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ARTICLES

CONGRESSIONAL REGULATION OF FEDERAL COURTS' JURISDICTION AND PROCESSES: *UNITED STATES V. KLEIN* REVISITED

GORDON G. YOUNG*

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I. INTRODUCTION

Recently legislation has been proposed to limit the jurisdiction of the federal courts in busing,¹ abortion,² and school

1. See, e.g., S. 1005, 97th Cong. 1st Sess. (1981) (to amend The Civil Rights Act of 1964, 42 U.S.C. 1971, 1975a - 1975d, 2000a to 2000h-6 (1976)) (Section 1207 of S. 1005 deprives all federal courts of jurisdiction to order busing or generally to require any changes in the racial composition of public schools). As this article went to press the Senate by a vote of 58 to 38 passed S. 951 which invokes both Congress' power over jurisdiction of the federal courts under article III and its powers under section 5 of the

prayer³ cases. Such proposals are hardly new. On many occasions Congress has been asked to use its regulatory powers over the jurisdiction of federal courts to avoid the effects of decisions of those courts.⁴

Recently, the Chief Counsel to the United States Senate Subcommittee on Separation of Powers has suggested restricting the Supreme Court's jurisdiction. This restriction would be an antidote to what he views as the unwarranted imposition of the Bill of Rights' restrictions upon state governments pursuant to the doctrine of incorporation.⁵ Completely realized, the Chief Counsel's proposal would devolve upon the state courts the power to reject conclusively much of the Warren Court's work.

Is Congress' power to regulate the jurisdiction of federal

fourteenth amendment to limit the authority of the federal courts to require busing as a remedy in certain cases. 128 CONG. REC., 97th Cong., 2d Sess. S. 393-414 (1982).

2. See, e.g., S. 158, 97th Cong., 1st Sess. (1981) (Section 2 denies the lower federal courts jurisdiction to declare invalid, or to restrain or enjoin enforcement of, any state law regulating or prohibiting abortions).

3. See, e.g., S. 481, 97th Cong., 1st Sess. (1981) (to amend Chapter 81 of title 28, U.S.C.) (Sections 2 and 3 of S. 481 together deprive the Supreme Court and lower federal courts of jurisdiction to hear cases arising out of any "State statute, ordinance, rule, regulation . . . which relates to voluntary prayers in public schools and public buildings").

4. For a description of sweeping jurisdictional proposals to avoid federal judicial review of state court decisions that were made during the Marshall Court era, see R. STEAMER, *THE SUPREME COURT IN CRISIS* 44-51 (1971). For a discussion of similar jurisdictional restrictions that were proposed, enacted and found valid by federal courts during the first half of this century, see the discussion of the Norris-La Guardia Act, the Emergency Price Control Act, and the Portal to Portal Act in P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 316-24 (2d ed. 1973) [hereinafter cited as *HART & WECHSLER*]; for other recent proposals, see *id.* at 360-75; *id.* at 106-08 (2d ed. Supp. 1981).

5. The speaker was Dr. James McClellan, Chief Counsel and Staff Director, Subcommittee on Separation of Powers, Committee on the Judiciary, United States Senate. The speech was delivered at the annual meeting of the American Judicature Society in August 1981. [The text of the speech is on file in the offices of the Wisconsin Law Review.] In his remarks Dr. McClellan attacked the doctrine of incorporation. Broadly defined, the doctrine of incorporation provides that guarantees against state action are implicit in the fourteenth amendment's due process clause and resemble the Bill of Rights' guarantees against federal action. He argued that the Bill of Rights was designed not simply to protect individuals against federal action but to "guarantee to the states that the federal government would not usurp the state's power over civil liberties." In addition he argued that the fourteenth amendment should not be interpreted in a way which changes the general independence of the states in matters of civil liberties. That is, the doctrine of incorporation is inappropriately applied to the fourteenth amendment. Finally Dr. McClellan concluded that Congress' powers to make exceptions to and regulations for the Supreme Court's appellate jurisdiction may be used justifiably to "return jurisdiction over civil liberties to the states" and "to restore . . . the constitutional balance provided by the framers." See G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 476-501 (particularly 488) (10th ed. 1980).

courts unlimited? Might the courts themselves enforce limits by ruling that some forms of jurisdictional regulation are unconstitutional? There is only one case in which a federal court has enforced such a limitation on Congress' jurisdictional power: *United States v. Klein*.⁶ In *Klein*, the Supreme Court invalidated a statute which, like the current proposals mentioned above, was an attempt to use jurisdictional regulation to avoid the effects of court decisions.⁷ Numerous commentators argue that *Klein* places limits on Congress' jurisdictional regulatory powers. They are, I believe, correct, but, as we shall see, they have also read that case both too broadly and too narrowly.

The events leading to the constitutional confrontation in *United States v. Klein* were set in motion when Victor Wilson marked his six hundred bales of upland cotton "C.S.A." to assure their safe transit within the Confederate States of America.⁸ Pursuant to legislation supported by the Radical Republicans,⁹ Wilson's cotton was seized by Union agents after Grant's victory at Vicksburg.¹⁰ However, that legislation also permitted persons who had remained loyal to the Union to recover property taken by Union agents or to recover its proceeds if it had been sold after capture.¹¹ Wilson claimed he had been loyal and, after his death, his administrator brought suit in the Court of Claims to recover the proceeds of the Union's sale of the cotton.¹² The administrator, John A. Klein, succeeded in the Court of Claims, which initially found Wilson to have been loyal

6. 80 U.S. (13 Wall.) 128 (1872). By regulation of jurisdiction I mean regulation of that jurisdiction permitted the federal courts under article III of the Constitution. See U.S. CONST. art. III, § 2, cl. 2 (reproduced in *infra* note 141). Occasionally Congress has attempted to regulate the jurisdiction of federal courts by expanding it beyond the confines of the judicial power as defined in article III. See *infra* note 141 and accompanying text. In such cases the Court has struck down or ignored the regulation. *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 303-04 (1809). See also *District of Columbia v. Eslin*, 183 U.S. 62 (1901); *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1864) (Chief Justice Taney's opinion for the Court in *Gordon* originally was lost but ultimately published in 117 U.S. at 697).

The regulation with which this article deals is the first sort. It takes two forms: either Congress has tried to restrict federal jurisdiction short of the broad grant found in article III, or Congress has tried to use control of jurisdiction to dictate the decision of a case involving the judicial power.

7. See *infra* text § II(B)(3).

8. Record at 5, 15, *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

9. For a description of the Radical Republicans, see H. TREFOUSSE, *THE RADICAL REPUBLICANS* 1-33 (1969). For a description of the legislation they supported, see *infra* notes 43-44 and accompanying text.

10. Record at 15, *Klein*.

11. See *infra* note 43 and accompanying text.

12. Record at 5-6, *Klein*.

in fact.¹³ On reopening Klein's case at the government's request, the Court of Claims determined that Wilson was, in fact, disloyal. It refused, however, to modify its \$125,300 judgment for Wilson's estate. Its reason was that, however disloyal in fact, Wilson was to be treated as legally loyal because he had received a Presidential pardon.¹⁴

Enraged by the Supreme Court's treatment of the pardoned disloyal, the Radical Republicans tried to defeat their claims.¹⁵ The Radicals recognized, however, that judgments like Klein's might be seen as constitutionally compelled and, hence, beyond the reach of Congress' substantive powers.¹⁶ Some Radicals believed that there were other means of reaching cases like *Klein*.¹⁷ The Constitution provided that Congress may regulate the Supreme Court's appellate jurisdiction.¹⁸ Case law suggested that Congress had complete power to refuse consent to suits seeking money from the federal treasury.¹⁹ Based on their interpretation of the Constitution and case law, the Radicals successfully sponsored a statute which gave the Supreme Court jurisdiction to review cases like Klein's, but only to reverse the judgments in such cases.²⁰ The Supreme Court was not given jurisdiction to affirm.

When the government's appeal invoking the Radical's legislation reached the Supreme Court, the Court struck down the legislation as violative of separation of powers principles and affirmed the judgment against the federal treasury.²¹ One separation of powers principle clearly emerges from Chief Justice Chase's confusing opinion for the Court: although Congress' powers to regulate the jurisdiction of the federal courts are vast, they do not include the power to compel a court to decide cases after removing from it the jurisdiction necessary to its deciding

13. *Id.*, 1-3, 16.

14. Addition to Record at 2, *Klein*.

15. The Radical Republicans were first troubled by the Supreme Court's decision in a case similar to *Klein*: *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870). See *infra* text § II(B)(3).

16. See *infra* text § II(B)(3).

17. *Id.*

18. See *infra* text § IV(A)(2).

19. See *infra* note 192 and accompanying text.

20. See *infra* text § II(B)(3)(b). The legislation as originally proposed expressly required reversal. See *infra* text accompanying note 88. The word "reversal" was dropped but the bill as passed required the Supreme Court to obliterate the judgment of a lower court. See *infra* text accompanying notes 103-09. In effect reversal was required, though the statute did not state this in these words.

21. 80 U.S. (13 Wall.) 128 (1872).

those cases in a manner consistent with the Constitution.²² To use the *Klein* episode as an example, Congress there unsuccessfully attempted to compel the Supreme Court to decide an appeal, while depriving that Court of the power to determine whether the Constitution's pardon provisions compelled the Court to decide in *Klein's* favor.

Klein's holding concerning congressional control of federal court jurisdiction seems first to have been given proper emphasis by Henry Hart.²³ It is a unique holding²⁴ to which Hart has lent force.²⁵ Thus, it is not surprising that *Klein* has achieved its present status as a separation of powers landmark.²⁶ What is sur-

22. See *infra* text § IV(A)(2).

23. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1373 (1953). See also HART & WECHSLER, *supra* note 4, at 315-16.

24. See *infra* text § IV(A)(2).

25. The bound edition of *Shepard's Law Review Citations* indicates that Professor Hart's article, *supra* note 23, arguing for limits on Congress' power over the jurisdiction of federal courts has been cited thirty-four times by federal courts including four times in United States Supreme Court opinions and eighty-five times in law journals. SHEPARD'S INC., SHEPARD'S LAW REVIEW CITATIONS 365 (3d ed. 1979).

26. *Klein* has been discussed or at least mentioned in the following books and articles: D. CURRIE, CASES AND MATERIALS ON FEDERAL COURTS 137 (2d ed. 1975); D. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL 35 (1976); C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, RECONSTRUCTION AND REUNION 840, 843-46, 1427 and 1443 (1971); G. GUNTHER, *supra* note 5, at 53-57; HART & WECHSLER, *supra* note 4, at 315-16; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 39-40 (1978); Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L. J. 498, 525-27 (1974); Hart, *supra* note 23 at 1373; Lenoir, *Congressional Control Over the Appellate Jurisdiction of the Supreme Court*, 5 KAN. L. REV. 16, 39-41 (1956); Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53, 55 n.9 (1962); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 180-81 (1960); Redish and Woods, *Congressional Power to Control the Jurisdiction of the Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 46 n.4 (1975); Sager, *The Supreme Court 1980 Term, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981) (discussed in *infra* note 179); Thompson & Pollitt, *Congressional Control of Judicial Remedies: President Nixon's Proposed Moratorium on "Busing" Orders*, 50 N.C.L. REV. 809, 830-32 (1972); Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229, 258 n.91 (1973).

For the variety of uses made of *Klein* in the federal courts, see, e.g., United States v. Sioux Nation of Indians, 448 U.S. 371, 402-07 (opinion of the Court), 427-31 (Rehnquist, J., dissenting) (1980) (where the majority and dissent disagree about *Klein's* implications for congressional power to require federal courts to relitigate cases already decided); *Carlson v. Green*, 446 U.S. 14, 37 (1980) (Rehnquist, J. dissenting) (stating that *Klein* indicates that there are some tasks Congress cannot impose on a federal court formed under article III of the Constitution); *Glidden Co. v. Zdanok*, 370 U.S. 530, 568 (1962) (citing *Klein* as holding that it is unconstitutional for Congress to prescribe to the judiciary rules for the decision of pending cases); *Pope v. United States*, 323 U.S. 1, 8-9 (1944) (reversing the Court of Claims which had held that *Klein* prohibited Congress from requiring that court to relitigate a case. The Supreme Court left open the possibility that

prising is the development among judges and scholars of an uncritical devotion which resembles a cult of the *Klein* case. As with the object of most cults, the *Klein* opinion combines the clear with the delphic. Chief Justice Chase's excessively broad and ambiguous statements for the majority provide the delphic elements in *Klein*. His statements have permitted *Klein* to be viewed as nearly all things to all men.

Viewed as a source of principles protecting the judiciary from the other branches, *Klein* is often stretched extraordinarily beyond its facts by advocates and judges.²⁷ One of the most respected works on federal jurisdiction, for example, has erroneously attributed to *Klein* a holding which limits congressional power to regulate judicial fact finding.²⁸ With only somewhat more plausibility, the Court of Claims in *Pope v. United*

Klein might prohibit congressionally compelled relitigation under other circumstances); *South Windsor Convalescent Home, Inc. v. Mathews*, 541 F.2d 910, 913 n.4 (2d Cir. 1976) (finding that *Klein* bears on the validity of congressional withdrawal from all federal courts of jurisdiction to hear constitutional challenges to specific federal statutes or official action); *United States v. Butenko*, 494 F.2d 593, 614, 638, 640-41 (3d Cir. 1974) (en banc), cert. denied sub nom. *Ivanov v. United States*, 419 U.S. 881 (1974) (in which two judges seem to view *Klein* as limiting Congress' power to prescribe rules of evidence to the federal courts. Those judges seem to disagree over whether *Klein* contains a holding which prohibits Congress from changing a law applying to pending appeals).

For a discussion of *Klein*'s alleged holding as to the regulation of evidence, see *infra* text § IV(B)(1). For a discussion of *Klein*'s possible holding as to the impropriety of Congress' changing the law applying to pending appeals, see *infra* text § IV(B)(2). For additional uses of *Klein*, see *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 605 (D.C. Cir. 1974) (finding that *Klein* lends support to the proposition that it would be a dereliction of duty for a federal court to fail to determine federal law merely because the executive has taken a position on the meaning of that law); *Putty v. United States*, 220 F.2d 473, 479 (9th Cir.), cert. denied, 350 U.S. 821 (1955) (Pope, Cir. J., concurring specially) (where Circuit Judge Pope strikes down a federal statute conferring jurisdiction on a federal trial court but withholding jurisdiction from the court to dispose of the case in certain ways); *Battaglia v. General Motors Corp.*, 169 F.2d 254, 262 (2d Cir.), cert. denied, 335 U.S. 887 (1948) (where, in distinguishing *Klein*, the Second Circuit Court of Appeals suggests that *Klein* may prohibit some varieties of congressional revision of federal courts' judgments); *United States v. Howard*, 440 F. Supp. 1106, 1110 (D. Md. 1977), aff'd on other grounds, 590 F.2d 564 (4th Cir.), cert. denied, 440 U.S. 976 (1979) (where in an alternative holding, citing *Klein*, the district court strikes down the Speedy Trial Act's time limitations as an unconstitutional interference with purely judicial functions); *Norwich & Worcester R.R. Co. v. United States*, 408 F. Supp. 1398, 1404 (Regional Rail Reorg. Ct. 1976) (distinguishing *Klein*); *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957, 977-78 (S.D.N.Y. 1965), aff'd, 383 F.2d 166 (1967), cert. denied, 390 U.S. 956 (1968) (rejecting the proposition that *Klein* forbids Congress from making new laws to apply to cases in trial court on remand).

27. In addition to the cases and commentary discussed in the text accompanying *infra* notes 28-36, compare the analysis of *Klein* made in section IV of this article with the opinions in *Carlson*, *Glidden*, *South Windsor*, *Butenko*, and *Battaglia* discussed in *supra* note 26.

28. HART & WECHSLER, *supra* note 4, at 315-16.

*States*²⁹ struck down an act of Congress as inconsistent with principles established by *Klein*. Though the actual decision in *Pope* is quite limited,³⁰ the Court of Claims in dicta suggested that *Klein* might prohibit Congress from requiring the Court of Claims to relitigate a case originally decided in favor of the government.³¹ *Pope* was ultimately reversed.³² Nearly half a century later, however, in *United States v. Sioux Nation of Indians*,³³ Mr. Justice Rehnquist, in dissent, revived the *Pope* Court of Claims' view. He urged that *Klein* does indeed prohibit Congress from mandating relitigation under circumstances similar to those in *Pope*.³⁴

Recently one federal judge cited *Klein* in a decision which held that the Speedy Trial Act is an unconstitutional intrusion into a purely judicial realm.³⁵ Another federal judge cited *Klein* in noting that the executive branch's interpretation of the law does not bind the federal courts.³⁶ Neither of these results was required by the holding in *Klein* for these cases present facts quite different from those before the Chase Court in 1872.³⁷ *Klein* is, however, generally supportive of them in that it establishes some protection from interbranch intrusion for the federal judiciary.

I will demonstrate that there are at least two identifiable

29. 100 Ct. Cl. 375, 375-76, *rev'd*, 323 U.S. 1 (1944).

30. The actual ground for the decision is that *Klein* prohibits Congress from requiring a court to decide a case while at the same time severely restricting the possible judicial responses. 100 Ct. Cl. at 380-82.

31. *Id.* at 382. The Court says that *Klein's* prohibition of a congressionally-compelled result in a pending case "could be applied with even greater emphasis to a legislative direction to a court which has already heard and decided a case, to hear it again and decide it differently." *Id.* at 382 (emphasis added). In reversing the Court of Claims decision, the Supreme Court in *Pope v. United States* left open the possibility that *Klein* might prohibit legislation only slightly different from that which it approved.

32. On review, the Supreme Court held that the act of Congress under consideration did not conflict with the Constitution as interpreted in *Klein*. 323 U.S. at 8-14. It did so, however, by determining that Congress had created a new cause of action and thus had required litigation of a new claim, not relitigation of an old one. *Id.* at 9. The Court left open the possibility that an act of Congress actually requiring relitigation would run afoul of the "principles announced in *Klein*." *Id.* at 8-9.

33. 448 U.S. 371 (1980).

34. *Id.* at 428-31 (Rehnquist, J., dissenting). Justice Rehnquist states that the Supreme Court in *Pope* decided that the Constitution prohibited relitigation. *Id.* at 428. In fact *Pope* clearly left the issue open. 323 U.S. at 8-9.

35. *United States v. Howard*, 440 F. Supp. 1106, 1109-10 (D. Md. 1977) (alternative holding), *aff'd on other grounds*, 590 F.2d 564 (4th Cir.), *cert. denied*, 440 U.S. 976 (1979).

36. *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 605 (D.C. Cir. 1974).

37. See *supra* note 27 and accompanying text.

holdings in *Klein*. The first holding involves a narrow but important limitation on congressional power to control the jurisdiction of federal courts.³⁸ The second holding has been overlooked by the many commentators on *Klein*. *Klein* holds that there are limits upon Congress' power to invoke the sovereign immunity privilege on behalf of the United States. Indeed, *Klein* is the only case in our constitutional history so to hold. Below I will discuss in detail *Klein*'s sovereign immunity holding and its current relevance.

I will also address other holdings which have been attributed to *Klein*. I will demonstrate that, despite an important statement to the contrary, *Klein* contains no holding limiting congressional regulation of judicial fact finding.³⁹ I will then consider *Klein*'s possible relevance to the existence of a congressional power to compel relitigation of cases otherwise finally decided by the federal courts—in particular, *Klein*'s relevance to the Supreme Court's 1980 *Sioux Nation* case.⁴⁰ I will show that *Klein* cannot be seen as speaking to the issues involved in *Sioux Nation*.⁴¹ Finally, I will consider *Klein*'s bearing upon the long debate over the status of the Court of Claims and I will show that the *Klein* opinion and ultimate congressional acquiescence in the payment of Klein's judgment suggest that the Court of Claims was, by the early 1870's, viewed as a full constitutional court.⁴²

The significance of *Klein*'s principles together with the frequent use made of *Klein* in cases and commentary testify to its importance. The record should be clear, however, as to what really happened when Congress attempted to use the Supreme Court as a puppet.

II. *Klein*'s FACTS AND BACKGROUND

A. *The Facts in Klein and the Court of Claims Decisions*

Shortly before the capture of Wilson's cotton, the third of a series of federal statutes dealing with confederate war property became law. This measure, the Abandoned Property Collection Act (hereinafter referred to as the 1863 Act)⁴³ permitted Trea-

38. See *infra* text § IV(A)(2).

39. See *infra* text § IV(B)(1).

40. 448 U.S. 371 (1980). See *infra* text § IV(B)(2).

41. See *infra* text § IV(B)(2)(b)(3).

42. See *infra* text § IV(C).

43. The relevant portions of that measure read:

sure agents to receive and collect all property captured or abandoned as the Union forces advanced within the areas in rebellion, to sell it and to pay the proceeds into the United States' Treasury. The act further provided that any loyal owner whose property was abandoned or captured could recover compensation for the same within two years upon proof "that he has never given any aid or comfort to the present rebellion."⁴⁴ Pursuant to the 1863 Act federal officers sold Wilson's cotton and paid the net proceeds, \$125,300, into the United States Treasury.

Klein's suit in the Court of Claims on behalf of Wilson's

And be it further enacted, That the Secretary of the Treasury . . . shall . . . cause a book or books of account to be kept, showing from whom such property was received, the cost of transportation, and proceeds of the sale thereof. And any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the court of claims; and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds

The Abandoned Property Collection Act, ch. 120, § 3, 12 Stat. 820 (1863) (second emphasis added) [hereinafter referred to as the 1863 Act].

The first of three statutes, Act of August 6, 1861, ch. 60, 12 Stat. 319 (1861), dealt only with property which was devoted to war use with the consent of the owner. It was not implicated in *Klein*.

The second confiscation act was not invoked by the government as justification for its actions leading to Klein's suit. Act of July 17, 1862, ch. 195, §§ 5-14, 12 Stat. 589 (1862) [hereinafter referred to as the 1862 Act]. It was, however, at least tangentially involved in *Klein*. After providing for the confiscation of property of high level officials of the Confederacy, the 1862 Act tried to induce allegiance to the Union among a separate class of persons—those within the states and territories in rebellion who participated in or aided or abetted the rebellion or who would do so in the future. The President was permitted to trigger the confiscation scheme by giving a public warning and proclamation to this separate class of rebels and aiders and abettors. *Id.* at § 6. Any such person not ceasing such wrongful acts within sixty days of the warning was subject to having his property condemned by the United States in an *in rem* proceeding. *Id.* at §§ 6-7. Although the property confiscated in *Klein* arguably might have been condemned in such an *in rem* proceeding, such a proceeding was never brought against Wilson by the government. As a consequence, this portion of the 1862 Act has no relevance to Klein's case as possible justification of the government's position and, indeed, it was never invoked by the government.

Klein, on the other hand, did involve a separate provision of the 1862 Act—that which permitted the President to pardon certain persons who "participated in the . . . rebellion":

And be it further enacted, That the President is hereby authorized, at any time hereafter, by proclamation, to extend to persons who may have participated in the existing rebellion in any State or part thereof, pardon and amnesty, with such exceptions and at such time and on such conditions as he may deem expedient for the public welfare.

Id. at § 13; 80 U.S. (13 Wall.) at 139.

44. The Abandoned Property Collection Act, ch. 120, § 3, 12 Stat. 820 (1863). See *supra* note 43.

estate was initially successful,⁴⁵ apparently for the simplest of reasons: Wilson was found to have given no aid or comfort to the rebellion and therefore to be entitled to compensation under the 1863 Act's proviso to that effect.⁴⁶ While the Court of Claims mentioned that a presidential pardon was granted to Wilson in 1862, its decision in Klein's favor apparently rested upon Wilson's loyalty in fact.⁴⁷ On May 26, 1869, after finding that Wilson was in fact loyal, the Court of Claims awarded Klein, as Wilson's administrator, judgment for \$125,300.⁴⁸

The government appealed to the United States Supreme Court. In October 1869, while its appeal was pending, the government moved, in the Court of Claims, to "open up" Klein's judgment.⁴⁹ Apparently as a result of a recent discovery by the government, the Court of Claims found that Wilson had, in August of 1862, become a surety on the bonds of two Confederate officers.⁵⁰ These facts were conceded by Klein in a stipulation.⁵¹ The Court of Claims once again noted that Wilson had received a pardon; indeed he had received it after becoming a surety in August of 1862.⁵² The Court of Claims next held that Wilson's undisputed suretyship (assuming that it constituted disloyalty under the law) was ultimately irrelevant to his right to recover.⁵³ The Court's reason was that Wilson's subsequent pardon removed the consequences of any disloyalty.⁵⁴ In so holding, the Court of Claims departed from its previously announced position on the effect of a pardon upon rights under the 1863 Act.⁵⁵

45. *Wilson v. United States*, 4 Ct. Cl. 559, 567 (1868) (finding 5), *modified*, 7 Ct. Cl. vii (1871), *aff'd sub nom.*, *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

46. Record at 16, *Klein*.

47. The court's mention of the pardon is contained in its summary of the United States' argument and not in its listing of facts which it found relevant to its decision. *Id.*

48. *Id.* at 14.

49. Addition to Record at 1.

50. *Id.*

51. *Id.* at 2. The court stated that the finding of Wilson's suretyship was "by the consent of the parties." See also the reference to the Supreme Court opinion in *Klein* as reported in the Court of Claims Reporter, 7 Ct. Cl. at 241 n.*.

52. Addition to Record at 1-2.

53. *Id.* at 2.

54. *Id.*

55. *Pargoud v. United States*, 4 Ct. Cl. 337, 341-44 (1868), *rev'd.*, 80 U.S. (13 Wall.) 156 (1872). *Pargoud* was *Klein's* companion case in the Supreme Court. See C. FAIRMAN, *supra* note 26, at 844. When *Klein* was originally decided in the Court of Claims in 1869 the *Pargoud* precedent was still controlling. Hence, had the court been presented with facts indicating Wilson had been disloyal in fact and pardoned, presumably it would have denied his claim. The only plausible explanation for the Court of Claims, on rehearing, finding that Wilson's pardon excused disloyalty is the decision in *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870).

B. Other Events Framing the Klein Decision in the Supreme Court

1. ISSUES IN KLEIN IMMEDIATELY AFTER THE COURT OF CLAIMS' REFUSAL TO OPEN KLEIN'S JUDGMENT

Two intervening events—first, the Supreme Court's decision in *United States v. Padelford*⁵⁶ and then the Congressional response to that decision⁵⁷—shaped the Supreme Court's *Klein* decision. In the absence of both of those events there is a remote chance that the Court of Claims' decision might have been affirmed on the ground that serving as a surety for a Confederate officer did not constitute disloyalty within any relevant act of Congress.⁵⁸ If there had been no legislative response to *Padelford*, Klein almost certainly would have succeeded on the ground that the statutes themselves viewed either loyalty-in-fact or pardon-conferred-loyalty as a sufficient ground for compensation.⁵⁹ As will become apparent, *Padelford* and the subsequent Act of Congress foreclosed these two possible dispositions of *Klein*.

After *Padelford* was decided and after Congress had acted, it was clear that actions like Klein's were to be characterized as disloyal. It was also clear that Congress intended to exclude the pardoned disloyal from benefits under the 1863 Act. The issue then became the constitutionality of such an exclusion.⁶⁰ This

Padelford construed the 1863 Act to include the pardoned disloyal within the class of those to be compensated. 76 U.S. (9 Wall.) at 543; see *infra* notes 70-71 and accompanying text. *Padelford* was decided by the Supreme Court on April 20, and announced on April 30, 1870. *Klein's* rehearing in the Court of Claims was concluded later. See Supplemental Findings of the Court of Claims 1-2, *Klein*.

56. 76 U.S. (9 Wall.) 531 (1870).

57. See *infra* text § II(B)(3).

58. This possibility was at best remote even before the Supreme Court's decision in *Padelford*. The Court of Claims did not view the claimant's suretyship as an obstacle apparently because the claimant had been indirectly coerced. *Padelford v. United States*, 4 Ct. Cl. 316, 323-27 (1868). See also *Stark v. United States*, 4 Ct. Cl. 280 (1868). The possibility of a similar disposition of *Klein*, if it ever existed, was foreclosed by the Supreme Court's decision in *Padelford* which seemed to reject such indirect coercion as a matter of law. 76 U.S. (9 Wall.) at 539. *Padelford* was the first Supreme Court case to pass on such suretyship as disloyalty. As a result, it is fair to say *Padelford* settled the matter.

59. This was *Padelford's* holding concerning the 1863 Act and an Act of June 25, 1868, ch. 71, 15 Stat. 75 (1868) [hereinafter referred to as the 1868 Act]. See *infra* notes 71-74 and accompanying text.

60. Despite making it clear beyond doubt that acts like Wilson's were disloyal within the meaning of the 1863 and 1868 Acts, the Supreme Court in *Padelford* held that under the 1870 Act a pardon excused such disloyal conduct. 76 U.S. (9 Wall.) at 542-43; see *infra* notes 70-74 and accompanying text. Those entitled to recover under those Acts

issue will be referred to as the "Exclusion Issue." Because Congress chose to exclude pardons by means of a restriction of federal court jurisdiction, the constitutional issues raised were not limited to the Exclusion Issue—the validity of a straightforward exclusion of pardonees. Issues regarding the extent of Congress' legitimate power over the jurisdiction of federal courts, and particularly over suits against the United States were also raised. The question was whether these congressional powers would support an otherwise unjustified exclusion of pardonees from benefits under the 1863 Act.⁶¹

2. THE PADEFORD DECISION

During the pendency of the government's appeal from the Court of Claims initial decision in *Klein* and before the rehearing, the Supreme Court skirted the Exclusion Issue in *Padelford* whose significant facts were very similar to those in *Klein*.⁶² *Padelford* narrowed the issues which might have been presented in *Klein*⁶³ and prefigured the non-jurisdictional Exclusion Issue ultimately decided.⁶⁴ The claimant in *Padelford* had had property seized pursuant to the 1863 Act.⁶⁵ Like Wilson, Padelford voluntarily had become a surety upon the official bonds of officers of the rebel army.⁶⁶ After becoming a surety on such

were both the innocent-in-fact and the pardoned disloyal who were legally innocent. Thus if there had been no further legislation after the Supreme Court's decision in *Padelford*, Klein would have recovered under the prevailing interpretation of the existing statutes. There was, however, one other remote possibility. The Supreme Court might have read the 1863 and 1868 Acts as distinguishing between Wilson, who received his pardon only after his property was seized, and Padelford who was pardoned before seizure; it declined to do so. See *infra* note 62 and accompanying text.

61. See *infra* text § IV(A).

62. *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870). Wilson (on behalf of whose estate Klein sued) and Padelford each received their pardons after the alleged act of disloyalty. However, the seizure of Wilson's cotton came before his pardon while that of Padelford's came after his pardon. Compare *United States v. Klein*, 80 U.S. (13 Wall.) 128, 142-43, 150 (1872) with *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 532-34 (1870).

This distinction was not significant because the Court in *Klein* did not think that the government's seizure of property under the 1863 Act divested the original owner of title or its proceeds. In the Court's view, the government became a trustee for the original owner. *Klein*, 80 U.S. (13 Wall.) at 142. As a consequence, Wilson, like Padelford, was pardoned while still the owner of the cotton or its proceeds.

63. *Padelford* concluded in strong dictum that voluntarily becoming surety on the official bonds of Confederate officers constitutes giving aid and comfort to the rebellion within the meaning of the 1863 Act. *Padelford* at 539.

64. See *infra* text § IV(A)(1).

65. 76 U.S. (9 Wall.) at 531-34, 537, 540. See *supra* note 43.

66. 76 U.S. (9 Wall.) at 533, 539.

bonds, Padelford took the oath of loyalty prescribed in Lincoln's amnesty proclamation of December 8, 1863.⁶⁷ Still later, Padelford's cotton was seized by union forces.⁶⁸

The Supreme Court in *Padelford* concluded that the act of voluntarily becoming a surety upon a rebel officer's official bond was one which "gave comfort" within the meaning of the 1863 Act.⁶⁹ How then was Padelford—guilty-in-fact but later pardoned—to be treated by the Supreme Court under the acts of Congress and the Constitution? The Court avoided constitutional issues. It read the 1863 Act's provision for payment to innocents in conjunction with the earlier legislation which invited a blanket presidential pardon, by proclamation, of all who swore an oath of future loyalty.⁷⁰ The Court, in effect, held that the 1863 Act's reference to those who never "gave aid or comfort" was intended by Congress to include both those who in fact were loyal and the pardoned guilty who were loyal in the eyes of the law.⁷¹ In addition, the Court seemed to ignore the purpose of an act of 1868,⁷² which required "affirmative proof" of loyalty in 1863 Act claims cases.⁷³ The Court held that the 1868 Act was not intended to change the nature of proof required by the earlier legislation.⁷⁴ In effect, therefore, the Court held that the 1868 Act had not been intended to prescribe different rules for

67. *Id.* at 539.

68. *Id.* at 539, 541.

69. *Id.* at 539.

70. *Id.* at 542-43.

71. *Id.* at 543. The Court did not deal with the 1863 Act as if it intended to deny compensation to guilty pardonees. If it had so read the act, the Court would have had to decide its constitutionality. Because the Court does not indicate that it was striking down the 1863 Act, it must be presumed it did not. Since Padelford recovered the Court must have read that act as permitting the pardoned disloyal to recover.

72. For the text of the 1868 Act, see *infra* note 74.

73. It was certainly the view of some Radical Republicans that the Court had ignored their purpose. See CONG. GLOBE, 41st Cong., 2d Sess. 3809-10 (1870) (statement of Senator Drake).

74. 76 U.S. (9 Wall.) at 538. The earlier legislation was the 1863 Act. Section 3 of the 1868 Act reads:

That whenever it shall be material in any suit or claim before any court to ascertain whether any person did or did not give any aid or comfort to the late rebellion, the claimant or party asserting the loyalty of any such person to the United States during such rebellion, shall be required to prove affirmatively that such person did, during said rebellion, consistently adhere to the United States, and did give no aid or comfort to persons engaged in said rebellion; and the voluntary residence of any such person in any place where, at any time during such residence, the rebel force or organization held sway, shall be prima facie evidence that such person did give aid and comfort to said rebellion and to the persons engaged therein.

Act of June 25, 1868, ch. 71, § 3, 15 Stat. 75 (1868).

those truly innocent and those merely pardoned. The Court's analysis suggested that legislation excluding the latter class from compensation might have been unconstitutional.⁷⁵

As demonstrated in the next section, by the time of the *Klein* decision, several years after *Padelford*, the intent of Congress to exclude people in Klein's position from the class entitled to compensation under the 1863 Act was expressed unmistakably. As a result, the Exclusion Issue along with new constitutional-jurisdictional questions pressed the Court for an answer.

3. LEGISLATION DESIGNED TO CHANGE THE RULE ANNOUNCED IN PADELFORD AND THE RESULT IN KLEIN AND OTHER PENDING CASES.

a. Senator Drake's proposal

Commerce in cotton was a major source of revenue for the

75. The majority's statements taken together suggest that its construction of the 1863 and 1868 Acts was necessary to avoid a constitutional issue. In passing the series of measures which included the 1863 Act, Congress invited a presidential blanket pardon of persons who participated in the rebellion. After noting this fact, Chief Justice Chase stated, "[t]hat the President had power, *if not otherwise* yet with the sanction of Congress, to grant a general conditional pardon, has not been seriously questioned" 76 U.S. (9 Wall.) at 542 (emphasis added). Chase then goes on to note, quoting from *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866), "[t]hat in the eye of the law the [pardoned] offender is as innocent as if he had never committed the offence." 76 U.S. (9 Wall.) at 542. Presumably the law in whose eye an offender is innocent is the constitutional law of pardons. The issue raised in the first quote is apparently whether a President can issue a blanket, as opposed to an individual, pardon without congressional permission. Chase, however, does not seem to suggest that congressional permission can be withdrawn with respect to pardons issued while the permission is in force.

Most convincingly, in response to the claim that *Padelford* was without a remedy, Chase stated:

The sufficient answer . . . is that after the pardon no offence connected with the rebellion can be imputed to him. If, in other respects, the petitioner made the proof which, under the act, entitled him to a decree for the proceeds of his property, the law makes the proof of pardon a complete substitute for proof that he gave no aid or comfort to the rebellion. A different construction would, as it seems to us, defeat the manifest intent of the [President's pardon] proclamation and of the act of Congress which authorized it.

76 U.S. (9 Wall.) at 543. Which law makes the pardon a complete substitute? Is it the Constitution or only the acts of Congress or is it both? *Padelford* does not answer these questions, not even in dictum.

Because the Court does not indicate that it was striking down the 1863 Act it must be presumed it did not. Because *Padelford* recovered, the Court must have read that act as permitting the pardoned disloyal to recover. It is, however, fair to say that the *Padelford* Court recognizes that more than the acts of Congress potentially bear on the rights of donees. Cf. *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866), cited in *Padelford*, 76 U.S. (9 Wall.) at 542.

Confederacy.⁷⁶ Consequently, it is not surprising that the Radical Republicans⁷⁷ behaved vindictively toward the wealthy planters who financed the rebellion but who hedged their bets by taking the oath necessary to receive Lincoln's blanket pardon.⁷⁸ For these reasons, the Radicals in Congress were displeased with the *Padelford* decision.⁷⁹ Furthermore, they felt the Supreme Court had resorted to an interpretation of the 1863 and 1868 Acts contrary to Congress' clear intent to prohibit the Court of Claims from compensating the disloyal who were subsequently pardoned.⁸⁰ Senator Drake,⁸¹ holding a copy of the *Padelford* decision before the Senate, offered a stinging denunciation of the Supreme Court and proposed curative legislation.⁸² As originally proposed, his bill made no reference to the appellate jurisdiction of the Supreme Court.⁸³

76. Early in the Civil War the Confederacy sought to create a cotton shortage in order to coerce European support. F. OWSLEY, *KING COTTON DIPLOMACY* 23-86 (2d ed. 1959). Later in the war, when other resources were depleted, the Confederacy began to sell its cotton. *Id.* at 361-93.

77. See H. TREFOUSSE, *supra* note 9, at 1-33.

78. During the Senate debates on the legislation ultimately struck down in *Klein*, Senator Edmunds, a Republican of Vermont, related to his colleagues a story of one such prominent person who, after pardon, indiscretely committed his true feelings in a correspondence. The letter read:

By availing myself of . . . President Lincoln's proclamation of 8th December, 1863, . . . I could . . . preserve all my property to myself, . . . and I could, whenever I pleased, expatriate myself from Yankee dominion and vicinity

If I cannot serve the confederacy by the course I have adopted I can at least defeat the Federal Treasury in acquiring all my property for its advantage, which I prefer to make myself a beggar and a dunderhead at my time of life, and if I may not thereby give active and direct aid to the better cause, it will be in some degree, at least, an indirect benefit, by diverting so much from its enemies.

CONG. GLOBE, 41st Cong., 2d Sess. 3811 (1870).

79. *Id.* at 3810 (statement by Senator Drake); *id.* at 3816 (statement of Senator Trumbull identifying the case as *Padelford*). See *supra* text § II(B)(2).

80. CONG. GLOBE, 41st Cong., 2d Sess. 3810 (1870). See also *id.* at 3816 (statement of Senator Trumbull).

81. 5 *DICTIONARY OF AMERICAN BIOGRAPHY* 425 (A. Johnson & D. Malone, eds. 1930); U. S. GOV'T PRINTING OFF., *BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS 1774-1971*, 879 (1971); H. Trefousse, *supra* note 9, at xiv.

82. CONG. GLOBE, 41st Cong., 2d Sess. 3809-10 (1870).

83. H.R. 974, 41st Cong., 2d Sess. (1870); CONG. GLOBE, 41st Cong., 2d Sess. 3809 (1870). The bill as originally proposed did not contain the word "jurisdiction." It did provide that a pardon shall not be used to establish "standing" in the Court of Claims. It also provided that if it is established that a claimant has received a pardon reciting his guilt and did not protest innocence, the Court of Claims shall dismiss his claim under the 1863 Act. *Id.* Perhaps these features were designed to deprive the Court of Claims of jurisdiction under the circumstances mentioned. The proposal said nothing about the Supreme Court's appellate jurisdiction. That Court was required to reverse Court of Claims' judgments rendered in favor of the pardoned guilty before passage of the bill. In

The bill, in its original form, purported to do several things relevant to this article. First, it would have made evidence of a pardon *inadmissible*, in the Court of Claims, *in support* of claims for the proceeds of abandoned or captured property.⁸⁴ Second, evidence of pardons, with some exceptions, would have been *admissible against* a pardoned claimant.⁸⁵ Indeed, receipt of a pardon would be conclusive of disloyalty and consequently an absolute obstacle to recovery of property.⁸⁶ An exception was recognized for those who professed innocence, upon receiving the pardon, despite its recital of their guilt.⁸⁷ Such protesting pardonees were free to prove their innocence in fact just as if they had received no pardon. With these first two provisions, the Radicals sought to control the result in cases not yet decided by the Court of Claims. Third, the bill dealt with cases like *Klein*—those already decided in favor of the claimant in the Court of Claims, but still pending before the Supreme Court. Such cases were, under Drake's proposal, to be "reversed" by the Supreme Court if the Court of Claims' judgment was based upon a pardon.⁸⁸ Presumably there would then be a remand but the Court of Claims would be bound by the first two features of the bill.⁸⁹ As a result, the lower court, on remand, would be required to presume conclusively the disloyalty of the pardoned claimant. In short, on remand the pardoned claimant would lose.

As a consequence, if Drake's amendment had been enacted in its original form, the significant issue before the Supreme Court in *Klein* would have been whether Congress has the substantive power under the Constitution to discriminate, in paying compensation, between those in fact innocent and those guilty in fact, but claiming legal innocence via a pardon. If Congress had such power the Supreme Court would have been required to reverse the Court of Claims' decision. If not, the Supreme Court would have affirmed it.

the evening session of the day he introduced his bill, Drake amended it to include the first jurisdictional language. *Id.* at 3816. This language seems to affect only the jurisdiction of the Court of Claims in cases of claims by pardonees who failed to protest innocence. The language affecting the jurisdiction of the Supreme Court was later inserted at Senator Edmunds' request. *See infra* notes 97-105 and accompanying text. Drake's bill appears to have been drafted by one Judge Hale who was counsel to the government in the cotton cases. *Id.* at 3820.

84. *Id.* at 3809.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *See supra* text accompanying notes 83-88 for a description of the features.

b. Debate on Drake's proposal

The Democrats responded to Drake's proposal by arguing that it was an unconstitutional encroachment on the President's pardon power.⁹⁰ Drake countered, arguing that his proposal "simply provided a rule of evidence for the Court of Claims."⁹¹ In rejoinder, Saulsbury, a Democrat, correctly pointed out that, although evidentiary in form, Drake's proposal was substantive in effect: to render a pardon inadmissible in a court of law is to deprive it of certain legal effects.⁹²

The most interesting debate on Drake's proposal took place among the Republicans themselves, some of whom disagreed about the appropriate means to a mutually desired end. Senator Trumbull, a Republican from Illinois,⁹³ was angry about the Supreme Court's apparent disregard of Congress' intent, but seemed to feel that sovereign immunity would be an adequate means of undoing *Padelford* as effective precedent:

[T]he action of Congress has been based upon [the] understanding, that we would not pay the claims of disloyal men in the rebel States. . . . we have been particular to require that the party bringing his claim in [the Court of Claims] must establish his loyalty, and establish it affirmatively

. . . I think it is entirely competent for Congress to refuse to let anybody sue the Government in any court, and let every claimant come to Congress and present his claim, and then we pay it or not, as we see proper. But Congress, out of liberality

90. The right to grant a pardon is a constitutional right vested in the President of the United States The constitutional pardon there vested in the President was a pardon having the quality of wiping out any stain; in other words, of making the man a new man; so that to have called a man, after he had been pardoned, a traitor was actionable at law, and damages could be recovered in a court of justice Now, the effect of the amendment of the Senator from Missouri would be that the Constitution could not be pleaded, because when you plead a constitutional pardon you plead in effect the Constitution; and you propose to provide by an act of Congress that it shall not be pleaded or given in evidence.

CONG. GLOBE, 41st Cong., 2d Sess. 3813 (1870) (statement of Senator Salisbury).

91. My friend from Delaware is too good a lawyer not to recognize the mistake he has fallen into This amendment does not propose in any way whatever to pass upon the intrinsic effect of a pardon or amnesty; but simply lays down a rule of evidence for the Court of Claims. The question is, who may maintain a suit in the Court of Claims against the United States? This amendment simply says that a pardon or amnesty shall not be evidence in that court of a right to maintain an action there.

Id. (statement of Senator Drake).

92. *Id.* at 3813-14.

93. According to at least one historian, Trumbull was on the fringe of the radical camp. H. TREFOUSSE, *supra* note 9, at 330.

to claimants, and to give them an opportunity to present their claims, has organized a Court of Claims. We need not have organized it. We could abolish the court to-morrow [sic]. We can give it just such jurisdiction as we please.⁹⁴

Trumbull proposed that the Radicals' purpose could be accomplished by striking all of Drake's proposed amendment except that portion which proscribed use of a pardon to establish innocence in the Court of Claims.⁹⁵

The main objection to Trumbull's proposal was that it was not clear that it would affect cases, like *Klein*, which were pending before the Supreme Court and in which judgment had already been rendered against the government by the Court of Claims.⁹⁶ Drake's proposal clearly would have affected such cases by requiring the Supreme Court to reverse the lower court.⁹⁷ It was this means rather than the end itself to which Trumbull objected:

I do not think it is proper to say that the Supreme Court shall reverse the judgment

. . . .
 . . . I think the proper way is to direct the court not to entertain jurisdiction of these cases.⁹⁸

A fellow Republican suggested that Trumbull's proposal would have had the unintended effect of allowing any extant Court of Claims judgment to stand.⁹⁹

To meet this difficulty, Senator Edmunds proposed the device which ultimately became part of the law.¹⁰⁰ He suggested that instead of requiring the Supreme Court to "reverse such judgment," Congress should provide that the Supreme Court "[shall] have no further jurisdiction thereof, and shall dismiss the cause for want of jurisdiction."¹⁰¹ The obvious objection was made by one Republican senator who asked whether this wording would do more than deprive the Supreme Court of appellate

94. CONG. GLOBE, 41st Cong., 2d Sess. 3816 (1870).

95. *Id.*

96. *Id.* at 3820 (statement of Senator Edmunds).

97. *Id.* at 3809.

98. *Id.* at 3824 (The two parts of this quotation are separated by Senator Sumner's remarks.).

99. *Id.* (statement of Senator Howard).

100. For the language of Edmunds' amendment, see *infra* text accompanying note 103. Drake's bill, *id.* at 3809, 3816, as modified by Edmunds' proposal, *id.* at 3824, ultimately became the Act of July 12, 1870, ch. 251, 16 Stat. 230 (1870) [hereinafter referred to as the 1870 Act].

101. CONG. GLOBE, 41st Cong., 2d Sess. 3824 (1870) (emphasis added).

jurisdiction.¹⁰² If refusing an appeal were the only result, Klein would be left with his judgment.

In response, Senator Edmunds concluded the defense of Drake's amended proposal with a tour de force of sophistical reasoning:

Mr. EDMUNDS. No; when the case comes up on appeal the case is in the Supreme Court, and now we direct the Supreme Court in cases of this kind, where before we said they should reverse the judgment, which would merely remand them to the Court of Claims again—that would be the effect of that—we say they shall dismiss the case out of court for want of jurisdiction; *not dismiss the appeal, but dismiss the case—everything.*

Mr. HOWARD. . . . [W]hat would be the condition of the cause itself after the Supreme Court should have dismissed it? Dismissed it from what?

Mr. EDMUNDS. Dismissed it out of court.

Mr. HOWARD. Out of its own jurisdiction. It will reach no further than the extent of its own jurisdiction. Where is the case then?

Mr. EDMUNDS. The case is dead and gone; it is in no court whatever. Then if the party has a case which will appeal to the equitable consideration of the Congress, of course he can come here by petition. We cannot stop that.

Mr. HOWARD. What I am anxious to attain is the utter extinguishment and annihilation of the cause of action itself.

Mr. EDMUNDS. This is an utter extinguishment of it, because the statute of limitations has now run so that nobody can bring a new cause in these cases in the Court of Claims; but only those that are there now can be heard.¹⁰³

Edmunds had virtually the last words in the Senate debate.¹⁰⁴ The Senate passed Drake's bill with Edmunds' modifications — substituting a requirement that the Supreme Court "dismiss the cause" for Drake's original requirement that it "reverse."¹⁰⁵ The House, after less interesting debates, agreed to Drake's amendment,¹⁰⁶ and it became law.¹⁰⁷ As a result, in effect but not in

102. *Id.* (statements of Senator Morton).

103. *Id.* (emphasis added).

104. *See id.* at 3824-25.

105. *Id.* at 3825.

106. *See id.* at 5424-27. The House Conference Committee was opposed to Drake's amendment. Nevertheless, it compromised this objection and the House appears to have voted on Drake's bill as originally proposed. *Id.* Both Drake's original proposal and the bill read to the House of Representatives before passage stated that in cases where a claimant's innocence had been established in the Court of Claims by a pardon, "the Supreme Court shall on appeal reverse [the] judgment." *Compare id.* at 3809 *with id.* at

terms, the Supreme Court was required to reverse cases like Klein's. The power invoked by Congress in making such a law was not merely its power to prescribe substantive rules within its legislative competence, but also its power over the jurisdiction of federal courts, its power to revoke its consent to suits seeking recoveries from the federal treasury, and possibly its power to prescribe rules of evidence.¹⁰⁸ The constitutionality of the Act of July 12, 1870¹⁰⁹ (hereinafter referred to as the 1870 Act) (Drake's bill as modified by Edmunds' proposal), was the central issue in *Klein*.¹¹⁰ Most of the remainder of this article deals with the rationale upon which the *Klein* Court ruled the 1870 Act unconstitutional.¹¹¹

5425. Consequently, as read on the floor of the House, the bill that the House of Representatives approved on July 9, 1870 was different from that previously approved by the Senate. Before his bill was passed by the Senate, Senator Drake modified it, at Senator Edward's suggestion, to remove the language requiring the Supreme Court to reverse. *Id.* at 3824-25. The language of the statute reflected this modification. The language read to the House, however, did not reflect the modification. See Act of July 12, 1870, ch. 251, 16 Stat. 230 (1870). The best explanation is that the wrong printer's version of the bill was read to the House on July 9, 1870, but that the House voted on the correct latest version. That last version of the House Bill—H.R. 974, Printer's No. 924, ordered printed May 28, 1870, nearly two months before the vote—did incorporate all the Senate amendments at that time.

107. The Congressional Globe reported that the bill was signed by the President on or before July 12, 1870. CONG. GLOBE, 41st Cong., 2d Sess. 5467 (1870).

108. See *supra* text accompanying notes 91, 94, 98-104.

109. Act of July 12, 1870, ch. 251, 18 Stat. 230 (1870).

110. 80 U.S. (13 Wall.) 128, 136, 142-48 (1872).

111. The text of that Act reads, in part:

Provided, [t]hat no pardon or amnesty granted by the President . . . shall be admissible in evidence on the part of any claimant in the court of claims as evidence in support of any claim against the United States, or to establish the standing of any claimant in said court, or his right to bring or maintain suit therein; nor shall any such pardon, amnesty . . . heretofore offered or put in evidence on behalf of any claimant in said court, be used or considered by said court, or by the appellate court on appeal from said court, in deciding upon the claim of said claimant, or any appeal therefrom, as any part of the proof to sustain the claim of the claimant, or to entitle him to maintain his action in said court of claims, or on appeal therefrom; but the proof of loyalty required [by the 1863 Act, and by the sections of several acts quoted], shall be made by proof of the matters required by said sections, respectively, irrespective of the effect of any executive . . . pardon, [or] amnesty . . . [a]nd in all cases where judgment shall have been heretofore rendered in the court of claims in favor of any claimant on any other proof of loyalty than such as is above required and provided, and which is hereby declared to have been and to be the true intent and meaning of said respective acts, the *Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction: And provided further, [t]hat whenever any pardon shall have heretofore been granted by the President of the United States to any person bringing suit in the court of claims for the proceeds of abandoned or captured property under [the 1863 Act as amended] . . . and such pardon shall recite, in substance, that such person . . . was guilty of any . . . disloyalty to the United States, and*

III. THE SUPREME COURT OPINION IN *Klein*

Before passage of the 1870 Act described above, the government's hopes for a victory in *Klein* were largely dependent upon the substantive arguments (1) that Congress intended, by the 1863 and 1868 Acts, to exclude pardonees from compensation and (2) that the Constitution's pardon provisions did not forbid such legislation. The decision in *Padelford* at least raised the possibility that the government would lose the second argument. *Padelford* prompted the 1870 Act. That Act was intended to require reversal of Court of Claims judgments; it depended on Congress' power over the jurisdiction of federal courts, over consent to suits against the United States as sovereign, and arguably over federal courts' fact-finding processes.

The government wasted little time in bolstering its original argument with the provisions of the 1870 Act, which the Radicals viewed as an independent basis for undoing the Court of Claims' judgment. In 1870, the United States moved to dismiss Klein's "cause" before the Supreme Court.¹¹² It was not a dismissal of the appeal that the government sought. A dismissal would have left Klein with his Court of Claims judgment. The government sought instead to have the case remanded to the Court of Claims with a mandate requiring that court to dismiss Klein's case for want of jurisdiction.¹¹³ This was in accordance with Senator Edmunds' statement that the 1870 Act required not the dismissal of the appeal but "the case—everything."¹¹⁴

The Supreme Court took two actions. First, it decided the Exclusion Issue in the appeal in favor of Klein's pardon-based

such pardon shall have been accepted in writing, by the person to whom the same issued, without an express disclaimer of and protestation against such fact of guilt contained in such acceptance, such pardon and acceptance shall be taken and deemed in such suit in the said court of claims, and on appeal therefrom, conclusive evidence that such person did take part in and give aid and comfort to the late rebellion, . . . and on proof of such pardon and acceptance, which proof may be heard summarily on motion or otherwise, the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant.

Act of July 12, 1870, ch. 251, 16 Stat. 230, 235 (1870) (emphasis added).

112. Motion of Attorney General U.S. to Remand Cause with Direction to Dismiss *Klein*.

113. The Attorney General's motion was captioned "Motion of Attorney General U.S. to Remand Cause with Direction to Dismiss" (emphasis added). The last paragraph read: "Therefore move the Court to send back this case to the Court of Claims with a mandate that the same be there dismissed for want of jurisdiction as now required by law." *Id.* at 3 (emphasis added). See *supra* note 103 and accompanying text.

114. See *supra* note 103 and accompanying text.

claim.¹¹⁵ Second, it decided the “motion to dismiss” against the government, holding the 1870 Act unconstitutional,¹¹⁶ and affirmed the judgment of the Court of Claims.¹¹⁷ It was only with respect to the Exclusion Issue that the dissenters¹¹⁸ disagreed; they would have reached the Exclusion Issue by holding the 1870 Act unconstitutional.¹¹⁹

Chief Justice Chase’s opinion for the Court first discussed the question of Klein’s constitutional rights in the absence of the 1870 Act.¹²⁰ It concluded that, apart from the 1870 Act, Klein had a right to recover compensation.¹²¹ In the second part of the opinion—that which concerns us—Chase took up the effect of the 1870 Act upon what would otherwise have been Klein’s right to compensation. He concluded that it had no effect.¹²² In other words, Chase concluded that Klein’s right to compensation could not be defeated by a simple repeal of the 1863 Act’s provision of compensation for guilty pardonees—the provision somewhat questionably read into the 1863 Act by the *Padelford* Court.¹²³

Additionally, Chase stated that various Congressional powers—those to govern (1) the jurisdiction of federal courts,¹²⁴ (2) suits against the United States,¹²⁵ and (3) rules of evidence for the federal courts¹²⁶—are not sufficient to permit Congress to do indirectly what could not have been done directly by a simple repeal. I will show that his statement as to rules of evidence is

115. Analytically this is the only way to make sense of Chase’s opinion. *See infra* text § IV(A)(1). Structurally, the opinion only roughly approximates this division. The first part, 80 U.S. (13 Wall.) at 136-42, deals with Klein’s property rights, and concludes that they had not been divested before the 1870 Act. This material bears most directly on the government’s right to exclude Klein from recovery. The second part deals with the validity of the 1870 Act, and includes arguments which bear both on the Exclusion Issue and on jurisdictional issues—e.g., arguments directed to the pardon power and arguments directed specially to Congress’ power over the jurisdiction of federal courts and suits against the United States. 80 U.S. (13 Wall.) at 142-48.

116. 80 U.S. (13 Wall.) at 142-48.

117. *Id.* at 148.

118. Justice Miller wrote a dissenting opinion in which Justice Bradley concurred.

119. 80 U.S. (13 Wall.) at 148.

120. *Id.* at 136-42.

121. *Id.* at 142.

122. *Id.* at 142-48.

123. *See supra* text § II(B)(2). Recall that the *Padelford* court ignores the requirement of affirmative proof of loyalty found in the 1868 Act. *See also supra* note 73 and accompanying text.

124. 80 U.S. (13 Wall.) at 145-46.

125. *Id.* at 144 (arguing that it is not entirely accurate that the right to sue the government is a matter of favor).

126. *Id.* at 147.

dictum.¹²⁷

It is this second part of Chase's opinion which concerns us. Unfortunately it is disjointed, ambiguous and generally difficult to follow. Chase begins with what seems to be a sovereign immunity argument: the right to sue the government in the Court of Claims is not entirely a matter of favor.¹²⁸ Without concluding the discussion of sovereign immunity, Chase considers Congress' general power to limit the jurisdiction of the Supreme Court under the clause of the Constitution which gives Congress the power to make "exceptions" to and "regulations" of the Supreme Court's appellate jurisdiction.¹²⁹ He concludes that the 1870 Act is not a valid exception or regulation. Chase then complains that the 1870 Act is an attempt to: (1) prescribe a decision for a case pending before the Court,¹³⁰ and (2) permit a party to a controversy to decide it in his favor.¹³¹ Finally, Chase seems to suggest that the 1870 Act is constitutionally infirm because it attempts to interfere with the federal courts' power to weigh evidence.¹³²

After having made or suggested these arguments (many in a fragmentary way), and after having failed to indicate their relative weight or interrelationship, if any, Chase states "We think it unnecessary to enlarge. The simplest statement is the best."¹³³ Indeed it might have been. The Court's statement, however, is far from the simplest, or clearest, and it is necessary to sort out the possible reasons for the Court's decision. Below I will attempt to deal with the many possible readings of *Klein* and to identify those which are most convincing given the facts of the case, the arguments presented in *Klein* and the state of the law at the time.

IV. ANALYSIS OF THE SUPREME COURT'S DECISION IN *Klein*

The focus of this article is *Klein's* bearing on legislative-judicial separation of powers doctrines. Part IV, Section A, subsection 1 dissects *Klein*, showing that it contains two holdings which can be identified with some certainty—that on Congressional control of jurisdiction and that on sovereign immunity.

127. See *infra* text § IV(B)(1).

128. 80 U.S. (13 Wall.) at 144.

129. *Id.* at 145. See U.S. CONST. art. III, § 2.

130. 80 U.S. (13 Wall.) at 146.

131. *Id.*

132. *Id.* at 147.

133. *Id.* at 148.

Section A, in subsections 2 and 3, analyzes these two holdings. Section B deals with *arguable* additional holdings in *Klein* which relate to the legislative-judicial separation of powers doctrine. Section C takes a brief look at *Klein's* influence on the status of the Court of Claims as a full-fledged constitutional court.

A. *Jurisdiction and Sovereign Immunity: Klein's Holdings Concerning Congress' Power*

1. THE ISSUES IN PERSPECTIVE

Klein contains two identifiable holdings, one concerning the scope of congressional control over federal jurisdiction and one concerning limitations on the doctrine of federal sovereign immunity. In reaching these holdings the Supreme Court used a three step analysis. In order to affirm *Klein's* Court of Claims judgment, a majority of the Supreme Court had to rule in his favor at each step of analysis.

First, the Court had to address the issue of whether Congress had the power in the 1870 Act to retract the statutory rights to recover compensation granted to guilty pardonees in the 1863 Act.¹³⁴ If the Court had found the retraction effective as applied in *Klein*, it would have been required to reverse the Court of Claims, and the remaining two steps would not have been reached. Instead, the Supreme Court affirmed the Court of Claims. This entailed a finding that the 1870 Act could not retract *Klein's* right to compensation. When the 1870 Act is viewed as a retraction of a right to compensation, there are two ways in which that Act might have been unconstitutional. Chase's opinion strongly suggests that either infirmity would justify invalidating the Act.

The first type is a substantive infirmity, based upon an argument that the exclusion of guilty pardonees from compensation was beyond Congress' substantive powers. Implicit in this argument is the proposition that *Klein's* right to recover compensation stems not solely from the 1863 Act but at least in part from a separate constitutional source. The possible sources are

134. The government certainly suggested that the right to recover proceeds could be withdrawn and the the 1870 Act was such a withdrawal: "The *right* here asserted by the respondents to this motion to *be beyond the* power of Congress to take away or modify . . . is a *mere statute* [sic] right to sue in a statute [sic] court . . ." Brief for Motions to Dismiss the Cases at 6, *Pargoud* and *Klein* (emphasis added). As for *Pargoud*, see *infra* note 186.

the President's power to pardon¹³⁵ and the fifth amendment's due process clause.¹³⁶

The second type of infirmity does not depend upon Congress' power to exclude, but on the timing of the exclusion. Conceding Congress' power to exclude claims like Klein's *ab initio*, an argument for the second type of infirmity would find the 1870 Act to be an *ex post facto* law¹³⁷ or a forbidden attempt to de-

135. At one point Chase states that, among other infirmities, the 1870 Act is objectionable for impairing the effect of a pardon, and thus infringing the constitutional power of the Executive. 80 U.S. (13 Wall.) at 147; *see also* *Armstrong v. United States*, 80 U.S. (13 Wall.) 154, 155-56 (1872) (so characterizing the holding in *Klein*). This holding seems to indicate holding that Congress could not accomplish a simple retraction of Klein's right to compensation. If so, the constitutional power of the Executive to issue effective pardons may be just one of the reasons for denying Congress the power to retract Klein's right to compensation. *See infra* notes 136-38. Since other grounds may forbid a retraction of Klein's right of action, one should also recognize the possibility, however remote, that the statements on the pardon power can be treated as dictum. *But see* *Armstrong v. United States*, 80 U.S. (13 Wall.) 154, 155-56 (1872).

136. Klein's lawyers made a fifth amendment argument. Respondents' Argument in Reply at 35. One elaboration of this argument would involve invoking both the fifth amendment and the pardon power. While a disloyal claimant's war zone property was subject to forfeiture by Congress, a pardon might be seen as eliminating the possibility of forfeiture. Hence, after a pardon, a disloyal claimant's property would be fully protected by fifth amendment rights. *Cf.* *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 542-43 (1870). This argument does not appear explicitly either in *Klein* or *Padelford*. It may however have been accepted *sub silentio*. If so, this helps explain why Chase took pains to argue that Wilson had retained a property interest in the proceeds of sale of the cotton. *See supra* note 62.

137. Such an argument would not itself be based necessarily upon the pardon power. The Chase Court construed the 1863 and 1868 Acts so as not to divest Klein's title to the proceeds. *Klein*, 80 U.S. (13 Wall.) at 142; *see Padelford*, 76 U.S. (9 Wall.) at 543; *see also supra* note 62 and accompanying text. Perhaps the Court went on to view the 1870 Act as attaching a new penalty to previously completed acts of disloyalty. In other words, the 1870 Act was viewed as working a forfeiture of Klein's right to the proceeds previously held in trust for him by the government. This forfeiture in turn might have been seen as a violation of the Constitution's prohibition against *ex post facto* laws. U.S. CONST. art. I, § 9 cl. 3. According to this view it is not the pardon provisions of the Constitution which forbid punishing pardonees, it is rather, the retroactive attachment of penalties to the pardoned disloyal—a class not penalized under the 1863 Act as interpreted in *Padelford*—which is forbidden. *See supra* notes 71-74 and accompanying text.

In *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1867) the Supreme Court struck down an act of Congress on the ground that it was an *ex post facto* law. That law required those who would practice law before certain federal courts to swear they had remained loyal to the union. False swearing was punishable by perjury. 71 U.S. (4 Wall.) at 374-81. The Court's theory was that the act "imposes a punishment for some acts . . . which were not punishable [when] committed and for other of the acts which had been punishable it adds a new punishment to that before prescribed . . ." 71 U.S. (4 Wall.) at 377.

Citing *Garland*, Klein's lawyers did argue that the 1870 Act was an *ex post facto* law. Brief for Appellees 4, 8 (brief in opposition to motion to dismiss) (T.D. Lincoln of Counsel); Respondents Argument in Reply 27-30. There is, however, no indication in *Klein* that the 1870 Act was struck down as an *ex post facto* law. Although the legislative

stroy the judgment of a court rendered before its passage.¹³⁸ Each of these possible infirmities may have been a basis of the majority opinion in *Klein*.¹³⁹ What is clear in *Klein* and necessary to the result is the holding that, for one or more of the reasons just mentioned, Congress was not free simply to repeal Klein's right.

At the second level of analysis the Court had to consider whether Congress' control over the jurisdiction of federal courts permitted it to forbid Klein his compensation. Forbidding Klein compensation, as discussed above, was an act otherwise prohibited by the Constitution. By affirming Klein's judgment, the Supreme Court held that Congress' powers to regulate jurisdiction under article III of the Constitution did not independently justify the reversal of Klein's judgment.

Finally, at the third level, even though none of Congress' other powers could support the 1870 Act, the Court had to determine whether Congress' powers to refuse consent to suits against the United States could support the 1870 Act. It is clear the Court considered this issue.¹⁴⁰ Consequently, its affirmance of the Court of Claims' decision entails a recognition of some limit on Congress' power to invoke the doctrine of sovereign immunity. The remainder of this section examines the scope of *Klein's* holdings concerning congressional control of federal court jurisdiction and sovereign immunity.

2. KLEIN AND LIMITS ON CONGRESSIONAL POWER TO CONTROL THE JURISDICTION OF FEDERAL COURTS

a. *The jurisdictional issues framed*

Article III of the Constitution contains what appears to be an exhaustive list of the types of cases which federal courts may entertain.¹⁴¹ Congress, nevertheless, has broad powers to regu-

history of the 1870 Act suggests a punitive purpose, *see supra* note 78 and accompanying text, Chase says nothing to indicate that he viewed the Act as punitive. These observations also apply to an assertion that the Court seriously considered the bill of attainder issue also raised in the briefs. Respondent's Argument in Reply 30-35.

138. *See infra* text § IV(B)(2).

139. From Chase's opinion it is impossible to determine whether there is a single holding at the first level of analysis and much dictum or whether there are one or more alternative holdings. 80 U.S. (13 Wall.) at 136-48. Surely a holding on the pardon issue is close to a certainty. *Armstrong v. United States*, 80 U.S. (13 Wall.) 154, 155-56 (1872).

140. *See infra* notes 186-88 and accompanying text.

141. 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

late the appellate jurisdiction of the Supreme Court¹⁴² and the appellate and trial jurisdiction of the lower federal courts.¹⁴³ These regulatory powers include the option of conferring on those courts less than all of the jurisdiction permitted by the Constitution.¹⁴⁴ The dollar amount limitation on federal trial courts' diversity jurisdiction is a familiar example of a congressional restriction accepted by courts.¹⁴⁵

With respect to the Supreme Court's appellate jurisdiction, the source of congressional power is purely textual: the Constitution provides that Congress can make "exceptions" to and "regulations" for that jurisdiction.¹⁴⁶ With respect to the jurisdiction, trial and appellate, of the lower federal courts, the existence of regulatory power is based upon inference. By negative implication the Constitution provides Congress with the power *not* to create inferior federal courts.¹⁴⁷ The inference from

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.

U.S. CONST. art. III, § 2, cl 1. The list does appear to be an exhaustive one defining the outer limits of the jurisdiction with which Congress can invest courts created under article III. See *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 303-04 (1809). On occasion some Justices, but never a majority, clearly have recognized congressional power to confer upon those courts a jurisdiction not specified in article III. See *National Mutual Ins. Co. v. Tidewater Transfer Co., Inc.*, 337 U.S. 582, 588-604 (1949) (plurality opinion). This article is not concerned with the controversy over the existence of congressional power to expand the jurisdiction clearly permitted by article III. It is rather concerned with possible limits on Congress' power to regulate or contract the jurisdiction enumerated in article III.

142. See *infra* notes 146, 156 and accompanying text.

143. See *infra* notes 147, 148 and accompanying text.

144. See *infra* notes 146-48, 153-56 and accompanying text.

145. See 28 U.S.C. 1332 (1976).

146. 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 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.*

U.S. CONST. art. III, § 2, cl. 2 (emphasis added). The Supreme Court has viewed congressional power under this section rather broadly at times suggesting complete congressional power to withdraw its appellate jurisdiction. See, e.g., *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321, 327 (1796) (dictum). See generally *Ratner, supra* note 26, 157-58 n.2 (presenting authority supporting view of congressional powers as plenary, but taking issue with that view).

147. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress *may* from time to time ordain and establish

U.S. CONST. art. III, § 1 (emphasis added). See *Lockerty v. Phillips*, 319 U.S. 182, 187-88

such a provision has been that Congress, which need not create lower federal courts, surely must have wide latitude in controlling the jurisdiction of those courts it chooses to create.¹⁴⁸ Though it is clear Congress has broad regulatory powers, it is not clear what limits there are on those powers.¹⁴⁹ It is particularly important to determine the extent to which those regulatory powers permit Congress to frustrate rights protected by other constitutional provisions. The recent proposals to use jurisdictional powers to affect busing, abortion, and school prayer cases demonstrate that these issues are alive.¹⁵⁰ Henry Hart, in what continues to be the most influential and comprehensive study of these matters, cited *Klein* as the only precedent which squarely establishes that there are limits.¹⁵¹ Some additional background is needed to understand this proposition and to assess its accuracy.

For purposes of our analysis, two basic types of suspect jurisdictional regulation must be distinguished. The first is what will be called a flat withdrawal or withholding of jurisdiction over defined classes of cases or appeals. The result of such a withholding, where effective, is that the trial or appellate court renders no judgment except the narrow one that the trial or appeal is dismissed on jurisdictional grounds. The second sort of regulation permits the court to entertain the suit or to hear the appeal but requires it to decide the case in a certain way. This sort of regulation, which will be called "regulating the decision," involves an attempt to use *jurisdictional* powers to limit how a court may decide a case over which it generally has jurisdiction.

The first sort of regulation—a flat denial of jurisdic-

(1943); *Sheldon v. Sill*, 49 U.S. (8 How.) 440, 448 (1849).

148. See *Lockerty v. Phillips*, 319 U.S. 182, 187-88 (1943); *Sheldon v. Sill*, 49 U.S. (8 How.) 440, 448 (1850) (suggesting plenary power to withdraw jurisdiction); HART & WECHSLER, *supra* note 4, at 11-12; C. WRIGHT, *FEDERAL COURTS* 26 (3d ed. 1976) (stating that Congress' discretion is considerable); Eisenberg, *supra* note 26, at 501-04 (characterizing the traditional view as one which recognizes complete congressional control, but taking issue with that view). For suggestions that Congress' power to withdraw jurisdiction from the lower federal courts is less than complete, see *infra* note 156.

149. See *infra* note 156-58 and accompanying text.

150. See *supra* notes 1, 2, 3 and accompanying text.

151. Of all the cases cited by Hart bearing on limits of congressional power to regulate the jurisdiction of federal courts, only *Klein* strikes down a regulation. Hart, *supra* note 23. The other cases cited involved jurisdictional regulation which was upheld. Hart's commentary takes the form of harmonizing their results with his own theory of meaningful limitations on congressional control. See Hart, *supra* note 23, at 1364-65, 1379-83.

tion—generally has been found to be legitimate.¹⁵² A number of cases have upheld such regulation of the lower federal courts jurisdiction.¹⁵³ They suggest vast congressional regulatory power.¹⁵⁴ Most commentators take the position that congressional power to withdraw jurisdiction from the lower federal courts is virtually unlimited.¹⁵⁵ As for the Supreme Court's appellate jurisdiction, the opinion in *Ex Parte McCordle*, written by Chase several years before *Klein*, and several other Supreme Court opinions, arguably recognize congressional *carte blanche* to forbid the Supreme Court from hearing a defined category of appeals.¹⁵⁶

It will be extremely useful to see what Henry Hart, the major commentator on *Klein*, thought about these issues of congressional control. Hart was somewhat skeptical about the existence of ultimate limits on Congress' power to withhold types of cases from consideration by the lower federal courts.¹⁵⁷ He did, however, argue forcefully that, despite *McCordle*, Congress is not completely free to deny *appellate* jurisdiction to the Supreme Court.¹⁵⁸ It is important to note, however, that Hart did not think *Klein* was relevant to this problem of flatly withholding some or all of the Supreme Court's appellate jurisdiction. Instead, it seems fair to say that Hart interpreted *Klein* to prohibit or at least limit the use of jurisdictional powers to regulate decisions:

On the other hand, if 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. Rutledge makes that point clearly in the *Yakus* case, as the Court

152. See *infra* notes 153, 155, 156 and accompanying text.

153. *Lauf v. Shinner & Co.*, 303 U.S. 323, 330 (1938); *Sheldon v. Sill*, 49 U.S. (8 How.) 440 (1850).

154. *Id.*

155. See *supra* note 148. But see Sager, 95 HARV. L. REV. 17 (1981), discussed in *supra* note 26 and *infra* note 179.

156. *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506, 513-14 (1868). See the cases referred to in Ratner, *supra* note 26, at 157-58 n.2.

While the scope of *McCordle* is very broad, some commentators argue for, and even some case law seems to support, the existence of limits on Congress' power to flatly withhold or withdraw jurisdiction. For the view that Congress does not possess complete power to withdraw appellate jurisdiction from the Supreme Court, see Hart, *supra* note 23, at 1364-65, 1401-02; Ratner, *supra* note 26. For an unusual but similar view as to congressional power over the jurisdiction of the lower federal courts, see Eisenberg, *supra* note 26. For expressions of doubt as to whether there are any limits on Congress, see *supra* text accompanying notes 146 and 148.

157. Hart, *supra* note 23, at 1398-99.

158. *Id.* at 1364-65.

itself made it clear long ago in *United States v. Klein*¹⁵⁹

Hart's reference to the *Yakus* case provides some indication of what he means in this passage. In *Yakus v. United States*¹⁶⁰ the United States Supreme Court considered a statute giving a trial court jurisdiction to conduct a federal criminal prosecution but withholding from that court jurisdiction to consider the defendant's constitutional defense.¹⁶¹ Thus Hart's citation of *Yakus* suggests that *Klein's* prohibition is against Congress' use of jurisdictional powers to require a court to decide a case in an unconstitutional manner. In other words, what is prohibited is regulating the decision.

The authors of *Hart & Wechsler's Federal Courts and the Federal System*, Hart's successors, also suggest that regulating the decision is the vice to which *Klein* speaks:

Does *Klein* in fact do more [concerning jurisdiction] than hold that . . . it is . . . an unconstitutional invasion of the judicial function when Congress purports, not to withdraw jurisdiction completely, but to bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds?¹⁶²

In summary, Hart and his successors interpret *Klein* to prohibit congressional regulation of decisions by means of jurisdictional powers *if* the effect of its legislation is to require a decision which would otherwise be unconstitutional. Let us now turn to *Klein* to see whether they are correct. Also of interest is whether Hart's successors are correct in their suggestion that *Klein's* jurisdictional holding does not speak to the validity of the first pattern of regulation, the pure withholding or withdrawal of jurisdiction.

b. *Klein's holding concerning regulation of jurisdiction*

Although it is improbable that the Chase Court held that a

159. *Id.* at 1373.

160. *Yakus v. United States*, 321 U.S. 414 (1944).

161. *Id.* at 418, 429-48. In Hart's view the *Yakus* Court's decision upholding such a restriction on jurisdiction, however unfortunate, is not inconsistent with his theory of the *Klein* case and of meaningful limits on congressional regulation of jurisdiction. The distinction is that under the statute upheld in *Yakus*, the appellant had been afforded an earlier opportunity to present his defense to a court. Hart's citation of *Yakus* with *Klein* suggests that, had such prior opportunity not been afforded the defendant in *Yakus*, the statute considered in *Yakus* would have been invalid under *Klein*. Hart, *supra* note 23, at 1379-80.

162. HART & WECHSLER, *supra* note 4, at 316.

pure withholding of jurisdiction was unconstitutional, there is language in *Klein* that would support such an interpretation.¹⁶³ At one point the Court says it is required by the 1870 Act "to dismiss the appeal." Additionally the Court uses the words "withhold appellate jurisdiction"¹⁶⁴ and, at one point, states that if certain facts are found, the Supreme Court's jurisdiction of the case ceases.¹⁶⁵

If it read the 1870 Act to require only dismissal of the appeal, *Klein* then would hold that, when appellate jurisdiction is withheld as a means to an unconstitutional end, the statute withholding jurisdiction is unconstitutional. If so read, *Klein* casts grave doubts on the constitutionality of many of the proposals currently pending before Congress limiting jurisdiction over a specified category of cases.¹⁶⁶ One argument for this view of *Klein* is that the 1870 Act did not specifically state that Congress has employed its regulatory powers over the jurisdiction of federal courts to regulate the substance of the Court's decision. Additionally it is difficult to see how it is even arguable that powers to regulate jurisdiction include powers to regulate decisions. Thus, it is tempting to read the 1870 Act as aimed at the elimination of appellate jurisdiction, instead of actually being aimed at the regulation of decisions. It would be equally tempt-

163. Some excerpts from the *Klein* opinion will prove helpful.

If it [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 It provides that whenever it shall appear that any judgment of the Court of Claims shall have been founded on such pardons, without other proof of loyalty, the Supreme Court shall have no further jurisdiction of the case and shall dismiss the same for want of jurisdiction

. . . The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

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.

The court is required 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 case in a particular way? . . . We are directed to *dismiss the appeal*, if we find that the judgment must be affirmed

80 U.S. (13 Wall.) at 145-46 (emphasis added).

164. *Id.* at 145.

165. *Id.* at 146.

166. See *supra* notes 1, 2 and 3 and accompanying text.

ing to read Chase's statements about "withholding" to indicate that the *Klein* Court viewed the 1870 Act as simply withholding appellate jurisdiction.

Despite the Court's use of the words "dismiss the appeal," the *Klein* opinion can not be interpreted as holding unconstitutional a pure withholding of appellate jurisdiction. First, the concept of jurisdictional powers which includes the power to regulate decisions, while not easy to grasp, is intelligible. In the *Yakus* case, cited by Hart as similar to *Klein*, the statute in issue clarified the mechanics of jurisdictional regulations which determine decisions.¹⁶⁷ In *Yakus*, a court was required to hear a case but deprived of jurisdiction to consider the defendants' constitutional defense.¹⁶⁸ This requirement, which was explicit in *Yakus*, demonstrates the intelligibility, if not the desirability, of a *jurisdictional* mechanism which would compel a court to reach a result otherwise unconstitutional. Its mechanics involve Congress' retracting some but not all of the court's jurisdiction in a case. In other words, Congress gives the Court jurisdiction to decide a case but purports to withdraw from the Court jurisdiction to decide in a particular way. Congress, thus, effectively prohibits the courts from giving effect to certain provisions of the Constitution.

Second, such a mechanism is the only intelligible means of turning jurisdictional regulation into substantive regulation.¹⁶⁹ It must be this that the Court found unconstitutional in *Klein*. A careful reading of the decision leaves no doubt that the 1870 Act was, in Chase's opinion, a regulation of the Court's decision, and not a withdrawal of appellate jurisdiction. The Court knew that the Radicals had drafted the statute. The government invoked the statute in *Klein* to require, in effect, the reversal of a lower court judgment¹⁷⁰ and not merely the dismissal of the appeal. If it had misunderstood the act and interpreted it to require the dismissal of the appeal, Chase's statements would make no sense. Chase concluded that the Act operated in *Klein* as "a means to [the] end"¹⁷¹—in other words, as a prescription of a

167. *Yakus v. United States*, 321 U.S. 414 (1944).

168. *Id.* at 429-38.

169. Any other mechanism would seem to rest simply upon an assertion that the power to regulate jurisdiction is the power to regulate substance. The mechanism discussed in the text is an attempt to regulate *jurisdiction*, but admittedly to substantive ends. Once the mechanism is identified, the question of its validity remains.

170. What was required was reversal in substance but not in form. *See supra* text accompanying notes 97-109.

171. 80 U.S. (13 Wall.) at 145.

“rule of decision”¹⁷² to deny Klein’s pardon rights. But this conclusion is just not true if a dismissal of the appeal is all that was required of the Court. Klein would then have retained his Court of Claims judgment. Indeed, if the 1870 Act had offered the Court such an easy way of protecting Klein’s rights while avoiding constitutional conflict, surely this is the path the Court would have taken it.

Chase stated that the Court was given “jurisdiction . . . to a given point”¹⁷³ but beyond this point and upon making certain determinations the Court must dismiss the cause. When this observation is coupled with his characterization of the 1870 Act as one which prescribed an unconstitutional rule for decision making,¹⁷⁴ a sensible interpretation of Chase’s view of the 1870 Act emerges. Jurisdiction “to a given point”¹⁷⁵ includes not only *the jurisdiction to determine its jurisdiction*, but a further limited jurisdiction to dismiss the “cause.”¹⁷⁶ The cause is not the appeal but is in the words of Senator Edmunds, the draftsman of that part of the 1870 Act, “the case—everything.”¹⁷⁷ The withholding then is not the withholding of jurisdiction to hear an appeal but the withholding of jurisdiction to use certain clauses of the Constitution in reviewing the decision of a lower court. For example, the 1870 Act was an attempt to deny certain plaintiffs the use of the pardon provisions of the Constitution. In short, the 1870 Act was not a pure withholding of jurisdiction; it attempted to “regulate the decision.” Thus, Hart and his successors seem correct when they suggest¹⁷⁸ that *Klein* does not impose limits on Congress’ power to deny the opportunity to appeal in any class of cases. For example, there may be limits on Congress’ power to deny an appeal in an action that the government has won in the lower court, but such a limitation can not be found in *Klein*.¹⁷⁹

172. *Id.* at 146.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*; see *supra* notes 103-09 and accompanying text.

177. See *supra* note 103 and accompanying text.

178. See *supra* text accompanying notes 159 and 162.

179. In an article published since this one was completed for publication, Professor Lawrence Sager concludes that *Klein* has some bearing on Congress’ power simply to withdraw categories of cases from the jurisdiction of the lower federal courts. Sager, *The Supreme Court 1980 Term, Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 29 (1981). He concludes that *Klein’s* aftermath in the Court of Claims lends support to the existence of judicial power to restrain, if not prevent, Congress from withdrawing jurisdiction

A difficult question remains as to the scope of the holding in *Klein* which prohibits congressional regulation of decisions. Which courts are protected under *Klein*? Chase states that the 1870 Act is not a valid exception to or regulation¹⁸⁰ of the Supreme Court's appellate jurisdiction. Hart interprets *Klein* to limit Congress' jurisdictional powers when Congress "directs an Article III court to decide a case."¹⁸¹ Whether it is fair to read

in order to defeat court-declared Constitutional rights. *Id.* at 27-29.

As discussed in the text above, *Klein* itself does not speak definitively to the power of Congress to withdraw jurisdiction in a category of cases. *Klein* involved instead an attempt by Congress to use its jurisdictional powers to compel a court to take jurisdiction of a case and to decide it in a way which was at odds with the pardon provisions of the Constitution. Sager does not assert that *Klein* itself went beyond a ruling against congressional tampering with a court's decision making. He does not assert that *Klein* itself refused to honor a simple withdrawal of jurisdiction. Instead he notes that, shortly after *Klein* was decided, the Court of Claims did refuse to honor a simple withdrawal of its jurisdiction, presumably based upon its reading of *Klein*. Sager notes that in *Waring's Case*, 7 Ct. Cl. 501 (1872), the Court of Claims continued to hear claims which were withdrawn from it by the 1870 Act, parts of which were struck down in *Klein*. Thus, that case does contain a *sub silentio* holding that a simple withdrawal of jurisdiction may sometimes be ignored.

Two other cases are more interesting than the case cited by Sager. In *Witkowski's Case*, 7 Ct. Cl. 393 (1872), the Court of Claims expressly used *Klein* to invalidate the 1870 Act's withdrawal of jurisdiction from the Court of Claims, although, as we have seen, no such question was necessarily decided in *Klein*. 7 Ct. Cl. at 394-99. Still more interesting is a post-*Klein* Supreme Court case holding, *sub silentio*, that the Court of Claims remained open to certain claims despite the 1870 Act's provisions to the contrary. In *Armstrong v. United States*, 80 U.S. (13 Wall.) 154 (1872), unlike *Klein*, the Court of Claims had decided against the claimant. 80 U.S. at 155. Consequently, the Supreme Court in *Armstrong* was not required by the application of the unconstitutional rules for decision in the 1870 Act to destroy a judgment which was valid when entered. The Supreme Court was instead asked to dismiss the appeal because of a lack of jurisdiction. Even assuming, however, that the Supreme Court could read the 1870 Act to leave its own jurisdiction intact when the claimant lost below, the 1870 Act clearly provided that the Court of Claims would have no jurisdiction to hear the claimants' case on remand. *See supra* note 111. Consequently, even if the Supreme Court disagreed with the Court of Claims' original substantive reason for deciding against the claimant, *Armstrong*, it should have been forced to affirm on the ground that the Court of Claims had no jurisdiction to hear the case. The Supreme Courts' remand to the Court of Claims to consider *Armstrong's* claim thus constitutes a refusal to give effect to the 1870 Act's withdrawal of the Court of Claims jurisdiction. It might be argued that the 1870 Act was not in force at the time of the original Court of Claims decision in *Armstrong*. That fact should not make a difference. If the withdrawal of a lower court's jurisdiction is otherwise valid, an appellate court is bound to apply it even though the withdrawal of jurisdiction is subsequent to the lower court's decision. *See infra* text § IV(B)(2).

Like the sovereign immunity holding I have found in *Klein*, perhaps *Waring's Case*, which was excavated by Sager, and *Armstrong*, whose jurisdictional significance I noticed after reading Sager, are susceptible to treatment as aberrations. Perhaps not. In the meantime they are an important part of the case law record with which scholars and judges must contend and which advocates can use.

180. 80 U.S. (13 Wall.) at 146.

181. Hart, *supra* note 23, at 1373.

Klein's holding to include lower federal courts depends upon why the 1870 Act was not a valid regulation of the Supreme Court's appellate jurisdiction. Immediately following Chase's comments that the exceptions and regulations power does not permit congressional regulation of the Supreme Court's decision are statements which suggest that article III implicitly protects all federal courts. In particular, Chase's statement that "Congress has . . . passed the limit which separates the legislative from the judicial power" seems to be founded more on the inherent integrity of article III courts than on specific textual rules which govern the Supreme Court.¹⁸² Chase seems to mean that Congress' exceptions and regulations powers are restricted by general article III limits on what Congress can do with the federal courts. On this reading of *Klein*, Congress is also forbidden from using its jurisdictional powers to regulate the decisions of the lower federal courts.

3. LIMITS ON CONGRESS' POWER TO REFUSE TO CONSENT TO SUITS AGAINST THE UNITED STATES

A striking feature of *Klein* is the Court's decision to allow a plaintiff to recover a money judgment against the federal government despite a federal statute which prohibited such a judgment.¹⁸³ Cases prior to *Klein* which dealt with sovereign immu-

182. 80 U.S. (13 Wall.) at 147.

183. The Supreme Court in *Klein* did affirm a money judgment of the Court of Claims against the federal government despite an act of Congress which forbade such a judgment. One might attempt to diminish *Klein's* sovereign immunity significance on the grounds: (1) that Chase held that *Klein's* property rights in the proceeds of his cotton had never been divested, *see* the Court's reasoning on this point in 80 U.S. (13 Wall.) at 142, and (2) that historically suits against federal officers to recover property wrongfully held have not been treated as barred by sovereign immunity. *United States v. Lee*, 106 U.S. 196, 204-23 (1882). Thus, one might argue that *Klein's* suit was simply one by a claimant against an officer to recover something which was still the claimant's property.

Such an argument can be put to rest. First, in all cases in which a plaintiff has recovered against a federal officer, the officer was a party to the suit and the United States was not an indispensable party. *See United States v. Lee*, 106 U.S. 196, 207-08 (1882). In *Lee* an officer was named defendant. *Id.* at 197, 210-11. In *Klein* the suit was against the United States as sole defendant. 80 U.S. (13 Wall.) at 128.

Even considering *Klein's* suit as one which was in substance against the Secretary of the Treasury for the return of Wilson's property, this will not bring *Klein* within *Lee*. First, even suits against federal officers have been viewed as suits against the United States where "the judgment sought would expend itself on the public treasury." *Land v. Dollar*, 330 U.S. 731, 738 (1947); *cf. Ex Parte New York*, 256 U.S. 490, 500-02 (1921).

Second, if the Treasury had held the proceeds of each potential claimant under the 1863 Act in a separate account, arguably important consequences would follow. If a separate account existed, Chase's claim that *Klein's* property rights had never been divested is at least intelligible. If there were no such account, Chase's statement is preposterous.

nity all suggested that there are no limits on Congress' power to limit claims for pecuniary compensation from the federal government.¹⁸⁴ Subsequent Supreme Court decisions have maintained or suggested in dictum that Congress has plenary control over such suits even where compensation is sought for violation

Without such an account, Klein's right was merely a right of action against an undifferentiated mass of Treasury assets. If there were no such account, the judgment in *Klein* then clearly required that which is today barred by sovereign immunity—a judgment which, contrary to Congress' will, “would expend itself on the public Treasury.” *Land v. Dollar*, 330 U.S. 731, 738 (1947). If there were no such segregated account, *Klein* is the break in an otherwise unbroken chain of judicial refusals to raid the federal treasury.

The available evidence compels a conclusion that there was not a segregated account. Although records were kept of the amount of the cotton proceeds, these proceeds were mingled with other treasury assets. When claimants were paid under the 1863 Act, the funds were drawn from general treasury funds.

First, and most convincing, the 1863 Act was treated as a permanent indefinite appropriation permitting expenditure of treasury funds to pay the judgments of the Court of Claims under that act. Undoubtedly the reason it was called a permanent indefinite appropriation is that it was impossible for Congress to know precisely how much was to be paid out in any one year. This suggests that Klein's money came from an undifferentiated source, not a particular account. *See, e.g.*, U.S. TREASURY DEPT., RECEIPTS AND EXPENDITURES 1869-1870 223 (1870) (Estimate of Appropriations for The Fiscal Year Ending June 30, 1872) (on file in the offices of the Wisconsin Law Review). If the Secretary of Treasury had simply been viewed as holding the proceeds separately from the general treasury funds, no appropriation would have been necessary.

Second, the moneys received from the sale of abandoned and captured property contributed to the amount by which general treasury funds were reported to increase annually. *See, e.g.*, U.S. TREASURY DEPT., RECEIPTS AND EXPENDITURES 1863-1864 20-37 (1865) (An Account of the Receipts and Expenditures of the United States for the Fiscal Year Ending June 30, 1864) (on file in the offices of the Wisconsin Law Review).

Third, Klein's payment was recorded as a general expenditure which depleted treasury funds. *See* U.S. TREASURY DEPT., RECEIPTS AND EXPENDITURES 1873-1874 56 (1875) (An Account of the Receipts and Expenditures of the United States for the Fiscal Year Ending June 30, 1872) (on file in the offices of the Wisconsin Law Review); U.S. TREASURY DEPT., REPORT OF THE SECRETARY OF THE TREASURY FOR THE FISCAL YEAR ENDING JUNE 30, 1872 4-5 (1872) (on file in the offices of the Wisconsin Law Review).

Finally, the Treasury Appropriations warrant (No. 1013 dated August 22, 1872) (on file in the offices of the Wisconsin Law Review) pursuant to which funds were officially transferred to pay Klein, was a general appropriation warrant which debited the general treasury account for appropriations. Indeed, this warrant also transferred funds to be used for running the Smithsonian. Although this transfer was made official after Klein had been paid, *see infra* note 326 and accompanying text, there is no reason to believe that at the time of payment funds were taken from a segregated account which contained proceeds of the sale of abandoned and captured property. Again there is no evidence that such a segregated account ever existed.

184. *See* *United States v. Eckford*, 73 U.S. (6 Wall.) 484, 487-91 (1867); *De Groot v. United States*, 72 U.S. (5 Wall.) 419, 431-32 (1866); *Reeside v. Walker*, 52 U.S. (11 How.) 272, 289-91 (1850); *United States v. McLemore*, 45 U.S. (4 How.) 286, 287-88 (1846). The cases hold that the United States is not amenable to suit under the circumstances presented. The Court's language suggests no exceptions, but of course the cases cannot so hold with respect to circumstances not presented.

of constitutional rights.¹⁸⁵ Congress may restrict such claims by the simple expedient of refusing of consent to suit. Though it held the 1870 Act unconstitutional, the *Klein* Court must have considered the doctrine of sovereign immunity as a basis for upholding the 1870 Act. The 1870 Act does not use the word "immunity" or the phrase "consent to suit." Instead, it is phrased in terms of jurisdiction and evidence. But the doctrine of sovereign immunity was raised by the government in support of the 1870 Act.¹⁸⁶ That doctrine was familiar to and accepted by the Chase Court.¹⁸⁷ Thus, Chase's rejection of the argument "that the right to sue the government in the Court of Claims is a matter of favor"¹⁸⁸ must be read as a rejection of sovereign immunity as a sufficient basis for the 1870 Act.

While Chase recognized that Congress could have refused to create a Court of Claims, he suggested there are some limits on Congress' power to regulate the jurisdiction of that Court once it is formed:

It was urged in argument that the right to sue the government in the Court of Claims is a matter of favor; but this seems not *entirely* accurate. *It is as much the duty of the government as of individuals to fulfill its obligations.* Before the establish-

185. See *Lynch v. United States*, 292 U.S. 571, 582 (1934) (dictum); *Schillinger v. United States*, 155 U.S. 163, 166-68 (1894) (assuming arguendo that the case arose under the fifth amendment's taking provision, the Court still concluded that its only jurisdiction was that given by statute).

186. *Klein* had a companion case, *Pargoud v. United States*, 80 U.S. (13 Wall.) 156 (1872), pending before the Court at the same time and ultimately reported in the *United States Reports* shortly after the *Klein* opinion. See *infra* notes 208-14. The government filed one consolidated motion to "dismiss" both cases. In a separate brief on behalf of *Pargoud* the government began its argument as follows:

The principal is fundamental, that every government has an inherent right to protect itself against suits; and if, in the liberality of legislation they are permitted, it is only on such terms and conditions as are prescribed by statute

The United States as sovereign are not liable to suit and if they submit themselves to suit it is *ex gratia* and on such terms as they may see fit

Supplemental brief for the United States on Motion to Dismiss at 1, *Pargoud* (citation omitted).

In the brief filed jointly in *Pargoud* and *Klein* the government stated:

"The collection of abandoned property," and the payment of its proceeds into the National Treasury, as prescribed by this act of March 12, 1863, being within the lawful authority of Congress, it inevitably follows that the disposal of those proceeds, in any manner, is within the unlimited discretion of Congress; that is unlimited by any judicial right of supervision, there being no method of drawing money from the Treasury of the United States except "in consequence of appropriations made by law. (Art. 1, Sec. 9 par. 6, Constitution of the United States)."

Brief for Motions to Dismiss the Cases at 3, *Pargoud* and *Klein*.

187. See the cases cited in *infra* note 192.

188. 80 U.S. (13 Wall.) at 144.

ment of the Court of Claims claimants could only be heard by Congress.¹⁸⁹

One might read Chase's statement that "it is the duty of the United States to fulfill its obligations . . ." as being consistent with a regrettable power to evade those obligations by withholding consent to suits. Chase, however, did not say merely that the government has a duty to fulfill its obligations. He said it is "not entirely accurate" that "the *right to sue* in the Court of Claims is a matter of favor." Read fairly, this strongly indicates that *suits* against the United States are not entirely dependent on congressional favor.

Although federal sovereign immunity is not expressly recognized in the Constitution, the Supreme Court has viewed it as an inherent privilege of the federal government.¹⁹⁰ There is, however, respectable opinion to the contrary which views sovereign immunity as designed for and suited to monarchies and, therefore, incompatible with our system of government.¹⁹¹ It is tempting to read Chase's statement broadly, to indicate a major retreat from the Court's pronouncements of congressional control over suits against the United States.¹⁹² Possible meanings of Chase's statements are explored below. Some explanations are extreme, not harmonizing well with the case law or commentary, but they are not implausible.

a. Extreme readings of Klein's sovereign immunity holding

Klein might be read to require the government to provide a judicial forum for claims against the federal government. This is an extreme reading. Read somewhat less radically, *Klein* rejects sovereign immunity as a defense once a court has been established to hear claims against the government.¹⁹³ Another and still milder view of such a holding is that sovereign immunity provides Congress with a means of barring some types of claims

189. *Id.* (emphasis added).

190. See *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 388 (1939).

191. See, e.g., Borchard, *Government Liability in Tort*, 34 *YALE L. J.* 1, 1-9 (1924); cf. *Chisolm v. Georgia*, 2 U.S. (2 *Dall.*) 419, 456 (1793) (separate opinion of Justice Wilson).

192. For such pronouncements near the time of *Klein*, see *Gibbons v. United States*, 75 U.S. (8 *Wall.*) 269, 274-76, (1868); *De Groot v. United States*, 72 U.S. (5 *Wall.*) 419, 431-32 (1866).

193. For a discussion of the difficulties involved with such a reading of *Klein* and the conclusion that these difficulties are not quite insurmountable, see *infra* text accompanying note 206.

but not others after the establishment of a court to hear claims against the government. This somewhat less sensational view would concede to Congress power to avoid ordinary tort and contract claims under the doctrine of sovereign immunity but would still recognize a judicial forum for some claims against the federal government. Cases to which the application of sovereign immunity seems particularly inappropriate in light of its origins and functional justifications could be litigated in such a forum. Two categories of cases in which the doctrine of sovereign immunity is inappropriate come to mind; *Klein* might be included in either or both.

First, there are those cases which reflect the fact that the United States government is limited in ways uncharacteristic of absolute sovereigns.¹⁹⁴ The fifth amendment limitation on the taking of property without compensation arguably needs court enforcement if it is to be more than an admonition to the majoritarian branches of government.¹⁹⁵ Although the fifth amendment is not expressly mentioned in *Klein*, the 1870 Act may have been struck down on "taking" grounds.¹⁹⁶

Second, in cases where a plaintiff claims rights conferred by one part of our trinitarian federal government in opposition to another part, the defense of sovereign immunity might be seen as inappropriate.¹⁹⁷ In *Klein*, for example, if the President's pardon power was the reason for invalidating the 1870 Act, then plaintiffs like *Klein* were the best advocates of that pardon power.¹⁹⁸ It could be argued that sovereign immunity should not afford Congress a means of insulating from adjudication its intrusions upon the executive branch.

While these possible limits on federal sovereign immunity are interesting, they have no support in case law, except possibly in *Klein* itself.¹⁹⁹ Indeed, the Supreme Court later seems to have rejected the possible Fifth Amendment exception to the doctrine of sovereign immunity.²⁰⁰ The Court seems never to have consid-

194. See Borchard, *supra* note 191, at 4-5.

195. U.S. CONST. amend. V.

196. See *supra* note 136 and accompanying text.

197. See Borchard, *supra* note 191, at 4-5.

198. Cf. *Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir. 1975). *But cf.* *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). The notion is one of surrogate standing. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 109-12 (1978).

199. Certainly the radical position discussed in the preceding paragraphs conflicts with the modern position subsequently taken by the Supreme Court. See *Lynch v. United States*, 292 U.S. 571 (1934).

200. *Schillinger v. United States*, 155 U.S. 163, 166-68 (1894).

ered the narrower separation of powers exception to sovereign immunity mentioned above. The sweeping statements of congressional control found well before *Klein* to the present day, however, indicate that the separation of powers exception to sovereign immunity is unsupported by the case law.²⁰¹ Although not quite decisive,²⁰² (1) Chase's concession that Congress need not have created a Court of Claims,²⁰³ (2) Congress' general power not to create lower federal courts,²⁰⁴ and (3) Congress' failure to create the Court of Claims before 1855,²⁰⁵ make it difficult to argue convincingly for either of the extreme views of *Klein* which attempt to explain why the doctrine of sovereign immunity may be inappropriate in some cases.²⁰⁶

201. See the cases cited in *supra* notes 184 and 192.

202. For the proposition that the arguments are not quite decisive, see *infra* text accompanying note 206.

203. For Chase's statement, see 80 U.S. (13 Wall.) at 145 ("Undoubtedly the legislature has complete control over the organization and existence of [the Court of Claims]").

204. See 80 U.S. (13 Wall.) at 145.

205. For the history of the Court of Claims, see *Glidden v. Zdanok*, 370 U.S. 530, 552-58 (1962).

206. The arguments against either extreme reading of *Klein* are formidable. Chase concedes that Congress *might have omitted to create* a Court of Claims, perhaps suggesting such an omission would be a constitutional privilege of Congress. According to this view, Congress has at least one way of avoiding the legitimate claims of its citizens by means of sovereign immunity. Beyond this, according to the prevailing view, Congress may refuse to create any lower federal courts. This option offers Congress another means of judiciously avoiding claims. See *supra* text accompanying notes 148-53.

While such arguments against an extreme reading of *Klein* are forceful, and perhaps ultimately dispositive, there is a response. First, as noted above, Chase indicates in *Klein* that the right to sue in the Court of Claims is not entirely a matter of favor. He further states that it is the "duty" of the government to fulfill its obligations. 80 U.S. (13 Wall.) at 144. Taken seriously this statement undercuts the notion that Congress' failure to create the Court of Claims is constitutionally privileged. Instead, one could argue that Congress had only the power to refuse to create such a court, just as it had the power, but not the right, to refuse to create the Supreme Court in violation of the Constitution's clear command. See U.S. CONST. art. III, § 1; see also the portion of the dissenting opinion in *Pargoud v. United States*, 4 Ct. Cl. 337, quoted in *infra* text accompanying note 214 in which, *inter alia*, a similar argument may have been intended. Some problems remain.

First, in the case of the Supreme Court, the Constitution clearly commands its creation. U.S. CONST. art. III, § 1. It might be objected that in the case of inferior federal courts, such as the Court of Claims, the structure of article III seems to give Congress the freedom to create or not to create such inferior courts. See *id.* If there is an answer to this objection it is that the fifth amendment, which requires compensation for takings, commands the creation of such a court. That amendment is, of course, subsequent to article III and could be interpreted to limit the original plan for *carte blanche* congressional powers over the existence and jurisdiction of the lower federal courts. The argument then is that Congress has the power but not the right to avoid suits against the government by refusing to create a Court of Claims. Once created, however, that court must hear fifth amendment claims even if Congress has not consented to them.

b. *Sovereign immunity and discrimination against pardonees*

There is, however, a much narrower and more plausible way of making sense of Chase's opinion. The Court may have taken an antidiscrimination position on sovereign immunity. According to this view Congress is conceded the constitutional power to frustrate even fifth amendment rights by means of sovereign immunity. Congress could not, however, open the Court to one class of persons and close it to another. Perhaps, for reasons already discussed above, Congress is not free to open the courts to truly innocent plaintiffs while closing them to those whose innocence comes by way of a pardon. The pardon power itself could reasonably be viewed to prohibit such discrimination. Even today the remedy for unconstitutional discrimination in limiting jurisdiction might be to open the Court to the excluded class (as Chase seems to have done) instead of closing the Court to the favored class.²⁰⁷

This argument is flawed. If the Court of Claims is free to ignore restrictions on its jurisdiction with respect to certain constitutionally based claims, why were not federal trial courts, *in such special cases* prior to the creation of the Court of Claims but after passage of the fifth amendment, free to ignore the complete restriction on their jurisdiction over suits against the government? In no case did a claimant prevail in a suit for compensation against the government prior to the creation of the Court of Claims. In each case the claim was dismissed on the ground that congressional consent was necessary. None of these cases, however, presented the question of a federal court's jurisdiction to hear a claim for compensation for an *intentional taking* by the federal government despite a lack of congressional consent. See the cases cited in *supra* note 184. Even if one views the sweeping statements in the cases as meant to encompass a case of intentional taking they are still dictum. It was not until the end of the nineteenth century that the Supreme Court stated clearly, still in dictum, that sovereign immunity trumps fifth amendment claims to compensation. *Schillinger v. United States*, 155 U.S. 163, 166-68 (1894).

Finally, it might be asked why, if there is a fifth amendment exception, state courts could not hear such suits against the United States prior to Congress' consent to such suits in federal court. Cf. Hart, *supra* note 23, at 1401-02. This possibility seems, however, never to have been raised in the Supreme Court prior to *Klein* and so one might argue it had not been rejected. Given the broad language of contemporary Supreme Court cases requiring consent to suits against the federal government in federal court, see cases cited in *supra* note 192, the Court almost certainly would have rejected a suit against the federal government brought in either a state or federal court which sought compensation for an intentional taking.

The argument made above does not extend to the possible legislative-executive separation of powers exception mentioned in this section of the text; see also *supra* text accompanying notes 197-98. To succeed, this second argument which is based upon the Constitution's structure, would have to overcome the inference drawn from article III's provision for such inferior federal courts as Congress "may" establish. See *supra* text accompanying notes 147-48.

207. See Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301 (1979).

There is at least some evidence which suggests that Chase considered the issue of discrimination when he rejected the sovereign immunity argument in favor of the 1870 Act. *Pargoud v. United States* was *Klein's* companion case before the Supreme Court.²⁰⁸ *Pargoud* raised issues similar to those in *Klein*, and the government filed a single brief urging dismissal of both *Klein* and *Pargoud* under the 1870 Act.²⁰⁹ It was the decision in *Klein* which permitted the Court's disposition of *Pargoud*. Despite the 1870 Act's provision to the contrary, *Pargoud's* pardon entitled him to recover property under the 1863 Act.²¹⁰ Chase, then, was certainly familiar with the record in *Pargoud*. That record included a dissenting opinion in the Court of Claims remarkably similar to Chase's later opinion in *Klein*.²¹¹ Both opinions suggest that Congress has at least a moral duty to provide a court which would hear claims against the federal government.²¹² Both opinions clearly indicate that there are some legal as well as moral constraints upon what Congress can do with a claims court if it creates such a court.²¹³ The greatest difference between the two opinions is that the dissent in *Pargoud* in the Court of Claims, unlike Chase's opinion in *Klein*, provides some guidance as to the nature of the restraints on Congress.

Nor do I consent to the proposition of the majority that the power to sue the government, in this court, is a *privilege bestowed by Congress and not a right conferred by the Constitution* . . . it is then as much the duty of Congress to provide such a tribunal as it is to coin money, to levy taxes, or to regulate commerce; and it is the undoubted right of the citizen to have such a court . . . And in the performance of that duty have no more right to overstep the constitutional limitations, or infringe upon the rights and functions of other departments, in the one case than in the others . . . *Could Congress exclude a man because he is a citizen of Pennsylvania or of Ohio? or because he is a colored man, or a red-haired man, a Catholic or a Protestant?* I may be told that in all these specified cases the Constitution would interfere to prevent such exclusion. I grant it. But no more than it does in the case under consideration; for the constitutional power of the President to pardon is coextensive with the power of Congress to define and

208. 80 U.S. (13 Wall.) 156 (1872). See C. FAIRMAN, *supra* note 26, at 843-44.

209. Brief for Motions to Dismiss the Cases. *Pargoud* and *Klein*.

210. 80 U.S. (13 Wall.) at 157 (statement of facts preceding opinion).

211. 4 Ct. Cl. 337, 347-48 (Casey, Ch. J., dissenting).

212. Compare 4 Ct. Cl. at 347-48 with 80 U.S. (13 Wall.) at 144-45.

213. *Id.*

punish offences, except in impeachments.²¹⁴

Klein, thus, may be interpreted to prohibit Congress from certain forms of discrimination in defining the Court of Claims jurisdiction. This harmonizes the Chase argument that there are limits on congressional power in the article III area, with other judicial pronouncements on the breadth of congressional power in this area. Chase had seen the argument that Congress is prohibited from certain forms of discrimination in defining jurisdiction for the Court of Claims in the *Pargoud* dissent. This view also constitutes the least radical departure from the prevailing view that Congress' powers over suits against the United States are plenary.

In summary, if Congress ever attempts to repeal the statute which permits the federal courts to hear claims for takings under the fifth amendment, an imaginative plaintiff's attorney could urge that *Klein* renders the repeal unconstitutional. In the alternative, the attorney could argue that, as a result, takings claims could be considered by federal district courts under their general federal question jurisdiction.²¹⁵ However, the existence

214. The quote in full reads as follows:

Nor do I consent to the proposition of the majority, that the power to sue the government, in this court, is a *privilege bestowed by Congress, and not a right conferred by the Constitution*. The grant of such a power is as express and explicit as any other in the Constitution. It was put there not for the benefit of Congress, but to maintain and guard the rights of the citizen. And when the situation and wants of the country require such a court, and the right to sue the government, it is then as much the duty of Congress to provide such a tribunal as it is to coin money, to levy taxes, or regulate commerce; and it is the undoubted right of the citizen to have such a court. And they have precisely the same warrant for doing so. And in the performance of that duty have no more right to overstep constitutional limitations, or infringe upon the rights and functions of other departments, in the one case than in the others. And when such a court is established and its jurisdiction defined, no citizen of the United States, who has a cause falling within its enumerated faculties, can be excluded arbitrarily, and without just cause from maintaining a suit there. To so exclude him, there must be some specified legal disability. If he is to be punished by such exclusion for an offence committed, it must be for an unpardoned crime. For he can no more be punished in that manner after pardon, than he can be tried and convicted and hung for the treason that was remitted and purged by the executive clemency. *Could Congress exclude a man because he is a citizen of Pennsylvania or of Ohio? or because he is a colored man, or a red-haired man, a Catholic or a Protestant?* I may be told that in all these specified cases the Constitution would interfere to prevent such exclusion. I grant it. But no more than it does in the case under consideration; for the constitutional power of the President to pardon is co-extensive with the power of Congress to define and punish offences, except in impeachments.

4 Ct. Cl. at 347-48 (Casey, Ch. J., dissenting) (first emphasis in original; second emphasis added).

215. See *supra* text accompanying notes 195, 196, 206.

of strong contrary dicta, some doctrinal difficulties and the presence of the potential narrower holding suggested above combine to make that lawyer's success unlikely. The antidiscrimination holding suggested above seems the narrowest way to explain the *Klein* Court's refusal to hold that the 1870 Act was based validly on sovereign immunity. Since the Court of Claims' dissent in *Pargoud*, which prohibited discrimination in defining jurisdiction, was known to Chase, there is reason to believe Chase considered such a view. If *Klein*'s holding is based on this unconstitutional discrimination, it lends at least some support to the proposition that congressional control over suits against the federal government is not plenary, as often said, but subject to the ordinary constitutional prohibitions against discrimination.

B. Other Possible Separation of Powers Holdings

Other possible separation of powers holdings in *Klein* are discussed below. It seems possible that the 1870 Act's attempt to repeal Klein's right was unconstitutional because it involved an incursion on the court's evidentiary powers or on a court's judgment. These issues occur analytically as what I have labeled the "first level of analysis." In other words, they offer reasons why Congress could not simply repeal Klein's right. Even assuming that a prohibition of either such incursion is the sole or an alternative holding at that level, *Klein* still goes beyond this prohibition of the retraction of Klein's right. As we have seen *Klein* holds that Congress' jurisdictional and sovereign immunity powers do not support the congressional repeal of those rights.

1. KLEIN'S ALLEGED HOLDING THAT A CONSTITUTIONAL SEPARATION OF POWERS DOCTRINE LIMITS CONGRESS' POWER TO LEGISLATE RULES OF EVIDENCE

The Second Edition of *Hart & Wechsler's The Federal Courts and the Federal System* suggests the presence of a third legislative-judicial separation of powers holding in *Klein*: "Does *Klein* in fact do more than hold that Congress intrudes on the judicial function by assuming to prescribe how the Court should decide an *issue of fact* (under threat of loss of jurisdiction)?"²¹⁶ The question assumes that *Klein* contains a holding which limits Congress' power to govern the fact-finding process in the federal courts. If *Klein* does contain such a holding, it would be the

216. HART & WECHSLER, *supra* note 4, at 316.

starting place for any development of limits upon Congress' power to regulate rules of evidence in the federal courts. Since the publication of this reading of the case in *Hart & Wechsler's Federal Courts and the Federal System* the presence of such a holding apparently has found some acceptance.²¹⁷ *Klein* may be interpreted to provide limitations on Congress' power over questions of evidence. The following passage appears in *Klein's* majority opinion: "[T]he court is 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 contrary We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power."²¹⁸ It is not clear that the Court treats the 1870 Act as a regulation of evidence. Any substantive law has an impact on the law of evidence: the law of evidence refers to the applicable substantive law to determine the relevance of evidence. Consequently, in some expanded sense, every substantive law regulates evidentiary matters. It seems likely that the *Klein* majority viewed the 1870 Act as regulating the "evidentiary process" only in this expanded sense. In short, it seems likely that Chase and those who joined him in *Klein* saw the 1870 Act as purely substantive in the ordinary sense of the word.

Elaboration will prove helpful. Clearly, the rule that a pardon shall not be evidence admissible in court concerning a par-

217. In a separate opinion concurring in part and dissenting in part Chief Judge Seitz states:

The final question [in *Klein*] was the effect of the 1870 act's provisions prescribing the evidence that could be relied upon for certain findings and the result required on the basis of other findings. . . . The Court of Claims had, in 1869, rendered a decision in *Klein's* favor, giving effect to the President's grant of pardon and amnesty and using *evidence* proscribed by the 1870 act. The Supreme Court held . . . that the 1870 act [did not require] the Court to reverse the Court of Claims decision in accordance with the statute's directive regarding the admission and *effect of evidence*. . . . I believe that *Klein* is apposite to and casts doubt upon the constitutionality of applying the [legislation before us] to [a party to this appeal.]

United States v. Butenko, 494 F.2d 593, 614 (1974) (Seitz, Ch. J., dissenting in part, concurring in part) (emphasis added). In context Chief Judge Seitz clearly means that *Klein* held that the 1870 Act's provisions which were designed to require reversal did not require reversal, because the provisions were unconstitutional. While it is clear that Chief Judge Seitz believed that *Klein* contained a holding limiting Congress' power to regulate the effects of evidence, it is not clear whether, in his view, it was this aspect of *Klein* which cast doubt on the constitutionality of the statute considered in *Butenko*.

See also Note, *Separation of Powers and the Federal Rules of Evidence*, 26 HASTINGS L. REV. 1059, 1065-66 (1975). Although the Note never expressly concludes that *Klein* contains a holding which restricts Congress' power to regulate evidence, it strongly suggests that *Klein* contains such a holding. *Id.*

218. 80 U.S. (13 Wall.) at 147.

ticular right it confers is a regulation of substantive rights and not of fact-finding. Such a regulation can mean only that, as a matter of law, the pardon does not confer the right in question. Therefore, the passage just quoted concerns the power of Congress to regulate the effect of a pardon, although the Court makes its arguments in the trappings of a statement about evidentiary rules. The truth of all this is so apparent that it is not likely that the Court saw the issue, described in the quotation above, as one involving the law of evidence. Indeed, one of Klein's lawyers made essentially this point in his brief in opposition to the government's motion to dismiss.²¹⁹

To be fair to those who see a fact-finding holding in *Klein*, there is a possibility that the Chase Court rejected the 1870 Act on the ground that the creation of a presumption impermissibly regulated the fact-finding process. The 1870 Act required the courts to treat as guilty pardonees who failed to protest the recital of guilt in their pardon. The presumption was conclusive; a pardon absent a protest of its recitation of guilt was to yield, in all cases, a factual conclusion of disloyalty which in turn required an exclusion from compensation under the 1863 Act.²²⁰ While one reasonably might view a rebuttable presumption as a regulation of the court's fact-finding process, the analytically preferable view is that a conclusive presumption is a rule of substantive law.²²¹

Not all modern Supreme Court opinions have taken a realistic view of conclusive presumptions. In a few cases they have been treated as rules of evidence.²²² Consequently, it is certainly possible that the Chase Court, sitting a century ago, was equally confused as to the evidentiary nature of conclusive presumptions. It is therefore possible that that Court felt a failure to protest the recital of guilt in a pardon was not sufficiently probative of disloyalty to justify a conclusive presumption. This conclusive presumption would, in effect, shut out all of the evidence

219. Respondent's Argument in Reply at 25, *Klein*.

220. For the text of the 1870 Act, see *supra* note 111.

221. 9 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE 2492 (3d ed. 1940); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection*, 72 MICH. L. REV. 800, 827-30 (1974).

222. In *Vlandis v. Klein*, 412 U.S. 441, 445-54 (1973), the Court apparently viewed a provision of Connecticut law as creating a conclusive presumption. The Court tested the validity of the presumption not as if it were a rule of substantive law, but rather in terms of: (1) the evidentiary bearing of the fact actually proved on the existence of the fact presumed, and (2) the difficulty of otherwise proving the fact presumed. *Id.* at 451. See also NOTE, *supra* note 221, at 827-30.

that a non-pardonee otherwise would be permitted to introduce in support of a claim of loyalty. A non-pardonee would be permitted, for example, to produce witnesses to testify as to loyalty; a pardonee would not be permitted to do this unless he had had the foresight to protest the pardon's recitation of his guilt. The Court might well have felt that there are limits upon Congress' power to create a conclusive presumption and that the 1870 Act surpassed those limits. *Klein* occasionally has been cited as precedent for the rule that there are limits on congressional power to create conclusive presumptions.²²³

Even indulging in the assumptions that the *Klein* Court saw the creation of a conclusive presumption as a vice of the 1870 Act and mistakenly viewed conclusive presumptions as evidentiary regulations, it is, nevertheless, clear that *Klein* does not contain a holding on the issue of conclusive presumptions. Cases treating the validity of a conclusive presumption could have arisen under the 1870 Act, but *Klein* was not such a case. This is true because none of the crucial facts was disputed in *Klein* and, as a consequence, the conclusive presumption did not operate to establish any fact in that case. This is true because it was stipulated in *Klein* that Wilson had served as a surety for rebel officers and was thus, disloyal. The conclusive presumption under the 1870 Act required that when a court found that there was a non-protested pardon, the court must find disloyalty. The finding of Wilson's disloyalty, made by the Court of Claims in *Klein*, was not, however, based upon Wilson's receipt of a pardon but rather upon the facts to which *Klein* stipulated. These conceded facts were adjudged, as a matter of law, to constitute disloyalty under the 1870 Act. In turn, such disloyalty under that Act was viewed, as a matter of law—the constitutional law of pardons—as having no effect on *Klein*'s claim.²²⁴

223. The authors of HART & WECHSLER, *supra* note 4, suggest that the fact-finding holding in *Klein* deals with presumptions, and in connection with that holding they cite a modern case dealing with presumptions under a former version of a federal law regulating firearms. *Id.* at 316, citing *Tot v. United States*, 319 U.S. 463 (1943). *Klein* has been cited in a brief before the Supreme Court for the proposition that conclusive presumptions are invalid. Respondent's Brief at 7-8, *Heiner v. Donnan*, 285 U.S. 312 (1932).

224. The report of the Supreme Court's opinion published in the Court of Claims reporter, 7 Ct. Cl. 240, indicates that this is how the Court of Claims findings were understood by the Supreme Court:

As in *Padelford's Case*, the disloyal acts of Mr. Wilson were discovered after the judgment in the Court of Claims, and were *incorporated into* the findings of the court by *consent of parties*. The opinion . . . was entirely upon other matters than the effect of the amnesty which was not considered.

7 Ct. Cl. at 241 n.* (emphasis added); see also 7 Ct. Cl. at vii-viii. The record in *Klein*

An analogy may be useful. At one time federal law provided a rebuttable presumption that any firearm possessed by certain persons had been procured in interstate commerce.²²⁵ It was a crime for such persons to possess firearms which had been procured in interstate commerce. Note, however, that if, in a case under this law, a criminal defendant had conceded that, *in fact*, he procured his firearm in interstate commerce, a judgment convicting him does not contain a holding about the validity of the presumption. The reason for this is that the presumption was not employed in that case to establish an element of the crime. Similarly, even if the 1870 Act is viewed as partially evidentiary—as prescribing a conclusive presumption—the conclusive presumption contained in the Act was not applied in *Klein* because the facts establishing disloyalty were stipulated. The only portion of the 1870 Act which regulated fact-finding was not applied by the Court of Claims in *Klein*. The issues presented in *Klein* were pure issues of law: given a complete record of fact which was not challenged by either of the parties, the issue was what the correct result would be. As a result of this analysis, it is clear that *Klein* does not contain a holding striking down a con-

indicates that the fact of disloyalty was stipulated by the parties on December 21, 1870. Supplemental Findings of the Court of Claims 1-2. This date is after the 1870 Act but the stipulation makes it clear that the 1870 Act was not used to find the fact that Wilson was disloyal. The Supplemental Findings refer to a decision of the Court of Claims overruling the motion for rehearing on May 23, 1870 without explanation. It seems likely that the court at that time dismissed the petition for rehearing without finding facts other than that Klein received a pardon. This is true because under *Padelford*, decided on April 20, 1870 and announced April 30, the court probably felt constrained to decide for Klein without determining Wilson's loyalty in fact. See *supra* notes 70-75 and accompanying text. The last part of the penultimate sentence of the court's supplemental findings seem to contain its conclusion of law: "[A]nd thereupon the court overruled the said motion upon the ground that taking the amnesty oath, as aforesaid, relieved him of any chance of disloyalty on account of him having become security as aforesaid . . ." Supplemental Findings of the Court of Claims at 2.

The potential importance of Klein's disloyalty in fact was insured with the passage of the 1870 Act. In December, 1870 Klein's attorneys stipulated to his having been disloyal (a surety), apparently content to rest primarily on pardon-based arguments. Supplemental Findings of the Court of Claims at 2. While the form of the Supplemental Findings is confusing, the above seems the best explanation. Certainly as indicated above, the Supreme Court opinion views such facts as having been stipulated. 80 U.S. (13 Wall.) at 142.

Finally, it should be noted that even if there had been no stipulation in *Klein*, if disloyalty had been determined based upon the Court of Claims finding that Klein had become a surety, the finding would have been logically independent of the 1870 Act. The 1870 Act would have been employed to determine disloyalty only if the Court of Claims had conclusively presumed disloyalty based upon its finding that the claimant did not protest his innocence at the time he received a pardon.

225. Federal Firearms Act, ch. 150, § 2(f), 52 Stat. 1250, 1251 (1938).

gressional attempt to interfere with the Court's evidentiary or fact-finding processes.²²⁶

2. POSSIBLE HOLDINGS LIMITING CONGRESS' POWER TO REVISE
JUDICIAL PROCEEDINGS: HEREIN THE SIOUX NATION CASE

a. *The changed law rule*

The following discussion of the 1870 Act appears in Justice Chase's opinion in *Klein*:

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, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. *Can we do so without allowing one party to the controversy to decide it 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?*

We think not; and thus thinking, we do not at all question what was decided in the case of *Pennsylvania v. Wheeling Bridge Co.* No arbitrary rule of decision was prescribed in that case²²⁷

It is impossible to know whether Chase and those who joined in his opinion took such passages seriously as reasons for invalidating the 1870 Act. It is possible that such language contains some of the real grounds for the decision, and so it is important to determine more precisely to what extent the court was influenced by the fact that the 1870 Act was enacted after the judgment of the trial court.

The possibility has been raised in other commentary that the Court in *Klein* invalidated the 1870 Act because the act required the Supreme Court to apply, to a case on appeal, a law

226. Neither of *Klein's* companion cases—*Pargoud* and *Armstrong*—may be said to involve such a holding. In *Pargoud* a Court of Claims judgment against a claimant was reversed. There, as in *Klein*, the claimant had conceded disloyalty. 80 U.S. (13 Wall.) at 156. As in *Klein*, the Court in *Armstrong v. United States*, 80 U.S. (13 Wall.) 154 (1872), did not use the 1870 Act as a basis to find facts. In *Armstrong*, the Court of Claims did find the fact of disloyalty. 5 Ct. Cl. 623, 626 (1870). These ultimate facts of disloyalty were, however, found before the passage of the 1870 Act (Records, *Armstrong*, 80 U.S. (13 Wall.) 154, at 3-4) and in any event were based upon a finding that the claimant had in fact done certain acts; it was not based upon his having failed to protest a pardon. 5 Ct. Cl. at 626.

227. 80 U.S. (13 Wall.) at 146-47 (emphasis added).

enacted subsequent to the judgment of the trial court.²²⁸ If one takes this view, the Chase Court recognized a constitutional right of a successful litigant to retain the judgment of a federal constitutional court as long as that judgment was not erroneous when entered.

Certainly there is language in *Klein* suggesting this possibility: "Can we do so [rule in favor of the government] without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?"²²⁹ In addition, *Pennsylvania v. Wheeling Bridge*,²³⁰ referred to by Chase above²³¹ and distinguished by him was a case in which, in some sense, the effect of a judgment of the Supreme Court was changed by subsequent legislation.²³² In *Wheeling Bridge* Pennsylvania attempted to abate the bridge as a nuisance under federal law despite a federal statute which declared that the bridge was not a nuisance.²³³ The State's argument was that, in an earlier case before the passage of the statute, it had won a Supreme Court judgment that the bridge was a nuisance under federal law.²³⁴ The State asked the Supreme Court to strike down the statute on the ground that it annulled the judgment of that Court in the earlier case.²³⁵ The Court agreed that Congress generally was not free to annul its judgments but found an exception where the new law affected public as opposed to private rights.²³⁶ Chase's citation of *Wheeling Bridge* strongly suggests that he was concerned with the 1870 Act's effect upon a pre-existing judgment of a federal court.²³⁷

228. HART & WECHSLER, *supra* note 4, at 316 n.4 (raising but rejecting this reading of *Klein*).

229. 80 U.S. (13 Wall.) at 146.

230. *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855).

231. The quotation appears *supra* in the text accompanying note 227.

232. 59 U.S. (18 How.) at 431-32.

233. *Id.* at 429-32.

234. *Id.*

235. *Id.* at 431.

236. *Id.*

237. It is worth noting that *Wheeling Bridge*, unlike *Klein*, involved a change in the law to be applied to a case after the completion of the appellate process. It is also worth noting that the federal government was not a party in *Wheeling Bridge*. In *Klein*, the 1870 Act was enacted after the Court of Claims judgment and before the Supreme Court's disposition of the appeal. In *Wheeling Bridge* the Supreme Court considered legislation which had the practical effect of annulling one of its earlier judgments. The fact that the legislation considered in the second *Wheeling Bridge* case was enacted after the end of the appellate process in the first case makes *Wheeling Bridge* a stronger case for a finding of unconstitutionality. Chase may be saying that the principle recognized,

On the basis of a line of cases beginning in 1801 and ending with the decision in *Klein*,²³⁸ the authors of *Hart & Wechsler's Federal Courts and the Federal System* reject an interpretation of *Klein* which is based on the congressional destruction of judgments.²³⁹ These cases support the proposition that an appellate court must apply the law which exists at the time of appeal regardless of whether doing so requires the reversal of a judgment valid when entered²⁴⁰ (I will refer to this proposition as the Changed Law Rule). Of course, a law enacted after judgment in a trial court may be independently unconstitutional for the usual variety of reasons. For example, its substance might conflict with a provision of the Bill of Rights. The Changed Law Rule establishes that Congress may require a new and *otherwise* valid law to apply to pending appeals without violating the Constitution.

I agree with the authors of *Hart & Wechsler's Federal Courts and the Federal System*. Despite some language in *Klein* which suggests a general repudiation of the Changed Law Rule, that Rule was well established at the time *Klein* was decided. Consequently it is unlikely that the Changed Law Rule was rejected in *Klein*. According to the Changed Law Rule, if Congress had been free, prior to judgment, to prescribe a rule of non-consent to suits against the government, it was free to change a rule of consent to a rule of non-consent during the pendency of the appeal. Therefore, if the 1870 Act had been otherwise sound, the Act could have been applied on appeal to reverse a judgment which had been rendered before its enactment. Thus, it seems unlikely that Chase would invalidate the 1870 Act on the ground that it required the reversal of a lower court's decision, even though that decision was sound when made.

One further possibility must be considered. Chase argued

but not applied, in *Wheeling Bridge* also protects lower court judgments from revision unless revision is justified. Revision was justified in *Wheeling Bridge* but not in *Klein* where the revision was arbitrary and not necessary to the government's function as a regulator. This is a possible interpretation of Chase's statements. 80 U.S. (13 Wall.) at 146-47.

238. HART & WECHSLER, *supra* note 4, at 316 n.4. *Hart & Wechsler* cites only *Schooner Peggy* up to the time of *Klein*. *Id.* The following cases, however, do support the general acceptance of the Changed Law Rule before the *Klein* decision: *United States v. Preston*, 28 U.S. (3 Peters) 56, 65-66 (1830) (arguably limited to admiralty); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 632 (1813) (the context is a change in law effected by treaty, but the statement is general). For a case shortly after *Klein*, see *Pugh v. McCormick*, 81 U.S. (14 Wall.) 361, 372-74 (1872).

239. See HART & WECHSLER, *supra* note 4, at 316 n.4.

240. See cases cited in *supra* note 238.

against the application of the 1870 Act to *Klein* because such an application would allow "one party to [a] controversy to decide it in its own favor."²⁴¹ If *Klein* cannot be read as a general repudiation of the Changed Law Rule, it might be read as creating an exception to that Rule. Perhaps Chase saw the Changed Law Rule—which generally permits Congress to change the law which is applicable to a pending appeal—as not permitting a change which would relieve the government of an unfavorable judgment. This would explain Chase's apparent concern with congressional destruction of judgments—a concern which is evidenced by the distinctions he makes between *Klein* and *Wheeling Bridge*.²⁴² At the same time, such an exception is compatible with the existence of the Changed Law Rule as a general proposition. Indeed, Chase distinguished *Wheeling Bridge* by noting that it involved "no arbitrary rule of decision."²⁴³ This phrase comes not long after Chase's expressed concern that the 1870 Act would allow "one party to a controversy to decide it in its own favor."²⁴⁴

This portion of Chase's opinion suggests the possibility that Chase believed that the Constitution prohibited Congress from destroying a federal court judgment which was previously rendered against the federal government. Indeed one could concede to the legislature the power to change the law governing an appeal in cases where the legislature acts as a regulator, i.e., where it is seeking prospective relief, but deny the legislature that power where the case involves a contest over property. While this distinction between two government roles may collapse if put under pressure, Chase might well have entertained it.²⁴⁵

241. 80 U.S. (13 Wall.) at 146.

242. *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855); see *supra* note 227 and accompanying text.

243. 80 U.S. (13 Wall.) at 146.

244. *Id.*

245. Cf. *Hodges v. Snyder* 261 U.S. 600, 603-04 (1923) (citing *Klein*). In *Hodges*, a taxpayer had been awarded an injunction and costs in a suit which challenged a school district in state court and under state law. The state's highest court had approved the injunction before an earlier remand. In a second appeal before the state's highest court, that court applied a new state statute which legitimated the district. It affirmed the judgment as to costs but, based upon the new statute, it reversed as to the injunction. The original plaintiff appealed to the United States Supreme Court, claiming the new statute violated his due process rights by destroying his previous judgment. The Supreme Court said:

[Appellants] sole contention is that as the curative act was not enacted until after the [state] Supreme Court had decided, on the first appeal, the consolidated district was invalid, and did not go into effect until after the Circuit Court had entered judgment adjudging its invalidity and enjoining the defendants from fur-

This narrower view of *Klein's* possible prohibition is consistent

ther conducting its affairs, it deprived them, as applied by the [state] Supreme Court, without due process, of the private property rights which had been vested in them under these adjudications.

It is true that, as they contend the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation. *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421, 429; *The Clinton Bridge*, 10 Wall. 454, 463; *United States v. Klein*, 13 Wall. 128, 146; *McCullough v. Virginia*, 172 U.S. 102, 124 (in which the repealing act was passed after judgment by the trial court).

This rule, however, as held in the *Wheeling Bridge Case*, does not apply to a suit brought for the enforcement of a public right, which, even after it has been established by the judgment of the court, may be annulled by subsequent legislation and should not be thereafter enforced; although, in so far as a private right has been incidentally established by such judgment, as for special damages to the plaintiff or for his costs, it may not be thus taken away. *Pennsylvania v. Wheeling Bridge Co.*, *supra*, pp. 431, 439. This case has been cited with approval in *The Clinton Bridge*, *supra*, p. 463 (likewise involving a public, as distinguished from a private, right of action), *United States v. Klein*

261 U.S. at 603-04.

Hodges of course raises somewhat different issues from those under discussion. First, a state and not the federal government is a party. The rule that is of interest to us prohibits the revision of federal court judgments against the United States based on article III, as opposed to due process grounds. Thus, an appeal from a state court in which the federal government is not a party is not pertinent. Second, *Hodges* involves the arguably more serious matter of revising a judgment after the time for appeal has lapsed, as opposed to the question of the validity of a change in the law pending appeal. While of course the law changed before the appeal to the United States Supreme Court, *the state law issue* of validity of the school district had been finally decided by the highest court which could decide *that issue*.

Despite these differences, *Hodges* suggests that destruction of judgments must be permitted to the extent that the legislature feels it necessary to protect "public rights." The Supreme Court in *Hodges* intimates that the state legislature could not have affected the state courts' award of costs against the school district because those are private rights incidentally vested by judgment. 261 U.S. at 603-04. This in turn suggests that a judgment which is correct when rendered can create a private right good against a governmental entity even before the appellate process has concluded. If this is true of judgments of lower federal courts, is it the result of constitutional protection of property alone? Or are correct-when-rendered private-right judgements accorded the status of property at least partially in order to protect the role of the federal courts? One might explain the Supreme Court's statements about the judgment for costs in *Hodges* on the ground that it had been affirmed by the state's highest court before the first remand. Arguably the state-law appellate process had been concluded—at least as to the issue of costs. Consequently, *Hodges* involves the more serious problem of post-appeal revision of a judgment. It is important to note, however, that the Supreme Court in *Hodges* cites *Klein* as precedent for the protection of judgments. In *Klein* the attempted revision occurred *during* the appellate process. Unless the Court in *Hodges* misunderstood that fact, it saw *Klein* as protecting at least some correct-when-rendered trial court judgments from legislative revision during the appellate process.

Note again that this interpretation which forbids the destruction of judgments based on private rights is not necessarily present in *Klein*. Chase stated that Wilson had never lost his property rights so, arguably, the favorable Court of Claims judgment was not necessary to *Klein's* favorable judgment in the Supreme Court. By this I mean that if *Klein* had lost in the Court of Claims, the Supreme Court would have reversed unless it

with the *Wheeling Bridge* case. In short, it allows the government to change the law in a case where it is a party acting as regulator but not where it is a party disputing property rights or money liability. In a rough sense, one might say the issue is whether the government is a *party in* a purely governmental capacity or in a proprietary capacity.²⁴⁶ I have found no cases up to the time of the *Klein* decision in which the Changed Law Rule was applied to permit reversal of a decision against the government. Indeed, if we restrict the issue to suits involving claims for money or title to property there are very few, if any, such cases during the 110 year period from *Klein* to date.²⁴⁷

had viewed itself as deprived of jurisdiction. See *supra* note 62 and accompanying text. However, it is possible that the 1870 Act was struck down at least in part on the grounds that the Act would destroy a judgment of the Court of Claims.

If indeed a judgment against the government is viewed as a vested right except where the government acts in a regulatory capacity, the very difficult question of when the government acts in a regulatory capacity remains. If legislation which increases public wealth is per se regulatory, the distinction between cases in which the government is a regulator and those in which it is a property seeker collapses. The government could then avoid any judgment unless the legislation which changed the judgment was invalid according to constitutional principles independent of those protecting judgments.

See the cases cited in *infra* note 247 in which Congress validated, *nunc pro tunc*, taxes invalidly collected by a federally protected territory. Assuming the federal government to be the real party in interest in those cases, is the federal government enforcing a new public regulation or is it involved in a property contest? If it is the former and if one ignores all the other reasons supporting *Klein*—including the possibility that the 1870 Act was an ex post facto law—how is *Klein* different? As should be apparent, if Chase intended to establish a rule against changing the law to favor the government, that position ultimately leads to difficult questions about permitting the government to regulate and, assuming an exception for regulation, to the further difficult problem of defining the border between that which is regulation and that which is not. This difficulty is inherent in a long line of analogous cases which purport to recognize protection against government destruction for private, but not public, rights. See *Crowell v. Benson*, 285 U.S. 22, 50-51 (1932) (recognizing the distinction but finding it irrelevant to the issue under consideration); *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855). In the *Crowell* and *Murray's Lessee* context the distinction between private and public rights is difficult to make at the borderline. See also Young, *Federal Courts & Federal Rights*, 45 BROOKLYN L. REV. 1145 (1979) (illustrating the collapse at the border of the distinction between suits at common law and administrative proceedings when Congress chose to metamorphose one into the other).

The point is that the difficulty of distinguishing government regulation of public rights from disputes over private rights — the potential collapse of such a distinction under pressure — does not keep it from being used by and perhaps useful to courts which continue to observe it. This is as true today as it was true when Chase wrote *Klein*. Therefore, the ultimate difficulties with a rule which prohibits the changing of the law in some appellate contexts should not preclude the possibility that Chase intended such a rule.

246. For a discussion of the problem with such a distinction, see *supra* note 245 and accompanying text.

247. In the following cases an act of Congress was held to validate tax collection by or for the territorial government of the Philippines. In each case the act was applied to

At first blush, then, one can make a respectable case for *Klein's* recognition of an exception to the Changed Law Rule for new laws from which the government would benefit as a party to a lawsuit in a proprietary context. Indeed, one could plausibly distinguish the few possibly contrary cases in this century and argue for the current viability of such an exception. *Klein* is arguably the main precedent for both the historical and the current law argument. If such an exception exists, or at least existed, what is its origin? What constitutional justification could the Court have had for devising such an exception to the Changed Law Rule?

First, it is important to note that the Supreme Court may well have made its decisions with no basis other than its own view of natural law.²⁴⁸ Another possible justification is rooted in the earliest separation of powers principle which prohibits or at least discourages non-judicial revision of federal courts' judgments.

b. Changing the law to favor the government on appeal and the rule against congressional revision of federal courts' judgments

(1) The case law background: *Gordon v. United States*

What follows demonstrates that Chase might well have extended preexisting constitutional principles in order to rule in *Klein* that the government cannot change the law to favor itself on appeal.

In 1864, in *Gordon v. United States*,²⁴⁹ the Supreme Court refused to hear an appeal from a judgment of the Court of Claims although it was apparently required by statute to do so.²⁵⁰ The basis for its refusal was the Court's conclusion that

require reversal of the trial court decision which, prior to such legislation, had found the tax invalid. *Rafferty v. Smith, Bell & Co.*, 257 U.S. 226 (1921); and *United States v. Heinszen & Co.*, 206 U.S. 370 (1907). In a number of cases in the 1940's the federal government, while not a party, seems to have benefited from the reversal, under a new law, of a judgment rendered in favor of an employee and against an employer with whom the government had a "cost plus" contract. See, e.g., *Lassiter v. Guy F. Atkinson Co.*, 176 F.2d 984 (9th Cir. 1949).

248. See *Gelpcke v. Dubuque*, 68 U.S. (1 Wall.) 175 (1863), where the Court's refusal to follow the apparently applicable state law based solely upon its view that doing so would "immolate truth, justice and the law" *Id.* at 206. See C. FAIRMAN, *supra* note 26, at 935-40.

249. 69 U.S. (2 Wall.) 561 (1864) (Chief Justice Taney's opinion for the Court was lost at the time of decision and published later at 117 U.S. 697 (1886)).

250. 117 U.S. at 698-706.

the Court of Claims had not acted in a judicial manner when it rendered the judgment.²⁵¹ The Court of Claims had not acted in a judicial manner because, by statute, the Treasury Department was forbidden to pay the Court of Claims judgments until the head of that department approved them.²⁵² No decision can be judicial if it is susceptible to modification by the executive branch. Since the Court of Claims had not behaved as a judicial body in rendering the judgment, review of such a judgment was not within the judicial power and was, therefore, outside of the constitutionally permissible appellate jurisdiction of the Supreme Court.²⁵³ Two years later when Congress removed the Treasury Secretary's revisory authority,²⁵⁴ the Supreme Court in *De Groot v. United States*²⁵⁵ resumed hearing appeals from the Court of Claims.²⁵⁶

Chief Justice Taney's opinion in *Gordon* was not the first to disapprove of non-judicial power to revise the judgments of federal courts.²⁵⁷ The opinion in *Gordon* was lost and not published until long after the *Klein* decision.²⁵⁸ It is to this day the most comprehensive treatment, in a Supreme Court opinion, of such revisory power. The *Gordon* opinion provides at least some indication of what a mid-nineteenth century Supreme Court Justice might have considered constitutionally defective in a scheme which permitted non-judicial revision of the federal courts' judgments. In fact, although Taney's opinion was lost, his arguments were known to his colleagues, many of whom served on the Chase Court.

Taney's opinion is based upon the separation of powers doctrine, an immanent rather than express constitutional doctrine. I believe it is possible to see two distinct but overlapping separation of powers arguments in Taney's rambling statements. The first argument is a basic separation of powers argument based on the independence of the judiciary.²⁵⁹ This argument may be described as follows. There are three distinct branches of the federal government. The Constitution's legislative history and its structure require those branches to be independent of each other

251. *Id.* at 699-706.

252. *Id.* at 698-99.

253. *Id.* at 702-06.

254. Act of March 17, 1866, ch. 19, § 1, 14 Stat. 9 (1866).

255. 72 U.S. (5 Wall.) 419 (1866).

256. See also *Gordon v. United States*, 117 U.S. 697, 706 n* (1886).

257. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

258. *Gordon v. United States*, 117 U.S. 697 (1886).

259. *Id.* at 699-700.

except where, by the design of the checks and balances system, they are permitted mutual interference. Any other interference, no matter how harmless it appears on the surface, ought to be forbidden on prophylactic grounds. Such uninvited interference might cause harm in tangible ways which are not immediately apparent, or it might invite further and more harmful tampering. Finally, such interference might symbolically weaken the affected branch, causing it to lose the respect of the other branches and of the people.

While Taney and other Justices have surely held views resembling that outlined above, there are suggestions in the *Gordon* opinion, and in subsequent Supreme Court opinions, of a more specific but overlapping argument against non-judicial revision. In *Gordon*, Taney complains that the Court of Claims judgment's non-judicial nature stems from the fact that the judgment has no force until triggered by another branch:

The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory . . . *merely an opinion* Such is not the judicial power²⁶⁰

(2) How *Gordon* may have been extended in *Klein*

What is most interesting about Taney's specific concern with the effect of judgments is his view that non-judicial revision may result in a court's having issued "merely an opinion." In other words, one, but by no means the sole, defect of non-judicial revision is that it results in a court's having done something akin to issuing an advisory opinion. It may be that this specific concern is directly related to the more general one already discussed: that advisory opinions are symbolically inconsistent with separation of powers principles.²⁶¹ However, there is another way in which requiring the judiciary to issue advisory opinions threatens it as a separate branch of government: such opinions can divert courts from their primary function of finally deciding controversies by keeping them busy with matters of no consequence.

There are some problems, however, with viewing a rejection

260. *Id.* at 702 (emphasis added).

261. *See supra* text accompanying notes 258-59.

of the Changed Law Rule (in cases where the government benefits as a party) as based upon a concern with advisory opinions. The first problem is that acceptance of the Changed Law Rule does not result in an advisory opinion. Opinions reversed as a result of a change in law on appeal were not advisory: they were fully effective when issued.²⁶² This objection is muted somewhat by the realization that such opinions and advisory opinions are similar. They are members of a common class—opinions which prove to have been unnecessary. The second objection is this: the hypothesis that the Constitution prohibits federal courts from issuing opinions which *may prove* unnecessary is clearly false. *Any* opinion ultimately may prove to have been unnecessary as a result of a wide variety of circumstances including the winning party's decision to ignore it. Despite some contrary indications, the case law clearly accepts the Changed Law Rule and, with it, the validity of requiring federal courts to issue opinions which may later prove to have been unnecessary.²⁶³

Nevertheless, unnecessary non-advisory opinions do cause harm similar to that caused by advisory opinions. Each involves a court's having deliberated in some sense unnecessarily. While it is not feasible to avoid unnecessary opinions entirely, it may be that certain dangerous and easily avoidable instances of unnecessary opinions can be identified and should be prohibited. Arguably, advisory opinions form one class of prohibited unnecessary opinion. A second type of unnecessary prohibited opinion may arise if, by means of a new law, the government changes a decision that is unfavorable to its interests.

In order to argue that the Changed Law Rule creates a risk that an opinion will prove unnecessary—a risk which is generally acceptable *except* where the government is the beneficiary of the change—one must undertake the burden of explaining why the government's dual role is important. The government might be

262. A non-advisory judicial opinion is one in support of a judgment which changes the legal relationship of the parties in ways that may or may not make some practical difference, depending upon future events. An advisory opinion is not connected with a judgment in this way. Even judgments dismissing an action (whether on the merits or for lack of jurisdiction) and even declaratory judgments have this potential effect of changing the legal relationship of the parties. Ordinarily such judgments have a *res judicata* effect with respect to issues decided and collateral estoppel effect as to facts necessarily determined in order to reach the decision. Consequently, after any judicial decision the parties stand in a different legal relationship with respect to possible future litigation. By contrast, after an advisory opinion the parties' legal rights remain unaltered.

263. See, e.g., *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *Pope v. United States*, 323 U.S. 1 (1944).

more tempted to change the law where it benefits directly as a party to a lawsuit. It seems fanciful, however, to assert that such increased temptation should cause the concern that courts will be overburdened with work which will prove to have been done unnecessarily.

Indeed, it seems that only the most general separation of powers principles could adequately explain an exception to the Changed Law Rule. Even if the specific argument that courts might be overburdened with ultimately useless work were more convincing, one would still need to explain why we should be concerned with Congress' overburdening lower federal courts it need not have created at all²⁶⁴ or a Supreme Court whose appellate jurisdiction it can greatly limit.²⁶⁵

For those who agree with Henry Hart that, as a practical matter, a government needs courts to legitimate certain of its activities, an explanation may be as follows.²⁶⁶ To abolish courts or, even less drastically, to have no court open to suits against the government, sends a clear signal to the electorate that Congress has not chosen to exercise its constitutional option of subjecting certain of its actions to judicial scrutiny. Permitting Congress to create such courts, but to ignore their judgments, involves a congressional choice of unaccountability which is more complicated and, hence, less easily understood by the electorate. As a result, it is more difficult to correct at the polls. When Congress acts as a regulator of public rights, it may need to change the rules governing a pending case on a rationale similar to that relied on by the Court in the *Wheeling Bridge* case. On the other hand when the contest involves claims to money or property, such justification may not be present. Particularly in cases like *Klein*, where, arguably, the government has a sovereign immunity privilege that allows it to avoid a constitutional attack, to permit the government to change the law because of some dissatisfaction with the result in pending cases would be to allow the government to hedge its bets from the start. Congress can open its courts to claims against the government hoping for a favorable resolution. If it wins, it wins twice; once with the favorable verdict, and second by the fact that the government appears to have subjected itself to the rule of law. If the government loses, it loses once; it can change the law on appeal. In-

264. See *supra* text accompanying notes 147, 148.

265. See *supra* text accompanying notes 146, 156.

266. Cf. HART, *supra* note 23, at 1370-71.

deed, it may not even lose an appearance of accountability if its refusals to abide by judgments are few. Perhaps a prohibition against Congress' changing the law on appeal, to favor the government, rests on a judgment that the judicial branch ought not participate in Congress' giving the false impression that it has opened the government to judicial scrutiny. If so, a prohibition against changing the law on appeal to favor the government is one which increases legislative accountability, by requiring that Congress either clearly open or clearly close the courts to certain claims.

With the assistance of this analysis, we can see that Chase's apparent concern with the government's power to change the law to favor itself is an intelligible constitutional argument that does not call into question the general validity of the Changed Law Rule. Indeed, such a view of *Klein* is compatible with a number of federal court opinions, including that of a majority of the Supreme Court in *United States v. Sioux Nation of Indians*.²⁶⁷

(3) *Sioux Nation and Klein*

The most recent case in which the Supreme Court has considered striking down an act of Congress using *Klein* is *United States v. Sioux Nation of Indians*.²⁶⁸ In a 1942 case, the Court of Claims had ruled against the Sioux Nation's claim for interest which was founded upon allegations of the unlawful taking of the Sioux Nation's land without compensation.²⁶⁹ In 1974 the Sioux Nation obtained a decision of the Indian Claims Commission holding that the Federal Government had taken the Sioux Nation's land.²⁷⁰ The Commission concluded that the 1942 Court of Claims decision was based upon lack of jurisdiction and was not based upon the merits.²⁷¹ As a consequence the Commission did not treat the Sioux Nation's claim as barred by that decision.²⁷² The government appealed from the Commission's ruling to the Court of Claims which, in 1975, held the Sioux Nation's claim was barred by *res judicata*.²⁷³ In 1978 Congress en-

267. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

268. *Id.*

269. *Sioux Tribe v. United States*, 97 Ct. Cl. 613 (1942), *cert. denied*, 318 U.S. 789 (1943); *see also* 448 U.S. at 384.

270. 448 U.S. at 385-86.

271. *Id.*

272. *Id.*

273. *United States v. Sioux Nation of Indians*, 518 F.2d 1298 (Ct. Cl. 1975).

acted a law which provided for Court of Claims review of the 1974 Commission decision "without regard to the defense of res judicata or collateral estoppel" ²⁷⁴ Thus, Congress gave the Sioux Nation a second chance. In affirming ²⁷⁵ the Indian Claims Commission's award for interest owed as a result of the taking, the Court of Claims apparently had no difficulty with the statute which required relitigation of the taking issue. ²⁷⁶ In the Supreme Court, Justices Blackmun and Rehnquist seriously considered the possibility that the statute requiring relitigation in *Sioux Nation* ran afoul of separation of powers principles established by *Klein*. ²⁷⁷ Justice Blackmun concluded for the court, after an analysis of *Klein* and other cases similar to *Sioux Nation*, that the statute was valid. ²⁷⁸ Justice Rehnquist, in dissent, maintained that *Klein* was an obstacle to such congressionally mandated relitigation. ²⁷⁹

Sioux Nation is the latest of a series of cases in which the Supreme Court has considered what bearing *Klein* has upon the validity of federal statutes which in some sense require the relitigation of cases otherwise finally decided by the federal courts. ²⁸⁰ In each of these cases, Congress arguably has abjured, by statute, the federal government's defense of *res judicata*. ²⁸¹ In each case Congress required the Court of Claims to reconsider, after the time for appeal had expired, a case won by the government. ²⁸²

In 1944, in *Pope v. United States*, ²⁸³ the Court of Claims, citing *Klein*, held that a statute was unconstitutional. ²⁸⁴ The plaintiff in *Pope* had won a judgment in an earlier case in the Court of Claims. ²⁸⁵ The judgment, however, disallowed compen-

274. Act of March 13, 1978, Pub. L. No. 95-243, 92 Stat. 153 (1978).

275. *Sioux Nation of Indians v. United States*, 601 F.2d 1157 (Ct. Cl. 1979).

276. All three opinions, including the dissent, assume the validity of the 1978 statute *sub silentio*, and proceed to deal with the merits of the case. *Id.*

277. 448 U.S. at 391-407, 427-34.

278. *Id.* at 407.

279. 448 U.S. at 430-31.

280. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *Pope v. United States*, 323 U.S. 1 (1944); *Cherokee Nation v. United States*, 270 U.S. 476 (1926); *Nock v. United States*, 2 Ct. Cl. 451 (1867). *See also* the cases collected in *United States v. Sioux Nation of Indians*, 448 U.S. at 398 n.24.

281. *See, e.g.*, *Cherokee Nation v. United States*, 270 U.S. 476, 486 (1926); *Nock v. United States*, 2 Ct. Cl. 451, 458 (1867).

282. *See, e.g.*, *Cherokee Nation v. United States*, 270 U.S. 476, 486 (1926); *Nock v. United States*, 2 Ct. Cl. 451, 455-58 (1867).

283. 100 Ct. Cl. 375 (1944).

284. *Id.* at 380-88.

285. *Id.* at 377.

sation for certain work.²⁸⁶ The statute which was held unconstitutional in *Pope* required payment for the work which was held non-compensable by the prior judgment, and it left only minor computational duties to the Court of Claims.²⁸⁷ Citing *Klein*, the Court of Claims in *Pope* invalidated the statute because it conferred jurisdiction upon the court but left the court without any substantial judicial function.²⁸⁸ The court also suggested the possibility that *Klein* would prohibit congressionally compelled relitigation even where the Court otherwise was permitted to function normally.²⁸⁹

The Supreme Court reversed,²⁹⁰ holding that the statute in question created a new legal liability to satisfy an old moral obligation.²⁹¹ Since the source of the right was new, the earlier proceeding did not constitute a *res judicata* bar.²⁹² As for the assertion that the Court of Claims was left with no judicial function, the Supreme Court disagreed, noting that courts often have little to do in cases where the law is clear and the facts are stipulated, or where judgment is rendered upon consent or upon the default of one of the parties.²⁹³ The Supreme Court in *Pope*, however, did leave open the possibility that *Klein* might apply in an arguably different case:

We do not consider just what application the principles announced in the *Klein* case could rightly be given to a case in which Congress sought, *pendente lite*, to set aside a judgment of the Court of Claims in favor of the Government and to require relitigation of the suit²⁹⁴

In *Sioux Nation* Mr. Justice Rehnquist, dissenting, felt the Supreme Court had before it just such a case of unconstitutional, congressionally compelled relitigation.²⁹⁵ Indeed, the statute at issue in *Sioux Nation* on its face did require the relitigation of a case decided in favor of the government many years earlier.²⁹⁶ Writing for the majority, Justice Blackmun conceded

286. *Id.* at 377-88; see also 323 U.S. at 5-8.

287. 100 Ct. Cl. at 377-88.

288. *Id.*

289. *Id.*

290. *Pope v. United States*, 323 U.S. 1, 14 (1944).

291. *Id.* at 8-11.

292. *Id.*

293. *Id.* at 12.

294. *Id.* at 8-9. Presumably, setting aside a judgment *post lite*, as in *Sioux Nation*, would have been even more questionable.

295. *Sioux Nation*, 448 U.S. at 424-31.

296. See Act of March 13, 1978, Pub. L. No. 95-243, 92 Stat. 153 (1978); United

that relitigation was, in effect, the statute's object.²⁹⁷ He considered two possible objections to the statute: (1) that it would render the Court of Claims' "earlier judgments . . . merely advisory opinions"²⁹⁸ and (2) citing *Klein*, that "Congress overstepped its bounds by granting the Court of Claims jurisdiction to decide the merits . . . while prescribing a rule for decision that left the Court no adjudicatory function to perform."²⁹⁹

In upholding the federal statute requiring relitigation, Justice Blackmun's primary argument was based upon earlier cases such as *Cherokee Nation v. United States*³⁰⁰ which permitted such relitigation.³⁰¹ He did not deal specifically with the advisory opinion argument which he raised at the outset. His argument seems to be a simple one: that such a relitigation does not transgress the rule against advisory opinions because the Supreme Court had already so held in *Cherokee Nation*.³⁰²

Justice Blackmun did, however, attempt to harmonize *Cherokee Nation* with *Klein*.³⁰³ He tried to explain their apparently different results by means of two distinctions:

First, of obvious importance to the *Klein* holding was the fact that Congress was attempting to decide the controversy at issue in the Government's own favor. Thus, Congress' action [in *Klein* as opposed to *Sioux Nation*] could not be grounded upon its broad power to recognize and pay the Nation's debts. *Second*, and even more important, the proviso at issue in *Klein* had attempted to "prescribe a rule for the decision of a cause in a particular way The amendment at issue in the present case, however, like the Special Act at issue in *Cherokee Nation*, waived the defense of res judicata so that a legal claim could be resolved on the merits. Congress made no effort in either instance to control the Court of Claims' ultimate decision of that claim"³⁰⁴

This passage offers some support for the argument presented earlier that the government's power to change a law to favor itself is prohibited as an exception to the Changed Law Rule, and that *Klein* may have been based on such a

States v. Sioux Nation of Indians, 448 U.S. at 389.

297. 448 U.S. at 389.

298. *Id.* at 391-92.

299. *Id.* at 392.

300. 270 U.S. 476 (1926).

301. 448 U.S. at 395-97.

302. *Id.* at 395-402.

303. *Id.* at 405-07.

304. *Id.* at 405 (emphasis added).

prohibition.³⁰⁵

Sioux Nation itself, however, involved the validity of a change in the law to favor the government's opponent. With respect to that question, Blackmun's second distinction between *Klein* and *Sioux Nation*, that the *Klein* rule "prescribed a rule for the decision," seems to raise a straw issue and indeed one not germane to the issue of relitigation. Assuming *arguendo* that Congress can require relitigation, it can certainly prescribe a substantive result by means of any constitutionally valid statute. As Justice Blackmun ultimately conceded, *Pope* made that proposition clear long ago in holding that, in a wide variety of cases, courts are simply required to apply the law to established facts.³⁰⁶

Justice Blackmun's discussion of the first distinction between *Klein* and *Sioux Nation* is apparently, although not expressly, designed to deal with the issue of relitigation. His distinction suggests that he was willing to view the statute in *Sioux Nation* as if it created a new statutory obligation. He was willing to view it that way even though on its face it did not create a new obligation, but rather required relitigation of once-settled issues. According to Blackmun, then, Congress has created a new obligation through its broad spending power. This must be his view, otherwise the spending power has no relevance to the issue of relitigation. His argument that the spending power permits "recognition" of debts is relevant to the issue of "relitigation" only as part of an argument that: (1) there is technically no relitigation because Congress has created a *new* obligation pursuant to the spending power and this new obligation is now the subject of litigation or (2) that since Congress, *in effect*, could have accomplished relitigation by creating a new obligation, it ought to be viewed as having done so.

There is little real analysis in either Justice Rehnquist's or Justice Blackmun's opinion. Both argue only on the basis of precedent and the most generalized notion of separation of powers. Which position is right? Can the government require relitigation under such circumstances? If so, is it forced to resort to the form of creating an odd "new right", one conditioned on the outcome of a new trial of issues previously litigated?

305. See *supra* text § IV(B)(2)(a). Justice Blackmun's point may be more limited however. He may simply question the government's power to intervene on behalf of itself once the time for appeal has expired.

306. 448 U.S. at 407.

While Justice Blackmun's opinion rivals Chase's opinion in *Klein* for its lack of clarity, Blackmun's result seems right. Only according to the most symbolic, ultraprophyllactic view of separation of powers does relitigation under the circumstances involved in *Sioux Nation* pose a threat to the independence of the judicial branch.

First, even if one takes seriously the "advisory" or unnecessary opinion argument,³⁰⁷ there seems little likelihood that the government will abjure a large number of favorable judgments. In short, permitting relitigation under the circumstances of *Sioux Nation* will not result in a large number of Court of Claims' opinions having been issued in vain.

Second, and more seriously, what of the separation of powers concern that Congress should not be permitted to appear to have subjected government action to judicial scrutiny when it has not? As we have already seen, this concern seems rooted in a further concern that Congress should not evade its moral responsibilities to be accountable in court.³⁰⁸ While the act of Congress considered in *Klein* seems to give cause for such concerns, those considered in *Sioux Nation*, *Cherokee Nation* and *Pope* have an opposite thrust. In the latter two cases Congress enlarged the government's accountability for its moral obligations. There is no good reason to prohibit Congress from creating a new liability, by statute, to reflect what it considers to be an existing moral obligation. There seems to be no relevant general limitation upon Congress' power to condition its newly created liability upon a court's finding certain facts. Because these propositions seem true, and because there is only a formal difference between the statute in *Pope*, which was adjudged to have created a new liability, and that in *Sioux Nation* which, it was held, required relitigation, the issue ought to be whether the difference in form reasonably bears on constitutional validity. As we have seen, the form of such a statute is irrelevant to all but the most symbolic of separation of powers concerns. Under such circumstances, it makes little sense to thwart a congressional will which can be effectively reasserted by the careful redrafting of a statute.

C. *Klein and the Status of the Court of Claims*

Today a distinction is recognized between the inferior fed-

307. See *supra* text accompanying notes 262-65.

308. See *supra* text accompanying notes 266-67.

eral courts which, under article III of the Constitution, Congress "may from time to time ordain and establish" and other federal entities created by Congress to function judicially.³⁰⁹ The former are called "constitutional" courts or "article III" courts.³¹⁰ When Congress is found to have established such a court its judges enjoy constitutionally guaranteed life tenure and undiminishable salaries.³¹¹ The second sort of judicial body includes the judicial arms of administrative agencies and various bodies called courts but whose judges' tenure and salaries are within congressional control.³¹²

At the time of the *Klein* decision, such a distinction had not fully emerged; indeed there is no indication that either Congress or the Supreme Court had by 1871 considered the possibility of the use of non-Article III courts outside of the territories.³¹³ A number of statements in Chase's opinion, nevertheless, can be read as suggesting that the Court of Claims was a court in the article III sense, just as any other federal court. Recall that in 1863, in *Gordon v. United States*, the Supreme Court refused to hear appeals from the Court of Claims on the grounds that the Secretary of the Treasury had statutory revisory power over the Court's judgments.³¹⁴ Recall also that in 1865 Congress repealed the Secretary's revisory authority and that, with *De Groot v. United States*, the Supreme Court resumed hearing appeals from the Court of Claims.³¹⁵ In *Klein*, Chase, citing *Gordon* and the Treasury Secretary's revisory power, concedes that "originally [the Court of Claims] was a court merely in name."³¹⁶ He then concludes, citing the repeal of the revisory authority and the *De Groot* case: "Since [the repeal of the revisory authority] the Court of Claims has exercised all the functions of a court The Court of Claims is thus constituted one of those inferior courts which Congress authorizes" ³¹⁷

In 1933, in *Williams v. United States*,³¹⁸ the Supreme

309. See *Glidden Company v. Zdanok*, 370 U.S. 530, 533-34 (1962).

310. *Id.* at 534, 539.

311. *Id.* at 533-34; see U.S. CONST. art. III, § 1.

312. *Glidden*, 370 U.S. at 533-34.

313. For a discussion of the history of this distinction between article III courts and legislative courts, see *id.* at 544-48.

314. *Gordon v. United States*, 117 U.S. 697 (1864). See *supra* text accompanying notes 249-53.

315. See *supra* text accompanying notes 254-56.

316. 80 U.S. (13 Wall.) at 144.

317. *Id.* at 144-45.

318. 289 U.S. 553 (1933).

Court, despite the suggestion in *Klein* to the contrary, held that the Court of Claims was not a constitutional court and that, therefore, its judge's salaries could be reduced.³¹⁹ Three decades later in *Glidden v. Zdanok* the Supreme Court concluded that the Court of Claims was a full-fledged Constitutional court.³²⁰ The five justices³²¹ who voted in favor of the Court's judgment in *Glidden* fell into two camps. Two Justices conceded the correctness of *Williams* but felt the court's status had been changed by Congress in the interim.³²² The other three Justices felt *Williams* had been wrongly decided.³²³ The issue, in their opinion, was largely one of the intent of Congress.³²⁴ Those Justices cited Chase's opinion in *Klein*, suggesting that the Court of Claims had been a full-fledged constitutional court at least as of the time that Congress repealed the Treasury Secretary's revisory power.³²⁵

The history of the *Klein* case bolsters the argument of those three Justices that the Court of Claims had become a constitutional court, at least by the time the Treasury Secretary lost his revisory authority. Although it is not mentioned in any of the commentary on *Klein*, Klein was paid his \$125,300 judgment after the Court of Claims decision was affirmed by the Supreme Court.³²⁶

On the surface this seems surprising. During the debate that has occasionally raged over the constitutional court status of the Court of Claims,³²⁷ it has been noted that Congress has, from time to time, refused to provide funds to pay that court's judg-

319. *Id.* at 559-60, 581.

320. 370 U.S. 530 (1962).

321. *Id.* at 531, 585.

322. *Id.* at 585.

323. *Id.* at 531.

324. *Id.* at 541-58.

325. *Id.* at 568.

326. Proof of payment can be found in the National Archives. It consists of (1) Treasury Department Settlement Warrant No. 260, dated February 14, 1872, authorizing the issuance of a draft, in the amount of \$125,300, to John A. Klein as Victor F. Wilson's Administrator, to cover "return of proceeds of captures and abandoned property" and (2) the draft No. 7708 dated February 15, 1872, endorsed by John A. Klein and stamped "Paid March 4, 1872." Copies of these documents are on file in the offices of the Wisconsin Law Review.

327. For a description of the debate, see *Glidden Co. v. Zdanok*, 370 U.S. 530, 552-58 (1962). *Glidden* summarized the Court of Claims' history including the Supreme Court's vacillations as to its status as a constitutional or legislative court. *Id.* at 552-58. *Glidden* itself overruled an earlier Supreme Court opinion and declared the Court of Claims to be a constitutional court. *Id.* at 562-68. *Glidden* is the Supreme Court's last pronouncement on the subject.

ments.³²⁸ Indeed, one Supreme Court Justice seems to have felt that the frequency with which Congress has refused to pay that court's judgments should provide at least some guidance as to the Court of Claims constitutional stature.³²⁹

The only study dealing with the frequency of nonpayment is a student Note in the *Harvard Law Review* which states that, while nonpayment has been infrequent, it has occurred—perhaps as many as fifteen times by 1933.³³⁰ That Note has played a role in the development of the law dealing with the status of the Court of Claims.³³¹ While asserting that there have been fifteen instances of nonpayment of Court of Claims' judgments, the Note cites only two instances, only one of which occurred in the nineteenth century.³³² It occurred just months after Klein's judgment was paid.³³³ In May 1872, this provision was appended to a law which, among other things, appropriated four hundred thousand dollars, for the next fiscal year, to pay judgments of the Court of Claims: "Provided: That no part of this sum shall be paid upon any judgment rendered in favor of George Chorpenning out of any service rendered in carrying the mail."³³⁴ It is this "instance of nonpayment," cited in the Note mentioned above, that raises questions about why no similar effort had been made to stop payment of Klein's judgment. Certainly Congress had gone to elaborate lengths to deprive Klein of his Court of Claims' judgment.³³⁵ If Congress was willing, on occasion, to refuse to pay Court of Claims' judgments in the early 1870's, one would expect a refusal in Klein's case.

Perhaps the Radical Republicans had not noticed that *Klein* had been decided by the Supreme Court. *Klein's* newspaper coverage was of the back page variety,³³⁶ and a reading of the *Congressional Globe* for two months following the decision does not reveal a single reference to it. Yet there is a more intriguing possibility. Perhaps Congress in the 1870's did not be-

328. Note, *The Court of Claims: Judicial Power and Congressional Review*, 46 HARV. L. REV. 677, 685-86 n.63 (1933).

329. *Glidden v. Zdanok*, 370 U.S. 530, 570 (1962).

330. Note, *supra* note 328, at 685-86 n.63.

331. See *Glidden v. Zdanok*, 370 U.S. 530, 570 (1962).

332. Note, *supra* note 328, at 685-86 n.63.

333. The instance cited occurred in 1872. *Id.* (citing an Act of May 8, 1872, ch. 2, 17 Stat. 61, 82 (1872)). Klein's judgment was paid on March 4, 1872 or as early as February 15, 1872 if delivery of a draft for that amount drawn on the U.S. Treasury is considered payment. See *supra* note 326.

334. Act of May 8, 1872, ch. 2, 17 Stat. 61, 82 (1872).

335. See *supra* text § II(B)(3).

336. The Daily Nat'l Republican, Jan. 30, 1872, at 4, col. 5.

lieve it was proper for it to refuse to pay a judgment of the Court of Claims. *Klein* was decided only eight years after the Supreme Court's refusal in *Gordon* to hear appeals from the Court of Claims because of the Secretary's revisory authority.³³⁷ Two years later, only six years before *Klein*, Congress had eliminated that barrier to review by repealing the law which gave the Secretary revisory authority.³³⁸

Were it not for the Chorpenning proviso³³⁹ cited by the Harvard Note, one might speculate that not even the Radical Republicans would have wished to deprive Klein of his judgment at the cost of returning to the chaotic situation which prevailed after the *Gordon* case. In *Gordon*, the Supreme Court refused to hear an appeal from the Court of Claims because the latter's judgments were subject to executive branch revision. The Supreme Court persisted in this refusal until Congress repealed the executive's revisory powers.³⁴⁰ By making a Court of Claims judgment subject to revision Congress might attempt to use the Supreme Court to undo a Court of Claims' judgment; if it succeeded, its action would have been adjudicated valid by a court—the Supreme Court. But, the argument continues, Congress needed the legitimacy provided by the Court of Claims, and was cautious about exercising raw power to refuse to pay its judgments. In short, they feared a return to a view expressed in *Gordon*: that Congress only *appeared* to have made itself subject to suit in a *court* by providing a Court of Claims.

The Chorpenning proviso, cited as involving an 1872 congressional refusal to pay a Court of Claims judgment, may in fact be consistent with an argument that Congress was reluctant to render a Court of Claims' judgment a nullity. That proviso is not what it seems to be. Chorpenning had neither recovered a judgment in the Court of Claims at the time of the proviso nor did he at any later time.³⁴¹ Indeed, at the time of the proviso, Chorpenning had no litigation pending, his appeal from the first Court of Claims decision had been dismissed and his second Court of Claims suit had not been filed.³⁴² The legislative history

337. See *supra* text accompanying notes 249-53.

338. See *supra* text accompanying notes 254-56.

339. See *supra* note 334 and accompanying text and *infra* note 342 and accompanying text.

340. See *supra* notes 249-56 and accompanying text.

341. See *infra* note 342.

342. The index to the Court of Claims Reports 1863-90 (volumes 1-25) contains three entries under Chorpenning's name: 12 Ct. Cl. 110 (a reprint of 94 U.S. (4 Otto) 397 (1876)); 11 Ct. Cl. 625 (1875); and 3 Ct. Cl. 140 (1867). These entries reflect two suits in

of the proviso is unfortunately murky. Even if one indulges in

the Court of Claims. The first, reflected in 3 Ct. Cl. 140, was lost by Chorpenning in the Court of Claims. He appealed to the United States Supreme Court but later withdrew that appeal. The second suit, reflected in the 11 Ct. Cl. 625 decision of the Court of Claims against Chorpenning, was affirmed by the Supreme Court. 94 U.S. (4 Otto) 397 (1876) (reprinted in 12 Ct. Cl. 110). The history of both suits is contained in the Supreme Court's opinion and the Record and Briefs in the second appeal. *Id.* In describing both suits I will occasionally refer to those two sources connected with the second appeal. The history of Chorpenning's litigation in the Court of Claims is complex. It arises out of his services as a mail carrier in the 1850's and early 1860's.

In 1857 Congress passed a special bill for Chorpenning's relief "requir(ing)" the Postmaster General to "adjust and settle" the former's claim to compensation for services rendered. Act of March 3, 1857, ch. 176, 11 Stat. 521 (1857) [hereinafter referred to as the 1857 Act]. In May of 1857 the Postmaster made an award to Chorpenning. 94 U.S. (4 Otto) 397. Chorpenning received the funds under protest and brought suit in the Court of Claims for additional compensation. *Id.* The Court of Claims found that the 1857 Act authorized the Postmaster to act judicially or quasi-judicially and that the Postmaster was meant to have *exclusive* jurisdiction over Chorpenning's claim. 3 Ct. Cl. at 147-49. As a result of this interpretation of the 1857 Act, the Court of Claims dismissed Chorpenning's petition. *Id.* at 149. He appealed to the United States Supreme Court. 94 U.S. (4 Otto) at 398 (opinion in the second Chorpenning appeal discussing the first appeal).

During the pendency of Chorpenning's appeal from his first loss in the Court of Claims, he attempted to obtain further redress from Congress with respect to the claim just mentioned and a new claim involving the loss of a mail route. Record in 94 U.S. (4 Otto) 397 at 2-3. He succeeded. Congress appointed the Postmaster General to readjust the old claim and to adjust the new one. Act of July 15, 1870, J. Res. 142, 16 Stat. 673 (1870). In December, 1870 the Postmaster made an award of approximately \$443,000, roughly evenly divided between the old and new claims. 94 U.S. (4 Otto) at 398; Record at 5-22.

In early 1871 Congress reacted angrily to Chorpenning's new award. See CONG. GLOBE, 41st Cong., 3d Sess. 833-37 (1871), 1011-13 (Senate, February 1871). The prevailing sentiment seemed to be that the 1870 Act requiring the new adjustment had been inadvertently drafted to result in an award of more than was truly owed Chorpenning. *Id.* Indeed it permitted an award of more than Chorpenning had claimed before the Congress. *Id.* at 834. In February, 1871 Congress repealed the legislation of 1870 which authorized the award. Act of February 9, 1871, J. Res. 26, 16 Stat. 702 (1871). Shortly thereafter, Congress attached riders to bills appropriating funds for the Post Office Department providing that none of the funds appropriated could be used to compensate Chorpenning. Act of March 3, 1871, ch. 115, 16 Stat. 515, 519, 571, 572. Presumably these Acts were designed to prohibit payment of the Postmaster General's award.

In December of 1871, Chorpenning withdrew his appeal from his first loss in the Court of Claims. Record in *Chorpenning v. United States*, Case No. 9 (December Term 1871) (available in the National Archives and on file at the Wisconsin Law Review). The Chorpenning proviso cited in the Harvard Law Review Note, see *supra* text accompanying notes 328-32, became law early the following year. Act of May 8, 1872, ch. 2, 17 Stat. 61, 82 (1872). It was the only legislation connected with Chorpenning's claims which expressly forbade payment of a judgment of the Court of Claims. It was passed at a time when Chorpenning had lost his only case in the Court of Claims and had withdrawn his appeal. His second suit was not filed until 1875. Record in 94 U.S. (4 Otto) 397 at 1. Even if Congress acted in ignorance of Chorpenning's 1871 withdrawal of his appeal, the 1872 Act is no more than advance warning to the Supreme Court that a judgment would not be paid if rendered in the future, i.e., if the Supreme Court reversed the Court of Claims' decision against Chorpenning. Such advance warning is more in the nature of a

the alternative and plausible assumption that the proviso was an attempt to tell the Court of Claims that any judgment in a particular, future action would not be paid, the proviso more resembles a repeal of consent to sue than a post-judgment non-payment. Perhaps the early history of the Court of Claims, after its metamorphosis in the 1860's, is more indicative of independence from Congress than has hitherto been believed.

While much later, Congress on occasion refused to pay Court of Claims' judgments, the apparent acquiescence in the payment to Klein suggests a particular congressional view of the Court of Claims in 1872: that that court's judgments must be paid unless undone by a superior federal court. According to this view, the Congress in 1872 recognized that its predecessor Congress, in repealing the Treasury Secretary's revisory power, had bought some legitimacy at the cost of creating a constitutional court which enjoyed immunity from congressional tampering.

CONCLUSION

Eleven decades of case law, scholarship and debate testify to *Klein's* great significance in relation to the separation of powers between the Congress and the federal judiciary. *Klein's* great and, I hope, enduring contribution is a byproduct of its holding unconstitutional a particular regulation of the federal courts' jurisdiction. As Salmon Chase declared, Congress had passed the "limit which separates the legislative from the judicial power." In so declaring, Chase legitimated the notion of a judicial check on Congress' abuse of its own check on the judiciary.

The particular holding in *Klein* prohibits Congress from using its jurisdictional powers to manipulate federal courts so as to reach decisions which, if addressed in terms of substantive law, would be forbidden by the Constitution. In *Klein* the offending manipulation took the form of conferring jurisdiction upon the Supreme Court to decide an appeal but refusing it jurisdiction to apply the pardon provisions of the Constitution, whose appli-

withdrawal of appellate jurisdiction or of consent to sue the federal government, see *supra* text accompanying note 240-41, than a refusal to pay an extant judgment of the Court of Claims against the government. There was no such judgment; the only extant judgment favored the government and not the claimant. Compare *Klein* in which the claimant had won in the Court of Claims. See *supra* text § IV(B)(2)(b).

Unfortunately the legislative history of the 1872 Act is obscured. Representative Dawes, who had lead the earlier attempt to undo the Postmaster General's award, attached it to a bill appropriating money for the Court of Claims, and it was accepted without debate. CONG. GLOBE, 40th Cong., 2d Sess. 628 (1872).

cation required affirmance of a lower court's decision against the government.

Like Procrustes' unfortunate guests, *Klein* often has been stretched painfully. It has been invoked for propositions on which it has little bearing other than its establishment of the legitimacy of an inquiry into Congress' abuse of its power to regulate the federal courts. Contrary to assertions in a recent case, for example, *Klein* has little to say about the constitutionality of the Speedy Trial Act. Contrary to suggestions in legislative debate, *Klein* has little bearing on the constitutionality of the recent and regrettable proposals to remove jurisdiction from the federal courts in busing, abortion and school prayer cases.³⁴³

The assertion that *Klein* contains a holding limiting congressional regulation of judicial factfinding is also incorrect. Certainly some of the language of the *Klein* opinion may be read as reflecting a concern with such matters. Those statements, if so intended, are interesting, perhaps valuable, dicta, but they have no connection with the result in Klein's case, in which the evidentiary features of the law struck down did not come into play.

Klein continues to be of interest to the federal courts in cases where Congress has attempted to change the result of a federal court judgment—as in *Sioux Nation*. We have seen that, while the government is generally free to change the law which applies to pending appeals, one could make a colorable case that it is not free to reap the benefits of such a change if it is itself a party to the appeal. *A fortiori*, Congress would not be free to change a judgment rendered against the federal government after the time for appeal had lapsed. But what of cases like *Pope* and *Sioux Nation* where Congress attempts to give a second lawsuit to a party who lost to the government? No reasonable reading of *Klein* suggests that Congress should be denied the use of federal courts as judicial instruments for a second lawsuit generously provided to the government's party opponent. Additionally nothing in the circumstances of *Pope* or of *Sioux Nation*, or of other similar cases indicates that a court was asked to function non-judicially.

While much has been read into *Klein*, some has been read out. One plain holding has apparently escaped the notice of the countless people who have had occasion to comment on the case.

343. See, e.g., 128 CONG. REC. S2251 (daily ed. March 17, 1982) (statements of Sen. Goldwater). For rebuttal, see *id.* at S2257 (statements of Charles E. Rice). This whole debate is replete with references to and descriptions of *Klein*. *Id.* at S2225-69.

Klein clearly holds that Congress' powers over sovereign immunity matters were not sufficient to permit it to require the Supreme Court to reverse a lower court's award of a monetary remedy against the United States. Read radically, *Klein* would support an argument that at least some part of the Court of Claims' jurisdiction becomes nonretractable, as a matter of constitutional law, once it is given. Read more realistically, *Klein* recognizes antidiscrimination limits upon Congress' control of suits against the federal government. On this view there are some limits on Congress' ability to open the Court of Claims to suits by one class of claimants while closing it to another. By the time Chase wrote the *Klein* opinion, he had certainly been exposed to such an argument.

Finally, Chase's statements in *Klein* concerning the status of the Court of Claims, together with the fact that Klein's judgment was paid by the treasury, suggest that by 1872 that court had achieved full status as an inferior court of the United States ordained and established under the Constitution's Third Article.³⁴⁴

344. As this article went to press, Congress substantially restructured the claims court system. See Federal Court Improvement Act of 1982, Pub. L. No. 97-1164, 96 Stat. 25 (1982).