

## *United States v. Klein, Then and Now*

Gordon G. Young\*©

*United States v. Klein, decided during Reconstruction, was the first U.S. Supreme Court case to invalidate a statutory restriction on federal courts' jurisdiction. It is the only case to do so by finding a violation of Article III of the Constitution. Klein has been cited in thirty-three U.S. Supreme Court opinions and roughly five hundred times each by lower federal courts and law journal articles. Recent commentators have read Klein both too broadly and narrowly. Its central holding is that Congress may not grant federal courts jurisdiction to decide a set of cases on the merits while depriving them of jurisdiction to apply specified parts of the Constitution in reaching their decisions. Read through the proper interpretive lens, Klein has a great deal more to say than this, indeed a great deal more than I thought or expressed in 1981 in the earliest comprehensive article on the case. By means of the law of judgments and preclusion, Klein is best explained by Congress's lack of power to simultaneously court-strip the state as well as the federal courts of the power to enforce constitutional rights. Despite my earlier doubts and some new Klein scholarship that would read it more narrowly, Klein can best be read as more broadly prohibiting statutory interference with federal courts' processes of fact-finding and their methods of both constitutional and statutory interpretation. These attractive readings of Klein call into question one federal post-conviction habeas corpus statute and, possibly, parts of the War on Terror that restrict the courts' use of foreign and international law, including the Geneva Conventions. Some recent scholarship seems to read Klein too narrowly as placing no restrictions on Congress's power to control how federal courts interpret statutes. Other recent scholarship reads it too broadly. The latter takes its prohibitions far beyond protection of federal courts' decision processes, seeing in Klein*

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*a holding that prohibits otherwise constitutional legislation on grounds that it would deceive the public. This attributed holding seems an unfortunate one. It would task courts with the job of requiring reasonable truth in legislation. That is a job that neither the Court at the time of Klein, nor the current Supreme Court, would relish or would be likely to find required of it by the Constitution. Beyond these issues, this Article explores the connections between Klein's central holding against treating federal courts as puppets and the perennial debate about court-stripping; specifically, Congress's power simply to exclude classes of constitutional claims from federal court enforcement.*

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[T]hese difficult objects, dilapidate  
Appearances of what appearances,  
Words, lines, not meanings, not communications  
Dark things without a double, after all\*\*

## INTRODUCTION

Arising out of the Civil War and Reconstruction politics, *United States v. Klein*<sup>1</sup> is both a product of and a case for tumultuous times.<sup>2</sup> It is one of only two U.S. Supreme Court cases to invalidate a congressional regulation of federal courts' jurisdiction as a violation of the judicial independence required by Article III of the Constitution.<sup>3</sup> *Klein* has been cited in thirty-three U.S. Supreme Court opinions and roughly five hundred times each by lower courts and law journal articles.<sup>4</sup> The opinion in its context has been a frequent object of

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\*\* WALLACE STEVENS, *An Ordinary Evening in New Haven*, in *THE COLLECTED POEMS OF WALLACE STEVENS* 465, 465 (Vintage Books 1990) (1923).

1. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). *Klein* struck a provision of a statute that required the Supreme Court to hear appeals but reverse any judgments in appellees' favor that were based on presidential pardons, without making inquiries into the substantive constitutional merits of the case. *Id.* at 140–48. For fuller treatments of *Klein*, see discussion *infra* Part I. See generally Gordon G. Young, *Congressional Regulation of Federal Courts Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1189 [hereinafter Young, *Klein Revisited*].

2. Howard M. Wasserman, *Constitutional Pathology, the War on Terror, and United States v. Klein*, 5 J. NAT'L SECURITY L. & POL'Y 211, 215–18 (2011) [hereinafter Wasserman, *Constitutional Pathology*] (arguing that *Klein* was a product of pathological political times and discussing its current application amidst the strains of the War on Terror).

3. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 320 (Robert C. Clark et al. eds., 6th ed. 2009). In recent times, the Court has struck down court-stripping provisions, but not as violations of Article III. In *Boumediene v. Bush*, the Court found that the limited judicial review permitted to detainees at Guantanamo violated the Constitution's provisions against suspension of habeas corpus. 553 U.S. 723, 792 (2008). Furthermore, in *United States v. Mendoza-Lopez*, the Court struck a provision similar to the one struck in *Klein* but on due process grounds. 481 U.S. 828, 840 (1987). The invalidated provision required a federal district court to preside over a conviction while, for all functional purposes, making it impossible for the court to consider the defendant's plausible constitutional defense. See *id.* at 839.

4. These statistics are based upon a Shepard's Report in LexisNexis of *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). *Klein* is cited in 457 federal (non-Supreme Court) and state court decisions and in 561 law journal articles. The first serious scholarship covering *Klein* was a brief interpretation in Henry Hart's famous *Dialogue*. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372–73 (1953). The earliest comprehensive coverage of *Klein* can be found in Young, *Klein Revisited*, *supra* note 1, at 1189–262. See also James S. Liebman & William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 773–75 (1998) (describing how a qualitative understanding of the judicial power helps explain *Klein*'s holding); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the*

interpretation and, in the words of the Wallace Stevens epigram, a difficult one. In recent years, *Klein* has been the focus of a new wave of scholarly interest.<sup>5</sup> The opinion has been described as creating a “myth” and (with more justification) confusing.<sup>6</sup> But *Klein* has one very clear meaning and important holding: It makes clear that Congress’s powers to regulate jurisdiction are not powers to override *Marbury v. Madison* by other means.<sup>7</sup> In short, even if Congress enjoys a great deal of authority to close federal courts to specified claims, it cannot open them only to use them as puppets.

In *Klein*, the Supreme Court struck down a statute that would have forced it to take jurisdiction over a government appeal from an adverse Court of Claims judgment.<sup>8</sup> The statute purported to give the Court only the power to issue a judgment reversing the lower court’s judgment.<sup>9</sup> These provisions deprived the Court of the power to consider whether the pardon provisions of the Constitution required affirming the judgment below.<sup>10</sup> Accordingly, *Klein* held that if federal courts are permitted jurisdiction to decide a case, then they must have freedom to apply all relevant federal law, giving hierarchical priority to constitutional law over statutes and other lesser forms.<sup>11</sup> *Klein* itself says nothing directly about the perennial federal court-stripping debate—whether Congress can remove sets of constitutional cases entirely from federal courts’ jurisdiction based on displeasure with the rights asserted. Nonetheless, *Klein* is related to that debate in several

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*Federal Courts*, 95 HARV. L. REV. 17, 64, 68 (1981) (examining *Klein*’s impact on Congress’s authority to limit federal court jurisdiction). For a brief summary of *Klein* and its significance, not reflecting my most recent views, see Gordon G. Young, *United States v. Klein*, 80 U.S. 128 (1872), in 5 ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 109, 109–10 (David S. Tanenhaus ed., 2008) [hereinafter Young, U.S. v. Klein].

5. The most general of these is Howard M. Wasserman, *The Irrepressible Myth of Klein*, 79 U. CIN. L. REV. 53 (2010) [hereinafter Wasserman, *Irrepressible Myth*]. Dealing with *Klein* and the War on Terror are Wasserman, *Constitutional Pathology*, *supra* note 2, at 214–15; and, more generally, Louis Fisher, *United States v. Klein: Judging Its Clarity and Application*, 5 J. NAT’L SECURITY L. & POL’Y 237 (2011), and Stephen I. Vladeck, *Why Klein (Still) Matters: Congressional Deception and the War on Terrorism*, 5 J. NAT’L SECURITY L. & POL’Y 251 (2011).

6. See, e.g., Wasserman, *Irrepressible Myth*, *supra* note 5, at 53–58, 64–65 (describing *Klein* as creating a myth and confusing, respectively); Young, *Klein Revisited*, *supra* note 1, at 1194–97 (dealing with the great confusion as to the meaning of *Klein*).

7. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803) (striking down portions of a statute read to assign the Supreme Court original jurisdiction but conflicting with limitations on Supreme Court jurisdiction in Article III of the Constitution).

8. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147–48 (1872).

9. *Id.* at 148.

10. See discussion *infra* Part I.A.1.

11. See *infra* note 85 and accompanying text.

ways.<sup>12</sup> First, a little-known companion case seems to strike down a court-stripping statute, one that simply closes the federal courts to specified claims.<sup>13</sup> Second, *Klein*'s prohibition against Congress's use of federal courts as puppets turns out to be, via the law of claim preclusion, the fraternal twin of a much more severe form of court-stripping: one that attempts to close both federal and state courts to specified constitutional claims.<sup>14</sup>

Congress attempted dual state and federal court-stripping in the Fair Labor Standards Act; the Second Circuit, during its illustrious Learned Hand years, determined that the practice was unconstitutional.<sup>15</sup> Indeed, Henry Hart's foundational writings in federal court studies make a compelling case against dual system court-stripping.<sup>16</sup> Additionally, three Supreme Court cases in the 1970s and 1980s, at a minimum, interpret statutes to avoid confronting the constitutionality of such laws.<sup>17</sup> But at a maximum (and not discussed in any scholarly literature), those cases—though not *Klein* itself—may be read more broadly as condemning simple single system, federal trial court-stripping.<sup>18</sup>

I first explored *Klein*, its one clear holding, and its considerable difficulties in a 1981 article.<sup>19</sup> Partially based on the influence of Ronald Dworkin's writings,<sup>20</sup> I now would attribute additional, more general holdings to *Klein*, radiating out like the circles on a bull's eye target.<sup>21</sup> The Court's opinion in *Klein* may be read, at some higher but reasonable level of generality, to prohibit a variety of restrictions on federal courts' deliberative processes. These additional restrictions prohibit some statutory regulation of the methods of finding facts; they also prohibit some statutory regulation of the methods of interpreting

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12. See discussion *infra* Part I.D.

13. See *Armstrong v. United States*, 80 U.S. (13 Wall.) 154, 154–56 (1871) (reversing a dismissal of Armstrong's claim against the United States for money damages and remanding for a decision on the merits despite a statute requiring dismissal). See also discussion *infra* Part I.E.3.

14. See discussion *infra* Part I.D (arguing that puppeteering regulations would accomplish the same result as dual system court-stripping).

15. See discussion *infra* Part I.E.1 (discussing *Battaglia v. General Motors Corp.*).

16. See discussion *infra* Part I.D.1 (arguing that state courts must be available when federal courts are not).

17. See discussion *infra* Part I.E.2 (discussing cases that closed federal courts to specified constitutional claims and did not make clear the ability of state courts to hear the claims).

18. See discussion *infra* Part I.E.2 (explaining that a broad reading of the cases would reveal that only federal, and not state courts, were discussed in the applicable court opinions).

19. See generally Young, *Klein Revisited*, *supra* note 1, at 1197–262.

20. See generally RONALD DWORIN, *LAW'S EMPIRE* (1986). For more on Dworkin's writings, see *supra* note 165 and accompanying text.

21. See also *infra* discussion Part II.B.

the Constitution, and even some, though not all, statutory limitations on courts' methods and tools for reading statutes.<sup>22</sup> These readings of Article III, through *Klein's* lens, raise questions about the constitutionality of portions of the statutory superstructure of the War on Terror,<sup>23</sup> which may attempt, in certain contexts, to cut federal courts off from using the Geneva Conventions even for inspiration and analogy in interpreting statutes.<sup>24</sup>

This view of *Klein* also has implications for portions of federal statutes, which hamstring the decision processes of federal courts when exercising habeas corpus jurisdiction to consider the constitutional validity of state court criminal convictions.<sup>25</sup> More concretely, a broader reading of *Klein* raises questions about the soundness of the majority's constitutional and statutory interpretations in *Williams v. Taylor*.<sup>26</sup> In *Williams*, the Supreme Court upheld a statute that it interpreted as requiring lower federal courts, while exercising habeas corpus jurisdiction, to defer to some federal constitutional interpretations by state courts, even though the federal habeas corpus courts thought them incorrect.<sup>27</sup>

The title of this Article—United States v. Klein, *Then and Now*—has a double meaning. “Then” refers both to what we know about *Klein* itself at birth and to my original perspectives, including previously unpublished commentary on my view of *Armstrong v. United States*. “Now” refers to a much more recent rethinking of some aspects of *Klein* prompted both by recent articles on *Klein* and by a new perspective on how lawyers and judges ought to read and interpret cases.

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22. See discussion *infra* Part II.B.1–2 (discussing concerns in protecting federal courts' decisional processes).

23. For a brief general description of the War on Terror and its relation to the Guantanamo Bay detention facility and other similar sites, see Jonathan Hafetz, *Military Detention in the “War on Terrorism”*: Normalizing the Exceptional after 9/11, 112 COLUM. L. REV. SIDEBAR 31, 31–32 (2012).

24. See discussion *infra* Part II.B.2.b (discussing limitations on Congress's power to control the methods courts use to interpret laws).

25. See *infra* Part II.B.3 (discussing the effects habeas corpus has on courts' judicial functions).

26. See *Williams v. Taylor*, 529 U.S. 362 (2000) (ignoring arguments presented based on *Klein*, and thus upholding requirements that federal judges, in habeas corpus proceedings brought by convicted state prisoners, defer to readings of the federal Constitution made by state courts in preserving convictions).

27. See *infra* part II.B.3 (discussing the justifications for requiring, in some cases, that a federal habeas corpus court defer to state court interpretations of the Constitution).

I. *KLEIN* THENA. *Two Forms of Jurisdictional Regulation*

## 1. Puppeteering Regulations

The first form of jurisdictional regulation considered in this Article normally has an effect that is very different from court-stripping, which is simply closing lower federal courts to specified claims.<sup>28</sup> This contrasting form of regulation does not attempt to close the federal courts, but rather, to use them as puppets to reach substantively unconstitutional results dictated by Congress.<sup>29</sup> More specifically, it attempts to use its powers to regulate courts' jurisdiction to compel the courts to issue judgments on the merits that would otherwise be constitutionally impermissible. Any argument for the constitutionality of such laws would have to be founded on the premise that Congress's powers over federal courts' jurisdiction in some way trump substantive personal constitutional entitlements. *Klein* itself invalidated a complex instance of this form of regulation.

Such regulation is problematic only in the case of statutes that attempt to use jurisdictional powers to prevent enforcement of constitutional rights. Courts must accept Congress's instructions about how to enforce statutory rights except in the unusual circumstances in which the Constitution interferes.<sup>30</sup>

This is easiest to understand through two hypothetical examples. Imagine a statute that permits federal district courts to conduct the trials of those accused of a particular federal statutory speech offense—e.g., some sort of incitement to violence—but which purported to withhold jurisdiction from those courts to consider the defendants' First Amendment challenges to the parts of the statute defining the crime. Or, to take a purely civil version, one might imagine a statute that left untouched federal district courts' diversity jurisdiction but purported to deprive them of jurisdiction to consider the effect of the First

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28. See discussion *infra* Part I.A.2 (arguing that court-stripping often takes the form of statutory exclusion from lower federal courts of specified cases or claims to relief based on constitutional rights, seeking to prevent the enforcement of these rights against the government and its officers).

29. Young, *Klein Revisited*, *supra* note 1, at 1221. See also J. Richard Doidge, Note, *Is Purely Retroactive Legislation Limited by Separation of Powers?: Rethinking United States v. Klein*, 79 CORNELL L. REV. 910, 959–61, 974 (1994) (describing *Klein* in such terms).

30. That courts must give effect to constitutionally valid statutes is basic. Perhaps the clearest illustration of this principle is that if the new statute that is itself constitutionally valid changes the result in a case on appeal, the court must apply the new statute. See *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109–10 (1801); FALLON ET AL., *supra* note 3, at 88.

Amendment in reaching decisions in state law libel cases.<sup>31</sup> These are simplified versions of the pattern of regulation condemned in *Klein*. Henry Hart saw *Klein*'s holding as a prohibition against this sort of regulation of federal courts.<sup>32</sup>

*Klein* itself is a rather unusual case, but, as Hart noted, the statute that it invalidated exemplifies puppeteering laws.<sup>33</sup> *Klein* started as an action in the Court of Claims to recover compensation from the United States Treasury for property seized from Victor Wilson by the Union Army during the Civil War (1861–1865).<sup>34</sup> Under an 1863 federal statute, those innocent of collaborating with the Confederacy were entitled to sue in that court for compensation.<sup>35</sup> Although Wilson had collaborated with the Confederacy, he was one of many who received a general pardon from President Abraham Lincoln. Klein was the administrator of Wilson's estate.<sup>36</sup> He sued the United States in the Court of Claims shortly after the U.S. Supreme Court held, in a previous case, that pardoned Confederate collaborators were legally innocent, at least for purposes of recovering property under the 1863 statute.<sup>37</sup> On the basis of this precedent, the Court of Claims awarded Wilson's estate more than \$125,000 in 1869.<sup>38</sup>

The decision angered Radical Republicans in Congress who successfully pushed through an 1870 statute aimed at Wilson and other despised collaborators who had won lower court judgments based on pardons.<sup>39</sup> The portions of the 1870 act bearing on *Klein* required the Supreme Court to hear the federal government's appeals of such awards, but it purported to deny the Supreme Court jurisdiction to consider pardon rights in deciding those appeals.<sup>40</sup> These provisions would have required a reversal of the judgment in Wilson's favor, without full judicial consideration of whether he was constitutionally entitled to a favorable judgment. The Supreme Court struck this down and affirmed the Court of Claims, stating in part:

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31. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (recognizing a constitutional defense against libel suits for those who make innocent or negligent mistakes of fact in criticizing public officials).

32. See Hart, *supra* note 4, at 1398–99.

33. *Id.* at 1373 & n.39.

34. Young, *Klein Revisited*, *supra* note 1, at 1197–99.

35. *Id.* at 1197–99.

36. *Id.* at 1198–99.

37. *Id.* at 1198–99, 1201–03.

38. *Id.* at 1199.

39. *Id.* at 1203–05.

40. *Id.* at 1206–09.

If [the 1870 Act] simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make ‘such exceptions from the appellate jurisdiction’ as should seem to it expedient.

But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. . . .

. . . .

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power. . . .

. . . .

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.<sup>41</sup>

It is worth noting that the Court’s emphasis in this central passage is two-fold—pardon rights and judicial power. The concern in *Klein* seems to be on how thwarting separate constitutional limits in this jurisdictional manner goes beyond its permissible control of the judicial power. Thus, by its general reference to incursions on the “judicial power,” *Klein*’s concerns seem to extend to protection of federal courts in general and not simply the Supreme Court.

## 2. Court-Stripping Regulations

The second of the two forms of regulation that this Article considers is widely referred to as “court-stripping” or “jurisdiction-stripping” legislation.<sup>42</sup> Often, this sort of regulation takes the form of the statutory exclusion from lower federal courts of specified cases or affirmative claims to relief based on constitutional rights.<sup>43</sup> Such laws

41. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145–47 (1872).

42. For an early use of the term, see Max Baucus & Kenneth R. Kay, *The Court-Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 992–94 (1982) (defining “court-stripping” as various attempts to selectively remove federal court jurisdiction over constitutional claims). For more recent examples of the use of this term, see Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 874 n.12, 890–91, 896–97 (2011) (referring to such laws as “jurisdiction-stripping”); Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 434 n.98 (2007) (explaining decisional independence in relation to court-stripping legislation).

43. With certain exceptions, the Norris-La Guardia Act deprived federal courts of jurisdiction to issue injunctions in labor disputes. In *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938), the Supreme Court seemed, in remanding a case, to require the district court to dismiss despite the possibilities that the injunction sought to enforce previous Supreme Court-declared constitutional

single out congressionally unpopular constitutional rights and seek to prevent their enforcement in federal courts against the government and its officers. Some examples include laws or proposed laws removing from federal courts the power to enforce arguably vested property rights, abortion rights, or rights against school prayer.<sup>44</sup> In this category, one might also include restrictions on judicial review of the confinement of enemy combatants at Guantanamo,<sup>45</sup> although those cases also raise issues of violation of the more specific right that habeas corpus not be suspended except in circumstances narrowly defined by the Constitution.<sup>46</sup>

In one common form, court-stripping simply closes the federal trial courts to plaintiffs who seek judicial assistance against unconstitutional action—e.g., a suit seeking an injunction to stop a threatened arrest on grounds that the First Amendment protects the plaintiff's proposed activities. A paired example of a court-stripping law is one that would excise such suits from federal district courts' generally broad jurisdiction over federal questions.<sup>47</sup> But one might substitute laws aimed at Fifth or Fourteenth Amendment rights or any other rights springing from the Constitution. The result in these examples, and

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rights. The Court said in remanding: "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." *Id.* at 330. It is possible, however, to read *Lauf* as finding the exceptions to the withdrawal of jurisdiction sufficient to permit enforcement of any substantive constitutional rights. Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132, 168–69 (1995) [hereinafter Young, *Congress's Power to Restrict*]. For a description of myriad, less successful attempts to withdraw jurisdiction over congressionally unpopular court-declared constitutional rights—including rights to abortion and busing for racial balance—see FALLON ET AL., *supra* note 3, at 277–78; Grove, *supra* note 42, at 900–16.

44. See FALLON ET AL., *supra* note 3, at 277.

45. See Hafetz, *supra* note 23, at 32 ("Among the features that distinguish this system [of military detention and prosecution] from the criminal justice system are fewer procedural safeguards afforded detainees, the significantly lower evidentiary burden imposed on the government, heightened secrecy, fewer constraints on interrogations, more limited judicial review, and the open-ended nature of the confinement itself.")

46. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). Provisions insulating from full judicial review the detention of "enemy non-combatants" have been seen as a special case of court-stripping. Benjamin G. Davis, *No Third Class Processes for Foreigners*, 103 NW. U. L. REV. 88, 90, 94 (2008). In *Boumediene v. Bush*, the Court, for the first time, found unconstitutional a federal statute that provided limited and exclusive judicial review to Guantanamo detainees on grounds that it violated the Suspension Clause. 553 U.S. 723, 792 (2008). While the reasoning relied on the Suspension Clause, the opinion says nothing about limitations on judicial review for non-habeas corpus claims to review unconstitutional action and laws; that is, those limitations allegedly depriving a would-be plaintiff of a federal court forum.

47. See 28 U.S.C. § 1331 (2006) (providing general federal trial court jurisdiction over cases "arising under the Constitution, laws and treaties of the United States.").

generally under a court-stripping law, would be a dismissal for want of jurisdiction, not on the merits. Normally, and perhaps always, simple stripping of federal trial court jurisdiction leaves state courts free to hear constitutionally based claims.<sup>48</sup>

*B. Sources of Congress's Power to Regulate the Jurisdiction of the Federal Courts*

Article III, Section 2 of the Constitution sets forth the nine categories of cases, including federal question and state citizen diversity cases, over which the federal courts may preside if Congress chooses to grant them jurisdiction.<sup>49</sup> It provides that in two such categories the Supreme Court shall have trial jurisdiction and, in the other seven, appellate jurisdiction. Article III, Section 2 further provides:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*<sup>50</sup>

The emphasized portion of this provision is the source of Congress's powers over the Supreme Court's appellate jurisdiction. Certain Supreme Court case law and commentary suggest that Congress can eliminate Supreme Court appellate jurisdiction over any category of cases it wishes to exclude, even those to enforce constitutional rights it finds inconvenient.<sup>51</sup> But there are contrary indications and arguments

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48. *See infra* Part I.D.1.

49. U.S. CONST. art. III, § 2, cl. 1:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

50. U.S. CONST. art. III, § 2, cl. 2 (emphasis added). On the surface, it is unclear whether this power to make exceptions and regulations touches only the Supreme Court's appellate jurisdiction, or whether such power allows or perhaps requires reciprocal adjustment of the powers of the lower federal courts versus those of the Supreme Court to assure that some federal court has jurisdiction over federal law cases. *See* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 216 (1985) (arguing, based on the language and structure of the Constitution, that either the Supreme Court, a lower federal court, or both courts, must be available to hear cases arising under the Constitution, laws and treaties of the United States, and certain other categories of the federal judicial power).

51. *See Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1868) (dismissing an appeal of a trial

that Congress may not simply discriminate against unpopular rights.<sup>52</sup>

Congress's powers to restrict, and otherwise regulate, the jurisdiction of the lower federal courts has a less clear textual basis. The Constitution vests the federal judicial power in one Supreme Court and "in such inferior Courts as the Congress *may* from time to time ordain and establish."<sup>53</sup> The use of the word "may" was no mistake but instead reflected a compromise at the Constitutional Convention, generally referred to as the "Madisonian Compromise," that avoided either requiring or prohibiting the existence of lower federal courts.<sup>54</sup> As a result, Congress was free not to establish lower federal courts. However, unlike its provisions for regulation of the Supreme Court's jurisdiction, the Constitution makes no explicit provisions for statutory exceptions to or regulations of the jurisdiction of lower federal courts that Congress does choose to establish.<sup>55</sup>

Despite the absence of explicit provisions for regulation, Article III has been read as implicitly providing Congress a great deal of power to give any lower federal courts (that it does create) as little or as much of the jurisdiction on the Article III's list as it wishes to give. This reading rests on the theory that the power to create lower federal courts implies the power to regulate them.<sup>56</sup> Over the years, however, in a variety of cases the Court's dicta about the extent of Congress's jurisdictional powers went much further than allowing Congress a choice of federal enforcement of all or of no federal law claims.<sup>57</sup>

Read literally, the Court's dicta permitted Congress to grant jurisdiction generally to federal trial courts in cases turning on federal questions but to withhold in it cases that sought enforcement of some

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court's refusal to grant habeas relief for a constitutional claim to liberty because Congress had repealed the Supreme Court's appellate jurisdiction). On the details and ambiguities of *McCardle*, see William Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 248–52, 254–60 (1973).

52. Any question about the extent of such powers would be resolved either by a reading of the "exceptions and regulations" language in Article III or a finding that later provisions of the Constitution—e.g., the Fifth or Fourteenth Amendment's Due Process Clause—placed further limits not necessarily implicit in the Constitution as of 1789. See Hart, *supra* note 4, at 1364–65 (suggesting that *McCardle*'s statements of plenary congressional power are dicta and that there may be structural limits on Congress's power under the Exceptions Clause to exclude constitutional claims from consideration by the Supreme Court).

53. U.S. CONST. art. III, § 1 (emphasis added).

54. See FALLON ET AL., *supra* note 3, at 7–9.

55. The Constitution authorizes Congress to "constitute Tribunals inferior to the supreme Court." U.S. CONST. art. I, § 8, cl. 9.

56. See *infra* note 60 and accompanying text. For the first eighty-six years under the Constitution there was no general federal question jurisdiction, except for a period of months around 1801. FALLON ET AL., *supra* note 3, at 743–45.

57. See *infra* note 60 and accompanying text.

congressionally disfavored federal constitutional right.<sup>58</sup> The logic of these Supreme Court statements is based on the generally, though not always, true proposition that a broad power includes any combination of its specifics.<sup>59</sup> The argument was that Congress's clear power over the existence of any lower federal courts includes the lesser power to create them with whatever jurisdictional limitations Congress chooses to impose. The following quote represents the earliest (and fullest) Supreme Court statement of this position, made in 1845, and often reiterated by the Court favorably in subsequent years:

[T]he doctrines so often ruled in this court that the judicial power of the United States, although it has its origin in the Constitution, is . . . dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.<sup>60</sup>

### C. Henry Hart's Position

Henry Hart was a co-founder of modern federal court studies and of the legal process school of legal analysis.<sup>61</sup> He wrote the foundational analysis of Congress's jurisdictional powers over both state and federal courts.<sup>62</sup> Hart sharply contrasts puppeteering regulations with ordinary

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58. See *infra* note 60 and accompanying text.

59. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545–48 (1985) (concluding that government's option to create certain contract rights does not include the option to control the process required in factual disputes over the rights created). Thus, not all conditions on government largesse comply with the Constitution. See generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (describing and theorizing about the constitutionality of various sorts of conditions on government largesse).

60. *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845) (footnote omitted). The remainder of the passage reads as follows:

To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely. It follows, then, that the courts created by statute must look to the statute as the warrant for their authority, certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them.

*Id.* This was quoted in part in the dicta of *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943). *Lockerty's* statement was dicta on court-stripping because the Court simply upheld an application of a provision that specified which particular trial court was available for plaintiff's claim and did not conclude that all federal trial courts could have been closed to that claim.

61. Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 954–64 (1994) (describing Henry Hart along with his coauthor Albert Sachs and their forerunner Felix Frankfurter).

62. Hart, *supra* note 4, at 1363–65.

federal court-stripping. As to simple court-stripping laws, he backs off any strong position that they are unconstitutional:

*Q.* . . . But suppose Congress is in dead earnest about withdrawing general jurisdiction in a special class of cases arising under the Constitution. Do you mean that it could only accomplish that by repealing Section 1331 [the federal question jurisdictional grant] *in toto*, on the theory that a mere amendment might be declared unconstitutional and the prior Section 1331 then left free to operate?

. . .

*A.* Well now, I'll have to stall a little. Habeas corpus aside, I'd hesitate to say that Congress couldn't effect an unconstitutional withdrawal of jurisdiction—that is, a withdrawal to effectuate unconstitutional purposes—if it really wanted to.<sup>63</sup>

But for Hart, opening federal courts to cases, but allowing them to function only as Congress's puppets, clearly exceeds a constitutional limit he recognized in *Klein's* reading of Article III: “[I]f Congress directs an Article III court to decide a case, I can easily read into Article III a limitation on the power of Congress to tell the court *how* to decide it. . . . [T]he Court itself made [that point] clear long ago in *United States v. Klein*.”<sup>64</sup>

Hart never explains his powerful intuition that this is the best reading of *Klein* or that puppeteering laws are more clearly unconstitutional than laws that simply remove jurisdiction from the lower federal courts to enforce specified constitutional rights. Later, this Article offers reasons for reading *Klein* in this manner.<sup>65</sup> The most forceful argument for this interpretation is based on the law of claim and issue preclusion and powerfully supports such a reading of *Klein* and the Constitution.<sup>66</sup>

#### *D. What Makes Court Puppeteering Especially Pernicious: Dual System Court-Stripping and Puppeteering as Fraternal Twins*

*Klein* does not turn on special attributes of the Supreme Court but

63. *Id.* at 1398–99 (footnote omitted). From one perspective, Hart's use of the word “unconstitutional” might support the view that he considered court-stripping unconstitutional, at least in some very limited sense of what is constitutionally proper. But he did not postulate that the courts are physically closed, so presumably they could declare that such limits are unconstitutional; ignore them; and hear the statutorily excluded cases. As I read this passage, Hart thought that simple federal court-stripping statutes, aimed at unpopular rights, were within Congress's powers under the Constitution, but regrettable in terms of constitutional values.

64. *Id.* at 1373.

65. See *infra* Part I.D (arguing that state courts must be available to constitutional claims and Congress cannot foreclose that option from potential claimants).

66. See discussion *infra* Part I.D.2 (arguing that puppeteering prevents litigants from having their day in court even more effectively than the troubling dual system court-stripping).

rather on the independent status of Article III courts more generally.<sup>67</sup> So what makes puppeteering the clearly more pernicious form of jurisdictional regulation? Hart never articulates his reasons for taking that position.

The most powerful support resides in the way that the law of judgments and preclusion magnify the harm of a dismissal on the merits, so that it leads, in effect, to the destruction of a constitutional claim.<sup>68</sup> There are other reasons that puppeteering is much more pernicious than ordinary federal court-stripping, including bad symbolism denigrating the status of the Article III courts and perhaps a certain sort of deception on the electorate concerning the existence of independent courts.<sup>69</sup>

The main argument has two steps. The first is the unconstitutionality of Congress's use of its jurisdictional powers to exclude enforcement of court-declared constitutional rights from both the state and federal courts. The second is the near identity of puppeteering to such dual system court-stripping.

### 1. The Unconstitutionality of Dual System Court-Stripping Laws

A. I've given all the important answers to that question, haven't I? I would have thought the rest was clear. Why, it's been clear ever since September 17, 1787.

Q. Not to me.

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67. Hart sees in *Klein* a proposition about what Congress cannot do to "an Article III court":

[I]f Congress directs an Article III court to decide a case, I can easily read into Article III a limitation on the power of Congress to tell the court *how* to decide it. [Justice] Rutledge makes that point clearly in the *Yakus* case, as the Court itself made it clear long ago in *United States v. Klein*.

Hart, *supra* note 4, at 1373.

68. See *infra* Part I.D.2 (arguing that state courts can still hear claims stripped from federal courts because they will simply have been dismissed for lack of jurisdiction, whereas puppeteering is more dangerous because it prevents claims from ever being adjudicated, as they will have been precluded).

69. There is some force to the unelaborated argument that the negative symbolism of treating a supposedly independent branch of the federal government as an instrument of another is a constitutional violation. Most separation of powers checks—e.g., the President's veto or the Senate's power not to consent to appointments and treaties—are negative. There is no pure example of an inter-branch check allowing one branch to take over the function of another. The closest imperfect one is the judicial-style power involved in impeachments. One analogy here is the Court's federalism jurisprudence, prohibiting Congress from using coercion to make state legislatures enact, as state law, federal programs or to make state executive officers enforce federal programs. See *Printz v. United States*, 521 U.S. 898, 935 (1997) (striking down portions of federal handgun regulation that imposed duties on local sheriffs); *New York v. United States*, 505 U.S. 144, 188 (1992) (striking down a federal law that penalized states for not enacting specified federal policy into state law).

A. The state courts. In the scheme of the Constitution, they are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones. If they were to fail, and if Congress had taken away the Supreme Court's appellate jurisdiction and been upheld in doing so, then we really would be sunk.

Q. But Congress can regulate the jurisdiction of state courts, too, in federal matters.

A. Congress can't do it unconstitutionally. The state courts always have a general jurisdiction to fall back on. And the Supremacy Clause binds them to exercise that jurisdiction in accordance with the Constitution.<sup>70</sup>

Thus, Hart's view is that state courts are available as backstops to hear any viable constitutional claim that is excluded from federal trial courts by court-stripping laws. Admittedly, case law clearly permits Congress to deny state courts' jurisdiction over federal statutory claims<sup>71</sup>—best seen as an exercise of Congress's power to do that which is necessary and proper to make its regulatory laws work well. Therefore, laws granting exclusive jurisdiction to the federal courts to hear certain claims under federal statutes (e.g., certain federal securities laws) are justifiable under legislative powers granted in Article I, Section 8 (most often the Commerce Clause as augmented by the Necessary and Proper Clause).<sup>72</sup> This power to make statutory claims exclusively cognizable in federal courts is well-settled in case law<sup>73</sup> and entails at least some power to limit the jurisdiction of state courts.<sup>74</sup>

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70. Hart, *supra* note 4, at 1401 (footnote omitted).

71. *Tafflin v. Levitt*, 493 U.S. 455, 458–61 (1990) (recognizing that federal statutes which create causes of action can explicitly or implicitly restrict their enforcement to the federal courts by clearly excluding state court jurisdiction). However, civil RICO actions are not explicitly so limited and do not meet the strict requirements for implication of exclusion of concurrent state court enforcement. *Id.* at 461.

72. Article I, Section 1 begins: "All legislative Powers herein granted shall be vested in a Congress . . ." U.S. CONST. art. I, § 1. The powers mentioned in the text appear in the following paragraphs: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.* § 8, cl. 3. The last paragraph of section eight reads: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* § 8, cl. 18. These sections make it clear that the larger scale ends or means explicitly specified are augmented by those reasonably necessary to their achievement. As long as any augmentation does not violate the Constitution in other ways, it too, though not specifically mentioned, is within Congress's powers to legislate. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (finding that Congress has the implicit power to create a bank in order to pursue explicitly given powers and proclaiming: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional").

73. See *supra* note 71 and accompanying text.

74. *Id.* at 464.

If backed by such powers, statutes are constitutional so long as they do not run afoul of more specific limits on governments, usually individual rights provisions. Of the latter, rational basis equal protection and rational basis due process law cover the entire field of regulation. These schemes usually provide very few limits on legislative action. In limited circumstances, however, they are beefed up to provide even stricter scrutiny.<sup>75</sup>

Under the strict scrutiny test, as well as under the generally weak rational basis test, a statute that can be explained *only* as pursuing an illegitimate end is *per se* unconstitutional.<sup>76</sup> Moreover, if Congress closes both sets of courts—state and federal—to specified claims of constitutional rights, its aim can only be understood as that of making unenforceable a right that Congress has no power to repeal directly. Certainly it would be doublespeak to treat this as legislation augmenting the “enforcement” of such a right. Such a law is neither justified by any explicit federal jurisdictional power authorizing control over state courts (because there are no such powers) or “necessary” in pursuit of any regulatory power authorized under Article I (because constitutional rights are neither created, nor generally adjustable, by statutes).<sup>77</sup> It is an end completely at odds with the existence and nature of the rights themselves.

This all seems simple, and yet it substantiates Hart’s unelaborated view that state courts must be available as backstops. Indeed, there are impressive cases that either support this view of the unconstitutionality of dual system court-stripping or call its validity into question.<sup>78</sup> When

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75. See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.5 (4th ed. 2011) (defining and explaining the levels of scrutiny used to determine the constitutionality of laws).

76. See Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1133–34 (2010) (“[L]egislation enacted with the aim of inviting state courts to defy applicable Supreme Court precedent is not necessary and proper to any constitutionally legitimate purpose and should be held unconstitutional on that basis.”); Young, *U.S. v. Klein*, *supra* note 4, at 109–10 (making this argument in a highly compact way). See generally Gordon G. Young, *Jurisdiction Stripping*, in 3 ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 95, 98 (David S. Tanenhaus ed., 2008) [hereinafter Young, *Jurisdiction Stripping*] (arguing that dual state-federal court-stripping flounders as based on unconstitutional motives); Gordon G. Young, *Justifying Motive Analysis in Judicial Review*, 17 WM. & MARY BILL RTS. J. 191 (2008) [hereinafter Young, *Motive Analysis*] (discussing the role of illegitimate motives in legislation); Young, *U.S. v. Klein*, *supra* note 4, at 109–10 (arguing that, via the law of preclusion, puppeteering regulations such as the one struck in *Klein* exclude plaintiffs’ constitutional claims from both sets of courts, state and federal).

77. But see U.S. CONST. amend. XIII, § 2 (granting Congress the power to legislate to enforce the Thirteenth Amendment); *id.* amend. XIV, § 5 (granting Congress the power to legislate to enforce the Fourteenth Amendment); *id.* amend. XV, § 2 (granting Congress the power to enforce the Fifteenth Amendment).

78. See discussion *infra* Parts II.E.1–3 (discussing in detail the arguably jurisdiction-stripping

considered together with the law of claim preclusion, the unconstitutionality of dual system court-stripping seemingly condemns puppeteering.

## 2. The Law of Preclusion and the Equivalence of Puppeteering to Dual State and Federal Court-Stripping

The most significant concrete difference between court-stripping and puppeteering regulations is in the sort of judicial judgment that each law, if constitutional, would compel a court to enter. A court-stripping law results in a dismissal for want of jurisdiction, not one on the merits.<sup>79</sup> It shuts a plaintiff seeking to enforce constitutional rights out of a federal trial court, but it has no preclusive effect on the plaintiff's claim on the merits. In most such cases, state courts are open to enforce the claim (subject to the usual defenses).<sup>80</sup>

Further, if the state courts are open to a constitutional claim, then the claim has not been extinguished but simply burdened by loss of an alternative forum. One can argue, as does Laurence Tribe, that in some cases such a burden is itself unconstitutional.<sup>81</sup> Below, this Article examines cases that may have held court-stripping laws unconstitutional.<sup>82</sup> However, the unconstitutionality of such laws is highly debatable.

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statutes involved in four Supreme Court cases—*Webster v. Doe*, 486 U.S. 592 (1988); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986); *Johnson v. Robison*, 415 U.S. 361 (1974); *Armstrong v. United States*, 80 U.S. (13 Wall.) 154 (1871)—and one Court of Appeals case—*Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir. 1948)).

79. See *Okoro v. Bohman*, 164 F.3d 1059, 1063 (7th Cir. 1999) (“[A] jurisdictional dismissal precludes only the relitigation of the ground of that dismissal, and thus has collateral estoppel (issue preclusion) effect rather than the broader *res judicata* effect . . . .”); 18 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4436 (2d ed. 2012) (“Civil Rule 41(b) provides that a dismissal for lack of jurisdiction or improper venue does not operate as an adjudication upon the merits. This provision means only that the dismissal permits a second action on the same claim that corrects the deficiency found in the first action. The judgment remains effective to preclude relitigation of the precise issue of jurisdiction or venue that led to the initial dismissal. The basic rule that dismissal for lack of subject-matter jurisdiction does not preclude a second action on the same claim is well settled.” (footnotes omitted)). See also *RESTATEMENT (SECOND) OF JUDGMENTS* § 20(1)(a) (1982) (“A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim . . . [w]hen the judgment is one of dismissal for lack of jurisdiction, for improper venue, or for nonjoinder or misjoinder of parties . . .”).

80. See *infra* Part I.E (discussing how state courts always have jurisdiction over such claims if the federal courts have been properly closed).

81. See Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 134–36 (1981) (discussing Congress's use of jurisdictional regulation to prevent the supremacy, uniformity, and enforcement of federal law).

82. See discussion *infra* Part I.E (arguing that several cases appear to have held court-stripping unconstitutional).

The different judgment required by, and thus the different effect of, the two forms of regulation is key. Surely that different effect was an important, though unarticulated, part of Hart's reasoning to reach the conclusion that puppeteering laws are clearly unconstitutional.<sup>83</sup> Unlike court-stripping, in cases of puppeteering, the result would not be a dismissal for want of jurisdiction but rather a judgment on the merits.<sup>84</sup> That is the essence of such a law: its purported use of jurisdictional powers to require a judgment on the merits that would disregard other specified portions of the Constitution. Puppeteering forces federal courts to do what *Marbury* said a federal court could not do: decide a case without considering the requirements of our most fundamental law.<sup>85</sup> The federal courts would read the Constitution's provisions for regulation of their jurisdiction to permit Congress to selectively switch off *Marbury*'s requirements.

In Hart's view, it is the availability of the state courts to give effect to constitutional rights—if the federal courts are stripped of authority to enforce them—that makes it at least arguable that court-stripping laws

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83. See Hart, *supra* note 4, at 1373.

84. If the Supreme Court had taken the position that Congress could puppeteer—the position it rejected in *Klein*—that would have encompassed the view that federal courts could be forced to resolve disputes on the merits despite restrictions on their applying the Constitution in doing so. Since the Court is on record that its decisions must not be advisory, but must finally resolve real legal controversies, that position would entail that their decisions on the merits must be followed by state courts as well as by other federal courts. See generally CHEMERINSKY, *supra* note 75, at 52 (explaining the justifications for prohibiting judicial advisory opinions). I believe that it was this unappealing aspect that makes puppeteering regulations especially constitutionally abhorrent.

85. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803) (striking down portions of a statute read to assign the Supreme Court original jurisdiction but conflicting with limitations on Supreme Court jurisdiction in Article III of the Constitution). The Court stated:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

*Id.* at 177–78. Thus, the Court concluded that it is bound by legislative texts in hierarchical order and has the authority to invalidate acts of Congress that conflict with the constitution or another statute when it is necessary to do so in applying law to decide a case.

are within Congress's constitutional powers. In the previous Section, we saw that dual system court-stripping laws are arguably beyond Congress's reach because Congress has no explicit or broad powers over those courts' jurisdiction, and because Congress cannot repeal or alter the contents of the right in question. Such rights are part of the laws of the United States that are also binding on state courts.<sup>86</sup> If these arguments are correct, puppeteering regulations would accomplish the same result as dual system court-stripping by means of claim preclusion, which in its different way would deprive a plaintiff of a state forum free to vindicate his constitutional right.<sup>87</sup>

After a federal court judgment, a state court must give it effect to prevent relitigation of the same case.<sup>88</sup> Remotely, a state court might consider that a judgment issued by an unconstitutionally hamstrung federal court is not entitled to preclusive effect.<sup>89</sup> But a federal court, which rendered the judgment while complying with puppeteering restrictions, would already have determined—either explicitly or

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86. The Supremacy Clause makes federal law binding on state judges. U.S. CONST. art. VI, cl. 2. State courts are obligated to enforce federal law, unless Congress validly provides for exclusive federal court enforcement or they have a valid excuse, such as *forum non conveniens*, that is not based on hostility to the substance of federal policy. See *Testa v. Katt*, 330 U.S. 386, 394 (1947) (reversing a Rhode Island court's refusal to entertain a federal statutory cause of action). See generally FALLON ET AL., *supra* note 3, at 408–17 (providing commentary on *Testa* and related cases).

87. I very briefly present this argument in Young, *U.S. v. Klein*, *supra* note 4, at 109–10.

88. For instance, in *Semtek International, Inc. v. Lockheed Martin Corp.*, the Court applied a federal law of preclusion that deferred to a state preclusion law for state claims resolved in a federal diversity case. In *Semtek*, the Court stated:

[N]o federal textual provision addresses the claim-preclusive effect of a federal-court judgment in a federal-question case, yet we have long held that States cannot give those judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes.

531 U.S. 497, 507 (2001) (citation omitted). See also *Stoll v. Gottlieb*, 305 U.S. 165, 170–72 (1938) (applying a federal court-made law of res judicata to a federal court's judgments). See generally FALLON ET AL., *supra* note 3, at 1311–14 (providing commentary on the res judicata effects of federal judgments); WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS § 110(a), at 329–31 (2d ed. 1993) (discussing the Full Faith and Credit Clause and its relation to federal court judgments).

89. Courts have occasionally recognized a fairness exception to the rule that they must give preclusive effect to the judgments of courts of other jurisdictions. RESTATEMENT (SECOND) OF JUDGMENTS § 71(2)(c) cmt. g (1982) (recognizing some ability to grant relief from a judgment if the issuing court deprived a litigant of a fair opportunity to present his claim or defense). If an issue could not be fully and fairly litigated in the proceedings leading to the judgment, that may justify non-enforcement. But if puppeteering laws were upheld and applied by the federal court issuing judgment, that court would have determined that it could issue a judgment on the merits. Thus, that would be preclusive of the issue of the effect of the federal court's judgment in state court. Cf. *Parsons Steel Inc. v. First Ala. Bank*, 474 U.S. 518, 525–26 (1986) (finding that a state court ruling on whether a federal court judgment was entitled to preclusive effect in the state proceedings was itself preclusive in a later federal court proceeding).

implicitly—that such a restriction is within Congress’s powers to regulate the jurisdiction of the federal courts. Thus, its decision would be *meta res judicata* on the very issue of whether its decision was *res judicata*, thus binding state courts.<sup>90</sup>

Of course, it is extremely unlikely that a state court would even work through such analysis in the teeth of a federal court judgment. This underscores how right-extinguishing a federal puppet court judgment is likely to be. The claim will have been as effectively excluded from state court as it would have been if Congress had stripped it from the jurisdiction of both the state and federal courts. Indeed, puppeteering is, if anything, slightly more troubling than dual system court-stripping. Repealing a court-stripping provision often will render enforceable a constitutional right previously blocked from all courts.<sup>91</sup> Puppeteering, if valid, would extinguish the claim.

Assuming that Congress has no power to court-strip both state and federal courts, it is precisely the near practical equivalence of puppeteering laws to such dual court-stripping that makes it unlikely a federal court would uphold such laws when challenged. Indeed, this harsh consequence of puppeteering regulations seems to be the strongest single explanation of the result in *Klein*.<sup>92</sup>

*E. Cases of Uncertain Import: Battaglia, Three Supreme Court Cases, and Armstrong*

In *Battaglia v. General Motors Corp.*,<sup>93</sup> the Second Circuit concluded, at a minimum,<sup>94</sup> that a federal law which prohibits both state and federal trial courts from exercising jurisdiction over constitutionally

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90. A judgment concerning the preclusive proceedings is itself entitled to *res judicata* effect, even if erroneous, as long as it was issued in a way that would otherwise qualify it for preclusive effect. *Cf. Parsons Steel*, 474 U.S. at 525–26 (finding that a state court ruling was preclusive in a later federal court proceeding).

91. If a right cannot be enforced by any court (state or federal), it is unenforceable in an ordinary language sense. If a court-stripping provision is repealed, then that barrier to enforcement is gone, and so the right becomes enforceable again unless it is subject to some defense, such as the expiration of a period of limitations. And any previous dismissal of a plaintiff’s claim on jurisdictional grounds would not bar the claim on the merits, because they were not litigated. *See supra* note 79 and accompanying text.

92. The constitutionally abhorrent consequences of puppeteering outlined earlier in this Article, coupled with my current views on methods of attributing meaning to earlier cases, lead me to this conclusion. As for those views on interpreting cases, see *infra* Part II.A.

93. 169 F.2d 254 (2d Cir. 1948), *aff’d*, 335 U.S. 887 (1948).

94. There are even broader readings that would extend the area of unconstitutionality suggested by these cases to cover statutes that excluded congressionally unpopular constitutional rights from the lower federal courts alone, thus leaving the state courts open to enforce them. *See* discussion *infra* Part I.E1.

based claims is unconstitutional.<sup>95</sup> Likewise, on three occasions in the 1970s and 1980s, the Supreme Court, *also at a minimum*,<sup>96</sup> found such laws sufficiently suspect to bend statutory interpretation. In fact, in *Armstrong v. United States*,<sup>97</sup> decided shortly after *Klein*, the Supreme Court may have actually struck down a simple federal court-stripping measure.

In all of these cases, the federal court in question took jurisdiction over a constitutional claim that a federal statute seemed to exclude from federal trial court jurisdiction.<sup>98</sup> In none of these cases, however, did the court discuss the unavailability of state courts as key to its conclusion regarding jurisdiction.<sup>99</sup> Therefore, it is possible to read them as concerned about the constitutionality of a law that simply strips jurisdiction from the lower federal courts over specified constitutional claims. Yet, there are reasons pointing away, while others point toward,

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95. See Portal to Portal Act of 1947, 29 U.S.C. §§ 251–62 (2006). Section 252 states:

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, [except certain specified activities]

....

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or after May 14, 1947, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under [those provisions of this section attempting to negate substantive liability]

*Id.* at § 252 (emphasis added). See also *supra* Part I.D.2 (spelling out powerful reasons supporting such a conclusion).

96. Here, too, there is an alternative broader reading. For a full discussion of the cases as well as the broader reading, see *infra* Part I.E.2.

97. *Armstrong v. United States*, 80 U.S. (13 Wall.) 154 (1871).

98. See *infra* Parts I.E.1–3 (discussing, in detail, four Supreme Court cases—*Webster v. Doe*, 486 U.S. 592 (1988); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986); *Johnson v. Robison*, 415 U.S. 361 (1974); *Armstrong v. United States*, 80 U.S. (13 Wall.) 154 (1871)—and one Court of Appeals case—*Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir. 1948)—and the arguably jurisdiction-stripping statutes respectively involved in each).

99. A word search of the opinions in those cases comes up with no reference to state or states that is in any way part of the Courts', or any judge or Justice's, analysis of how far court-stripping provisions can block or frustrate substantive constitutional rights enforcement. In *Battaglia*, the word "state" appears once in a discussion of a different issue (the constitutionality of a direct repeal of certain entitlements) and then in the footnotes (but only in a quotation of the statute that explicitly disallows state courts jurisdiction over the claims in question). Nowhere in their deliberations do the judges discuss that aspect of the statute's jurisdictional limitations. For occurrences of the word "state" in *Battaglia*, see *Battaglia*, 169 F.2d at 256 n.3, 261.

this alternative reading. Let us explore the ambiguity of these cases.

1. *Battaglia v. General Motors Corp.*

In *Battaglia*, a distinguished panel<sup>100</sup> of the U.S. Court of Appeals for the Second Circuit determined that it would be unconstitutional for Congress to use its jurisdictional powers to block judicial consideration of the plaintiff's claim that the federal government had caused a deprivation of a vested, constitutionally protected property right.<sup>101</sup>

Earlier, the Supreme Court had interpreted the Fair Labor Standards Act in a way that was surprising to many, including Hart.<sup>102</sup> The interpretation entitled mining employees to compensation for time spent traveling from the surface of the mine to the work site underground and back again at the end of the day, so-called "portal-to-portal time." This decision resulted in liabilities, both to private employers and to the government, by virtue of cost-plus contracts, which were a significant percentage of the nation's gross domestic product.<sup>103</sup> In response, Congress passed the Portal-to-Portal Act in an attempt to retroactively destroy such newly recognized liabilities. Hedging its bet on the constitutionality of such a retroactive, substantive repeal, the statute provided a back-up means to accomplish its questionable ends. It purported to deprive both state and federal courts of jurisdiction to enforce any claim for portal-to-portal compensation that the statute

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100. See generally MARVIN SCHICK, *LEARNED HAND'S COURT* (1970) (providing a history of the United States Court of Appeals for the Second Circuit during Learned Hand's tenure as Chief Judge from 1939 to 1951). As for the Second Circuit as a whole during this period, Schick concludes: "Greatness may consist of doing greatly what a court is capable of doing. In this sense, the Learned Hand Court was truly outstanding." *Id.* at 355. *Battaglia* was decided during this era and its opinion was written by Harrie Chase. *Id.* at 255. Concurring in opinion were Learned Hand's cousin, Augustus Hand, and Thomas Swan. *Id.* For laudatory evaluations of these three judges, see *id.* at 26–29, 23–26, and 19–23, respectively.

101. See *Battaglia*, 169 F.2d at 257 (holding that the Fifth Amendment limits Congress's power to remove jurisdiction over property claims if the rights have vested).

102. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691 (1946), *superseded by statute*, Portal to Portal Act of 1947, 29 U.S.C. §§ 251–62 (2006), *as recognized in* *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) ("[T]he time necessarily spent by the employees in walking to work on the employer's premises, following the punching of the time clocks, was working time within the scope of [the statute]."). The amount of compensation under this interpretation was immense. For Henry Hart's description of the surprise that the *Anderson* decision engendered, see Hart, *supra* note 4, at 1383–84.

103. The excess liability of employers resulting from the Court's Portal to Portal interpretation of the Fair Labor Standards Act totaled five billion dollars, of which \$1.4 billion was potentially owed by the Federal Department of War on cost-plus contracts. FALLON ET AL., *supra* note 3, at 306–07. These amounts were respectively two per cent (.02048) and half a percent (.0057) of the United States' gross domestic product in 1947, which was \$244.1 billion (in 1947 dollars). See *Gross Domestic Product (GDP)*, U.S. DEP'T OF COMMERCE BUREAU OF ECON. ANALYSIS, <http://www.bea.gov/national/index.htm#gdp> (last modified Aug. 15, 2012).

could not repeal consistently with the Constitution.<sup>104</sup>

The *Battaglia* court began its analysis with a consideration of the constitutionality of such a deprivation of jurisdiction over a constitutional claim. The court concluded that, if a jurisdictional limitation such as the one before it blocked its enforcement of a constitutional right, then the limit was unconstitutional.<sup>105</sup>

As required by its test for the validity of jurisdictional restrictions, the court then looked to the underlying merits and found that the substantive constitutional claim to compensation was without merit and so upheld the jurisdictional limitation.<sup>106</sup> This statement in *Battaglia* is the clearest statement, in all reported opinions to date, of the unconstitutionality of certain federal court jurisdiction restrictions, outside the realm of habeas corpus, an area otherwise governed by an explicit guarantee of court access rather than an inferential one stemming from Article III.<sup>107</sup>

Nevertheless, questions about *Battaglia* remain, based on ambiguities and other features of the case. Firstly, was the court's statement holding or was it just extraordinarily clear dicta? Secondly, whether dicta or holding, what did the critical statement condemn? Did *Battaglia* condemn court-stripping of lower federal courts' trial jurisdiction or was it concerned with something more devastating to constitutional rights and functionally equivalent to puppeteering regulations—dual state and federal trial court-stripping?

On the one hand, the fact that the *Battaglia* court did not strike down the jurisdictional limitation as applied to the case before it may appear to support the “dicta view.” Consequently, it is uncertain whether the court would have “put its money where its mouth was” and struck down the provision had it turned out to block a constitutionally protected, vested right. In fact, the court merely condemned the jurisdictional restriction as it would apply in crucially different circumstances—those in which it actually blocked enforcement of constitutional rights.

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104. Portal to Portal Act § 252(d).

105. The *Battaglia* court stated:

[W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, *it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation. Thus, regardless of whether [the jurisdiction-stripping] had an independent end in itself, if one of its effects would be to deprive the appellants of property without due process or just compensation, it would be invalid.*

169 F.2d at 257 (emphasis added) (footnotes omitted) (citation omitted).

106. *Id.* at 257–62.

107. U.S. CONST. art. I, § 9, cl. 2. For the full text, see *supra* note 46.

On the other hand, the court acted on its stated constitutional test for the validity of jurisdictional restrictions. It did so by following its just-announced decision protocol—that a determination of the validity of such a jurisdictional restriction depended on whether it blocked enforcement of a constitutional right. Accordingly, the court moved to a consideration of whether the jurisdictional restriction would have such an effect in the case. In deciding that the right had not vested,<sup>108</sup> the Second Circuit found the jurisdictional restriction constitutionally acceptable.<sup>109</sup> Thus, its statement was instrumental in the resolution of the case. As a result, *Battaglia*'s statements seem to lie in the shadowy “no man’s land” between dicta and holding. Regardless of how one may characterize the statements in *Battaglia*, they are the carefully considered expressions of a particularly powerful panel: Judges Chase, Swan, and Augustus Hand.<sup>110</sup>

Notwithstanding its indeterminate precedential status, *Battaglia* made clear its view that, as applied to prevent enforcement of constitutional rights, the jurisdiction-stripping provision under consideration would have been unconstitutional. Was the Second Circuit’s concern solely with that fact of attempted dual system court-stripping, which has much the same effect as puppeteering: the functional extinguishment of the claim as one enforceable in any court? Or was it simply that federal trial courts had been closed to such claims? Express language in the statute purported to close both the federal and state courts to claims of compensation, whose constitutionally protected status was asserted but undetermined at the outset of the case.

The first is more constitutionally troubling (as outlined in previous Sections).<sup>111</sup> The second is also debatably unconstitutional, even though it leaves state courts open to enforce any constitutional right. Indeed, Laurence Tribe sees the second type of regulation as unconstitutional;<sup>112</sup> Henry Hart seems to lean the other way.<sup>113</sup>

Which of these scholar’s views is *Battaglia* best seen as supporting? *Battaglia* seems to stand for the second view that is more restrictive of Congress, one that even prohibits the closing of lower federal courts without respect to the availability of the state courts. In its analysis

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108. *Battaglia*, 169 F.2d at 261–62.

109. *Id.* at 257–62 (reaching the conclusion that the limit on the federal trial court jurisdiction over certain claims was valid only because the rights asserted were not vested constitutional rights, but were subject to repeal by statute).

110. See generally SCHICK, *supra* note 100, at 5–38.

111. See discussion *supra* Part I.D.

112. Tribe, *supra* note 81, at 132, 136, 155.

113. See *supra* note 63 and accompanying text.

condemning the jurisdictional restriction as applied to a constitutional claim with merit, the court never referred to the fact that the statute purported to close state courts to portal-to-portal claims. The only mention of the closing of state courts is in a quotation from the statute in a general description of its operation.<sup>114</sup> Nowhere in the *Battaglia* opinion does the Second Circuit suggest that the portion dealing with state courts played a role in the court's analysis. Thus, the opinion largely reads as if the court's only concern was with the constitutionality of a restriction on *its* jurisdiction.

Yet, *Battaglia*'s view is more obviously right if read narrowly and restricted to statutes that have the most destructive effect on federal constitutional rights—i.e., those that render them unenforceable in any court. And courts use a fairly free hand in interpreting earlier, peer-level opinions for purposes of stare decisis. Supporting this interpretation, one might simply see, in the court's expressed concern about compensation for takings, that *Battaglia* concerns the availability of some remedy in some set of courts.<sup>115</sup>

It is not at all surprising to see *Battaglia* cited only for the narrower proposition—the unconstitutionality of closing all courts.<sup>116</sup> Yet, *Battaglia* also lends support for the unconstitutionality of simple federal court-stripping, and thus, continues to offer potential support for both views until the Second Circuit definitively elucidates *Battaglia*'s meaning or the Supreme Court clarifies the law. Only the Supreme Court can finally resolve whether the constitutional ban on puppeteering and its nearly identical twin, dual system court-stripping, should be extended to include their less troubling cousin, simple lower federal court-stripping. A number of more recent Supreme Court cases also bear on this issue but also are ambiguous in ways similar to *Battaglia*. These cases, as equivocal as *Battaglia* but much more complex, are addressed in the next several Sections.

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114. *Battaglia*, 169 F.2d at 256, 261 n.13.

115. *Battaglia* is also susceptible to a third and even narrower reading that the Takings Clause is special and that, under such circumstances, closing both sets of courts constitutes a taking under one of the few constitutional provisions that specifically provides a remedy for its violation: just compensation. Habeas might be seen as similar in providing an express remedy for constitutional wrongs, though not those defined by the habeas provision itself, but by the entitlements to liberty in the Due Process Clauses. But this is not a clearly necessary reading of *Battaglia*. If *Battaglia* does not prohibit single system court-stripping but only closing of both federal and state courts, a better reading is that such dual system stripping provisions are unconstitutional to the extent that they prohibit all enforcement of a constitutional right otherwise enforceable.

116. FALLON ET AL., *supra* note 3, at 305.

## 2. Supreme Court Cases: A Ninety-Degree Turn in the 1970s and 1980s

In *Battaglia*, Congress's attempt to close both federal and state trial courts to specified claims of Constitutional violations was clear on the face of the statute considered by the court, though not discussed in the opinion. However, it is unclear whether the simultaneous closing of the state courts was essential to the Second Circuit's reasoning that the statute would have been unconstitutional had the claim asserted in the district court been one to protect an actual constitutional right.

The Supreme Court cases from the 1970s and 1980s discussed below resemble *Battaglia* in some ways.<sup>117</sup> Each case casts doubt on the constitutionality of a statute, which on its surface closed only the federal courts to specified constitutional claims. They are unlike *Battaglia* in that they do not make clear whether state courts were unavailable as backstops.

After over a century of making statements that Congress can remove any set of cases from the jurisdiction of the lower federal courts,<sup>118</sup> the Supreme Court decided a series of three opinions in the 1970s and 1980s that can be read as rethinking this nearly absolute control. In *Johnson v. Robison*,<sup>119</sup> *Webster v. Doe*,<sup>120</sup> and *Bowen v. Michigan Academy of Family Physicians*,<sup>121</sup> the Supreme Court confronted: (1) claims for coercive relief against federal administrative officials to protect certain constitutional rights, and (2) statutory provisions that could be fairly read to deny jurisdiction over the cases. In all three cases, the Court read the latter provisions as not precluding jurisdiction on the ground that such an interpretation would raise a serious constitutional question about Congress's powers to enact court-stripping legislation.<sup>122</sup>

As with *Battaglia*, discussed above, and *Armstrong*, discussed below,

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117. See *Webster v. Doe*, 486 U.S. 592, 603 (1988) (holding that while section 102(c) of the National Security Act gives the CIA director very broad discretion to terminate employees, it does not "exclude review of constitutional claims" and acknowledging that if construed otherwise, it would raise serious constitutional questions); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (construing neither 42 U.S.C. § 1395ff nor § 1395ii to bar judicial review of Medicare program regulations, acknowledging that to find otherwise would raise a serious constitutional question, and citing to commentators on the court-stripping debate); *Johnson v. Robison*, 415 U.S. 361, 366–67 (1974) (reading 38 U.S.C. § 211(a), which generally precludes judicial review of the decisions of the Administrator of Veterans Affairs, not to reach the equal protection claims of the plaintiff below).

118. See *supra* note 60 and accompanying text.

119. *Johnson*, 415 U.S. at 366–67.

120. *Webster*, 486 U.S. at 603.

121. *Bowen*, 476 U.S. at 681 n.12.

122. See *supra* note 117 and accompanying parentheticals (listing the Court's conclusions that Congress was not precluded from using its power to enact court-stripping legislation).

what is not clear in the more recent Supreme Court cases is the nature of the constitutional question. Similar to *Battaglia*, the majority opinion—in fact, all opinions—in all three cases never discussed state courts, much less the possibility that state courts were implicitly excluded from enforcement powers.<sup>123</sup> There was no suggestion in any of the three opinions that what made the exclusion of federal jurisdiction constitutionally problematic was the simultaneous exclusion of state court jurisdiction. Indeed, unlike the statute considered in *Battaglia*, none of the statutes considered in the three Supreme Court cases mentioned state courts at all.

Thus, on the surface, each of the three opinions concern court-stripping in the form where constitutional objections are at their weakest (though still debatable)—Congress’s doing no more than singling out particular constitutional claims for exclusion from federal trial court enforcement.<sup>124</sup> If this reading is accurate, then the Court turned ninety degrees from long-standing dicta that federal court-stripping is generally constitutional, to one in which it is recognized as a troubling question to be avoided in almost all circumstances. It is important to note, however, that the Court in these three cases did not spin one hundred eighty degrees to a position in dicta that such exclusion *would* be unconstitutional.

In a previous article on court-stripping, I placed these cases in the federal court-stripping cubbyhole.<sup>125</sup> From that perspective, their constitutional skepticism about court-stripping extended even to a situation in which state courts remain open. Under such a view, they open reconsideration of decades of dicta supporting mere single system federal court-stripping. The editors of *Hart and Wechsler’s The Federal Courts and the Federal System* (“*Hart and Wechsler*”) seem, implicitly, to make the opposite choice: by placing these cases in a section on dual system-stripping, they suggest a more limited set of Supreme Court concerns.<sup>126</sup>

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123. A careful reading and word search of the opinions revealed no such analysis.

124. For the proposition that ordinary court-stripping of federal courts presents real, but lesser constitutional concerns than puppeteering or dual system federal and state court-stripping, see *supra* Part I.D. For the fact that the analytic portion of the *Battaglia* and the three Supreme Court opinions never discussed the simultaneous closing of the state courts as significant, see *supra* notes 100–22 and accompanying text. Thus, the opinions in these cases were written as if the only issue was the mere closing down of federal courts and that such closing was constitutionally problematic by itself.

125. Young, *Congress’s Power to Restrict*, *supra* note 43, at 150–54.

126. See FALLON ET AL., *supra* note 3, at 305–09 (declining to mention these cases in the portions devoted to mere elimination of federal trial court jurisdiction and including them only in a section dealing with “congressional preclusion of both state and federal court jurisdiction”).

Just like *Battaglia*, these decisions are ambiguous because it is possible that the state courts were closed as well to the plaintiffs' claims.<sup>127</sup> If that were true, then the effect of the statutes in these three cases is the same as that of the dual system court-stripping powerfully condemned by Hart<sup>128</sup> and by the Second Circuit in *Battaglia*, even on a narrow reading of that opinion.<sup>129</sup> My own view is that Hart and *Battaglia* were right—Congress cannot remove jurisdiction from both state and federal courts to hear a set of constitutional claims. Thus, on a proper reading of the Constitution, if federal courts were closed to the claims in these three cases, then state courts were open to consider their merits. The language of Article III, the Supremacy Clause, and the Madisonian Compromise together seem to indicate that Congress has no *jurisdictional* regulatory powers to close both the state and federal courts to enforcement of constitutional claims otherwise appropriate for enforcement.<sup>130</sup>

But everyone might not agree. There are at least respectable counterarguments that, without explicit statutory consent, state courts are foreclosed, by structural features of federalism, from hearing suits to compel federal officers to adhere to law in performing their duties.<sup>131</sup> The case law basis for such an argument is at least plausible, though not clearly correct, when the suit is a habeas corpus proceeding to free a detainee held by a federal officer.<sup>132</sup> By analogy, and with the support

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127. See *infra* note 132 and accompanying text (recognizing the existence of arguments founded in case law that would, on grounds of implicit limits in constitutional federalism, prohibit state courts from issuing coercive relief against federal officers).

128. See *supra* note 70 and accompanying text.

129. See *supra* note 115 and accompanying text.

130. There are, however, many reasons other than jurisdiction-stripping that constitutional rights might not be enforceable in state courts. Sovereign immunity, for example, provides Congress with the ability to block, in all courts, claims for damages sought against the United States Treasury. For elaboration on the proposition that there is a general requirement that courts keep government within bounds and remedy constitutional rights—but balanced against other interests that sometimes regrettably, but legitimately, get in the way—see Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1738–57 (1991).

131. See *infra* notes 132–34 (describing cases suggesting that state courts may not exercise habeas corpus jurisdiction over federal prisoners or issue mandamus to federal officers, although these cases also might be read in a more limited way). Likewise, state courts have never issued injunctions to federal officers, and scholars speculate as to whether that is ever constitutionally permissible. See *supra* note 112. Together, all of this information suggests the possibility that state courts have no power to control federal officers. This possibility, however, leads to the unattractive conclusion that state courts would have had little ability to serve as protectors of constitutional rights had there been no lower federal courts or when their jurisdiction is selectively shut off for constitutional claims. This conclusion is unattractive to me. I reject it. So did Henry Hart. See Hart, *supra* note 4, at 1401; see also *supra* note 59 and accompanying text.

132. *Tarble's Case*, 80 U.S. (13 Wall.) 397, 409 (1872) (reversing a state court judgment on

of suggestions in the cases, one might see the structural bar as also extending to mandamus and injunctive relief against federal officers.<sup>133</sup> I reject this position; but, if one accepts it, then the three cases from the 1970s and 1980s arguably are more concerned with the constitutionality of laws resembling dual system court-stripping, and might be so confined.

It seems plausible that the Court in the 1970s and 1980s cases had a sense, perhaps not fully developed, that removal of federal court jurisdiction to enforce constitutional rights would ultimately raise issues not just of federal court-stripping but of how to handle a provision that might leave no court open.<sup>134</sup> Most pointedly, which set of trial courts might the Supreme Court require to be open if it were to strike down such a provision? Perhaps it is this set of constitutional difficulties, not simply those of single system federal court-stripping, that caused the Court to duck and reinterpret the statutes in question. Thus, these cases may be seen as avoiding the issue as to whether state courts must be available as backstops, making it unlikely to be resolved unless Congress were to force the issue by very clear statutory language.<sup>135</sup> While the meaning of these cases remains open to interpretation, they are best read as being concerned with the especially pernicious constitutional problem—dual system court-stripping.<sup>136</sup>

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the ground that state courts are unavailable to hear habeas corpus claims of those detained by federal officials, but doing so in the context of a case over which federal courts possessed habeas jurisdiction). But there are other readings of *Tarble's Case's* prohibition on state court habeas directed to federal officials as confined to circumstances in which the federal courts are also closed. See FALLON ET AL., *supra* note 3, at 398–406.

133. See *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 605 (1821) (holding that a state court did not possess the power to issue a writ of mandamus directed to a federal official). For the ambiguities in this line of cases, see FALLON ET AL., *supra* note 3, at 406–07. As for failure to resolve whether there may be a rule against state court injunctions directed to federal officials resembling the stringent view of state court habeas corpus, see *id.* at 407.

134. Unlike the Court in *Klein* and *Armstrong* in the 1870s, *Johnson, Webster and Bowen*—the Supreme Court decisions from the 1970s and 1980s previously discussed—were decided after Hart's well-known dialogue; thus, the dialogue was available to and presumably known by many of the participating justices.

135. I believe that to effectively close the lower federal courts, such a statute would have to make clear: (1) that it intended to close both the state courts and the lower federal courts, but (2) that, if such dual closure was found unconstitutional, it was the state courts that were to remain open. Without part (2), I believe that federal courts would simply make the reasonable assumption that Congress's preference was the reverse. Such a provision is unlikely but not impossible. A Congress that disfavored a particular court-declared constitutional right against certain action by states might prefer to let state rather than federal courts deal with the assertion of such rights by plaintiffs.

136. We have seen that that form is at least the fraternal twin of the sort of puppeteering regulation that the Court struck in *Klein*. See *supra* Part I.D.

### 3. *United States v. Armstrong*: A Partial Reconsideration

One interesting Supreme Court case arguably is similar to the three considered above. *Armstrong v. United States*<sup>137</sup> is a case not mentioned by Henry Hart and neglected by federal court scholars until the 1980s.<sup>138</sup> Armstrong brought his action in the Court of Claims before the 1870 Acts went into effect.<sup>139</sup> The Court of Claims dismissed Armstrong's case on grounds of his disloyalty in fact.<sup>140</sup> In addition to its puppeteering provision, which was struck in *Klein*, the law included a court-stripping provision.<sup>141</sup> It excluded from the Court of Claims all claims to property seized by Union Troops on grounds of innocence that were based on Lincoln's pardon. Citing *Klein*, the Supreme Court reversed and remanded, requiring the Court of Claims to consider Armstrong's claim on the merits, despite the court-stripping provision.<sup>142</sup> The citation to *Klein* was the Court's only explanation.<sup>143</sup> Thus, *Armstrong* invalidated a provision, which on the surface of its language simply excluded a set of constitutionally based claims from

137. 80 U.S. (13 Wall.) 154 (1871).

138. Young, *Klein Revisited*, *supra* note 1, at 1222 n.179.

139. See *Armstrong v. United States*, 5 Ct. Cl. 623, 625–26 (1869), *rev'd*, 80 U.S. (13 Wall.) 154 (1871) (dismissing the suit on the ground of Armstrong's actual disloyalty).

140. When the Court of Claims dismissed Armstrong's case, the 1870 Act was not in force and hence was not the ground for that court's dismissal. See *id.* at 625–26. When the Supreme Court heard Armstrong's appeal, the 1870 Act was in force. *Armstrong*, 80 U.S. (13 Wall.) at 155–56. At the time the Supreme Court decided *Armstrong*, there was (and still is) a requirement that federal courts apply new and otherwise constitutional statutes to cases pending before it. See *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109–10 (1801); see also FALLON ET AL., *supra* note 3, at 88 (recognizing that since *Schooner Peggy*, “courts are obligated to apply law (otherwise valid) as they find it at the time of their decision, including, when a case is on review, new statutes enacted after the judgment below”); Young, *Klein Revisited*, *supra* note 1, at 1240 & nn.238–41. Thus, if Congress could have properly excluded pardonees' claims from the Court of Claims, the Supreme Court would have affirmed the Court of Claims dismissal on the independent and intervening ground of the 1870 Act. Instead, the Court remanded, ignoring the jurisdictional restriction as unconstitutional. *Armstrong*, 80 U.S. (13 Wall.) at 155–56.

141. Act of July 12, 1870, ch. 251, 16 Stat. 230, 235 (“[A]nd on proof of such pardon . . . the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant.”).

142. *Armstrong*, 80 U.S. (13 Wall.) at 154–56.

143. The Court's full statement is brief:

We have recently held, in the case of the *United States v. Klein*, that pardon granted upon conditions, blots out the offence, if proof is made of compliance with the conditions; and that the person so pardoned is entitled to the restoration of the proceeds of captured and abandoned property, if suit be brought within “two years after the suppression of the rebellion.” The proclamation of the 25th of December granted pardon unconditionally and without reservation. This was a public act of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect. The claim of the petitioner was preferred within two years. The Court of Claims, therefore, erred in not giving the petitioner the benefit of the proclamation.

*Id.* at 155–56.

the federal courts.

I cited *Armstrong* in my original article on *Klein*. In a subsequent article, I argued that, while strange and anomalous in light of preexisting dicta to the contrary, *Armstrong* is the only Supreme Court case holding a court-stripping provision unconstitutional.<sup>144</sup> In response, editors of *Hart and Wechsler* suggested that what *Armstrong* condemned, whatever its form, was more akin to a puppeteering provision than a simple provision stripping federal court trial jurisdiction:

By contrast, Young argues, *Armstrong* . . . involved a “court-stripping” portion of the statute purporting to deprive *trial* courts of jurisdiction over a defined class of cases. He concludes that “[i]t seems impossible to distinguish . . . the plaintiff in *Armstrong* from plaintiffs today who might seek federal court enforcement of modern constitutional rights, such as busing or abortion rights, despite a statute which purports to close off the federal courts.” . . . Under a statute that authorizes lower courts to entertain claims, but orders them to dismiss those claims for want of jurisdiction upon proof of a presidential pardon, is the line between “puppeteering” and “court-stripping” as clear as Young suggests?<sup>145</sup>

The editors do not elaborate why, despite its court-stripping form, the substance of the provision struck in *Armstrong* resembled puppeteering. There seems to be one possible good reason why the provision in *Armstrong* is closer to a puppeteering regulation than to mere federal court-stripping, which it resembled in form. There are powerful arguments that the state courts were closed to such claims.<sup>146</sup> If so, then the court-stripping provision in *Armstrong* substantially had the effect of dual system state and federal trial court-stripping, which offends Article III as understood in the context of the Madisonian Compromise.<sup>147</sup> And it is entirely possible that the state courts were closed to *Armstrong*'s claim. Indeed, given the sovereign immunity of the federal government, the burden is on the proponent to present arguments that the state courts might have remotely been open.<sup>148</sup>

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144. Young, *Congress's Power to Restrict*, *supra* note 43, at 164.

145. FALLON ET AL., *supra* note 3, at 304 n.27.

146. Although the details have been worked out over a great many years, from the beginning under the Constitution, suits against the United States or seeking its property, to which the government did not consent by statute, were problematic and, at the very least, likely to be barred by sovereign immunity. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 478 (1793) (assuming in dicta that such suits are barred). See generally FALLON ET AL., *supra* note 3, at 841–43.

147. See Fallon & Meltzer, *supra* note 130, at 1797–807 (discussing the language of Article III).

148. See *supra* note 146 (explaining the issues that arise with suits against the United States as a party or suits seeking property).

Certainly, to the Supreme Court of the 1870s it would have been unthinkable that the state courts would ever hear claims, such as *Armstrong's* for money damages against the United States, without consent in a federal statute.<sup>149</sup> But it was equally unthinkable that federal courts could do so. It had long been clear that the United States was not subject to suit by individuals seeking money damages. This indeed is the backdrop to one of the mysteries of *Armstrong* and *Klein*. In *Armstrong*, the United States in the 1870 Act had revoked any consent it had given to a class of suits for money damages.<sup>150</sup> As applied in *Klein*, that statute had retroactively revoked consent to suit for cases on appeal. On the surface, either invocation of sovereign immunity should have been within Congress's constitutional powers, and thus, would seem to require a different result in both cases.

Perhaps there is a better explanation of *Klein* and *Armstrong* by analogy to equal protection. Today, Congress can deny consent to almost any category of suit seeking money damages from the federal treasury, but a denial based on race, gender, or some other suspect class would surely be unconstitutional.<sup>151</sup> Perhaps both *Klein* and *Armstrong* reflected a similar, if not hazy, view of presidential pardons, specifically that federal law must treat those receiving pardons the same way it treats those who were actually innocent of the conduct in question. If so, then both cases can be seen as holding that, unless Congress clearly wanted to more generally deny relief to all whose property had been seized, it could not deny relief to those who met the statutory requirements by virtue of a pardon.

This interpretation, however, does not help resolve the issues that the *Hart and Wechsler* editors raised concerning *Armstrong*. The question remains whether such a pardon equality right would have been enforceable in any state courts that were opened by statute to certain claims against the federal government had Congress never established lower federal courts.

One view is that, at least absent federal statutory consent, there are some things a state court simply can never do while respecting federal interests, even if this restriction would mean that a federal constitutional right is nowhere enforceable.<sup>152</sup> As discussed above, issuing coercive

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149. See *United States v. McLemore*, 45 U.S. (4 How.) 286, 288 (1846). For a general discussion of which suits are treated as suits against the United States—and barred without statutory consent—and which are treated as suits against officers and permitted, see FALLON ET AL., *supra* note 3, at 841–59.

150. See Young, *Klein Revisited*, *supra* note 1, at 1222 n.179.

151. FALLON ET AL., *supra* note 3, at 292.

152. See *supra* notes 132–33 and accompanying text (discussing *Tarble's Case*, which held

judgments to federal officials may be one of these restrictions.<sup>153</sup> But that would also entail that state courts were not a complete jurisdictional backstop to enforce federal constitutional rights had Congress not created lower federal courts. This interpretation seems inconsistent with *Marbury*, the Supremacy Clause, and the Madisonian Compromise, which all permit Congress to use state courts in place of federal courts. A different, albeit more imaginative, reading of *Armstrong* (and this sort of “reconstruction” must depend heavily on imagination) is that it would never have occurred to the *Armstrong* Court that if some court must be open, Congress would have preferred it be a state court. Thus, a better reading of *Armstrong* may be that Congress could not close both court systems to a pardon equality claim and that, had Congress known this limitation, it would have preferred an expert federal court that it had designated generally for such matters over a state court.<sup>154</sup>

## II. *KLEIN* NOW: A RECONSIDERATION

In the years since I first wrote about *Klein*, my views on how to attribute meaning to old cases have changed in favor of more expansive readings. As a result, it now seems reasonable to read *Klein* as placing some limits on congressional regulation of courts’ fact-finding processes.<sup>155</sup> Even though *Klein* was not affected by such a limit, its broader concerns about interference with courts’ processes easily generalize to cover unreasonable restrictions on methods of fact-finding.

Additionally, it now seems a better reading that, at a reasonable level of generality, *Klein* also restricts tampering with federal courts’ methods of statutory and Constitutional interpretation. Though there is much more room for Congress to regulate how courts read federal statutes, some Article III limits on interference with statutory interpretation should be recognized. These limits are easily seen as within *Klein*’s concerns about interference with federal courts’ decision processes.<sup>156</sup> As discussed in recent writings about *Klein* by Howard

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that state courts are unavailable to hear habeas corpus claims of those detained by federal officials, and *McClung v. Silliman*, which held that a state court did not possess the power to use a writ of mandamus directed to a federal court).

153. See *supra* note 152 and accompanying text.

154. This parallels how I now see the Supreme Court’s ambiguous cases in the 1970s and 1980s. See *supra* notes 116–38 and accompanying text (discussing jurisdiction- and court-stripping).

155. See *infra* Part II.B.1 (discussing how *Klein* might limit congressional regulation of judicial fact-finding).

156. See *infra* Part II.B.2.

Wasserman<sup>157</sup> and Steven Vladeck,<sup>158</sup> these thoughts implicate some provisions of the superstructure of the War on Terror that would dictate whether courts can consider foreign and international law in interpreting some federal statutes.

Finally, those issues inspire consideration of whether *Klein* might have a legitimate bearing on the constitutionality of federal habeas corpus statutes.<sup>159</sup> Those provisions place limits on the availability and operation of post-conviction relief for state prisoners who allege federal constitutional mistakes by the state courts in the process of deciding and reviewing criminal cases.<sup>160</sup> The provisions in question require federal trial judges, in determining the validity of the incarceration of convicted state prisoners, to defer to the interpretations of federal constitutional law made by state judges. In other words, *Klein*, properly read, might call into question the correctness of *Williams v. Taylor*, which upheld such provisions after reading them unnecessarily broadly.<sup>161</sup> Below, I quickly examine this case in various ways, including through considerations previously developed in this Article.<sup>162</sup> Next, in its final Section, this Article examines scholarship that pushes *Klein*'s holding too far.<sup>163</sup>

#### A. Some Slightly Revisionary Thoughts on *Klein* and on Reading Old Cases

How should one attribute meaning to opinions in old cases? This problem becomes especially acute if the old precedents: (1) deal with aspects of the world very different from those existing at the time of the later case, or (2) are offered in support for theories developed at a later time.<sup>164</sup> While of course there are simply things that an earlier opinion

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157. Wasserman, *Constitutional Pathology*, *supra* note 2, at 232–33.

158. Vladeck, *supra* note 5, at 261.

159. See *infra* Part II.B.3 (discussing Congress's control over courts' interpretations of statutes in cases where constitutional rights are not implicated).

160. See 28 U.S.C. § 2254(d)(1)–(2) (2006) (“An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”).

161. See *Williams v. Taylor*, 529 U.S. 362, 378–79 (2000). For a list of requirements that must be met before a writ of habeas corpus may be granted, see 28 U.S.C. § 2254(d) (2006).

162. See *infra* Part II.B.3 (discussing, in light of *Williams v. Taylor*, the effects of lower federal court decisions and the constitutional reasoning of federal courts in deciding a constitutional case).

163. See *infra* Part II.C (discussing the Redish and Pudelski scholarship on *Klein*).

164. A different article would meditate at length on the differences and similarities of these

cannot be made to say, courts often avoid the decision of whether to overrule by reading precedents elastically. If one accepts this view, then the soundness of finding a case's dicta or holding is often a matter of some satisfying fit with surrounding law and theories and much less the finding of the exact original meaning of an opinion.

Put differently, Ronald Dworkin's view of how courts and judges function at their best<sup>165</sup> is much more often realized in the practice of reading cases than in the practice of reading statutes, where the tendency to pursue a fictitious embedded meaning often conceals the necessary lawmaking involved. This is particularly true for judges wedded to textualism.<sup>166</sup>

From a more flexible perspective, it should be unnecessary that a holding from a much earlier case actually occurred to the authors of the older opinion undergoing interpretation.<sup>167</sup> It is necessary, however, that: (1) however general an attributed holding is, it—if it had been applied—would have resolved the case as it was resolved, (2) the opinion's authors would have understood the attributed holding, and (3) the opinion's authors would likely have found its holding forceful or attractive.<sup>168</sup> The strength of an attributed holding initially depends on

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questions as they arise in the case of statutory or constitutional interpretation. In statutory interpretation, the dominant conceit, and often fiction, is one of a court's finding preexisting meaning—the meaning packed into the statute at its birth. And the tools for doing so are dictionaries, textual canons of statutory interpretation, etc. These are like the tools delivered at a table with a lobster to extract the meat that is embedded in the claw. Nothing is literally embedded in statutory language, but if embedding is a metaphor for sufficient clarity in a community of speakers' practices for producing language to be decoded, then there is metaphorical embedding. I am skeptical about how much clarity (embedded meaning) exists in statutes and thus also about the ratio of decoding to creativity in statutory interpretation.

Although the surface conceit seems to be the same when the object of judicial interpretation is a previous judicial opinion, one sees much less of anything resembling an effort at finding a preexisting intention or meaning. The use of dictionaries and linguistic canons almost never, if ever, play any role in a court's assigning meaning to previous cases for the purpose of determining whether they are bound in any of the ways that precedents bind lower courts and, more weakly, bind the issuing court in future cases.

165. See generally DWORKIN, *supra* note 20. By a Dworkinian reading of cases, I mean a reading through the processes of "law as integrity" as advocated in *Law's Empire*. *Id.* at 225–32, 240–45. As with the author of the next chapter in a chain novel, a judge both must honor the constraints of the values and decisions made in the past but, within those limits, has great room to interpret them and strive to make his contribution show the past in its best current light.

166. See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (describing forms of textualism, appreciating some of their virtues, and offering a critique of their vices); Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431 (1989) (recognizing the substantial element of lawmaking in statutory interpretation).

167. See *supra* note 164 and accompanying text (discussing the multiple factors that affect statutory interpretation).

168. Hart's puppeteering reading of *Klein* passes this test, as does an extension of it above to a protection of Article III courts' fact-finding and interpretive processes. See discussion *infra* Part

these factors; but if they are indeterminate, then a fourth factor should break the tie. Following Dworkin, it seems accurate that in close cases under the first three criteria, proper attribution of a holding depends on its attractiveness as a rule of law in the current legal system.<sup>169</sup>

These ideas lead to a slight change of my views on *Klein*, views very different from the conditional, but stronger, retraction involving *Armstrong*.<sup>170</sup> A holding against puppeteering still seems best attributable to *Klein*, but that does not clearly indicate that the *Klein* Court had such a holding in mind. Hart's much later writings, distinguishing between court-stripping and puppeteering,<sup>171</sup> were not available to the justices who decided *Klein*.

What makes the anti-puppeteering reading of *Klein* powerful is: (1) the long history of dicta that supported the constitutionality of mere federal court-stripping at the time *Klein* was decided, and (2) what must have been the *Klein* Court's sense that the regulation of courts it confronted was somehow different and more troubling than court-stripping or any form of regulation previously confronted or discussed. The latter is true even if the justices had not precisely pinned down how or why the interference was different, either in their opinion or in their minds. The problem is one of fitting a new explicit theory (Hart's) to an old case decided before the theory became available. What makes Hart's anti-puppeteering theory the best fit is that it so powerfully explains the *Klein* Court's unease. It seems very likely that, had Hart's argument against puppeteering been presented to Chief Justice Salmon Chase in *Klein*, it would have been featured in his opinion to explain what made *Klein* so different from the ordinary single system court-stripping that the Court had repeatedly said was within Congress's powers.

The next Section looks at how *Klein* can comfortably be broadened beyond the anti-puppeteering holding, while the final Section looks to recent scholarship on *Klein*, some of which would extend *Klein* much too far.

### B. Comfortably Broadening Klein

Based on the more flexible view of reading precedent presented above, *Klein* comfortably can be read to support broader propositions than the narrowest, best-fitting anti-puppeteering holding. The

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#### II.B.1.

169. See DWORKIN, *supra* note 20, at 225–32, 240–45.

170. See *supra* notes 137–54 and accompanying text (discussing *Armstrong* and the possible interpretations of the decision as they relate to *Klein*).

171. Hart, *supra* note 4, at 1372–73.

possibilities are like an archery bull's eye target of concentric rings, with more general readings as one moves from center to periphery.<sup>172</sup> At some point, the generalization becomes too broad to be a plausible reading of the past, and misses the target entirely. I now think that *Klein* can be reasonably generalized beyond the bull's eye proposition that Congress cannot force the federal courts to decide cases while ignoring substantive constitutional rights.

At a higher, yet appealing level of generality, *Klein* can be seen as prohibiting unwarranted intrusions into federal courts' processes for deciding cases. This prohibition, implicit in Article III and vaguely identified and used in *Klein* in one context, easily extends to other subsets of the same general circumstances of unreasonable interference with courts' decision processes. In one of those subsets, *Klein* can be seen as recognizing limits on Congress's control of the fact-finding processes of federal courts when such courts are left open to issue judgments on the merits in constitutional cases. In another, *Klein* would extend to support Article III-based limits on statutory control of federal courts' interpretative processes, even in cases of purely statutory interpretation involving no constitutional questions. Surely there are fewer and less stringent limits on Congress's regulation of courts' statutory interpretation than their constitutional interpretation. But it is appealing to see Article III-based limits on both, in ways that implicate *Klein*'s concern with interference in the process left open to decide a case.

However, a comfortable generalization of *Klein* reaches its limits, and goes entirely off the archery target, before one gets to Martin Redish and Christopher Pudelski's reading of *Klein* to prohibit court enforcement of statutes that significantly deceive the public.<sup>173</sup> The broadened reading of *Klein* proposed in this Article is animated (as was *Klein* itself) by concerns about separation of powers and the degree to which Congress can instruct courts, in deciding cases, how to use the Constitution, find facts, and interpret law. The even broader Redish and Pudelski reading urges courts—those whose decisional processes are not in most circumstances hamstrung by Congress—to read the Constitution through *Klein*'s lens to create an individual right to non-misleading laws.<sup>174</sup> If generalization is to have limits, then *Klein*'s core

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172. See DWORKIN, *supra* note 21, at 225–32, 240–45.

173. 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, 461 (2006).

174. See *infra* notes 248–51 and accompanying text (discussing Redish and Pudelski's view of *Klein*).

concern was about separation of powers and not a general right of those affected by laws not to be misled. Additionally, as discussed below, the particular individual right is not one that would be advisable or likely for a court to find implicit in the structure of the Constitution or any of its individual rights provisions.

### 1. How *Klein* Might Limit Congressional Regulation of Judicial Fact-Finding

#### a. Rules of Law, Factual Presumptions, and *Klein*

Originally, I rejected a suggestion by commentators that *Klein* limits Congress's ability to dictate to Article III courts what facts they must find and how they must find them.<sup>175</sup> The rejected inference was that *Klein* struck down a requirement in the 1870 Act that a court find a pardonee guilty of supporting the Confederacy if he had accepted a pardon without protesting his innocence at the time he received it.<sup>176</sup> Then, it seemed crucial to me that this provision had not been applied in *Klein*, since the plaintiff in the Court of Claims had stipulated that he had been guilty of supporting the Confederacy. He relied on the legal effects of the pardon he had received, and not on a factual claim of actual innocence.<sup>177</sup>

Surely, if one reads *Klein* narrowly, then it contains no such holding. If, however, one reads *Klein* slightly more broadly, the case can easily be seen as generally condemning any method of regulation that unduly interferes with the courts' processes for applying the correct law to facts in cases over which it has jurisdiction to render a judgment on the merits.<sup>178</sup> This includes some legislation apparently addressing fact-finding processes. Dealing in perverse ways with facts made relevant by law undermines the law itself.

There are several ways Congress might be or seems to be tampering with judicial fact-finding. First, Congress might try to define a constitutionally crucial fact in a way at odds with the explicit or implicit constitutional criteria for the existence of that fact. Second, Congress might try to create presumptions concerning the existence of such facts

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175. Young, *Klein Revisited*, *supra* note 1, at 1233–35.

176. *Id.* at 1235.

177. *Id.* at 1236.

178. One can evade a legal rule by, on the one hand, not applying it or applying a different rule, or, on the other hand, by means of distorting the facts that the rule makes crucial. Reading a rule only against intentional killing as covering non-intentional ones flouts it. So does applying the right rule to a mistaken finding that a killing was intentional. A fact-finding process that is seriously flawed or intentionally skewed against particular rights can undermine the law itself as much as a mistake about the rule's content.

based on supposed correlative facts it specifies. And third, Congress might try to provide inadequate procedures—e.g., notice, lack of cross examination, etc.—for finding the facts, even if the court was permitted to discover the relevant facts as defined by the Constitution. The first two of these forms are simply puppeteering in slight disguise. Even read narrowly, *Klein* condemns them.<sup>179</sup> Only the third would go beyond puppeteering as I originally saw it.<sup>180</sup> These three forms are discussed in the next three Subsections. I now think that *Klein* should be seen as extending to, and condemning, the third form as well.

(1) *Substantive Error Disguised as Regulation of Fact-Finding*

The first two of these three forms of regulation do not really involve interference with the fact-finding processes, except to the extent that changing any legal rule changes the facts that are relevant to its operation. A legal rule simply is a device to map certain facts to required outcomes. Often, the mapping is extremely complex and the meaning of parts of a rule is textually unclear and must be developed by a court through interpretation. But at bottom, a rule of constitutional law, as fully explicated by the courts, is such a mapping. Giving Congress power to change the definition of the facts that constitutional rules make operative would be the same thing as giving it the power to change the Constitution itself. Imagine a statute that provides that human detainees at Guantanamo are not “persons” for purposes of the Fifth Amendment protections and thus, for that reason, are not entitled to due process.<sup>181</sup> Courts would not enforce that provision<sup>182</sup>—a statutory requirement that courts use an incorrect definition of the facts

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179. These *Klein* violations would take the form of statutes requiring courts to decide cases using (1) the wrong definition of the facts the Constitution makes crucial, including the use of statutory irrebuttable presumptions, or (2) rebuttable presumptions of such facts, based on proof of another fact, at least if the effect is to weaken the constitutional rights in question without a sufficiently good reason of evidentiary efficiency. These two forms are discussed in Part II.B.1.a.(1)–(2), *infra*. In many cases the suspect presumptions are hard to understand as springing from anything other than a motive to weaken constitutional rights by indirect means. Both of these patterns are the equivalent of the statutory requirement, struck down in *Klein*, that a court decide a case but not apply all constitutional requirements in doing so.

180. This form would not stop courts from using the right law including legal definitions, but would hamstring the process of fairly developing evidence to prove those facts. I suggest that Article III carries with it a requirement of fair procedures analogous to those required by procedural due process, but springing from Article III and not necessarily coextensive. *See infra* Part II.B.1.b.

181. *See* U.S. CONST. amend. V (prohibiting the federal government from depriving persons of “life, liberty or property, without due process of law”). For a more general discussion, see *infra* Part II.C.

182. Though in a way, one might make a credible metaphorical claim that that is what Congress is doing more generally.

made operative by the Constitution is clearly unconstitutional under *Marbury*.<sup>183</sup> *Klein*'s core holding says that Congress's jurisdictional powers do not override *Marbury*.<sup>184</sup>

The second form of judicial fact-finding regulation—conclusive presumptions as to constitutionally operative facts—presents a similar problem. If the criteria for some operative fact are established by judicial interpretation, Congress might try to create a presumption of the fact's existence or non-existence based on some correlative fact or facts. For example, the statute struck in *Klein* created a conclusive presumption that receipt of a pardon without proclaiming one's innocence conclusively established guilt. But conclusive presumptions are rules of law and, in constitutional cases, cannot be used to change constitutional requirements.<sup>185</sup>

Such congressional tampering with constitutionally compelled definitions is simply an instance of substantive unconstitutionality, which can be declared by any Article III court that is open with unimpaired jurisdiction. After *Klein*, a statute violates Article III if the law purports to confer jurisdiction generally on Article III courts to decide a set of cases, but not to use the correct definitions of facts required by the Constitution. And then it would be a violation of the center bull's eye holding—the anti-puppeteering holding—that Congress cannot force federal courts to decide cases while withholding jurisdiction to apply the courts' own reading of the Constitution.

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183. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803) (striking down portions of a statute read to assign the Supreme Court original jurisdiction but conflicting with limitations on Supreme Court jurisdiction in Article III of the Constitution). *Marbury* is often seen as the interpretive fountainhead of the Court's power to review federal statutes. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 39 (3d ed. 2006).

184. The Court in *Marbury* concluded that, in properly deciding a case, it is bound by legislative texts in hierarchical order and must invalidate acts of Congress that conflict with a statute when it is necessary to do so in applying law to decide a case. A puppeteering law, if the Court permitted it, would make it impossible for it to perform its duty of judicial review as defined and rationalized in *Marbury*. See *supra* note 85 and accompanying text (quoting the relevant portion of the *Marbury* decision).

185. Conclusive presumptions are entirely different matters. Courts no longer scrutinize them if they simply move a statute's meaning to a different place that is within Congress's power to legislate. If Congress can regulate the growing of lemons and plums in certain ways, it can do so by means of a statute that defines lemons as including plums and then just regulate lemons. Redish and Pudelski might see constitutional difficulties, associated with *Klein*, with the deceptiveness of such a statute if it were opaque to the public, even though not to the courts. See discussion *infra* Part II.C (discussing the scholarship of Redish and Pudelski, which finds a holding in *Klein* against substantially deceptive legislation of all sorts). But I reject both the attribution to *Klein* and that there is or should be a constitutional rule with such content. So do some, but not all, of the commentators whose work I discuss below. See *infra* note 205 and accompanying text (comparing the Anti-Injunction Act with *Mitchum v. Foster*'s finding that the Civil Rights Act was within the exception of the anti-injunction statute).

(2) *Rebuttable Presumptions Based on Probabilities*

Perhaps not all rebuttable presumptions as to the existence of facts made operative by the Constitution are the same. It is possible that Congress's powers—real, but less than absolute—over the processes of the federal courts include a power to create reasonable rebuttable presumptions even as to the existence of facts made crucial by the Constitution to the resolution of certain claims.<sup>186</sup> One might ask where Congress gets affirmative power to regulate constitutional rights. The most plausible answer is Congress's enforcement powers under the last sections of the Thirteenth, Fourteenth, and Fifteenth Amendments entail some such power as the rights created by those amendments.<sup>187</sup> But even so, the Court has made clear that laws under these Amendments, which help enforce rights created by the Constitution, will be upheld if they do not change the substance of the right involved.<sup>188</sup> And of course Congress has no powers to adjust the content of other rights if courts are open to hear claims based on them. Thus, not only would courts independently review conclusive presumptions that are inconsistent with such rights, but would also review perverse, non-conclusive presumptions concerning facts made operative by constitutional provisions.

On *Klein*'s facts, the presumption operated conclusively as a rule of law at odds with the Constitution by providing that a pardoned person, who had not asserted innocence, would be excluded from recovery.<sup>189</sup> *Klein* did not protest innocence when he received his pardon; rather, he stipulated that he had been guilty of supporting the Confederacy.<sup>190</sup> Thus, as applied to *Klein*, the presumption operated conclusively and was a case of standard puppeteering, forcing on the courts Congress's version of constitutionally defined operative facts.<sup>191</sup>

Read at a more general level, concerning non-interference with

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186. Congress's powers over federal courts' procedural and evidentiary matters might allow some such regulation, but surely is restricted so that the constitutional right in question is not unduly limited. For a more general discussion, see *infra* note 203 and accompanying text.

187. See U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."); *id.* amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *id.* amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

188. See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("Congress' power under § 5, however, extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment. The Court has described this power as 'remedial.' The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." (citation omitted)).

189. See *supra* note 185 and accompanying text discussing conclusive presumptions.

190. Young, *Klein Revisited*, *supra* note 1, at 1236.

191. *Id.*

Article III courts' decision processes on the merits of a constitutional case, *Klein* comfortably reaches far enough to limit Congress's powers to legislate non-conclusive presumptions of constitutionally crucial facts. *Klein* can be seen as not permitting a weakening of constitutional rights by means of unjustified, probabilistic requirements for their enforcement. Imagine a statute providing that a policeman, who has taken a course regarding the appropriate use of force, is entitled to a presumption that he did not commit police brutality whenever accused. Further, assume that the presumption is rebuttable only if a plaintiff suing him proves "beyond a reasonable doubt" facts constituting unlawful force under the Constitution. Surely the consistency of this presumption with the legal rule it undermines is a substantial constitutional question for the courts. Perhaps Congress has some power to regulate the efficiency of the enforcement of rights by creating rebuttable presumptions.<sup>192</sup> But, at least if the presumptions are unreasonable, as a practical matter, they unjustifiably alter the nature of the right itself. It is strongly arguable that *Klein's* anti-puppeteering holding securely extends to allowing courts to strongly scrutinize Congress's indirect control of constitutional meaning through probabilistic presumptions.

b. *Klein* and Article III as a Source of Minimally Fair Fact-Finding Procedures

*Klein* may be fairly interpreted to read Article III as requiring Congress—even when it is not tampering with constitutional definitions as to facts—to allow minimally fair process for the finding of those crucial facts. This places *Klein* in what is usually the realm of procedural due process.<sup>193</sup> Is fair process confined only to

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192. See *infra* note 203 (discussing Congress's power over court processes and the limits on those powers).

193. The due process clauses of the Fifth and Fourteenth Amendments, respectively, require the federal government and state governments not to deprive persons of life, liberty or property without according them "due process." U.S. CONST. amend. V; *id.* amend. XIV, § 1. For the most part, due process is a guarantee of fair judicial style procedure. If a government takes judicial style action, either in a court or executive branch agency, that threatens a person's life, liberty, or property interests, then the government must allow him procedures to develop facts demonstrating that such deprivation is not warranted under law. For example, an accused criminal must have a reasonable chance to call witnesses and cross-examine those against him in order to prove that he did not commit the crime charged. Or, to take an example of a civil proceeding, a defendant must be allowed fair procedures to develop facts showing that he did not commit a civil infraction warranting seizure of his property. CHEMERINSKY, *supra* note 75, §§ 7.1–7.4, at 545–602. For a helpful, compact discussion, see Todd G. Conenza, Note, *Preserving Procedural Due Process for Legal Immigrants Receiving Food Stamps in Light of the Personal Responsibility Act of 1996*, 65 *FORDHAM L. REV.* 2065, 2068–77 (1997) (discussing the development and basic requirements of procedural due process). In a separate line of cases, the

constitutional cases to which the Fifth or the Fourteenth Amendment is applicable? And, where those Amendments are applicable, are the only procedures that are constitutionally required those that stem from those Amendments?

The right to habeas corpus existed even before the first of these sources of fair procedure.<sup>194</sup> For habeas cases before the enactment of the Fifth Amendment, could Congress have specified any procedure no matter how skimpy or perverse? *Boumediene v. Bush* provides an example of implying constitutional requirements of fair procedure in Constitutional provisions which simply contemplate that federal courts will decide cases. Rarely discussed about the *Boumediene* case<sup>195</sup> is its holding that, independently of any due process requirements, the Constitution's habeas requirements implicitly require minimally fair procedures for finding facts crucial to claims of liberty.<sup>196</sup>

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Supreme Court has interpreted due process to have a substantive component that severely limited the enactment of legislation that cuts into fundamental rights recognized by the Court (such as a right to abortion in certain circumstances and the right to use birth control methods). For a discussion of this separate line of cases, see *Planned Parenthood v. Casey*, 505 U.S. 833, 846–47 (1992) (“Although a literal reading of the [Due Process] Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since *Mugler v. Kansas*, the Clause has been understood to contain a substantive component as well, one ‘barring certain government actions regardless of the fairness of the procedures used to implement them.’ As Justice Brandeis (joined by Justice Holmes) observed, ‘despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.’” (citations omitted)).

194. U.S. CONST. art. I, § 9, cl. 2.

195. In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Court found for the first time a federal statute unconstitutional on grounds that it violated the Suspension Clause. Given reliance on the Suspension Clause, the opinion says nothing bearing on judicial review limitations for non-habeas corpus claims to review of unconstitutional action and laws, such as those allegedly depriving a would-be plaintiff of a federal court forum.

196. *Boumediene* states:

Even if we were to assume that the [Combatant Status Review Tribunals] satisfy due process standards, it would not end our inquiry. Habeas corpus is a collateral process that exists, in Justice Holmes' words, to “cu[t] through all forms and g[ro] to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.” Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant . . . .

Although we make no judgment whether the CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is “closed and accusatorial.” And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too

It seems fair to read *Klein* as implying a similar conclusion under Article III: Article III courts, left open to hear constitutional cases, must be allowed to use minimally fair procedure to decide facts that constitutional law makes vital to the outcome.<sup>197</sup> Of course, no constraint on fact-finding operated in *Klein*, where the parties stipulated to facts.<sup>198</sup> Nonetheless, a rule concerning such constraints might be seen as a subset of wrongs in a broader view of *Klein*—one that protects Article III courts' decision processes in constitutional cases. A court that is not given ample latitude to determine facts made operative by the Constitution is not able to effectively apply appropriate legal rules. To offer an extreme example, would a statute that required that facts be found by a Ouija board be consistent with the independence of courts under Article III? Surely the legitimate debate is not about whether there are limits in Article III, but rather, to what lengths those limits extend. Thus, one might say that a correct understanding of *Klein's* broader concerns about non-interference with courts' decision processes includes hamstringing the courts' ability to find facts in a reasonable way under all of the circumstances.

Perhaps this aspect of judicial independence is simply a matter of historical interest because courts have had to accord procedural due process in cases challenging federal action since 1791 and in those challenging state action since 1868.<sup>199</sup> Yet, the *Boumediene* Court not only held that habeas itself was a source of procedural requirements, but it also suggested that those requirements might in some circumstances exceed those of due process.<sup>200</sup> Analogously, it seems possible that the availability of procedures from Article III might turn out to be significant in future cases. Perhaps such minimal procedures could be seen as a matter of minimal judicial integrity and not waivable by the parties, at least on the same terms, as other procedural rights.

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significant to ignore.

For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings.

*Id.* at 785–86 (citations omitted).

197. If courts are to be open to apply facts to law, and if this is not simply appearance or a sham, that implies that there must be some procedures minimally directed to developing the facts the law makes relevant. Thus, just as the requirement that habeas corpus be available in some circumstances implies some minimally fair set of procedures, it seems likewise proper to read Article III that way.

198. Young, *Klein Revisited*, *supra* note 1, at 1236–37.

199. U.S. CONST. amend. V (1791); *id.* amend. XIV (1868).

200. See *Boumediene*, 553 U.S. at 785 (“Even if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry [as to the adequacy of certain procedures for judicial review of confinement under the Military Commissions Act].”).

## 2. *Klein* and Limits on Regulation of Statutory Interpretation

Are there limits on Congress's control of how courts interpret statutes under circumstances implicating no constitutional rights other than this separation of powers question? If Congress can enact any one of a number of rules consistently with other provisions of the Constitution, then it may reach those results by the alternate means of guiding statutory interpretation. This is the position that some scholars take in recent scholarship on *Klein*.<sup>201</sup> While this position seems sound in

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201. "There is no such thing as Congress compelling a court to speak a 'statutory untruth'—no such thing as limiting or controlling judicial interpretive authority or independent judgment on matters of statutory substance." Wasserman, *Constitutional Pathology*, *supra* note 2, at 229 (emphasis added). But perhaps, if pressed, Wasserman might recognize some limits. He cites some of the relatively sparse literature on limits of Congress's control of interpretation. *See id.* at 232 n.135 (arguing that there is a general consensus that Congress has the ability to define statutory terms because it is an inherent indication of legislative power). But he cites it for the clearly correct position that Congress may control statutory or treaty definitions. Of the two sources he cites, one finds no limits, in separation of powers law alone, on congressional regulation of creation and interpretation of statutory meaning. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2086, 2127 (2002). Rosenkranz would allow virtually all regulation of statutory interpretation that a later Congress theoretically might discover and repeal. *Id.* For me, the issue is not theoretical susceptibility to repeal, but whether a set of such regulations very seriously burdens current courts and legislatures in their respective processes of uttering and decoding statutes.

In that footnote, Wasserman cites one other article. Wasserman, *Constitutional Pathology*, *supra* note 2, at 232 n.135 (citing Linda D. Jellum, "Which Is To Be Master," *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 880, 882 (2009)). He cites this article for the unobjectionable proposition that Congress has much control over the definition of words used in statutes and treaties. *Id.* at 232. But Jellum makes clear the plausibility of separation of powers limits on more general regulations of courts' interpretive process. Jellum, *supra*, at 880–82.

I believe there are some such limits and see them as easily fitting into my Dworkinian expansion of *Klein*'s holding. But I disagree with important specifics of Jellum's argument. It depends on a distinction between formalism and functionalism in constitutional interpretation. She argues that the former position alone condemns statutory limits on all general methods of statutory interpretation, while both positions would balk at legislative imposition of theories of interpretation, e.g., textualism. *Id.* at 842, 847–52, 856–57, 890–97. My view is that courts should make more complex and particularized decisions about whether regulation of interpretation unduly hamstring the functioning of courts or of later Congresses.

As for Jellum's first distinction, formalism and functionalism are not sufficiently differentiated in this context. Unless a textual rule is very clear—e.g., a President must be thirty-five years old—even formalists need to understand the plausible underlying policy in order to initially determine the content of the rule that they will ultimately recognize to fill the textual void. Any rules limiting Congress's regulation of interpretation will be found, not in clear Constitutional text, but to be implicit in the Constitution's structure. Thus, the formalist/functionalist distinction is especially unhelpful concerning these sorts of limits. As for the second distinction, are interpretative methods usefully distinct from theories? Do not various versions of the plain meaning canon of interpretation entail theoretical textualism to some degree or another?

Nevertheless, the thrust of Jellum's article makes the point that it is not enough simply to say, without defense, that Congress is in absolute control of how statutes are to be interpreted by courts. *See generally* Jellum, *supra* (discussing how the legislature may violate the separation of

many circumstances, in others, as discussed below, it raises serious separation of powers problems that implicate *Klein*'s more general concerns with protecting federal courts' decisional processes.

If, for example, Congress directly can regulate both avocados and lemons in a certain way, then surely it can do so by drafting legislation dealing with "avocados," and instructing courts to interpret that word as meaning both avocados and lemons in their ordinary sense.<sup>202</sup> This is a clear set of instructions to the courts concerning a substantive set of outcomes that it is within Congress's power to mandate. However, there must be some limits under Article III on congressional interference with courts' methods of interpreting ambiguous statutory language, and these are easily seen as associated with *Klein*. Read broadly, *Klein* invalidates unreasonable congressional interference with courts' decision processes when they are left open to decide cases on the merits. Indefinite limits that one Congress attempts to place on the conversation between future Congresses and courts pose a threat to the proper functioning of both bodies. As we will see, the Anti-Injunction Act of 1793 raises these questions.<sup>203</sup> But even some regulations of the judicial interpretation process, placed within a single statute to govern its own interpretation, can also constitute an overreach of Congress's powers to control the courts.

#### a. Restrictions on Interpretation Projected Forward

Let's return to avocados and lemons. Suppose a statute provides that in future legislation and unless this statute is repealed, "avocado" includes lemons in their ordinary linguistic sense. Can one Congress validly control the terms of the future legislative conversation in this way? If one thinks this fanciful, one might see the Anti-Injunction Act

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powers when attempting to control the interpretive process of the judicial power). Whatever the scope of such limits, it seems fair to see *Klein*'s proto-concerns, those generally about Congress unduly crossing the line protecting the independence of courts, to be concerns encompassing this form of regulation.

202. In recent writings on *Klein*, Howard Wasserman also rejects the Redish and Pudelski view. His rejection of the broader proposition is simply based on the unelaborated view that Congress is the master of sub-constitutional (statutes and treaties) law, with the power to amend it. Wasserman, *Constitutional Pathology*, *supra* note 2, at 218–35 (rejecting Steven Vladeck's *Klein*-based challenge to the deceptiveness of various provisions of the MCA on grounds that Congress is the master of sub-constitutional law and can change it, largely however it wishes, by statute). In a separate section below, I further elaborate reasons for rejecting the broad anti-deception view of *Klein*. See *infra* part II.C.

203. Act of Mar. 2 1793, ch. 22, § 5, 1 stat. 224 (codified as amended at 28 U.S.C. § 2283 (2006)). The Anti-Injunction Act reads: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." *Id.* See *infra* Part II.B.2.a (discussing the Anti-Injunction Act).

of 1793<sup>204</sup> as raising this question and *Mitchum v. Foster* as ducking it.<sup>205</sup> The Anti-Injunction Act prohibits federal courts from enjoining state court proceedings unless *expressly* authorized by Congress.<sup>206</sup> Section 1983 of the federal civil rights laws, enacted during Reconstruction, is designed to robustly enforce the civil rights created by the Fourteenth Amendment by suits at law and in equity.<sup>207</sup> But section 1983 nowhere expressly provides for injunctions against state court proceedings, not even for those proceedings that might be used in the most devastating way to frustrate Fourteenth Amendment rights. It is very likely that, in drafting section 1983, Congress wanted such injunctions available for cases in which legal remedies, such as damages, would not fully protect the Fourteenth Amendment right.<sup>208</sup>

Must the Reconstruction Congress follow the 1793 Congress's instructions (as long as not formally repealed) regarding how to speak if they want to accomplish a result? Or do courts have a duty to understand, as best as they can, what the Congress that wrote a particular statute intended by its language? The former would be a burden on future Congresses to speak a certain way and on the courts to interpret a certain way. Imagine the burden on official speakers and readers of federal legislation as the linguistic rulebook they must master, to speak and decode, becomes thicker and less intuitive over the

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204. *Id.*

205. Compare Anti-Injunction Act, 28 U.S.C. § 2283, with *Mitchum v. Foster*, 407 U.S. 225, 226, 242–43 (1972) (holding that § 1983 of the Civil Rights Act is “within the ‘expressly authorized’ exception of the anti-injunction statute”). *Mitchum* found that § 1983 contains the *express* authorization of an injunction to stop state proceedings that is required by the earlier Anti-Injunction Act, despite the fact that § 1983 never mentions injunctions against such judicial action. *Mitchum*, 407 U.S. at 243.

206. See Anti-Injunction Act, 28 U.S.C. § 2283 (detailing that a U.S. court may only grant an injunction to stay proceedings in a state court when expressly authorized by a congressional act, where necessary in aid of its jurisdiction, or to protect or effectuate its judgments).

207. 42 U.S.C. § 1983 (2006), titled “Civil action for deprivation of rights,” states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

208. The Supreme Court has described § 1983 as enacted to make the newly created Fourteenth Amendment rights enforceable against recalcitrance of state officers, including judicial officers, and that it was part of a great transformation of the state-federal relationship after the Civil War. *Mitchum*, 407 U.S. at 238–39, 242–43.

years. That is inconsistent with a fair understanding of Articles I and III, reasonably read together. Congress and the courts share responsibility for developing the rules of the legislative language game in ways that must be worked out if their desires conflict. That process involves two branches—one voicing commands and one interpreting and applying the commands.

We now move beyond bizarre definitions, cast in terms of interpretation, to limitations on methods of reading words not further defined. For example, can a Congress not just prohibit the use of legislative history in interpreting a specific statute, or perhaps for a specific Congress, but prohibit the use for the indefinite future until the prohibition is repealed? Can one Congress prohibit courts' use of specified linguistic or substantive canons of statutory interpretation for the indefinite future until repeal? As to linguistic canons, judges give them the weight that they think that they deserve in decoding the words of a particular Congress—understood as an objective public expression, not cryptic private poetry. In my view, it is for the courts to decide how to do this as long as they make a good faith effort to adhere to what is objectively and clearly expressed in the statute.

As for substantive canons, conceivably some can be destroyed by legislation that provides for the indefinite future until repeal. Perhaps Congress can generally declare that it often has an intention to legislate extraterritorial effects, destroying, until the declaration is repealed, the canon that presumes against such effects. I have some doubts. Especially doubtful is Congress's power to control, generally in the future, the courts' invocation of the canon that legislation will be construed to avoid serious questions of its unconstitutionality, even against an interpretation that seems somewhat linguistically stronger.<sup>209</sup> This rule was developed by the courts partly to deal with the conjunction of its powers of judicial review and statutory interpretation. At least to some extent it is designed to force Congress to be careful as it approaches constitutional limits and to be very clear about which it intends to cover. It is not clear to me that such a rule is within Congress's control. It seems that there must be some limits on the power of earlier Congresses to completely control how later ones speak and how interpreting courts' determine the intentions of an enacting Congress.

This seems a rule, developed by the courts partly to deal with the conjunction of its powers of judicial review and statutory interpretation,

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209. I have fewer, albeit real, concerns about such a declaration that operates only within the context of a particular statute.

which to some extent is designed to force Congress to be careful as it approaches constitutional limits and to be very clear when it violates them. It is not clear to me that such a rule is within Congress's control. Without further developing these thoughts, it seems that there must be some limits on earlier Congresses completely controlling how later ones speak and how interpreting courts' read legislation.

These cases of legislating interpretative rules for the indefinite future are problematic along two dimensions. They make it difficult for a future Congress to know how to speak, and they require courts not just to read the difficult language that future Congresses provide but also to change interpretive methods. This double-edged burden will sometimes be too much for each branch and far too great a burden on the legislative process as a whole. For example, this Article will argue below that the War Crimes Act's prohibition against the use of foreign or international law by the courts may unduly burden their role as interpreters.

#### b. Controlling Interpretation Internally within a Statute or Contemporaneous Group of Statutes

Even within a particular statute, there may be limits on Congress's power to control the methods courts use to interpret laws. Certainly, in drafting legislation, if Congress is clear enough for lawyers and judges to understand how it wants a statute to operate on the ground, it should not matter if it achieves that result by controlling interpretation. But, when laws are unclear, must courts play the difficult game of not using particular canons or external helpful texts, if that is what Congress specifies? This is not to suggest, as some do,<sup>210</sup> that *Klein* requires Congress to make clear to the public a statute's effect or risk invalidation on grounds of deception alone. Such a rule would move beyond separation of powers to recognize problematic individual rights.<sup>211</sup> The position that this Article advocates stays within that realm and suggests that Congress may structure the meaning of a statute so long as a court can interpret the law with reasonable ease and specificity. Congress may make its intended results clear by using the language of interpretation as long as its intentions for the practical operation of a statute are clear.

But what about instructions concerning the methods and materials courts may use to decipher indeterminate statutory instructions? One

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210. See discussion *infra* Part II.C (discussing Martin H. Redish and Christopher R. Pudelski's broader interpretation of *Klein*'s holding as having more subtle implications).

211. See *infra* note 222 and accompanying text (suggesting that Congress cannot limit or control the judicial interpretative authority or independent judgment on statutory interpretation).

provision of the 2006 Military Commissions Act provides: “No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.”<sup>212</sup> This provision could be read to prohibit use of the Conventions as mere background material for interpreting rights stemming from other laws. This reading, however, is especially constitutionally problematic. Nevertheless, the Military Commissions Act has now been softened in a way that likely eliminates the separation of powers issue.<sup>213</sup>

Still existing is another troubling portion of the statutory superstructure of the War on Terror: “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 prohibitions enumerated in [the War Crimes Act].”<sup>214</sup> If the precise intended effects of this provision on the outcome of an interpretation of the War Crimes Act are clear to courts, then courts must follow the clearly expressed intention of Congress. But suppose that the language, “basis for a rule of decision,” includes having some influence on interpreting ambiguous provisions of the War Crimes Act. It seems an attractive reading of separation of powers to find limits on more vague statutory directions for courts not to use particular canons of interpretation or draw inspiration in reasoning from external legal sources. When those limits are crossed, we have a tampering with the functioning of those courts in violation of *Klein*’s protection of Article III courts’ decision processes. I would conjecture that true interpretation of laws starts when Congress has not been sufficiently clear. At that point, courts must be left alone to interpret ambiguous laws.

This is not formalism for formalism’s sake. If that were so, it would entail that even a clear specification of a statute’s effect by means of controlling interpretation is a violation.<sup>215</sup> Consider an analogy that

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212. Military Commissions Act, Pub. L. No. 109–366, § 3(a)(1), 120 Stat. 2600, 2602 (2006) (codified at 10 U.S.C. § 948b(g) (2006)), *amended by* Pub. L. No. 111–84, 123 Stat. 2575 (2009).

213. “No alien unprivileged enemy belligerent subject to trial by military commission under this chapter may invoke the Geneva Conventions as a basis for a private right of action.” 10 U.S.C.A. § 948b(e) (West 2012). This statute simply seems to exercise Congress’s prerogative to clearly control the domestic effect of treaties.

214. Pub. L. No. 109–366, § 6(a)(2), 120 Stat. 2632 (2006) (codified at 18 U.S.C. § 2441 (2006)).

215. By this I mean that formalism would say that in attempting to write rules that control the behavior of people and institutions within its regulatory powers, Congress must always accomplish its purpose by using clearer substantive language and never by using language instructing the court how to interpret other language. This overly formalistic division of powers is non-functionally rigid. If the interpretation instructions are clear enough to specify fairly clear substantive results, it makes no sense to prohibit that means of specifying substantive results. But

aids understanding of the separation of powers stakes. Under current broad constitutional rules permitting delegation of legislative power to agencies, Congress can be as clear and limiting as it wishes. In the unclear areas, though, it has created functional legislative power in the Executive Branch. Given the impossibility of complete clarity, this results in a shared, and at least temporarily separate, power over the state of the law that may be seen as a salutary spreading of authority. It is reasonable to see this spreading as part of a constitutional separation of powers. One might see a rule giving courts the authority to resolve ambiguity as a similar spreading of power. Once Congress has written the text of statutes, it is up to courts, under the separation of powers, to decide—within the limits of linguistic good faith—how they will reason and from what materials they will reason, to fill genuine gaps in ambiguous laws. Perhaps this argument is a more developed version of Justice Scalia's views on judicial independence, presented recently in a speech to a foundation: "No one is more opposed to the use of foreign law than I am, but I'm darned if I think it's up to Congress to direct the court how to make its decisions."<sup>216</sup>

The arguments above are somewhat similar to, but crucially different from, those debated by Howard Wasserman and Stephen Vladeck in two recent articles on *Klein* and the War on Terror.<sup>217</sup> Vladeck would invalidate the provisions of the War on Terror discussed above on a reading of *Klein* that is too broad. He adopts the recent reading of

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when the interpretive instructions as applied to the substantive portions of the statute do not lead to fairly particular results, Congress is no longer legislating results but telling the Court what generalized thought processes to use to resolve ambiguity created by its substantive language. At some point, that cannot be determined in advance with formalistic clarity, Congress has encroached too much on the Court's function.

216. Wasserman, *Constitutional Pathology*, *supra* note 2, at 233 (quoting Charles Lane, *Scalia Tells Congress to Mind its Own Business*, WASH. POST, May 19, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/18/AR2006051801961.html>). Apparently, Wasserman believes that Scalia's views on this matter do not extend to interpretation of subconstitutional law, which includes statutes, and indeed statutes specifying the domestic effect of treaties. *See id.* (reconciling Scalia's first position of adopting a broad, nationalist approach to congressional control over enforceability of treaties as domestic law in *Medellin* with his second position that Congress cannot direct the Court on how to make its decisions).

217. *See* Vladeck, *supra* note 5, at 253 (interpreting the decision in *Klein* broadly so that legislation is attacked if interfering with legislative application); Wasserman, *Constitutional Pathology*, *supra* note 2, at 233 (arguing that Congress can change subconstitutional law however it wishes by statute). But I note that Scalia's position that Congress is the master of subconstitutional law does not entail that it is the master of all issues of how such law, if ambiguous, will be interpreted, including the appropriate canons and methods of statutory interpretation. My view expressed above is that there are limits on such congressional control of statutory interpretation. It seems Wasserman disagrees with me or, possibly, that he has not considered this precise question of the appropriate sharing of power, between Congress and the judiciary, of power to determine subconstitutional law.

Martin Redish and Christopher Pudelski, critiqued below,<sup>218</sup> that prohibits substantially deceptive legislation.<sup>219</sup> This reading would condemn deceptive legislation regardless of whether it interferes with the law applying or interpreting the fact-finding process of federal courts.<sup>220</sup> Howard Wasserman rejects the Redish and Pudelski view, as do I.<sup>221</sup> As I read him, Wasserman would allow Congress to adjust unconstitutional law (statutory law including statutes adjusting treaties) nearly anyway it wishes.<sup>222</sup> I agree with Wasserman that the confusing or deceptive nature of laws is not generally a ground for finding them unconstitutional. But it seems, though it is hard to be certain, that he would allow Congress to very broadly control methods of statutory interpretation.<sup>223</sup> Thus, I believe that Vladeck reads *Klein* too broadly, while Wasserman reads it slightly too narrowly. The final Section of this Article contains the critique of Redish and Pudelski's very broad reading of *Klein*. First, this Article presents a case study that applies some of the arguments concerning Article III limits on statutory interference with the decision processes of courts to decide cases on the merits.

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218. See *infra* Part II.C (discussing Redish & Pudelski's broader interpretation of *Klein*'s holding as having more subtle implications).

219. See Redish & Pudelski, *supra* note 173, at 438–39 (“What we derive from *Klein*, however, is a far more subtle precept of American political theory: that the judiciary has the constitutional power and obligation to assure that Congress has not deceived the electorate as to the manner in which its legislation actually alters the preexisting legal, political, social, or economic topography.”).

220. See *id.* at 439 (“The legislative deception that is of concern . . . does not go to the legislators' private motivation in enacting the legislation, or what incidental or collateral effects the legislation may have, beyond its direct and immediate impact. Instead, we are focused exclusively on the much more fundamental concern about deception as to what the legislation actually *does*.”).

221. See Wasserman, *Constitutional Pathology*, *supra* note 2, at 218–35 (arguing that Congress alone is the master of unconstitutional law).

222. *Id.* at 218–35.

223. See *id.* at 229–30 (“There is no such thing as Congress compelling a court to speak a ‘statutory untruth’—no such thing as limiting or controlling judicial interpretive authority or independent judgment on matters of statutory substance.”).

### 3. *Klein* and Habeas Corpus: A Case Study in Interference with Courts' Decision Processes

There is one interesting, distressing, and especially problematic setting in which *Klein* arguments have been rejected by the Supreme Court, but in which such arguments deserve explicit and more careful consideration than they seemed to receive in response to the briefs filed. A part of the Antiterrorism and Effective Death Penalty Act of 1996 provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.<sup>224</sup>

In *Williams v. Taylor*,<sup>225</sup> the habeas petitioner argued that these provisions should be read narrowly, as not requiring federal courts exercising post-conviction habeas jurisdiction to defer to any state court readings of the Constitution that they believed wrong; and that, if read broadly, these provisions violated separation of powers as explicated in *Klein*.<sup>226</sup> In *Williams*, the Supreme Court, with four dissents, adopted a reading that would, in some cases, require a federal habeas court to defer to state court interpretations of the Constitution that the federal

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224. 28 U.S.C. § 2254(d)(1), (2) (2006).

225. See *Williams v. Taylor*, 529 U.S. 362, 402–13 (2000) (ignoring arguments presented based on *Klein*, the Court upheld requirements that federal judges, in habeas corpus proceedings brought by convicted state prisoners, defer to readings of the federal Constitution made by state courts in upholding convictions). The restrictions are found in 28 U.S.C. § 2254(d)(1), (2).

226. Brief for Petitioner at 48–54, *Williams v. Taylor*, 529 U.S. 362 (No. 98-8384), 1999 U.S. S. Ct. Briefs LEXIS 729, at \*84–85 (arguing the unconstitutionality, under *Klein*, of a broad reading of AEDPA); Petition for Writ of Certiorari, *Williams v. Taylor*, 529 U.S. 362 (No. 98-8384), 1999 U.S. S. Ct. Briefs LEXIS 1200, at \*66 (arguing the unconstitutionality, under *Klein*, of a broad reading of AEDPA); see also Brief for Professors Lance G. Banning, Jack N. Rakove, William W. Van Alstyne, & Gordon G. Young as Amici Curiae Supporting Petitioner, *Williams v. Taylor*, 529 U.S. 362 (No. 98-8384), 1999 U.S. S. Ct. Briefs LEXIS 730, at \*35, 40–42, 44, 47–48 (arguing for a rejection of the Fourth Circuit's interpretation of AEDPA resulting in state courts ruling on matters of federal law control despite federal courts finding them erroneous). The Court granted certiorari on questions other than the direct constitutional one, including the statutory interpretation questions. *Williams*, 529 U.S. at 367. Arguments about the constitutionality of readings of AEDPA, however, remained open, because the Court reads statutes to avoid constitutionally problematic constructions when it can.

courts thought were wrong.<sup>227</sup> These were interpretations of the federal Constitution by the state courts—made at the time of their decision affirming a conviction—which were in some sense wrong, but not unreasonable.

There are a number of possible justifications that might be put forward for the conclusion that such regulation is consistent with a reasonably independent federal judiciary. One might argue that, while Congress does not control the meaning of the Constitution, it has some legislative control over the retroactivity of later decisions broadening rights over criminal convictions that were final before those later decisions. This argument is of disputable validity. But even assuming that Congress wields some power to regulate retroactivity, this would simply entail that constitutional law, not recognized until a later time, cannot be used in certain circumstances to overturn earlier convictions. It would not mean that states could be made the largely final arbiters of what the law was at the time of conviction. Equally problematic is the limitation on what sources of law count in determining the law or the clarity of law at the time. The federal habeas statute applied in *Williams* provides that such an earlier constitutional right cannot be sufficiently clear unless it stems from Supreme Court precedent.<sup>228</sup> Not even unanimous agreement of the circuit courts at the time of conviction would suffice. This is an extremely serious interference with the effects of lower federal court decisions and the constitutional reasoning of federal courts in deciding a constitutional case.

One might also argue that post-conviction habeas corpus consideration is a privilege—unlike the right to habeas consideration of purely executive detention not following a determination of rights in a state or federal court.<sup>229</sup> An example of the latter right is detention by

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227. *Williams*, 529 U.S. at 399–414 (O'Connor, J., concurring).

228. The federal habeas statute provides, in relevant part, that:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

28 U.S.C. § 2254(d)(1) (2006).

229. Until *Brown v. Allen*, 344 U.S. 443 (1953), state convictions that were even minimally procedurally fair were not subject to scrutiny by federal courts via habeas corpus. The state court findings of fact and conclusions of law were preclusive; thus, they could be reviewed in federal court only by a superior court—the U.S. Supreme Court. *Brown* rested on a rereading of the federal habeas statutes, not on recognition of a constitutional right to habeas. FALLON ET AL., *supra* note 3, at 1220–35. My own view is that due process should be interpreted to require that some post-conviction relief must be available to assess powerful claims to innocence. See George

the military or government mental health officials.<sup>230</sup> In either case, habeas is a right. It might be the only method of testing the validity of detention. Thus such cases present the most compelling claims of right to a habeas corpus hearing.

Post-conviction cases following criminal trials and appeals are different in ways that make claims to entitlement weaker. Under current law, except perhaps in extraordinary circumstances, it is not clear that post-conviction federal habeas corpus is constitutionally required.<sup>231</sup> But whether that should settle the matter, given the doctrine of unconstitutional conditions, remains unclear.<sup>232</sup> Indeed, Vladeck's narrower use of the Redish and Pudelski anti-deception view of *Klein* seems more attractive in these specific circumstances. Here this is risk of public confusion about basic criminal justice in the United States, and the possibility of demeaning the highest officials in an independent branch. This view is much more limited than Redish and Pudelski's general anti-deception view of *Klein* because it is limited to separation of powers issues, specifically the giving of false appearances that courts are functioning independently.

The deference to fact-finding in the habeas provision<sup>233</sup> could also be

C. Thomas III, Gordon G. Young, Keith Sharfman & Kate B. Briscoe, *Is it Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 266 (2003) (arguing that while it should never be too late to achieve post-conviction relief, this statement must be qualified, and strong evidence is needed to overcome a conviction previously rendered by fair process).

230. See, e.g., *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872) (reviewing an attempted state habeas corpus action to free a person detained in the federal military).

231. See FALLON ET AL., *supra* note 3, at 1238–39 (discussing post-conviction federal habeas corpus). Indeed, there is a greater open question as to whether any review of a trial court decision is required. Put another way, would denying appellate review across the board (to avoid equal protection problems) violate the Constitution? For a discussion of Supreme Court cases pointing toward finding no such right, see Alex S. Ellerson, Note, *The Right to Appeal and Appellate Procedural Reform*, 91 COLUM. L. REV. 373, 375–76 (1991). But see *id.* at 377–404 (arguing that the Court should recognize such a right in some circumstances and that newer decisions are somewhat difficult to square with this hard line position).

232. Sometimes a power over the existence of an institution does not entail complete control over how it functions. For example, the Court has found a right to counsel and transcripts for indigents on their first appeal from a conviction without ever finding that there is right to such an appeal at all. For a discussion of these cases and the unconstitutional conditions doctrine, see generally *supra* note 59.

233. 28 U.S.C. § 2254(d)(2) (2006):

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

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(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

targeted under a reasonably expanded reading of *Klein*. If restricting habeas courts' abilities to find the underlying facts unduly interferes with Article III courts' judicial function, then there is arguably a violation of the judicial independence required by Article III as explicated in *Klein*.<sup>234</sup> Certainly, if the statutory standard required federal habeas courts to accept state court fact-findings unless the chance that they were right was negligible or less, then that would seem beyond Congress's power to impose. Read broadly, *Klein* invites federal judges to determine just how much power Congress has to write standards of review or presumptions in constitutional rights cases.<sup>235</sup> However, there are good reasons why reviewing courts ought to defer to trial court and jury findings of fact, and why, perhaps, Congress should be able to adjust this deference within a reasonable range.<sup>236</sup> Whether

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234. It may be a violation of Article III, as explicated in *Klein*, to open a federal habeas court that need not be open but to hamstring its decisions. In *Griffin v. Illinois*, 351 U.S. 12, 18–19 (1956), and *Douglas v. California*, 372 U.S. 353, 355–56 (1963), the Court was careful not to hold that states are obligated to provide appeals after convictions in trial courts. However, it did hold, respectively, that if it made such appeals generally available, it must provide counsel and transcripts to indigents. This jurisprudence seems best termed a contingent fundamental due process right that is subject to strict equality requirements if the state creates it. See *supra* note 59 and accompanying text (dealing generally with unconstitutional conditions on interests whose existence is not required by the Constitution).

235. See discussion *supra* Part II.B.2 (discussing *Klein* and the limits on regulation of statutory interpretation).

236. The reasons include the efficiency of having facts found once, and by a decider who has seen the demeanor of witnesses, and who has seen the whole context of a piece of evidence in other evidence, both testimonial and documentary.

Congress has the power to create such efficiency-based rules of deference. The Supreme Court has been clear about Congress's broad general powers to regulate procedural and evidentiary processes in federal courts:

[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

*Hanna v. Plumer*, 380 U.S. 460, 472 (1965). Since 1934, Congress has done this by delegating the authority to draft rules of procedure and evidence to the Judicial Conference and that to approve them to the Supreme Court, subject to negation by statute. See 28 U.S.C. §§ 2072–74 (2006) (detailing the Supreme Court's power to prescribe general rules of practice and procedure). Thus, existing practice recognizes broad Congressional powers over such matters described in the *Hanna* case.

Rule 52(a)(6) of the Federal Rules of Civil Procedure provides, “[F]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.” FED. R. CIV. P. 52(a)(6). There is no reason to believe that the Constitution itself requires the substance of Rule 52(a)(6). It seems more sensible to see Congress as having a choice within a reasonable range of positions concerning the amount of deference required.

But while the range of procedural choices left for Congress is broad, it is limited by the requirements of individual constitutional rights as the Court interprets them under its power to

§ 2254(d)(2) of the federal habeas corpus statute violates these requirements should depend on just how much deference that provision requires and on whether the court sees it as too restrictive.

*C. Less Comfortably Broadening Klein: Redish and Pudelski*

In a recent article, Martin H. Redish and Christopher R. Pudelski agree that *Klein* prohibits puppeteering laws.<sup>237</sup> But they also attribute a second set of holdings to *Klein*. While subtler, these holdings are seen as having a real significance that previously had been missed or only vaguely appreciated. Stripped down, the additional set of holdings attributed to *Klein* find unconstitutional certain types of especially misleading laws.<sup>238</sup> These laws create a false appearance of providing rights or other protections that, in fact, are either non-existent or much less substantial than they seem.<sup>239</sup> In *Klein*, the argument goes, the law appeared to protect the statutory and constitutional rights to compensation of those who were innocent of aiding the Confederacy

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engage in definitive constitutional interpretation. For example, the Court has indicated that its duty to enforce the First Amendment requires it to conduct review broader than specified in a federal rule or statute. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 n.27 (1984) (recognizing the Court's duty to make an independent review of facts in First Amendment cases); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) ("This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.'"). Implicitly, these cases conclude that, at least one constitutional right carries with it minimal procedural guarantees to assure the right is not indirectly gutted. The Court has not been clear about the details of its duty of independent review of facts supporting First Amendment claims or defenses. And it is not clear that the freedom to review facts underlying assertions of First Amendment rights would provide the standard for other rights, such as a takings claim.

Perhaps the best way of looking at this is that it is a question for the Courts to what extent the individual constitutional rights provisions are flexible enough to allow the rights that they create to be somewhat negatively affected by systems of procedure, and to what extent the collision of rights with procedural limitations unacceptably harms the right. *See, e.g.*, Bryan Adamson, *Critical Errors: Courts' Refusal to Recognize Intentional Race Discrimination Findings as Constitutional Facts*, 28 YALE L. & POL'Y REV. 1, 3, 11 (2009) (arguing that, as constitutional facts, findings of intentional discrimination should be subjected to less-deferential review).

237. Redish & Pudelski, *supra* note 219, at 443–44 (discussing what they see as *Klein*'s first holding that "Congress may not dictate to the courts how to read the Constitution").

238. *Id.* at 449–64.

239. Redish and Pudelski note that:

It is our position, however, that, when viewed through the lens of *Klein*, the legislative deception model finds grounding in the Constitution. To be successful, legislative deception must conscript the federal judiciary in the imposition of what amounts to a political fraud on the public. Such a practice violates fundamental notions of judicial integrity embodied in Article III, which expressly insulates the federal judiciary from improper influence by the political branches by guaranteeing judicial tenure and salary.

*Id.* at 461.

and whose property had been seized by Union troops.<sup>240</sup> However, this was a false appearance because “fine print” in the challenged statute caused it actually to work in a manner very different from the way one would expect on the surface.<sup>241</sup> In those authors’ opinion, judicial enforcement of such laws involves undermining democratic accountability in ways that are so serious that they should be viewed as unconstitutional.<sup>242</sup>

In Redish and Pudelski’s view, the statute reviewed in *Klein* violated this principle because it made the acceptance of a pardon strong—though not quite irrebuttable—proof of guilt, leading to ineligibility for compensation.<sup>243</sup> In their view, this sort of problem was at least a vague concern of the *Klein* majority, even if not conceived of by the Court with great clarity in precisely the way the authors offer the principle now.<sup>244</sup> The authors call this “macro” deception, analogizing it to a nearly invisible but dangerous piece of DNA that puts an apparently healthy body greatly at risk.<sup>245</sup> It is a rule of law potentially applying to a number of cases.<sup>246</sup>

They distinguish this from an also unconstitutional “micro” deception that involves a legislative attempt to control the outcome in a particular case.<sup>247</sup> They make a convincing constitutional case against micro deceptions but do not suggest that *Klein* raised that issue.<sup>248</sup> The statute challenged in *Klein*, in their conceptual scheme and terminology, was struck down for being a macro deception among its other fatal flaws.<sup>249</sup>

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240. See *id.* at 448–51 (providing background and then characterizing the statute in *Klein* as an elaborate shell game deceiving the public).

241. *Id.* at 448–52.

242. *Id.* at 449–64.

243. *Id.* at 449–50.

244. *Id.* at 450–51.

245. *Id.* at 439 n.8.

246. *Id.* at 453–55.

247. *Id.* at 455–58.

248. Their description of the rule against macro deceptions is one of a constitutional right independent of whether other constitutional rights are affected. And none of the examples of macro deception that they use turns on whether an independent constitutional right has been distorted, but rather simply on whether the public has been misled as to which of Congress’s many permissible alternatives it has in fact chosen. *Id.* at 453–55.

249. *Id.* at 453–55. The authors, in attributing this holding against macro deception to *Klein*, stated that

[f]or present purposes, however, suffice it to say that a procedural or evidentiary modification should be deemed to alter the essence of applicable substantive law when, as a result of the procedural or evidentiary modification, the law’s impact on citizens’ primary behavior is so significant as to alter a reasonable voter’s perception of her elected representative on the basis of that representative’s vote on the relevant substantive legislation.

*Id.* at 450.

To understand these authors' views, it is important to realize that a constitutional violation of the macro deception sort is not founded on evasion or destruction of a separate constitutional right, such as the pardon right that would have been destroyed had the Court in *Klein* complied with Congress's instructions.<sup>250</sup> It also covers such deception as to the nature of subconstitutional rights, specifically, rights that Congress is free to create or not create by statutes. If Congress falsely appears to create such a right, or it creates one but is deceptive as to its scope, then the legislation is on that ground alone potentially vulnerable to this newly ascribed holding. If sufficiently substantial, such deception violates a completely separate and freestanding constitutional right of individuals that Redish and Pudelski read *Klein* as identifying and protecting.<sup>251</sup>

The free-standing quality of their proposed rule is what makes it different from the anti-puppeteering holding, which they also endorse,<sup>252</sup> and which is the central, though not exclusive, holding in *Klein*.<sup>253</sup> The fact that Klein may have been denied constitutional rights created by a presidential pardon is central to a puppeteering violation, because the essence of this type of violation is an attempt to use jurisdictional powers to force courts to render a judgment that is inconsistent with the Constitution. *Klein*'s anti-puppeteering holding is that jurisdictional powers do not trump separate constitutional limits.<sup>254</sup>

How convincing is Redish and Pudelski's reading of *Klein* to find a holding against all substantially deceptive legislation? According to my current views on how to read cases, it is not necessary that one can say with great certainty that holdings attributed to a case actually occurred to the authors of the opinion under interpretation.<sup>255</sup> I would require that an attributed holding could have resolved the case as it was resolved and that the opinion's authors would likely have found it

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250. *Id.* at 450.

251. *Id.*

252. *Id.* at 443–44. See *supra* note 237 and accompanying text (discussing Redish & Pudelski's view of what they see as *Klein*'s first holding).

253. See Young, *Klein Revisited*, *supra* note 1, at 1213–15 (addressing the confusion surrounding the interpretation of *Klein*); Young, *Congress's Power to Restrict*, *supra* note 43, at 157 (explaining that *Armstrong* is the only Supreme Court case holding a court-stripping provision unconstitutional). See also discussion *supra* Part I.A.1 (discussing Congress's judicial regulation in the form of using federal courts as puppets to reach substantively unconstitutional results).

254. See *supra* Part I.A.1 and Part I.D (arguing that state courts must be available to constitutional claims if they are excluded from federal courts and that Congress cannot foreclose that option from potential claimants).

255. See *supra* note 164 and accompanying text (detailing a separate article that could be authored on how to attribute meaning to opinions in older cases).

attractive. Hart's puppeteering reading passes this test, as does my extension of it to a protection of Article III courts' fact-finding processes in constitutional cases.<sup>256</sup> The strength of an attributed holding initially depends on these factors. To the extent that their application yields indeterminate results, then I would add a fourth—following Dworkin, in close cases, proper attribution of a holding depends on its attractiveness as a rule of law in the current legal system.<sup>257</sup>

In *Klein* the Court was clearly concerned with separation of powers, specifically in interference with its decision processes in constitutional cases.<sup>258</sup> Both the puppeteering interpretation and one that prohibits certain interference with fact-finding, and even with statutory interpretation, seem congenial to the Court's concerns. And these holdings ultimately fit well with *Marbury v. Madison*—both law at the time of *Klein* and in modern jurisprudence. Indeed they seem required by it.<sup>259</sup> One might argue that the *Klein* Court was concerned with deception. But from the *Klein* Court's position, the deception would have concerned separation of powers: whether the Article III courts were operating as an independent branch of government exercising their own constitutional judgment as to what the law says or whether they were open only as performers in Congress's puppet show.<sup>260</sup>

But does *Klein* suggest at any level of generality that, if the courts are open and can use independent constitutional judgment to determine rights, they should, in the exercise of these powers, recognize a general anti-deception right? Nothing in the opinion, or its context, suggests that the Court was concerned with courts taking on such a difficult task. This reading goes beyond what credibly might have concerned the *Klein* Court and creates a rule that is currently unattractive in terms of the demands it would make on the courts.<sup>261</sup> Redish and Pudelski describe

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256. See discussion *supra* Part II.B.1 (discussing how *Klein* might limit congressional regulation of judicial fact-finding).

257. DWORKIN, *supra* note 20, at 225–32, 240–45.

258. See *supra* Part II.B.2(a) (discussing how, unless interpretive methods change, future courts will face issues in understanding the difficult language that future Congresses provide in statutes).

259. That constitutional statutes are binding on the courts is so basic a part of our system that ordinarily it goes without saying in judicial opinions. One may find this implicit in *Marbury v. Madison*'s supposition that courts must apply legislative-style law in hierarchical order. See *supra* note 85 and accompanying text. See also *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1868) (dismissing an appeal concerning a constitutional claim because a statute so commanded).

260. See Young, *Klein Revisited*, *supra* note 1, at 1197, 1213–15 (discussing *Klein*'s holdings concerning Congress's control over federal jurisdiction and limitations based on the doctrine of sovereign immunity).

261. In the political question it identifies, the Court considers the unworkability or

the Court's function under their proposed rule as follows:

In deciding whether a procedural rule or evidentiary presumption has transformed substantive law's essence, a reviewing court should ask itself whether the voters' perceptions of their elected representatives' political commitment, revealed by their votes on the legislation in question, might reasonably change had they been aware of the true substantive impact of the law when combined with its related procedural or evidentiary modification.<sup>262</sup>

Such a rule requires a court to make judgments that interfere with legislation that, in the language of political question cases, may be judicially "unmanageable" or "unworkable" even were they otherwise desirable.<sup>263</sup> It would be difficult to craft more specific methods of assessment and metrics about whether and how much voters' perceptions are likely to change if modifying procedural provisions were gone or different. And, were those problems solved, it certainly offers no guidance about how much deception is too much deception. On several scores, I would not attribute to *Klein* a holding requiring or authorizing courts to scrutinize legislation in this way. This generalization of *Klein* would likely have been as surprising and

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unmanageability of a proposed constitutional standard for judicial intervention among many other factors when refraining from pronouncing and applying law. *See Nixon v. United States*, 506 U.S. 224, 228–30 (1993) (finding the impeachment of a federal judge a political question, and reciting this factor as merely one, but relying on others). I have always found it difficult to understand just what unworkability might mean in a constitutional law that contains many standards that are difficult to apply. But the proposal that Congress make difficult "consumer protection" judgments about the objective deceptiveness of federal statutory provisions appearing to create rights seems to me a candidate for the Court's either determining on the merits that macro deception is not a rule of constitutional law or deciding that it might be but is a political question.

262. Redish & Pudelski, *supra* note 219, at 461.

263. The political question doctrine, developed by the Supreme Court with little textual support, recognizes exceptions to the Court's power or willingness to exercise judicial review over certain sorts of constitutional questions. *See generally* CHEMERINSKY, *supra* note 75, at 129–49 (discussing the Court's power to review federal statutes). The Court has announced several criteria that, in various combinations, warrant its refusal to disturb actions of the political branch while offering no determination of their constitutionality: "A controversy is nonjusticiable—*i.e.*, involves a political question—where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Nixon*, 506 U.S. at 228–29 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

My contention is that the review of legislation that Redish and Pudelski urge—judicial review of statutes for construction or wording that is deceptive to the public—is simply unmanageable. It is difficult to come up with a metric of how much "deception" is too much or even whether legislation on complex subjects is likely to be significantly misunderstood in ways that benefit the views of Congress while providing it with protection from action by the electorate. Beyond this, in deciding whether to recognize a right against deceptive legislation in the first place, the Court would naturally ask questions about the manageability of any right it was considering implying with little constitutional textual basis.

uncongenial to the Court in 1872 as it would be on a purely fresh consideration now. From a Dworkinian perspective, finding such a holding is an unconvincing reading of the past that fits badly into the present.

#### CONCLUSION

*United States v. Klein* is an important and generative precedent dealing with the core freedom of courts, when granted jurisdiction by statute, to function fully as courts. It has little to say directly about court-stripping—the debatable power of Congress to close the federal courts to constitutional claims while leaving the state courts open to them. But its prohibitions seem congruent with the best interpretation of congressional powers over courts’ jurisdiction: that they do not include the power to exclude sets of congressionally disfavored constitutional claims from the jurisdiction of both lower federal courts and state courts. At its center, *Klein* prohibits Congress from requiring courts to issue judgments on the merits that conflict with constitutional requirements. Through the operation of the law of preclusion, such judgments, if valid, would have the practical effect of excluding constitutional rights from enforcement in any court, thus extinguishing them.

Howard Wasserman and other scholars have offered broad reassessments of *Klein* in recent years. All of these recognize in various formulations that *Klein* indicates that courts which are open for business cannot be closed off from using the Constitution in deciding cases. Occasionally, scholars have seen in *Klein* limits on tampering with federal courts’ fact-finding processes. *Klein*’s concerns and broad language comfortably generalize that far. It also seems right to generalize *Klein* far enough to identify it with limits on unreasonable congressional tampering with the sources of inspiration, analogies, and tools that federal courts use in interpreting ambiguous statutes. To see in *Klein* a general rule against legislation that seriously deceives voters as to its effects, expands that decision far beyond the concerns that occupied the *Klein* Court. The rule proposed by Redish and Pudelski is one that would require a court to spend too many resources second guessing Congress about the clarity of its legislation over the entire range of statutory law, not just statutes addressing how the court functions. At the time of *Klein*, as well as now, that rule would seem to require more of the courts than their resources permit.

In the end, Wasserman is right that *Klein* is a limited precedent, though not a severely limited one, and that it is a product of pathological times. And its core holding is an almost effortless

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extension of *Marbury*—a recognition that Congress’s jurisdictional powers cannot cut functioning courts off from the Constitution. But its more general recognition of the limits on interference with courts’ decision processes has real possibilities for particularization and expansion by courts in the preservation of third branch integrity. And while pathology, by definition, cannot be normal, it is all too often with us. Though *Klein* seldom has been used by the courts to invalidate pathological laws, its deterrent effect on their passage may have at least a little to do with that. Properly broadened, it warns Congress that courts must have some real freedom to determine and apply the law and to find the facts, without unreasonable interference that would make the existence of a functioning and independent judicial branch a mirage.