably fair and accessible legislative process?[250]

Applying this analysis to section 318 indicates that any judicial review should focus on the process by which it was enacted, and not on the substantive appropriateness of its environment-economy trade-offs or the special status accorded the Northwest forests. This conclusion flows from a proper respect for relative institutional competencies of courts and legislatures; after all, what do courts know about the specific characteristics of the Northwest's ecosystem and economic needs? Thus, we are faced with a situation where the legislature should be able to do the classifying, and the resulting classification may appropriately be quite

249. This would also go some way toward understanding why the Court has limited its bill of attainder analysis to instances of legislative imposition of punitive measures against named individuals. Because due process requires that such measures be imposed only after a process that is incompatible with normal legislative processes, it stands to reason that Congress would be disabled from imposing such measures. Consistent with this analysis is the Constitution's prescription of the impeachment process, the only instance in which Congress is authorized to pass judgment on individuals. Tellingly, the Constitution's impeachment process (1) provides for the separation of the charging and judging functions, *see* U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment"); *id.* art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments"); (2) describes the Senate's procedure at such a trial, *see id.*; and (3) installs the Chief Justice of the United States as the presiding officer at any Presidential impeachment trial, *see id.*

250. *But see* Romer v. Evans, 517 U.S. 620, 625-26 (1996) (affirming a state court's judgment striking down a state constitutional provision prohibiting local or state laws protecting gays and lesbians from discrimination, but declining to consider the state court's rationale that the provision violated gays' and lesbians' asserted fundamental right to participate in the political process).

narrow, depending on the legislature's understanding of the particular characteristics of the affected forests and economies. However, because the resulting classifications may be narrow, it is possible that the process producing that classification may have been infected by illegitimate singling out. Courts may most effectively guard against such a result by policing not the substance of the legislation, but instead, the process by which it is enacted. Not only does this role best correspond to the courts' limited competence, but doctrinally this role fits quite snugly within the *Londoner/Bi-Metallic* analysis noted above–specifically, the importance of a *fair* legislative process when the legislature is all that an individual can rely on.

How should courts go about reviewing the fairness of the legislative process? In answering this question it is helpful to turn to a concept known as "due process of lawmaking."

IV. DUE PROCESS OF LAWMAKING

A. Introduction

The term "due process of lawmaking," coined by Justice Hans Linde of the Oregon Supreme Court,[251] has been used in a wide variety of contexts. Linking these contexts, however, is the idea that judicial review of legislation should not purport to second-guess its substantive content, but instead should scrutinize either the process by which a governmental decision was made, or the structure of the decision-making entity. Proponents of this sort of review, including Justice Linde himself, consider it to be more appropriate than judicial review of the substance of government action, which is criticized as beyond judicial competence and overly intrusive into the legislature's policy-making prerogative.[252] Scholars have identified a variety of governmental actions claimed to be amenable to this type of judicial review, among them a statute discriminating on the basis of gender, whose benign justification was apparently not the actual purpose motivating its enactment,[253] a statute whose burdening of a class

251. *See* Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 255 (1976).

252. *See, e.g., id.* at 243; Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 915 (1987); *see also* Ethyl Corp. v. EPA, 541 F.2d 1, 66-67 (D.C. Cir. 1975) (en banc) (Bazelon, C.J., concurring) (arguing against stringent judicial review of the substantive accuracy of EPA technical judgments, given courts' lack of understanding of scientific issues, and arguing instead that courts play their most constructive roles by ensuring the fairness of the procedure by which EPA came to its conclusions).

253. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 n.16 (1982); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 56-58 & n.122 (1985) (using the Supreme Court's gender discrimination jurisprudence as an example of

may have resulted from congressional inadvertence or mistake,[254] or an administrative regulation that may have been supported by a policy rationale over which the agency was not granted any responsibility.[255] In all of these situations, the perceived flaw in the governmental action lay not in its substance, but instead in the means by which the government acted. Thus, in the first example the legislature might have successfully justified its statute had it shown that it had really been motivated by the benign rationale; in the second, the legislature might have justified its action had it shown that it actually understood what it was doing, and, in the third, the same rule might have been valid had it issued from a body with responsibility for implementing the policy that was cited as the rationale for the decision.

This theory is subject to a number of critiques. To the extent it relies on discovery of a purported legislative intent, it is open to the well-known criticism that such intent either does not exist, cannot be known, or at least does not furnish a legitimate basis for judicial decision.[256] More generally, a judicial focus on the legislative process could be seen as an illegitimate incursion into the internal affairs of a coordinate branch of government,[257] save for the few situations where the suspect

---

judicial focus on the extent to which a challenged statute was the product of reasoned analysis); *see also* TRIBE, *supra* note 207, § 17-2, at 1682 (discussing *Hogan*).

254. *See* Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 96-98 (Stevens, J., dissenting); Farber & Frickey, *supra* note 252, at 917 n.247 (noting Justice Stevens' dissent as an example of judicial opinions focusing on the extent of the legislature's deliberation); *cf.* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 182-83, 185-86 (1980) (Brennan, J., dissenting) (arguing that the Equal Protection Clause was violated when a statute burdened one group of railroad workers relative to another, based on suspected congressional misunderstanding of the bill's likely effects).

255. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 116-17 (1976) (striking down a Civil Service Commission regulation that cited a foreign policy rationale, on the ground that the Commission was not entrusted with implementation of foreign policy); TRIBE, *supra* note 207, § 17-2, at 1678-79 (discussing *Hampton* in the context of Professor Tribe's theory of "structural justice").

256. *See, e.g.*, Kassel v. Consolidated Freightways, Corp., 450 U.S. 662, 702-05 (1981) (Rehnquist, J., dissenting) (criticizing the majority's attempt to discern the "true" motivation of a legislative body). The best-known judicial proponent of this view is Justice Antonin Scalia. *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (1989) (Scalia, J., concurring in part and dissenting in part) (criticizing intent-based interpretive methodology and arguing that statute and its later amendments must be interpreted based on the resulting text and not by analyzing the intent of the original enacting and amending Congresses), *overruled on other grounds*, Seminole Tribe v. Florida, 517 U.S. 44 (1996). Public choice theorists have also noted the difficulties inherent in accurately determining the intent of a legislative body whose operations raise sequential voting and agenda control concerns. For an explanation and evaluation of this argument, see generally Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988).

257. *But see* Linde, *supra* note 251, at 243 (discounting importance of this objection).

process violates a clear constitutional mandate, such as the bicameralism and presentment requirements for legislation[258] or the principle—rarely, if ever, enforced today—that Congress may not delegate its legislative power.[259] Extreme applications of this theory might also elicit the objection that the procedural requirements constitute a useless formalism.

On the other hand, judicial focus on the process or structure of lawmaking has advantages. Commentators and judges have suggested that courts are simply more competent to review such issues than to assess the substance of the resulting legislation.[260] This sort of review is at least arguably less intrusive on a coordinate branch than a second-guessing of the substance of their decisions, especially when the review makes it clear that the government remains at least potentially able to achieve the same result.[261] Such review may also be more honest, with corresponding credibility benefits for courts, to the extent it avoids substantive review that is essentially a rubber stamp[262] (except for the rare case where more searching review only serves to confuse lower courts and private parties)[263]. Finally, the theoretical basis for this approach fits neatly into the

258. *See* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983) (striking down legislative veto as violative of the Constitution's bicameralism and presentment requirements). *But see, e.g.,* Susan Rose-Ackerman, *Judicial Review and the Power of the Purse*, 12 INT'L REV. L. & ECON. 191, 193-98 (1992) (proposing that courts prohibit Congress from waiving its own internal rules restricting use of appropriations bills to amend substantive legislation).

259. *See, e.g.*, 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.6 (3d. ed. 1994) (suggesting demise of the non-delegation doctrine). *But see* City of New York v. Clinton, 985 F. Supp. 168, 182 (D.D.C. 1998) (striking down the Line Item Veto Act based on a version of the non-delegation doctrine), *aff'd on different grounds*, 524 U.S. 417 (1998).

260. *See, e.g.*, Farber & Frickey, *supra* note 252, at 915 (stating that the courts are more capable of ensuring a system of deliberative due process than deciding specifically whether a statute embraces public values); Ethyl Corp. v. EPA, 541 F.2d 1, 66-67 (D.C. Cir. 1976) (en banc) (Bazelon, C.J., concurring) (discussing the need for a sound administrative process because of the lack of expertise judges have with highly mathematical and scientific analysis).

261. *See, e.g.*, Linde, *supra* note 251, at 243.

262. *Cf.* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 186-87 (1980) (Brennan, J., dissenting) (criticizing the majority's equal protection review of economic and social regulation as tautological).

263. *Compare, e.g.,* Nordlinger v. Hahn, 505 U.S. 1, 18 (1992) (upholding purchase price real estate tax valuation scheme as satisfying equal protection's rational basis test), *with* Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, 488 U.S. 336, 344-46 (1989) (striking down essentially the same scheme using the same rational basis standard). *See generally Nordlinger*, 505 U.S. at 18 (Thomas, J., concurring in part and concurring in the judgment) (arguing that *Nordlinger* and *Allegheny Pittsburgh* are inconsistent since the taxation schemes involved were indistinguishable); *id.* at 31-32 (Stevens, J., dissenting) (concluding there is little difference whether the discrimination was *de jure* as in *Nordlinger* or *de facto* as in *Allegheny Pittsburgh*).

Due Process Clause's fundamental distinction between the constitutional protections afforded persons burdened as a class and persons burdened as individuals, by ensuring that due process means something even for individuals relegated to the political process.[264]

Applying this insight to section 318 raises several questions. Was the process leading to section 318's enactment appropriate? If not, what values were offended? Can a court protect those values?

B. Due Process of Lawmaking and Section 318

Section 318 emerged from a less-than-ideal legislative process. As a substantive provision included in an appropriations bill,[265] section 318 was not subject to the scrutiny of the congressional committees with jurisdiction over the National forests, nor did it ever face an up or down vote on its own merits before the full House or Senate.[266] Commentators have pointed out the shortcomings of such a process,[267] including not only the reduced quality of the resulting legislation,[268] but also undesirable proce-

---

264. *See generally* Swierenga, *supra* note 205. Indeed, Swierenga has analyzed several Supreme Court decisions striking down laws as violating equal protection's rational basis standard as looking fundamentally to whether the burdened individuals had been afforded fair access to the political process. That analysis not only echoes the *Carolene Products* understanding of equal protection, but it also suggests the role due process could play in situations where due process does not require an individualized determination before government burdens an individual.

265. Provisions such as section 318 should be distinguished from appropriations riders that deal specifically with the spending of federal money. An example of the latter includes provisions that prohibit the agency in question from spending money on a particular program, or to enforce a particular regulation. Courts have disagreed on whether such provisions constitute substantive changes in the underlying law, beyond a mere funding limitation. *See* Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 481-99 (recounting disagreements among courts on this issue). By contrast, provisions such as section 318 purport clearly to do more than affect how agencies can spend money. The only question addressed by this Article is whether there is some constitutional objection to imposing this sort of substantive change by means of a precisely-directed provision contained in an appropriations bill.

266. *See* Sher & Hunting, *supra* note 57, at 478 (noting that neither the Agriculture, Environment, nor the Judiciary Committees of Congress examined section 318).

267. For a general critique of the use of appropriations riders to amend substantive legislation, see Sandra B. Zellmer, *Sacrificing Legislative Integrity at the Alter of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457 (1997) and Devins, *supra* note 265, which discusses particular problems posed by limitations riders to appropriations bills.

268. *See, e.g.*, James J. Brudney, *Congressional Commentary on Judicial Interpretation of Statutes: Idle Chatter or Telling Response*, 93 MICH. L. REV. 1, 58 (1994) ("To the extent Congress legislates more furtively, without such input from interested and technically competent outsiders, it often produces a shoddier product").

dural features such as its impairment of both legislative deliberation[269] and public access to the legislative process,[270] and the attendant rise in the influence of narrow interest groups[271] and decline in the legislature's ultimate accountability to the electorate.[272] Moreover, as a piece of extremely particularistic legislation, section 318 reflects a style of legislative conduct that has been criticized as inappropriate for a majoritarian body.[273] Section 318's particularistic focus raises a risk of singling out, by eliminating the possibility that a piece of legislation will apply to other,

---

269. *See, e.g.*, Susan Low Bloch, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation*, 76 GEO. L.J. 59, 112 (1987) (arguing that "appropriation riders are frequently not the product of legislative deliberation and consensus"); Devins, *supra* note 265, at 465 (finding that "substantive policymaking by limitation riders does not allow for sufficient study of the policy issues in question"); Thomas O. McGarity & Sidney A. Shapiro, *OSHA's Critics and Regulatory Reform*, 31 WAKE FOREST L. REV. 587, 643-45 (1996) (noting lack of debate on the important issue of restricting OSHA's ability to promulgate workplace standards when the restriction was placed in an appropriations bill); Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and its Consequences*, 19 U. MICH. J.L. REFORM 805, 814 n.32 (1986) (documenting a case of Congress enacting a substantive provision of which it was unaware, due to its inclusion in an appropriations rider); Zellmer, *supra* note 267, at 484-85 (noting legislators' complaints that a particular appropriations rider had been misrepresented to them).

270. *See, e.g.*, ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 91 (1997) (noting the importance of committee hearings in focusing public attention on proposed legislation and allowing interested parties to be heard); Brudney, *supra* note 268, at 58 ("Whatever its shortcomings, the current, committee-centered legislative drafting process is a relatively 'public' experience. There is considerable opportunity for notice to affected government and private groups and for participation by those groups."); McGarity & Shapiro, *supra* note 269, at 644.

> The thousands of workers who will not receive the protections from an effective OSHA ergonomics standard were not likely to have learned of the congressional attempt to kill the standard through the appropriations process in time to write their representatives. Even if their opinions had been expressed, it would have been easy for a representative to claim that his or her hands were tied by the need to enact an appropriations bill to keep the government running.

Id.; Zellmer, *supra* note 267, at 500-503 (noting public access accorded by normal committee-based drafting process).

271. *See, e.g.*, McGarity & Shapiro, *supra* note 269, at 643; Sunstein, *supra* note 243, at 1582-83.

272. *See* MIKVA & LANE, *supra* note 270, at 91 (noting the importance of committee hearings to "establish a forum at which legislators can be evaluated"). For general process critiques of the use of appropriations riders, see Sher & Hunting, *supra* note 57, at 476-85, and Linda M. Bolduan, Comment, *The Hatfield Riders: Eliminating the Role of the Courts in Environmental Decision Making*, 20 ENVTL. L. 329, 375-80 (1990).

273. *See supra* Part III.B (describing Justice Breyer's critique of the statute struck down in *Plaut*, and Justice Powell's critique of the statute struck down in *Chadha*). *But see* Plaut v. Spendthrift Farm, 514 U.S. 211, 239 n.9 (1995) (criticizing the idea that a statute's ultra-particularity calls into question its status as a legislative act).

currently unknowable, transactions or individuals in the future. This possibility is one of the major guarantees against oppressive laws, and encourages careful legislative scrutiny of proposed legislation.[274] In section 318's case, the ill-effects of this particularism were heightened by its format as a direction to courts to find pre-existing statutory requirements satisfied, as opposed to an explicit repeal of those requirements, or even an acknowledgment of those requirements by means of a "notwithstanding any other provision of law" clause.[275] The impact on legislative deliberation of section 318's format derives from the possibility of legislative "hiding" inherent in the failure to explicitly repeal or create an exemption from pre-existing legislation that section 318 clearly impacts.

Nevertheless, this diagnosis is open to criticism. First, it is not clear that the process producing section 318 restricts public participation in the actual legislative process to any greater degree than the "normal" legislative process. It is theoretically possible that section 318's insertion into an appropriations bill, rather than a bill handled by the committees that usually deal with logging issues, might have caught some interested groups off guard.[276] But this is by no means clear. Section 318 represented a major part of the resolution of the spotted owl issue. Thus, interest groups on both sides clearly should have been aware of its pendency in the appropriations bill for the Interior Department. The direct evidence that does exist suggests as much,[277] as does the compromise character of the final result. At the very least, the public controversy surrounding the successor provision to section 318 suggests that the en-

---

274. *See supra* note 166 and accompanying text (citing cases discussing the protection general laws afford against arbitrary government action).

275. *See* Pub. L. No. 99-500, 100 Stat. 1783-349, § 114(a) (1986), *reenacted in identical form as* Pub. L. No. 99-591, 100 Stat. 3341-349, § 114(a) (1986).

276. *Cf.* Sher & Hunting, *supra* note 57, at 487 n.265 (1991) (suggesting the possibility that Congress could bypass the traditional enactment process even in the face of "the most vigilant outside participants"). *But see infra* note 279 (asserting that not all appropriations bills are hidden).

277. *See, e.g.*, Stuart Wasserman, *Oregon's Version of the Spotted Owl Battle Accelerates*, SAN FRANCISCO CHRON., July 17, 1990, at A8 (discussing section 318's logging provisions and quoting James Monteith, director of Oregon's Natural Resources Council, as stating "the politics are all over the place"). This suspicion is also borne out by the experience of other battles in the war over the Spotted Owl, where substantive appropriations riders dealing with management of the Northwest forests were the target of significant controversy. *See, e.g.*, Greg Brown et al., *Allowable Sale Quantity (ASQ) of Timber as a Focal Point in National Forest Management*, 33 NAT. RESOURCES J. 569, 584-86 (1993) (recounting political controversy over an appropriations rider setting forth government timbering policy in the Northwest forests); *see also* Sher & Hunting, *supra* note 57, at 487-90 (describing the controversy over the successor provision to section 318, and how it was eventually voted down in the Senate after environmental groups made its defeat a high priority).

actment of the original provision caused environmental groups to pay close attention to the appropriations process. Indeed, the successor provision to section 318—again inserted into the Interior Department's annual appropriations bill—caused a great deal of controversy, and its defeat was considered a high priority by environmental groups.[278] Representatives voting on this latter bill certainly knew its contents, at least as much as they know about the contents of any other piece of legislation.

More generally, it seems doubtful that substantive appropriations riders always, or even usually, fail to attract the attention necessary to ensure spirited debate, public lobbying (at least by organized interest groups) and legislative deliberation.[279] Certainly, for example, it would not be accurate to so describe the riders attached to Defense Department authorization bills in the early 1970's that prohibited further funding for the Vietnam War, or the riders dealing with federal policy toward racially discriminatory private schools.[280] Indeed, riders are sometimes appended to appropriations bills exactly because the substance of the rider is sufficiently controversial as to imperil its passage as a freestanding bill, but may be more successful if its fate is tied to that of a necessary appropriations measure.

The point here is that the inability to draw general conclusions about the process implications of appropriations riders makes it difficult to craft an appropriate judicial response. For the Court, the choice would be between imposing a categorical rule against substantive appropriations riders,[281] regardless of the level of deliberation that attended any individual rider, and reviewing the legislative process producing the particular challenged rider, in order to determine how much Congress was thinking about that issue. With the possible exception of probably-rare cases where there is evidence of affirmative misunderstanding by Congress,[282] this is a troubling choice. While a categorical rule would impose

---

278. *See* Sher & Hunting, *supra* note 57, at 487-90 (stating that environmental groups "made it one of the key environmental votes of the year").

279. It is at least probably true that not all appropriations bills are so hidden. *See, e.g.,* Kathryn Abrams, Comment, *Law's Republicanism*, 97 YALE L.J. 1591, 1602 (1988) (criticizing the generality of the argument that appropriations provisions should be construed narrowly).

280. *See* Neal Devins, *Budget Reform and the Balance of Powers*, 31 WM. & MARY L. REV. 993, 1009-10 (1990).

281. *Cf.* Rose-Ackerman, *supra* note 258 (proposing a judicially-crafted prohibition on Congress waiving its internal rule against including substantive legislation in appropriations bills).

282. *See, e.g.,* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 193 (1980) (Brennan, J., dissenting) (arguing that Congress, when considering complex amendments

legislative restrictions not found in the Constitution,[283] a rule requiring rider-by-rider inquiry into the amount of congressional deliberation would require a severe judicial intrusion into the conduct of legislative business, unanchored by a specific constitutional prescription of legislative procedures[284] or limitation on the powers[285] enjoyed by Congress.[286] In reality, affirmative misunderstanding would probably be much rarer than legislative inattention to a single rider attached to an enormous (and possibly unrelated) appropriations bill.[287] Legislative inattention, even though it reflects presumably undesirable legislative conduct, nevertheless presents its own unique challenge for a court: if Congress gives a particular amount of attention to the overall spending issues implicated by an appropriations bill, how would a court determine what percentage

---

to a railroad worker retirement scheme, was misled by interest groups that played an unusually large role in drafting and defending the legislation). This is described only as a possible exception since, at least, the *Fritz* Court is unwilling to give effect to evidence of Congress' alleged misunderstanding. *See id.* at 179.

> [W]e disagree with the District Court's conclusion that Congress was unaware of what it accomplished [in the statute] or that it was misled by the groups that appeared before it. If this test were applied literally to every member of any legislature that ever voted on a law, there would be very few laws which would survive it. The language of the statute is clear, and we have historically assumed that Congress intended what it enacted.

Id. Moreover, limitation of such review to the rider process is both under-inclusive and over-inclusive. As suggested above, *see supra* text accompanying notes 279-280, some riders are quite controversial, while some non-rider legislation may suffer from lack of congressional attention or understanding, as Justice Brennan argued occurred with the legislation challenged in *Fritz*.

283. *Cf.* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983) (striking down the legislative veto as a violation of the constitutionally-mandated procedures for enacting legislation). In fact, one commentator has proposed amending the Constitution so as to enact this very format restriction. *See* Zellmer, *supra* note 267, at 512-35.

284. *See* Zellmer, *supra* note 267, at 512-35.

285. *Cf.* Powell v. McCormack, 395 U.S. 486, 518-548 (1969) (rejecting argument that House of Representatives' decision not to seat a duly-elected representative was a political question because it was allegedly a decision textually committed to Congress, given Congress' power to judge the qualifications of its members and to expel members).

286. *See* United States v. Lopez, 514 U.S. 549, 614 (Souter, J., dissenting) (arguing that this sort of deliberateness review would be inconsistent with the rationality review the Court would otherwise apply to the substance of such legislation). Justice Souter criticized the majority's suggestion that legislative findings on the effect on interstate commerce of possession of guns in school zones would assist the Court in upholding the statute as an exercise of Congress' commerce power, because this would constitute deliberateness review, which would be "as patently unconstitutional as an Act of Congress mandating long opinions from this Court." *Id.*

287. *See, e.g.*, McGarity & Shapiro, *supra* note 271, at 643-44 (describing the process by which an important substantive rider was attached to a much larger budget bill and thus received little consideration during the floor debate).

of that attention—however attention is measured—sufficed to constitute adequate attention? Even Professor Sunstein, while urging such review for deliberativeness, acknowledges the institutional competence problem here.[288]

The same empirical doubts attend any claim that section 318's format makes it impossible for members of the broader public to hold legislators accountable for their votes. Courts and commentators have embraced analogous accountability claims as the basis for the non-delegation and "state government commandeering" doctrines. The doctrine against delegating legislative power to administrative agencies rests in part on the concern that political accountability is diminished when elected legislators do not make fundamental policy choices, but instead delegate those responsibilities to non-elected administrators. Such broad delegation of policy formation allows legislators to "hide," by noting, that a specific government action was not of their doing. Such hiding, in turn, damages the concept of representative democracy.[289] In recent years, the Supreme Court has embraced an analogous concern as a basis for invalidating federal laws commanding state governments to implement federal mandates. According to the Court, such mandates make it difficult for voters to know which level of government to hold responsible for policy successes or failures, and thus again undermine the principles of representative democracy.[290]

Even if there is validity to the accountability concerns addressed in these doctrines, a point on which there is strong disagreement,[291] that fact

---

288. *See* Sunstein, *supra* note 253, at 77 (discussing the mixed motives that legislators possess and the problems a court would have in deciphering those motives).

289. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 132-34 (1980).

290. *See* Printz v. United States, 117 S. Ct. 2365, 2382 (1997) (discussing why the federal government cannot require states to implement a federal gun control law); New York v. United States, 505 U.S. 144, 187-88 (1992) (stating that the states are not political subdivisions of the Federal Governmment). Professors Davis and Pierce also suggest an accountability-based argument against the "bitter with the sweet" theory of procedural due process, under which government has the power not just to create a property interest in a government benefit but also to prescribe the procedure the beneficiary is due if the government attempts to deprive an individual of the benefit. *See* Arnett v. Kennedy, 416 U.S. 134, 151-54 (1974) (plurality opinion) (adopting this theory). *But see* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (rejecting this theory, on behalf of a majority of the Court). This theory, according to Davis and Pierce, impairs the legislature's accountability to the public, by empowering the legislature to create benefits while allowing agencies to deprive those benefits selectively. *See* 2 DAVIS & PIERCE, *supra* note 166, § 9.4, at 35-36.

291. *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 87-88 (1985) (presenting and then critiquing accountability-based theories for favoring stricter non-delegation doctrine). *Compare Printz*, 117 S. Ct.

does not necessarily suggest that the rider process should elicit the same concern. At least in the commandeering and non-delegation cases, it could be said that the voter looking for someone to blame incorrectly passes over Congress, because the actual mandates affecting individuals issue either from the commandeered state or the agency implementing a standardless congressional mandate.[292] Here, by contrast, Congress has made its intention at least as plain as it has in other complicated, intricately-worded statutory schemes. It may take some effort for a voter to discern the true meaning of section 318—that compliance with its provisions excuses the need to comply with pre-existing environmental statutes—but the voter's deciphering task is surely no more complicated than determining Congress' policy choices in, for example, ERISA[293] or the Clean Air Act.[294] In sum, if the appropriations rider process does not make it any more difficult than normal for the public to know about and

---

at 2395 n.18 (Stevens, J., dissenting) (arguing that local law enforcement officials are able to publicize the federal nature of the Brady Law's background check mandate, and thus to direct public criticism of the policy to the appropriate level of government) *and* Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1060-87 (1995) (critiquing the Supreme Court's anti-commandeering jurisprudence as based on an empirically unsound concern for accountability), *with Printz*, 117 S. Ct. at 2382 (majority opinion) (arguing that political accountability is deflected from Congress to states when Congress requires state law enforcement officers to devote time and effort to enforcing federal laws) *and* Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1406-09 (1993) (arguing that unfunded federal mandates are best understood as legislative attempts by Congress to deflect political accountability to lower levels of government). One commentator reasons that "legislators have an incentive to pass [substantive laws for which appropriations are never made] because they can claim credit at the time of passage and may never be blamed for the low level of appropriations." Susan Rose-Ackerman, *Progressive Law and Economics—And the New Administrative Law*, 98 YALE L.J. 341, 349-54 (1988)(arguing that voters generally have little information about legislatures' actions, and concluding that courts should interpret statutes in a manner that will inform that public about legislative bargains). *But see* Caminker, *supra* at 1068-69 (noting that voters have access to information that reveal the federal nature of the mandate for state action, and concluding that voter failure to do the appropriate investigation, though lamentable, is no less unconstitutional than voter apathy).

292. *See New York*, 505 U.S. at 168-69 (stating that a congressional mandate for state action means that the state government officials may be blamed for the policy notwithstanding the fact that the ultimate policy decision was made by Congress); Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 671-82 (1980) (Rehnquist, J., concurring in judgment) (arguing that Congress did not create a policy when it directed the agency to develop a standard that would ensure protection of worker health "'to the extent feasible'").

293. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 832 (codified as amended at 29 U.S.C. § 1001 *et seq.* (1994)).

294. Clean Air Act, ch. 360, 69 Stat. 322 (1955), (codified as amended at 42 U.S.C. § 7401 *et seq.* (1994)).

participate in the process through which a legislative proposal is considered, then it must also be false that the rider process makes it uniquely difficult for the public to hold legislators accountable for their decisions. There is simply no difference between the ability to participate in the process and the ability to discipline legislators based on the result of that process.[295]

These objections do not conclusively refute the rationales for questioning statutes such as section 318. However, they do suggest that the judicial role in reviewing such statutes should be relatively narrow. Accordingly, the judicial role should focus on the characteristic that makes section 318 so unusual: its format as an interpretation of pre-existing statutory requirements. The quest for the trouble with *Robertson* thus turns to two questions. First, is there a doctrine that can focus on this particular characteristic of section 318? Second, would application of any such doctrine respond to our intuitive suspicion of statutes such as section 318?

C. Public Purpose and Equal Protection

Any constitutional fault with statutes such as section 318 need not rest entirely on the empirical soundness of the participation and accountability concerns discussed above. Section 318's format is also troubling because it makes it difficult for the courts to review and evaluate any public purpose the statute may be said to promote. Such a difficulty raises the possibility of an equal protection violation.

In theory, at least, Congress legislates in order to achieve a purpose that can be uncovered by a court when the judicial task requires discovery of such a purpose.[296] The court can go about that discovery process

295. Of course, section 318 presents another accountability problem in that the voter will still find the environmental statutes impacted by section 318, ostensibly unamended and in full force throughout the country, in the statute books. However, the U.S. Code is littered with statutes that qualify other statutes, even though the qualified statutes do not reflect that fact, and even though the qualifying statutes may not appear in the same part of the Code. For example, a number of statutes explicitly prohibit a particular government agency from making use of a particular exemption to the Administrative Procedure Act's notice and comment provisions for informal rulemaking. *See* 5 U.S.C. § 553 (1994). The generally-applicable exemption remains in place but is limited by the more specific provision. *See, e.g.*, 15 U.S.C. § 1262 (e)(1)(1994) (Health and Human Services Department procedure for declaring toys hazardous, prohibiting agency use of good cause exemption). Such a technical and subtle issue surely cannot give rise to a conclusion that legislative accountability is sufficiently impaired so as to create a constitutional violation.

296. When the issue is simply the interpretation or application of a statute to a fact pattern, discovery of an underlying purpose is not technically necessary. Other theories of statutory interpretation, most notably the textualist approach often associated with Justice Scalia, allow courts to answer interpretive questions without determining the statute's

any number of ways: by reading the statute's own statement of legislative purpose, examining indicators such as legislative history, or investigating the underlying compromises between private parties that produced the statute. Alternatively, a court can simply announce a legislative purpose by hypothesizing one, a route often taken, for example, in modern equal protection cases.[297] In all of these cases, a purpose is identified, even if the purpose is only, in a sense, constructive.

The deferential review implied by the Court's willingness to hypothesize a legislative purpose should not suggest that the purpose requirement is unimportant. Aside from the fact that the Court has continued to insist on the purpose requirement despite such deference,[298] the purpose requirement is necessary for the coherence of any judicial review of legislative classifications. As Professor Tribe notes, the requirement of rationality in a legislative classification

> assumes that all legislation must have a legitimate public purpose or set of purposes based on some conception of the general good. Without such a requirement of legitimate public purpose, it would seem useless to demand even the most perfect congruence between means and ends, for each law would supply its own indisputable - and indeed tautological - fit: if the means chosen burdens one group and benefits another, then the means perfectly fits the end of burdening just those whom the law disadvantages and benefiting just those whom it assists.[299]

The assumption that legislation must have a public purpose in turn

---

purpose. *See* Gregory E. Maggs, *Reconciling Textualism and the* Chevron *Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 396-97 (1995). Commentators have also critiqued the idea of searching for a *coherent* legislative purpose, on the theory that legislation is the product of bargaining between different interest groups, which produces not a coherent statutory policy, but instead a cobbled-together compromise that may point in conflicting policy directions. *See generally* Frank H. Easterbrook, *The Supreme Court, 1983 Term, Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984) (setting forth this theory of legislation).

297. *See, e.g.*, Nordlinger v. Hahn, 505 U.S. 1, 12-14 (1992) (speculating on possible rationales for California's Proposition 13 property tax law).

298. *See* Sunstein, *supra* note 253, at 52 (noting the centrality of purpose requirement despite deferential review of the purpose/means relationship).

299. TRIBE, *supra* note 229, § 16-2, at 1440 (footnote omitted). Essentially the same point is made in what is generally considered to be one of the seminal analyses of the Equal Protection Clause:

> where are we to look for the test of similarity of situation which determines the reasonableness of a classification? The inescapable answer is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law.

Tussman & tenBroeck, *supra* note 202, at 346.

suggests that legislation cannot be thought of as a statement that pre-existing statutory standards have been met. Instead, as Justice Powell noted in *Chadha*, such a statement "appears clearly adjudicatory."[300] Intuitively, such a statement seems to lack the policy purpose necessary under any equal protection doctrine that turns on the fit between a statute's classification and the reason underlying it.[301]

This analysis, if it holds up, thus suggests a surprising conclusion: that section 318 should be vulnerable to an equal protection challenge on the ground that it does not have any reasonably-discoverable legitimate purpose. This conclusion may be surprising because of the modern Supreme Court's well known—and appropriate—aversion to second guessing legislative classification decisions, at least when they do not involve fundamental rights or suspect classes. However, the suggestion that section 318 runs afoul of equal protection does not require a revision of that well-settled rule of deference because it does not call into question the ability of Congress to make a classification of this sort (*e.g.*, one that, as here, classifies the Northwest forests differently from all other forests in terms of the rules the government must follow in managing them). In other words, using equal protection to strike down section 318 does not require the Court to second-guess the *substance* of the legislature's classification decision. Instead, under this analysis the Court would examine whether the *manner* in which Congress acted was one calculated to reflect any purpose at all. As argued above, Congress' decision in section 318 to act via a pronouncement that certain government conduct satisfied a statutory requirement cannot be said to reflect any larger policy purpose.[302]

---

300. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 964 (1983) (Powell, J., concurring in judgment).

301. *See id.* at 964-65 (Powell, J., concurring in the judgment) ("On its face, the House's action [stating that several individuals did not satisfy the statutory criteria for suspension of their deportation] appears clearly adjudicatory. The House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria. It thus undertook the type of decision that traditionally has been left to other branches."); *see also* DAVID R. MIERS & ALAN C. PAGE, LEGISLATION 212 (1982) ("The enactment of legislation is . . . a purposeful activity, typically an aspect of the wider implementation of government policy which is intended to have an impact in the real world."); TRIBE, *supra* note 229, § 10-6, at 657 & n.8 (suggesting that a statute that effectively applies law to individuals makes it more difficult to discern the legislature's purpose in enacting the statute).

302. A caveat is in order at this point. It is possible that equal protection would not apply to section 318 since the statute classifies forests, not persons (the beneficiaries of the equal protection guarantee). *But see supra* note 232 (citing sources discussing the possibility of recognizing legal rights for inanimate objects). Nevertheless, it might be possible to craft an equal protection argument on behalf of persons, such as users of the Northwest

Thus, section 318 presents a situation unlike those presented in *Fritz v. Railroad Retirement Board*,[303] where, at least according to Justice Brennan, the legislature mistakenly thought it was achieving a purpose that the statute did not in fact promote,[304] or in cases such as *City of Cleburne v. Cleburne Living Center, Inc.*,[305] where the Court has found statutes to fail the rational basis test due to the illegitimacy of the government's motivation.[306] In those cases, the judicial criticism assumes the existence of a legislative purpose, which is either not achieved by the statute (Justice Brennan's view in *Fritz*) or is simply unacceptable (the Court's view in cases such as *City of Cleburne*). Analogously, Professor Sunstein argues that a fundamental value animating a variety of constitutional provisions is that legislation should benefit the public, and not simply private interests.[307] In the case of Professor Sunstein's private interest statute, just like the statutes in *Fritz* and *City of Cleburne*, there is a discernible purpose to the statute; it just happens that the purpose—the legislature's desire simply and exclusively to confer a private benefit—is not legitimate.

By contrast to all of these situations, the problem with section 318 lies with the structure of the statute, which is incompatible with the classic conception of legislation in which the legislature perceives a particular need and prescribes certain policies in order to satisfy the need. This conception makes possible a judicial role in which courts scrutinize the relationship between those ends and means, even if that scrutiny is extraordinarily deferential, as it is under modern equal protection's rational basis standard.[308] But such a relationship is impossible to discern in a

---

forests, whose interests in using those forests are treated differently than the interests of users of other National forests due to section 318's exemption of the Northwest forests from generally-applicable environmental laws. More broadly, however, the equal protection argument considered here applies to statutes that unquestionably classify persons and thus are subject to the equal protection guarantee. For example, it could conceivably apply to the securities law amendment considered in *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995), which imposed differing burdens on securities lawsuit defendants. *See supra* Part III.B.1 (discussing Justice Breyer's concurring opinion in *Plaut* and the relationship between that opinion and this Article's singling out analysis).

303. 449 U.S. 166 (1980).

304. *See Fritz*, 449 U.S. at 193 (Brennan, J., dissenting).

305. 473 U.S. 432, 450 (1985) (striking down application of a city zoning ordinance used to require special use permit for the siting of a group home for mentally retarded people).

306. *See id.* at 448-50; *see also* Romer v. Evans, 517 U.S. 620, 635-36 (1996) (striking down state constitutional amendment denying legal protection to gays and lesbians based on their sexual orientation on the ground that the statute had no conceivable purpose except an illegitimate animus toward the burdened group).

307. *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1731 (1984).

308. *See generally* TRIBE, *supra* note 229; Tussman & tenBroek, *supra* note 202, at 346.

statute such as section 318, at least if one accepts that a statutory interpretation analysis does not itself have a policy "purpose," and that the performance of such an analysis is logically incompatible with the discovery or hypothesis of such a purpose.[309]

Boiled down, the theory is simply stated: if section 318 can be considered an act of statutory interpretation, no amount of judicial hypothesizing can logically yield the conclusion that it reflects a policy purpose. But, this distillation elicits an immediate objection to the analysis, namely, that a court could in fact discern a purpose behind section 318. Indeed, common sense, confirmed by history, suggests that Congress' intent in enacting section 318 was to effect a temporary compromise solution to the conflict between conservation and economic values in the Pacific Northwest. Certainly this is a legitimate purpose, and a statute that exempted the Northwest forests from all environmental laws and created unique rules for their management would simply be required to pass muster under standard equal protection ends-means review. But this objection is not completely responsive to the "statutory purpose" hypothesis. The purpose requirement allows courts to review the rationality, and hence, the basic fairness, of the challenged action. A statute like section 318 undermines the theoretical basis for this review. The statute does not purport to classify persons or conduct, thereby allowing subsequent judicial review of the classification. Instead, it simply deems that certain persons or conduct fit into pre-existing classifications. Thus, at least as a formal matter, a statute like section 318 violates the assumption of legislative purpose that, serves as the foundation for equal protection review.

Ultimately, the suggested problem with section 318 is based on its format. Specifically, the theory is that section 318's format is logically inconsistent with equal protection analysis, because a purely interpretive provision such as subsection (b)(6)(A) is inconsistent with any appropriate conception of legislative purpose. Thus, the fact that Congress could have achieved what appeared to be the purpose underlying section 318 does not mean that section 318 is therefore constitutional. Of course, the constitutional infirmity arises only if one puts significant weight on the format by which Congress acted. So far, then, this analysis only makes the most formalistic of cases for striking down section 318. This realization illuminates the real question about this analysis of section 318, the

309. *See supra* note 301 and accompanying text (noting the importance of a policy purpose in legislation). *But see* Easterbrook, *supra* note 296, at 66-76 (criticizing attempts to discern coherent purposes in statutes, given the ad hoc compromise nature of the legislative process).

same question asked in a different doctrinal context by the Ninth Circuit and the Supreme Court opinions in *Robertson*: is there any good reason to take section 318's format so seriously? Should section 318 be struck down solely because of its format, when it is assumed that Congress could have reached the exact same substantive result?[310]

1. Does Format Matter?

The fact that Congress could have achieved the same substantive result simply by amending the underlying laws is not necessarily a fatal objection. Commentators have either proposed or discerned in judicial opinions doctrines under which the Court would scrutinize the process or format by which the legislature acted. For example, Professor Cass Sunstein reads the Court's gender discrimination cases as stressing the motivation underlying the legislature's enactment of a gender distinction.[311] Similarly, Professors Farber and Frickey interpret *Fullilove v. Klutznick*[312] as reflecting a process-based concern whether Congress had given sufficient thought to what the Court considered to be acceptable reasons for a minority set-aside program.[313] Since some gender and race distinctions may be constitutional even without the nearly-impossible[314] satisfaction of the strict scrutiny test,[315] inquiry into whether the legisla-

310. *Compare* Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1317 (9th Cir. 1990) (noting that Congress could possibly have written a constitutional statute achieving the same result as did section 318, but concluding that this did not suffice to validate section 318 itself), *with* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 439-40 (1992) (concluding that section 318 was the functional equivalent of amendments to the underlying environmental statutes, and concluding that the format by which Congress acted was constitutionally irrelevant).

311. *See* Sunstein, *supra* note 253, at 56-58 & n.122.

312. 448 U.S. 448 (1980) (plurality opinion) (upholding federal minority business set-asides).

313. *See* Farber & Frickey, *supra* note 252, at 917 n.247 (citing *Fullilove*, 448 U.S. at 456-467, 477-478, 490); *see also* Quill v. Vacco, 80 F.3d 716, 731 (2d Cir. 1996) (Calabresi, J., concurring in the result) (concurring in holding striking down New York's 168 year-old assisted suicide law as violating the Equal Protection Clause but leaving open the possibility that the same statute repassed by modern New York legislature might be constitutional), *rev'd*, 521 U.S. 2293 (1997); ELY, *supra* note 289, at 169-70 (suggesting that modern repassage of a constitutionally-suspect statute originally enacted during a period when the burdened group was denied effective representation may justify upholding of statute); Guido Calabresi, *The Supreme Court: 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 77 (1991) (suggesting that the striking down of statutes is not the only option for judicial review of allegedly discriminatory laws and suggesting that, instead, courts may be justified in remanding statute to legislatures for reconsideration and repassage that would then be immune from judicial review).

314. *See* Gunther, *supra* note 205, at 8 (describing strict scrutiny as "fatal in fact").

315. *But see* United States v. Virginia, 518 U.S. 515 (1996) (applying a test that may be

ture had a benign motivation, or at least considered such a motivation, may be appropriate.

Immigration and Naturalization Service v. Chadha[316] presents an example of the concern for format. In *Chadha* the Court held Congress to the letter of the constitutional requirements of bicameralism and presentment, despite the popularity of the legislative veto in restraining otherwise very broad grants of power to administrative agencies.[317] The majority's opinion reflected concern that these limits were the only way to ensure some form of legislative deliberation.[318] Indeed, it was the lack of other controls on Congress, and the presence of other controls on administrative action, that explained for the Court why agency rulemaking did not have to go through those same procedural steps.[319] Nevertheless, the *Chadha* Court refused to find constitutional fault with the particularity with which Congress wielded the legislative veto challenged in that case, where Congress vetoed an INS decision suspending several named individuals' deportations. Indeed, the majority opinion explicitly rejected Justice Powell's argument that the particular legislative veto at issue constituted adjudication and thus would be invalid even if enacted as a formal statute.[320] Therefore, in *Chadha*, the Court was concerned enough to strike down a widely-used congressional tool on formalistic grounds that reflected concerns about legislative deliberation, but nevertheless, implicitly sanctioned particularistic legislation that raised substantial concerns that the deliberative process would function poorly against legislative oppression.[321] The message from the Court was that the best the Constitution could do in that situation was to ensure the potentiality of a proper legislative process by enforcing the explicit bicameralism and presentment requirements. So too here, the requirement that a statute at least be formally characterizable as having a purpose may be the only real limit imposed by the Equal Protection Clause's pur-

---

akin to strict scrutiny to a gender classification); Shaw v. Reno, 509 U.S. 630, 657 (1993) (suggesting that strict scrutiny is always appropriate for race classifications).

316. 462 U.S. 919, 959 (1983) (striking down legislative veto of agency action as violating bicameralism and presentment requirements for legislation).

317. *See id.* at 967-68 (White, J., dissenting) (noting the popularity of the legislative veto for this reason).

318. *See id.* at 946-51.

319. *See id.* at 953-54 n.16 (noting the existence of judicial review of agency action and the power of Congress to limit or revoke its previous grant of authority to the agency).

320. *See id.* at 957 n.22.

321. *See id.* at 956-59. Also, Justice Powell argued that the suspension of Mr. Chadha's and five other individuals' deportation was too particularistic an action to trust to a majoritarian legislature. *See id.* at 960 (Powell, J. concurring).

pose requirement.[322]

In both *Fullilove* and *Chadha*, the Court was less concerned with what Congress did (creating set-asides or legislating particularistically), than how it did it (by considering the inequality minorities suffered in obtaining contracting opportunities or by short-circuiting the bicameralism and presentment requirements for legislation).[323] Likewise, there is a constitutional reason for the format restriction calling section 318 into question: if the Equal Protection Clause really does prohibit illegitimate legislative classifications, then, as Professor Tribe points out,[324] there must be a justification, or purpose, against which a classification is challenged. A statute that cannot be coherently read as containing such a purpose fails this fundamental requirement.

Format restrictions may also affect the substance of the legislative product. For example, commentators have suggested that the presence or absence of a public-regarding purpose may matter to legislators who are attentive to public opinion.[325] According to this argument, judicial

---

322. Clearly, much more judicial scrutiny is possible at subsequent steps in the equal protection analysis. For example, the Court has been moderately active in striking down laws under the rational basis test on the grounds that the statute did not have a proper or legitimate legislative purpose. *See generally* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); Romer v. Evans, 517 U.S. 620 (1996). However, this is a different ground, arising at the next step in the analysis, from the one discussed here. In these cases, the Court was able to determine or infer a statutory purpose and then conclude whether it was legitimate. *Cf.* Russell W. Galloway, Jr. *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 159-63 (1989) (discussing the rational basis test). For example, in *Romer*, the Court characterized the challenged state constitutional amendment as having the purpose of an animus-driven desire to burden gays and lesbians. *See Romer*, 517 U.S. at 631-32. *See also City of Cleburne*, 473 U.S. at 448. (identifying the purpose of the challenged government action as the inappropriate fear of mentally retarded individuals). By contrast, section 318, as analyzed in this Article, suffers from an even more preliminary flaw—the lack of any purpose at all.

323. A small caveat to this statement is required by Justice Powell's concurrence in *Chadha*. Under Justice Powell's analysis, Congress, in fact, might not have been able to achieve the same result under the particular facts of that case (i.e., the exclusion of Mr. Chadha and the other individuals named in the legislative veto) as this might have involved Congress either acting, unconstitutionally, as a court or enacting a bill of attainder. *See* Chadha, 462 U.S. at 963-66 (Powell, J., concurring in judgment). The majority rejected this analysis. *See id.* at 957 n.22. After *Chadha*, however, the Court, on *Chadha*'s authority, struck down legislative vetoes of agency actions even when Congress unquestionably could have achieved the same substantive result had it enacted a full-blown statute. *See* Process Gas Consumers Group v. Consumer Energy Council of Am., 463 U.S. 1216 (1983), *aff'g* Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d 425 (D.C. Cir. 1982) (striking down a legislative veto of a generally-applicable agency regulation).

324. *See supra* note 299 and accompanying text.

325. *See, e.g.*, Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest-Group Model*, 86 COLUM. L. REV. 223, 257 (1986).

enforcement of a purpose requirement may lead to legislative deliberation and debate on the statute's probable efficacy in reaching any goals asserted in the statute's text or legislative history. As Professor Tribe states: "[b]y requiring the legislature to expose its purpose for observation the political processes are given a fuller opportunity to react to it."[326] Commentators have suggested that such a political reaction may occur even when courts hypothesize a public purpose. The theory is that that courts' willingness to evaluate a statute based on whether it furthers such a hypothesized purpose may convince interest groups to make the lack of such a purpose explicit in the statute. In turn, an explicit denial of that public purpose may raise the political cost of enactment and reduce the likelihood of passage.[327] If this analysis is correct, then the requirement that a statute take a form consistent with the imputation of such a purpose, while seemingly formalistic, could in fact affect legislative substance.[328]

---

326. TRIBE, *supra* note 229, at 657 (discussing separation of powers); *see also* Macey, *supra* note 325, at 240-41 (asserting that the purpose of the separation of powers principle supports an activist approach empowering courts to act in the public interest); Rose-Ackerman, *supra* note 291, at 349-51 (discussing the public interest role in the legislative process).

327. *See generally* Macey, *supra* note 325. Indeed, it is because he believes that legislation can legitimately be just a private interest compromise that Judge Easterbrook characterizes such private interest compromise-statutes as without a purpose, but nevertheless argues in favor of judicial interpretation of such statutes so as simply to enforce the compromise. *See* Easterbrook, *supra* note 296, at 49-51 (arguing that private-interest statutes should simply be read narrowly, to honor the bargain made in Congress between the competing interests, but that courts should not read into such bargain a public purpose that does not exist).

328. Thus, even commentators who describe the legislative process as a pluralistic battle for private gain nevertheless advocate judicial review that seeks to maximize whatever public-regarding nature can be found in the statute. For example, Professor Macey urges use of a method of statutory interpretation that takes statutory invocations of a public purpose at face value and makes those asserted purposes the touchstone for the interpretation of the statute, resulting with private rent-seeking deals that will be enforced only if the private groups are willing to pay the price of foregoing the cover of such a public-regarding purpose. *See* Macey, *supra* note 325, at 250-56; *see also* Rose-Ackerman, *supra* note 291, at 352-53. This is not a unanimous view, however. For example, Judge Easterbrook has also noted the existence of statutes that have no public purpose. For him, however, the existence of such private-regarding statutes, while no occasion for rejoicing, does not justify the importation of a public purpose that never played a significant role in the enactment decision. *See* Easterbrook, *supra* note 296, at 45-47. Since he believes that the nature of the statute is akin to that of a contract (*i.e.*, a bargained-for exchange), he sees the role of the courts as the enforcers of that bargain; namely, the enforcement of the strict terms of the statute, but nothing more, including no importation of a non-existent public interest. *See id.* at 46. ("If legislation grows out of compromises among special interests . . . a court cannot add enforcement to get more of what Congress wanted. What Congress wanted was the compromise, not the objectives of the contending interests. The statute has no purpose.").

The suggestion that courts should look for legislative purposes raises the question of how careful that search should be. As indicated by cases such as *Fritz*, this question is controversial.[329] Nevertheless, the question does not apply to our situation since, again, the absence of a legislative purpose in section 318 is not a problem of stringency of review, but instead flows logically from the statute's very format. Thus, if there is to be an equal protection requirement that legislation be logically susceptible to a judicial discovery of a legislative purpose, then section 318 fails the test under any level of scrutiny.

Thus, we have identified the problem with statutes such as section 318, and have suggested a doctrinal justification for dealing with it. Can this justification be applied coherently?

2. The "Statutory Purpose" Rule Applied

This analysis brings us back to *United States v. Klein*.[330] Specifically, the proposed "statutory purpose" rule has distinct echoes of the interpretation of *Klein* requiring the legislature to act by changing the underlying law, rather than by prescribing results under pre-existing law. This close relationship should not be surprising. As suggested earlier, a statute deeming pre-existing law to be satisfied is analogous to a judicial decision reaching the same conclusion (*i.e.*, they both constitute law interpretation). The fact that such a statute violates the Equal Protection Clause's purpose requirement really means nothing more than that it is not truly legislation. To the extent such a statute more closely resembles adjudication, the separation of powers, and specifically *Klein*, is implicated.[331]

This analysis suggests that the equal protection requirement of a statutory purpose may accomplish the same purpose as *Klein*'s supposed law-changing/result-directing holding. This would be a welcome result, given the difficulty courts and commentators have encountered in trying to make sense of this part of *Klein*. Before embracing this solution to the *Klein* problem, however, it is necessary to test out the "statutory purpose" rule, to determine whether in fact it does provide a satisfactory means for resolving these sorts of issues. To the extent that this rule is simply a restatement of the *Klein* test, it may well be susceptible to the

329. *Compare* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 182 (Brennan, J., dissenting), *with id.* at 176-77 n.10 (majority opinion) (criticizing Justice Brennan's analysis).

330. 80 U.S. (13 Wall.) 128 (1871). *See supra* Part II (discussing *Klein* and courts' attempts to apply it).

331. *See* TRIBE, *supra* note 229, § 10-6, at 657-58 n.8 (linking the doctrine of separation of powers and bill of attainder clauses in a similar way).

same difficulty of application.

a. The Legislative Interpretation Problem

The "statutory purpose" rule requires simply that legislation be expressed in a format that can be characterized as having a purpose. This generous test provides an enormous amount of leeway for Congress. The sort of purpose that would satisfy this test ranges from the extremely broad to the extremely narrow. An example of an extremely broad statute is one requiring users of toxic waste dumps to pay for their cleanup, which might be characterized as motivated by a desire to impose such costs on those who benefit from the polluting activities. An example of an extremely narrow statute is one prescribing that a particular road be built despite the existence of other laws that would otherwise prohibit its construction, which might be characterized as motivated by a desire to ensure construction of the road regardless of other generally-applicable commitments that might stand in the way. These examples satisfy the rule for the simple, if ultimately crucial, reason that they are logically susceptible to a judicial discovery or hypothesis of an underlying purpose. Since the only criterion is this format consideration, questions about the substantive rationality of a given classification would not enter into this analysis, but would instead be treated by the subsequent equal protection question of the statute's ends-means relationship.

Still, the second of these examples—a statute requiring construction of a particular road despite contradictory laws—raises a serious question about this analysis. In *Stop H-3 Ass'n v. Dole*,[332] the Ninth Circuit rejected a *Klein*-based separation of powers challenge to just such a statute, which ordered the Secretary of Transportation to approve a particular highway project running through a park, notwithstanding any other provision of law.[333] The Ninth Circuit in *Robertson* distinguished *Stop H-3*, by concluding that the statute in *Stop H-3* did in fact change the law, since that statute specifically stated that the statutory rule (construction of the highway) would govern regardless of any other conflicting rule. In general, this is the correct result: enunciation of such a rule should be enough to justify upholding the statute, as it is just as susceptible to judicial imputation of a purpose as a broader rule of the type found in the average statute, such as the hypothetical toxic waste cleanup statute noted above.

---

332. 870 F.2d 1419 (9th Cir. 1989).

333. Pub. L. No. 99-500, 100 Stat. 1783-349, § 114(a) (1986), *reenacted in identical form as* Pub. L. No. 99-591, 100 Stat. 3341-349, § 114(a) (1986).

The more serious problem arises when statutes such as the one in *Stop H-3* appear to be motivated by a legislative belief that the statutory rule represents a proper interpretation of pre-existing law. This seems to have been the case with the statute challenged in *Stop H-3*.[334] Even here, our instinct should tell us that Congress should be able to speak to the meaning of its prior work. The contrary conclusion seems illegitimate: certainly, Congress should be able to ensure that its understanding of pre-existing law controls, by enacting a subsequent statute enshrining explicitly that understanding.

But what does this conclusion do to our rule? For wouldn't the *Stop H-3* statute violate the "statutory purpose" rule if that rule necessarily means that the legislature cannot apply particular facts to an underlying legal rule? The Ninth Circuit's answer in *Robertson* (expressed not as an answer to this Article's proposed "statutory purpose" rule but instead to the closely-related *Klein* question) was that the *Stop H-3* statute changed the underlying law, through its "notwithstanding any other provision of law" language.[335] This cannot be the total answer, though; otherwise, the constitutional question turns on distinctions even more formalistic than those underpinning the "statutory purpose" rule. If the "statutory purpose" rule is to be more than a formalistic check on the particular words with which Congress legislates, there must be a more meaningful way to deal with statutes, such as the one at issue in *Stop H-3*, where the enactment represents nothing less than statutory interpretation by the legislature.

Such a method may be found in the degree of plausibility of that interpretation; for example, the conclusion that Congress' interpretive act in the *Stop H-3* statute reflected a plausible reading of the pre-existing law, while section 318's new requirements, by contrast, have very little to do with fulfilling the affected pre-existing statutes.[336] This rationale would

---

334. *See Stop H-3*, 870 F.2d at 1438 (suggesting that members of Congress believed that the road project at issue was consistent with the pre-existing environmental laws).

335. *See* Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1316-17 (9th Cir. 1990), *rev'd*, 503 U.S. 429 (1992).

336. *See id.* at 1316.

> The clear effect of subsection (b)(6)(A) is to direct that, if the government follows the plan incorporated in subsections (b)(3) and (b)(5), then the government will have done what is required under the environmental statutes involved in these cases.
>
> . . . .
>
> In this way Congress, through section 318, seeks to perform functions reserved to the courts by Article III of the Constitution. For example, if the Secretary follows subsection (b)(3) and (b)(5), then the Secretary will be found to have used the "principles of multiple use and sustained yield" and the "systematic interdis-

also distinguish section 318 from other statutes that are understood to be legislative responses to perceived judicial misinterpretations of previously-enacted statutes. Such legislative "corrections" occur relatively frequently; for example, recent amendments to voting rights[337] and employment non-discrimination[338] statutes seem to have been motivated at least in part by an intention to overturn judicial interpretations of previous versions of those laws.[339] By contrast, it might be argued that section 318 represented an attempt by Congress to dictate an outcome without either explicitly enunciating a new rule or plausibly interpreting pre-existing law.

The importance of the plausibility of the congressional interpretation lies in the fact that it reflects the congressional role in the iterated process of policy formulation that takes the form of legislative enactment, judicial interpretation, and legislative correction. To the extent that this "legislative correction" really is a correction of a perceived judicial misinterpretation of the original statute, the correction can be viewed as part of the law-making process, in effect, nothing more than increased statutory specification. So understood, such corrections, or even pre-emptive "corrections" (pre-emptive because a court had not yet interpreted the underlying original statute), relate back to the original statute, and thus satisfy the "statutory purpose" requirement even if they appear to be pure interpretive acts.

The test for when a statute should be considered interpretive need not be stringent, in recognition of the respect that should be granted Congress' role in the interpretive dialogue. Thus, the *Stop H-3* statute would survive as a legitimate interpretation of the pre-existing environmental statutes that otherwise might have been interpreted as barring construction of the road. By contrast, the sort of "non-interpretive interpreta-

---

ciplinary approach" mandated by the Federal Land Policy and Management Act, 43 U.S.C. § 1712(c)(1) and (2). In addition, the agency will be deemed to have included detailed statements of adverse environmental effects and alternatives required under NEPA, 42 U.S.C. § 4332. Also, there will have been no taking of habitat as proscribed under the Migratory Bird Treaty Act, 16 U.S.C. § 703. Subsection (b)(6)(A) here at issue does not establish new law, but directs the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court.

Id.

337. *See supra* note 13 and accompanying text (discussing the propensity of Congress to overturn judicial interpretations of statues when Congress finds errors in the courts' judgements).

338. *See id.*

339. *See also* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 424-41 (1991) (listing statutes enacted in the past 30 years which have overturned Supreme Court decisions).

tion" that would fail even this lenient test is exemplified by section 318 itself. As the Ninth Circuit demonstrated, section 318's new substantive requirements were not plausible interpretations of the pre-existing law.[340] Since it is not a plausible reading of the underlying environmental statutes, section 318 cannot be considered part of the string of original enactment-judicial interpretation-legislative correction.[341]

Determining whether a statute such as section 318 represents a plausible reading of the statute it arguably interprets would seem to be a difficult, but by no means impossible, task. It is analogous to the task facing the Court when it determines, for habeas corpus purposes, whether a constitutional interpretation represents an extension of existing precedent or a newly-discovered rule,[342] or when it determines, for Takings Clause purposes, whether a regulatory statute represents a background legal principle extant when the claimant purchased the property, or an entirely new form of regulation.[343] The inquiry is also analogous to a judicial determination whether a federal statute enacted pursuant to Congress' power to enforce the Fourteenth or Fifteenth Amendments[344] is an appropriate enforcement measure or instead an illegitimate attempt to interpret the Constitution.[345]

Of course, the interpretive task implied by this "plausible legislative interpretation" idea is not the exact same inquiry as those required by the habeas corpus, takings and section 5 doctrines, since it requires comparisons not wholly between cases (the habeas doctrine) or between cases and statutes (the takings and section 5 doctrines), but instead comparisons between statutes. In theory, at least, this inquiry may be more difficult, as it magnifies the always-present uncertainty about legislative intent by the need to consider the relationship between the handiwork of

340. *See Robertson*, 914 F.2d at 1316 (noting the requirements of the pre-existing environmental laws, and suggesting that section 318 did not plausibly interpret those requirements).

341. For a more general discussion of this issue, see William D. Araiza, *Text, Purpose and Facts: The Relationship Between CERCLA Sections 107 And 113*, 72 NOTRE DAME L. REV. 193 (1996). For a discussion of the specific issue of legislative history commenting on judicial interpretation of an earlier version of a statute under consideration for amendment, see generally Brudney, *supra* note 268.

342. *See generally* Teague v. Lane, 489 U.S. 288 (1989) (holding that the petitioner could not benefit from a rule announced after his conviction became final).

343. *See generally* Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003 (1992).

344. U.S. CONST. amend. XIV, § 5; *id.* amend. XV, § 2.

345. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 508 (1997) (holding that the Religious Freedom Restoration Act of 1993 crossed the line from enforcement measure to interpreting the Constitution).

two different Congresses.[346] In practice, though, this may not always be a difficult inquiry. For example, as noted above,[347] the Ninth Circuit demonstrated persuasively that section 318's requirements could not be viewed as plausible interpretations of what the previously-enacted environmental statutes required. In such cases, it is relatively easy to conclude that the subsequent statute does not plausibly interpret the previously-enacted ones, and that therefore it cannot be expressed (like section 318 was expressed) as a statement deeming those prior statutes to be satisfied.

Finally, there may also be at least some political reality behind this somewhat arcane distinction. If the failure to articulate a public purpose may have some effect on a statute's chances for enactment, and thus some political "bite," [348] then section 318's failure to articulate that it works a change in pre-existing law, and is not merely an extension or an interpretation of it, may have some, also. One commentator has suggested that legislative accountability is impaired whenever Congress purports to open government action to judicial scrutiny but then proceeds to change the law during the pendency of the case.[349] Surely such an after-the-fact alteration of the law is even more accountability impairing if, as with section 318, the format of the alteration is not as obvious.[350] The

346. For an example of the difficulty inherent in this issue, see generally *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (reflecting different approaches among the justices regarding the proper way to integrate a statute with amendments enacted by a subsequent Congress), *overruled on other grounds*, Seminole Tribe v. Florida, 517 U.S. 44 (1996). Of course, this analysis assumes that it makes theoretical sense to view a later Congress' work as an attempt to clarify the intent of the earlier Congress that enacted the original statute. If one does not accept this assumption, then the analysis suggested in this Article simply does not work, because the later statute could not be viewed as a clarification of the earlier Congress' intent, but instead as an independent enactment. In that case, a court would have to integrate the later statute into the earlier statutory scheme, presumably based on the textual provisions of both. *See* Araiza, *supra* note 341, at 219-21 (discussing Justice Scalia's analysis of such an interpretive task in *United States v. Fausto*, 484 U.S. 139 (1988)). For our purposes, the important consequence of rejecting this assumption is that the later enactment must satisfy or fail the "statutory purpose" requirement on its own, without relating back to the original enacting statute. The correctness of this assumption, or of the competing view, is beyond the scope of this Article.

347. *See supra* note 336 (quoting *Robertson*).

348. *See, e.g.*, Macey, *supra* note 325 and accompanying text (noting that the existence of a purpose may affect public opinion minded legislators).

349. *See* Young, *supra* note 69, at 1248-49.

350. *See, e.g.*, Doidge, *supra* note 92, at 929 n.83 (suggesting an accountability rationale for distinguishing between section 318 and the statute challenged in *Stop H-3*, based on the theory that the *Stop H-3* statute's explicit exemption from the otherwise applicable environmental laws was more open to public understanding, and thus public evaluation, than section 318's more surreptitious "determines and directs" language). This Article's argument does not depend on the strength of such a subtle and unproven empirical dis-

impact of such accountability-impairing would be even greater if the altered laws are environmental laws, which have historically enjoyed broad public support.[351]

b. Legislating By Definition

An important variant on the legislative interpretation problem arises from legislatures' practice of explicitly defining key statutory terms. Legislatures wield this authority nearly every time they enact a major statutory program.[352] In addition, a legislature will very often also define terms used in particular statutory provisions.[353] These practices, while superficially violating the "statutory purpose" rule, in fact are not particularly troubling. They represent a necessary adjunct to the articulation of the substantive rule the legislature is enacting, ensuring that the exact contours of that rule are understood by courts and private parties. Thus, they represent not so much the interpretation of law as its articulation.

A legislature may also redefine a statutory term in response to a judicial ruling. An example of this sort of action is Congress' amendment of the Taft-Hartley Act to exclude foremen from the definition of "employees," in response to a Supreme Court decision holding foremen to come within the definition.[354] Such redefinitions represent a more explicit type of the legislative interpretation discussed in the previous subsection. As

---

tinction, given the "interpretive plausibility" theory sketched in the text above.

351. For example, broad public support convinced Republican leaders to back off election promises they had made during the 1994 congressional campaign to cut back on those laws. *See, e.g.*, Richard L. Berke, *In a Reversal, GOP Courts the 'Greens,'* N.Y. TIMES, July 2, 1997, at A1 (noting the political losses suffered by the Republican Party based on its perceived anti-environmental stance); John H. Cushman, Jr., *Environment Gets a Push from Clinton*, N.Y. TIMES, July 5, 1995, at A11 (noting the continued political popularity of environmental protection despite an otherwise antigovernment political trend after the 1994 elections).

352. *See, e.g.*, 5 U.S.C. § 551 (1994) (defining terms used in the Administrative Procedure Act); 42 U.S.C. § 9601 (1994) (defining terms used in the Comprehensive Environmental Response, Compensation, and Liability Act); CAL. GOVERNMENT CODE § 11342 (West 1992) (defining terms used in California Administrative Procedure Act).

353. On July 31, 1999, a WESTLAW search of the United States Code database for the words "term" and "means" within five words of each other yielded 4,445 hits. Many of these may be statutory definition sections occurring at the start of a comprehensive statute. *See supra* note 352. However, a great many defined terms for purposes of a single statutory provision or rule. *See, e.g.*, 5 U.S.C. § 552a (a)(1) (defining "agency" for purposes of § 552 differently than the general definition of that term in the Administrative Procedure Act).

354. *See* Act of June 23, 1947, ch. 120, Title I, § 101, 61 Stat. 137, *codified at* 29 U.S.C. § 152(3) (1994). This statute superseded the result in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 448 (1947), which held that foremen were "employees" for purposes of the National Labor Relations Act.

the legislature's answer to a court's interpretation of a statute, this practice can be justified as part of the dialogue between legislatures and courts, at least as long as the redefinition is plausible.

Since, as noted above, such a "plausibility" test can accommodate significant deference to the legislature,[355] redefinitions could satisfy this test even without an intervening judicial interpretation, as long as the redefining could be explained as something other than a desired change in the substance of the law. As an example of such a redefinition, consider the Coast Guard inspection statute at issue in *Ace Waterways, Inc. v. Fleming*.[356] The statute, enacted in the nineteenth century, required inspection of "steam vessels," which it originally defined as "[e]very vessel propelled in whole or in part by steam."[357] A 1933 amendment to the law, however, redefined "steam vessels" to include "[e]very vessel . . . propelled in whole or in part by steam *or by any other form of mechanical or electrical power*."[358] The court applied the changed definition, using language acknowledging apparently limitless congressional power to legislate by redefining previously-enacted statutory terms.[359] Even more than section 318, statutes such as the one in *Ace Waterways* appear at first glance to conflict with the statutory purpose rule.

But, even the statute in *Ace Waterways* can be harmonized with the "statutory purpose" rule. According to the court, the redefining statute was intended to modernize a law that had been drafted before the development of internal combustion engines.[360] Thus, even this statute, as contradictory to the original term as it seems, appears nevertheless to have been enacted as an updating of the original Congress' intent. If the original intent was that any non-sail-powered vessel was to be subject to the inspection requirement, then the development of new non-sail means of power required new statutory language to ensure that the statute retained its original effect. Thus, the 1933 amendment seems to have been a part of the original legislative string, simply updating the statute to take account of technological change that required statutory change if the original purpose of the statute was to be vindicated.

Thus, legislative interpretation, whether accomplished by definition or redefinition of statutory terms or by less explicit interpretive acts (such

355. *See supra* text accompanying notes 340-341.

356. 98 F. Supp. 666 (S.D.N.Y. 1951).

357. *Id.* at 667 (quoting the original statute).

358. Act of June 13, 1933, ch. 61, § 4399, 48 Stat. 125 (emphasis added).

359. *See Ace Waterways*, 98 F. Supp. at 667 ("Congress has a right to legislate by definition if it chooses.").

360. *See id.*

as the statute in *Stop H-3*), is consistent with the "statutory purpose" rule.[361] But has this distinguishing job been too successful?

3. Reconsidering the Rule

Despite the justifications offered, the "no statutory purpose" rule still emerges from the preceding discussion seriously bruised. Unless we are to place greater weight on the deliberation and accountability concerns that this Article suggested but then minimized, the only substantial support for the rule comes from its importance to the formal structure of equal protection analysis. As suggested above, this rule puts into place a baseline against which to judge the appropriateness of the legislature's classifications. This role is crucial to equal protection theory. Paradoxically, though, the rule appears to be somewhat empty, given the easy ways (for example, rewording of the provision as a substantive rule featuring a "notwithstanding any other provision of law" clause) that a legislature could be said to have drafted a statute with a purpose. The problem is compounded by the further limitation this Article has concluded is necessary to the rule: namely, that there may be situations where it is constitutionally appropriate for a legislature to legislate by definition, the ultimate interpretive act. The rule that emerges, then, is one that is not only easily evaded, but that also has only a narrow range of applicability to begin with. One way to think about this rule, then, is as a doctrinal Maginot Line, holding fast against direct assaults but utterly useless against simple flanking movements.

What this paradox suggests is that the purpose requirement, as currently applied in equal protection law, may not mean very much. If a violation of that requirement (for example, the deeming of statutory requirements to be satisfied, as in section 318) is functionally indistinguishable from other actions that must be viewed as satisfying the requirement (such as redefining the key statutory terms or rewording the statute as a non-interpretive statement) then the purpose requirement itself seems to present no real barrier to legislative action.[362] Of course, it may be that

361. As noted above, this analysis assumes the validity of a legislative intent-based theory of statutory interpretation. *See supra* note 346.

362. Professor Sunstein argues that the purpose requirement should function to invalidate what he calls "naked preferences," that is, legislative action that has no public-regarding goal in mind but merely represents an aggregation of private preferences with sufficient political power to enact the preference as legislation. *See* Sunstein, *supra* note 307, at 1731-32. This conception has been forcefully attacked on the ground that it is difficult, if not impossible, for a court to determine objectively when a statute should be so characterized. *See, e.g.*, Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L. J. 1685, 1694-1700 (1988) (arguing that competing interpretations of statutes can almost al-

political realities do in fact limit the ability of Congress to redraft otherwise problematic legislation as direct policy commands satisfying the "statutory purpose" rule. Ultimately, the value of a format restriction of the sort suggested by the "statutory purpose" rule may turn on one's estimate of those political realities. As noted in the discussions of the anti-commandeering and non-delegation doctrines[363] and in the proposals for requiring more evidence of legislative deliberation,[364] commentators disagree on that empirical issue. Compared to the anti-commandeering and non-delegation doctrines, however, the "statutory purpose" rule is an arguably weaker doctrine, since it is purely format-based, and does not disable Congress from achieving any particular result.[365]

Thus, once again, the relationship of this Article's equal protection analysis arrives at a similar point as the separation of powers analysis in *Klein* and *Robertson*. Just as the purported *Klein* distinction between law changing and result directing appears to collapse, as suggested by the cases that have tried to apply that distinction,[366] so too this Article suggests that, at base, the statutory purpose requirement may be problematic at its core: easily evadable by expedients of unquestioned constitutionality, and quite possibly responsive to no serious political process flaw beyond those endemic to a legislative process that, by its very com-

---

ways be reasonably viewed as serving some conception of the public interest).

363. *See supra* note 291 and accompanying text.

364. *See supra* text accompanying notes 279-288.

365. Of course, the anti-commandeering and non-delegation doctrines can also be described as purely format based, to the extent they merely disable Congress from achieving a particular result by, respectively, commandeering state government institutions or legislating without reaching a policy choice. *See generally* Calvin R. Massey, *Etiquette Tips: Some Implications of "Process Federalism"*, 18 HARV. J.L. & PUB. POL'Y 175 (1994) (describing anti-commandeering jurisprudence as imposing only procedural limits on Congress' power over state governments). Yet limits on the decision to use state governments as instruments of federal policy, or to legislate so broadly as to violate whatever remains of the non-delegation doctrine, appear to be more substantive than the limits imposed by the "statutory purpose" rule, in that the constitutional infirmity is not cured by the same sorts of easy expedients that seem to satisfy the "statutory purpose" rule. At base, the distinction reflected by the statement in the text reflects the view that decisions to commandeer state governments or to legislate broadly are integral parts of the legislative policy, and not mere matters of the style through which that policy is expressed. By contrast, the "statutory purpose" rule as developed in this Article, by exempting from its coverage statutory formats that yield the exact same substantive result, appears to be much more a matter of style, and thus qualitatively different from the anti-commandeering and non-delegation doctrines. This difference remains even if one believes that there are political accountability concerns that lead the legislature to prefer a statutory style like section 318's to one that explicitly amends the pre-existing law. The key point is not whether there are real reasons for Congress to prefer one style over another, but rather, whether the difference can be viewed reasonably as influencing the statute's real effect.

366. *See supra* Part II (discussing courts' attempts to apply *Klein*).

plexity, manages to hide its details from the electorate.[367]

V. CONSEQUENCES

This Article's analysis has led to a discouraging result. Statutes like section 318 raise fundamental issues regarding the appropriate line between legislative and judicial power. As this Article has explained, that line does not simply help define the constitutional structure of the federal government, but also plays a direct role in guarding individual rights. Given the important role that line plays, the inability to delineate it by means of a satisfactory, judicially-enforceable test is troubling.

Of course, the lack of a judicially enforceable test does not mean that the line does not exist. Instead, it may simply mean that the line reflects what Professor Sager calls an "underenforced constitutional norm," which he defines as a constitutional principle that courts are institutionally unable to enforce but that nevertheless exists and binds other governmental decision makers.[368] Indeed, Professor Sager identifies the equal protection principle of treating likes alike as such a norm, at least in that principle's application to social and economic legislation that burdens neither a suspect class nor a fundamental right.[369]

This Article does not consider in detail whether Professor Sager's thesis extends appropriately to the hybrid separation of powers/equal protection issues raised by section 318. It should be at least noted, though, that arguments can be made on both sides. For example, this Article has suggested that judicial review of the legislative process (*e.g.*, judicial review of the deliberation Congress gave to an ultra-specific substantive appropriations rider) would entangle courts in a judicially unmanageable task. On the other hand, statutes such as section 318 present nothing less than a challenge to the independence of the federal courts as a separate, co-equal branch of the national government. Given the importance of the principle at stake, judicial under-enforcement of this norm may be inappropriate.[370]

---

367. *Cf.*, *e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938) (suggesting that legislation impeding political expression and free speech should be subject to heightened judicial scrutiny, since barriers to such activities make it more difficult to use the legislative process to repeal such laws).

368. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213-14 (1978).

369. *See id.* at 1215-18.

370. Indeed, Professor Sager's two primary examples of roles for other governmental entities in articulating underenforced constitutional norms—Congress' section 5 power to "enforce" the Fourteenth Amendment, and state courts' power to protect federal constitutional rights more generously than federal courts—both involve situations where there is

Rather than concern itself with that debate, this Article has examined a preliminary question: whether some doctrinal approach provides a judicially-manageable mechanism for checking this clear, if distant, threat to the autonomy of the federal courts. The benefit of such a mechanism should be clear. First, statutes such as section 318 threaten the fundamental constitutional balance and, ultimately, the individual rights that that balance seeks to protect.[371] Second, other governmental actors are not likely to contest this sort of legislative action.[372] The importance of such a mechanism makes its absence, or at least the absence of a completely satisfactory version, all the more troubling.

But the absence of a perfect judicial response to this problem does not excuse the Supreme Court's failure even to begin the search. Sooner or later, litigants will press such claims in contexts more compelling than section 318—a "jobs versus environment" compromise that does not classify individuals and thus does not directly implicate the individual rights protections that derive from the separation of powers.[373] Indeed, in

---

no challenge to the fundamental status of the federal courts in the constitutional system. *See generally* Sager, *supra* note 368 at 1228-63 (discussing these two examples). Congress' section 5 power is, of course, textually granted, and even though it is limited to "enforcement" and not "interpretation" of the Fourteenth Amendment, that power, at least arguably, represents an explicit sharing of interpretive power, perhaps when, for example, Congress is uniquely able to perceive facts that require a specific response in order to guarantee the Amendment's protections. Sager's discussion of state court interpretations of federal constitutional provisions considers only the question whether the United States Supreme Court should correct such "overly generous" interpretations through the latter's certiorari power. This is merely an argument about how the Court should use its discretion over its docket. Neither of these two examples implicates the federal judiciary's status as a co-equal branch of the federal government. By contrast, a statute such as section 318, which at least raises a substantial question whether Congress is dictating how the judiciary should adjudicate certain cases, presents a much clearer threat to the judiciary's core status.

371. *See* text accompanying *supra* notes 176-177.

372. *Cf.* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983) (noting "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power"); Buckley v. Valeo, 424 U.S. 1, 129 (1976) ("[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches."). There is no reason to believe that the Executive branch, or the states, would be motivated to resist legislative attempts to interfere with the judicial function. If such attempts reflect a singling out of unpopular groups, it is generally assumed that the courts are the most appropriate institution to enforce the Constitution's requirements. On the other hand, if such attempts merely reflects a desire to micromanage a policy issue by interfering with the courts' ability to interpret generally-applicable laws, the executive will presumably go along with the effort as long as he agrees with the underlying policy.

373. *See supra* note 302 (noting legal rights are not likely recognized for inanimate objects).

Robertson itself an amicus argued that section 318 violated the separation of powers doctrine due to its extreme specificity.[374] The Court declined to consider the argument, as it had not been raised below or by a party to the litigation.[375] But, such a challenge becomes more and more likely, given Congress' continued use of particularistic directives that do not explicitly purport to amend existing law, the increased academic interest in methods of scrutinizing statutes for flaws in the enactment process,[376] and the slow accretion of precedent, such as the concurring opinions in *Chadha* and *Plaut*, suggesting judicial recognition of limits on legislatures' power to enact precisely-targeted statutes.

If this Article has demonstrated anything, it is the fundamental structural and individual rights implications of such a challenge, and the enormous difficulty in developing a satisfactory response. But the problems posed by such a challenge will not go away by denying their existence. Indeed, by engaging in such denial, the Supreme Court actually does more damage than if it were to acknowledge them but admit that it was institutionally incapable of devising a solution.[377] By concluding that section 318 was an unexceptional exercise of the legislative power, the *Robertson* Court seems to have engaged in exactly this denial. Breezily concluding that section 318 created "no occasion to address any broad question of Article III jurisprudence,"[378] the Court may have created a troublesome precedent in its consideration of future cases. In the end, the Court's refusal to face such broad and difficult questions may be the real trouble with *Robertson*.

---

374. *See* Brief for Amicus Curiae Public Citizen at 12-13, Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1990) (No. 90-1596).

375. *See* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1990).

376. *See, e.g.*, Macey, *supra* note 325, at 261-62 (suggesting increased judicial scrutiny of actual stated legislative purposes in order to create a legislative dynamic in which there is more legislative debate on such purposes); Sunstein, *supra* note 243, at 1582 (arguing that courts in a republican polity should use statutory interpretation to guard against or limit "possible malfunctions in the legislative process"); Zellmer, *supra* note 267, at 458 (searching for method to allow heightened judicial scrutiny of appropriations riders).

377. Such a course would, of course, amount to an explicit embrace of Professor Sager's concept of underenforced constitutional norms. *See supra* notes 368-370 and accompanying text.

378. *Robertson*, 503 U.S. at 441.