

LEGISLATIVE DECEPTION, SEPARATION OF POWERS, AND THE DEMOCRATIC PROCESS: HARNESSING THE POLITICAL THEORY OF *UNITED STATES V. KLEIN*

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I. INTRODUCTION

Some Supreme Court decisions withstand the test of time. They are universally recognized as the fulcrums of modern constitutional law, even if they were decided before the turn of the prior century. If students learn nothing else in their constitutional law courses it is the names (if not the actual holdings) of these decisions. A few of these decisions are known primarily because we love to hate them.¹ In contrast, there are numerous Supreme Court decisions that are effectively buried, even before the Justices who authored them are buried themselves.

There also exists a third, less easily described category of Supreme Court decisions that are not readily classifiable under either of the other headings. They are not nearly as well known as the doctrinal giants of constitutional law. Nevertheless, they generally receive respectful, if not extensive treatment in the casebooks, largely because there is a widely shared sense that they are somehow of substantial significance in the flow of American constitutional or political theory. The problem, however, is that no one is exactly sure how or why.

*United States v. Klein*² is just such a decision. It is a case whose importance to the shaping of American political theory has never been fully grasped or articulated by scholars,³ and whose meaning has been compre-

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¹ *Lochner v. New York*, 198 U.S. 45 (1905), is perhaps the best illustration of this subcategory. See, e.g., David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373 (2003).

² 80 U.S. (13 Wall.) 128 (1872).

³ See, e.g., Richard A. Doidge, Note, *Is Purely Retroactive Legislation Limited by the Separation of Powers?: Rethinking United States v. Klein*, 79 CORNELL L. REV. 910 (1994); William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761

hended by the federal judiciary—including the Supreme Court itself—virtually not at all.⁴ It is our view that once the Court's decision in *Klein* is appropriately dissected and extrapolated, both judges and scholars will be in a position to grasp the essence of an extremely important—yet often ignored or misunderstood—precept of American democratic and constitutional theory that lies at the hidden core of the *Klein* opinion.

In *Klein*, the post-Civil War Supreme Court held unconstitutional a federal statute that sought to employ Congress's constitutional power to make exceptions to Supreme Court appellate jurisdiction⁵ as a vehicle for requiring the Court to deem the issuance of a presidential pardon to be conclusive proof of disloyalty on the part of former Confederates.⁶ A finding of disloyalty mattered greatly because those found to have been disloyal were statutorily disabled from recovering property that had been seized by the federal government. In this Essay, we undertake to glean a vitally important, yet largely unrecognized, element of democratic theory from the reasoning contained in the *Klein* opinion that declared this legislatively directed rule of evidence unconstitutional and to explore its essential role in the healthy operation of the American political process. We derive from *Klein* the need for a dynamic, intersecting relationship among three important actors in the American political system: the elected branches of government, the electorate that chose them, and the unrepresentative judiciary. In this relationship, it is, paradoxically, the most undemocratic branch of government that is to stand as the policeman of the democratic process, seeking to assure the continuing viability of representative democracy and the integrity of the fiduciary relationship between the elected and the electorate.

It would surely not be a startling revelation to suggest that, in the American constitutional system, it is the insulated judiciary that is intended to police the elected branches of government. What we derive from *Klein*, however, is a far more subtle precept of American political theory: that the

(1997); Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998); Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1189.

⁴ For example, in *United States v. Sioux Nation*, 448 U.S. 371, 404 (1980), the Court described *Klein* in the following manner: “[T]he [congressionally enacted] proviso was unconstitutional in two respects: First, it prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor. . . . Second, the rule prescribed by the proviso ‘is also liable to just exception as impairing the effect of a pardon and thus infringing the constitutional power of the Executive.’” *Id.* (quoting *Klein*, 80 (13 Wall.) at 147). As we subsequently explain, neither of these holdings makes the slightest constitutional sense. See discussion *infra* Part II.B.1–2.

⁵ U.S. CONST. art. III, § 2 (“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.”).

⁶ For a detailed description of the facts and holding of *Klein*, see *infra* Part II.A.

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. The legislative deception that is of concern, we should emphasize, 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*.

One might wonder how Congress could possibly attempt to deceive the electorate as to the direct impact of its legislation. After all, the words of the statute presumably tell us what the law does. On occasion, ambiguity may exist as to what a statute means or exactly how it will impact the legal and political worlds, either due to inartful drafting or a conscious legislative decision, embodied either explicitly or implicitly in the body of the statute, to delegate common-law-making power to the courts or, on occasion, to agencies empowered to administer the statute.⁷ But *ambiguity* is surely not the same as *deception*. The deception about which we are concerned, however, comes not from within the text of the operative substantive provisions of the statute. The deception to be avoided, rather, may be accomplished by other means.

Legislative deception may take one of two forms, what we refer to as "micro" and "macro" deception. When a legislature engages in *micro* deception, it leaves the generalized substantive law intact, but legislatively directs that a particular litigation (or group of litigations) arising under that law be resolved in a manner inconsistent with the dictates of that preexisting generalized law. In the case of *macro* deception, in contrast, the legislature leaves substantive law unchanged on its face, but alters it in a generally applicable manner by enacting procedural or evidentiary modifications that have the effect of transforming the essence—or what can appropriately be described as the "DNA"⁸—of that law. In the former situation, the legislature has altered the reach of the substantive law in specific applications; in the latter, it has sought to alter preexisting controlling law generally but has done so through the use of indirect procedural or evidentiary manipulation. In both situations, the legislature has purported to leave controlling law unchanged but in reality has manipulated the application of that law, either in specified instances or more generally. As a result, the essential elements of the democratic process will have been under-

⁷ The Sherman Antitrust Act, 15 U.S.C. § 1 (2000), provides a good illustration of this process of substantive legislative delegation. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1, 51 (1911) (analyzing the statutory term "restraint of trade" by reference to use of these words in the common law evolutionary tradition).

⁸ For a discussion of how one may operationalize the concept of a law's DNA, see discussion *infra* Part III.B.1.

mined, because the electorate may have been deceived as to the nature and extent of its chosen representatives' political commitment in voting for or against that legislation. A legislator's vote for or against a proposed substantive law means little if the legislature has furtively altered the reach or impact of that law, by resorting to a form of legislative shell game.

In both micro and macro deception, the legislature accomplishes this sleight-of-hand without clearly informing the electorate of how its procedural legislation has transformed the political, social, and economic landscape. As a result, the deception effectively denies the electorate the opportunity to hold its representatives accountable. When members of Congress vote for or against proposed legislation, they are making a political commitment that enables the electorate to judge them. This process of political commitment facilitates protection of the essential elements of the American democratic process: representation, accountability, and checking.⁹ A voter cannot judge her elected representative on the basis of that legislator's vote on legislation when the legislation in question amounts to something approaching a sham, due to the manipulative effect of accompanying procedural or evidentiary devices.

The key theoretical insight that may be gleaned from *Klein* is that the judiciary—the one governmental branch insulated from the electorate—provides the only effective means of assuring that the democratic process operates in the manner necessary to the attainment of the normative goals that underlie the nation's chosen form of representative government. It does so by policing the legislative process to eliminate both micro and macro legislative deception.

There are a number of reasons why this extremely significant aspect of American democratic theory—namely, the need to have the unrepresentative judiciary police possible legislative deception—may have become lost in the doctrinal and theoretical shuffle in the years since *Klein*. First, there existed an alternative rationale for the Court's finding of unconstitutionality that more clearly and directly implicated the judiciary's traditional role in the constitutional process, and much of the post-*Klein* analysis has centered on this question.¹⁰ Second, the *Klein* Court itself may not have fully grasped the theoretical implications of the point that it was making.¹¹ Third, the post-*Klein* Supreme Court has been less than forthright in either its explication or application of the legislative deception aspect of *Klein*. On occasion, the Court has described the *Klein* holding in what are largely obscure and misleading terms.¹² On other occasions, it may have disingenuously ignored blatant violations by Congress of the democratically imposed limits on its authority to manipulate the judicial process, without

⁹ See discussion *infra* Part III.

¹⁰ See discussion *infra* Part II.B.1–2.

¹¹ See discussion *infra* Part V.

¹² See *United States v. Sioux Nation*, 448 U.S. 371, 402–03 (1980).

either acknowledging or seemingly comprehending the serious stakes involved for purposes of the success of American democracy.¹³

Part II of this Essay focuses on the facts and holdings of *United States v. Klein*. In doing so, it describes the alternative conceivable constructions of the Court's opinion.¹⁴ Part III that follows seeks to place *Klein* within the framework of American political theory. It explicates the connection between democratic theory, legislative accountability, and the potential harms of legislative deception.¹⁵ The Essay then posits, and seeks to respond to, potential criticisms of the legislative deception model that we fashion.¹⁶ It proceeds to examine the manner in which the Constitution authorizes the judiciary to perform the policing function necessary to eliminate instances of legislative deception. In so doing, it explains how congressional use of the judiciary to implement the devices of legislative deception threatens fundamental dictates of constitutionally protected separation of powers.¹⁷

All of the dictates of democratic theory that we expound upon here derive from the theoretical seed planted by the Court in its opinion in *Klein*. Perhaps due to our recognition of the important political theory that lies implicitly at the heart of the *Klein* decision, that case will be promoted from the type of constitutional purgatory in which it presently resides to the place where it belongs: in that category of truly significant Supreme Court decisions, recognized for their contributions to the foundations of American political theory.

II. THE MYSTERY OF *UNITED STATES V. KLEIN*

A. *The Facts and Holding of Klein*

United States v. Klein was one of the last Supreme Court cases during Reconstruction to invalidate congressional legislation. Throughout Reconstruction a primary concern of the Republican-controlled Congress was the loyalty of Southerners pardoned after the Civil War. The legislation challenged in *Klein* was designed to ensure that those who were pardoned would not receive preferential treatment. Klein, an administrator of an estate, sued on behalf of that estate to recover property seized from the decedent and sold by the federal government pursuant to the Abandoned Property Collection Act of 1863. That legislation authorized the Treasury Department to collect abandoned or captured property in any territory involved in the insurrection. However, it also enabled the owner of the seized property to recover the proceeds from its sale upon proof of loyalty. Under

¹³ See *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992), discussed *infra* Part III.B.2.

¹⁴ See *infra* Part II.

¹⁵ See *infra* Part III.

¹⁶ See discussion *infra* Parts III, IV.

¹⁷ See *infra* Part IV.

an earlier judicial ruling, a claimant would be deemed loyal for purposes of the 1863 Act if he had received a presidential pardon. In *Klein*, the decedent had received a pardon, the Court of Claims entered judgment in favor of the estate, and the government appealed.

While the government's appeal was pending, Congress passed the Act of July 12, 1870,¹⁸ declaring pardons inadmissible as evidence to establish loyalty in cases under the 1863 Act. The Act directed the Supreme Court to dismiss, for want of jurisdiction, appeals from judgments that denied recovery to pardoned individuals. The law further provided that receipt of a pardon containing recitation of the pardoned acts without a disclaimer of participation in those acts would constitute conclusive evidence of disloyalty, which effectively meant that the Supreme Court must reverse judgments awarding recovery to pardoned individuals.¹⁹ In other words, the legislation made evidence of a pardon inadmissible in support of a claimant and admissible against a claimant.²⁰ Klein challenged the 1870 Act on the grounds that it violated separation of powers. The government argued that the 1870 Act was constitutional because Congress had employed its power to make exceptions to the Supreme Court's appellate jurisdiction pursuant to Article III's "Exceptions Clause"²¹ as a means of precluding Supreme Court review.

The *Klein* Court rejected this argument and held the 1870 Act unconstitutional.²² The Court found the congressional action to be constitutionally defective because it required the Court to "ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way?"²³ After describing the law's jurisdictional directive, the Court asked rhetorically, "Can we do so without allowing one party to the controversy to decide in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?"²⁴

¹⁸ Act of July 12, 1870, ch. 251, 16 Stat. 230 (1870). For an excellently detailed history of the Act, see Young, *supra* note 3.

¹⁹ The original proposal of the Act explicitly required that "the Supreme Court shall on appeal reverse" judgments where a pardon established innocence in the Court of Claims; however, it was later reworded to use the "softer" language requiring the Court to "dismiss the cause" of action entirely. See Young, *supra* note 3, at 1208.

²⁰ *Id.* at 1205. As the Supreme Court explained in *United States v. Klein*: "The substance of this enactment is that an acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it, both in the Court of Claims and in this court on appeal." 80 U.S. (13 Wall.) 128, 144 (1872).

²¹ U.S. CONST. art. III, §2, cl. 2.

²² Admittedly, the *Klein* opinion itself is a terse read, and it is difficult to distinguish the Court's dictum from its actual holding. A fair reading, however, recognizes that at least one clear and agreeable ground for decision can be drawn from the opinion.

²³ *Klein*, 80 U.S. (13 Wall.) at 146.

²⁴ *Id.*

The constitutional problem, said the Court, was that under the law the judiciary was “forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely to the contrary.”²⁵

The Court then provided several conceivable grounds to explain its decision. It is at this point, however, that the analysis becomes murky. All of the rationales suggested in the Court’s opinion are framed in brief, cryptic terms. Some of them, when taken literally, make little sense in terms of the basic principles of American democracy. More importantly, the Court did not appear to grasp the magnitude of the issues with which it was dealing, from the perspectives of American constitutional and political theory. Likely, it is for these reasons that *Klein* has played so limited a role in the shaping of modern American constitutional law. In the discussion that follows, we explore the various interpretive permutations and combinations to which the Court’s opinion in *Klein* may give rise. After that discussion, we describe the important insight of democratic theory that should be deemed to lie at the heart of the *Klein* decision, even if (as seems likely) the *Klein* Court itself may have failed to recognize the full theoretical implications of its own conclusions.

B. *The Alternative Constructions of Klein*

1. *Construction 1: Congress May Not Dictate to the Courts How to Interpret the Constitution.*—Although Congress purported to employ its presumably broad power under Article III, section 2, to make exceptions to the Supreme Court’s appellate jurisdiction, the Court correctly rejected this effort as little more than a sham: “[T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny pardons granted by the President the effect which this court has adjudged them to have.”²⁶ While the statute dictated that pardons were not to be considered by the Supreme Court on appeal, the Court “had already decided that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty.”²⁷ The Court’s point appears to be sound: In a society governed by a countermajoritarian Constitution, the very majoritarian branches limited by that document may not usurp the function of interpreting the document’s terms. This is nothing more than a summary restatement of the reasoning of both Hamilton in *Federalist No. 78*²⁸ and Chief Justice John Marshall in *Marbury v. Madison*. While several

²⁵ *Id.* at 147. The Court went on to say, “We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.” *Id.*

²⁶ *Id.* at 145.

²⁷ *Id.*

²⁸ THE FEDERALIST NO. 78, at 463–71 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706 (2003).

scholars have challenged this assertion of judicial supremacy, it surely is not inconsistent with prevailing doctrinal and theoretical notions of judicial power for the Court to assert this authority.²⁹ Even if one were to postulate a very different model of the judicial role, whereby each branch of government could determine for itself the extent of the constitutional limits on its authority,³⁰ the congressional action invalidated in *Klein* would still have been unconstitutional. For rather than simply state that the pardon means what Congress believes it means, Congress sought to have the judiciary invoke the congressional determination as part of the adjudicatory process. If Congress wishes to make use of the legitimacy of the politically insulated federal judiciary, it must simultaneously allow the judiciary to make its own determinations.³¹

If this were all the Court had found, the case would still be important as one of a number of Supreme Court assertions of its ultimate authority to interpret the terms of the Constitution. But the Court immediately proceeded to embark down some very cryptic—and, on occasion, misguided—lines of analysis.

2. *Construction 2: Congress May Not Prescribe “a Rule of Decision in Causes Pending” in Its Favor.*—After noting the primary purpose of the law was “to deny to pardons granted by the President the effect which this court had adjudged them to have,” thereby seemingly invoking the principle of judicial supremacy in constitutional interpretation, the *Klein* Court immediately proceeded to shift its reasoning to a much less compelling logic. The opinion noted that in the law, “the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress.”³²

By means of a rhetorical question, the Court then provided the second conceivable rationale for its holding:

What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal Can we do so without allowing one party to the controversy to decide in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?³³

³⁰ See, e.g., Paulsen, *supra* note 28.

³¹ See *Yakus v. United States*, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting) (“It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them.”).

³² *Klein*, 80 U.S. (13 Wall.) at 146.

³³ *Id.*

Here the Court appears to be saying one of two things: First, Congress may not constitutionally allow one party to decide the case in its own favor, and second, Congress may not “prescribe rules of decision” to the courts in pending cases. In terms of the strength of the Court’s rationale, however, a great deal depends upon which of the two points the Court intended to make.

Recall the fundamental premise of constitutional democracy that the Court may not invalidate a federal statute unless that law violates the Constitution. What, one may ask, is unconstitutional about Congress directing either result, assuming such direction does not usurp the judicial power to interpret the Constitution? While the Court never really answers this question, in one sense it is not difficult to find the constitutional basis for a holding that prohibits Congress from directing the result in a particular case. The resolution of individual cases—including the process of the application of general law in fact-specific contexts—clearly falls within the concept of “judicial” power, as a definitional matter. Thus, Congress may not constitutionally adjudicate individual disputes, because to do so would constitute the performance of a nonlegislative function, in violation of Article I’s vestiture in Congress of nothing more than the “legislative power.”³⁴ If Congress may not itself resolve individual litigations, its direction to the courts as to how to resolve specific disputes is constitutionally problematic.

It is by no means clear, however, that the Court intended to confine its constitutional rationale to the legislative resolution of an individual case. First, the legislation challenged in *Klein* appeared to do far more than simply resolve the individual litigation pending before the Court. Rather, it was framed in the traditionally general terms that characterize legislation, applying to *all* cases in which pardons had been issued to former Confederates. Second, the Court’s opinion expressed constitutional concern with more than a congressional effort to legislatively resolve an individual litigation. Indeed, the Court’s suggestions that Congress lacks constitutional authority either to “decide [a litigation] in its own favor” or “prescribe rules of decision” in cases pending before the courts make little constitutional sense. Of course, if by the former suggestion the Court meant simply that Congress may not prescribe the result in an individual case, for reasons already discussed the point would be sound. The Court’s statement, though, does not appear to be so confined because its logic is not limited to the decision of *a single case* in which the government is a party in the government’s favor. Rather, the Court’s statement would apply to congressional resolution of *all* litigation in which the government is a party. On the other hand, if Congress seeks to influence the resolution of an individual case, even one in which the federal government is a party, simply by altering the sub-constitutional landscape through enactment of generally applicable legislation affecting the outcome of the particular case, it is difficult to understand

³⁴ U.S. CONST. art. I, § 1.

why the legislation is unconstitutional. Congress possesses the power to alter the general law in constitutionally valid ways, and that change in general law must control, even in pending cases.³⁵ Put bluntly, the Court is wrong in its statement that Congress lacks constitutional authority to “prescribe rules of decision to the Judicial Department of the government in cases pending before it,” even in those to which the government is a party, at least to the extent the statement was intended to extend beyond legislative resolution of a particular litigation or the resolution of issues of constitutional interpretation.³⁶

3. *Construction 3: Congress May Not Prohibit the Court from “Giv[ing] the Effect to Evidence Which, in Its Own Judgment, Such Evidence Should Have”*.—Until this point, we have seen that the Court in *Klein* provided two probably sound rationales for its decision: that Congress may neither control the judiciary’s interpretation of the Constitution nor direct the resolution of an individual suit. In addition, we have seen that the Court may have seriously undermined the force of these holdings by suggesting the insupportable rationale that Congress may not, through the enactment of generally applicable legislation, alter the governing rule of decision in a pending litigation. Lost in all this, however, is the most subtle and insightful—yet also most controversial—of the possible rationales for the Court’s conclusion that the statute purporting to restrict its jurisdiction was unconstitutional

The Court put forth this rationale in its attempt to defend its broad assertion that Congress may not prescribe rules of decision in pending cases. In defending this assertion, the Court sought to distinguish its earlier decision in *Pennsylvania v. Wheeling and Belmont Bridge Co.*,³⁷ where

after a decree in this court that the bridge, in the then state of the law, was a nuisance and must be abated as such, Congress passed an act legalizing the structure and making it a post-road; and the court, on a motion for process to enforce the decree, held that the bridge had ceased to be a nuisance by the exercise of the constitutional powers of Congress, and denied the motion.³⁸

The *Klein* Court distinguished *Wheeling Bridge* because in that case “the court was left to apply its ordinary rules to the new circumstances created by the act” while “[i]n the case before us no new circumstances have been created by legislation.”³⁹ In the instant case, “the court is forbidden to give

³⁵ See, e.g., *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

³⁶ The modern day Supreme Court has said as much. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (noting that “later decisions have made clear” that *Klein*’s prohibition on congressional prescription of rules of decision in pending cases “does not take hold when Congress ‘amends applicable law’” (quoting *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 441 (1992))).

³⁷ 59 U.S. (18 How.) 421 (1855).

³⁸ *Klein*, 80 U.S. at 146.

³⁹ *Id.* at 147.

the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.”⁴⁰ This sentence establishes that the *Klein* Court did not mean what its earlier words literally suggest because, if it did, it would have been impossible to distinguish *Wheeling Bridge*: Congress’s statute legalizing the bridge clearly prescribed a rule of decision in a pending case. In distinguishing the *Wheeling Bridge* decision, though, the *Klein* Court made clear what so troubled it about the challenged statute in *Klein*: The law forbade the judiciary from giving the effect to the evidence that it deemed it should have. The key problem, then, was not that Congress had changed the governing rule of decision, as it had in the statute upheld in *Wheeling Bridge*. Rather, the constitutional problem with the statute challenged in *Klein* was that Congress *had not* changed the governing rule of decision. Instead, it had sought to control the outcome of the case, not by altering the governing substantive law, but instead *by manipulating the evidentiary inferences the judiciary could make in applying that preexisting substantive law*.

There are two conceivable constitutional difficulties with this congressional control of evidentiary inferences, though the Court did not really make clear which of the two caused it concern. First, the Court could have been troubled by congressional control of evidentiary inferences because it deemed the manner of resolution of individual suits to be exclusively a judicial function. So characterized, the judicial authority would not only extend to determining the outcome of particular litigation; it would also include the power to determine the significance of particular evidence within a category of litigation. Second, the *Klein* Court’s distinguishing of *Wheeling Bridge* underscores the Court’s concern with congressional attempts to alter substantive law indirectly through manipulation of applicable procedure. Congress may seek to change existing law by altering or amending the preexisting legal landscape through substantive legislation (as the *Klein* Court found Congress had done in the *Wheeling Bridge* situation), or it may instead seek to do what amounts to the same thing by purporting to leave existing law in place but altering that law indirectly through procedural or evidentiary manipulation (as the Court appeared to conclude Congress had sought to do in the legislation overturned in *Klein*). The former method is constitutional, the Court concluded, while the latter is unconstitutional.

4. *The Import of Klein for American Constitutional and Political Theory.*—After parsing the Court’s opinion in *Klein*, we are left with five conceivable constitutional dictates growing out of the case: (1) Congress may not control or direct the Court’s interpretation of the Constitution; (2) Congress may not dictate the outcome of an individual litigation; (3) Congress may not dictate the rule of decision in pending cases; (4) Con-

⁴⁰ *Id.*

gress may not dictate the rule of decision in cases in which the federal government is a party; and (5) Congress may not alter the substantive law by dictating how a court should weigh competing evidence. The first possibility finds support in the Court's opinion, and, for reasons previously mentioned,⁴¹ constitutes a legitimate means of maintaining separation of powers and constitutional supremacy. In contrast, while the third and fourth possibilities find an arguable basis in both the text of the opinion and subsequent Supreme Court interpretations of *Klein*,⁴² neither makes sense, in light of accepted principles of separation of powers and constitutional structure. As long as the controlling rule of decision does not reverse a judicial decision already made⁴³ or attempt to provide a controlling interpretation of the Constitution, there exists no reason, in constitutional theory or doctrine, why Congress may not enact subconstitutional, generally applicable rules of decision, even for pending cases in which the federal government is a party, which have the effect of deciding the case in the government's favor.

The *Klein* Court's language, taken literally, may be thought to support these broader—and largely indefensible—pronouncements of constitutional structure. When put in context, however, it appears likely that the opinion intended to make a far more modest—but nevertheless insightful and foundational—point about the nature of the relationship between the legislative and judicial branches. The Court was saying that while Congress has authority to enact governing generally applicable substantive law, it may not dictate to the court how to resolve cases brought pursuant to that law, without actually changing that law accordingly.

A constitutional prohibition on the legislative resolution of cases may apply on two levels, “micro” and “macro.” On the micro level, the restriction prohibits legislative resolution of individual litigations in a manner inconsistent with controlling law, absent a corresponding alteration in that law. This concern is clearly reflected in the *Klein* opinion, even though one might debate exactly how the principle applies to the facts of that case itself.⁴⁴ On the macro level, the prohibition extends to even more generalized directives as to the use of evidence or procedures in the resolution of categories of cases.⁴⁵ In both situations, the Court is saying that while Congress may prescribe the generalized, subconstitutional law that the judiciary is to interpret, apply, and enforce in the course of adjudications, it may not direct how the adjudication is to be resolved, either on the specific or general levels.

⁴¹ See discussion *supra* Part II.B.1.

⁴² See, e.g., *United States v. Sioux Nation*, 448 U.S. 371 (1980).

⁴³ See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (noting that Congress may not overrule specific decisions of the federal courts).

⁴⁴ See discussion *supra* Part II.B.2.

⁴⁵ See discussion *supra* Part II.B.3.

When stated in such a “bottom line” fashion, neither the micro nor macro levels of judicial protectionism is free from doubt. On the micro level, a formalist rationale for branch separation is by no means universally accepted.⁴⁶ Thus, congressional performance of what is technically a judicial function may not be inherently unconstitutional. On the macro level, if taken literally, the rationale would prevent Congress from providing any evidentiary presumptions or substance-specific procedural directives—hardly a feasible conclusion in the modern world of judicial-legislative interaction. Moreover, an argument could be fashioned that the greater power to legislate substantive law subsumes the lesser power to establish the generalized method for adjudicating that law. Indeed, it may be reasonable to characterize the “substantive law” as a single package that includes both the substantive directives enacted by Congress, and whatever evidentiary or procedural restrictions Congress has chosen to impose on the adjudication of those directives.⁴⁷ It may be, then, that by attempting to distinguish the *Wheeling Bridge* decision from the case before it, the *Klein* Court was groping towards a very different theoretical rationale. It is our position that this is indeed the case, though we acknowledge that the Court itself may not have fully grasped the subtle ramifications of the distinction it was drawing.

In *Wheeling Bridge*, Congress had chosen to alter the governing substantive law in a constitutionally permissible manner. Where Congress has done this, it is the duty of the court, even in the course of an ongoing suit,⁴⁸ to enforce the substantive law as it has been altered, unless it finds the alteration to violate the Constitution. In *Klein*, on the other hand, Congress did not directly alter governing substantive law; both before and after the challenged statute had been enacted, the controlling law remained the same: An individual found to be “disloyal” during the rebellion could not reacquire previously seized properties.⁴⁹ However, before enactment of that law, in light of relevant judicial precedent, evidence of a pardon would be deemed proof that the individual had, in fact, been loyal. In contrast, following enactment of the challenged statute, evidence of a pardon would be deemed conclusive proof that the individual had been disloyal.⁵⁰

In addition to the serious constitutional difficulty that such a law sought to preempt judicial authority to interpret the ramifications and implications of a specific constitutional provision—the executive’s power to is-

⁴⁶ See Martin H. Redish & Elizabeth J. Cisar, “If Angels Were to Govern”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991).

⁴⁷ See, e.g., Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85.

⁴⁸ In situations where a court has already issued a final decision, legislative action seeking to reopen that litigation would be unconstitutional. See *Plaut*, 514 U.S. 211. However, where—as in *Wheeling Bridge*—the judicial relief that had been issued was ongoing, the court must adhere to a change in the governing substantive law. *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855).

⁴⁹ See discussion *supra* Part II.A.

⁵⁰ *Id.*

sue pardons⁵¹—the legislation altered the meaning of the prior law but did so only indirectly, through the device of an evidentiary presumption. Both before and after enactment of the statute, controlling substantive law was that “disloyal” Southerners were legally disabled from reacquiring their seized property. Even had there been no interpretation of a constitutional term involved, the challenged statute achieved a fundamental alteration in substantive law through means other than a direct alteration in that law. The end result was that while the controlling substantive law purportedly remained the same, in reality the essence of that law had been effectively transformed into something very different.

When the dust settled, then, it was possible that the public had become the victim of a type of political shell game: Congress may have effectively deceived the electorate as to what the governing substantive law actually was.⁵² If rationalized on the basis of judicial concern over this legislative deception, the macro version of the restriction on legislative power to dictate the resolution of cases appears not nearly as unreasonably overwhelming as it might have at first seemed. Instead of constitutionally prohibiting *any* form of procedural or evidentiary directive to the judiciary, this legislative deception model limits the reach of the constitutional restriction to situations in which the procedural or evidentiary modification imposed by Congress has the effect of altering the essence of the underlying substantive law. Of course, it will not always be a simple matter to distinguish between the two situations. This is an issue to which we devote attention in a later discussion. For 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.⁵³

The legislative deception rationale also explains the micro version of that restriction. Viewed from the perspective of the legislative deception model implicit in *Klein*, the prohibition on the legislative resolution of individual suits is explained as an effort to prevent Congress from altering the legal and political *impact* of the controlling generalized substantive law in specific contexts without also altering that substantive law *itself*. Were Congress permitted to leave controlling generalized law intact but simultaneously direct the resolution of particular disputes in a manner inconsistent

⁵¹ U.S. CONST. art. II, § 2; *see* discussion *supra* Part II.B.1.

⁵² Whether this was actually the case in the *Klein* context is by no means clear. *See* discussion *infra* note 78. However, for reasons we subsequently explain, it would be unwise to have application of the legislative deception model turn on an empirical assessment of the extent to which the public was actually deceived in the particular case. *See* discussion *infra* Part III.B.3.c.

⁵³ *See* discussion *infra* Part III.B.3.

with the judiciary's assessment of the controlling substantive law, Congress would be able to deceive the electorate into believing the law has remained the same while in reality it has not.

When viewed together, the constitutional concerns about both micro and macro legislative manipulation of the judicial decisionmaking process can be rationalized by one overriding constitutional concern: the fear that Congress will undermine the sound operation of the representative democratic process by enlisting the judiciary in a plan to deceive the electorate. It is this synthesis of the macro and micro concerns about congressional disruption of the democratic process by means of the legislative deception of the electorate, achieved through congressional manipulation of the judicial process, that lies at the theoretical core of *Klein*. It is this focus on the concern with legislative deception that should be gleaned from the *Klein* opinion as its greatest contribution to American political and constitutional theory.

In the following section, we consider the validity of the *Klein* Court's implicit concern over the danger of legislative deception, from the perspective of both democratic and constitutional theory. While we acknowledge a number of potential difficulties with our theory of legislative deception,⁵⁴ it is our position that the concern to which we point, and which underlay much of the analysis contained in the Court's opinion in *Klein*, is central to the preservation of democratic values. When a legislative body uses evidentiary or procedural mechanisms or legislative resolution of individual litigations to indirectly alter the "DNA" of its substantive law, a significant danger exists that the legislative body is misleading the electorate into believing that the law remains unchanged. In such a situation, the electorate is unable to judge its legislators on the basis of their support for or opposition to proposed legislative change, because it has been confused as to whether any such change has actually been implemented.

III. LEGISLATIVE DECEPTION, POLITICAL COMMITMENT, AND DEMOCRATIC THEORY

A. The Centrality of the Electoral Process in Democratic Theory

The concept of constitutional democracy necessarily implies that the bulk of subconstitutional policy choices will be made by those who are representative of and accountable to the electorate. In the words of a leading theorist, "everything necessary to [democratic] theory may be put in terms of (a) legislators (or decision-makers) who are (b) legitimated or authorized

⁵⁴ See discussion *infra* Part III.B.3.

to enact public policies, and who are (c) subject or responsible to popular control at free elections.”⁵⁵

Through the process of elections, a democratic system assures that, on some basic level, those who make the bulk of normative policy choices will represent the positions of those who elected them. In this sense, the democratic process assures that individuals will be able to control their lives, if only indirectly. The process is by no means perfect. A legislator faces many decisions, and that she agrees with a member of the electorate on one issue does not ensure that they will agree on another issue.⁵⁶ But the value of the electoral process is highlighted by considering the alternatives. An imperfect representative process fosters the values that underlie democracy far more than would even a benevolent dictatorship.⁵⁷

It is true that once elected, the chosen representative is not bound to adopt the normative positions of the electorate’s majority on each—or, indeed, any—piece of proposed legislation.⁵⁸ But it is that point that underscores the second function performed by the electoral process: accountability. Even under the version of democratic theory that posits an extremely limited role for the electorate in making policy choices,⁵⁹ the members of the electorate are assumed to play an important role on election day, by determining whether their elected representatives have done so in a manner the electorate deems acceptable. Absent this principle, the essential element of democracy is lost. Without an ability, through resort to the electoral process, to oust elected officials deemed by the populace to be unrepresentative of its wishes, the electorate has no means of assuring that government is representative or in any way checking those who have been vested with governing power. This, in short, describes what we refer to as the “political commitment” principle.⁶⁰

⁵⁵ H.B. MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY 103 (1960); *see also* J. ROLAND PENNOCK, DEMOCRATIC POLITICAL THEORY 310 (1979) (“Elections are thought to constitute the great sanction for assuring representative behavior, by showing what the voters consider to be their interests by giving them the incentive to pursue those objectives.”).

⁵⁶ Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1545–46 (1988). In the words of Sunstein, “[i]n any representative democracy, there is simply too much slippage between legislative outcomes and constituent desires.” *Id.* at 1546.

⁵⁷ ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 131–32 (1956). As democratic theorist Robert Dahl has stated in response to such a line of argumentation, “[e]lections and political competition do not make for government by majorities in any very significant way, but they vastly increase the size, number, and varieties of minorities whose preferences must be taken into account by leaders in making policy choices.” *Id.* at 132.

⁵⁸ *See, e.g.*, HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 14–20 (1967) (discussing Hobbes’s political theory, which advocated a significant amount of implied authority to elected officials).

⁵⁹ *See generally* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1942).

⁶⁰ For different uses of the political commitment principle, *see* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 137–38, 156–61 (1995).

Skeptics might respond that while the political commitment principle may make sense purely as a theoretical matter, on a practical level it breaks down. The stark reality is that rarely does the populace have awareness of, much less serious interest in, the content of federal legislation, the argument proceeds. The realities, however, are far more complex than this simplistic argument suggests. The populace's awareness of and concern with proposed legislation is similar to the impact of advertising on consumers. It is said that half of a company's advertising efforts are probably wasted; the problem is that no one knows which half that is. Similarly, there can be little doubt that *some* legislation is of enormous interest to different segments of the electorate. This is true of proposed laws dealing with such subjects as the environment, welfare, health care, tariffs, tax relief, defense spending, and drug regulation. Other laws may be of much narrower interest, but nevertheless remain of great significance to well-defined, albeit more limited, interest groups. It is impossible for anyone—especially a court—to determine, in an individual case, exactly which laws are matters of public interest. Thus, the safest course is for a reviewing court to proceed on the assumption that the electorate is aware of all legislation enacted by its chosen representatives.

B. Political Commitment and Legislative Deception

1. *Macro Deception.*—When legislative deception occurs, the legislators purport to make a political commitment by voting for or against proposed substantive legislation. However, through contemporaneous or subsequent procedural or evidentiary modification or the legislatively dictated resolution of individual litigations,⁶¹ the legislative body has altered the essence—or “DNA”—of that underlying substantive law. It is as if Congress has enacted “law A,” but, through indirect means, has transformed into “law B,” or even “law not A.” An illustration of legislative deception is *Michael H. v. Gerald D.*,⁶² where California purported to give substantive rights to a biological father, but indirectly altered this law through use of an evidentiary presumption that the husband of the mother is the biological father and denying the individual claiming to be the biological father under such circumstances any opportunity to refute the presumption. When the dust has settled, the law effectively denies the biological father any rights, through resort to an evidentiary presumption.

Another possible example of legislative deception through procedural manipulation is a process in which the legislature enacts a substantive cause of action designed to compensate individuals who have been personally in-

⁶¹ It is our position that nothing should turn on whether the nonsubstantive modification comes contemporaneously or subsequently, though in *Klein* the modification came subsequently. See discussion *infra* Part III.B.3.a.

⁶² 491 U.S. 110 (1989).

jured by a defendant's wrongdoing, yet—either simultaneously or subsequently—dictates to the court use of a broad-based statistical model in the adjudication of those causes of action. In such a situation, the court would be required to award damages for what are, as a substantive matter, supposed to be nothing more than individualized determinations of liability, even absent any actual proof that the individual plaintiff had, in fact, been injured by the legally proscribed behavior of the defendant. As a practical matter, such legislation creates a type of “compensa-tax,” whereby companies that have engaged in behavior deemed to give rise to a socially unacceptable risk of harm will be made to transfer wealth in order to benefit classes of victims injured by such behavior, whether by the defendant or others similarly situated. Thus, through use of legislatively directed evidentiary presumptions, Congress will have implemented what is known as the “public” model of modern tort theory, even though on its face the governing substantive law purports to implement the generally very different “private rights” model of tort theory, which is premised on individualized determinations of liability.⁶³ Such legislation may or may not be socially or morally justifiable, but that is not the question posed by the legislative deception model. The issue, rather, is whether the face of the substantive directive comports with what the law actually does in practice.

There can be little doubt that legislative deception is far more invidious to the operation of the political commitment principle than such conceivable legislative practices as broad legislative delegation or secret legislative voting. In the case of legislative delegation, at least the electorate is put on notice that its legislators have declined to make a political commitment through their votes for or against proposed legislation, and may judge them accordingly at the polls.⁶⁴ Even in the case of secret legislative ballot, members of the electorate are placed on notice not to rely on how their legislators voted on proposed legislation and instead to judge them on alternative bases. In contrast, when legislation is deceptive in the manner we have described, members of the electorate have been defrauded into believing that their legislators' vote for or against a proposed law actually meant something, when the reality is far different. When Congress *simultaneously* alters the essence of a substantive law through procedural or evidentiary means, the legislators' vote on the substantive portion of the law is effectively a sham. When Congress *subsequently* alters the DNA of the substan-

⁶³ See John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 529–31 (2003) (contrasting differences among alternative theories of tort).

⁶⁴ See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985) (arguing that “[a]ll we need do is not forget there are also presidential elections and that . . . presidents are heads of administrations”). As Jerry Mashaw has argued: the dynamics of accountability apparently involve voters willing to vote upon the basis of their representative's record in the legislature. *Id.* Assuming that our current representatives in the legislature vote for laws that contain vague delegations of authority, we are presumably holding them accountable for that at the polls. How is it that we are not being represented?

tive reach of the statute, the electorate is likely unaware that its current legislators have in reality made a political commitment very different from the one made by the earlier Congress. In short, while the legislative delegation and secret ballot models contemplate *no* political commitment on the part of elected representatives, the legislative deception model is concerned with preventing *false* political commitments and the consequent disruption of the populace's performance of its intended checking role through the electoral process. Although in the former situations the voters are put on guard, in the latter situation the voters are lulled into a false sense of security about the political commitments made by their elected representatives.

2. *Micro Deception.*—Congress may deceive the electorate about the state of controlling law through manipulation of the resolution of specific litigations, as well as through adoption of generalized procedural or evidentiary rules. When Congress attempts to resolve individual litigations, it purports to leave the generalized controlling law unchanged, but effects alterations in the application of that law in specific situations by the legislative direction to the court.⁶⁵

Despite the importance of the micro legislative deception rationale for *Klein*,⁶⁶ it has had a surprisingly rocky time of it in post-*Klein* doctrine. The Supreme Court has played fast and loose with both its recognition and application of the micro rationale. In *Robertson v. Seattle Audubon Society*,⁶⁷ the Court reversed a decision of the Ninth Circuit holding an act of Congress to be a violation of separation of powers under the principles of *Klein*. The plaintiffs in two consolidated cases had challenged the statute on grounds that it directed a particular outcome in pending cases without changing the actual substance of the underlying applicable law. The appellants argued that the National Forest Service and the Bureau of Land Management's guidelines for implementing a particular forestry management plan conflicted with the directives of prior environmental statutes.⁶⁸

Meanwhile, Congress enacted legislation that established the "Northwest Timber Compromise."⁶⁹ The provision (embedded in an appropriations bill) established a plan to increase timber harvesting in some areas and decrease it in other areas. In it, Congress referred to the two pending cases

⁶⁵ It is possible, of course, that Congress could direct resolution of a particular case in the exact same way that the adjudicating court would have resolved it even absent congressional direction. We cannot know this at the outset of the litigation, however, and in any event, if it is true then there was no point to the congressional direction in the first place.

⁶⁶ See discussion *supra* Part II.B.4.

⁶⁷ 503 U.S. 429 (1992).

⁶⁸ *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311 (9th Cir. 1990). These acts included the Oregon and California Lands Act, 43 U.S.C. § 1181 (2000), the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–1782 (2000), and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703–711 (2000).

⁶⁹ Dep't of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745–50 (1989).

within the Ninth Circuit by name and case number and insulated sections (b)(3) and (b)(5) from judicial review.⁷⁰ Essentially, the new law provided that for purposes of judicial review, if the agencies acted pursuant to the requirements identified in the preexisting environmental legislation, then they would satisfy the statutory requirements of the preexisting environmental statutes. Congress presumably could have specifically identified those preexisting laws. Instead, it referenced the specific cases in which the statutes had been considered. In response to this provision, the district courts dismissed the actions for want of jurisdiction and the plaintiffs appealed to the Ninth Circuit.

The Ninth Circuit held the new law unconstitutional under *Klein*,⁷¹ finding that Congress had exceeded its constitutional authority by directing a particular result in a pending case without repealing, amending, or changing the underlying substantive law. The court found that Congress had not modified the underlying law but instead had enacted a provision within an appropriations bill that directed the court to reach a specific result and to make certain factual findings within the two pending cases.⁷² This was a threat to judicial independence, and therefore a violation of separation of powers.

In reversing, the Supreme Court held that the provision actually did modify the substantive law embodied in the preexisting provisions and therefore did not direct particular findings in particular cases without changing controlling law.⁷³ In response to the argument that the legislation specifically mentioned the pending cases by number and therefore constituted an attempt to interfere with the judicial power, the Court explained that Congress did so merely because those cases contained references to the underlying statutes Congress was modifying.⁷⁴ The Court concluded that, whether or not Congress lacked constitutional authority to decide individual cases, the legislative enactment in question “compelled changes in law, not findings or results under old law.”⁷⁵

⁷⁰ *Seattle Audubon*, 914 F.2d at 1313 (“Without passing on the legal and factual adequacy of [prior agreements that defined timber sales] . . . the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section . . . is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160* and *Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99* . . . and the case *Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR*. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States.”).

⁷¹ *Id.* at 1316–17.

⁷² *Id.* at 1316 (“Section 318 does not, by its plain language, repeal or amend the environmental laws underlying this litigation, even though some subsections add additional requirements.”).

⁷³ *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429 (1992).

⁷⁴ *Id.* at 440.

⁷⁵ *Id.* at 438.

There are two troubling features of the Supreme Court's decision in *Robertson*. First, it is difficult to understand how a statute that expressly directed a result in two specifically mentioned pending litigations can be deemed not to resolve specific litigation. Second, whether or not the Court was correct in its assessment of the specific situation involved in *Robertson* itself, it is surprising that the Court would suggest that the constitutionality of a congressional attempt to alter the outcome of litigation without simultaneously altering preexisting, general substantive law is an open question.

As to the former question, it is at least arguable that the *Robertson* Court was correct in concluding that the congressional action had, in fact, altered preexisting law; the statute did, after all, provide that specified behavior would now be deemed to satisfy certain statutory requirements that it had not previously satisfied. Any legislation, however, that directs findings in specifically referenced litigation should categorically be deemed to violate *Klein*, if only as a prophylactic effort to avoid confusion. If Congress is truly changing substantive law, it can do so without express reference to specific pending cases, and any case-specific reference in legislation is certainly suspect.

Second, whether or not the Court was correct in its assessment of the specific situation involved in *Robertson* itself, it is surprising that the Court would suggest that the constitutionality of a congressional attempt to affect the outcome of litigation without simultaneously altering preexisting, general substantive law is an open question. There is no conceivable context in which Congress could constitutionally alter the result in a specific litigation without simultaneously altering preexisting general substantive law. We are concerned that the Supreme Court could even countenance such a possibility. Whether or not the Court agreed with the Ninth Circuit's application of the *Klein* standard, there should have been no doubt about the validity of the general principle that the lower court had invoked.

3. *Potential Difficulties with the Legislative Deception Model.*—

While this description of how legislative deception negatively impacts the political commitment principle provides the rationale for the legislative deception model, a number of gaps remain to be filled and potential criticisms to be considered. Five difficult questions need to be answered: (a) If Congress has openly adopted the procedural or evidentiary modification of the substantive law, or has openly legislated the resolution of a particular case, how can it be thought that the public has been deceived? (b) Even in situations in which procedural or evidentiary modifications have transformed underlying substantive law, would not individuals directly affected by the alteration make sure to communicate its existence to the electorate? If so, why would there be any need to have the judiciary police legislative deception? (c) Is it reasonable to presume that the electorate is even aware of, much less actually cares about, how its chosen representatives vote on legislation? (d) Since all procedural and evidentiary rules will inevitably

impact the enforcement of substantive rights in some way, why are *all* such rules not deemed to be impermissible alterations of a preexisting substantive political commitment? Yet, if it is conceded that all procedural and evidentiary rules may in some sense impact the substantive rights being enforced, why disapprove of such a connection only in certain contexts? (e) Is it really feasible to determine whether a particular procedural or evidentiary modification has, in fact, altered the essence or “DNA” of a particular substantive statute? We believe that each of these questions can be answered satisfactorily, and as a result, both the content and rationale of the legislative deception model will become more understandable.

a. Openness of procedural or evidentiary modification.—It is true that a legislative body does not implement the deception through the adoption of secret codicils. Either contemporaneously or subsequently, the legislature modifies the substantive statute through open processes.⁷⁶ Thus, one might reasonably question our characterization of this alteration as “deceptive”; it is there, on the statute books, for all to see.

What may *not* be so readily recognizable to the public eye, however, is the true connection between procedural or evidentiary modifications and the transformation of the substantive law. The modifications that concern us, though technically open and available for all to see, are analogous to the small print boilerplate that effectively alters the terms provided for in larger print in the body of a contract. There is little question that such small print contractual modifications are appropriately characterized as “deceptive,” even though as a technical matter the alteration is there for the consumer to read.⁷⁷ We do not demand that all consumers possess the perspicacity of an experienced attorney. Like the deceptively small print alteration in a consumer contract, a procedural or evidentiary rule that alters the essence of underlying substantive law implements its change in a manner not likely to be recognized by most political consumers. The important functions of electoral checking and accountability are thereby significantly undermined.

It is true that we will not be able to ascertain empirically, in the individual case, whether a procedural or evidentiary modification actually has misled the electorate. Indeed, in certain politically celebrated contexts, it may be quite clear to all concerned what Congress is actually attempting to do substantively, even when it seeks to do so indirectly through procedural or evidentiary manipulation.⁷⁸ In some situations, then, it may seem overly

⁷⁶ Indeed, commentators have argued that the essence of a substantive right created by a legislative body necessarily includes the procedural baggage imposed by that body on the enforcement of that right. See Easterbrook, *supra* note 47.

⁷⁷ See, e.g., *Donnelly v. Illini Cash Advance, Inc.*, No. 00C094, 2000 WL 1161076 (N.D. Ill. Aug. 16, 2000) (asserting that an affirmative statement on front of contract that no security interest is taken defeats boilerplate language to the contrary on back of the contract).

⁷⁸ It may well be true, for example, that in *Klein* it was widely understood how Congress was actually attempting to alter substantive law. See discussion *supra* Part II.A.

formalistic to draw a rigid distinction between direct substantive change and indirect alteration through resort to procedure or evidentiary presumptions. But the fact that we cannot be sure, in the individual case, whether use of indirect forms of modification will actually deceive the electorate should not dictate rejection of the legislative deception model. It is, rather, far wiser to risk overprotection than underprotection.

b. Communication by interested groups.—For much the same reasons, we cannot allow a court to attempt to determine, in the individual instance, whether advocacy groups have adequately communicated and explained to the electorate as a whole the nature of the profound alteration of controlling substantive law by simultaneous or subsequent procedural or evidentiary modification. It is simply too unpredictable a safety valve, and too difficult a task for a reviewing court to ascertain the adequacy and clarity of political debate in the individual instance. Thus, a court may be required to ignore existence of extensive political debate over one particular proposed procedural modification, in order to avoid underprotection in other instances in which it would, as a practical matter, be impossible for a court to make such a determination.⁷⁹

c. The public's unawareness of legislative votes.—It might be suggested that even if our fear of legislative deception were grounded in reality, little turns on this fact as a practical matter, because the public is generally unaware of how its legislators vote on proposed legislation. The first point to note in response is the seeming inconsistency between this challenge to the legislative deception model, on the one hand, and the argument that the public will be readily able to see through the technical distinctions between direct substantive modification and indirect modification through the use of procedural or evidentiary devices, on the other.⁸⁰ Presumably, both cannot be true.

This inconsistency underscores the empirical uncertainty that pervades our ability to judge the extent of the public's knowledge and understanding of its representatives' role in the legislative process. Where it is impossible to know what the public's actual understanding and awareness is in a particular case, it is advisable to adopt a prophylactic approach. Such an approach presumes, in all cases, that the public considers how its legislators vote in deciding on their electoral retention. Any less formalistic test risks underprotecting the foundations of our democratic system. It is, as already noted, wiser to risk overprotection of the essential elements of American democracy than to risk their underprotection.

⁷⁹ It is certainly conceivable that the *Klein* case itself was an instance in which widespread political debate existed yet the Court proceeded on the implicit assumption of lack of public awareness.

⁸⁰ See discussion *supra* Part III.B.3.a.

d. The substantive-procedural overlay.—As part of its line of cases stemming from *Erie R.R. v. Tompkins*,⁸¹ the Supreme Court has recognized the inevitable intersection between substance and procedure.⁸² Moreover, in the Rules Enabling Act, Congress expressly prohibited the Federal Rules of Civil Procedure from abridging, enlarging, or modifying a substantive right.⁸³

Far from undermining the legislative deception model, recognition of this inevitable intersection underscores the importance of inquiring into the possibility of legislative deception through procedural manipulation. While the substantive-procedural intersection in some instances is inevitable, the nature and extent of that intersection may vary. As already noted, the Rules Enabling Act dictates that a Federal Rule may not modify a substantive right; yet it simultaneously contemplates the existence of procedural rules that will inevitably impact substantive rights. If the inevitable impact of a procedural rule on the enforcement of substantive rights automatically modifies those rights, then no procedural rules could be promulgated. Clearly, the Rules Enabling Act contemplates *some* intersection; the question is, how much? For present purposes, however, we need not attempt to resolve the mysteries of the Rules Enabling Act. All that we need do is place within a special category those procedural (or evidentiary) rules that do a great deal more than incidentally “affect” or “impact” underlying substantive rights—namely, those rules that *effectively transform the essence* of those substantive rights. One might question whether it is feasible to separate such situations from other substantive-procedural interactions. It is to this question that we now turn.

e. Ascertaining the “DNA” of substantive law.—To this point, we have indicated that the legislative deception model is triggered only by evidentiary or procedural rules that alter the “DNA” of underlying substantive law. We have, however, spoken only briefly as to how to determine whether a law’s “DNA” has been transformed.⁸⁴ It is possible to fashion a reasonably satisfactory rule of thumb that, though not always free from controversy or uncertainty, will provide a reviewing court with the necessary guidance in applying the restrictions of the legislative deception model.

⁸¹ 304 U.S. 64 (1938).

⁸² See, e.g., *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958) (establishing a test that looks to the impact of federal procedural rules on substantive state interests). As one of us has previously written, this recognition derives from acknowledgement “that procedural rules often will have an inherent and inescapable spillover onto nonprocedural interests and that to ignore such substantive consequences will not prevent them; it merely will allow them to occur without any regulation or societal control.” Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 598 (2001).

⁸³ 28 U.S.C. § 2072(b) (2000).

⁸⁴ See discussion *supra* notes 8, 52–53, 61–64 and accompanying text.

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. Even if this inquiry turns out not to resolve all problems of application, the fact that a general legal standard may encounter difficulty in its application in specific contexts surely does not disqualify it from use.

Applying this standard to the facts of *Klein*, it is clear that the case was correctly decided. To transform the law from saying that issuance of a pardon allows the individual to recover property ("disloyalty" *before* the statute challenged in *Klein*) to one saying that issuance of a pardon conclusively prevents such property recovery ("disloyalty" *after* the challenged statute) dramatically alters the political impact of that law. We have previously provided several additional examples of such impermissible transformations.⁸⁵ To be sure, relatively speaking there will be few instances of such deception. This is, of course, as it should be, since it would be extremely problematic were a democratically elected legislative body to seek to deceive the populace with regularity. In those instances in which such deception exists, however, it should not be an impossible task to unearth it.

IV. LEGISLATIVE DECEPTION AND SEPARATION OF POWERS

Until now, we have established that Congress may employ procedural or evidentiary devices to disguise its modifications of governing substantive law and in so doing undermine the democratic goals of checking, accountability, and representation. The fact that legislation undermines even the fundamental elements of the democratic process, however, does not necessarily imply that it is unconstitutional. It is only when those precepts of democratic theory are in some way embodied in or protected by the Constitution that the judiciary may invalidate an enactment that contravenes them. Thus, absent grounding in the Constitution, the legislative deception model could be no more than an elaboration of normative political theory.

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.⁸⁶

⁸⁵ See *supra* text accompanying notes 62–63.

⁸⁶ U.S. CONST. art. III, § 1.

Prior to the Constitution's adoption, it was not uncommon for colonial assemblies to function "as courts of equity of last resort, hearing original actions or providing appellate review of judicial judgments."⁸⁷ The Framers recognized these legislative violations of judicial integrity. In *Federalist No. 48*, Madison warned, "[the legislature's] constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments."⁸⁸ The framers vested the judicial power in an independent and insulated judiciary principally to rectify these problems.⁸⁹

Article III's guarantee of life tenure and protection against salary reduction prophylactically insulates the judiciary from the majoritarian branches.⁹⁰ But to have confined the scope of judicial independence protections exclusively to these institutional guarantees would have rendered the framework fatally vulnerable to legislative erosion. If Congress were able to control either the method or conclusion of the judicial decisionmaking process, the formal protections of independence would prove to be of little value. Instead, the legislative branch would be in a position to undermine the integrity of the judicial branch and usurp its constitutionally vested authority. Thus, it is appropriate to ground the prohibition on legislative deception in the constitutional guarantee of separation of powers.

None of this analysis is inconsistent with the established understanding that Congress possesses broad power to regulate the jurisdiction of the federal courts.⁹¹ It is one thing to exclude completely the federal courts from adjudication; it is quite another to vest the federal courts with jurisdiction to adjudicate but simultaneously restrict the power of those courts to perform the adjudicatory function in the manner they deem appropriate. In the for-

⁸⁷ *Plaut v. Spendthrift Farm Inc.*, 514 U.S. 211, 219 (1995) (citing GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 154-55 (1969)).

⁸⁸ THE FEDERALIST NO. 48, at 251 (James Madison) (Gary Wills ed., 1982); see also GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 322-23 (1992) ("As early as the 1780s many were already contending that only the judiciary in America was impartial and free enough of private interests to solve [the] problem [of protecting private property and minority rights]. . . . These efforts to carve out an exclusive sphere of activity for the judiciary, a sphere where the adjudicating of private rights was removed from politics and legislative power, contributed to the remarkable process by which the judiciary in America suddenly emerged out of its colonial insignificance to become by 1800 the principal means by which popular legislatures were controlled and limited. The most dramatic institutional transformation in the early Republic was the rise of what was called an 'independent judiciary.'").

⁸⁹ As the Supreme Court has stated, "[t]he Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression." *Plaut*, 514 U.S. at 219.

⁹⁰ U.S. CONST. art. III, § 1; see Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 700-06 (1995).

⁹¹ See, e.g., *Lockerty v. Phillips*, 319 U.S. 182 (1943); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850); see also MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 24-47 (2d ed. 1990).

mer instance, by wholly excluding the federal courts, Congress loses its ability to draw upon the integrity possessed by the Article III judiciary in the public's eyes. In contrast, where Congress employs the federal courts to implement its deception, the harmful consequences to that judicial integrity are far more significant. Thus, Henry Hart was correct when he asserted that

the difficulty involved in asserting any judicial control in the face of a total denial of jurisdiction doesn't exist if Congress gives jurisdiction but puts strings on it

. . . .

. . . [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.⁹²

V. CONCLUSION

It might be suggested that our Essay illustrates all too vividly what can happen to a Supreme Court decision when scholars get a hold of it. It might be suggested that, by attempting to read a model of political theory into a relatively brief and cryptic post-Civil War decision, we seek to twist that decision beyond all recognition. In reality, the argument proceeds, the Court was probably doing nothing more than seeking to assert strong judicial authority at a time of great political stress for, and attempted congressional manipulation of, the federal judicial power.

To a certain extent, the point is well taken; we cannot assert with any level of historical confidence that Chief Justice Chase had thought through a detailed political theory designed to avoid the harms of legislative deception through legislative manipulation of the judicial process. Yet it does seem to be clear that, whatever the Chief Justice had in mind, the opinion's brief but important distinction of the situation before it from the *Wheeling*

⁹² 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); see also *Yakus v. United States*, 321 U.S. 414, 467 (1944) (Rutledge, J., dissenting) (raising doubt as to whether “Congress can confer jurisdiction upon federal and state courts in the enforcement proceedings [under the Emergency Price Control Act of 1942], more particularly the criminal suit, and at the same time deny them jurisdiction or power to consider the validity of the regulations for which enforcement is thus sought” (internal quotations omitted)). To Justice Rutledge, it was “one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements, or, what in some instances may be the same thing, without regard to them.” *Id.* at 468. In delimiting the scope of judicial independence from the legislative branch of the federal government, it is important to distinguish the unconstitutional restrictions on judicial power from the constitutionally valid congressional power to engage in generalized lawmaking. The danger to which the legislative deception model is directed is that instead of engaging in such generalized substantive lawmaking, Congress will employ the federal judiciary as an instrument of deception through the use of seemingly nonsubstantive devices that alter the essence of that substantive law.

Bridge situation must have had *something* to do with fear that Congress could employ legislatively imposed evidentiary directives to unconstitutionally disrupt the sound operation of the judicial process. The Court was necessarily concerned about an issue above and beyond the constitutional problem, expressed earlier in its opinion, that Congress was seeking to interfere with the judicial interpretation of constitutional provisions.⁹³ If that had been the Court's sole concern, it could have easily distinguished its earlier *Wheeling Bridge* decision by simply pointing out that the earlier case had not involved construction of a constitutional provision. It did not seek to distinguish its earlier decision on this ground, however. The Court's focus, instead, was on a separation of powers concern that extended also to the adjudication of subconstitutional questions. The Court's difficulty with the congressional action, then, necessarily included the fear that Congress was improperly invading the judicial province. As noted earlier, there are two conceivable ways in which Congress could invade the judicial province: either by telling the courts how to resolve individual litigations, or by enlisting the federal judiciary in a fraudulent manipulation of the substantive law through use of modifying procedural rules or evidentiary presumptions. Both, we believe, undermine the essence of the nation's commitment to the democratic process. Moreover, both violate fundamental constitutional dictates of separation of powers.

⁹³ See discussion *supra* Part II.A.