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February 2010

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THE IRREPRESSIBLE MYTH OF *KLEIN*

Howard M. Wasserman*

Associate Professor of Law

FIU College of Law

howard.wasserman@fiu.edu

(305) 348-7482

Abstract

The Reconstruction-era case of *United States v. Klein* remains the object of a “cult” among commentators and advocates, who see it as a powerful separation of powers precedent. In fact, *Klein* is a myth—actually two related myths. One is that it is opaque and meaninglessly indeterminate because, given its confusing and disjointed language, its precise doctrinal contours are indecipherable; the other is that *Klein* is vigorous precedent, likely to be used by a court to invalidate likely federal legislation. Close analysis of *Klein*, its progeny, and past scholarship uncovers three identifiable core limitations on congressional control over the workings of federal courts: 1) Congress cannot dictate case outcomes or judicial findings and conclusions; 2) Congress cannot tell courts how to understand, interpret, or apply the Constitution; and 3) Congress cannot enact unconstitutional rules. But close analysis also reveals that these principles are neither exceptional nor vigorous as judicial constraints on congressional power. Blatant legislation actually violating any of these principles is unlikely to be enacted. On the other hand, in 140 years, *Klein* has not been used to invalidate any actual legislation, other than the law at issue in *Klein* itself. The myth of *Klein* is demonstrated in two recent pieces of Global War on Terror legislation: the Military Commissions Act of 2006, which limited federal judicial decisionmaking in cases brought by GWOT detainees, and the FISA Amendments Act of 2008, which granted telecommunications companies retroactive immunity for their assistance to the Bush Administration in conducting domestic warrantless surveillance. Both pieces of legislation survive constitutional *Klein* scrutiny, revealing that, properly understood, the case does no real constitutional heavy-lifting. At bottom, *Klein* becomes the lynchpin for constitutionalizing basic policy preferences against these laws. But this ignores a central distinction between bad policy and unconstitutional policy; we cannot confuse what the Constitution prohibits with bad statesmanship. Couching policy objections in *Klein* terms does not make the decision any less a constitutional myth.

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

THE IRREPRESSIBLE MYTH OF *KLEIN*

Introduction

Law is steeped in myth.¹ So, too, are many judicial decisions that constitute the legal canon.²

To the roster of mythical law we must add *United States v. Klein*.³ In that Reconstruction-era decision, the Supreme Court invalidated a congressional attempt to dictate the judicial and evidentiary effect of presidential pardons in actions brought by Southern property owners to recover proceeds on proper confiscated by Union agents during the Civil War.⁴ *Klein* is canonical as much for the indeterminacy surrounding it as for its principles of separation of powers.⁵ The case is of “substantial significance,” although “no one is exactly sure why or how.”⁶

In fact, *Klein* is more relevant today than it has been in its 140-year history.⁷ In the past decade, Congress has considered, and occasionally enacted, a variety of laws—prohibiting particular classes of tort claims,⁸ attempting to override state litigation,⁹ prohibiting judicial use of foreign and international law in constitutional interpretation¹⁰—that have at least triggered *Klein*-based separation of powers objections. In particular, Congress has enacted two pieces of Global War on Terror legislation that unavoidably return *Klein*, and the limits it purportedly imposes on Congress and the executive, to the center of the constitutional debate. The first is the Foreign Intelligence Surveillance Act (FISA)

¹ See, e.g., Edward K. Cheng, *The Myth of the Generalist Judge*, 51 STAN. L. REV. 519 (2008); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003); Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601 (2002); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991 (2009); see also Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 972 (2009).

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

³ 80 U.S. (13 Wall.) 128 (1872).

⁴ *Id.* at 145-47; see Evan Caminker, Schiavo and Klein, 22 CONST. COMMENT. 529, 571-72 (2005); Edward A. Hartnett, *Congress Clears its Throat*, 22 CONST. COMMENT. 553, 570-73 (2005); Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437, 438 (2006); Lawrence G. Sager, *Klein's First Principle*, 86 GEO. L.J. 2525, 2525-26 (1998); Gordon G. Young, *Congressional Regulations of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1190, 1192-94.

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

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

⁷ Two things demonstrate *Klein*’s rebirth in doctrinal prominence. First, one Federal Courts casebook now gives *Klein* and its subsequent evolution substantial play. See Peter W. Low, John C. Jeffries, Jr., and Curtis A. Bradley, *Federal Courts and the Law of Federal-State Relations* 103-113 (6th ed. Supp. 2009). Other casebooks continue to give the case note status. See, e.g., DONALD L. DOERNBERG, C. KEITH WINGATE, DONALD H. ZEIGLER, *FEDERAL COURTS, FEDERALISM AND SEPARATION OF POWERS: CASES AND MATERIALS* (4th ed. 2008); RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, DAVID L. SHAPIRO, HART AND WECHSLER’S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (6th ed. 2009); MARTIN H. REDISH AND SUZANNA SHERRY, *FEDERAL COURTS: CASES, COMMENTS, AND QUESTIONS* (6th ed. 2007). Second, the new “Federal Courts Stories” book, telling the underlying stories of significant Fed Courts cases, includes a chapter on *Klein*. Amanda L. Tyler, *The Story of Klein: The Scope of Congress' Authority to Shape the Jurisdiction of the Federal Courts*, in *FEDERAL COURTS STORIES* (Vicki C. Jackson and Judith Resnik, eds. 2009).

⁸ See, e.g., Protection of Lawful Commerce in Arms Act, Pub. L. No. 100-92, 119 Stat. 2095 (2005); Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. (2005) (as passed in the House of Representatives).

⁹ See An Act for the Relief of Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 25 (2005)

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

Amendments Act of 2008, which granted retroactive immunity to telecommunications providers for their role in assisting the federal government with arguably unconstitutional warrantless domestic surveillance.¹¹ The second is the Military Commissions Act of 2006, which in several provisions created adjudicative mechanisms to deal with terror suspects and attempted to limit the scope and manner of judicial review of those mechanisms.¹²

The problem is that *Klein* is a myth. Actually, *Klein* is two related myths. The first is the myth of meaninglessness—that *Klein* does not obviously stand for anything because no one knows what the case means or says. To be sure, the opinion by Chief Justice Chase is “opaque,” “deeply puzzling,” “disjointed,” “delphic,” “generally difficult to follow,” and contains broad language and exaggerated rhetorical flourishes, with statements of principles that cannot literally be true and often are dead wrong.¹³ That perceived opacity creates indeterminacy, an all-things-to-all-people quality to the case.¹⁴ The result is a “cult of *Klein*,” a reverence that prompts parties and scholars to seize on the perceived lack of clarity and argue for broad *Klein*-derived limits on congressional control over federal law and courts.¹⁵ If *Klein* has no discernible meaning, there is at least a plausible argument that it applies to any given situation.

This leads to *Klein*’s second, more fundamental myth of vigor—the false belief that *Klein* is a strong precedent imposing genuine, unique limitations that an overreaching Congress realistically might transgress and that a court might wield to invalidate congressional action. Consider that in almost 140 years, the only case to strike down a law explicitly on *Klein* grounds was *Klein* itself; every *Klein*-based challenge to federal legislation has, quite appropriately, failed.¹⁶ *Klein* arguments rarely gain traction with anyone other than entrepreneurial litigants, scholars, and the occasional stray judge.¹⁷

In speaking of the myth of *Klein*, we must understand the paradoxical meanings “myth” has in law. Most commonly, myth is a synonym for fiction, describing an idea or premise that is false.¹⁸ But myth also describes a story or belief that, although false in some respects, nevertheless is accepted and

¹¹ Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436, § 802, 110th Cong. (2008), codified at 50 U.S.C. § 1885a; *In re Nat’l Security Agency Telecommunications Records Litig.*, 633 F. Supp. 2d 949, 956-57 (N.D. Cal. 2009); *infra* Part VI.A

¹² Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 109th Cong. (2006); *infra* Part VI.B

¹³ See William D. Araiza, *The Trouble with Robertson: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1074 (1999); Frederic M. Bloom, *Unconstitutional Courses*, 83 WASH. U. L.Q. 1679, 1718 (2005) [hereinafter Bloom, *Unconstitutional Courses*]; Hartnett, *supra* note ___, at 572; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction’s Political Court*, 91 GEO. L.J. 1, 34 (2002) (“*Klein* is sufficiently impenetrable that calling it opaque is a compliment”); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2549 (1998) (“Much that it said in the opinion is exaggerated if not dead wrong . . .”); Sager, *supra* note ___, at 2525 (arguing that, while not exactly Fermat’s Last Theorem, *Klein* is “deeply puzzling”); Young, *supra* note ___, at 1193, 1195 (describing opinion as “confusing” and criticizing “excessively broad and ambiguous statements” in majority opinion); *id.* at 1212 (labeling opinion “disjointed, ambiguous, and generally difficult to follow”).

¹⁴ See Young, *supra* note ___, at 1195.

¹⁵ *Id.*

¹⁶ See, e.g., *Plaut*, 514 U.S. at 218; *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 439-41 (1992); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1139 (9th Cir. 2009); *City of New York v. Beretta Corp.* U.S.A., 524 F.3d 384, 396 (2d Cir. 2008); *Ecology Center v. Castaneda*, 426 F.3d 1144, 1148 (9th Cir. 2005); *Save Our Mall*, 269 F.3d at 1096; *In re National Security Agency Telecommunications Records Litig.*, 633 F. Supp. 2d 949, 961-64 (N.D. Cal. 2009); see also Caminker, *supra* note ___, at 542 (stating that courts “work very hard to avoid *Klein*”); Sager, *supra* note ___, at 2525 (“*Klein* typically is invoked as good law but not applicable to the case before the Court[.]”).

¹⁷ Compare, e.g., Sager, *supra* note ___, at 2532-33 with Meltzer, *supra* note ___, at 2543; compare *Schiavo ex rel Schindler v. Schiavo*, 404 F.3d 1270, 1274-75 (11th Cir. 2005) (Birch, J., specially concurring in denial of rehearing *en banc*) with Hartnett, *supra* note ___, at 580-81.

¹⁸ Pettys, *supra* note ___, at 992-93.

celebrated in the legal community because it “encapsulate[s] a community’s perceptions of its origins, its identity, or its commitments, and thereby advance[s] the lives of its members.”¹⁹ Both meanings are in play here. Calling *Klein* a myth suggests that our common judicial and scholarly understanding is wrong (false). But it also suggests that this wrong (false) understanding is fundamental or necessary to the understanding and functioning of the politico-legal community.²⁰

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

However inartfully written, the “doctrine” of *Klein* is not indeterminate. Read historically with subsequent elaboration, limitation, and application, *Klein* readily admits of several related, clearly identifiable constitutional principles. Once past the sweeping and inaccurate rhetoric of the opinion itself, three core principles²¹ (in skeletal form, for the moment) emerge: 1) Congress cannot dictate to courts the outcome of particular litigation or command how courts should resolve particular legal and factual questions in a case;²² 2) Congress cannot compel courts to speak a “constitutional untruth” by dictating how to understand and apply the Constitution where courts’ independent judgment compels a different understanding or conclusion;²³ and 3) Congress cannot enact legislation that deprives individuals of constitutional rights.²⁴ The problem is that none of these principles is groundbreaking or exceptional; all are common ideas, reflected in and associated with other precedents and constitutional doctrines. Moreover, they do little or no work in providing a judicial basis for invalidating overreaching legislation.

Even if false, however, *Klein*’s twin myths remain fundamental to our community’s constitutional self-understanding.²⁵ *Klein* is a product of a unique time—the Civil War and its Reconstruction aftermath—and a unique set of political and constitutional pathologies.²⁶ There were rebellious states and citizens and efforts to bring them back into the Union fold; a unique class of confiscated enemy property and efforts by property owners to recover proceeds;²⁷ and a three-way power struggle among the Radical Republicans dominating Congress, Democratic President Andrew Johnson (and his non-Radical Republican successor, Ulysses S. Grant); and the Supreme Court.²⁸ *Klein* suggests that the Court can and will protect itself from the encroachment of the other branches. Alternatively, *Klein* works, silently, to keep Congress from pursuing its worst excesses in enacting legislation that genuinely might so invade the

¹⁹ *Id.* at 993.

²⁰ *Id.* Fred Bloom captures the same idea in his concept of the “noble lie.” Frederic M. Bloom, *Jurisdiction’s Noble Lie*, 61 STAN. L. REV. 971, 975 (2009) [hereinafter Bloom, *Noble Lie*].

²¹ Because the statute at issue in *Klein* targeted the Supreme Court’s jurisdiction, *infra* notes ____, a fourth reading of the case treats it as about “fundamental and timeless constraint on Congress’s otherwise broad authority to control the jurisdiction of the federal courts.” Tyler, *supra* note ____, 88. But the jurisdictional point largely has fallen away in *Klein* discussions.

²² *Infra* Part III.A.

²³ Meltzer, *supra* note ____, at 2545; Sager, *supra* note ____, at 2529; *infra* Part III.B.

²⁴ Hartnett, *supra* note ____, at 580; *infra* Part III.C.

²⁵ Pettys, *supra* note ____, at 993.

²⁶ See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 459 (1985) (defining pathology as “the phenomenon of an unusually serious challenge to one or more of the central norms of the constitutional regime”).

²⁷ See *Klein*, 80 U.S. at 136-37.

²⁸ *Infra* notes ____ and accompanying text.

judicial province; with *Klein* in the background, Congress dare not approach the constitutional line or engage in extreme separation-of-powers brinksmanship.

At least not in ordinary times, which might be the point. If *Klein* is a product of constitutional pathology, it does its constitutional heavy lifting only in similar periods. Genuinely *Klein*-violative legislation—in which Congress truly oversteps the limits of separation of powers—arises only in the worst of times.²⁹ This perhaps justifies the “cult of *Klein*”, reverence for the tool that the Court uses to defend itself (and the public) against congressional overreaching in most-desperate times. If that is to be *Klein*’s purpose, however, we need a fully contextualized understanding of the case and its resulting doctrine. Unfortunately, such a contextualized understanding exposes *Klein*’s lack of doctrinal vigor; even pathological legislation will not run afoul of *Klein*’s identifiable principles. Whatever the socio-legal benefits the legal community derives from holding onto the myth of *Klein* and maintaining its cult as a separation-of-powers bulwark, its practical use and strength as a judicial tool to invalidate real, even pathological, legislation is a falsehood.

We arguably find ourselves in a constitutionally pathological period surrounding the War on Terror. The period has been marked by efforts of one branch (the executive) to expand its power;³⁰ by skirmishes among the three branches as to who can exercise power;³¹ and by restrictions on individual liberties.³² And it produced the two pieces of legislation purporting to run afoul of *Klein*’s constitutional limits.³³ But in the clearest demonstration of the myth of vigor, even these laws, products of a pathological period though they are, largely survive separation-of-powers challenge under *Klein*’s various principles,³⁴ ultimately appearing as valid enactments.³⁵ Thus, even accepting that courts and the Constitution exist for when the chips are down and the ordinary checks on Congress (including, perhaps, the shadow of *Klein*) are inoperable, *Klein* still does not wield sufficient doctrinal force to be a significant tool for judicial enforcement of constitutional limits.

²⁹ Although Vincent Blasi’s seminal work on constitutional pathology focuses on the role of the First Amendment in pathological times, he speaks in terms of constitutionalism generally and the need for stability as to basic structural arrangements. Blasi, *supra* note ___, at 453. This includes separation of powers and the arrangements of power among the three branches. *Id.*; *infra* Part IV and accompanying text.

³⁰ ERIC LICHTBLAU, BUSH’S LAW: THE REMAKING OF AMERICAN JUSTICE 7-9 (2008); JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 49-51 (2008); Paul M. Schwartz, *Warrantless Wiretapping, FISA Reform, and the Lessons of Public Liberty: A Comment on Holmes’ Jorde Lecture*, 97 CAL. L. REV. 407, 423-24 (2009).

³¹ Compare *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (holding that presidentially established military commissions for terror suspects violate federal law and the Geneva Conventions) with Military Commissions Act of 2006, Pub. L. No. 109-366, 109th Cong. (2006); see Paulsen, *supra* note ___, at 1839 (arguing that Congress repudiated the Court’s understanding a reinstated the executive view); see also *Hamdan*, 548 U.S. at 636 (arguing that President must consult with Congress, absent an emergency); cf. *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008)

³² See, e.g., JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 114-15 (2007); LICHTBLAU, *supra* note ___, at 4, 137-39; MAYER, *supra* note ___, at 52; Schwartz, *supra* note ___, at 412-13; *In re Nat’l Security Agency Telecommunications Records Litig.*, 633 F. Supp. 2d 949, 955 (N.D. Cal. 2009); see also *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (rejecting limitations on habeas corpus for enemy combatants); *Padilla v. Yoo*, C. 08-35, 2009 WL 1651273, *4 (N.D. Cal. 2009) (permitting claim by detainee against government lawyer who promulgated legal opinions supporting detention and interrogation policies leading to alleged constitutional violations).

³³ *Supra* notes 8-10 and accompanying text; *infra* Part V.

³⁴ And even the provisions that might run afoul of some *Klein* principle ultimately seem of little practical consequence.

³⁵ At least under *Klein*. I take no position on other, non-*Klein*-based defects in these laws.

At bottom, these two War-on-Terror laws (as well as other recent *Klein*-vulnerable legislation and proposals) were objected to as politically regrettable or unwise congressional enactments, especially for those who want to see private litigation used to enforce accountability on government and government officers. The instinct towards broad judicial independence and supremacy leads to a visceral sense that Congress overstepped its bounds, even if only as a policy matter. But there is a central distinction bad or unwise public policy and unconstitutional action.³⁶ Couching policy preferences in *Klein* terms does not change this.

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

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

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

Part V examines the problem of conflating bad policy with unconstitutional policy, a conflation to which *Klein* contributes. With its broad language, apparent indeterminacy, purportedly empty core, and perceived historical pedigree as a separation-of-powers, judicial-independence trump card—that is, in light of the twin myths of opacity and vigor—*Klein* takes on an all-things-to-all-people quality.³⁷ It becomes the ideal vehicle for constitutionalizing those ordinary policy preferences, however inappropriate that might be.

Finally, Part VI analyzes the controversial FISA Amendments Act and the Military Commissions Act and shows why all or most of both pieces of legislation survives *Klein* scrutiny, thus demonstrating *Klein*'s doctrinal weakness even against genuinely pathological legislation.

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

³⁷ Young, *supra* note ____, at 1195.

United States v. Klein, it becomes clear, is a myth in both senses of the word—a source of rarely used and genuinely ineffectual constitutional principles, but principles on which we continue to place great rhetorical weight and hope and through which we define our legal convictions and our constitutional culture.

The goal of this paper is to expose *Klein* in all its mythical glory.

II. A Brief History of *Klein*

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

During the Civil War, Congress enacted a series of laws to address the unique legal problem of abandoned and confiscated property in the South. Congress particularly targeted cotton, the sale of which was financing the Confederate war effort.³⁸ The first law, in 1861, provided for forfeiture of all property used in aiding, abetting, and promoting the insurrection.³⁹ A second statute, in 1862, empowered the President to make a public warning to those engaged in or aiding the rebellion to cease on threat of forfeiture of property.⁴⁰

The central act was the third one, in 1863.⁴¹ Congress empowered the Secretary of the Treasury to appoint agents to receive and collected abandoned and captured property, sell it, and deposit proceeds into the general treasury.⁴² The 1863 Act also established procedures through which the owner of abandoned or captured property could bring a claim to recover proceeds in the Court of Claims:

Any person claiming to have been the owner of any such abandoned property may, at any time within two years after the suppression of the rebellion, refer his claim to the proceeds thereof in the Court of Claims, and on proof to the satisfaction of the said of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds.⁴³

At the same time, Congress sought to pave the way for bringing those who had supported the South back into the Union fold. An 1862 law had invited the President to extend pardon and amnesty⁴⁴ to all persons who had participated in the rebellion on terms and conditions “expeditious for the public welfare.”⁴⁵ President Lincoln did so in December 1863, granting a full blanket pardon to all who had

³⁸ Tyler, *supra* note ____, at 88-89; Young, *supra* note ____, at 1203-04.

³⁹ *United States v. Klein*, 80 U.S. (13 Wall.) 128, 130 (1872) (citing Act of Aug. 6, 1861).

⁴⁰ *Id.* at 130.

⁴¹ Young, *supra* note ____, at 1197-98.

⁴² *Klein*, 80 U.S. at 131, 138; Tyler, *supra* note ____, at 89; Young, *supra* note ____, at 1198.

⁴³ *Klein* 80 U.S. at 131; Young, *supra* note ____, at 1198.

⁴⁴ Formally the law “authorized” the pardon, *Klein*, 80 U.S. at 139. But the President believed he held and could exercise the pardon power without congressional authorization. *Id.*; Tyler, *supra* note ____, at 90.

⁴⁵ *Klein*, 80 U.S. at 139-40.

engaged in rebellion as participants or as aiders-and-abettors, with restoration of all property rights, except as to slaves, upon the taking and keeping of a prescribed oath to support the Union, the Constitution, and all acts and proclamations regarding slaves.⁴⁶ Lincoln defended the oath requirement:

Laws and proclamations were enacted and put forth for the purpose of aiding in the suppression of the rebellion. To give them their fullest effect there had to be a pledge for their maintenance. In my judgment, they have aided, and will further aid, the cause for which they were intended. . . . [I]t is believed the Executive may lawfully claim it in return for pardon and restoration of forfeited rights.⁴⁷

In July 1863, following Grant's victory at Vicksburg, Union agents (acting under authority of the 1863 Act) seized 600 bales of cotton belonging to V.F. Wilson; Wilson had marked the cotton "C.S.A" to ensure its safe passage through the South.⁴⁸ The cotton was sold for more than \$ 125,000 and the proceeds paid into the Union general treasury.⁴⁹ Wilson had acted as a surety on bonds for confederate officers, which constituted the giving of aid and comfort.⁵⁰ In February 1864, following Lincoln's pardon proclamation, Wilson took the required oath and received a pardon.⁵¹ In 1865, the executor of Wilson's estate, Klein, petitioned the Court of Claims to recover proceeds of the sale of the cotton and prevailed. The court initially found that Wilson had been loyal in fact because he had given no aid or comfort to the rebellion. The government subsequently presented evidence that Wilson had acted as a surety on bonds for Confederate officers (a fact to which Klein stipulated), an act which the Court had held did constitute giving aid and comfort to the rebellion. Nevertheless, the Court of Claims reaffirmed its judgment the award in Klein's favor, finding the subsequent pardon removed the consequences of any actual disloyalty, rendering him legally (if not factually) loyal.⁵²

While the government's appeal was pending, the Supreme Court decided *United States v. Padelford*,⁵³ a case largely on all fours with *Klein*—a claim to recover proceeds on confiscated-and-sold property by a former Confederate surety who had taken the required oath and received a pardon.⁵⁴ Padelford had been disloyal in fact by acting as a surety for a Confederate officer.⁵⁵ But the 1863 Act authorizing payment of proceeds to those who could prove loyalty was to be read in conjunction with the 1862 law inviting presidential pardon; the two together showed congressional intent to permit recovery by those who were

⁴⁶ *Id.* at 140; Tyler, *supra* note ___, at 89-90.

⁴⁷ *Id.* at 140. This was the first of several blanket pardons issued over the next several years. *Id.* at 140-42.

⁴⁸ Young, *supra* note ___, at 1192.

⁴⁹ *Id.* at 1198.

⁵⁰ *Klein*, 80 U.S. at 132; Young, *supra* note ___, at 1199.

⁵¹ *Klein*, 80 U.S. at 132; Tyler, *supra* note ___, at 91-92; Young, *supra* note ___, at 1199.

⁵² *Klein*, 80 U.S. at 132; Tyler, *supra* note ___, at 93; Young, *supra* note ___, at 1199.

⁵³ 76 U.S. (9 Wall.) 531 (1870).

⁵⁴ *Id.* at 539-42; Young, *supra* note ___, at 1201-03. One difference, ultimately irrelevant, was that Padelford took the oath and received the pardon before his property was seized, while Wilson came forward for the pardon only after the seizure. Young, *supra* note ___, at 1201 n.62; *see* Hartnett, *supra* note ___, at 573.

⁵⁵ *Padelford*, 76 U.S. (9 Wall.) at 539; Young, *supra* note ___, at 1201-02.

factually loyal and by those who, through a pardon, were rendered legally loyal.⁵⁶ The pardon rendered Padelford innocent in law—as though he never had given aid and comfort—and purged his property of any taint.⁵⁷

Radical Republicans in Congress were outraged with the decision in *Padelford*. It let off the hook the wealthy cotton growers who had financed the southern insurrection and who Republicans sought to sanction.⁵⁸

Congressional objections to *Padelford* and to the Court of Claims decision in *Klein* were of a piece with broader discontents of the time. In 1867, Congress had statutorily removed the invitation or authorization for presidential pardon in confiscated-property cases,⁵⁹ likely as part of a broader, ongoing battle with President Andrew Johnson.⁶⁰ *Padelford* was one of a series of Supreme Court decisions that rejected, narrowed, or could be perceived as interfering with the Republicans' Reconstruction agenda.⁶¹ Congressional disaffection with the decision, and subsequent efforts to undo its effects,⁶² were part of the broader political jockeying among Congress, the President, and the Court as to the direction of the postbellum nation, particularly on matters of national power and the reintegration of southern states and citizens into the Union.⁶³

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

[N]o pardon or amnesty granted by the President . . . nor any acceptance of such pardon or amnesty, nor oath taken . . . shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence in support of any claim against the United States . . . but the proof of loyalty required [by the 1863 Act] shall be made by proof of the matters required, irrespective of the effect of any executive proclamation, pardon, amnesty, or other act of condonation or oblivion.⁶⁴

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

⁵⁶ *Padelford*, 76 U.S. (9 Wall.) at 543; Young, *supra* note ____, at 1202-03.

⁵⁷ *Padelford*, 76 U.S. (9 Wall.) at 543.

⁵⁸ Tyler, *supra* note ____, at 94-95; Young, *supra* note ____, at 1193, 1204.

⁵⁹ *Klein*, 80 U.S. at 141-42.

⁶⁰ See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 247-48 (1988); Edwards, *supra* note 329. Johnson was impeached a year later. See BRUCE ACKERMAN, WE THE PEOPLE, VOL. 2: TRANSFORMATIONS 18-20 (1998) [hereinafter ACKERMAN, VOL. 2]; FONER, *supra* note ____, at 333-35; Edwards, *supra* note ____, at 329-30.

⁶¹ See BRUCE ACKERMAN, WE THE PEOPLE, VOL. 1: FOUNDATIONS 101 (1991) [hereinafter ACKERMAN, VOL. 1]; FONER, *supra* note ____, at 529; Edwards, *supra* note ____, at 335; see also, e.g., Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Blyew v. United States, 80 U.S. (13 Wall.) 581 (1872).

⁶² When Sen. Drake introduced legislation to undo *Padelford*, *Klein*, and similar decisions, he waved a copy of *Padelford* when speaking on the Senate floor. See Young, *supra* note ____, at 1204.

⁶³ See ACKERMAN, VOL. 2, *supra* note ____, at 123, 199-200, 209; FONER, *supra* note ____, at 183-84, 237-38, 250-51; Edwards, *supra* note ____, at 327-29; *infra* notes __ and accompanying text.

⁶⁴ *Klein*, 80 U.S. at 133, 143; Young, *supra* note ____, at 1207-08

And such pardon shall recite in substance that such persons took part in the late rebellion . . . or was guilty of any act of rebellion . . . and such pardon shall have been accepted in writing by the person to whom the same issued without an express disclaimer of, and protestation against, such fact of guilt contained in such acceptance, such pardon and acceptance shall be taken and deemed . . . conclusive evidence that such person did take part in, and give aid and comfort to, the late rebellion[.]⁶⁵

But the question remained what to do in pending cases such as *Klein*, where the Court of Claims had issued judgment in favor of the claimant based on his having been made legally innocent by virtue of the pardon. The original Senate bill would have required the Supreme Court to reverse any judgments for claimants relying on pardons that were pending on appeal, presumably resulting in a remand and a new determination by the Court of Claims, with the result that the claimant would lose on remand under the new legal rule that pardon was conclusive proof of disloyalty.⁶⁶ During Senate debates, support shifted to the alternative of relying on congressional power over the jurisdiction of the Court of Claims and the Supreme Court appellate jurisdiction.⁶⁷ The Senate stripped the Supreme Court of appellate jurisdiction over all cases in which a pardon had been used as evidence of loyalty, requiring the Court to dismiss “the cause” for want of jurisdiction.⁶⁸ Importantly, Republicans intended this to mean dismissal of “the case—everything.”⁶⁹ It was not enough to have the appeal to the Supreme Court dismissed, which would have left the Wilson Estate with its Court of Claims judgment in tact; Congress wanted the judgment undone and the entire lawsuit dismissed where the claim was based on a pardon.⁷⁰

The *Klein* Court struck back, rejecting the proviso and its purported limits on appellate jurisdiction. First, the Court rejected the argument that the proviso was a permissible exercise of congressional power under the Exceptions Clause.⁷¹ The proviso did not withhold appellate jurisdiction “except as a means to an end” of denying to presidential pardons the effect that the Court adjudged them to have in *Padelford*.⁷² Rather, the purpose of the law was to “deny to a pardon granted by the President the effect which this court had adjudged them to have.”⁷³

The denial of jurisdiction to the Court of Claims and to the Supreme Court was “founded solely on the application of a rule of decision, in causes pending, prescribed by Congress.”⁷⁴ Congress was not appropriately regulating appellate jurisdiction, but “prescrib[ing] a rule for the decision of a cause in a particular way.”⁷⁵ This was “not an exercise of the acknowledge power of Congress” over the Court’s

⁶⁵ *Klein*, 80 U.S. at 134, 143-44.

⁶⁶ Tyler, *supra* note ___, at 95-96; Young, *supra* note ___, at 1204-05, 1210.

⁶⁷ *Id.* at 1207-08; see U.S. CONST. art. III § 2.

⁶⁸ *Klein*, 80 U.S. at 134 (citing 1870 proviso).

⁶⁹ Young, *supra* note ___, at 1208 (quoting legislative debates and statements of Sen. Edmunds, sponsor of the final measure).

⁷⁰ *Klein*, 80 U.S. at 134; Young, *supra* note ___, at 1210, 1221-22.

⁷¹ *Klein*, 80 U.S. at 145.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 146.

⁷⁵ *Id.*

appellate jurisdiction.⁷⁶ The Court was required to dismiss the appeal, even if it believed the judgment below should be affirmed by virtue of the pardon.⁷⁷ Such a requirement was problematic in two respects. First, in allowing the government, as party to the case, to decide in its favor, and second, in allowing Congress to prescribe rules of decision to the judiciary in cases pending before it.⁷⁸

The Court then distinguished its own decision in *Pennsylvania v. Wheeling Bridge Company*.⁷⁹ After a court decreed that a particular bridge was a public nuisance and ordered its abatement, Congress re-designated the bridge as a post road that no longer had to be abated.⁸⁰ The Supreme Court held that the initial nuisance decree could not be enforced because the bridge had, by virtue of the new law and new legal designation, ceased to be a nuisance.⁸¹ The difference between *Klein* and *Wheeling Bridge* was that Congress in the latter had not prescribed any “arbitrary” rule of decision.⁸² Rather, Congress had created new legal circumstances to which the Court simply applied ordinary rules.⁸³ By contrast, here Congress had forbidden the Court to give the pardon the evidentiary effect the Court, in its own judgment, believed the pardon should have, instead directing the Court to give it the precisely contrary effect.⁸⁴

The second, seemingly separate basis for rejecting the legislation was that it impaired the effect of a presidential pardon. By requiring the Court to view pardons as evidence of disloyalty, it functionally required the Court to treat them as null and void and without legal effect.⁸⁵ This infringed the Executive’s constitutional power.⁸⁶ More problematically, it compelled the courts to be instrumental in that infringement.⁸⁷

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

III. Three Judicially Enforceable Principles

It has become an article of academic faith that *Klein* is, at best, not a model of clarity and, at worst, opaque.⁸⁸ But calling it opaque creates indeterminacy, a presumed meaninglessness, to the resulting

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ 59 U.S. (18 How.) 421 (1855).

⁸⁰ *Id.* at 429; *see also Klein*, 80 U.S. at 146; Redish & Pudelski, *supra* note ____, at 446-47.

⁸¹ *Klein*, 80 U.S. at 146 (discussing *Wheeling*).

⁸² *Id.* at 146-47; Hartnett, *supra* note ____, at 579.

⁸³ *Klein*, 80 U.S. at 147.

⁸⁴ *Id.*

⁸⁵ *Id.* at 147.

⁸⁶ *Id.*

⁸⁷ *Id.*; Araiza, *supra* note ____, at 1075 (describing problem that proviso made courts into Congress’ “constitutional puppet”).

⁸⁸ *See sources cited supra* notes ____.

doctrine that allows *Klein* arguments to at least be raised against all manner of laws.⁸⁹ In fact, careful reading of *Klein*, in light of its evolution in subsequent (and more recent) cases, reveals three clear, somewhat related judicially enforceable constitutional principles. But parsing *Klein* and its progeny to avoid indeterminacy and reveal core principles also runs headlong into the doctrine's lack of vigor. The principles identified are neither exceptional nor particularly powerful limits on Congress that can be wielded to invalidate likely or significant legislation.

In other words, the twin myths of *Klein* stand and fall together. By wading through the case and its progeny we find a core meaning in three somewhat related principles. In finding those principles, we discover that they lack real doctrinal force.

A. Congressional control over fact-finding and litigation outcomes

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

1. Dictating substantive rules of decision

Oft-cited language in *Klein* prohibits Congress from prescribing rules of decision for cases in federal courts; the Court criticized the 1870 proviso as denying jurisdiction “solely on the application of a rule of decision, in causes pending, prescribed by Congress.”⁹⁰

Importantly, however, no act of Congress (other than the proviso in *Klein* itself) has been deemed unconstitutional on that principle.⁹¹ Moreover, that statement cannot literally be true.⁹² Congress prescribes rules of decision whenever it enacts substantive law that controls primary conduct and establishes the legal rules that courts apply to resolve disputes under that substantive law. Consider, for example, the Civil Rights Act of 1964.⁹³ In prohibiting employers from firing people “because of” race and other characteristics, Congress established a rule of decision that courts apply in resolving discrimination claims under the statute; the rule requires a court to find in favor of, and grant relief to, a plaintiff who can present evidence showing that his fired was because of racial animosity.⁹⁴

The *Klein* Court itself seemed to recognize the literal incoherence of that language, as indicated by its efforts to distinguish *Pennsylvania v. Wheeling Bridge*.⁹⁵ By redefining the bridge as a post road under federal law, Congress imposed a new rule of decision to be applied by the Court—the bridge took on its congressionally defined status and the Court was bound by that status. The Court distinguished *Wheeling*

⁸⁹ See Young, *supra* note ___, at 1195; see also Tyler, *supra* note ___, at 103-04.

⁹⁰ United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1872); Hartnett, *supra* note ___, at 577; Redish & Pudelski, *supra* note ___, at 444-45.

⁹¹ Hartnett, *supra* note ___, at 581.

⁹² Meltzer, *supra* note ___, at 2549; Redish & Pudelski, *supra* note ___ at 446 (labeling the Court's statement “wrong”); Tyler, *supra* note ___, at 105 (“This proposition cannot be reconciled with the settled principle that courts are obliged to apply otherwise valid law as they find it.”).

⁹³ 42 U.S.C. § 2000e-2(a).

⁹⁴ Hartnett, *supra* note ___, at 577-78; see also Araiza, *supra* note ___, at 1059 (“[A]ll legislation amounts to the imposition of legal liability on individuals involved in certain fact patterns.”).

⁹⁵ *Klein*, 80 U.S. at 146-47 (discussing *Pennsylvania v. Wheeling Bridge Co.*); Redish & Pudelski, *supra* note ___, at 446-47.

Bridge on the ground that Congress had not prescribed an “arbitrary rule of decision,” but simply had left the court to “apply its ordinary rules to the new circumstances created by the act.”⁹⁶ But those new circumstances properly included a new rule of decision—the bridge is a federally designated post road and thus cannot be a public nuisance as a matter of federal law.

Subsequent cases have reconciled *Klein* and *Wheeling Bridge* by recognizing that Congress remains free to amend generally controlling substantive law, even as the change in substantive law affects (or potentially affects) litigation outcomes by establishing a new rule of decision.⁹⁷ Lower courts have become highly deferential and tolerant of such changes in law, so long as Congress changes the overall substantive legal landscape—the new legal circumstances⁹⁸—in some “detectable way.”⁹⁹

So narrowed (or watered-down, depending on one’s perspective), this principle does not impose meaningful limits on congressional power. But it also holds *Klein* in check, keeping it from imposing overbroad restrictions on Congress’ essential ability to legislate in beneficial and necessary ways.¹⁰⁰ *Klein* twice emphasized that the law applied to pending cases.¹⁰¹ But Congress can change substantive law prospectively, retrospectively, or both. Courts apply valid law in effect at the time a case is being decided, even where controlling law has changed during pendency of the case in the trial court or between trial-court judgment and appeal.¹⁰² Congress only need make its retroactive intent plain.¹⁰³

Another explanation for *Klein* is that the proviso targeted specific pending litigation. Congress was aware that the government’s appeal in *Klein* was pending and that *Padelford* controlled, meaning the government likely would lose on appeal. In his comprehensive history of *Klein*, Gordon Young has shown that Senate Radical Republicans knew it would be insufficient merely to control the evidentiary effect of pardons prospectively, because that would leave in place judgments already rendered by the Court of Claims.¹⁰⁴ It thus was necessary for Congress specifically to target cases pending on appeal, whether by requiring the Court to reverse judgments based on pardons, as initially proposed by Senator Drake, or by stripping the Court of appellate jurisdiction over such appeals with a requirement to dismiss “the cause,” as ultimately enacted.¹⁰⁵

⁹⁶ *Klein*, 80 U.S. at 146-47; Redish & Pudelski, *supra* note ___, at 446-47.

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

⁹⁸ *Klein*, 80 U.S. at 147.

⁹⁹ *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1569-70 (9th Cir. 1993).

¹⁰⁰ See Araiza, *supra* note ___, at 1075 (“In a very real sense, any conventional statute ‘directs results,’ yet the enactment of statutes remains the quintessential legislative function.”); Hartnett, *supra* note ___, at 577-78; Redish & Pudelski, *supra* note ___, at 448 (“[T]here exists no reason, in constitutional theory or doctrine, why Congress may not enact subconstitutional, generally applicable rules of decision . . .”).

¹⁰¹ *Klein*, 80 U.S. at 146 (stating that the government argument “is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress”); *id.* (“Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?”).

¹⁰² *Landgraf v. USI Film Products*, 511 U.S. 244, 273 (1994); Hartnett, *supra* note ___, at 578; Redish & Pudelski, *supra* note ___, at 446; Young, *supra* note ___, at 1240 & n.238.

¹⁰³ *Plaut*, 514 U.S. at 226; *Landgraf*, 511 U.S. at 270.

¹⁰⁴ Young, *supra* note ___, at 1210, 1221-22.

¹⁰⁵ *Id.* at 1208, 1210.

But even this anti-targeting principle does not invalidate much legislation. The closest call was *Robertson v. Seattle Audubon Society*.¹⁰⁶ The case arose out of an ongoing controversy over Northwest timber harvesting and its effect on the habitat of the spotted owl.¹⁰⁷ Two lawsuits by environmental groups challenged the government's management of thirteen national forests and BLM lands in Oregon and Washington as being contrary to five separate federal statutes.¹⁰⁸ In the Northwest Timber Compromise of 1990, Congress established comprehensive new rules governing timber harvesting for a limited period of time, expanding harvesting in some areas and prohibiting it in others.¹⁰⁹ At the heart of the controversy was a provision that

Congress hereby determines and directs that management of areas according to [provisions of the Compromise] on the thirteen national forests in Oregon and Washington . . . is adequate consideration for the purpose of meeting the statutory requirements that are the basis for [the two pending district court cases, mentioned by name].¹¹⁰

The Supreme Court upheld the compromise as a permissible alteration of substantive law.¹¹¹ Claims initially would have succeeded if the challenged harvesting had violated any of five statutes; but those claims now failed so long as the harvesting did not violate either of the two relevant provisions in the new statute.¹¹² The Court was untroubled by the explicit statutory reference to pending litigation. That simply was generalized shorthand for identifying the five previous statutory requirements that formed the basis for the lawsuits and that functionally had been amended by the Compromise; rather than naming each statutory provision amended, Congress named the litigation in which the now-amended provisions were in play.¹¹³ But any effect on the two pending litigations resulted from the modification of applicable substantive law.

Robertson is the closest Congress has come to violating this principle of *Klein*. In fact, many suggest both that the Court was wrong not to strike the law down¹¹⁴ and that if that legislation did not violate *Klein*, nothing will.¹¹⁵ Consider the D.C. Circuit decision in *National Coalition to Save Our Mall v. Norton*.¹¹⁶ Plaintiffs brought an action seeking to enjoin construction of the World War II Memorial on

¹⁰⁶ 503 U.S. 429 (1992).

¹⁰⁷ *Id.* at 431-32; Araiza, *supra* note ___, at 1065; Redish & Pudelski, *supra* note ___, at 455-56; Sager, *supra* note ___, at 2527.

¹⁰⁸ *Robertson*, 503 U.S. at 432; Araiza, *supra* note ___, at 1065; Redish & Pudelski, *supra* note ___, at 456; Sager, *supra* note ___, at 2527.

¹⁰⁹ *Robertson*, 503 U.S. at 433; Araiza, *supra* note ___, at 1065; Redish & Pudelski, *supra* note ___, at 456; Sager, *supra* note ___, at 2527.

¹¹⁰ *Robertson*, 503 U.S. at 434-35; Sager, *supra* note ___, at 2527.

¹¹¹ *Robertson*, 503 U.S. at 438, 440-41.

¹¹² *Id.* at 438; see Araiza, *supra* note ___, at 1059, 1072; Redish & Pudelski, *supra* note ___, at 457; Sager, *supra* note ___, at 2527; see also Araiza, *supra* note ___, at 1071 (“The key to the Court’s conclusion . . . seems to have been the observation that . . . [the amended law] would operate to change defendants’ duties under statutes[.]”).

¹¹³ Araiza, *supra* note ___, at 1058; Redish & Pudelski, *supra* note ___, at 456; Sager, *supra* note ___, at 2527.

¹¹⁴ Araiza, *supra* note ___, at 1059 (“[I]t is hard to avoid the feeling that there is something inappropriately non-legislative about this statute.”); Caminker, *supra* note ___, at 542 (describing the “Court’s apparent willingness to work very hard to avoid *Klein*”); Redish & Pudelski, *supra* note ___, at 455 (arguing that *Robertson* shows the Court playing “fast and loose” with this principle); Sager, *supra* note ___, at 2527.

¹¹⁵ *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001) (rejecting *Klein* argument as to statute that “presents no more difficulty than the statute upheld” in *Robertson*).

¹¹⁶ 269 F.3d 1092 (D.C. Cir. 2001).

the National Mall, alleging that various federal agencies and officials had violated a host of federal statutes in approving the Memorial design and construction.¹¹⁷ While litigation was pending, Congress enacted a law requiring expeditious construction of the Memorial, “notwithstanding any other provision of law.”¹¹⁸ Again, Congress used generalized blanket language to functionally amend any and all laws that might have been used to block construction. Congress did not identify the overridden statutory provisions by name, but left it to the courts to know what laws were in play in the pending case and that those laws had been superseded.

The D.C. Circuit captured the emptiness of the argument that legislation can be too litigation-specific. First, it was clear under *Wheeling Bridge* that Congress could have imposed new standards in cases that already had proceeded to judgment and to issuance of an injunction. Congress therefore has power to impose new substantive rules in pending actions for injunctive relief where no injunctive had been issued at the time of the amended legislation.¹¹⁹ Second, plaintiffs in *Save Our Mall* conceded during argument that the new legislation would have been valid amended substantive law had it been enacted prior to commencement of the lawsuit, even if enacted in express anticipation of the lawsuit.¹²⁰ Given that concession, the court rejected the idea that legislative specificity became fatal merely because enacted against a pending, rather than anticipated, lawsuit.

2. *Finding Facts and Dictating Outcomes*

Rhetoric aside, Congress has power to prescribe (non-rights-infringing) rules of decision that bind courts, even through retroactive amendments to existing rules and applicable to pending cases.¹²¹ Establishing and amending legal rules entails determining legal standards, identifying the significant legal and factual issues that courts must apply to a set of circumstances, and dictating the legal consequences that flow from the court’s application of the legal standards to a set of facts.¹²²

What really is going on under *Klein* is a prohibition on Congress using legislative power to predetermine litigation outcomes, through explicit commands to courts as to how to resolve particular factual and legal issues or telling courts who should prevail in given cases under existing law.¹²³ It knocks out blatant examples—“In the case of *A v. B*, pending in the United States District Court for the Southern

¹¹⁷ *Id.* at 1093-94.

¹¹⁸ *Id.* at 1094 (citing legislation).

¹¹⁹ *Id.* at 1097.

¹²⁰ *Id.*

¹²¹ Araiza, *supra* note ___, at 1075 & n.97; Hartnett, *supra* note ___, at 578; Tyler, *supra* note ___, at 106; *supra* notes ___ and accompanying text.

¹²² Araiza, *supra* note ___, at 1059 (“[A]ll legislation amounts to the imposition of legal liability on individuals involved in certain fact patterns.”).

¹²³ Araiza, *supra* note ___, at 1079, 1088 (describing distinction between Congress changing law and Congress directing results in particular cases, although recognizing the difficulty courts have had in drawing the line); Caminker, *supra* note ___, at 539 (calling this the “narrower and more traditional understanding of the *Klein* principle”); Redish & Pudelski, *supra* note ___, at 445 (“If Congress may not itself resolve individual litigations, its direction to the courts as to how to resolve specific disputes is constitutionally problematic.”); Redish, *supra* note ___, at 718 (“Congress may not, through legislation, dictate the resolution of a particular litigation”); Shugerman, *supra* note ___, at 979 (arguing that best reading of *Klein* is “prohibition against Congress dictating specific results or interpretations of laws and facts”).

District of Florida, A shall prevail” or “In all cases filed, courts shall find that no federal environmental laws were violated in the management of national forest lands.”¹²⁴

But such blatant enactments seem unlikely, which perhaps explains why no actual laws have been invalidated under this principle.¹²⁵ Consider *Robertson* again. Although the 1990 law explicitly referenced pending litigation, it did not dictate which party should prevail, did not dictate findings of fact, and did not command a conclusion that any particular timber harvests or sales did or did not violate federal law. The amended law only established new legal standards to be applied in determining the validity of sales and harvests; it did not dictate how to apply those legal standards in the litigation. It remained with the court to determine whether those standards had been satisfied.¹²⁶

Or consider *Plaut v. Spendthrift Farms*,¹²⁷ where the Court addressed congressional creation of a new, potentially longer limitations period for certain securities fraud claims.¹²⁸ The amended limitations period provided that any claims previously dismissed as time-barred under the old limitations rule should be reinstated if the claim would have been timely under the new rule.¹²⁹ The new limitations period “indisputably does set out substantive legal standards for the Judiciary to apply, and in that sense changes the law (even if solely retroactively).”¹³⁰ But the Court again rejected a *Klein* argument. The law did not command courts how to decide the facts underlying the limitations issue, nor whether to conclude that a particular claim was timely under the controlling period. The law only told courts the legal consequences (reinstatement of claims) of judicially determined conclusions in a particular factual circumstance.

Of course, all legislation “directs results” in court and imposes legal liability on certain fact patterns.¹³¹ Congress does not impermissibly dictate outcomes so long as it merely identifies the relevant legal and factual issues that will control the outcome and the consequences of particular legal and factual

¹²⁴ See Araiza, *supra* note ___, at 1125 (“[A] statute deeming pre-existing la to be satisfied is analogous to a judicial decision reaching the same conclusion[.]”); Gunther, *supra* note ___, at 910; Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1373 (1953) (“I can readily read into Article III a limitation on the power of Congress to tell the court how to decide it.”); Redish & Pudelski, *supra* note ___, at 457 (“Any legislation that directs findings in specifically referenced litigation should categorically be deemed to violate *Klein*.”); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 48 MERCER L. REV. 697, 718 (1995) (arguing that “every observer reasonably” can understand that “Congress may not adjudicate individual litigations”).

¹²⁵ Or the Court has invalidated the law without relying on *Klein*. This arguably is the case with *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987). The Court struck down a federal statute that prohibited collateral challenge to the constitutionality of a prior administrative order (deportation) where that order was an element of a subsequent crime (unlawful reentry after deportation) prosecuted in federal court. *Id.* at 837-39. Although the context was different, functionally the statute forced courts to accept a non-judicial factual determination and prohibited courts from engaging in independent analysis about the constitutionality of the underlying order—what this principle of *Klein* purports to invalidate. Yet the Court made no mention of *Klein*. See also *Estep v. United States*, 327 U.S. 114, 123-25 (1946) (reading statute to permit judicial review of constitutionality of draft board order in subsequent prosecution for refusing induction, without citing *Klein*). Thanks to Gordon Young for raising this point.

¹²⁶ *Robertson* 503 U.S. at 438-39; see *Ecology Center v Castaneda*, 426 F.3d 1144, 1149 (9th 2005) (stating that *Klein* is not violated where Congress changed the underlying law but left to the courts the role of determining whether new legal criteria had been met); Sager, *supra* note ___, at 2534; but see sources cited *supra* note ___.

¹²⁷ 514 U.S. 211 (1995).

¹²⁸ In *Lampf, Pleva, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991), the Court had held that the limitations period on securities fraud claims expired one year after discovery of facts showing the violation and within three years of the violation. Congress provided that, for all actions filed on or before June 19, 1991 (the day *Lampf* was decided), district courts should adopt the limitations period of the state in which they sat. 15 U.S.C. § 78aa-1; *Plaut*, 514 U.S. at 214-15.

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

¹³⁰ *Plaut*, 514 U.S. at 218.

¹³¹ Araiza, *supra* note ___, at 1059, 1075.

conclusions. *Klein* only requires that courts retain the power to exercise its independent judgment to find facts and to apply the legal standard to those facts and decide whether the congressionally dictated rule of decision (new or old) has been satisfied and how the specific case should be resolved.

Accepting that legal rules command results presents a wrinkle: Congress designs legal rules (either in the first instance or through an amendment to the substantive legal landscape) with the “hope” that rules produce certain outcomes on certain facts. This is Congress’ purpose in enacting or modifying the law—to achieve certain substantive policy goals through the operation of legal rules and judicial enforcement of those legal rules.¹³² Congress establishes liability rules to protect and incentivize conduct deemed socially beneficial and punish or deter conduct deemed socially destructive.¹³³ When Congress prohibited racial discrimination in employment in Title VII, it “hoped” that plaintiffs who were fired under certain circumstances would prevail. When Congress enacted the 1990 Northwest Timber Compromise, it hoped that some timber harvesting could go forward under the more-relaxed standards and it hoped that a litigation effort to stop that harvesting would fail. Congress viewed the construction of the World War II Memorial as a socially beneficial activity and altered rules to eliminate legal barriers to that construction.¹³⁴

This is particularly true when Congress amends the legal landscape. Congress has seen how courts have applied existing legal rules and it has seen the outcomes of cases under those rules. Dissatisfied with those results, Congress changes the legal rule and legal circumstances so that future cases come out differently on similar facts, or so it hopes (or intends).¹³⁵

But hoping for an outcome in a particular case under its legal rules is not determining (or dictating) that outcome. If it were, all legislative-override amendments would be invalid, which clearly is not the case.¹³⁶ Moreover, legislative intent remains the touchstone for determining statutory meaning.¹³⁷ Courts must account for substantive legislative goals reflected in the statute when applying the law to a set of facts in litigation. Congressional “hope” thus plays a necessary role in judicial understanding and application of statutes. But legislative hope does not override independent judicial judgment; it remains the judicial domain to apply the congressionally dictated legal standards to a set of facts that the court finds and to reach independent conclusions in the particular case and circumstances at issue.

3. *Klein as drafting rule*

¹³² Araiza, *supra* note ___, at 1072.

¹³³ See S. Jay Plager, *Challenges for Intellectual Property Law in the Twenty-first Century: Indeterminacy and Other Problems*, 2001 U. ILL. L. REV. 69, 70; Richard Epstein, *The Tort/Crime Distinction: A Decade Later*, 76 B.U. L. REV. 1, 4 (1996).

¹³⁴ See *Save Our Mall*, 269 F.3d at 1093-94; see also Pub. L. 107-11, 115 Stat. 19 (2001).

¹³⁵ See Caminker, *supra* note ___, at 533; Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 520, 525 (2009); see also Araiza, *supra* note ___, at 1127 (“Congress should be able to ensure that its understanding of pre-existing law controls, by enacting a subsequent statute enshrining explicitly that understanding.”).

¹³⁶ See Widiss, *supra* note ___, at 525-26 (discussing statistics on frequency of congressional overrides of judicial interpretations of federal statutes). For a recent example, see the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, 123 Stat. 5 (2009), which overrode the Court’s decision on calculating the statute of limitations on statutory equal-pay claims in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

¹³⁷ See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 596 (2007) (Stevens, J., dissenting) (“Congressional intent should guide us in matters of statutory interpretation.”); *United States v. Rosenbohm*, 564 F.3d 820, 823 (7th Cir. 2009).

Unfortunately, this begins to sound like a dispute over legislative format, turning *Klein* into nothing more than a drafting guide.¹³⁸ Congress can avoid the force of *Klein* by its choice of statutory language and form. By avoiding blatantly problematic language—“A shall prevail against B” or “The court shall find that federal rights were not violated”—Congress preempts most *Klein* challenges.

Not that there will not be close cases. Imagine that Congress wanted to suspend the statute of limitations for a class of cases through a statute providing that certain claims may be brought “without regard” to the statute of limitations. This statute admits of two readings. We might read it to change the law to eliminate the statute of limitations as an applicable defense and as an issue for the court to deal with; alternatively, we might read it as Congress telling the court that, when the limitations defense is raised, the court must reject the defense and find the claim timely.¹³⁹ The former is the better reading, from the standpoint of protecting Congress’ ability to draft substantive law.¹⁴⁰

Larry Sager and Evan Caminker all recognize that this basic principle of *Klein* can be overcome through alternative drafting.¹⁴¹ But they reach different conclusions about that fact. Sager argues that no-dictating-outcomes cannot be the core principle of *Klein*, because such an understanding “threatens to exalt form over substance.”¹⁴² In fact, the Court did just that in *Robertson*, paying nominal obeisance to *Klein*, but discarding any meaningful distinction in the form that amending legislation takes.¹⁴³ This principle of *Klein* thus does no meaningful constitutional work; Congress can draft around it and courts look for ways to uphold laws that come close to the line.¹⁴⁴

Caminker counters that, even if only a drafting rule, it remains a rule that matters.¹⁴⁵ Language is what law does. Statutory language makes a difference to public understandings of potential conflicts between the legislative and judicial branches, should Congress be tempted to cross the line and encroach on norms of judicial independence and the rule of law.¹⁴⁶ This is formalism, but what we might call a good kind of formalism that preserves a realm for the judiciary to exercise its prerogatives.¹⁴⁷ Nevertheless, Caminker’s point is limited (as he acknowledges) by the effect of repeated judicial rejections of *Klein* arguments and the extreme judicial efforts to avoid (or ignore) *Klein* difficulties.¹⁴⁸

If the prohibition on dictating outcomes is a rigid one that cannot be drafted around, it means the Court properly applied the rule in *Klein*. And it is only the subsequent softening of the rule—by

¹³⁸ Caminker, *supra* note ___, at 542 (stating that *Klein* arguments “boil[] down to the question whether the *Klein* rule is in practice nothing more than a trivial rule of drafting etiquette”).

¹³⁹ Compare Caminker, *supra* note ___, at 541 with *id.* at 540.

¹⁴⁰ See Araiza, *supra* note ___, at 1132-33 (emphasizing propriety of Congress amending substantive law by providing that new legal rule applies “notwithstanding” any other legal provisions).

¹⁴¹ See Caminker, *supra* note ___, at 541-42; Sager, *supra* note ___, at 2526; see also Araiza, *supra* note ___, at 1134 (questioning whether principle similar to *Klein* “may be problematic at its core: easily evadable by expedients of unquestioned constitutionality”).

¹⁴² Sager, *supra* note ___, at 2526 (calling it a relic of a more formalistic era).

¹⁴³ *Id.* at 2527.

¹⁴⁴ See Araiza, *supra* note ___, at 1088-89.

¹⁴⁵ Caminker, *supra* note ___, at 542.

¹⁴⁶ *Id.* at 542.

¹⁴⁷ See Araiza, *supra* note ___, at 1090, 1134; Caminker, *supra* note ___, at 542.

¹⁴⁸ Caminker, *supra* note ___, at 542; see *supra* note 12 and accompanying text.

recognizing the ethereal line between amending substantive law and dictating outcomes—that got it wrong.¹⁴⁹ Thus *Robertson*, with a statute that imposed a blanket alteration of five different environmental statutes affecting the outcome of two specifically identified cases about the spotted owl habitat, was a categorical violation of *Klein*.¹⁵⁰ So was *Save Our Mall*, where Congress similarly undermined specific litigation (although not by name) affecting the Memorial with a blanket amendment of all potentially applicable law.¹⁵¹ Such a reading justifies the mythic status of *Klein*—it is a precedent that should and would possess significant force, but for its subsequent watering-down.¹⁵²

But this dramatically cuts into Congress’ power to amend (as opposed to create in the first instance) substantive law. It calls *Wheeling Bridge* into question, because Congress similarly altered the applicable legal rule (the status of the bridge) to be applied to ongoing prospective remedy.¹⁵³ And it would call into question Congress’ power ever to make new law applicable to pending cases.¹⁵⁴ That force is inconsistent with the complete non-use of this principle since *Klein* itself.

B. *Speaking Untruths and Dictating Meaning*

The second express holding in *Klein* focused on the proviso impairing the effect of a presidential pardon, thereby infringing on the constitutional authority of the President, by making acceptance of an uncontested pardon *per se* proof of disloyalty.¹⁵⁵ And by requiring courts to give the pardon the congressionally determined effect, Congress directed the court to be an instrument of that impairment.¹⁵⁶ Congress thus overstepped its constitutional authority *viz a viz* the judiciary by attempting to dictate to the judiciary the scope and meaning of the constitutional presidential pardon power and the effects of the exercise of that power.

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

The judiciary will not allow itself to be made to speak and act against its own best judgment on matters within its competence which have great consequence for our political community. The judiciary will not permit its particular authority to be subverted to serve ends antagonistic to its actual judgment; the judiciary will resist efforts to make it seem to support and regularize that with which it in fact disagrees.¹⁵⁷

¹⁴⁹ See Araiza, *supra* note ___, at 1089.

¹⁵⁰ See Araiza, *supra* note ___, at 1059 (“[I]t is hard to avoid the feeling that there is something inappropriately non-legislative about this statute.”); Caminker, *supra* note ___, at 542 (describing the “Court’s apparent willingness to work very hard to avoid *Klein*”); Redish & Pudelski, *supra* note ___, at 455 (arguing that *Robertson* shows the Court playing “fast and loose” with this principle); Sager, *supra* note ___, at 2527; *supra* notes ___ and accompanying text.

¹⁵¹ National Coalition to Save Our Mall v. Norton, 269 F.3d 1092, 1096-97 (D.C. Cir. 2001).

¹⁵² Cf. Bloom, *Unconstitutional Courses*, *supra* note ___, at 1720-21 (“*Klein* is far from jurisprudentially trivial, even if the facts seem historically quaint.”); Meltzer, *supra* note ___, at 2549 (“*Klein* should not be discarded as a badly-reasoned relic with no contemporary significance.”).

¹⁵³ See *Klein* 80 U.S. at 146-47; Redish & Pudelski, *supra* note ___, at 446-47; *supra* notes ___ and accompanying text.

¹⁵⁴ See *supra* notes ___ and accompanying text; but see Araiza, *supra* note ___, at 1130; Young, *supra* note ___, at 1248-49.

¹⁵⁵ *Klein*, 80 U.S. at 147-48; see Meltzer, *supra* note ___, at 2538-39, 2549; Sager, *supra* note ___, at 2531..

¹⁵⁶ *Klein*, 80 U.S. at 148; Sager, *supra* note ___, at 2531.

¹⁵⁷ Sager, *supra* note ___, at 2529.

Put succinctly, Congress may not compel courts to speak a “constitutional untruth.”¹⁵⁸

There are two ways to understand this idea. A broader, judicial-supremacy-centered take is that courts, not Congress, determine constitutional meaning. *Klein* then becomes unexceptional, a straightforward assertion that it is not for the majoritarian legislature to declare meaning of the countermajoritarian Constitution.¹⁵⁹ A narrower, departmentalist take is that while Congress can (indeed must) interpret the Constitution for itself,¹⁶⁰ it cannot insist that the judiciary adopt the congressional interpretation as its own (any more than the judiciary can insist that Congress adopt the judicial interpretation as its own) and it cannot compel the judiciary to apply that interpretation within the adjudicative process.¹⁶¹ Either leads to the same point: the Constitution is violated by a statute that “will implicate the judiciary in misrepresentation of matters of constitutional substance.”¹⁶²

Whether this is *Klein*’s true first principle, it may be its most enduring. It converges somewhat with the prohibition on Congress predetermining rules and case outcomes, as both demand an unimpeded realm for independent judicial analysis and best judgment.¹⁶³ But courts and Congress both can interpret around the latter limits by drafting and interpreting legislation as a permissible amendment to substantive law.¹⁶⁴ By contrast, courts cannot read around this principle where Congress and the courts disagree on constitutional meaning. If a law redefines a constitutional provision and commands courts to apply that definition despite judicial disagreement, this principle of *Klein* requires that courts exercise their best judgment as to the Constitution, necessarily disregarding any statute compelling the contrary.

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

¹⁵⁸ Meltzer, *supra* note ___, at 2545; see Bloom, *Unconstitutional Courses*, *supra* note ___, at 1721-22 (arguing that *Klein* means courts should not be forced to reach or validate incorrect or unconstitutional outcomes); Tyler, *supra* note ___, at 109 (“Congress may not compel the courts to enforce an unconstitutional law . . .”).

¹⁵⁹ Redish & Pudelski, *supra* note ___, at 443; Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 774 (2002); see Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1737 (2006) (“The central question in constitutional adjudication is the degree of deference, if any, that courts give to constitutional interpretation by other governmental actors.”); Whittington, *supra*, at 778 (“[T]he debate over judicial supremacy focuses more squarely on . . . who should make the final decision concerning contested [constitutional] interpretations.”); see also *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997); *Cooper v. Aaron*, 358 U.S.1, 18 (1958).

¹⁶⁰ See Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Inperpretation*, 81 IOWA L. REV. 1267, 1269-70 (1996); Paulsen, *Myth*, *supra* note ___, at 2709; Whittington, *supra* note ___, at 781.

¹⁶¹ Sager, *supra* note ___, at 2533.

¹⁶² *Id.*; see Bloom, *Unconstitutional Courses*, *supra* note ___, at 1721-72; Tyler, *supra* note ___, at 109.

¹⁶³ See Bloom, *Unconstitutional Courses*, *supra* note ___, at 1721 (arguing that *Klein* prevents Congress from threatening courts’ autonomy and power to decide cases independently, finally, and effectively); *supra* Part III.A.

¹⁶⁴ See Araiza, *supra* note ___, at 1133; Caminker, *supra* note ___, at 542; Sager, *supra* note ___, at 2534; *supra* notes ___ and accompanying text.

Sager argues that a modern violation of this principle occurred with enactment of the Religious Freedom Restoration Act (RFRA),¹⁶⁵ which sought to override by statute a judicial interpretation of the First Amendment’s Free Exercise Clause. In *Employment Division v. Smith*,¹⁶⁶ the Court held that the Free Exercise Clause is not violated by a neutral law of general applicability that incidentally regulates religiously motivated conduct in the same way it regulates identical conduct committed for non-religious reasons.¹⁶⁷ The Court considered and rejected the argument that laws incidentally infringing on religiously motivated conduct should be subject to strict scrutiny,¹⁶⁸ which would have forbidden incidental regulation of religiously motivated conduct (but not identical secularly motivated conduct) unless the regulation was the least restrictive means to serve a compelling government interest.¹⁶⁹ RFRA was an express congressional reaction to *Smith*.¹⁷⁰ It provided that any state or federal law that “substantially burdened” religious activity must satisfy strict scrutiny as the least restrictive means to serve a compelling interest.¹⁷¹ Congress made unquestionably clear that it believed *Smith* had been wrong and that it was seeking to legislatively undo that constitutional decision.

Sager insists this violates *Klein*. In applying RFRA, courts had to conduct a familiar constitutional analysis—determining whether a plaintiff’s religiously motivated conduct was substantially burdened, then applying “exquisitely constitutional” compelling-interest analysis.¹⁷² But this is not the analysis a court, left to its independent First Amendment judgment and following *Smith*, would have applied; the statute compelled the court to speak a constitutional untruth as to the appropriate constitutional standard to evaluate the religion-burdening law.¹⁷³ And it likely pushed the courts to a different outcome, since strict scrutiny obviously invalidates many laws that survive less-rigorous review.

In fact, however, RFRA is not invalid under the no-constitutional-untruths principle. RFRA did not tell courts what the First Amendment means or how it should apply; it did not say “X violates the First Amendment” or “the First Amendment shall mean X.” Instead, RFRA created a new, distinct statutory right to be asserted in lieu of or supplemental to a First Amendment claim that would be governed by *Smith*.¹⁷⁴ Congress frequently legislates against a constitutional background, creating statutory rights and duties different from existing constitutional rights and duties, intended to be either complementary or exclusive of constitutional rights as to the same conduct.¹⁷⁵ True, RFRA adopted a now-defunct

¹⁶⁵ 42 U.S.C. § 2000bb-2000bb-4.

¹⁶⁶ 494 U.S. 872 (1990).

¹⁶⁷ *Id.* at 878-79; *see also* Sager, *supra* note ___, at 2532.

¹⁶⁸ *Smith*, 494 U.S. at 882-84. This contrasts with laws that target religiously motivated conduct and only religiously motivated conduct. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

¹⁶⁹ *Smith*, 494 U.S. at 885-88.

¹⁷⁰ 42 U.S.C. § 2000bb(a)-(b).

¹⁷¹ 42 U.S.C. § 2000bb-1(a), (b); *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997); Sager, *supra* note ___, at 2532.

¹⁷² Sager, *supra* note ___, at 2532

¹⁷³ *Id.* at 2533; *see also* Tyler, *supra* note ___, at 109.

¹⁷⁴ Meltzer, *supra* note ___, at 2545.

¹⁷⁵ *Id.* at 2545-46; *see, e.g.*, *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 794 (2009).

constitutional standard that the Court did not view as the best understanding of the First Amendment.¹⁷⁶ But, as Daniel Meltzer argues, any statutory rule of decision must come from somewhere and it arguably is better for Congress to borrow an outdated constitutional standard than to blindly use whatever standard lobbyists come up with.¹⁷⁷ Congress may adopt a statutory standard (regardless of source) different than the constitutional standard (thus reaching conduct perhaps not unconstitutional) so long as the underlying rule is within Congress' legislative power.¹⁷⁸ Whatever the merits of no-constitutional-untruths as *Klein*'s first principle, RFRA did not compel courts to support and regularize a constitutional standard that ran against their independent judgment as to proper resolution of a claim for relief under the Constitution itself; it only required courts to apply a statutory standard different than the constitutional standard. And whatever the validity of RFRA as a matter of congressional power (a point beyond this paper), the constitutional issue has nothing to do with *Klein*.¹⁷⁹

So what might violate no-constitutional-untruths, if not RFRA? One example might be recent threatened-but-never-enacted congressional efforts to prohibit federal courts from using foreign or international law in interpreting and applying the Constitution.¹⁸⁰ Such a prohibition operates one step removed from Sager's core principle—rather than dictate the appropriate constitutional standard, Congress dictates the legal sources and ideas that courts use in identifying, defining, and applying the appropriate constitutional standard. But the effect is the same. By limiting the sources to which courts might turn in elucidating constitutional ideas and meaning—sources to which judges might be inclined to turn if left to their best judgment—it necessarily compels courts to understand the Constitution in a way different than the judge, in her independent judgment, deems appropriate and, as a result, to announce that different understanding as a constitutional rule.

¹⁷⁶ Meltzer, *supra* note ___, at 2543-44.

¹⁷⁷ *Id.* at 2544.

¹⁷⁸ *Id.* at 2546.

¹⁷⁹ In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court unanimously struck down RFRA as to a local ordinance, although for a non-*Klein* reason. The Court held that RFRA exceeded Congress' power under § 5 to enforce the Fourteenth Amendment, including incorporated Bill of Rights provisions. The power to "enforce" meant Congress only could create statutory rights that were "congruent and proportional" to rights established under the Constitution, with the Court wielding sole power to determine the scope of the Constitution. *Id.* at 530-31; *see also* Sager, *supra* note ___, at 2532. RFRA's statutory rule of strict scrutiny went too far beyond the constitutional (as interpreted in *Smith*) rule of, essentially, rational basis review. *City of Boerne*, 521 U.S. at 531.

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

¹⁸⁰ *See, e.g.*, Constitution Restoration Act of 2005, S.520, 109th Cong., § 201 (2005) (as introduced in the Senate). The proposal was motivated by several decisions in which the Court looked to principles of international law and the law of other nations in defining constitutional meaning. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 575-76 (2005) (death penalty for juveniles); *Lawrence v. Texas*, 539 U.S. 558, 560 (2003) (criminalization of same-sex sodomy); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing to foreign nations views of executing mentally handicapped).

But we should not read this as indicating real practical vigor to this principle. First, Congress never has come close to enacting this or any similar bill, so the force of this “first principle” of *Klein* thus remains hypothetical. In fact, enactment is highly unlikely, given that the strongest proponent of the *Klein* argument against such efforts is the strongest judicial opponent of the use of foreign and international law in U.S. constitutional interpretation—Justice Scalia. Scalia has criticized the practice of using foreign law in several dissents¹⁸¹ and in public debates with Justice Breyer.¹⁸² But Scalia insists that the sources of law that federal judges use in making constitutional decisions are none of Congress’ business—“No one is more opposed to the use of foreign law than I am, but I’m darned if I think it’s up to Congress to direct the court how to make its decisions.”¹⁸³ This is a no-untruths argument.

Second, it introduces a gap in congressional control over constitutional rules as opposed to sub-constitutional rules.¹⁸⁴ The no-untruths principle limits congressional power to define for courts the meaning and interpretation of constitutional provisions; it prohibits congressional efforts to limit the Court’s interpretive authority on matters of “constitutional substance.”¹⁸⁵ Congress cannot tell courts what the pardon power means or what the Free Exercise Clause means and Congress cannot dictate the appropriate standard of review or method of analysis.

Congress remains master of statutory law, within the parameters of internal and external constraints on its prescriptive lawmaking jurisdiction.¹⁸⁶ There is no such thing as compelling a court to speak a “statutory untruth,” no such thing as limiting judicial interpretive authority or independent judgment on matters of statutory substance. The “truth” of the statutory rule, and what the court always is bound to wield its independent judgment to find, is whatever Congress deems the statute to mean.

This is a matter on which Congress wields broad discretion.¹⁸⁷ Nicholas Quinn Rosenkranz argues that Congress can define and dictate to courts everything about statutory meaning, how a statute should be understood, and how it should be applied in reaching decisions—including definitions of terms,¹⁸⁸ legal standards, interpretive instructions, interpretive and constructive rules, permissible sources of legislative

¹⁸¹ See *Roper*, 543 U.S. at 624 (Scalia, J., dissenting) (“[T]he basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.”); *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (labeling citation to foreign law “dangerous dicta”).

¹⁸² See *Constitutional Relevance of Foreign Court Decisions*, U.S. Ass’n of Constitutional Law Discussion, Feb. 27, 2005, available at <http://www.freerepublic.com/focus/news/1352357/posts>.

¹⁸³ Charles Lane, *Scalia Tells Congress to Mind its Own Business*, WASH. POST, Mar. 19, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/18/AR2006051801961.html>.

¹⁸⁴ See Meltzer, *supra* note ___, at 2549 (emphasizing the “importance and transparency of a formal distinction between statutory prescription and purported constitutional revision”); Redish, *supra* note ___, at 715 (arguing that the purported limits on congressional authority fall away with respect to congressional control over sub-constitutional rules).

¹⁸⁵ Sager, *supra* note ___, at 2533.

¹⁸⁶ Howard M. Wasserman, *Jurisdiction, Merits, and Non-Exant Rights*, 56 U. KAN. L. REV. 227, 243, 270 (2008); Widiss, *supra* note ___, at 518; see *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 115 (1991), (Stevens, J., dissenting) (“In the domain of statutory interpretation, Congress is the master.”), *superseded by statute*, 42 U.S.C. § 1988.

¹⁸⁷ Tyler, *supra* note ___, at 106; see Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2041 (2002) (“[T]he whole reason for having a political process for enacting statutes is to determine what the ‘right’ thing is by assuring that, within constitutional bounds, political preferences are reflected in statutory results.”).

¹⁸⁸ Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2127 (2002).

history and interpretive guidance, and even interpretive methodology used in understanding the statute.¹⁸⁹ Congress could, for example, prevent courts from looking to foreign and international law as guides in interpreting and understanding a statutory rule.

By contrast, Bill Araiza and Linda Jellum both agree that Congress can establish rules and standards and even definitions (and redefinitions) of terms.¹⁹⁰ But both distinguish drafting statutes from interpreting statutes and argue that Congress crosses a separation of powers barrier when it ventures into the latter by commanding courts how to interpret the language that Congress has written and defined.¹⁹¹ Both presumably would reject a rule prohibiting courts from using foreign and international law in interpreting federal statutes.

It is not clear, however, what is sacred about statutory interpretation as opposed to statutory drafting and definition. Both are “inescapably a kind of legislation,” ways to identify statutory rules of decision.¹⁹² Congress has final say as to the best way to express the meaning of the legal rule it creates in the legislation itself. Sometimes specific definitions of each term and provision will be possible.¹⁹³ Other times, given the inherent limits of language, Congress may find it more effective or feasible to write in broad strokes and dictate the manner in which courts interpret and understand those strokes (such as rules about interpretive methodology or permissible sources of authority), a more flexible, open-ended way to establish statutory rules and a broader, cohesive, coherent statutory regime.¹⁹⁴

Moreover, Congress unquestionably can trump judicial interpretations of statutes through overriding legislation—new or amended statutes overriding judicial interpretations of statutory language where the legislature disagrees with those interpretations.¹⁹⁵ There is no reason Congress cannot statutorily direct courts as to the proper understanding (i.e., proper interpretation) of its statutes and legal rules at the outset, rather than waiting for courts to get it wrong (in Congress’ view) and having to go back and enact new legislation to correct the (congressionally viewed) erroneous interpretation.¹⁹⁶

What is uniquely judicial is not interpretation, but application of a legal rule (as written and interpreted) to a particular set of facts and circumstances to resolve a specific dispute between specific

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

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

¹⁹¹ Araiza, *supra* note ___, at 1120, 1127; Jellum, *supra* note ___, at 882-83.

¹⁹² Widiss, *supra* note ___, at 519.

¹⁹³ See Rosenkranz, *supra* note ___, at 2142.

¹⁹⁴ *Id.* at 2143 (arguing that congressionally adopted interpretive rules could form a true interpretive regime, a set of background principles with internal coherence).

¹⁹⁵ See John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1020 (2002); Widiss, *supra* note ___, at 520; *supra* notes ___ and accompanying text.

¹⁹⁶ Recognizing legislative freedom to control all manner of statutory interpretation at the outset avoids three problems in the statutory creation and interpretation dance. First is figuring out when an amendment is an improper interpretation. See Araiza, *supra* note ___, at 1127. Second, courts often continue to follow (now-overruled) statutory precedent even in the face of new overriding legislation. See Widiss, *supra* note ___, at 515. And third, Congress does not and realistically cannot review most of the body of statutory decisions or take steps to override those with which its current members disagree. See Ferejohn & Kramer, *supra* note ___, at 974 n.25; Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1409-10 (2005).

parties. Congress has free reign (within constitutional bounds) to define sub-constitutional legal rules, including the means of identifying those rules. What Congress cannot dictate is the application of those sub-constitutional legal rules to those particular facts or the outcome of the case on those facts; that must remain within the court's independent judgment. But this simply collapses the no-untruths principle into the earlier *Klein* prohibition on legislative dictation of case outcomes, at least where statutory or sub-constitutional rules are concerned.¹⁹⁷ Congress retains free reign to establish the statutory rule and the methods for divining that rule; courts merely must have free reign to apply the rule and resolve the legal and factual dispute before it.

C. Dictating unconstitutional rules of decision

Edward Hartnett suggests a very different, but arguably more straight-forward, constitutional principle that emerges from the overall context of the case, if not from the confusing language of the opinion itself. According to Hartnett, it is not that Congress lacked authority to prescribe rules of decision (of course it has that authority¹⁹⁸), only that Congress lacks authority to prescribe "arbitrary" rules of decision.¹⁹⁹ In other words, Congress cannot prescribe unconstitutional rules of decision, that is, rules that violate constitutional rights. The problem with the 1870 proviso, at least as applied in *Klein*, was that Wilson had received and accepted his pardon, which granted him certain rights that vested the moment he received it and of which he could not be stripped.²⁰⁰

On this view, neither of the independent holdings explicitly stated in *Klein* or the principles derived from them truly are central. For example, a law that established a new rule of decision applicable to a pending case would not have raised constitutional problems so long as it was not arbitrary in that it stripped vested constitutional rights. Hartnett imagines that Congress in 1870 (while *Klein* was pending on appeal) enacted a statute overturning the judicial rule from *Padelford* that serving as a Confederate surety was an act of disloyalty, such that those who had acted as sureties could recover proceeds under the 1863 Act, regardless of whether they had received a pardon.²⁰¹ Wilson's estate would have been entitled to recover proceeds, regardless of the content of the pardon, because Wilson would be deemed loyal-in-fact, never having given aid and comfort. Such a law would not strip any individual (vested constitutional) rights and thus would not have been struck down, even though it did establish a rule of decision in a pending case.

On the other hand, there was nothing Congress could do to keep Wilson and similarly situated individuals from recovering proceeds. *Klein* becomes not about a pending/non-pending distinction, but

¹⁹⁷ See *supra* Part III.A.

¹⁹⁸ Hartnett, *supra* note ___, at 578; *supra* notes ___ and accompanying text.

¹⁹⁹ *Id.* at 579; *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872).

²⁰⁰ Hartnett argues that the concept of vested rights was a dominant feature of 19th century general constitutional law, which recognized limits on any laws or legal rules that stripped rights once they had vested with the rights-holder. Under then-existing constitutional understandings, vested rights became constitutionally protected against congressional infringement. Hartnett, *supra* note ___, at 579-80.

²⁰¹ *Id.* at 579; *supra* notes ___ and accompanying text.

about altering the effect of the pardon after the pardon had been accepted and rights had vested. The proviso would have been invalid even in cases brought after its passage; regardless of timing, it still would have made acceptance of the pardon proof of guilt, undoing the pardon's effect and stripping vested rights emanating from it.

This reading also means *Klein* is not a separation of powers case, but an individual rights case. *Klein* also becomes more than a pardon case.²⁰² That Wilson's vested rights came from a pardon was mere fortuity; the outcome would be the same if a law interfered with vested rights emanating from any constitutional source.

But this reading again renders *Klein* unexceptional and undeserving of its cult status. For one thing, the concept of vested rights no longer forms a prominent part of modern constitutional analysis. For another, to the extent *Klein* becomes about basic constitutionalism, it is well-established that the Constitution imposes internal and external limits on the statutory rules that Congress can enact. It is well-established that courts cannot enforce statutes that exceed Congress' power.²⁰³ And it is well-established that a legal rule that infringes constitutional rights does not exist as enforceable law; the rights such a rule creates and duties it imposes do not exist and cannot be enforced or vindicated.²⁰⁴ *Klein* thus does no more than *Marbury* and dozens of cases in which the Court has struck down substantive federal statutory law as violating individual constitutional rights.²⁰⁵ *Klein* adds nothing meaningful to the judicial canon.

* * *

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

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

IV. The Pathology of *Klein* and the meaning of myth

²⁰² Tyler, *supra* note ____, at 107 (arguing that it is a mistake to under-read *Klein* as speaking exclusively to the pardon power).

²⁰³ See *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803).

²⁰⁴ See Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1005, 1120, 1155 (2003); Wasserman, *supra* note ____, at 253-54

²⁰⁵ See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001); *Dickerson v. United States*, 530 U.S. 428 (2000); *Reno v. ACLU*, 521 U.S. 844 (1997); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

We should pause at this point to consider the unique legal and historical context of *Klein* and its effect on the doctrine and the myth that has developed around the case.²⁰⁶

Constitutionalism, Vincent Blasi argues, “derives from a view regarding the various objectives that are served by constraining representatives institutions by means of the device of constitutional limitations.”²⁰⁷ It depends “on the existence of a considerable measure of continuity and stability regarding the most basic structural arrangements and value commitments of the constitutional regime.”²⁰⁸ A pathological period reflects “an unusually serious challenge to one or more of the central norms of the constitutional regime.”²⁰⁹ It is marked by a “sense of urgency stemming from societal disorientation if not panic.”²¹⁰ That panic affects structural features and arrangements, such as formal and informal separation of powers and checks and balances.²¹¹

Reconstruction qualifies as a pathological period under Blasi’s definition, particularly the 1869-71 period that produced *Padelford*, the proviso, and *Klein*. At that time, the Thirteenth and (especially) Fourteenth Amendments were being considered or had just been enacted and their effect on congressional power and on federal-state balance remained unclear.²¹² Tension between Congress and President Andrew Johnson (who had left office a few months before the Court of Claims awarded proceeds to Wilson’s Estate) had begun as early as 1867 and had bubbled over into Johnson’s 1868 impeachment and near-removal from office.²¹³ Congress had statutorily removed the invitation/authorization for presidential pardon (to the extent it could do so) in confiscated-property cases.²¹⁴ *Padelford* had outraged Congress by interfering with efforts to punish the cotton growers who had been essential to funding the Confederate war effort.²¹⁵ Dissatisfaction with *Padelford*, which led to the 1870 proviso to undo it, *Klein*, and several other cases, was part of the broader jockeying among the branches as to the direction of the postbellum nation, particularly on matters of national power and the reintegration of southern states and citizenry into the Union.²¹⁶ In that sense, *Padelford* and *Klein* both can be seen as two of a series of decisions rejecting, narrowing, or otherwise interfering with the Republicans’ Reconstruction agenda.²¹⁷

²⁰⁶ See Bloom, *Unconstitutional Courses*, *supra* note ____, at 1720 (“*Klein* may now seem almost trifling, a relic of zealous postbellum politicking.”).

²⁰⁷ Blasi, *supra* note ____, at 453.

²⁰⁸ *Id.*

²⁰⁹ Blasi, *supra* note ____, at 459; *id.* at 456 (“In pathological periods, at least some of the central norms of the constitutional regime are indeed scrutinized and challenged.”).

²¹⁰ Blasi, *supra* note ____, at 468.

²¹¹ *Id.*

²¹² See ACKERMAN, VOL. 2, *supra* note ____, at 100-19; 122-24; FONER, *supra* note ____, at 257-58; Edwards, *supra* note ____, at 327-28.

²¹³ See ACKERMAN, VOL. 2, *supra* note ____, at 18-20; FONER, *supra* note ____, at 333-35; Edwards, *supra* note ____, at 329-30.

²¹⁴ *United States v. Klein*, 80 U.S. (13 Wall.) 128, 141-42 (1872); Tyler, *supra* note ____, at 90.

²¹⁵ See *supra* notes __ and accompanying text.

²¹⁶ See ACKERMAN, VOL. 2, *supra* note ____, at 123, 199-200, 209; FONER, *supra* note ____, at 183-84, 237-38, 250-51; Edwards, *supra* note ____, at 327-29.

²¹⁷ See ACKERMAN, VOL. 1, *supra* note ____, at 101; FONER, *supra* note ____, at 529; Edwards, *supra* note ____, at 335; see also, e.g., *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1872).

To the extent we can look at Reconstruction as a period of Congress overstepping its constitutional bounds, *Klein* did precisely what Blasi’s constitutionalism expects the judiciary to do,²¹⁸ albeit arguably for one of the rare times in history.²¹⁹ The *Klein* Court responded to the unique period and circumstances of Reconstruction and a visceral sense that Congress was “cooking” the law in a time of uniquely sharp three-way inter-branch conflict to achieve its desired result.²²⁰

But then we must explain why *Klein* has not been used to invalidate any piece of federal legislation other than the 1870 proviso. Perhaps *Klein* becomes tied to its historical context.²²¹ We certainly have encountered pathological periods in which “central norms of the constitutional regime” have been “scrutinized and challenged” to the same extent as Reconstruction and 1870.²²² And Congress and the President have overstepped constitutional bounds—including bounds of separation of powers—since then.²²³ Perhaps this demonstrates the myth of *Klein*’s vigor—*Klein* simply is not strong enough as judicially enforceable constitutional doctrine to invalidate even genuinely pathological legislation, thus courts have not seen an opportunity to wield it.

Of course, we might question whether the problem is *Klein* itself or the subsequent watering down of *Klein* in modern cases, where courts have backed off the strict prohibition on Congress prescribing rules of decision in favor of recognizing the need for Congress to create and amend the substantive statutory legal landscape.²²⁴ This notion of dilution of constitutional principles is important to the pathological perspective on *Klein*. Blasi’s theory is that constitutional rules must be reserved for extreme cases challenging pathological laws and actions—cases in which all other structural barriers have broken down and only the courts and the Constitution remain as a bulwark.²²⁵ Blasi specifically warned against overuse of constitutional rules in ordinary times and as to ordinary legislation, out of a concern that regular use would cause constitutional principles and doctrine to be watered down and thus unavailable when truly pathological legislation arises.²²⁶ This might explain *Plaut*, *Robertson*, *Save Our Mall*, and other recent cases in which courts have rejected *Klein* arguments against fairly ordinary, non-pathological legislation by defining it as a permissible amendment to substantive law.²²⁷ The problem, Blasi might argue, is that those cases have weakened the constitutional rules, leaving us with a non-vigorous *Klein* that will not be

²¹⁸ Blasi, *supra* note ___, at 468 (“Judicial methods and doctrines designed to function well in the worst of times must take into account that sense of urgency and the reduced effectiveness of traditional checks.”).

²¹⁹ See generally Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 THE REV. OF POLITICS 369, 378-79, 383-86 (1992).

²²⁰ See Bloom, *Unconstitutional Courses*, *supra* note ___, at 1720 (“*Klein* may now seem almost trifling, a relic of zealous postbellum politicking.”).

²²¹ See Bloom, *Unconstitutional Courses*, *supra* note ___, at 1720; Meltzer, *supra* note ___, at 2549.

²²² See Blasi, *supra* note ___, at 459.

²²³ See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); see also Rosenberg, *supra* note ___, at 379 (Table I) (noting multiple periods of congressional attack on independence of federal courts).

²²⁴ See *supra* notes ___ and accompanying text.

²²⁵ Blasi, *supra* note ___, at 468.

²²⁶ *Id.* at 457.

²²⁷ See sources cited *supra* note 12.

available if and when a genuinely pathological period returns and produces genuinely pathological legislation.²²⁸

At the same time, recent history demonstrates that the extreme laws that would violate *Klein*—“In *A v. B* pending in the District Court, B shall prevail” or “The federal courts shall understand the First Amendment to mean X”²²⁹ or “Federal courts may not consider or cite foreign and international law in interpreting the Constitution”²³⁰—never are enacted and never really come close to enactment.

Perhaps *Klein* itself deters Congress from testing the limits of its lawmaking powers, avoiding laws that cross or draw too close to the line.²³¹ In other words, Congress, presumed to know the state of the law,²³² does not go too far knowing *Klein* is out there. If so, we might modify the assertion that *Klein* does no meaningful constitutional work to say that, even if it does no meaningful judicial work in *ex post* judicial challenges to actual litigation, it might do meaningful *ex ante* legislative and political work—controlling Congress’ (and the President’s) lesser instincts and disciplining it against its worse populist excesses.²³³ Congress has bought into the myth that *Klein* vigorously limits its powers and that myth guides its conduct and its understanding of what it can, should, and will do. And if Congress’ belief in the myth of *Klein* deters potential abuses of legislative power and checks inter-branch conflict before it occurs, the American politico-legal community is advanced and important politico-legal objectives achieved—in keeping with myth as a significant (even if false) part of our constitutional identity and culture.²³⁴

This ideal of *Klein*-in-Congress fits well with a fourth principle derivable from *Klein*, proposed by Martin Redish and Christopher Pudelski—Congress cannot cook procedural and evidentiary rules to achieve desired substantive outcomes without fully changing and publicly acknowledging the state of substantive law. Under this principle, the problem with the 1870 proviso was that it left the substantive 1863 Act in full force (all property owners could recover on proof of ownership and loyalty), but altered the evidentiary rules related to pardons to prevent a class of owners (those relying on an unchallenged pardon to show legal loyalty) from recovering under the 1863 Act.²³⁵ The proviso allowed Congress to deceive the public about the true state of the law by manipulating evidentiary and procedural rules; substantive law appeared to the public to go one way, procedural law commanded different results.²³⁶

²²⁸ *Infra* Part V.

²²⁹ As discussed previously, *supra* notes ___ and accompanying text, I do not believe RFRA dictated to courts the meaning of the First Amendment.

²³⁰ *See supra* note ___.

²³¹ *Cf. Gunther, supra* note ___, at 911; Rosenberg, *supra* note ___, at 373-74.

²³² *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

²³³ Blasi, *supra* note ___, at 453 (“The willingness of those who exercise political power to recognize superior constitutional authority may derive from perceptions of past commitment, calculations of reciprocal advantage, or loyalties born of a sense of common endeavor.”). Of course, it is empirically unprovable to what extent members of Congress or Congress as a whole actively think in *Klein* terms when deciding what legislation they can or should enact.

²³⁴ *See Pettys, supra* note ___, at 993; *supra* notes ___ and accompanying text.

²³⁵ *See Redish & Pudelski, supra* note ___, at 447, 461.

²³⁶ *Id.* at 450-51.

This sounds in structural democratic concerns. Representative democracy obligates elected representatives to make clear the policy choices they make and support on their constituents' behalf and prohibits legislators from deceiving constituents about the true policies they support. Congress cannot play a "legislative shell game" of purporting to leave substantive law in place, then blunting the legal and practical effect of substantive law by manipulating procedural and evidentiary rules to defeat the operation of that law.²³⁷ This is elusive and difficult to apply as judicial principle and it will be difficult to prove in a given case that the public was in fact deceived as to the state of the law by a particular enactment.²³⁸ And Congress arguably got away with just such deception in *Robertson*, when the Court validated functional congressional alteration of foundational environmental statutes without expressly and publicly amending them.²³⁹

Klein becomes about congressional self-enforcement. It works to strengthen representative democracy by imposing on Congress and on individual legislators a constitutional obligation of openness and forthrightness about the state of the law, the legal rules they enact, and the policies to which they have committed. Even if *Klein* could not serve to judicially invalidate whatever laws Congress enacts, there are political and prudential reasons for Congress not to exercise (or even come too close to exercising) the full limits of its powers, especially when the exercise of power may infringe on the judicial domain.²⁴⁰ Congress preemptively avoids potential *Klein* controversies by not enacting odd-looking, judiciary-intruding or -limiting laws that might draw objections, even if those objections would prove ultimately meritless. Of course, the essential characteristic of a pathological period is that such internal constraint fall away and legislative self-enforcement, without meaningful judicial enforcement, will not be sufficient in a truly pathological period.²⁴¹ Thus, the problem of *Klein*'s lack of judicial vigor remains.

V. Constitutionalizing Policy Preferences

Given *Klein*'s lack of genuine judicial power, we might wonder why the Cult of *Klein* developed and why it remains. Put differently, we might wonder why *Klein* remains a myth in the second sense of a legal narrative, otherwise false, that remains fundamental to the self-understanding and commitments of the politico-legal community.

Ultimately, *Klein* arguments reduce to an instinctive belief (among some) in broad judicial supremacy and visceral instinct that Congress overstepped its bounds. The contours of *Klein*-centered cases often are

²³⁷ *Id.* at 440.

²³⁸ Redish and Pudelski acknowledge this. *Id.* at 458-59.

²³⁹ Araiza, *supra* note ___, at 1065-66; *supra* notes ___ and accompanying text.

²⁴⁰ Michael J. Gerhardt, *What's Old is New Again*, 86 B.U. L. REV. 1267, 1280 (2006) (describing the congressional "constitutional norm against legislation that would directly interfere with judicial decisions or decision making"); Gunther, *supra* note ___, at 911 (arguing that the consequences "have no doubt helped inhibit Congress from resorting" to its full powers); Rosenkranz, *supra* note ___, at 2147 (arguing that congressional hesitancy in controlling all aspects of legislative meaning "may stem from an inchoate concern about separation of powers").

²⁴¹ See Blasi, *supra* note ___, at 453 ("[U]nless the appeal to constitutionalism evokes genuine sentiments of long-term commitment or aspiration, officials and citizens cannot be expected to forego their preferences of the moment in deference to the claims of the constitutional regime.").

quite similar. Congress appears to have attempted to control the rules governing an issue, likely with the hope of achieving particular outcomes, including in pending cases. Laws appear to affect the judicial function, threatening the vaunted, if undefined, judicial independence and rule of law.²⁴² Congress appears to be “cooking” procedural rules to achieve certain case outcomes. The laws are presumed to disadvantage plaintiffs, particularly plaintiffs seeking to vindicate rights against government or against big business. For example, the prohibition on foreign and international is always seen as disadvantaging rights claimants, by narrowing the scope of U.S. constitutional rights relative to similar rights elsewhere.²⁴³ These laws are politically distasteful to many commentators and advocates.

With its broad language, apparent indeterminacy, purportedly empty core, and historical perception as a separation-of-powers, judicial-independence trump card, *Klein* takes on an all-things-to-all-people quality.²⁴⁴ If *Klein* defines us as a legal-political community, the tendency is to want, and expect, it to do some constitutional heavy-lifting, to be a doctrinal tool with which courts can push back against Congress, especially in pathological times. The twin myths of opacity and vigor together make commentators and advocates likely to find constitutional defects far more frequently than *Klein*’s principles (properly and narrowly understood) would otherwise suggest. *Klein* becomes the ideal vehicle for constitutionalizing those ordinary policy preferences. This is the cult at work.

But morphing political distaste into unconstitutionality blurs a central distinction.²⁴⁵ The conflation of wisdom and constitutionality is unfortunate, but quite common in disputes over the limits of congressional (and executive) authority with respect to the judiciary. Gerald Gunther identified this problem in an earlier academic controversy over a different judicial-independence fault line—congressional power to strip federal courts of jurisdiction to hear and resolve particular classes of constitutional cases. Gunther (and many academic commentators) argued that jurisdiction-stripping proposals were neither desirable nor likely to be effective.²⁴⁶ But Gunther rejected most constitutional arguments against jurisdiction stripping, arguing that they confused “what the Constitution authorizes” with “sound constitutional statesmanship.”²⁴⁷

²⁴² See Caminker, *supra* note ___, at 542 (grounding strong *Klein* principle in need to “generate sufficient norms of independence and, frankly, essentiality, to safeguard long-term fidelity to the rule of law”); *but see* Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 979 (2003) (arguing for narrow understanding of *Klein* to keep from “turning it into a Frankenstein of judicial independence”).

²⁴³ That has proven to be the case for recent cases in the Supreme Court. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 575-76 (2005) (death penalty for juveniles); *Lawrence v. Texas*, 539 U.S. 558, 560 (2003) (criminalization of same-sex sodomy); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing to foreign nations views of executing mentally handicapped). But it will not be true across the board. For example, the use of foreign law might result in much narrower understandings of some constitutional liberties, notably the First Amendment freedom of speech, and the upholding of more legislative limits on expression than without the use of foreign law. *See SOURCE*

²⁴⁴ Young, *supra* note ___, at 1195.

²⁴⁵ Gunther, *supra* note ___, at 898.

²⁴⁶ Gunther, *supra* note ___, at 898, 921.

²⁴⁷ *Id.* at 898.

Much the same is at work with many *Klein* arguments—the laws at issue (were they to be enacted) may be unwise, but *Klein* is not (and cannot be) so broad or powerful as precedent to render unwise laws constitutionally defective.

VI. *Klein* and the War on Terror

So why worry about the myths and ultimate powerlessness and emptiness of a 140-year-old Supreme Court decision that has not been successfully wielded to invalidate any legislation?

In the past decade, Congress has enacted or had proposed a number of statute that raise *Klein* objections, unsuccessful though they may be.²⁴⁸ More importantly, if *Klein* truly is reserved only for pathological times, the years since the terrorist attacks of September 11—defined by two foreign wars, the ubiquitous Global War on Terror, and a host of controversial domestic and foreign actions by the federal government, especially the executive—exemplify Blasi’s definition of a period of “unusually serious challenge to one or more of the central norms of the constitutional regime.”²⁴⁹

As many accounts have shown, the period produced a significant shock to, and arguably breakdown of, structural and individual-rights features of the constitutional and political system.²⁵⁰ The President claimed for himself broad powers, often to the exclusion of Congress and the courts.²⁵¹ There has been a three-way dance among the branches vying to assert power for themselves and to limit or eliminate the power of the other branches.²⁵² At issue in all of this was the nation’s and government’s fundamental approach to an existential crisis, a similar dynamic as during Reconstruction that led to the 1870 proviso and to *Klein*.²⁵³ If there is a pathological historical period likely to produce genuinely *Klein*-violative legislation, this is it. If *Klein* is to exert meaningful judicial doctrinal force, it is precisely in these worst of times that it would.

Two pieces of legislation draw obvious *Klein* arguments. As to both, the Bush Administration had taken unilateral action to address international terrorism and national security; in response to actual or anticipated judicial disapproval of those actions, Congress retroactively ratified the Administration’s

²⁴⁸ Protection of Lawful Commerce in Arms Act, Pub. L. No. 100-92, 119 Stat. 2095 (2005); An Act for the Relief of Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 25 (2005); Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. (2005).

²⁴⁹ Blasi, *supra* note ___, at 459; *supra* notes ___ and accompanying text.

²⁵⁰ See, e.g., GOLDSMITH, *supra* note ___, at 114-15; LICHTBLAU, *supra* note ___, at 4, 137-39; MAYER, *supra* note ___, at 52; Schwartz, *supra* note ___, at 412-13; *In re Nat’l Security Agency Telecommunications Records Litig.*, 633 F. Supp. 2d 949, 955 (N.D.Cal. 2009); see also *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (rejecting limitations on habeas corpus for enemy combatants); *Padilla v. Yoo*, C. 08-35, 2009 WL 1651273, *4 (N.D. Cal. 2009) (permitting claim by detainee against government lawyer who promulgated detention and interrogation policies leading to alleged constitutional violations).

²⁵¹ GOLDSMITH, *supra* note ___, at 124; LICHTBLAU, *supra* note ___, at 7-9; MAYER, *supra* note ___, at 49-51; Schwartz, *supra* note ___, at 423-26; see also GOLDSMITH, *supra* note ___, at 123 (describing Bush Administration’s “go-it-alone route”).

²⁵² See GOLDSMITH, *supra* note ___, at 123, 205-07 (discussing consequences of Bush Administration’s decision to pursue anti-terrorism policies unilaterally); compare *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (holding that presidentially established military commissions for terror suspects violate federal law) with Military Commissions Act of 2006, Pub. L. No. 109-366, 109th Cong. (2006); see Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 Yale L.J. 1762, 1839 (2009) [hereinafter Paulsen, *Constitutional Power*] (arguing that Congress repudiated the Court’s understanding and reinstated the executive view); *id.* at 1847; see also *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring) (arguing that President must consult with Congress, absent an emergency); Paulsen, *Constitutional Power, supra*, at 1835; cf. *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008)

²⁵³ *Supra* Part II.

actions and policies. Both laws and their contexts possess all the characteristics likely to draw constitutional fire and both are at least susceptible to arguments based on all the principle we have identified as emanating from *Klein*.

Yet even in these pathological times, both statutes largely survive challenge under any relevant *Klein*-derived principles, again demonstrating the narrowness and weakness of *Klein* as constitutional doctrine. One global explanation could be differences in the relationship between Congress and the President; in both recent War-on-Terror laws, Congress supported and tried to bolster the asserted presidential power, rather than undermining it, as did the 1870 proviso. But another is that *Klein* simply lacks any significant judicial force.

We now examine both laws against the *Klein* principles identified in Parts III, IV, and V. For the most part, both pieces of legislation remain valid under those principles, demonstrating the myth (the fiction) of *Klein*. And it perhaps signals the pointlessness of pursuing *Klein* arguments to these laws and to most legislation that could conceivably be enacted. *Klein* arguments against both pieces of legislation reduce to nothing more than arguments about basic, sub-constitutional policy preferences.

A. Telecommunications Immunity and the Foreign Intelligence Surveillance Act Amendments Act

Sometime after the 9/11 attacks, the Bush Administration established a secret intelligence-gathering program involving wiretapping overseas calls to and from U.S. residents, without a warrant and outside procedures established in the Foreign Intelligence Surveillance Act of 1978.²⁵⁴ All but one of the major telecommunications companies (Qwest) assisted the NSA with the program, permitting the government to install surveillance equipment in their calling stations, agreeing to route overseas calls through domestic switching stations, and helping the NSA pore through the vast communications flowing in and out between the United States and certain countries in the Middle East.²⁵⁵ *The New York Times* broke the story on the program in late 2005, after sitting on it for approximately a year.²⁵⁶ President Bush quickly acknowledged the existence of the program and defended it as necessary for national security and preventing a repeat of 9/11.²⁵⁷

Lawsuits followed against the NSA and various government agencies and officials, as well as against the telecom companies.²⁵⁸ The claims against the telecoms alleged that the companies had conspired with the government to engage in a program that violated the Fourth Amendment prohibition on unreasonable

²⁵⁴ LICHTBLAU, *supra* note ___, at 9; Schwartz, *supra* note ___, at 412.

²⁵⁵ LICHTBLAU, *supra* note ___, at 149-50, 153-54.

²⁵⁶ *In re National Security Agency Telecommunications Records Litig.*, 633 F. Supp. 2d 949, 955 (N.D. Cal. 2009); LICHTBLAU, *supra* note ___, at 193-94, 209-11, 212-13; Schwartz, *supra* note ___, at 413.

²⁵⁷ LICHTBLAU, *supra* note ___, at 212-13; Schwartz, *supra* note ___, at 412-13.

²⁵⁸ *See Telecommunications Records Litig.*, 633 F. Supp. 2d at 955; Schwartz, *supra* note ___, at 413.

searches and seizures and the First Amendment freedom of speech, as well as various statutory provisions.²⁵⁹

While defending the surveillance activity, President Bush and administration officials argued that the warrant requirements and FISA procedures were outdated and ill-suited to the threats of modern terrorism and that the wiretap program was necessary to prevent new terrorist attacks.²⁶⁰ They sought to codify (and legalize) the program already pursued and to generally broaden executive surveillance powers.²⁶¹ As part of the codification, the Administration also sought retroactive immunity for the telecoms for their role in assisting the NSA with the (unlawful-at-the-time) program.²⁶² The final measure, the FISA Amendments Act of 2008,²⁶³ included a retroactive immunity provision.²⁶⁴ The legislative history showed that Congress targeted the pending telecom lawsuits.²⁶⁵

The law was sharply criticized as capitulation by the Democratic congressional majority to an unpopular and politically weak President Bush.²⁶⁶ Debate over the legislation took on electoral dimensions, as well. Then-Senator Barack Obama, at the time the presumptive Democratic presidential nominee, voted for the bill with the immunity provision; he argued that he disagreed with the immunity grant and suggested he might seek to rescind it if elected, but that the full legislation was flawed but necessary.²⁶⁷ Liberal activists criticized Obama for failing to stand up against the immunity grant.²⁶⁸

The immunity provision prohibited civil actions in federal or state court against the telecoms arising from their providing “assistance to an element of the intelligence community.”²⁶⁹ Any civil action filed or pending at the time of enactment must be dismissed if the United States Attorney General certifies to the court that the defendant telecom provider acted in connection with a presidentially authorized surveillance program in place between September 11, 2001 and January 17, 2007,²⁷⁰ designed to prevent or protect against a terrorist attack on the United States, and that the defendant provider acted on written guarantee from the Attorney General or head of a portion of the intelligence community that the surveillance had been authorized by the President and had been determined by the President to be lawful.²⁷¹ The court

²⁵⁹ *Telecommunications Records Litig.*, 633 F. Supp. 2d at 955.

²⁶⁰ LICHTBLAU, *supra* note ___, at 308.

²⁶¹ *Id.* at 307-08; Schwartz, *supra* note ___, at 414-15.

²⁶² Schwartz, *supra* note ___, at 417.

²⁶³ Pub. L. No. 110-261, 122 Stat. 2436 (2008).

²⁶⁴ *Id.* § 802, codified at 50 U.S.C. § 1885a; *Telecommunications Records Litig.*, 633 F. Supp. 2d at 956; Schwartz, *supra* note ___, at 417.

²⁶⁵ *Telecommunications Records Litig.*, 633 F. Supp. 2d at 959.

²⁶⁶ Schwartz, *supra* note ___, at 426; cf. Julian Sanchez, *Fear, Frenzy, and FISA*, REASON ONLINE, Aug. 7, 2007, at <http://www.reason.com/news/show/121797.html>.

²⁶⁷ Eric Lichtblau, *Senate Approves Bill to Broaden Wiretap Powers*, N.Y. TIMES, July 10, 2008, at http://www.nytimes.com/2008/07/10/washington/10fisa.html?_r=1.

²⁶⁸ Michael Falcone, *Blogtalk: Obama's FISA Vote*, N.Y. Times: The Caucus, July 9, 2008, at <http://thecaucus.blogs.nytimes.com/2008/07/09/blogtalk-obamas-fisa-vote/>; Chris Cillizza, *Wag the Blog: FISA Problems for Obama?*, THE FIX: WASHINGTON POST, July 1, 2008, at <http://voices.washingtonpost.com/the-fix/wag-the-blog-wag-the-blog-fisa-problems-for.html>.

²⁶⁹ 50 U.S.C. § 1885a(a).

²⁷⁰ The temporal limitation is significant as to the conclusion that Congress targeted pending litigation. The covered period begins at the point that President Bush authorized the surveillance program and asked the telecoms for assistance and ends at the point that Congress initially codified the administrations' program. See Schwartz, *supra* note ___, at 417.

²⁷¹ 50 U.S.C. § 1885a(a)(4).

must give effect to the AG certification (meaning the case must be dismissed) unless it finds the certification not supported by “substantial evidence” provided to the court.²⁷² Orders granting or denying motions to dismiss or for summary judgment under § 802 are deemed final and immediately appealable.²⁷³ In June 2009, the district court handling all the telecom lawsuits under Multi-District Litigation upheld the constitutionality of § 802, including as against a *Klein* challenge, and dismissed the constitutional claims against the telecoms.²⁷⁴

The primary *Klein* objection (and the one made to the district court) is that § 802 dictates findings and litigation outcomes and cannot be saved as an amendment to substantive law within the meaning of *Robertson*. If the Attorney General were to decline to present the certification to the court, the argument goes, the telecom defendants’ conduct arguably would remain unlawful under the Constitution. It is true that Section 802 is unusual in that Congress did not attempt to alter the claim-creating substantive law, which still prohibits or makes sanctionable defendants’ underlying conduct; instead, Congress established a statutory immunity from liability notwithstanding the claim-creating law, an affirmative defense that the telecoms could interpose to bar liability notwithstanding the claim-creating law.²⁷⁵

It should be immaterial for *Klein* purposes whether the amendment to substantive law targets the claim-creating law or creates a defense that acts as an outside shield against that law. Changing applicable substantive law means changing the overall legal landscape applicable to a case—all the legal rules of decision that govern some set of facts. We get that change from establishment of an affirmative defense as much as by alteration of the claim-creating law. The end result in either situation is that defendants have no legal duties and plaintiffs have no existing legal rights against those defendants under controlling law. Claims that might (depending on the facts the court found) have succeeded under the old legal landscape (which did not include immunity) no longer succeed under the new legal landscape (because of immunity). That plainly qualifies as a “detectable” change in substantive law. And here, of course, Congress had to leave the claim-creating law—the First and Fourth Amendments—untouched because to

²⁷² *Id.* § 1885a(b).

²⁷³ *Id.* § 1885a(f).

²⁷⁴ See *Telecommunications Records Litig.*, 633 F. Supp. 2d at 955

²⁷⁵ *Id.* at 963. The *Telecom Litigation* court labeled § 802 “*sui generis*,” in part because the defense only could be asserted by the government as a third-party intervenor, not by the telecom beneficiary of the defense. *Id.* at 959. But this may not be so. Section 802(a) prohibits the defined civil actions and while the ordinary means of establishing the immunity is the AG certification, there is nothing that prevents a telecom or the government from proving entitlement to immunity without such a certification. Moreover, it is difficult to imagine a case in which the Attorney General would refuse to provide the certification for a meritorious immunity defense.

The district court insisted that § 802 is not an affirmative defense but an immunity, in part because of this structure. *Id.* at 963. But the two are not mutually exclusive. An immunity simply is one type of affirmative defense. What makes something an affirmative defense is not who asserts it, but that it involves a separate legal rule that bars liability notwithstanding the claim-creating legal rule; an affirmative defense involves a separate rule that is introduced into the case other than by the plaintiff’s statement of the claim and that must be proven by someone other than the plaintiff. Section 802 is unique in that the government, not the telecom defendant invokes and introduces it. But that should not alter the characterization. It also is noteworthy that § 802 is titled “Procedures for Introducing Statutory Defenses,” 50 U.S.C. § 1885a, suggesting that Congress understood the immunity as a defense.

legislatively redefine constitutional meaning to legalize the telecoms' conduct would violate Sager's no-compelled-constitutional-untruths principle.²⁷⁶

Similarly, by requiring the court to accept the Attorney General certification so long as it is supported by substantial evidence, the argument goes, Congress has delegated to the Executive the power to find facts and determine whether statutory requirements have been satisfied in a given case. This strips the judiciary of its independent authority to engage in fact-finding and making legal determinations.²⁷⁷

But this argument over-emphasizes the formal mechanisms of the immunity defense while ignoring its practical operation. The AG certification introduces immunity into the case and serves as initial proof of the defense. The court then must decide whether there is substantial evidence supporting the facts certified. In other words, the court determines whether there is substantial evidence establishing the elements of the statutory immunity reflected in the AG certification—that the telecom gave assistance to an element of the intelligence community within the time frame; that it did so in connection with the presidentially authorized national-security program; and that it acted on presidential request and assurances of the program's legality.

Nothing in § 802(b) tells courts how to resolve these issues in any given case; it remains with the court to decide whether the certification has independent support by looking at evidence and information presented and to dismiss only if it finds sufficient support for the elements of the immunity.²⁷⁸ Section 802 does lower the evidentiary standard for the immunity—the telecom and government must prove the immunity defense only by substantial evidence, rather than the typical requirement of preponderance of evidence. But Congress has power to establish and alter evidentiary standards applicable to claims and defenses created by federal statute.²⁷⁹ *Klein* only prohibits Congress (or the Executive, via delegation) from dictating when that evidentiary standard has been satisfied on some facts, which § 802 does not purport to do.

Second, § 802 also might face the argument that it violates Sager's no-constitutional-untruths principle, in that it redefines constitutional rights or dictates constitutional meaning to the courts. But the immunity provision does not affect the scope or meaning of the underlying constitutional rights allegedly violated. Rather, it establishes a statutory affirmative defense that protects telecoms from liability, notwithstanding whether their conduct violated the Constitution, as determined by a court exercising its independent constitutional judgment. In fact, § 802 obviates the need for any constitutional interpretation, because the sub-constitutional immunity defense makes any violation irrelevant. Alternatively, a court might determine that the Constitution was violated, but that recovery still is barred by § 802. In either

²⁷⁶ Sager, *supra* note ___, at 2529; *supra* notes ___ and accompanying text.

²⁷⁷ *Telecommunications Records Litig.*, 633 F. Supp. 2d at 963-64

²⁷⁸ *Id.* at 964.

²⁷⁹ See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983) (citing *Steadman v. SEC*, 450 U.S. 91, 95 (1981)).

situation, the new law does not restrict or affect the court’s constitutional analysis and pronouncements, only the subsequent question of whether relief is available as a result of those pronouncements.

Section 802 immunity is analogous to official immunities that limit or entirely prevent damages against government officials for constitutional violations under § 1983 and *Bivens*²⁸⁰ despite, and regardless of, whether constitutional rights had been violated.²⁸¹ These immunities are an accepted part of the scheme of constitutional litigation. Formally, of course, official immunities under § 1983 are not congressional creations, but common law rules that *sub silentio* survived passage and were incorporated into the statutory litigation scheme.²⁸² And *Bivens* is not a statute at all, but a judicially created common law cause of action that incorporates common law defenses.²⁸³

But Congress always can override common law rules by statute,²⁸⁴ no less for immunities than for any other common law rules. Congress thus could eliminate all existing immunities, statutorily narrow or expand existing immunities,²⁸⁵ or create new immunities beyond those recognized at common law. To define § 802 as impermissible congressional dictation of constitutional meaning ignores the wide acceptance of these existing sub-constitutional defenses to constitutional liability.²⁸⁶

A final criticism is that Congress tried to dictate case outcomes because it enacted the immunity provision against the backdrop of pending lawsuits against the telecoms hoping to achieve a specific result (dismissal of the claims) in those pending actions. Congress and the President clearly wanted to protect the telecom companies from liability, presumably so the intelligence community and the President could call on them for technical assistance and cooperation with future War-on-Terror concerns.²⁸⁷

But as discussed earlier, this is what legal rulemakers always do with substantive law—establish liability rules to protect and incentivize conduct deemed socially beneficial and punish or deter conduct deemed socially destructive.²⁸⁸ That is true of every piece of legislation we have considered in light of *Klein*. Congress viewed Northwest timber harvesting as a socially beneficial activity and altered legal

²⁸⁰ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

²⁸¹ See, e.g., *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 859-60 (2009) (absolute prosecutorial immunity); *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (qualified executive immunity); *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) (absolute legislative immunity); *Mireles v. Waco*, 502 U.S. 9, 11 (1991) (absolute judicial immunity).

²⁸² See *Bogan*, 523 U.S. at 49.

²⁸³ Fallon & Meltzer, *supra* note ___, at 1749-50; see also, e.g., *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001) (qualified immunity in *Bivens* action); cf. *Ashcroft v. Iqbal*, 192 S. Ct. 1937, 1948-49 (2009) (describing *Bivens* as “federal analog” to § 1983).

²⁸⁴ See Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 769 (2004); Wasserman, *supra* note ___, at 247; see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994) (“[L]egislation has come to supply the dominant means of legal ordering, and circumspection has given way to greater deference to legislative judgments.”).

²⁸⁵ In 1996, Congress amended § 1983 to extend the scope of absolute judicial immunity beyond the common law rule recognized in *Pulliam v. Allen*, 466 U.S. 522 (1984). See Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847, 3853, § 309 (1996).

²⁸⁶ Tracy Thomas argues that there is a fundamental right, grounded in due process, to a remedy for a violation of a right and Congress can limit or deny remedy for such violation only to serve a compelling interest. Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1643 (2004). Because official immunities do limit remedies even if the plaintiff has established a violation of a right, the question becomes whether official immunities are supported by compelling policy concerns, and perhaps they are not. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1820-21 (1991); Thomas, *supra*, at 1645. But this argument sounds in Due Process, not in *Klein*’s separation-of-powers concerns. Thus, even if there were a constitutional argument against official immunities (which also might invalidate § 802’s immunity), *Klein* still would not be doing any meaningful constitutional work.

²⁸⁷ *Telecommunications Records Litig.*, 633 F. Supp. 2d at 956; Schwartz, *supra* note ___, at 417.

²⁸⁸ See Plager, *supra* note ___, at 70; Epstein, *supra* note ___, at 4; *supra* notes ___ and accompanying text.

rules to make that harvesting possible (while somewhat respecting environmental concerns) on proof of certain facts as to certain forest areas.²⁸⁹ Congress viewed the construction of the World War II Memorial as a socially beneficial activity and altered rules to eliminate legal barriers to that construction.²⁹⁰ Congress viewed lawful manufacture and sale of firearms as socially beneficial activity and altered legal rules to prevent manufacturer liability for third-party violence, eliminating a possible deterrent to participation in the lawful firearms market.²⁹¹ The same reasoning underlies § 802. Congress viewed it as socially beneficial for telecoms to aid the federal government in its national-security efforts, so Congress altered legal rules to remove liability for such aid, eliminating a possible deterrent to future telecom assistance with government efforts. Again, so long as Congress is merely hoping for that outcome under its newly created legal circumstances and not statutorily dictating it in a particular case (“In *A v. B*, *A* shall prevail”), we remain at the core of what legislatures do, safe from *Klein*’s reach.

We thus are back to bottom-line policy disagreement with the congressionally hoped-for outcome of protecting telecoms from liability, at the expense of individuals whose constitutional rights were violated. We again are dealing with policy preferences disguised as constitutional argument. One can object (not unreasonably so) to allowing telecoms to get away with helping the government engage in at-the-time blatantly unlawful conduct simply because the President asked them to do so.²⁹² But calling the grant of telecom immunity unwise says nothing about its constitutionality. And *Klein*, properly understood, has nothing to say about the validity of the grant of immunity and Congress’ hoped-for outcome.

B. Military Commissions Act of 2006

Post-9/11 hostilities in Afghanistan and Iraq, along with broader efforts against terrorism, necessitated a scheme for dealing with individuals captured and detained, in the United States and abroad.²⁹³ Having obtained from Congress authorization to use “all necessary and appropriate force” against nations and groups that had perpetrated or supported the 9/11 attacks “in order to prevent any future attacks,” President Bush issued a comprehensive military order authorizing the establishment of military commissions for trying certain classes of people for terror-related activities.²⁹⁴ He relied on the AUMF, provisions of the Uniform Code of Military Justice, and, ultimately, his constitutional authority as commander-in-chief as the basis for his military order.²⁹⁵ He therefore did not seek or obtain congressional approval for military commissions or for the processes.²⁹⁶

²⁸⁹ See *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 438-39 (1992).

²⁹⁰ See *Nat’l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1093-94 (2001); see also Pub. L. 107-11, 115 Stat. 19 (2001).

²⁹¹ See *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1139 (9th Cir. 2009) (upholding Protection of Lawful Commerce in Arms Act, Pub. L. No. 100-92, 119 Stat. 2095 (2005)); *New York City v. Beretta U.S.A. Corp.*, 524 F.3d 384, 389 (2d Cir. 2008) (same).

²⁹² See Posting of Michael Dorf to Dorf on Law, <http://michaeldorf.org/2007/12/immunity-for-phone-companies.html> (Dec. 18, 2007, 3:30 p.m.).

²⁹³ GOLDSMITH, *supra* note ___, at 106-08

²⁹⁴ *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008); Authorization for Use of Military Force (AUMF), § 2(a), 115 Stat. 224 (2001); GOLDSMITH, *supra* note ___, at 109-10.

²⁹⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006); Paulsen, *Constitutional Power*, *supra* note ___, at 1837.

²⁹⁶ GOLDSMITH, *supra* note ___, at 123-24.

The Supreme Court pushed back in *Hamdan*, holding that the administration-established military commissions were unlawful because not congressionally authorized,²⁹⁷ and actually conflicted with existing congressional enactments, notably the Uniform Code of Military Justice.²⁹⁸ The UCMJ, in turn, incorporated provisions of the four Geneva Conventions, particularly provisions of Common Article 3, which required that any proceeding be by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”²⁹⁹ *Hamdan* was, at bottom, a decision about the relationship between the political branches and the President’s obligation to act within the existing statutory regime or to get Congress to alter that regime.³⁰⁰ Congress responded by enacting the Military Commissions Act of 2006, authorizing the President’s military commissions regime, as well as resolving objections raised by the Court in *Hamdan*.³⁰¹

Several provisions in the MCA raise potential objections under *Klein*’s principles and a few provisions might even violate some of them. Perhaps this is not unexpected from pathological legislation that attempts to control one branch of government in favor of another. But we still must recognize *Klein*’s genuine narrowness. However pathological the times and however politically controversial the MCA, *Klein* has little to say about most of its provisions. And even those provisions that do raise *Klein* problems may not be, in the end, legally significant.

Under the MCA, alien unlawful enemy combatants are prohibited from invoking the Geneva Conventions as a source of rights before military commissions.³⁰² Congress also prohibited all parties from invoking the Geneva Conventions in habeas proceedings and in civil actions in federal court against the United States or one of its officers or agents.³⁰³ Military commissions are declared to be a “regularly constituted court[s], affording all necessary judicial guarantees which are ‘recognized as indispensable by civilized people’ for purposes of common Article 3 of the Geneva Conventions.”³⁰⁴ The statute then defines how United States obligations under the Geneva Convention are to be implemented as domestic law. Section 6 amends the War Crime Act³⁰⁵ to provide that only “grave breaches” of Common Article 3 violate domestic law, then defines what constitutes grave breaches, omitting some recognized Convention

²⁹⁷ *Hamdan*, 548 U.S. at 567; *id.* at 636 (Breyer, J., concurring); GOLDSMITH, *supra* note ___, at 136.

²⁹⁸ *Hamdan*, 548 U.S. at 613.

²⁹⁹ *Id.* at 631-32.

³⁰⁰ *Id.* at 636 (Breyer, J., concurring) (“Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”); Paulsen, *Constitutional Power*, *supra* note ___, at 1835 (“[T]ultimate upshot of the Court’s decision—as emphasized by the very narrow, far-more-succinct concurrence of four Justices¹⁹⁹—was that the President lacked authority, in the Court’s view, to take such actions alone. If Congress authorized military commissions, however, that was a different matter.”).

³⁰¹ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006); *see* GOLDSMITH, *supra* note ___, at 138-39; Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 104 AM. J. INT’L L. 322, 327 (2007); *see also* Paulsen, *Constitutional Power*, *supra* note ___, at 1839 (discussing the back-and-forth among the three branches on the question of military commissions and the Geneva Convention as an example of how separation of powers functions).

³⁰² Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, § 948b (2006).

³⁰³ *Id.* § 5(a), *codified* at note to 28 U.S.C. § 2241

³⁰⁴ *Id.* § 948b(f); Bradley, *supra* note ___, at 341 & n.125.

³⁰⁵ 18 U.S.C. § 2441

rights.³⁰⁶ It then declares that the War Crimes Act (as amended) fully satisfies the United States' obligations under the Geneva Convention to provide effective penal sanctions for grave breaches.³⁰⁷ Finally, it provides that “no foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting” the domestic prohibitions of the War Crimes Act.³⁰⁸

With one small exception, *Klein* lacks the doctrinal force to invalidate any of this.

The obvious *Klein* attacks rests on Sager's no-constitutional-untruths principle. By prohibiting parties from raising, and courts from considering, the Conventions as a source of substantive rights in federal court, even while leaving unchanged U.S. treaty obligations, § 5 of the MCA dictates judicial analysis and the principles courts can apply.³⁰⁹ Critics might invoke the same argument against the prohibition on courts relying on foreign decisions in interpreting the Geneva Conventions—that it strips courts of the ability to exercise best judgment in resolving legal questions and compels them to tell an untruth by determining legal issues (about the Conventions) differently than they might if left to the full scope of their analytical discretion about appropriate legal sources and guides.

This depends how we understand treaties as judicially enforceable domestic law.³¹⁰ One view is that treaties are not judicially enforceable federal domestic law unless the treaty itself is self-executing and the Senate ratifies it on that understanding or Congress enacts an implementing statute.³¹¹ Domestic judicial enforceability of treaty obligations thus is up to Congress (or the Senate alone) and the President.³¹² Treaties are akin to statutes, not the Constitution, in being subject to congressional control.³¹³ Congress may choose not to provide implementing legislation, in which case a non-self-executing treaty does not become enforceable in private litigation.³¹⁴ Conversely, Congress may decide after the fact to alter a treaty's domestic enforceability by “unexecuting” the treaty for purposes of domestic law.³¹⁵ This is effectively what § 5 of the MCA does—whatever the prior status of Common Article 3 as a matter of

³⁰⁶ Pub. L. No. 109-306, 120 Stat. at 2632, § 6(a)(1), (b)(1)(B); note to 18 U.S.C. § 2441; Bradley, *supra* note ___, at 329.

³⁰⁷ Pub. L. No. 109-306, 120 Stat. at 2632, § 6(a)(2); Bradley, *supra* note ___, at 329.

³⁰⁸ Pub. L. No. 109-306, 120 Stat. at 2632, § 6(a)(2).

³⁰⁹ Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CAL. L. REV. 1193, 1239-40 (2007)

³¹⁰ See David Sloss, *The United States, in THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY* (Derke Jinks & David Sloss, eds., 2009) (M.7) (describing “fundamental disagreement” between nationalists and transnationalists going to whether treaty creating binding international obligations, without more, binds domestic legal actors as a matter of domestic law).

³¹¹ *Medellin v. Texas*, 128 S. Ct. 1346, 1356 (2008); Bradley, *supra* note ___, at 337; Paulsen, *Constitutional Power*, *supra* note ___, at 1789; Sloss, *supra* note ___, at ___ (M.7) (discussing the nationalist interpretation of *Medellin*).

³¹² Bradley, *supra* note ___, at 340; Paulsen, *Constitutional Power*, *supra* note ___, at 1798 (arguing that treaties' “force is utterly contingent on the prospective actions and decisions of U.S. constitutional actors”).

³¹³ Bradley, *supra* note ___, at 340; Paulsen, *Constitutional Power*, *supra* note ___, at 1785-86.

³¹⁴ *Medellin*, 128 S. Ct. at 1356; Bradley, *supra* note ___, at 340; Paulsen, *Constitutional Power*, *supra* note ___, at 1789; cf. *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (discussing standards for determining congressional intent that statute to be privately judicially enforceable).

³¹⁵ Bradley, *supra* note ___, at 339; see also Paulsen, *Constitutional Power*, *supra* note ___, at 1789 (arguing that a law that contradicts or interprets narrowly a treaty obligation prevails as a matter of U.S. law).

domestic law prior to the MCA, those provisions now are unenforceable as domestic law, at least in federal court in habeas and in civil actions against the government and government officials.³¹⁶

Any *Klein* argument as to § 5 must account for this degree of congressional control. Sager’s first principle is not implicated where Congress controls substantive law (or judicial enforceability of substantive law) to be applied—that is, as to all sub-constitutional law. Just as a court cannot logically be compelled to speak a “statutory untruth” because the truth of the statute is congressionally determined,³¹⁷ neither can a court logically be compelled to speak a “treaty-domestic-enforcement untruth,” because that enforcement (and the truth of the underlying rule) is congressionally determined.

One might challenge § 6, and its limit on the interaction between the Geneva Conventions and the War Crimes Act, on both no-untruths and no-dictating-outcomes principles. But both arguments fail. Congress has not dictated case outcomes here. Congress simply has defined a term of domestic statutory law (“grave breach of Common Article 3”) as a matter of enforceable domestic statutory law.³¹⁸ The MCA does not purport to tell courts whether a grave breach has occurred in any particular case, only what relevant facts, if found, show a grave breach for purposes of domestic law.

Similarly, Congress is well within its prescriptive authority in prohibiting courts from using foreign and international law in interpreting the Geneva Conventions for purposes of the War Crimes Act. Again, Congress has the power to define how courts understand and interpret congressional enactments, including defining permissible analytical rules, sources, and techniques.³¹⁹ Congress could have eliminated all domestic judicial enforcement of the Geneva Conventions,³²⁰ thus it can take the lesser step of controlling the manner of judicial interpretation, such as the interpretive rules applicable to the domestic-enforcement statute, thereby narrowing that enforcement.³²¹ Section 6 is different, for *Klein* purposes, from Congress’ effort to prohibit the use of foreign and international law in interpreting the Constitution, given the greater definitional and interpretive control that Congress has over statutes such as the War Crimes Act and over enforceability of treaties as domestic law.³²²

The strongest *Klein* argument targets § 948b(f), declaring that a military commission is a regularly constituted court satisfying U.S. obligations under the Geneva Convention. Here, Congress does seem to be dictating the conclusion on a fact—when confronted with a challenge to military commissions under the Conventions, the court is obligated to find that the commission is a regularly constituted court, a

³¹⁶ Bradley, *supra* note ___, at 340-41; Paulsen, *Constitutional Power*, *supra* note ___, at 1848.

³¹⁷ See *supra* notes ___ and accompanying text.

³¹⁸ And there is general agreement that Congress can define statutory terms. See Araiza, *supra* note ___, at 1131; Jellum, *supra* note ___, at 880, 882; see also Rosenkranz, *supra* note ___, at 2127 (“[D]efining terms is, in the first instance, an inherent incident of the legislative power.”); *supra* notes ___ and accompanying text.

³¹⁹ See *supra* notes ___ and accompanying text.

³²⁰ See *Medellin*, 128 S. Ct. at 1356; Bradley, *supra* note ___, at 341; Paulsen, *Constitutional Power*, *supra* note ___, at 1789.

³²¹ Paulsen, *supra* note ___, at 1848.

³²² See *supra* notes ___ and accompanying text. Note that Justice Scalia, while a strong opponent of congressional efforts to control judicial decisionmaking in constitutional cases, *supra* notes ___ and accompanying text, joined the *Medellin* majority in recognizing broad congressional control over domestic treaty enforcement.

finding that triggers the consequential conclusion that U.S. treaty obligations are satisfied. The problem is not congressional dictation of the legal consequence of the factual conclusion (again, this is what statutes do); the problem is congressional dictation of the conclusion in a case that commissions are regularly constituted courts.

Ultimately, however, it is not clear how much this provision matters. First, Curtis Bradley suggests Congress may not have been expecting the provision to be enforced; § 948b(f) may be something akin to a sense-of-Congress provision that courts might disregard.³²³ Second, Congress might have been dictating the conclusion not for purposes of domestic judicial (legal) enforcement, but for purposes of U.S. international relations and the nation’s political (rather than legal) obligations to comply with treaty and convention obligations.³²⁴ *Klein* is concerned only the former.

* * *

We thus see *Klein*’s lack of doctrinal power. Two controversial statutes, passed in pathological times, impose restrictions on the courts, judicial authority, and judicial decisionmaking, all to achieve “hoped for” outcomes in pending and threatened litigation favorable to congressional policy preferences. And *Klein* has little to say about either piece of legislation and gives courts no power to halt Congress’ efforts. However worshipful we wish to be with *Klein*, however much we may want to be part of its cult, *Klein* is a doctrine which exerts no meaningful doctrinal force. The best we can say is that they may be unwise policies; that does not render them unconstitutional.

Recognizing the twin myths of *Klein*—that the doctrine is not meaningless or indeterminate, but also not at all constitutionally vigorous—is a big step towards clearing up much constitutional confusion. And that clarity is necessary as Congress considers and enacts *Klein*-suspect laws, particularly in the pathological context of the War on Terror.

³²³ Bradley, *supra* note ___, at 341 n.125. This argument might mitigate the impact of the never-enacted Constitution Restoration Act, S.520, 109th Cong. § 201 (2005), which prohibited the use of foreign and international law in constitutional interpretation—Congress never intended the provision to be more than a sense-of-Congress statement. *See supra* notes ___ and accompanying text.

³²⁴ *See* Paulsen, *Constitutional Power*, *supra* note ___, at 1770 (“[I]nternational law is primarily a political constraint on the exercise of U.S. power, not a true legal constraint; it is chiefly a policy consideration of international relations—of international politics.”).