

9-1-2017

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Recommended Citation

Evan C. Zoldan, *The Klein Rule of Decision Puzzle and the Self-Dealing Solution*, 74 Wash. & Lee L. Rev. 2133 (2017), <https://scholarlycommons.law.wlu.edu/wlulr/vol74/iss4/7>

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The *Klein* Rule of Decision Puzzle and the Self-Dealing Solution

Evan C. Zoldan*

Abstract

Scholars and courts have struggled to make sense of the Supreme Court's decision in United States v. Klein, an intriguing but enigmatic opinion concerning the limits of Congress's ability to interfere with cases pending before the federal courts. Klein is intriguing because its broad and emphatic language suggests significant limits on the power of Congress. Klein is enigmatic because the Court has never again struck down a statute because of Klein or even made clear what principle animates its result. In fact, despite reaffirming the existence of a principle based on Klein, the Court has repeatedly read it narrowly, suggesting that the principle it embodies has not been adequately articulated. This Article argues that Klein's principle is a specific application of a robust constitutional tradition that restrains governmental self-dealing. A Klein principle restraining governmental self-dealing explains the Court's Klein cases, situates the principle within constitutional theory and doctrine, and provides much-needed direction to lower courts wrestling with questions about legislative intrusions into judicial functions.

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I. Introduction

By dividing the power of the federal government among three interdependent branches,¹ the Constitution sets the lawful exercise of power by each branch in tension with the lawful exercise of power by the others.² This Article explores one prominent and perennial consequence of this tension. On one hand, Congress is empowered to enact statutes that federal courts must apply;³ on the other hand, the courts are empowered to decide

1. See U.S. CONST. arts. I–III (establishing the legislative, executive, and judicial branches of the federal government).

2. See *Morrison v. Olson*, 487 U.S. 654, 693–94 (1988) (noting that the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity” (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (concurring))).

3. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States.”).

cases pending before them.⁴ Usually, these powers are complementary. When Congress writes broad, generally applicable statutes, the courts have ample leeway to decide cases pending before them by applying the law to the facts of these pending cases.⁵ Conflict arises when Congress enacts a statute so specific that it guarantees an outcome in a particular case.⁶ When it acts with this level of specificity, Congress's lawful power to write rules can be indistinguishable from the courts' prerogative to decide cases pending before them.⁷

The line between lawmaking and judicial application of law is governed by a facet of separation of powers doctrine called the *Klein* "rule of decision" principle.⁸ The *Klein* rule of decision principle is named for a Reconstruction-era Supreme Court case that rebuffed Congress's attempt to direct a federal court to rule in favor of the government in a particular class of cases.⁹ *Klein* held, in deceptively simple language, that Congress may not prescribe a rule of decision for the federal courts in cases pending before them.¹⁰ The intuitive simplicity of *Klein*'s rule of decision principle has earned it a place in the Federal Courts canon. However, although the Court has entertained numerous *Klein* challenges in the 150 years since it was decided, the Court has found no other *Klein* violation nor adequately explained the principle that animates its result. Scholars, too, have continued to wrestle with

4. See *id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in . . . inferior Courts.").

5. See JAMES PFANDER, PRINCIPLES OF FEDERAL JURISDICTION 405 (2016) (noting that applying rules of decision is precisely what courts do).

6. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1373 (1953) (inferring a limitation from Article III on Congress's ability to "tell the court how to decide" a case over which it has jurisdiction).

7. William D. Araiza, *The Trouble with Robertson: Equal Protection, The Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1104–05 (1999) (noting the narrow space, if any, between writing rules of decision and guaranteeing an outcome).

8. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871).

9. See *id.* at 147 (holding that Congress may not "prescribe a rule in conformity with which the court must deny to itself the jurisdiction" otherwise conferred by Congress).

10. *Id.* at 146.

the *Klein* puzzle, although they have never agreed on what *Klein* means or even whether it means anything at all.¹¹

The Court's recent opinion in *Bank Markazi v. Peterson*¹² elucidates how difficult it is to articulate an enforceable *Klein* rule of decision principle.¹³ *Bank Markazi* arose out of a lawsuit by victims of Iranian-sponsored terrorism to recover damages from the country of Iran.¹⁴ Because Iran had no assets in the United States that could satisfy these judgments, Congress directed the federal courts to treat the assets of Bank Markazi, the Central Bank of Iran, as the assets of the country of Iran for the purposes of the pending lawsuit.¹⁵ The effect of the statute was to direct the court to find in favor of the claimants, awarding approximately \$1.75 billion dollars to hundreds of terrorism victims.¹⁶ The Court

11. See generally PETER A. GERANGELOS, THE SEPARATION OF POWERS AND LEGISLATIVE INTERFERENCE IN JUDICIAL PROCESS: CONSTITUTIONAL PRINCIPLES AND LIMITATIONS (2009) [hereinafter GERANGELOS, JUDICIAL PROCESS]; Evan H. Caminker, Schiavo and Klein, 22 CONST. COMMENT. 529 (2005); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521 (2003); Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing The Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437 (2006); Amy D. Ronner, *Judicial Self-Demise: The Test of When Congress Impermissibly Intrudes on Judicial Power After Robertson v. Seattle Audubon Society and the Federal Appellate Courts' Rejection of the Separation of Powers Challenges to the New Section of the Securities Exchange Act of 1934*, 35 ARIZ. L. REV. 1037, 1071–72 (1993); Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L. J. 2525 (1998); Stephen I. Vladeck, *Why Klein (Still) Matters: Congressional Deception and the War on Terrorism*, 5 J. NAT'L SEC. L. & POL'Y 251 (2011); Howard Wasserman, *The Irrepressible Myth of Klein*, 79 U. CIN. L. REV. 53 (2011); Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1189 (1981) [hereinafter Young, *Congressional Regulation*]; Gordon G. Young, *United States v. Klein, Then and Now*, 44 LOY. U. CHI. L. J. 265 (2012) [hereinafter Young, Klein, *Then and Now*].

12. 136 S. Ct. 1310 (2016).

13. *Id.* (upholding a statute that favored a party in a pending case).

14. See *id.* at 1319 (describing underlying conduct that gave rise to claims).

15. See 22 U.S.C. § 8772(b) (2012) (defining assets subject to execution to include assets specifically named in a particular lawsuit); see also *Bank Markazi*, 136 S. Ct. at 1320–21 (describing the operation of Iran Threat Reduction and Syria Human Rights Act).

16. See *Bank Markazi*, 136 S. Ct. at 1320–22 (noting that the district court ordered the turnover of Bank Markazi's assets to satisfy outstanding judgments

wrestled with the fact that the statute left little, if any, judicial work for the court to do, but ultimately upheld it.¹⁷ *Bank Markazi* suggests that any limitation on Congress's ability to pick winners and losers in particular, pending cases is slim.¹⁸

This Article reexamines *Klein* in order to determine what principle it states, if, indeed, it states any principle at all. A close look at *Klein*, its progeny, and related Supreme Court doctrine, reveals that *Klein* still polices the boundary between lawmaking and law application by preventing *governmental self-dealing*. That is, although Congress has broad leeway to direct the courts to write rules of decision for courts to follow, Congress does not have unlimited power to direct courts to render judgment in favor of the government in particular cases. A principle against governmental self-dealing not only explains *Klein* and other rule of decision cases, but it also situates *Klein* within a strong constitutional tradition that restrains the government from acting in its own self-interest without also providing generally applicable rules of conduct.¹⁹

Part II of this Article describes *Klein*'s mysterious rule of decision principle and the meanings most often attributed it.²⁰ *Klein* has long stood for the proposition that Congress may not make an exception to federal court jurisdiction when the withdrawal "is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress."²¹ This statement seems, at first blush, correct because it resonates with abstract notions of separation of powers: a constitutional norm preventing Congress from prescribing a rule of decision in a particular case appears to insulate the judicial function from legislative interference. In his foundational essay about Congress's power to limit the jurisdiction of the federal courts, Henry Hart

against Iran).

17. *See id.* at 1329 (holding that the relevant statute does not offend separation of powers because it does not impinge upon the independence of the judiciary).

18. *See id.* at 1326 (upholding statute that directs judgment in favor of particular party in pending case).

19. *See infra* Part III (introducing a principle against governmental self-dealing).

20. *See infra* Part II (discussing *Klein*).

21. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871).

read *Klein* as establishing the principle that Article III of the Constitution creates a space for federal courts not just to declare one party to a case the winner, but actually, acting like a court, to decide the case.²²

Hart did not articulate what principle would constrain Congress's otherwise broad power to set federal court jurisdiction; in the subsequent half-century, scholars have tried to answer this question by proposing principles that comport with the language and result of *Klein* itself and also explain the Court's reluctance to find a *Klein* violation in any subsequent case.²³ The most persuasive explanations of *Klein*'s rule of decision principle argue that the result turned on the specificity or retroactivity of the statute at issue in *Klein*,²⁴ the fact that it seemed to be politically motivated,²⁵ or the fact that it directed a decision in favor of the government.²⁶ Despite the merits of these explanations, however, each fails to state an enforceable principle because each conflicts with longstanding doctrine and jurisprudential considerations. Recognizing the difficulty in finding a jurisprudentially coherent, doctrinally supported *Klein* principle, a number of scholars have given up looking for one, instead contending that, however important the sentiment animating *Klein*,²⁷ the case states no enforceable and coherent principle about the line between the judiciary and the legislature.²⁸

22. See Hart, *supra* note 6, at 1373 (inferring a limitation from Article III on Congress's ability to "tell the court how to decide" a case over which it has jurisdiction).

23. E.g., Sager, *supra* note 11, at 2528–29 (formulating principle based on *Klein*).

24. See GERANGELOS, JUDICIAL PROCESS, *supra* note 11, at 177–79 (raising concerns about targeted legislation); Jackson, *supra* note 11, at 586–87 (same).

25. See Sager, *supra* note 11, at 2528–29 (describing a *Klein* principle that prohibits Congress from forcing the judiciary to "speak and act against its own best judgment"); Young, Klein, *Then and Now*, *supra* note 11, at 269 (arguing that Congress may not open the federal courts "only to use them as puppets").

26. See GERANGELOS, JUDICIAL PROCESS, *supra* note 11, at 181–83 (raising concern with legislation that favors the government as a party); Ronner, *supra* note 11, at 1071 (same); Young, *Congressional Regulation*, *supra* note 11, at 1244 (same).

27. See Caminker, *supra* note 11, at 542 (arguing that *Klein* stands for important if unenforceable principles).

28. See Adrian Vermeule, *The Judicial Power in the State (and Federal)*

But, even this explanation is unsatisfying. Unlike many cases that the Court has explicitly or implicitly overruled, the Court continues to reaffirm the importance of *Klein*. In its recent *Bank Markazi* case, the Court reaffirmed *Klein*'s rule of decision language and appeared to try to make sense of *Klein* in light of prior and subsequent authority.²⁹ Because the Court continues to treat *Klein* as stating an important constitutional principle, this Article seeks a viable principle that can explain *Klein*, square it with the significant doctrine that stands in tension with it, and situate it within the American constitutional tradition.³⁰

Part III returns to *Klein* to determine whether it is possible to articulate a rule of decision principle that meets the concerns raised in Part II.³¹ Closely analyzing the language of *Klein* reveals that the Court was troubled that Congress directed a result in favor of the government. But, as others have noted, a principle that prevents Congress from ever favoring the government in a pending case is too broad to accurately state the law.³² Nevertheless, *Klein* can be read, accurately and meaningfully, to embody a principle against governmental *self-dealing*.

Governmental self-dealing is a phenomenon disfavored in constitutional law and jurisprudence. The generation that framed the Constitution, steeped in the republican tradition,³³ developed

Courts, 2000 SUP. CT. REV. 357, 423–24 (2000) (arguing that “the Court has labored to identify some extra test, restriction, or factor that can coherently separate *Klein* violations from ordinary legislation” but “none of these efforts has succeeded”); Wasserman, *supra* note 11, at 85 (asserting that “*Klein* does no more than *Marbury* and dozens of cases in which the Court has struck down substantive federal statutory law as violating individual constitutional rights”). At least, *Klein* is still good law for its alternative holding about the line between congressional authority and the President’s pardon power. See *Witkowski v. United States*, 7 Ct. Cl. 393, 396–97 (1872) (reaffirming *Klein*’s application to the line between the executive and legislative branches).

29. See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323–26 (2016) (reaffirming the validity of the *Klein* rule of decision principle).

30. See *infra* Part III (introducing a *Klein* principle against governmental self-dealing).

31. *Id.*

32. See Redish & Pudelski, *supra* note 11, at 448 (reading *Klein* to permit Congress to enact “generally applicable rules of decision, even for pending cases in which the federal government is a party, which have the effect of deciding the case in the government’s favor”).

33. See NICHOLAS R. PARILLO, AGAINST THE PROFIT MOTIVE: THE SALARY

a strong aversion to self-dealing—that is—the act of trading on a public prerogative for private gain.³⁴ Although members of the framing generation did not always act selflessly,³⁵ a dominant strain of thought during the framing period held “official disinterestedness” in high regard.³⁶ Prominent and ordinary members of this generation openly criticized public officials for benefitting from their official decisions³⁷ and, very often, scrupulously avoided conflicts of interest when acting in a public capacity.³⁸ Echoing a longstanding tradition, James Madison argued that “[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”³⁹ From this premise, Madison

REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 10 (2013) (describing the “civic republican” tradition); ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED 39 (2014) [hereinafter TEACHOUT, CORRUPTION IN AMERICA] (connecting republicanism with a principle against public corruption); Jack M. Balkin, *Which Republican Constitution?*, 32 CONST. COMMENT. 31, 49–50 (2017) (describing the American tradition of republicanism); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 373–74 (2009) [hereinafter Teachout, *The Anti-Corruption Principle*] (arguing that the Constitution’s framers shared a general belief that political corruption includes the “self-serving use of public power for private ends”).

34. See KEN KERNAGHAN & JOHN LANGFORD, *THE RESPONSIBLE PUBLIC SERVANT* 142–43 (1990) (describing the use of public authority for private gain).

35. See KENNETH R. BOWLING, *THE CREATION OF WASHINGTON, D.C.: THE IDEA AND LOCATION OF THE AMERICAN CAPITAL* 214 (1991) (noting President George Washington’s possible self-interest in selecting D.C.’s location); PARILLO, *supra* note 33, at 29, 42 (describing colonial and post-revolutionary American legal structures that permitted self-interested official behavior); Seth Barrett Tillman, *Business Transactions and President Trump’s Emoluments Problem*, 40 HARV. J.L. PUB. POL’Y 759, 764–66 (2017) (explaining President George Washington’s “engage[ment] in business transactions for value with the Federal Government”).

36. PARILLO, *supra* note 33, at 10.

37. See BOWLING, *supra* note 35, at 213 (noting criticism of Washington for self-interested behavior); Teachout, *The Anti-Corruption Principle*, *supra* note 33, at 373 (discussing distinction between self-interest and public interest).

38. See JEAN EDWARD SMITH, JOHN MARSHALL, *DEFINER OF A NATION* 429 (1996) (describing John Marshall’s avoidance of appearance of conflicts of interest); GORDON WOOD, *REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT* 16–20 (2006) [hereinafter WOOD, *REVOLUTIONARY CHARACTERS*] (describing disinterestedness in 18th Century America).

39. THE FEDERALIST NO. 10, at 124 (James Madison) (Isaac Kramnick ed., 1987).

reasoned that the proposed Constitution's system of representative government can mitigate the effects of self-interested decision-making.⁴⁰ A principle against self-dealing, not surprisingly, is reflected in a number of the Constitution's clauses. For example, the Constitution precludes the Vice President from presiding over Senate proceedings to convict the President after impeachment because the Vice President would benefit personally and directly from official decisions that led to the President's conviction and removal.⁴¹

Examining Supreme Court doctrine other than *Klein* confirms that minimizing governmental self-dealing is a central concern of constitutional law. A close reading of well-established doctrine under the Due Process,⁴² Contract,⁴³ and Ex Post Facto⁴⁴ Clauses demonstrates that a principle against governmental self-dealing animates the Court's interpretation of these clauses, all of which help define the relationship between the government and the individual. As a result, reading *Klein* to state a principle against self-dealing situates the rule of decision principle within a broader tradition that prevents the government from aggrandizing its authority through self-interested behavior at the expense of individual citizens.

Principles gleaned from the Court's self-dealing doctrine can be arranged into an administrable test that not only largely

40. See *id.* at 124–25.

41. See U.S. CONST. art. I, § 3, cl. 6 (providing that when “the President of the United States is tried [by the Senate], the Chief Justice shall preside”); Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 121–22 (1995) (reading the Constitution's clause requiring the Chief Justice to preside over Senate trials of the President as a device to curb self-dealing); see also U.S. CONST. amend. XXVII (delaying congressional pay raises until after an intervening election).

42. See *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996) (distinguishing between “regulatory legislation that is relatively free of Government self-interest . . . and, on the other hand, statutes tainted by a governmental object of self-relief”).

43. See *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25–26 (1977) (holding that “complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake”).

44. See *Carmell v. Texas*, 529 U.S. 513, 532–33 (2000) (holding that the Ex Post Facto Clause prevents the government from retroactively altering rules “in a way that is advantageous only to the State”).

explains existing rule of decision doctrine but also provides direction to courts resolving future cases. Stated succinctly, a *Klein* principle against governmental self-dealing prevents a court from applying a change in law that has the effect of benefitting the government as a party in a case that is pending.⁴⁵ A statute benefits the government as a party if it has the effect of abrogating an obligation owed by the government⁴⁶ in a way that is not merely incidental to the accomplishment of a broader governmental objective.⁴⁷

Part IV applies the test formulated above to *Klein* and the other rule of decision cases, demonstrating the ability of the *Klein* self-dealing principle to explain current doctrine.⁴⁸ Part V unpacks the most important implications of the new rule by applying it to a series of hypothetical cases.⁴⁹ By analyzing these hypothetical cases, the advantages of a *Klein* principle against self-dealing are revealed: it better explains the law than other theoretical models; it situates *Klein* within a robust constitutional tradition disfavoring governmental self-dealing; it provides clear guidance to lower courts facing rule of decision cases; and it explains why the Court has continued to reaffirm *Klein*'s importance despite its inability to articulate a workable principle.

II. *The Elusive Klein Rule of Decision Principle*

The search for an enforceable *Klein* rule of decision principle can feel quixotic. Like Don Quixote, the seeker of this principle must be idealistic enough to look for coherence among Supreme Court cases whose results are more easily explained by politics

45. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871) (declining to apply change in law to favor the government); *Winstar*, 518 U.S. at 896–98 (same); *United States Trust*, 431 U.S. at 25–26 (same); *Perry v. United States*, 294 U.S. 330, 347 (1935) (same).

46. See *United States Trust*, 431 U.S. at 25–26 (declining to defer to state's repudiation of its own financial obligation).

47. See *Winstar*, 518 U.S. at 896–98 (distinguishing between self-interested laws and statutes “incidental to the accomplishment of a broader governmental objective”).

48. See *infra* Part IV (describing a *Klein* self-dealing principle).

49. See *infra* Part V (applying *Klein* to hypothetical cases).

than law. The prize is the ability to articulate an enforceable principle that elegantly separates Congress's power to write rules of decision from the federal courts' power to decide cases pending before them. But just as Quixote tilted at windmills, the federal courts knight-errant is faced with explanations for *Klein* that appear formidable until they are subjected to close examination. This Part describes the *Klein* case and its elusive rule of decision principle. It then explores each of the meanings most often attributed to *Klein* and demonstrates the limitations of each as an enforceable constitutional principle.

A. *The Klein Case*

The enigmatic *Klein* rule of decision principle grew out of an interpretation of the 1863 Abandoned and Captured Property Act (ACPA), which permitted federal agents to seize and sell abandoned or captured civilian property in states or territories in rebellion against the United States.⁵⁰ Because some of the property would belong to loyal residents of rebellious areas, the ACPA permitted claimants to make claims against the United States for the value of seized property, provided that they demonstrated that they had “never given any aid or comfort to the present rebellion.”⁵¹ Despite the more obvious interpretation of this language, the Supreme Court held in a case called *United States v. Padelford*⁵² that even a person who had committed disloyal acts would be considered to have “never given any aid or comfort to the present rebellion” as long as he later took an oath of loyalty pursuant to a presidential pardon.⁵³ In facts similar to those in *Padelford*, Wilson, a wealthy merchant, took an oath of loyalty after his cotton was confiscated and sold by Union forces.⁵⁴ After Wilson's death, Klein, the administrator of his estate, prevailed in a suit under the

50. Abandoned and Captured Property Act of 1863, ch. 120, § 1, 12 Stat. 820.

51. *Id.* § 3.

52. 76 U.S. (9 Wall.) 531 (1869).

53. *Id.* at 534 (emphasis added).

54. See Amanda L. Tyler, *The Story of Klein: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, in FEDERAL COURTS STORIES 87, 91–92, 103 (Vicki C. Jackson & Judith Resnik eds., 2010) (discussing the historical background of *Padelford*).

ACPA before the Court of Claims.⁵⁵ The idea of formerly rebellious southerners taking advantage of a loyalty oath to recover money from the Treasury exercised the Radical Republicans in Congress,⁵⁶ many of whom did not share Lincoln's hope that post-war politics would proceed "with malice toward none" and "charity toward all."⁵⁷ While Klein's case was pending on the government's appeal from the award, Congress tried to undo *Padelford* by eliminating pending and future claims under the ACPA for claimants who relied on an oath of loyalty.⁵⁸

In what would otherwise have been a routine appropriations bill funding the federal government for the coming year, Congress added a proviso that would become the focal point of the Supreme Court's *Klein* decision.⁵⁹ After appropriating money to pay judgments rendered against the United States, the bill provided that no loyalty oath would be admissible as evidence to *support* any claim against the United States under the ACPA,⁶⁰ as it had been used in *Padelford* and *Klein's* action before the Court of Claims.⁶¹ Instead, a presidential pardon would serve as "conclusive evidence that [a claimant] did take part in and give aid and comfort to the late rebellion" within the meaning of the ACPA.⁶² The proviso further directed the Court of Claims to dismiss suits in which the claimant asserted an oath of loyalty as proof of claim and withdrew jurisdiction from the Supreme Court over claims—like Klein's—in which the claimant had previously prevailed based on a loyalty oath.⁶³

55. *Id.* at 93.

56. *Id.* at 94–95 (arguing that the proviso was prompted by the Radical Republican desire to undo *Padelford*).

57. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865).

58. *See* *United States v. Klein*, 80 U.S. (13 Wall.) 128, 143–44 (1871) (noting that the proviso made "no pardon . . . admissible in evidence" to support a claim for reparations).

59. Tyler, *supra* note 54, at 94–95. The appropriations proviso is also known as the Drake Amendment, after its sponsor, United States Senator from Missouri, Charles Drake. *Id.*

60. Act of July 12, 1870, ch. 251, § 1, 16 Stat. 230, 235.

61. *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 533 (1869); *Klein*, 80 U.S. (13 Wall.) at 133–34.

62. Act of July 12, 1870 § 1.

63. *Id.*

B. Klein's Promises

When the government's appeal from the Court of Claims's judgment for Klein reached the Supreme Court, the Court invalidated the appropriations proviso and held that Klein was entitled to his judgment.⁶⁴ This much is clear. But, what is less clear is the basis for the result. Neither in *Klein* itself, nor in subsequent cases, has the Court adequately explained precisely what principle animates the holding.⁶⁵ In his opinion for the Court, Chief Justice Chase introduced a number of interrelated concepts that have formed the basis for all subsequent discussions about *Klein's* meaning.⁶⁶ In order to understand *Klein's* possible meanings, it is first helpful to examine Chase's language.

Chase began by finding that Wilson (Klein's decedent) had been pardoned pursuant to presidential proclamation and statutory acts of amnesty.⁶⁷ As a result, under the pre-proviso ACPA, as interpreted in *Padelford*, Klein would be entitled to the proceeds of the seized cotton.⁶⁸ The issue, then, was the effect of the appropriations proviso.⁶⁹ Because the proviso purported to withdraw the jurisdiction of the Court of Claims and the Supreme Court, Chase addressed whether Congress has power to do so under its authority to manage the inferior courts of the United States and its power to make exceptions from the Supreme Court's appellate jurisdiction.⁷⁰ Chase acknowledged that "the legislature has complete control over the organization and existence" of the Court of Claims and the absolute right to eliminate the Supreme Court's appellate jurisdiction over "a particular class of cases."⁷¹ But, Chase noted, "the proviso shows plainly that it does not intend

64. *Klein*, 80 U.S. (13 Wall.) at 148.

65. See Tyler, *supra* note 54, at 87; Redish & Pudelski, *supra* note 11, at 437; Vermeule, *supra* note 28, at 423–24; Vladeck, *supra* note 11, at 251; Wasserman, *supra* note 11, at 54–55.

66. See, e.g., Tyler, *supra* note 54, at 101–13; Redish & Pudelski, *supra* note 11, at 437; Vermeule, *supra* note 28, at 423–24; Vladeck, *supra* note 11, at 251; Wasserman, *supra* note 11, at 54–55.

67. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 140–43 (1871).

68. *Id.*

69. *Id.* at 142.

70. *Id.* at 143.

71. *Id.* at 145.

to withhold appellate jurisdiction except as a means to an end,” that is, to deny the effect of presidential pardons.⁷² Because the purpose of the proviso was to “deny to pardons granted by the President the effect which this court had adjudged them to have,” Chase concluded that the proviso’s withdrawal of jurisdiction was “founded solely on the application of a rule of decision, in causes pending, prescribed by Congress.”⁷³

It is these words, *Klein*’s rule of decision principle, which have intrigued and confounded generations of scholars.

The cause of this confusion is clear: where one would expect an explanation of what is wrong with a statute that withdraws jurisdiction based on a “rule of decision, in causes pending, prescribed by Congress,”⁷⁴ Chase offered scarcely more than a repetition of the rule of decision language. Chase wrote that the proviso was not an exercise of Congress’s Exceptions Clause power because it required the Court to “ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased What is this but to prescribe a rule for the decision of a cause in a particular way?”⁷⁵ Chase then made the same point a third time: “We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon 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”⁷⁶ Chase concluded that this behavior—prescribing a rule of decision in causes pending—“passed the limit which separates the legislative from the judicial power.”⁷⁷

Chase made two other points that are relevant for determining the scope of *Klein*. First, Chase intimated that the proviso was defective because it intervened in a suit in favor of the United States against a private party.⁷⁸ Specifically, Chase was bothered by the fact that the proviso purported to allow “one party to the

72. *Id.*

73. *Id.* at 145–46.

74. *Id.* at 146.

75. *Id.*

76. *Id.*

77. *Id.* at 147.

78. *Id.* at 146.

controversy to decide it in its own favor.”⁷⁹ And, later, Chase returned to this theme, denouncing the proviso because it withdrew the Court’s jurisdiction “because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor.”⁸⁰ Second, Chase held, in the alternative, that the statute violated the principle of separation of powers because it purported to change the effect of the President’s amnesty proclamation.⁸¹ The legislature “cannot change the effect of such a pardon any more than the executive can change a law.”⁸² The proviso, then, impaired not only the judicial power by prescribing a rule of decision in causes pending; it also “impair[ed] the executive authority and direct[ed] the court to be instrumental to that end.”⁸³

Chase’s short opinion ended with a statement that, with hindsight, seems imbued with irony: “We think it unnecessary to enlarge. The simplest statement is the best.”⁸⁴ But, Chase’s opinion has proved far from simple to disentangle. It has generated reams of scholarship attempting to discern what *Klein* meant in its own time and what it might mean today.⁸⁵ Many of these readings contain useful insights but none have proved wholly satisfying. The following section analyzes each of the most likely readings of *Klein* and determines whether any can serve as the basis for an independent, enforceable rule of decision principle.

C. Klein’s Broken Promises

Klein’s rule of decision principle, that it is unconstitutional for Congress to withdraw jurisdiction from the federal courts based “solely on the application of a rule of decision, in causes pending,

79. *Id.*

80. *Id.* at 147.

81. *Id.*

82. *Id.* at 148.

83. *Id.*

84. *Id.*

85. See generally Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L. J. 2547, 2549 (1998) [hereinafter Meltzer, *Constitutional Remedies*]; Redish & Pudelski, *supra* note 11, at 437; Wasserman, *supra* note 11, at 65.

prescribed by Congress,”⁸⁶ seems at once intuitively correct and too broad to be literally true.⁸⁷ The rule of decision language resonates with abstract notions of separation of powers; preventing Congress from prescribing a rule of decision in a particular case appears to preserve an important part of the judicial function from legislative interference. However, a literal reading of this prohibition conflicts with precedent requiring courts to apply the law as Congress writes it, even on appeal from final judgment in pending cases, and even retroactively.⁸⁸ Scholars and courts have tried to resolve this tension by offering a variety of interpretations of *Klein*’s rule of decision principle.⁸⁹ Some of these readings attempt to articulate a *Klein* rule of decision principle that is viable in light of previous and subsequent precedent.⁹⁰ Other readings conclude that *Klein* serves as a reminder of important, if unenforceable constitutional values.⁹¹ Still other readings of *Klein* conclude that its rule of decision language is meaningless and should be ignored.⁹² The rest of this Part considers the most likely explanations of *Klein*’s rule of decision language, including the possibility that *Klein* states no principle about the line separating the legislative and judicial functions that can be enforced consistent with doctrine.⁹³

86. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145–46 (1871).

87. *See* Meltzer, *Constitutional Remedies*, *supra* note 85, at 2549 (arguing that *Klein*’s principle resonates as important but lacks doctrinal force); Redish & Pudelski, *supra* note 11, at 446 (same); Wasserman, *supra* note 11, at 65 (same).

88. *See* *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (holding that when “subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the [new] law must be obeyed”).

89. *See supra* note 11 (collecting sources describing *Klein*).

90. *See, e.g.*, Young, *Congressional Regulation*, *supra* note 11, at 1244 (arguing that *Klein* represents an extension of a principle against nonjudicial revision of court judgments).

91. *See, e.g.*, Caminker, *supra* note 11, at 542 (arguing that *Klein* stands for important if unenforceable principles).

92. *See, e.g.*, Vermeule, *supra* note 28, at 380–81 (arguing that *Klein* states no coherent and enforceable principle about the line between the judiciary and the legislature).

93. *See infra* Part II.C.

1. *May Congress Prescribe a Rule of Decision?*

The *Klein* Court objected to the fact that Congress *prescribed a rule of decision* to the courts in causes pending before them.⁹⁴ The relevance of the fact that the appropriations proviso affected pending cases is addressed below.⁹⁵ But, putting aside the important issue of specificity for a moment, the Court's concern in *Klein* cannot be that Congress prescribed a rule of decision for the courts to follow. As a number of scholars have recognized, writing rules of decision for courts to follow—that is, writing the substantive law—is precisely what a legislature does.⁹⁶

Even the more limited claim, that a legislature may not prescribe *how* a court finds facts to apply to a rule of decision, proves too much.⁹⁷ Congress can, and does, write rules of evidence, defining what is relevant, what is admissible and inadmissible, and who is competent to give testimony.⁹⁸ A notable exception proves the rule: the Constitution specifically provides a definition of treason, sets out its required elements, and establishes the mode of proof required to establish its elements.⁹⁹ In the absence of the rare constitutional restriction on its power, Congress is free to create a claim, delineate its elements, and establish how it may be proved; in short, Congress may prescribe rules of decision for courts to follow. As a result, *Klein* cannot stand for the unadorned proposition that Congress may not prescribe a rule of decision to a federal court.

94. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871) (invalidating the proviso for prescribing a rule of decision in causes pending).

95. *See infra* Part II.C.2.

96. *See* PFANDER, *supra* note 5, at 405 (noting that applying rules of decision is precisely what courts do); Tyler, *supra* note 54, at 105 (same); Wasserman, *supra* note 11, at 65 (same).

97. Vermeule, *supra* note 28, at 380–81 (arguing that all statutes make some facts relevant or irrelevant to adjudication).

98. *See generally* FED. R. EVID. State legislatures, too, write substantive, evidentiary, and procedural rules. *See generally* VA. R. EVID.; VA CODE ANN. § 8.01 (West 2011).

99. *See* U.S. CONST. art. III, § 3 (“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort . . . No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”).

2. *May Congress Prescribe a Rule of Decision for
Particular Cases?*

Of course, the *Klein* Court did not invalidate the proviso simply because it prescribed a rule of decision. Instead, *Klein* held that Congress may not “prescribe rules of decision to the Judicial Department of the government in *cases pending before it*.”¹⁰⁰ This language suggests that the Court disapproved of the proviso’s application only to a particular set of cases that were identifiable because they were already pending before the courts. The Court made its concern about the particularity of the appropriations proviso explicit when it described Congress’s more general power under the Exceptions Clause.¹⁰¹ Congress’s broad power to withdraw jurisdiction from the Court may lawfully be exercised only on “a particular *class* of cases.”¹⁰² By contrast, the proviso applied to particular cases, identifiable because they were pending before the federal courts, rather than a class of cases.

It is the application of a rule of decision to pending cases rather than a class of cases that Court describes as “arbitrary” and explains the distinction Chase drew between *Klein*’s facts and those of its earlier case, *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*¹⁰³ The Court had previously enjoined the operation of a bridge that interfered with shipping after finding that it was a nuisance.¹⁰⁴ Congress then enacted a statute declaring that the bridge was not a nuisance.¹⁰⁵ In *Wheeling*

100. *Klein*, 80 U.S. (13 Wall.) at 146 (emphasis added).

101. *See id.* at 147 (“The Constitution . . . provides that in all cases other than those of original jurisdiction, ‘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.’” (quoting U.S. CONST. art. III, § 2, cl. 2)).

102. *Id.* at 145 (emphasis added).

103. 59 U.S. (18 How.) 421 (1855); *see Klein*, 80 U.S. (13 Wall.) at 146–47 (distinguishing the proviso from the statute at issue in *Wheeling Bridge*). The Court made this point explicitly in *United States v. Sioux Indians*, 448 U.S. 371, 430 (1980) (“While Congress enjoys broad authority to regulate judicial proceedings in the context of a *class* of cases, when Congress regulates functions of the judiciary in a *pending* case, it walks the line between judicial and legislative authority.” (internal citation omitted)).

104. *See Wheeling Bridge*, 59 U.S. (18 How.) at 440 (describing the history leading up to the statute declaring the bridge lawful).

105. *Id.* at 422.

Bridge, the Court held that courts must apply new law enacted during an ongoing litigation that changes the legal significance of a fact relevant to the litigation.¹⁰⁶ Because the injunction was dependent on the finding that the bridge was a nuisance, Congress's declaration that the bridge was *not* a nuisance changed the legal significance of the bridge's interference with shipping and justified the dissolution of the injunction.¹⁰⁷ In *Klein*, Chase distinguished this case in the following way: the *Wheeling Bridge* Court dissolved the injunction based on the generally applicable law of nuisance; that is, once the bridge was no longer a nuisance, the injunction was no longer justified.¹⁰⁸ This was lawful, Chase explained, because the Court "was left to apply its ordinary rules to the new circumstances created" by the new statute.¹⁰⁹ As a result, no "arbitrary rule of decision was prescribed in that case."¹¹⁰ By contrast, wrote Chase, the *Klein* appropriations proviso did not create "new circumstances" but rather required the Court to make an exception from the standing laws for particular "cases pending before it."¹¹¹ In other words, the appropriations proviso was arbitrary because it made an exception from the generally applicable law—the recovery provision of the ACPA—for an identifiable set of cases, and no others.

The Court's uneasiness about legislative particularity comports with basic rule of law principles; if Congress may prescribe a new rule for a case that is currently before the courts—and only for that case—it can subject one known individual to treatment that is different than the treatment of others for identical conduct. As I have argued elsewhere, a rule that prohibits legislation from targeting identifiable individuals—a value of legislative generality—is a principle of constitutional dimension.¹¹²

106. *Id.* at 431.

107. *Id.* at 431–32.

108. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146–47 (1871).

109. *Id.* at 147.

110. *Id.* at 146.

111. *Id.* at 146–47.

112. *See generally* Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625 (2014) [hereinafter Zoldan, *Reviving Legislative Generality*]; Evan C. Zoldan, *The Equal Protection Component of Legislative Generality*, 51 RICH. L. REV. 489 (2017) [hereinafter Zoldan, *The Equal Protection Component*].

This value comports with constitutional history, the Constitution's text, and widely held jurisprudential commitments.¹¹³ Indeed, a value of legislative generality seems to follow directly from Chief Justice Marshall's statement in *Fletcher v. Peck*,¹¹⁴ that "[i]t is the peculiar province of the legislature to prescribe *general* rules for the government of society; the *application* of those rules to individuals in society would seem to be the duty of other departments."¹¹⁵ The Court was even more explicit in *Hurtado v. California*,¹¹⁶ in which it explained that "a special rule for a particular person or a particular case" cannot properly be considered "law."¹¹⁷ In that case, the Court opined that all types of targeted legislation are invalid, including: "acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another."¹¹⁸ Because of the injustice of particularized legislation, and because of *Klein*'s focus on pending cases, the most persuasive explanations of *Klein* focus on the connection between legislative direction of the result in pending cases and a value that disfavors legislative particularity.¹¹⁹ For example, Vicki Jackson argued that *Klein* might prohibit Congress from telling a court how to decide a particular case, even if that prohibition can be evaded by artful drafting.¹²⁰ Peter Gerangelos formulated a *Klein* principle that accords legislative specificity important, but nonconclusive, weight.¹²¹

113. Zoldan, *Reviving Legislative Generality*, *supra* note 112, at 650–60 (describing the constitutional tradition suggesting an enforceable value of legislative generality).

114. 10 U.S. (6 Cranch.) 87 (1810).

115. *Id.* at 136 (emphasis added).

116. 110 U.S. 516 (1884).

117. *Id.* at 535–36.

118. *Id.* at 536.

119. See generally Araiza, *supra* note 7, at 1104–05; Peter A. Gerangelos, *The Separation of Powers and Legislative Interference in Pending Cases*, 30 SYDNEY L. REV. 61, 82 (2008) [hereinafter Gerangelos, *Pending Cases*]; Jackson, *supra* note 11, at 583–84. For an argument that legislative generality was already defunct after *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992), see Wasserman, *supra* note 11, at 67–69.

120. See Jackson, *supra* note 11, at 586–87 (noting that the legislature can control judicial interpretations through narrow drafting).

121. See GERANGELOS, JUDICIAL PROCESS, *supra* note 11, at 177–79 (formulating principles to govern legislative direction of judgments).

The modern Supreme Court has been less receptive to the idea of a value of legislative generality. The Court's recent *Bank Markazi* decision, in particular, seriously calls into question whether legislation is ever constitutionally suspect simply because it is particularized.¹²² *Bank Markazi* grew out of Congress's expansion of an exception to the Foreign Sovereign Immunities Act (FSIA) that allows for suits against state sponsors of terrorism.¹²³ Victims of terrorism, and family members and estate representatives of those victims, demonstrated that the country of Iran was responsible for injuries and deaths caused by terrorist acts.¹²⁴ Judgments in their favor, which amounted to billions of dollars, could not be satisfied by assets in the United States.¹²⁵

With their judgments unsatisfied, these claimants filed a consolidated action against Bank Markazi, the Central Bank of Iran.¹²⁶ Under generally applicable law, however, Bank Markazi, as a Central Bank, was specifically excluded from the definition of "state sponsor of terrorism" in the FSIA¹²⁷ and so could not be reached to satisfy the existing default judgments against Iran.¹²⁸ To avoid this result, Congress enacted the Iran Threat Reduction and Syria Human Rights Act of 2012, which permitted claims against Iran under the FSIA to be satisfied by the assets of Bank Markazi.¹²⁹ Specifically, Congress provided that the "financial assets that are identified in . . . *Peterson et al. v. Islamic Republic of Iran et al.*, Case No. 10 Civ. 4518" would be available "to satisfy

122. See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1327 (2012) ("While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action." (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995))).

123. See Foreign Sovereign Immunities Act, 28 U.S.C. § 1605A (2012) (providing terrorism exception to sovereign immunity of foreign states); *Bank Markazi*, 136 S. Ct. at 1319–20 (explaining the operation of the FSIA).

124. *Bank Markazi*, 136 S. Ct. at 1315.

125. *Id.* at 1319–20, 1319 n.5, 1320 n.6.

126. *Id.* at 1315.

127. 28 U.S.C. § 1611(b)(1).

128. *Bank Markazi*, 136 S. Ct. at 1318.

129. Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772 (creating an exception from the general operation of the FSIA); 28 U.S.C. § 1611(b)(1) (2012) (providing that funds belonging to a state's central bank are immune from attachment).

any judgment . . . awarded against Iran for damages for personal injury or death caused by” acts of terrorism.¹³⁰ The Iran Threat Reduction statute applied to the particular, pending case against Bank Markazi and no others.

Before the Supreme Court, Bank Markazi argued that the Iran Threat Reduction statute violated *Klein*’s rule of decision principle because it prescribed a rule that applied to a single pending case, indeed, one identified in the statute itself.¹³¹ The Court rejected the Bank’s position that there is something wrong with particularized legislative action.¹³² The Court noted that “the assumption that legislation must be generally applicable,” is “flawed.”¹³³ The Court continued: although “legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action.”¹³⁴ Citing examples of particularized laws that have been held constitutional (but silent on *Fletcher*, *Hurtado*, and related doctrine), the Court held that “singling out” an individual is not enough to render a statute invalid.¹³⁵

Bank Markazi’s affirmative rejection of a principle disfavoring particularized legislative action was an innovation. Although the modern Court has not rigorously enforced a value of legislative generality,¹³⁶ previous decisions reserved judgment on whether targeted legislation could ever be constitutionally defective in the context of *Klein*’s rule of decision principle.¹³⁷ In *Robertson v. Seattle Audubon Society*,¹³⁸ the Court reserved for another day the possibility that a change in law would be considered “unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue” in

130. 22 U.S.C. § 8772(a)(1), (b) (emphasis added).

131. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 (2012).

132. *Id.* at 1327.

133. *Id.*

134. *Id.*

135. *Id.*

136. See *Nixon v. Admin. of Gen. Serv.*, 433 U.S. 425, 472 (1977) (holding that Congress may legislate for one person if that person is a legitimate class of one).

137. See *infra* notes 138–144 and accompanying text (considering, but not deciding, whether particularized legislation can ever be constitutionally infirm).

138. 503 U.S. 429 (1992).

specifically named cases.¹³⁹ When another day came, in *Plaut v. Spendthrift Farm Inc.*,¹⁴⁰ the Court again avoided deciding the issue of specificity.¹⁴¹ In *Plaut*, the Court invalidated legislation reopening final judgments; but, the Court did not rest on the fact that the statute reopened specific cases, instead noting only in passing that it was “questionable” whether there was something wrong with particularized legislative action.¹⁴² By contrast, *Bank Markazi*’s rejection of a value that disfavors particularized legislation appears more or less definitive.¹⁴³ The Court’s rejection of a principle of legislative generality is a misstep that it may need to retract on further reflection: it does not give appropriate weight to a constitutional principle of legislative generality suggested by the Constitution’s text, history, and philosophical underpinnings.¹⁴⁴ Nevertheless, whatever were the reasons underlying *Klein* at the time, if *Klein* stands for an enforceable principle today, it must be narrower than a prohibition on all particularized legislation.

3. May Congress Prescribe a Rule of Decision Retroactively?

Closely related to the issue of specificity is the issue of retroactivity. By providing a rule of decision for cases already pending at the time of its enactment, *Klein*’s appropriations proviso required retroactive application of its new evidentiary standard.¹⁴⁵ Retroactively applied legislation has long been

139. *Id.* at 441.

140. 514 U.S. 211 (1995).

141. *See id.* (deciding case on grounds other than specificity of statute).

142. *Id.* at 239. Moreover, *Plaut* invalidated rather than upheld the statute at issue in that case. *See id.* at 218 (invalidating statute on grounds other than *Klein*).

143. *See* *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1327 (2012) (holding that “the assumption that legislation must be generally applicable,” is “flawed”).

144. *See generally* Evan C. Zoldan, *Bank Markazi and the Undervaluation of Legislative Generality*, 35 YALE L. & POL’Y REV. INTER ALIA 1 (2016) [hereinafter Zoldan, *Bank Markazi*].

145. *See* *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871) (noting that the purpose of the proviso was to deny “pardons granted by the President the effect which this court had adjudged them to have”); *see also* PFANDER, *supra* note 5, at 404, 405 (noting “an element of retroactivity” in the proviso).

criticized because it can be used to subject a person to conduct he could not have known was wrong, thereby denying him the opportunity to conform his conduct to the law.¹⁴⁶ Consider Wilson, Klein's decedent: he could not have known that taking an oath of loyalty would, in the future, preclude a suit for damages before the Court of Claims for his confiscated cotton. Had Wilson known about this future statute, he might well have chosen to forego the oath with an eye toward attempting to prove his claim some other way. Because retrospective laws fail to provide notice of what conduct is considered lawful, they have been called "oppressive, unjust, and tyrannical" and "condemned by the universal sentence of civilized man."¹⁴⁷

However good are the jurisprudential reasons for prohibiting the retrospective application of statutes, the Supreme Court has long permitted retroactive laws like *Klein's* appropriations proviso.¹⁴⁸ Generally, courts apply a change in law to cases pending at the time of the change.¹⁴⁹ This has long been true, despite the fact that a person affected by a new law applied in a pending case has no opportunity to conform her conduct to the law before it is applied.¹⁵⁰ Even outside the context of pending cases, moreover, restrictions on retroactivity are narrow. The Constitution's prohibition on ex post facto laws applies only to criminal or penal laws.¹⁵¹ By contrast, courts will apply civil, nonpunitive laws

146. See Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693, 715, 723 (1960) (arguing that retroactive legislation denies a person the ability to conform conduct to the requirements of the law); Evan C. Zoldan, *The Civil Ex Post Facto Clause*, 2015 WISC. L. REV. 727, 729 (2015) (same).

147. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 216, 266 (1827); see also LON L. FULLER, *THE MORALITY OF LAW* 53 (1969) ("Taken by itself, . . . a retroactive law is truly a monstrosity.").

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

149. See *id.* (holding that when "subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the [new] law must be obeyed").

150. See John Bernard Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C. L. REV. 745, 752–53, 756–58, 773 (1983) (discussing the retroactive effect of applying laws to pending cases).

151. U.S. CONST. art. I, §§ 9–10; *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389 (1798) (opining that Ex Post Facto Clause applies only to criminal laws); see also John

retroactively, so long as Congress clearly stated its intention to act retroactively.¹⁵² Although distasteful, a civil statute like *Klein*'s appropriations proviso would not have been prohibited because of its retroactivity either at the time *Klein* was decided or today. As a result, an enforceable *Klein* principle cannot be based on an aversion to retroactivity.

4. May Congress Prescribe a Rule of Decision Based on Political Motives?

For all its opacity, the *Klein* opinion clearly acknowledges the strongest counterargument to its result: Congress directed the dismissal of suits like *Klein*'s by altering federal court jurisdiction and the Supreme Court's appellate jurisdiction, over which it noted that "the legislature has complete control."¹⁵³ What made the appropriations proviso invalid—an exception to, or limitation on, Congress's broad authority—was the fact that it did "not intend to withhold appellate jurisdiction except as a *means to an end*."¹⁵⁴ It seems, then, that the Court objected to Congress's motive behind its withdrawal of jurisdiction. Put otherwise, the Court suggested that some motivations for withdrawing jurisdiction are invalid and would not be enforced. An internal limitation on Congress's power over federal court jurisdiction, as suggested by *Klein*,¹⁵⁵ does comport with the Constitution's language.¹⁵⁶ As Leonard Ratner argued, in order for an exception from jurisdiction to remain an

Harrison, *Legislative Power and Judicial Power*, 31 CONST. COMMENT. 295, 302–03 (2016) (same).

152. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) (declining to give retroactive effect to statute absent a clear statement by Congress).

153. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871).

154. *Id.* at 145 (emphasis added).

155. *Id.* at 147 (holding that Congress's power to make exceptions to the appellate jurisdiction of the federal courts does not apply when the limitation is only a means to an end).

156. See U.S. CONST. art. III, § 2 (providing that the "Supreme Court shall have appellate jurisdiction . . . with such exceptions, and under such regulations as the Congress shall make").

“exception,” it must not be so broad as to swallow the general grant of jurisdiction.¹⁵⁷

If Congress’s motive was objectionable, it was because, as the *Klein* Court stated plainly, Congress’s goal was to deny the effect of the president’s pardon power.¹⁵⁸ Generalizing from the Court’s statement, commentators have suggested that, even outside the specific context of jurisdiction and the pardon power,¹⁵⁹ the proviso was objectionable because it directed the Court to do something otherwise unconstitutional. In Daniel Meltzer’s phrase, Congress may not compel the courts “to speak a constitutional untruth.”¹⁶⁰

157. Leonard Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 169 (1960) (arguing that an exception presumes the existence of a general rule); see also Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 973 (2003) (same).

158. *Klein*, 80 U.S. (13 Wall.) at 145–46.

159. Even reading *Klein* as a limitation only on Congress’s power to withdraw jurisdiction for political reasons is likely too broad to be accurate. In *Ex Parte McCordle*, just a few years before *Klein*, and also authored by Chief Justice Chase, the Court upheld a jurisdiction-stripping act that threatened to interfere with the Radical Republican political agenda. 74 U.S. 506, 514 (1868); see also Daniel Meltzer, *The Story of Ex Parte McCordle*, in *FEDERAL COURTS STORIES* 71–74 (2010) [hereinafter Meltzer, *McCordle*]. The Court held that it was “not at liberty to inquire into the motives of the legislature.” *McCordle*, 74 U.S. at 514. “We can only examine into its power under the Constitution, and the power to make exceptions to the appellate jurisdiction of this court is given by express words.” *Id.* at 513–14. There is certainly debate over how seriously to take *McCordle*’s strong assertion of Congress’s authority under the Exceptions Clause. *McCordle* itself can be read more narrowly in light of the fact that the Court suggested, and later confirmed, that a habeas petitioner could prevail under the Judiciary Act of 1789 despite the Court’s narrow reading of the jurisdiction-stripping act. Meltzer, *McCordle*, *supra*, at 83. Viewed in this light, *McCordle* can be reconciled with *Klein* if *Klein* means only that a court may not withdraw jurisdiction to direct a particular result based on the motivation of Congress if there is no other avenue for relief. Even this most narrow reading of *Klein*, however, is in tension with the Court’s subsequent rule of decision cases. *District of Columbia v. Eslin*, 183 U.S. 62, 65–66 (1901).

160. Meltzer, *Constitutional Remedies*, *supra* note 85, at 2540. See Jackson, *supra* note 11, at 586 (arguing that *Klein* might prevent Congress from legislating “to require courts to act unconstitutionally”); Lloyd C. Anderson, *Congressional Control over the Jurisdiction of the Federal Courts: A New Threat to James Madison’s Compromise*, 39 BRANDEIS L.J. 417, 439 (2000) (arguing that “Congress cannot direct courts to make decisions that are inconsistent with the Court’s own interpretation of the Constitution”); Tyler, *supra* note 54, at 113 (arguing that

In Lawrence Sager's formulation, *Klein* stands for the proposition that Congress may not "conscript the judiciary in a constitutional charade" by forcing it to "act out a . . . morality play."¹⁶¹ A principle that prevents Congress from directing the courts to undertake an unconstitutional act is an important limitation on Congress; but, it is a principle derivative of the well-established rule that the judiciary is tasked with stating what the Constitution requires.¹⁶² In the words of Chief Justice Marshall, "[i]t is emphatically the province and duty of the judicial department to say what the law is."¹⁶³ This is an important principle to be sure, but one that does not suggest that *Klein* has any independent force. Rather, this reading of *Klein* may merely restate an obvious principle of constitutional law.

A motivation-based explanation of *Klein* can also be stated in nonconstitutional terms. First, a nonconstitutional version of Sager's morality play formulation of *Klein* prohibits Congress, out of political motivation, from requiring the courts to reach a conclusion that the courts lawfully would have been permitted to reach in the absence of specific direction by Congress. *Klein* can be read in this way: the appropriations proviso was motivated, in part, by the desire of Radical Republicans in Congress to undo *Padelford*, which had smoothed the way for repentant rebels to recover funds from the Treasury.¹⁶⁴ Viewed in this light, the appropriations proviso can be seen as an attempt by Congress to give a politically motivated but otherwise constitutional act—denying compensation to former rebels—the veneer of neutrality by involving the federal courts. This reading of *Klein* is also suggested by Young, who argued that *Klein* might be read to

"Congress may not compel the courts to play an instrumental part in violating" the Constitution).

161. Sager, *supra* note 11, at 2528.

162. See *infra* note 163 and accompanying text (considering whether *Klein* states a principle different than *Marbury*).

163. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). This is, in substance, Meltzer's argument. Meltzer, *Constitutional Remedies*, *supra* note 85, at 2549 (arguing that *Klein* should be read to mean that Congress may not require a federal court to act unconstitutionally).

164. See Tyler, *supra* note 54, at 91, 94–95 (providing historical context for *Klein*).

prohibit Congress from tampering with judicial fact-finding, even in nonconstitutional cases.¹⁶⁵

Although the nonconstitutional morality play reading of *Klein* comports with the notion of separation of powers at a high level of abstraction, its explanatory power is limited. In a sense, all trials are morality plays.¹⁶⁶ As Stephanos Bibas has described, trials further the substantive aims of the law by allowing the community to pronounce judgment, exonerate the innocent, “brand” the guilty, and even reintegrate the guilty into society.¹⁶⁷ This is precisely how Congress relates to the judiciary whenever it enacts law. By enacting substantive law, Congress establishes societal rules about acceptable and unacceptable conduct.¹⁶⁸ And by extending jurisdiction to adjudicate claims, Congress enlists the courts in making a public demonstration of the acceptability *vel non* of the behavior adjudicated. As a result, if the statute that Congress enacts is constitutional, a morality play test cannot distinguish a *Klein* situation from any other lawmaking. *Bank Markazi* stands as a clear example of lawmaking as morality play. In that case, the Court upheld, against a *Klein* challenge, a statute that deemed the assets of the Iranian Central Bank to be the assets of the republic of Iran, against which there were outstanding but uncollected judgments for damages resulting from terrorist activities.¹⁶⁹ This situation, no less than *Klein*, forced the Court to carry Congress’s

165. See Young, Klein, *Then and Now*, *supra* note 11, at 314–15 (suggesting a limited congressional role in prescribing rules of interpretation).

166. See J.D. MORTON, *THE FUNCTION OF CRIMINAL LAW IN 1962*, at 30 (1962) (comparing the aspects of trials to the aspects of plays); see also Stephanos Bibas, *Harmonizing Substantive Criminal Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1401 (2003) (discussing the dramatic elements of trials); cf. Milner S. Ball, *The Play’s the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81, 98–99 (1975) (discussing the contrast between trials and morality plays).

167. Bibas, *supra* note 166, at 1401.

168. See MORTON, *supra* note 166, at 35–37 (describing the relationship between law and societal norms).

169. See generally *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016). A more limited claim suggests that *Klein* prevents the conscription of courts in times of deep political dysfunction, as was Reconstruction. Wasserman, *supra* note 11, at 215–16. If this ever was a constitutional principle, the Court appears to have definitively rejected it in *Bank Markazi*.

banner in an overtly political, even partisan, fight, by requiring it to assign legal liability based on Congress's moral judgment that the Iranian bank was responsible for the country of Iran's acts of terrorism.¹⁷⁰

Second, a similar argument suggests that *Klein* prevents Congress from deceiving the electorate about the manner in which its legislation alters the legal landscape. Under Martin Redish and Christopher Pudelski's reading, *Klein* was defective because it led the electorate to believe that the decision to deny *Klein*'s claim was a legal decision, cloaked in the authority of neutrality, rather than a political one.¹⁷¹ This prevented, the argument goes, the electorate from holding politicians accountable for the denial of *Klein*'s claim.¹⁷² But, the deception formulation is too broad to distinguish *Klein* from ordinary lawmaking. The deception model of *Klein* assumes that the electorate is familiar with the standing, generally applicable law while at the same time unable to understand the import of a change in the law.¹⁷³ Consider *Klein* itself: the deception model assumes that the electorate would have been aware of the requirements of the ACPA and the Court's *Padelford* opinion interpreting it, but unaware that the appropriations proviso altered those conditions. The assumption that the public pays much attention at all to Congress's legislative activities is contradicted by political science literature, which has found that "Americans are almost totally uninformed about legislative issues in Washington."¹⁷⁴ So, too, they are unaware of the role of the judiciary.¹⁷⁵ *A fortiori*, it is implausible that the

170. See generally *Bank Markazi*, 136 S. Ct. 1310.

171. See Redish & Pudelski, *supra* note 11, at 439 (arguing that *Klein* can be read to require the judiciary to prevent Congress from deceiving the electorate); see also Vladak, *supra* note 11, at 253 (same).

172. See Redish & Pudelski, *supra* note 11, at 439–40 (arguing that "the judiciary has the constitutional power and obligation to assure that Congress has not deceived the electorate").

173. See *id.* at 453 (suggesting that courts proceed on the assumption that the "electorate is aware of all legislation enacted by its chosen representatives").

174. Warren E. Miller & Donald E. Stokes, *Constituency Influence in Congress*, 57 AM. POL. SCI. REV. 45, 47 (1963).

175. See Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 GEO. L.J. 899, 899–900 (2007) (concluding that public knowledge about the judiciary is minimal).

public would be aware both of generally applicable laws and Supreme Court interpretations of these laws but unaware of subsequent amendments to limit them. *Wheeling Bridge* stands as a poignant example of the limitations of the deception model. No less than *Klein*, the *Wheeling Bridge* statute can be said to have deceived the public by implying that the decision to dissolve the injunction against the bridge company was a legal decision rather than a political one.¹⁷⁶ Nevertheless, the Court upheld this statute, a decision that was specifically reaffirmed in *Klein*.¹⁷⁷

5. *May Congress Direct the Court to Rule in Favor of the Government?*

Klein contains two statements suggesting the infirmity of a statute with the effect of deciding a suit in the government's favor. Chase noted that the proviso could not be given effect because it would permit "one party to the controversy to decide it in its own favor."¹⁷⁸ Chase later returned to this theme, denouncing the proviso for withdrawing the Court's jurisdiction "because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor."¹⁷⁹

These statements have led some scholars to contemplate a *Klein* principle that prevents the courts from applying a change in law that has the effect of destroying a judgment rendered against the government.¹⁸⁰ Such a rule has intuitive appeal. As Amy Ronner noted, the concept of rule of law, at a high level of

176. See generally *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855).

177. *Id.* at 431–32. As Young has suggested, the deception formulation is also practically "unworkable" and "unmanageable." Young, *Klein, Then and Now*, *supra* note 11, at 327–28.

178. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871).

179. *Id.* at 147.

180. See Jackson, *supra* note 11, at 586 (interpreting *Klein* to mean that Congress cannot deprive courts of the authority necessary to render independent judgment); see also Redish & Pudelski, *supra* note 11, at 447–48 (rejecting the importance of the government as a party to *Klein*); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 *YALE L.J.* 498, 526–27 (1974) (same); Shugerman, *supra* note 157, at 978 (noting the tension between a self-dealing rationale for *Klein* and *Robertson*).

abstraction at least, is inconsistent with the idea of the “government securing for itself a [judicial] victory by a Congressional change.”¹⁸¹ Accordingly, Ronner proposed a *Klein* test that would consider, as a factor but not a determinative one, whether the statute has the effect of favoring the government.¹⁸² Peter Gerangelos reformulated Ronner’s test, incorporating her emphasis on the government’s decision to decide the case in its own favor.¹⁸³ Gordon Young conducted the most elaborate evaluation of a *Klein* principle that turns on the presence of the government as a party.¹⁸⁴ Young suggests that this reading of *Klein* is explained as an extension of the principle against nonjudicial revision of court judgments.¹⁸⁵ A rule taking into consideration the presence of the government as a party finds support in *United States v. Sioux Nation of Indians*,¹⁸⁶ in which the Court upheld a special jurisdictional statute that waived the government’s defense of res judicata.¹⁸⁷ The Court distinguished the facts of *Sioux Nation* from *Klein* by emphasizing that *Klein*’s appropriations proviso resolved the controversy in favor of the government.¹⁸⁸ By contrast, the *Sioux Nation* jurisdictional statute imposed a new legal obligation on the government.¹⁸⁹

Despite *Sioux Nation*, the greater weight of scholarship has been less optimistic about the possibility of reading *Klein* to turn on whether the change in law redounds to the benefit of the

181. Ronner, *supra* note 11, at 1071–72.

182. *See id.* at 1071 (arguing that whether “legislation has the effect of favoring the government as a party” is a factor in *Klein*).

183. *See* GERANGELOS, JUDICIAL PROCESS, *supra* note 11, at 178–79 (proposing a test for determining the legality of legislation directing judgment).

184. *See* Young, *Congressional Regulation*, *supra* note 11, at 1241–44 (evaluating the significance of the presence of the government as a party to a pending case).

185. *See id.* at 1247–48 (suggesting that *Klein* follows from the principle against nonjudicial revision of court judgments).

186. 448 U.S. 371 (1980).

187. *See id.* at 407 (upholding a change of law in a pending case).

188. *See id.* at 404–05 (noting that the it was of “obvious importance to the *Klein* holding . . . that Congress was attempting to decide the controversy at issue in the Government’s own favor”).

189. *See id.* at 401, 406–07 (describing the jurisdictional statute in *Sioux Nation*).

government. Most forcefully, Jackson and Eisenberg point to *District of Columbia v. Eslin*,¹⁹⁰ in which the Court upheld a withdrawal of jurisdiction that had the effect of nullifying judgments payable by the United States.¹⁹¹ *Eslin* would seem to preclude a broad reading of *Klein* to prohibit withdrawals of jurisdiction that favor the United States in pending cases. Nevertheless, Jackson does incorporate such a principle into her proposed *Klein* rule, suggesting that *Klein* may prevent Congress from legislating to “force the courts to rule in favor of the government” by depriving them of the power to express their independent legal judgment.¹⁹² As Jackson notes, however, subsequent decisions limit the force of this potential explanation of *Klein* by permitting Congress to define the scope of law so narrowly as to effectively eliminate the court’s independent legal judgment.¹⁹³

The more recent *Robertson* case also challenges a reading of *Klein* that would prohibit Congress from enacting a statute with the effect of directing a ruling in favor of the government. In *Robertson*, environmental and logging industry groups brought suits against the United States to challenge the government’s management of logging activities in Oregon.¹⁹⁴ During the litigation, Congress enacted a statute to govern logging in the Oregon forests that had the effect of ending the ongoing litigation in favor of the United States.¹⁹⁵ The Court upheld the new statute against a *Klein* challenge:¹⁹⁶ As Jed Shugerman argued, *Robertson* precludes reading *Klein* as a broad prohibition on changes in law simply because they have the effect of directing judgment in favor of the United States.¹⁹⁷

190. 183 U.S. 62 (1901).

191. See *id.* at 65–66; see also Jackson, *supra* note 11, at 585–86 (noting the tension between *Eslin* and *Klein*); Eisenberg, *supra* note 180, at 526 (same).

192. See Jackson, *supra* note 11, at 587.

193. See *id.* at 586–87 (arguing that the difference between prescribing a new rule of decision and directing a particular judgment “is in some measure a matter of form”).

194. See generally *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 433 (1992).

195. *Id.* at 434–36.

196. *Id.* at 441.

197. See Shugerman, *supra* note 157, at 978–79 (noting the tension between

Doctrine aside, other scholars are skeptical of the relevance of the presence of the government as a party even as a theoretical matter. Redish argued that constitutional theory suggests no reason why Congress may not enact statutes that have the effect of favoring the government in pending cases.¹⁹⁸ Redish is surely correct to doubt the *Klein* Court's bald assertion that the appropriations proviso was defective simply because it allowed "one party to the controversy to decide it in its own favor."¹⁹⁹ In a number of contexts, our constitutional system appears to tolerate almost literal violations of a principle that would prevent an entity from deciding a controversy in its own favor.²⁰⁰ For example, in the context of administrative law, administrative agencies hear countless disputes each year in which an agency, acting both as party and adjudicating authority,²⁰¹ decides a dispute in its own favor. Gerangelos, although sympathetic to the argument that the presence of the government as a party should matter, argued that this proposition is not supported by authority other than *Klein* itself.²⁰²

For these reasons, it is important not to overstate the argument that *Klein* turns on the presence of the government as a party or the fact that the statute rendered judgment in the government's favor. If these facts have any continued relevance, they must be situated within a defensible theoretical and doctrinal framework. As I argue in Part III, this is possible: a principle disfavoring governmental self-dealing, which takes these facts into

Klein and *Robertson*).

198. See Redish & Pudelski, *supra* note 11, at 448 (arguing that Congress may change the law to benefit the government as a party in a pending case); see also Ratner, *supra* note 157, at 181 (discussing tension between *Klein* and *McCardle*).

199. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871).

200. See Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 393–94 (2012) [hereinafter Vermeule, *Contra Nemo*] (arguing that the "structural features of the constitutional system" violate an absolute reading of the *nemo iudex* principle).

201. See *id.* at 393 (asserting that conflicts of interest are a feature of the administrative state); see also 5 U.S.C. § 556 (2012) (permitting agencies to adjudicate disputes involving the agencies themselves).

202. See GERANGELOS, JUDICIAL PROCESS, *supra* note 11, at 184–85 (arguing that *Klein* is the only case suggesting the relevance of the presence of the government as a party to a pending case).

account, has deep roots in constitutional history, doctrine, and jurisprudence.²⁰³ A principle disfavoring governmental self-dealing also provides a framework for examining *Eslin* and *Robertson* and demonstrates how these cases differ from *Klein*. But more on that later. First, we must confront the possibility that *Klein* means nothing at all.

6. *Might Klein Mean Nothing at All?*

It is possible, of course, that *Klein* means nothing—or at least nothing that can be called a distinct and enforceable principle concerning the relationship between Congress and the courts.²⁰⁴ Scholars have argued, alternatively, that *Klein* is no broader than its exceptions, that it stands only for a rule already clear from other constitutional principles, and that it is merely a formal drafting requirement.

First, *Klein* might be no broader than its exceptions. Even at the time it was decided, the possible range of applications for *Klein* was quite small. In the early case of *United States v. Schooner Peggy*,²⁰⁵ the Court held that courts must apply changes of law to cases pending on appeal.²⁰⁶ In that case, the district court had condemned the Schooner Peggy.²⁰⁷ While the case was pending on appeal, the United States entered into a treaty with France that

203. See *infra* Part III.

204. At least, *Klein* is still good law for its holding that the appropriations proviso was invalid because it encroached on the President's pardon power. This is not, however, the full extent of *Klein*. See *Witkowski v. United States*, 7 Ct. Cl. 393, 396–97 (1872) (noting that *Klein* is not limited to the line between executive and legislative power). In subsequent cases, the Court has considered *Klein* in the context of the division of labor between the judicial and legislative departments. See, e.g., *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1315 (2016) (discussing *Klein* in the context of the legislative direction of judgment).

205. 5 U.S. (1 Cranch) 103 (1801).

206. *Id.* at 110. The *Schooner Peggy* case comports with the traditional view that courts, discovering rather than making law, declare what the law *was* as well as what the law *is*. 1 WILLIAM BLACKSTONE, COMMENTARIES *70–72 (noting that judges are “not delegated to pronounce a new law, but to maintain and expound the old one”).

207. See *Schooner Peggy*, 5 U.S. (1 Cranch) at 108 (noting that the vessel had been condemned by the trial court).

the Court interpreted as requiring the return of the vessel in spite of the condemnation.²⁰⁸ The Court held that an appellate court was bound to apply the new treaty, even if the trial court decision was correct when decided.²⁰⁹ When “subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the [new] law must be obeyed.”²¹⁰ This requirement is often referred to as the “Changed Law Rule.”²¹¹

Klein can be read as an exception to *Schooner Peggy*,²¹² restricting the application of new law in pending cases on appeal in certain circumstances. Nevertheless, this reading is precluded by subsequent cases, in which the Court inverted the relationship between *Schooner Peggy* and *Klein* by expanding the “Changed Law Rule” into a wholesale exception to *Klein*.²¹³ In *Robertson*, the Court implied that the Changed Law Rule was an exception to *Klein* by holding that Congress may always amend or repeal existing law, even for the purpose of ending ongoing litigation.²¹⁴ Later, in *Plaut*, the Court explicitly made the Changed Law Rule an exception to *Klein*, holding that its “prohibition does not take hold when Congress amend[s] applicable law.”²¹⁵ And, in *Bank Markazi*, the Court completed the transformation, relying on the Changed Law Rule to reach its result. The Court held that *Klein* did not prohibit a statute deeming one entity’s assets available to satisfy judgments against another because, by defining the assets

208. *Id.* at 108–09.

209. *Id.*

210. *Id.* at 110.

211. See Gerangelos, *Pending Cases*, *supra* note 119, at 84 (referring to the above-mentioned principle as “the changed law rule”); see also Richard Doidge, *Is Purely Retroactive Legislation Limited by the Separation of Powers?: Rethinking United States v. Klein*, 79 CORNELL L. REV. 910, 959 (1994) (same).

212. See Young, *Congressional Regulation*, *supra* note 11, at 1240–41 (reading *Klein* as an exception to the Changed Law Rule).

213. See *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 436, 441 (1992) (noting that *Klein* does not apply when Congress has amended the law).

214. See *id.* at 440 (noting that Congress may end litigation by amending the law).

215. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (internal citations omitted).

in reference to the funds identified in a pending case, Congress had amended applicable law.²¹⁶

Bank Markazi appears to confirm, as others have already argued, that the Changed Law Rule swallowed *Klein* altogether. Describing the status of *Klein* after *Robertson*, William Araiza argued that all lawmaking changes the law within the meaning of *Klein*: “[I]f lawmaking is the power to create liability rules and the procedural structure for enforcing those rules, then overturning a statutory interpretation and amending the underlying statute both constitute lawmaking.”²¹⁷ Araiza’s interpretation has been borne out by a number of post-*Robertson* lower court cases that illustrate the vanishingly small space between amending applicable law, which is permissible, and prescribing a rule of decision in causes pending, which is prohibited.²¹⁸ In *City of New York v. Beretta U.S.A. Corp.*,²¹⁹ the Second Circuit upheld, over a *Klein* challenge, a statute that terminated identifiable pending cases against gun suppliers.²²⁰ The City of New York filed suit against firearms suppliers, claiming that they created a public nuisance.²²¹ While this case was pending, Congress enacted the Protection of Lawful Commerce in Arms Act,²²² which required the immediate dismissal of pending claims against manufacturers or sellers of firearms.²²³ Although this statute directed the dismissal of particular, pending cases, the court held that the statute *also* “change[d] the applicable law” because it eliminated liability for the defendants in those cases: As a result, it did not violate *Klein*.²²⁴ The Second Circuit is not alone; similar cases in the Ninth

216. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 (2016).

217. Araiza, *supra* note 7119, at 1079; *see also* GERANGELOS, JUDICIAL PROCESS, *supra* note 11, at 175 (noting that *Robertson* is in tension with *Klein*); Vermeule, *supra* note 28, at 424 (same).

218. *See generally* *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008) (upholding a statute that both amends the law and prescribes a rule of decision).

219. 524 F.3d 384 (2d Cir. 2008).

220. *See generally id.*

221. *Id.* at 389.

222. 15 U.S.C. §§ 7901–7903 (2012).

223. *See Beretta*, 524 F.3d at 389 (citing the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–7903).

224. *Id.* at 396.

Circuit and D.C. Circuit reveal that any statute, perhaps, can be read as amending applicable law and, as a result, skirt the already modest restrictions imposed by *Klein*.²²⁵

Chief Justice Roberts made this same point in his dissenting opinion in *Bank Markazi*. The Court distinguished the *Bank Markazi* statute from a hypothetical statute declaring that “Smith wins” on the ground that the latter, impermissible statute “would create no new substantive law.”²²⁶ The Chief Justice responded that such a statute does in fact create new substantive law: the statute provides the new, substantive law that Smith wins.²²⁷ Noting that “[c]hanging the law is simply how Congress acts,” Roberts concluded that describing one statute rather than another as changing the law is merely conclusory.²²⁸ If a “change in law” has the broad meaning attributed to it by Roberts, then an exception to *Klein* contingent on whether Congress has changed the law is coextensive with *Klein* itself.

Second, a number of scholars have formulated *Klein* principles that are no broader than already existing constitutional rules. Most relevantly, a number of scholars have suggested that Congress may not compel the courts to make untrue statements about the law, whether constitutional or otherwise.²²⁹ Hart suggested that, at least, Congress may not grant federal courts jurisdiction contingent on the requirement that they refrain from declaring a particular law unconstitutional.²³⁰ Meltzer argued that

225. See *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1139 (9th Cir. 2009) (holding that *Klein* does not take hold when Congress amends applicable law); *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2002) (same).

226. *Bank Markazi v. Peterson*, 136 S. Ct 1310, 1335 (2016) (Roberts, C.J., dissenting).

227. *Id.* (“Saying Congress ‘creates new law’ in one case but not another simply expresses a conclusion on that issue.”). If there is a difference between “Smith wins” and a change in “substantive law,” it has to do with the specificity of the statute. But, *Bank Markazi* strongly suggests that particularity is no longer an issue. See *id.* at 1327 (discussing targeted legislation).

228. *Id.* at 1335.

229. See Meltzer, *Constitutional Remedies*, *supra* note 85, at 2540 (“Congress may not compel the courts to speak a constitutional untruth.”); see also Young, Klein, *Then and Now*, *supra* note 11, at 314–15 (discussing the limits of congressional power to require particular findings of fact); Jackson, *supra* note 11, at 586 (stating that Congress may not force courts to act unconstitutionally).

230. See Hart, *supra* note 622, at 1373 (discussing the line between rendering

Klein may prevent Congress from compelling the courts “to speak a constitutional untruth.”²³¹ Similarly, Jackson suggested that *Klein* might prevent Congress from legislating “to require courts to act unconstitutionally.”²³² As noted above, this is an important principle, but one that does not need *Klein* as an independent source. It is already implicit in *Marbury v. Madison*’s²³³ statement that it is the duty of the courts to “say what the law is.”²³⁴

Third, scholars have argued that *Klein* is no more than a formal drafting requirement. Under this view, *Klein* does not prevent Congress from doing anything in particular, but it may prevent Congress from doing it in a particular way.²³⁵ As Evan Caminker and Lawrence Sager have explained, it is easy to replace language that directs the courts to rule in favor of one party with language that guarantees the same result by changing the substantive law.²³⁶ Consider Chief Justice Roberts’s *Bank Markazi* hypothetical. If, during the pendency of *Smith v. Jones*, Congress enacts a statute that says “in the case of *Smith v. Jones*, Smith wins,” both the Court and Roberts, and probably federal courts scholars like Caminker and Sager, would agree that *Klein* was violated.²³⁷ But, imagine further that the case of *Smith v. Jones* was a breach of contract action in which the only issue was Jones’s

judgment and actually deciding a case); GERANGELOS, JUDICIAL PROCESS, *supra* note 11, at 127 (same).

231. Meltzer, *Constitutional Remedies*, *supra* note 85, at 2540.

232. Jackson, *supra* note 11, at 586.

233. 5 U.S. (1 Cranch) 137 (1803).

234. *Id.* at 177. Others have suggested that *Klein* requires that courts must be allowed to use “minimally fair procedures.” Young, Klein, *Then and Now*, *supra* note 11, at 310. This is an important rule, but probably one that is no broader than what due process requires. *See id.* at 308–09 (“This places *Klein* in what is usually the realm of procedural due process.”).

235. *See* Caminker, *supra* note 11, at 542 (arguing that *Klein* is a drafting requirement).

236. *See* Caminker, *supra* note 11, at 542 (arguing that a change in substantive law can effectively direct judgment in a particular case); Sager, *supra* note 11, at 2526 (same); Gerangelos, *Pending Cases*, *supra* note 119, at 84 (same); Doidge, *supra* note 211, at 926 (same).

237. *See* *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1335–36 (2016) (Roberts, C.J., dissenting) (arguing that congressional directives to reach a particular result are unconstitutional); Caminker, *supra* note 11, at 541–42 (suggesting that *Klein* may be a drafting principle preventing overly specific direction to courts).

defense that he lacked capacity to contract. A statute providing “in the case of *Smith v. Jones*, the defense of lack of capacity to contract is abolished” changes the underlying substantive law. Although this statute would guarantee the outcome in a pending case, it also would avoid *Klein*’s restrictions under the *Robertson-Bank Markazi* version of the Changed Law Rule. The *Bank Markazi* majority responded to a similar hypothetical by noting that it might be unconstitutional, irrespective of *Klein*, because the legislature is bound to be reasonable.²³⁸ The Court’s response is all but an admission that *Klein* has no force as an independent constitutional principle, but rather is a formality easily evaded by competent drafting.

These arguments strongly suggest that *Klein* no longer stands for an independent and enforceable principle about the relationship between Congress and the courts. Although the Court has not overruled *Klein* explicitly, the Court sometimes implicitly overrules an old case or allows it to fade away.²³⁹ Indeed, one could read *Eslin*, a case remarkable because of its similarity to *Klein* but which fails to distinguish it, or even to cite it, as evidence of *Klein*’s irrelevance.²⁴⁰ It is also possible to read *Robertson* and *Plaut*, both of which made short work of *Klein* arguments,²⁴¹ as a signal that it is no longer viable.

But *Bank Markazi* suggests that *Klein* is neither gone nor forgotten. Instead, the Court seemed genuinely to wrestle with *Klein* and the other rule of decision cases to discern a workable line that distinguishes the direction of judgment from a change in substantive law.²⁴² The Court tried to situate *Klein* within the broader context of Article III, explain the significance of its “rule

238. See *Bank Markazi*, 136 S. Ct. at 1326 (noting that a narrowly tailored law may be irrational and, therefore, unconstitutional).

239. See Bradley Scott Shannon, *Overruled by Implication*, 33 SEATTLE U. L. REV. 151, 154 (2009) (noting that the Court “sometimes overrules prior holdings only by implication”).

240. See generally *District of Columbia v. Eslin*, 183 U.S. 62 (1901).

241. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (invalidating a statute that reopened final judgments without resting on *Klein*); *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 441 (1992) (restricting *Klein* to circumstances in which Congress has not amended applicable law).

242. See *Bank Markazi*, 136 S. Ct. at 1323–26 (drawing a distinction between changing substantive law and directing judgment).

of decision” language, and reconcile its result with *Schooner Peggy*, *Robertson*, and *Plaut*, among other cases.²⁴³ In short, the Court treated the *Klein* rule of decision principle as a principle of constitutional dimension. Because the Court continues to regard *Klein* as a case of constitutional importance, and because *Klein* reflects a strong intuition about the separation of legislative power from judicial power, it is worth exploring whether sense can be made of this puzzling opinion. For the purposes of the rest of this Article, therefore, I explore what principle animates *Klein*, assuming that it still represents an enforceable constitutional principle.

III. Back into Klein’s Vault

Bank Markazi is a double-edged sword for the federal courts enthusiast seeking an enforceable *Klein* principle. On one hand, *Bank Markazi*, once again, failed to find a *Klein* violation in a statute that all but guaranteed the result in a pending case.²⁴⁴ And the Court rejected, for the first time, the infirmity of legislative specification as a possible justification for *Klein*, undermining the persuasive argument that *Klein* is rooted in concerns about targeted legislative action.²⁴⁵ On the other hand, the Court seemed to take *Klein* seriously, raising the possibility that *Klein* stands for an enforceable principle that has not been adequately articulated.²⁴⁶ A return to *Klein*’s vault—that is, a look into the reasoning underlying the Court’s cryptic opinion in that case—reveals that if *Klein* can be justified today, it can best be viewed as a principle that prohibits governmental self-dealing.

A principle against governmental self-dealing builds on the work of scholars, including Vicki Jackson, Gordon Young, Peter Gerangelos, and Amy Ronner, who identified and evaluated the possibility that *Klein* turns on whether the government is a party

243. See *id.* at 1323–25 (situating *Klein* among other separation of powers cases).

244. See *id.* at 1325 (upholding statute against *Klein* challenge).

245. See *id.* at 1328 (rejecting the argument that legislation affecting very few cases is necessarily unconstitutional).

246. See *id.* at 1334 (discussing *Klein*).

to the dispute.²⁴⁷ As noted above, this latter argument faces significant challenges. It is difficult to square with subsequent rule of decision cases like *Robertson* and *Eslin*, and it is not clear where it fits within the American constitutional tradition. A *Klein* principle against governmental self-dealing must grapple with these objections. This Part introduces a constitutional principle against governmental self-dealing and demonstrates its connection to *Klein*. It concludes by proposing a *Klein* rule of decision principle that comports with the language of *Klein* and situates it within the strong constitutional tradition disfavoring governmental self-dealing in other contexts.²⁴⁸ Part IV demonstrates the explanatory power of a *Klein* principle against governmental self-dealing by applying it to the rule of decision cases most in tension with it.²⁴⁹ Part V provides guidance to lower courts by demonstrating how a *Klein* principle against governmental self-dealing can apply to cases that will arise in the future.²⁵⁰

A. What is Self-Dealing?

Before describing how a principle against self-dealing can solve *Klein*'s rule of decision puzzle, it is necessary to define self-dealing and explain how self-dealing can apply to an institution like Congress.

1. Self-Dealing in the American Constitutional Tradition

A person self-deals when he takes an official action to confer a private benefit on himself.²⁵¹ Self-dealing in the context of public

247. *Supra* Part II.C.5.

248. *See infra* Part III (introducing a principle against governmental self-dealing).

249. *See infra* Part IV (applying the principle against self-dealing to existing cases).

250. *See infra* Part V (applying the principle against self-dealing to hypothetical cases).

251. *See* KERNAGHAN & LANGFORD, *supra* note 34, at 142–43 (defining self-dealing).

office, a special case of political corruption,²⁵² has long been disfavored in Anglo-American jurisprudence. *Dr. Bonham's Case*,²⁵³ an English authority better known for its lasting effect on American legal philosophy than on British law, is often cited as a source for an American principle against governmental self-dealing.²⁵⁴ In *Bonham's Case*, Chief Judge Coke opined that the Royal College of Physicians did not have the power to fine and imprison Bonham for practicing medicine in London without the College's permission.²⁵⁵ Coke reasoned that members of the College "cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture."²⁵⁶ Viewing *Dr. Bonham's Case* through the lens of self-dealing, the problem with the institutional arrangement of the College of Physicians was that its members both had the power to fine Dr. Bonham and stood to benefit from the fines imposed by the College.²⁵⁷

Coke's disapproval of official self-dealing resonated with republican principles espoused during the revolutionary period.²⁵⁸

252. See Teachout, *The Anti-Corruption Principle*, *supra* note 33, at 373–74 (describing political corruption to include self-interested use of public power); TEACHOUT, CORRUPTION IN AMERICA, *supra* note 33, at 38 (describing corruption as the exercise of public prerogatives for private gain); Balkin, *supra* note 33, at 49–50 (describing republicanism and the public good).

253. 77 Eng. Rep. 638 (1610).

254. See *id.* at 652 (invalidating institutional arrangement that reflected self-dealing); see also Vermeule, *Contra Nemo*, *supra* note 200, at 384–86 n.6 (noting connection between *Bonham's Case* and a principle against self-dealing); see also Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 428–29 (1995) (suggesting the importance of a principle against self-dealing); Brian C. Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 787 (1996) (describing self-dealing in constitutional design); cf. 1 WILLIAM BLACKSTONE, COMMENTARIES *91–92 (noting that "it is unreasonable that any man should determine his own quarrel").

255. See *Bonham's Case*, 77 Eng. Rep. at 646 (holding that the college did not have the power to fine and imprison Bonham); R.H. Helmholz, *Bonham's Case, Judicial Review, and the Law of Nature*, 1 J. LEGAL ANALYSIS 325, 326 (2009) (discussing Coke's opinion).

256. *Bonham's Case*, 77 Eng. Rep. at 652.

257. Vermeule, *Contra Nemo*, *supra* note 200, at 384–86 & n.6 (noting the connection between *Bonham's Case* and a principle against self-dealing).

258. See Teachout, *The Anti-Corruption Principle*, *supra* note 33, at 373–74 (describing views about self-dealing in the eighteenth century); TEACHOUT,

In *Calder v. Bull*,²⁵⁹ the early Supreme Court echoed *Dr. Bonham's Case* when reasoning that a law that “makes a man a Judge in his own cause” is “contrary to the great first principles of the social compact, [and] cannot be considered a rightful exercise of legislative authority.”²⁶⁰ The Court’s statement in *Calder* reflected the republican virtue of “disinterestedness” that preoccupied the generation that framed the Constitution.²⁶¹ This principle suggests that citizens who are free from financial dependence are best able to execute their official duties impartially.²⁶² Members of the revolutionary generation idealized the Roman hero Cincinnatus, who served his country when he was needed and then, refusing official rewards, returned to civilian life when his service was complete.²⁶³ And if they idealized Cincinnatus, they idolized George Washington, the “American Cincinnatus” who both refused compensation for serving as head of the Continental Army and later resigned his military commission to the Continental Congress at the end of the War of Independence.²⁶⁴ To many members of the revolutionary generation, public offices were burdens to be borne by exceptional citizens, like Washington, rather than plum posts to be exploited.²⁶⁵

CORRUPTION IN AMERICA, *supra* note 33, at 9 (describing American views of corruption); PARILLO, *supra* note 33, at 9 (describing eighteenth century American aspiration to separate governmental power from individual interests).

259. 3 U.S. (3 Dall.) 386 (1798).

260. *Id.* at 388.

261. See GORDON WOOD, REVOLUTIONARY CHARACTERS, *supra* note 38, at 16–20 (describing the virtue of disinterestedness); PARILLO, *supra* note 33, at 10 (describing the civic republican ideal of official disinterestedness).

262. See Gordon Wood, *Classical Republicanism and the American Revolution*, 66 CHI.-KENT L. REV. 13, 23–26 (1990) [hereinafter Wood, *Classical Republicanism*] (discussing the connection between financial independence and disinterestedness); PARILLO, *supra* note 33, at 9–10 (describing American attitudes about the financial security of public officials).

263. See Jason S. Lantzer, *Washington as Cincinnatus: A Model of Leadership*, in GEORGE WASHINGTON: FOUNDATION OF PRESIDENTIAL LEADERSHIP AND CHARACTER 33 (2001) (describing parallels between the lives of George Washington and Cincinnatus).

264. See *id.* at 41–43 (describing deliberate retirement of Washington from public life).

265. See WOOD, REVOLUTIONARY CHARACTERS, *supra* note 38, at 16–20 (discussing attitudes toward class and public office in the eighteenth century); see

None of these idealized images of the members of the generation that framed the Constitution should suggest that public actors during this period were immaculately free from self-interest. Nicholas Parillo has shown that the revolutionary generation's belief in official disinterestedness coexisted with behaviors that modern sensibilities would classify as self-dealing.²⁶⁶ For example, customs officers received a share of goods that were forfeited, creating an incentive for the officers to confiscate goods. Perhaps even more surprisingly, prosecutors "received a fee for every case they brought to trial," encouraging more prosecutions.²⁶⁷ Indeed, even Washington, normally so scrupulous about his public reputation, undertook official decisions that benefitted him personally.²⁶⁸ When he chose the location for the federal district that would become the District of Columbia, he picked an area in close proximity to land owned by him and his family.²⁶⁹ The result, as Washington foresaw, was "an immediate rise in the value of his land."²⁷⁰

This mixed historical record complicates the story of self-dealing during the framing period. Nevertheless, in certain key ways, the republican "dream" of separating government power

also Wood, *Classical Republicanism*, *supra* note 262, at 23–24 (describing the obligation of exceptional men to hold office in the revolutionary era).

266. See PARILLO, *supra* note 33, at 40–42 (describing the eighteenth century practice of providing bounties and moieties to public officers for performing the duties of public office).

267. *Id.*

268. See Tillman, *supra* note 35, at 764–66 (describing George Washington's business transactions with the government).

269. See BOWLING, *supra* note 35, at 213–14 (arguing that Washington had an economic interest in the placement of the capital).

270. *Id.* at 214. Just as Washington alternately exhibited disinterested and self-interested behavior, so too did other prominent members of the framing generation. John Marshall famously recused himself from *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), because he had a small but personal stake in the outcome of the case. See SMITH, *supra* note 38, at 429 (describing Marshall's decision to recuse himself). Earlier, however, he authored *Marbury v. Madison*, although it was his omission, as Secretary of State, that was responsible for Marbury failing to receive his commission. See ALBERT JEREMIAH BEVERIDGE, 3 THE LIFE OF JOHN MARSHALL 124 (1919) (describing historical background of *Marbury v. Madison*).

from self-interest²⁷¹ survived the realities of its lived experience. Madison defended the structure of the proposed United States government on the theory that the design of its institutions would minimize self-dealing.²⁷² As Publius, Madison argued that “[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”²⁷³ From this simple premise, Madison advanced a system of representative democracy to minimize the ill effects of self-interested decision-making.²⁷⁴

Aside from the overall structure of the government, a number of other clauses of the Constitution confirm the importance of minimizing self-dealing to the American constitutional tradition. The Constitution precludes the Vice President from presiding over a Senate trial of a President who has been impeached.²⁷⁵ This clause can best be explained as an anti-self-dealing device. Because the Vice President would benefit personally and directly from the conviction and removal of the President, the Constitution precludes the official involvement of the Vice President in the process.²⁷⁶ Similarly, the Constitution’s Twenty-Seventh Amendment (proposed, incidentally, in 1789) prevents a pay raise for Congress from taking effect until after an intervening congressional election.²⁷⁷ This Amendment prevents all members of the House and some members of the Senate from voting for a raise that they will necessarily enjoy.²⁷⁸ Akhil Amar has argued that even the Bill of Rights, normally considered to be a protection for individual rights against the majority, may also be viewed as a

271. See PARILLO, *supra* note 33, at 9 (describing the early American aspiration of dividing private interests from public power).

272. THE FEDERALIST NO. 10, *supra* note 39, at 124.

273. *Id.*

274. *Id.*

275. See U.S. CONST. art. I, § 3, cl. 6 (providing that the Chief Justice shall preside over proceedings when the President is tried in the Senate).

276. See Amar & Amar, *supra* note 41, at 121–22 (arguing that the Constitution is designed, in part, to prevent self-dealing).

277. See U.S. CONST. amend. XXVII (“No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened.”).

278. *Id.* (delaying the effect of changes in congressional compensation).

way to prevent governmental self-dealing.²⁷⁹ The First Amendment, for example, protects speech and petition, which are ways for the people to ensure that government officials do not insulate themselves from public scrutiny, thereby entrenching themselves in office.²⁸⁰

2. Who is the “Self” in Self-Dealing?

In order to explain why a principle against self-dealing accounts for the result in *Klein*, it is necessary to determine whether the “self” that can self-deal includes an institution, like Congress, with institutional rather than personal interests. As a literal statement, self-dealing appears to apply only to an individual who acts in a public capacity for his own private benefit. The paradigmatic example is a judge deciding a case in which she is a litigant.²⁸¹

The self may be interpreted more broadly to describe a person contributing to a decision that would confer a particular benefit on himself.²⁸² This is the sense in which self-dealing was the basis for the result in *Dr. Bonham’s Case*.²⁸³ Members of the College could not be “judges, ministers, and parties”²⁸⁴ because they benefitted from fines paid to the College. A decision of this type is less directly self-interested than a judge deciding a case to which she literally is a party, but each of the College’s members had a personal, albeit

279. Akhil Reed Amar, *Some Comments on “The Bill of Rights as a Constitution,”* 15 HARV. J.L. & PUB. POL’Y, 99, 100, 105 (1992).

280. *See id.* (describing the structural components of the Bill of Rights).

281. *See* Vermeule, *Contra Nemo*, *supra* note 200, at 384 (considering whether there is a constitutional value preventing a person from being a judge in his own case); *Dr. Bonham’s Case*, 77 Eng. Rep. 638, 652 (1610) (noting that, in the same case, an institution’s members may not be “judges to give sentence of judgment; ministers to make summons; and parties to have the moiety of the forfeiture”).

282. *See* *Tumey v. Ohio*, 273 U.S. 510, 520–23 (1927) (holding that a person’s rights are violated when his case is heard by a judge who “has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case”).

283. *Bonham’s Case*, 77 Eng. Rep. 638, 646 (1610). *See* Vermeule, *Contra Nemo*, *supra* note 200, at 384–86 (arguing that the principle against self-dealing is often linked to *Bonham’s Case*); *see also* Kalt, *supra* note 254, at 779 (discussing self-dealing).

284. *Bonham’s Case*, 77 Eng. Rep. at 652.

nonexclusive, interest in the outcome of the case. As a result, it is possible to see how the arrangement at issue in *Dr. Bonham's Case* can be considered self-dealing. The Constitution speaks to self-dealing of this variety: the Twenty-Seventh Amendment prevents a pay raise for Congress from taking effect until after an intervening congressional election.²⁸⁵

Even more broadly, self-dealing might describe a person who contributes to a group decision that stands to benefit him only as a member of a class, but not in his individual capacity. This is the sense in which Madison invoked the concept when describing legislative activities. In *Federalist*, No. 10, Madison wrote that “[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”²⁸⁶ But Madison’s use of this phrase was metaphorical because the subject of Madison’s aphorism is legislative rather than judicial activity.²⁸⁷ Madison continued:

With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens?²⁸⁸

In Madison’s metaphor, legislative activities are aggregated judicial determinations, resolving disputes among classes rather than individuals.²⁸⁹ And legislators are not only the judges making these determinations, but they are also the parties who stand to benefit from the outcome. As Madison wrote: “Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other.”²⁹⁰ Under this description, self-dealing might extend to legislative deliberations,

285. U.S. CONST. amend. XXVII (“No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened.”).

286. THE FEDERALIST NO. 10, *supra* note 39, at 124–25.

287. See Vermeule, *Contra Nemo*, *supra* note 200, at 391 (noting that Madison’s use of phrase was metaphorical).

288. THE FEDERALIST NO. 10, *supra* note 39, at 124–25.

289. See Vermeule, *Contra Nemo*, *supra* note 200, at 391 (noting metaphorical use of the language of judging).

290. THE FEDERALIST NO. 10, *supra* note 39, at 124–25.

but it would still be confined to situations of “corruption,” that is, a “self-serving use of public power for private ends.”²⁹¹

But, the self-interestedness criticized by the Court in *Klein* did not involve even this metaphoric use of the term “self.” The *Klein* Court did not suggest that any members of Congress stood to benefit, even as members of a class, from denying claims like Klein’s. Members of Congress benefitted financially from the appropriations proviso only in the *de minimis* sense that, as taxpayers, they stood to share in the savings to public fisc. Nevertheless, the Court was emphatic that the appropriations proviso was impermissible because it allowed “one party to the controversy to decide it in its own favor.”²⁹² In so doing, *Klein* treated Congress as the party bound by a principle against self-dealing.²⁹³ From *Klein*, therefore, we learn that the “self” that is restrained by a principle of self-dealing can be broader than a person or class with pecuniary interest in the outcome of a dispute. Rather, Congress as an institution may be “self-interested” when directing a decision in favor of the United States, even if the members that make up Congress are not.²⁹⁴ This type of self-dealing, which has been called “institutional self-dealing,”²⁹⁵ is the subject of *Klein*’s self-dealing principle.

291. Teachout, *The Anti-Corruption Principle*, *supra* note 33, at 373–74.

292. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871).

293. See TEACHOUT, CORRUPTION IN AMERICA, *supra* note 33, at 68 (noting extension of the principle of self-dealing to legislative activity).

294. See *United States v. Winstar Corp.*, 518 U.S. 839, 898 (1996) (describing the self-interest of the government). This is the sense in which Hamilton used the phrase. In *Federalist*, No. 80, he relied on this principle to describe why federal courts rather than state courts should hear cases between states or citizens of different states. See THE FEDERALIST NO. 80, at 447 (Alexander Hamilton) (Peter Smith ed., 1987) (federal rather than state tribunals should hear cases involving states because “[n]o man ought certainly to be a judge in his own cause”).

295. See Aziz Z. Huq, *Enforcing (But Not Defending) ‘Unconstitutional’ Laws*, 98 VA. L. REV. 1001, 1086 (2012) (describing institutional self-dealing); Vermeule, *Contra Nemo*, *supra* note 200, at 389 (same).

B. Klein Disfavors Governmental Self-Dealing

A close look at the structure of *Klein*'s argument reveals that self-dealing is the closest thing that can be considered the rationale for its rule of decision language. Although the Court was clear that a statute prescribing a rule of decision in a pending case was constitutionally problematic, it did not say precisely why. After describing the statute, the Court asks: "Can we do so [that is, apply the proviso,] 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?"²⁹⁶ It answers: "We think not."²⁹⁷

This passage, although far from a model of clarity, suggests that there is something wrong with a statute that allows one party to a controversy to decide it in its own favor. It does not, however, explain what, if any, is the connection between this concern and its rule of decision language. This explanation comes later, in the last paragraph of the opinion's rule of decision section. Summing up the previous several pages of its opinion, Chase asks whether Congress can "prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself."²⁹⁸ In this passage, the Court ties together all of the themes it introduced throughout the opinion until this point, including the withdrawal of jurisdiction, prescription of a rule of decision, retroactivity, deviation from the standing law, the motivation of Congress, and favoritism to the government.²⁹⁹ But, unlike the rest of the discussion, this last sentence suggests that all of these themes are organized around the Court's concern with self-dealing; that is, Congress's interference with the Court of Claims's judgment was constitutionally defective "because and only because its decision"

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

297. *Id.*

298. *Id.*

299. See *id.* (holding that Congress overstepped the constitutional boundary separating the legislative and judicial branches).

was “adverse to the government and favorable to the suitor.”³⁰⁰ Put another way, the Court’s concern appears to be one of *self-dealing*; that is, Congress took advantage of its otherwise lawful power to establish federal court jurisdiction to benefit itself as a party in an ongoing dispute.

C. *Self-Dealing and the Constitution*

As the above analysis reveals, a principle discouraging the government from self-dealing may explain *Klein*’s result. Although it has gained relatively little scholarly or judicial traction,³⁰¹ it does reflect one of a few concerns that the *Klein* Court emphasized,³⁰² and possibly was its primary concern. Of course, reading *Klein* as a statement about self-dealing would be a thin explanation for its result if *Klein* were unique in constitutional doctrine for stating this principle. Redish made this objection when he argued that constitutional doctrine and theory provide no reason to prevent Congress from enacting statutes that have the effect of favoring the government in pending cases.³⁰³ Gerangelos voiced the same concern, arguing that a *Klein* principle that takes into account the status of the government as a party fails to connect this insight to other areas of constitutional law.³⁰⁴

But, contrary to these objections, *Klein* is not alone in suggesting the constitutional importance of a principle against self-dealing. Even apart from *Klein*’s rule of decision principle, a principle against governmental self-dealing animates several lines

300. *Id.*

301. *Cf.* GERANGELOS, JUDICIAL PROCESS, *supra* note 11, at 185 (considering the relevance of the government as a party to the *Klein* question); Ronner, *supra* note 11, at 1071 (same); Young, *Congressional Regulation*, *supra* note 11, at 1249 (same).

302. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871) (rejecting the proviso “because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor”).

303. *See* Redish & Pudelski, *supra* note 11, at 448 (noting Congress’s broad authority to benefit the government as a party in a pending case); *see also* Ratner, *supra* note 157, at 181 (noting the tension between *McCardle* and *Klein*).

304. *See* GERANGELOS, JUDICIAL PROCESS, *supra* note 11, at 185 (arguing that a *Klein* principle rooted in the distinction between government as regulator and government as sovereign is not supported by doctrine other than *Klein*).

of constitutional law cases, including Contract, Due Process, and Ex Post Facto Clause doctrine.³⁰⁵ The broad commitment to limiting governmental self-dealing described by these other constitutional doctrines answers the objection that a *Klein* principle against self-dealing is unique in constitutional law.³⁰⁶ These cases also provide parameters for evaluating how a value against self-dealing could operate in the *Klein* context.³⁰⁷

1. Contract Clause Doctrine is Driven by a Principle Against Governmental Self-Dealing.

The Supreme Court reads the Contract Clause to embody a principle against self-dealing by state governments.³⁰⁸ The Contract Clause prohibits the states from enacting any “Law impairing the Obligations of Contract.”³⁰⁹ Despite the absolute-sounding nature of its prohibition, the strictness of the clause’s application turns on whether the statute impairs private obligations only or instead relieves the state government of its own obligations.³¹⁰ When a state enacts a statute that impairs private obligations, like a statute impairing mortgage obligations between borrowers and lenders, the Court reviews the validity of the breach under a deferential standard akin to rational basis.³¹¹ By contrast, when the Court reviews statutes repudiating contractual

305. See *infra* Parts III.C.1–3 (describing the connection between constitutional doctrine and principle against self-dealing).

306. Cf. Redish & Pudelski, *supra* note 11, at 448 (arguing that constitutional theory does not support a *Klein* principle that turns on whether the government is a party to a pending case).

307. See *infra* Part IV (applying principle against self-dealing).

308. See *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 17 (1977) (holding that “the Contract Clause limits the power of the States to modify their own contracts”).

309. U.S. CONST. art. I, § 10, cl. 1.

310. See *United States Trust*, 431 U.S. at 22–23, 29–31 (distinguishing between modification of rights related to public contracts and private contracts).

311. See *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 438, 444–45 (1934) (recognizing that laws intended to regulate existing contractual relationships must be reasonable and necessary to serve a legitimate public purpose).

obligations to which the state itself is a party, it does not defer to the state's decision to breach its contractual obligation.³¹²

The Court rests its distinction between public and private contracts on the assumption that the state is an interested party when it makes the decision to breach its own contractual obligations.³¹³ As the Court described in *United States Trust Co. of New York v. New Jersey*,³¹⁴ deference to a state's decision to impair contractual obligations is based on the premise that, normally, a state is acting for a public purpose.³¹⁵ There will be winners and losers as a result of the state's decision to breach a generally applicable set of contractual obligations, to be sure; but the legislature, rather than a court, is best situated to weigh the costs and benefits created by the impairment.³¹⁶ By contrast, when the state itself is a party to a contract, deference to legislative judgment about whether to breach that obligation is not appropriate.³¹⁷ Unlike in the case of a purely private obligation, when the state has the ability to breach its own contractual obligation, it has the power to pick itself as a winner.³¹⁸ As a result, the Court held, deference to the state "is not appropriate because the *State's self-interest is at stake*."³¹⁹ Because deference is not warranted to the state's self-interested decision, the Court interprets the Contract Clause strictly when a state enacts legislation breaching its own financial obligations.³²⁰ The Court has maintained its *United States Trust* distinction, refusing to

312. See *United States Trust*, 431 U.S. at 22–23, 29–31 (distinguishing between modification of rights related to public contracts and private contracts).

313. See *id.* (holding that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake").

314. 431 U.S. 1 (1977).

315. See *id.* at 25 (describing reserved powers doctrine).

316. See *id.* at 22–23 (noting that "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure").

317. *Id.* at 25–26 (holding that "complete deference . . . is not appropriate because the State's self-interest is at stake").

318. See *id.* at 26 ("If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.").

319. *Id.* at 25–26 (emphasis added).

320. *Id.* at 24, 26.

uphold state breaches of contractual obligations when the state itself is a party to the contracts it impairs.³²¹ In light of this distinction, which is not suggested either by the text or history of the Contract Clause,³²² the Court's self-dealing rationale appears to be driving the doctrinal result in *United States Trust*.³²³

2. Due Process Doctrine Reflects a Principle Against Governmental Self-Dealing

The Court's bifurcated approach to the Contract Clause came as a surprise to scholars and attracted a good deal of criticism.³²⁴ But, this surprise may have been unwarranted; long before *United States Trust*, the Court expressed a similar concern about governmental self-dealing in the context of the Fifth Amendment's Due Process Clause.³²⁵ In *Perry v. United States*,³²⁶ the petitioner held bonds issued by the United States.³²⁷ Congress disavowed its

321. See *Energy Res. Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412–13 (1983) (noting that a stricter level of scrutiny applies under the Contract Clause when a state alters its own contractual obligations).

322. See Evan C. Zoldan, *The Permanent Seat of Government*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 163, 205 (2011) [hereinafter Zoldan, *Permanent Seat*] (noting arguments that neither the text nor history of the Constitution supports the bifurcation of the Contract Clause).

323. Because the Contract Clause applies only to the states and not Congress, it may be argued that mistrust of state legislatures prompted the Court's heightened scrutiny of state decisions to breach their own obligations. However, as described below, the Court has imposed a parallel distinction against Congress through the Due Process Clause. *Infra* Part III.C.2. This suggests that a concern about self-dealing, rather than federalism, animates Contract Clause doctrine.

324. See Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 718–19 (1984) (arguing that the express language of the Contract Clause does not distinguish between private and public contracts); Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 293–94 (1988) (arguing that *United States Trust*'s conclusion is “precisely backwards”).

325. See *Perry v. United States*, 294 U.S. 330, 346 (1935) (discussing the government's ability to alter the terms of an agreement which later becomes disadvantageous to it).

326. 294 U.S. 330 (1935).

327. See *id.* at 346 (describing the obligation owed by the United States).

obligation to redeem the bonds in accordance with their terms.³²⁸ The Supreme Court rebuffed Congress, holding that the United States is not “free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient.”³²⁹ Importantly, the Court held that there is a distinction between the power of the government to regulate contractual obligations generally and the “power of the Congress to alter or repudiate the substance of *its own* engagements.”³³⁰ Although Congress has a freer hand to regulate private contracts, the Court specifically rejected the government’s argument that, as a sovereign, Congress could not bind itself by contract.³³¹ The power to enter into binding contracts is itself a sovereign power, the Court noted; it reasoned, therefore, that disclaiming a previous contractual obligation was as much a repudiation of sovereignty as fulfilling it.³³²

The Court has reaffirmed *Perry*’s essential point about governmental self-dealing. In *United States v. Winstar Corp.*,³³³ the Court wrestled with the same question posed in *Perry* and, indeed, *United States Trust*: that is, how does the law accommodate the government’s prerogative to legislate with its “obligation to honor its contracts.”³³⁴ The *Winstar* Court held that the appropriate balance depends on whether the government’s breach of contract is due to a sovereign act or whether the breach is simply a repudiation by the “Government as contractor.”³³⁵ The difficult question, the Court noted, is how to distinguish between the government as contractor and the government as regulating sovereign.³³⁶ The Court suggested a mechanism that, like its Contract Clause analysis, resonates with a self-dealing rationale. If a statute’s impact on the government’s financial obligations is “merely incidental to the accomplishment of a broader

328. *Id.* at 347.

329. *Id.* at 350.

330. *Id.* at 350–51 (emphasis added).

331. *Id.* at 350.

332. *Id.* at 353–54.

333. 518 U.S. 839 (1996).

334. *Id.* at 896.

335. *Id.*

336. *Id.*

governmental objective,” it will be considered a sovereign act.³³⁷ However, the “greater the Government’s *self-interest* . . . the more suspect becomes the claim that its private contracting partners ought to bear the financial burden.”³³⁸ Indeed, if “a substantial part of the impact of the Government’s action rendering performance impossible falls on its own contractual obligations,” the government will not be able to claim any sovereign act defense at all.³³⁹ Put simply, the Court suggested that the government’s self-interest determines whether it must be bound by its contractual obligations. When the government’s self-interest is low, it has more leeway to take action with the effect of abrogating its obligations. But, the government’s self-interest is presumed—perhaps definitively established—when a “substantial part” of the impact of the new rule benefits the government at the expense of a party who bears the brunt of the change in law.³⁴⁰

3. *Ex Post Facto Clause Doctrine Reflects a Principle Against Governmental Self-Dealing*

The Contract Clause and Due Process Clause lines of cases discussed above are similar because they reflect self-dealing in the context of breaches of financial obligations. Indeed, it makes sense that self-dealing concerns would come up most often in these cases. Importantly, however, the Court’s concern with self-dealing transcends the financial context. In the criminal context, too, constitutional doctrine reflects an anti-self-dealing rationale. In *Carmell v. Texas*,³⁴¹ the Court considered whether a retrospective change in an evidentiary rule violated the Ex Post Facto Clause.³⁴²

337. *Id.* at 898.

338. *Id.* (emphasis added).

339. *Id.*

340. *Id.*

341. 529 U.S. 513 (2000).

342. *See id.* at 516 (noting that not every retrospective change in rules of evidence is unconstitutional); *see also* *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (opining that the Ex Post Facto Clause prohibits, *inter alia*, “[e]very law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*” (emphasis added)).

A state rule of evidence required convictions for certain sexual offenses to be based both on testimony from the victim and corroborating evidence.³⁴³ The rule was amended to permit convictions for these offenses based solely on the victim's testimony, thereby lowering the amount of evidence needed to convict.³⁴⁴ The application of the new law to conduct that occurred before its enactment reduced the amount and kind of evidence needed to convict a person;³⁴⁵ as a result, the Court held that the statute violated the Ex Post Facto Clause.³⁴⁶ But, the Court noted, not every rule of evidence, if altered, implicates ex post facto concerns.³⁴⁷ Rather, the evidentiary amendment at issue was defective because it retroactively altered the rules "in a way that is advantageous only to the State."³⁴⁸ Some evidentiary rules, the Court noted, are "evenhanded;" that is, "they may benefit either the State or the defendant in any given case."³⁴⁹ For example, a change in a witness competency rule that retrospectively permits a type of witness (like a convicted felon) to testify does not "necessarily run in the State's favor."³⁵⁰ It may help the government convict in some cases but, in others, it will aid the defense.³⁵¹ By contrast, rules that lower the amount of evidence needed to convict have only one result: they "*always* run in the prosecution's favor because they always make it easier to convict the accused."³⁵²

Carmell reads a self-dealing rationale into the Ex Post Facto Clause. The Court invalidated the retroactive application of a law in a criminal case, but only because the change in law could benefit

343. *Carmell*, 529 U.S. at 516.

344. *Id.*

345. *See id.* at 531 (noting that the state law decreased the amount of evidence needed to convict).

346. *See id.* at 531 (holding that the state law falls within *Calder's* fourth category of prohibited ex post facto laws).

347. *Id.*

348. *Id.* at 533.

349. *Id.* at 533 n.23.

350. *Id.* at 546.

351. *See id.* at 546–47 (distinguishing between even-handed changes in law and changes that always inure to the benefit of the government).

352. *Id.* at 546.

the government alone. Viewed in this light, the self-dealing rationale appears to be doing the doctrinal work in *Carmell*; a legislature has broad authority to alter the laws of evidence, even retroactively, but only if the change could benefit a defendant as well as the government. A rule that only benefits the government is self-dealing and, therefore, prohibited as an ex post facto law.

D. Klein's Principle Reformulated

The Contract, Due Process, and Ex Post Facto Clauses cover different factual situations and reflect different goals. Nevertheless, reading together the doctrine from these disparate lines of cases reveals that they all reflect the tension between the legislature's right to achieve a public objective and its questionable power to benefit itself at the expense of a member of the public.³⁵³ The Court reconciles this tension by emphasizing what may be called a constitutional principle against governmental self-dealing.³⁵⁴ When a statute has broadly applicable results, and applies evenhandedly to the government and non-governmental entities alike, it represents broad governmental policy rather than self-dealing. By contrast, when a statute is drawn narrowly to benefit the government in a particular set of cases, or necessarily will run to the advantage of the government in all situations, a statute self-deals within the meaning of this principle.³⁵⁵

353. See *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996) (noting that “some line has to be drawn . . . between regulatory legislation . . . and, on the other hand, statutes tainted by a governmental objective of self-relief”); *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25–26 (1977) (noting that “in reviewing economic and social regulation . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure . . . [H]owever, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State’s self-interest is at stake.”); *Carmell v. Texas*, 529 U.S. 513, 533 n.23 (2000) (stating that not “every rule that has an effect on whether a defendant can be convicted implicates the Ex Post Facto Clause” even though they might be unfair).

354. See *Winstar*, 518 U.S. at 896–97 (evaluating statute reflecting government self-interest); *United States Trust*, 431 U.S. at 25–26 (same); *Carmell*, 529 U.S. at 533 n.23 (same).

355. See *Winstar*, 518 U.S. at 896–97 (evaluating statute reflecting government self-interest); *United States Trust*, 431 U.S. at 25–26 (same); *Carmell*, 529 U.S. at 533 n.23 (same).

A principle against governmental self-dealing has important implications for understanding the proper functions of the executive and judicial branches as well as the legislative branch. Although the implications for the executive and judicial branches are important, they are beyond the scope of this Article.³⁵⁶ The remainder of this Article will address the implications of a constitutional principle against governmental self-dealing only for the purpose of reevaluating the *Klein* rule of decision principle. Rule of decision doctrine and the self-dealing cases described above, together with *Klein* itself, suggest a reformulated *Klein* rule of decision principle that may be called the *Klein* Self-Dealing Principle.³⁵⁷

356. For example, a constitutional principle against self-dealing may inform the appropriate line between Article III judicial power and administrative agency adjudicatory authority, see generally Vermeule, *Contra Nemo*, *supra* note 200, at 399, the scope of Emoluments Clause; Andy Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639 (2017), and judicial disqualification, see generally Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 KAN. L. REV. 531 (2005).

357. An issue closely related to the *Klein* rule of decision question is the extent to which Congress may interfere with final court judgments. The Court has held that Congress may not subject a federal court judgment to revision by the executive branch. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792) (holding that "revision and control" of federal court judgments by the executive branch is inconsistent with judicial independence). Nor may Congress require a court to reopen a final judgment that is no longer subject to appeal. Compare *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (holding that Congress may not require federal courts to reopen final judgments), with *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (holding that a court must apply new law to case pending on appeal). However, the court must modify an ongoing injunction if required by a change in law. See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431–32 (1855) (requiring court to modify ongoing injunction to conform with new law). *Miller v. French*, 530 U.S. 327 (2000) blurred the line between ongoing injunctions and final judgments by upholding a statute that revised final judgments, but only temporarily, and for the purpose of facilitating other changes that were the main purpose of the law. See *id.* at 346 (holding that an automatic stay does not suspend a final judgment); GERANGELOS, JUDICIAL PROCESS, *supra* note 11, at 240 (describing *Miller's* effect on a principle preventing Congress from requiring the courts to reopen final judgments). *Miller* stands in some tension with *Klein* to the extent that it allows significant congressional intrusion into judicial activity; but, because it addresses a somewhat different issue than *Klein* it does not stand in the way of an enforceable rule of decision principle. However, to the extent that the final judgment rule must be reconciled with the rule of decision principle, my tentative

First, the general rule: a court must apply the law in force at the time it decides a case,³⁵⁸ even to a case pending on appeal at the time of the change,³⁵⁹ and even if applying the change benefits the government.³⁶⁰

Second, the *Klein* principle is an exception to this general rule. A court may not apply a statutory³⁶¹ change in law that reflects governmental self-dealing. A statute reflects governmental self-dealing when it has the effect of benefitting the government as a party in a case that is pending.³⁶² A statute benefits the

view is that a principle against governmental self-dealing reconciles these two lines of cases. A *Klein* self-dealing principle distinguishes between a statute that affects the government's obligations in a way that is "merely incidental to the accomplishment of a broader governmental objective," from a statute that primarily affects an obligation of the government. *Winstar*, 518 U.S. at 897. The statute at issue in *Miller* did affect a case to which the government was (nominally) a party, but it also accomplished a broader governmental objective: it set new standards for the entry of injunctions in prison litigation cases. As a result, a *Klein* principle against self-dealing, if applied more broadly, also helps clarify the Court's final judgment doctrine. *See also* *United States v. Sioux Indians*, 448 U.S. 371, 404–05 (1980) (holding that Congress may reopen final judgments *in favor of the United States*).

358. *See Wheeling Bridge*, 59 U.S. (18 How.) at 431–32 (holding that the bridge was no longer a nuisance, despite previous decision declaring it a nuisance, because Congress intervened by passing a statute legalizing it).

359. *See Schooner Peggy*, 5 U.S. (1 Cranch) at 110 ("But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.").

360. *See Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992) (upholding a statute conditionally ending litigation in favor of the United States).

361. *Klein* and other rule of decision cases involve the application of new statutory requirements. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871) (considering effect of statutory change in law); *Robertson*, 503 U.S. at 441 (same). There are different principles at stake when a court considers the retroactive application of a new judge-made rule or administrative regulation. *See generally Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993) (considering retroactive application of judicial opinions); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) (considering retroactive application of administrative regulations). As a result, the *Klein* principle articulated in this Article applies only to statutory changes in law.

362. *See Klein*, 80 U.S. (13 Wall.) at 147 (holding that Congress may not "prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor");

government as a party if it has the effect of abrogating an obligation owed by the government³⁶³ in a way that is not merely incidental to the accomplishment of a broader governmental objective.³⁶⁴ It is strong evidence that the change in law benefits the government as a party rather than accomplishing a broader governmental objective if the change necessarily will benefit the government³⁶⁵ or if a substantial part of the impact of the change in law is to relieve the government of its obligation.³⁶⁶

Third, there are two corollaries to the general rule and *Klein* exception. Corollary A: if none or only an insubstantial part of the impact of a change in law inures to the benefit of the government, the court must apply the change in law.³⁶⁷ Corollary B: if the change in law abrogates an obligation of the government only incidental to the accomplishment of a broader governmental

U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 25–26 (1977) (“[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State’s self-interest is at stake.”); *Perry v. United States*, 294 U.S. 330, 350 (1935) (rejecting the argument that “Congress can disregard the obligations of the Government at its discretion”); *United States v. Winstar Corp.*, 518 U.S. 839, 896–98 (1996) (holding that the Government’s self-interest in a matter will affect the availability of the sovereign acts defense); *Carmell v. Texas*, 529 U.S. 513, 546 (2000) (invalidating a retrospective statute because it will “necessarily run in the State’s favor”).

363. See *United States Trust*, 431 U.S. at 25–26 (declining to defer to a state’s repudiation of its own financial obligation); *Perry*, 294 U.S. at 350 (rejecting the argument that “Congress can disregard the obligations of the Government at its discretion”).

364. See *Winstar*, 518 U.S. at 896–98 (“[G]overnmental action will not be held against the Government for purposes of the impossibility defense so long as the action’s impact upon public contracts is . . . merely incidental to the accomplishment of a broader governmental objective.”).

365. See *Carmell*, 529 U.S. at 546 (stating that changes to the evidentiary rules that lower the quantum of evidence needed to convict always benefit the prosecution).

366. See *Winstar*, 518 U.S. at 896–98 (“[W]here a substantial part of the impact of the Government’s action rendering performance impossible falls on its own contractual obligations, the defense will be unavailable.”).

367. See *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 104–05 (1801) (applying a change in law for the benefit of parties other than the government); *United States v. Sioux Indians*, 448 U.S. 371, 404–05 (1980) (same); *Pope v. United States*, 323 U.S. 1, 14 (1944) (same).

objective, or benefits someone other than the government, then it amends applicable law and must be applied by the court.³⁶⁸

The implications of this newly reformulated *Klein* rule of decision principle, the *Klein* self-dealing principle, are explored in Part IV, below.

IV. *The Klein Self-Dealing Principle*

If *Klein* is a puzzle, as it often has been described,³⁶⁹ this Article has tried to fit its pieces together into an administrable constitutional principle that fits within an established constitutional tradition. As demonstrated above, the Court relies on a self-dealing rationale throughout its constitutional law doctrine, confirming that a principle against governmental self-dealing is a value of constitutional weight.³⁷⁰ Reading *Klein* in light of these cases allows us to view *Klein* not as an outlier or “derelict on the waters of the law,”³⁷¹ but rather as a specific application of a deeply ingrained principle. This Part demonstrates the explanatory power of the *Klein* self-dealing principle by showing the extent to which it satisfies the constraints of both *Klein* itself and other rule of decision cases. Part V demonstrates how the *Klein* self-dealing principle provides a workable rule for lower courts to follow by applying it to a series of hypothetical cases.³⁷²

368. See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1311 (2016) (applying a change in law that sets broad government policy); *Robertson v. Seattle Aububon Soc’y*, 503 U.S. 429, 441 (1992) (same).

369. See Sager, *supra* note 11, at 2525 (noting that *Klein* “is deeply puzzling”); see also Araiza, *supra* note 7119, at 1074 (“*Klein* is a puzzling case.”); Vermeule, *supra* note 28, at 423 (“The puzzle is that if *Klein*’s pronouncements are taken seriously, the decision can be made applicable to any statute at all.”); PFANDER, *supra* note 96, at 405 (stating that the *Klein* decision has “puzzled” scholars since it was decided).

370. See *supra* Part III.C (describing a principle against governmental self-dealing).

371. *Lambert v. California*, 355 U.S. 225, 245 (1957) (Frankfurter, J., dissenting).

372. See *infra* Part V (applying principle against self-dealing to hypothetical cases).

A. The Klein Self-Dealing Principle Explains Klein Itself

The principle against self-dealing formulated above explains the result in *Klein*, which appears to be the only case of its kind to have reached the Supreme Court. The Court of Claims correctly awarded Klein damages against the United States under the ACPA, as interpreted by *Padelford*, at the time the suit was brought.³⁷³ However, by the time this judgment was subject to review by the Supreme Court, Congress had changed the law through the appropriations proviso. Under the general rule stated above, the Court would have been bound to apply the proviso, resulting in a dismissal of Klein's claim on appeal, unless the *Klein* self-dealing principle directed otherwise.³⁷⁴

Most of the elements of the *Klein* self-dealing principle are satisfied by *Klein* without difficulty. The appropriations proviso benefitted the government in pending cases, including both Klein's case and a number of other cases pending under the ACPA.³⁷⁵ It benefitted the government by abrogating an obligation owed by the government—the obligation to provide compensation for captured property set out by the ACPA.³⁷⁶ The key interpretive question is whether the proviso resulted in a benefit to the government as a party or whether, by contrast, the benefit was merely incidental to accomplishing a broader governmental objective.³⁷⁷ Under *Klein*'s facts, the difficulty may be described in the following way: even acknowledging that the proviso benefitted the government in Klein's pending case, was this benefit merely incidental to the accomplishment of a broader governmental objective? On its face, the purpose of the appropriations proviso was to deny compensation to formerly disloyal southerners. Whether or not this was a good result, can it not be described as a policy or, in the

373. See *United States v. Padelford*, 76 U.S. 531, 533 (1869) (broadly interpreting the ACPA to include claims like those in *Klein*).

374. See *Schooner Peggy*, 5 U.S. (1 Cranch) at 110 (applying change in law to pending case).

375. See *Klein*, 80 U.S. at 146 (noting that statute relieved the government of its obligations in a pending case).

376. See *id.* at 138–39 (describing the government's obligations under the ACPA).

377. See *supra* Part III.D (describing the rule against governmental self-dealing).

language of the *Klein* self-dealing principle, a “governmental objective?”

Irrespective of Congress’s purposes in enacting the proviso, the proviso did not establish a broader governmental policy within the meaning of the *Klein* self-dealing principle formulated above. Under this principle, a change in law benefits the government as a party in a way that is not incidental to a broader governmental objective when the law necessarily will benefit the government³⁷⁸ or if a substantial part of the impact of the change is to relieve the government of an obligation.³⁷⁹ As its application to *Klein* demonstrates, the *Klein* self-dealing principle distinguishes between an even-handed rule—one that sometimes benefits the government and sometimes benefits other parties—from a rule that always benefits the government. It also distinguishes between a rule with a public objective—one in which the change of law benefits the government but also does other things—from a rule that relieves the government of an obligation but does nothing or little else. Under *Klein*’s facts, the appropriations proviso was not even-handed because it provided a rule that would always benefit the government in all its applications.³⁸⁰ Indeed, the sole effect of the proviso was to relieve the government of obligations identifiable at the time the proviso was enacted.³⁸¹ Moreover, whatever the motivations of Congress for doing so, the *effect* of the proviso was only to relieve the government of its obligations under the ACPA, not to set public policy.³⁸² As a result, under the *Klein* self-dealing principle, the appropriations proviso benefitted the government as a party in a pending case. It was, therefore, self-dealing within the meaning of the *Klein* self-dealing principle. Because the appropriations proviso was self-dealing, the Court correctly declined to apply it to the facts of *Klein*.

378. See *Carmell v. Texas*, 529 U.S. 513, 546 (2000) (invalidating change in law that necessarily benefitted the government in a pending case).

379. See *Klein*, 80 U.S. (13 Wall.) at 146 (invalidating change in law that relieved the government of its obligations in a pending case); *United States v. Winstar Corp.*, 518 U.S. 839, 896–98 (1996) (same); *Carmell*, 529 U.S. at 546 (same).

380. See *Klein*, 80 U.S. (13 Wall.) at 147 (invalidating statute that would necessarily benefit the government).

381. See *id.* at 148 (describing the effect of the proviso).

382. See *id.* (describing the effect of proviso).

B. The Klein Self-Dealing Principle Easily Explains Most Rule of Decision Cases

A principle against governmental self-dealing is not, to be sure, the only possible reading of *Klein*. But, unlike its many other potential meanings,³⁸³ reading *Klein* to state a principle against governmental self-dealing largely explains pre- and post-*Klein* cases that consider the bounds of Congress's power to direct decisions in particular cases.

The broadest articulations of *Klein* suggest that it should be read to prevent the government from picking winners and losers in particular cases.³⁸⁴ This potential *Klein* principle, although jurisprudentially attractive,³⁸⁵ has proved inconsistent with every rule of decision case except *Klein* itself.³⁸⁶ By contrast, reading *Klein* as limited to disfavoring governmental self-dealing explains hard-to-distinguish cases that have made doctrinal analysis of *Klein* so challenging. The *Klein* self-dealing principle is an exception to the general rule that the court must apply a change in law to pending cases, even cases pending on appeal.³⁸⁷ The *Klein* self-dealing principle is an exception to this general rule, but only for cases that demonstrate self-dealing on the part of the government.³⁸⁸ In order for a statute to reflect self-dealing on the part of the government, it must have the effect of benefitting the government as a party in a case that is pending.³⁸⁹ As a result, a

383. See *supra* Part II (describing possible meanings of *Klein*).

384. See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1336 (2016) (Roberts, C.J., dissenting) (criticizing the Court for permitting Congress to “unabashedly pick the winners and losers in particular pending cases”).

385. See *supra* Part II.C (describing possible meanings of *Klein*; see also Zoldan, *Bank Markazi*, *supra* note 144, at 8–9 (arguing that *Bank Markazi* incorrectly rejected a value of legislative generality).

386. See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435–36 (1855) (applying new law to benefit a party in a pending case); *Bank Markazi*, 136 S. Ct. at 1324–25 (same).

387. See *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (applying a change in law to a pending case); *Wheeling Bridge*, 59 U.S. (18 How.) at 435–36 (same).

388. See *supra* Part III (describing a self-dealing justification for *Klein*).

389. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871) (invalidating the statute that benefitting the government as a party in a pending case); *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25–26 (1977) (same); *United*

Klein self-dealing principle easily explains cases like *Wheeling Bridge* and *Bank Markazi*, neither of which involved the government as a party.³⁹⁰ Both of these opinions upheld statutes in which the government picked a winner in a particular case;³⁹¹ however, in neither case was the government a party to the dispute. As a result, neither implicates the *Klein* self-dealing principle. In the language of Corollary A, because the benefit of the changes in law in these cases inured to a party other than the government, the Court properly applied the change in law.

For this same reason, the *Klein* self-dealing principle also explains cases in which the government is a party to an ongoing dispute, but Congress's intervening statute favors a party other than the government. In *Schooner Peggy*, the American vessel Trumbull captured the Schooner Peggy, which was brought to port for condemnation.³⁹² The court of appeals found that the Schooner Peggy was an "armed vessel," rendering the Peggy and its cargo lawful prize.³⁹³ Accordingly, the court decreed that the proceeds of the sale of the Peggy and its cargo should be divided between the United States and the crew of the Trumbull.³⁹⁴ The Supreme Court reversed, holding that a treaty entered into between the United States and France, after the lower court's opinion was rendered, required the return of the vessel to France.³⁹⁵ Unlike *Klein*'s appropriations proviso, the treaty had the effect of benefitting a party to a pending case, but a party other than the government—in this case the Peggy's French owners. As a result, the Court correctly applied the change in law under the *Klein* self-dealing principle.

States v. Winstar Corp., 518 U.S. 839, 896–98 (1996) (same); Perry v. United States, 294 U.S. 330, 347 (1935) (same); Carmell v. Texas, 529 U.S. 513, 546 (2000) (same).

390. See *Wheeling Bridge*, 59 U.S. (18 How.) at 435–36 (applying a change in law to benefit a party other than the government); *Bank Markazi*, 136 S. Ct. at 1324–25 (same); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995) (same).

391. See *Bank Markazi*, 136 S. Ct. at 1336 (Roberts, C.J., dissenting) (noting that statute picked winner in pending case); *Plaut*, 514 U.S. at 228 (noting that reducing favoritism is not the purpose of separation of powers).

392. *Schooner Peggy*, 5 U.S. (1 Cranch) at 108.

393. *Id.* at 106.

394. *Id.* at 107.

395. *Id.* at 108–109.

Although *Schooner Peggy* did not expressly emphasize the relevance of which party benefitted from the change in law, this factor was central to the Court's later opinions in *Pope v. United States*³⁹⁶ and *Sioux Nation*, both of which emphasize the significance of whether a change in law benefits the government as litigating party.³⁹⁷ In *Pope*, a government contractor failed to prevail in a claim for government funds in the Court of Claims.³⁹⁸ In response, Congress directed the Court of Claims to render judgment in favor of the claimant.³⁹⁹ The Court distinguished this case from *Klein*, noting that the special act, unlike *Klein*'s appropriations proviso, created a new right enforceable *against* the United States.⁴⁰⁰ Although the Court did not reach the question, it doubted whether *Klein* prevented Congress from "set[ting] aside a judgment of the Court of Claims *in favor of the Government*."⁴⁰¹

The question left open in *Pope* was answered a few decades later in *Sioux Nation*. *Sioux Nation* arose out of a federal statute that abrogated a treaty between the United States and the Sioux, guaranteeing the latter undisturbed use of the Black Hills of South Dakota.⁴⁰² The Sioux claimed that the federal statute was a Fifth Amendment taking but failed to prevail in their suit for damages.⁴⁰³ Later, Congress created a general mechanism for Indian tribes to bring claims against the government arising under treaty.⁴⁰⁴ When the Sioux again brought a claim arising from the loss of the Black Hills, this time pursuant to the new statute, the court held that the claim was barred, because of *res judicata*, by the previous Black Hills suit.⁴⁰⁵ In response, Congress enacted still another statute, this time authorizing the court to hear the Sioux's

396. 323 U.S. 1 (1944).

397. *See id.* at 8–9 (holding that *Klein* does not apply when Congress changes the law to set aside judgment in favor of the government).

398. *Id.* at 5–6.

399. *Id.* at 6.

400. *See id.* at 9 (noting that the Act's purpose was to create a new obligation on the part of the Government).

401. *Id.* at 8–9 (emphasis added).

402. *United States v. Sioux Indians*, 448 U.S. 371, 374 (1980).

403. *Id.* at 384.

404. *See id.* at 384–85 (describing the Indian Claims Commission Act).

405. *Id.* at 387.

Black Hills claim “without regard to the defense of res judicata and collateral estoppel.”⁴⁰⁶ Freed from the restraints of preclusion, the lower court awarded the Sioux compensation for the value of the Black Hills.⁴⁰⁷ Reviewing this award, the Supreme Court considered whether the statute reopening the Sioux’s claims for judicial consideration had “passed the limit which separates the legislative from the judicial power,” thereby violating *Klein*’s rule of decision principle.⁴⁰⁸ The Court held that it did not.⁴⁰⁹ The Court specifically distinguished *Klein* by emphasizing that *Klein*’s appropriations proviso “required the courts to decide a controversy in the Government’s favor.”⁴¹⁰ This distinction is relevant, the Court said, because it was of “obvious importance to the *Klein* holding” that “Congress was attempting to decide the controversy in its own favor.”⁴¹¹

Viewed through the lens of a *Klein* self-dealing principle, *Sioux Nation* and *Pope* are easily explained. Unlike *Klein*, in which the Court repudiated a change of law that benefited the government as litigating party, *Sioux Nation* and *Pope* applied changes in law that inured to the benefit of a party litigating *against* the government.⁴¹² In the language of Corollary A, because the change in law in these cases inured to the benefit of a party other than the government, the court properly applied the change in law.⁴¹³

406. *Id.* at 391.

407. *Id.* at 389–90.

408. *See id.* at 391 (considering the application of *Klein* to a statute that benefits someone other than the government (citing *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871))).

409. *Id.* at 404–05.

410. *Id.* at 404–05.

411. *Id.* at 405.

412. *Id.* at 405 (upholding statute that reopened claim against the government); *Pope*, 323 U.S. at 8-9 (same).

413. *See supra* Part III.D (describing principle against governmental self-dealing). Moreover, *Sioux Nation* and *Pope* affirm that *Klein*’s language focusing on whether the change in law benefitted the government is not an idiosyncrasy of the *Klein* opinion.

C. The Klein Self-Dealing Principle and the Limits of Doctrine

The *Klein* self-dealing principle described above explains *Klein*, situates it within a strong constitutional tradition disfavoring self-dealing, and easily explains many of the rule of decision cases that are thought to stand in tension with *Klein*. But, other cases, even under the self-dealing principle, are difficult to square with *Klein*. In particular, *Robertson* and *Eslin* each describe factual situations that are similar to *Klein* in relevant ways.⁴¹⁴ As described below, the self-dealing principle goes a long way toward explaining *Robertson* and *Eslin*, even if, ultimately, it is not possible to reconcile them entirely with *Klein*.⁴¹⁵ Nevertheless, rereading *Robertson* and *Eslin* in light of the *Klein* self-dealing principle elucidates two important implications of the principle. Specifically, the *Klein* self-dealing principle gives new meaning to the Changed Law Rule relied on by *Robertson* and the principle invoked by *Eslin* that Congress pays claims only as a matter of grace.

1. Robertson and the Changed Law Rule

The difficult *Robertson* decision has long been considered a significant challenge to the articulation of a viable *Klein* principle. By inverting the relationship between *Klein*'s rule of decision principle and the Changed Law Rule, *Robertson* can be read to mean that any statutory change prevents the application of *Klein*. If it is true, as scholars and Chief Justice Roberts have argued,⁴¹⁶ that Congress changes the law within the meaning of *Klein* whenever it acts, then *Robertson* bars the application of *Klein* in the only situations in which it might apply, to wit, when Congress changes the law. But this is not the only way to read *Robertson*. Viewing *Robertson* through the lens of self-dealing reveals a principled standard for determining when an Act of Congress

414. See *infra* Parts IV.C.1–2 (describing *Eslin* and *Robertson*).

415. *Id.*

416. See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1335 (2016) (Roberts, C.J., dissenting) (describing the narrow space between *Robertson* and *Klein*); see also Araiza, *supra* note 7118, at 1079 (same).

“changes applicable law” within the meaning of *Klein* that still leaves some space for the operation of a *Klein* principle.

a. The Northwest Timber Compromise

Robertson arose out of the management of federally owned forests in Oregon.⁴¹⁷ The United States Bureau of Land Management (BLM) and the state of Oregon entered into an agreement for the dual purposes of protecting spotted owls living in the forests of Oregon and also permitting logging in those forests.⁴¹⁸ Conservation and logging groups brought suits to challenge the designation of logging and protected areas.⁴¹⁹ While litigation was pending, Congress intervened; in a statute widely known as the Northwest Timber Compromise, Congress required the BLM to offer for sale a certain amount of timber during the following year⁴²⁰ but also prohibited logging in particular areas. Specifically, § (b)(3) prohibited harvesting in areas previously designated as no-harvest areas by BLM.⁴²¹ Section (b)(5) prohibited harvesting in areas identified as no-harvest areas in the agreement between BLM and the State of Oregon.⁴²² Finally, as a way to enforce the Compromise, Congress provided a conditional mechanism for terminating the ongoing litigation over the proper amount of timber harvesting.⁴²³ In § (b)(6), Congress provided that “management of areas according to subsections (b)(3) and (b)(5) of this section . . . is adequate consideration for the purpose of meeting the statutory requirements that are the basis” for three

417. *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 432–33 (1992).

418. *Portland Audubon Soc’y v. Lujan*, 712 F. Supp. 1456, 1460 (D. Or. 1989).

419. *Robertson*, 503 U.S. at 432.

420. *Id.* at 433; see Department of the Interior and Related Agencies Appropriations Act, 101 Pub. L. No. 121, § 318(a), 103 Stat. 701, 745–50 (1990) (providing for compromise between logging and preservation interests).

421. § 318(b)(3), 103 Stat. at 746.

422. See § 318(b)(5), 103 Stat. at 746–47 (providing for compromise between logging and preservation interests).

423. See § 318(b)(6), 103 Stat. at 747–48 (providing for conditional dismissal of cases against the government).

particular, pending cases challenging BLM's logging and preservation decisions.⁴²⁴

Put simply, if BLM sold timber and preserved forestland in accordance with the provisions of §§ (b)(3) and (b)(5), it would be deemed to have satisfied the statutory requirements that served as the bases for suits pending against BLM. The effect of (b)(6), therefore, was to require courts to dismiss the litigation challenging BLM's timber management decisions, provided that BLM followed the conditions set out in the statute.⁴²⁵ The Court upheld the Compromise against a *Klein* challenge.⁴²⁶ Finding that the statute amended applicable law, the Court held that *Klein's* restrictions did not take hold.⁴²⁷

b. The Broader Governmental Objective Analysis

Robertson is often characterized as presenting an insurmountable challenge to the continuing viability of an enforceable *Klein* rule of decision principle.⁴²⁸ Indeed, by naming particular cases, the Compromise appears to direct the outcome in pending cases even more pointedly than *Klein's* appropriations proviso itself. Although *Robertson* is a close case, the *Klein* self-dealing principle suggests how it might be distinguished from *Klein*. Under this principle, the Compromise would be prohibited as self-dealing only if it had the effect of abrogating an obligation owed by the government in a way that was not merely incidental to the accomplishment of a broader governmental objective. It would be strong evidence that the Compromise benefitted the government as a party rather than accomplishing a broader governmental objective if it necessarily benefitted the government or if a substantial part of the impact of the Compromise was to relieve the government of an obligation.⁴²⁹

424. § 318(b)(6)(A), 103 Stat. at 747.

425. See *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 434–36 (1992) (describing the effect of the Compromise).

426. See *id.* at 441 (upholding the Compromise).

427. See *id.* (finding that the Compromise “*did* amend applicable law”).

428. See Vermeule, *supra* note 28, at 424 (describing tension between *Robertson* and *Klein*); Araiza, *supra* note 7119, at 1079 (same).

429. *Supra* Part III.D; see also *Carmell v. Texas*, 529 U.S. 513, 546 (2000)

First, the Compromise did not necessarily benefit the government. The key difference between the proviso and the Compromise is the fact that the Compromise did not automatically terminate the pending litigation against BLM; rather, it conditioned the termination of the litigation on the BLM's satisfaction of the conditions in (b)(3) and (b)(5).⁴³⁰ As a result, although the Compromise resulted in a benefit to the government in the particular cases that were described in it, the benefit was contingent. The Compromise did not provide a rule of decision that *necessarily* inured to the benefit of the government,⁴³¹ either in those cases or in future cases. Section (b)(6) required the dismissal of the suits it referenced only if the government abided by the conditions in (b)(3) and (b)(5).⁴³² Those conditions were not foregone conclusions: the government was required by (b)(3) and (b)(5) both to refrain from permitting logging in areas in which BLM previously had prohibited it and to adhere to its agreement with Oregon.⁴³³ In order to receive the benefit of the Compromise, therefore, the government was required to modify its future conduct. If the government had failed to meet either of these conditions, the Compromise would not have determined the result in the lawsuits referenced in the Compromise. Contrast this with *Klein*. In *Klein*, the dismissal of cases under the proviso was not conditioned on any future act of the government.⁴³⁴ Rather, there was nothing that the government had to do—or refrain from doing—to win every case within the ambit of the proviso. The

(upholding a change in law as evenhanded when it does not “necessarily run in the State’s favor”).

430. See Department of the Interior and Related Agencies Appropriations Act, 101 Pub. L. No. 121, § 318(b)(6)(A), 103 Stat. 701, 747 (1990) (describing conditional termination of litigation).

431. Cf. *Carmell*, 529 U.S. at 546 (invalidating statute that necessarily benefitted the government in a pending case).

432. See § 318(b)(6)(A), 103 Stat. at 747 (describing conditional termination of litigation).

433. See § 318(b)(5), 103 Stat. at 746–47 (describing conditions precedent to termination of litigation); *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 433–35 (1992) (same).

434. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 129 (1871) (noting that the proviso “deemed . . . conclusive evidence that such person did take part in and give aid and comfort to the late rebellion” (citing Abandoned and Captured Property Act of 1863, ch. 120, § 1, 12 Stat. 820)).

proviso's benefit for the government was therefore a foregone conclusion and the application of the proviso necessarily benefitted the government.

Second, although it a close case, a substantial part of the impact of the Compromise was not to relieve the government of an obligation. This is the most analytically uncertain part of *Robertson*. Certainly, some part of the impact of the Compromise relieved the government of an obligation; at the least, it was relieved of its obligation to litigate the cases referenced in the Compromise.⁴³⁵ Further, to the extent that the obligations of (b)(3) and (b)(5) were less onerous than the statutory obligations provided by generally applicable environmental statutes, the government was relieved of those burdens as well. But the Compromise did considerably more than lighten the government's burdens. It was, truly, a compromise, balancing competing policies of environmental conservation and natural resource exploitation. As members of Congress described at the time, the Compromise struck a balance between the preferences of environmentalists and the timber community.⁴³⁶ In the Court's words, it "established a comprehensive set of rules to govern harvesting" in thirteen national forests, albeit for a limited time.⁴³⁷ Seen in this light, the government primarily stood to benefit from the Compromise in the sense that it always benefits from successfully reaching agreement among different interest groups over competing public goals. Congress agreed to the Compromise precisely because interested members of the public—including both environmentalists and the logging industry—wanted to compromise.⁴³⁸

Moreover, because dismissal of the pending cases was conditional, the Compromise forced the government to adhere to the terms of the Compromise or risk returning to court to defend

435. See § 318(b)(6)(A), 103 Stat. at 746–47 (identifying cases to be terminated).

436. See Associated Press, *Compromise Reached on Spotted Owl*, N.Y. TIMES (Sept. 29, 1989), <http://www.nytimes.com/1989/09/30/us/compromise-reached-on-spotted-owl.html?mcubz=3> (last visited Dec. 6, 2017) (describing the legislative compromise to protect the spotted owl and allow logging in the Pacific Northwest) (on file with the Washington and Lee Law Review).

437. *Robertson*, 503 U.S. at 433.

438. See Associated Press, *supra* note 436 (describing policy issues at stake in Compromise).

its decision to depart from it.⁴³⁹ This is unlike *Klein*'s proviso.⁴⁴⁰ The proviso had the effect of voiding the government's obligations under the ACPA, forcing Klein and others like him to bear the costs of the government's decision.⁴⁴¹ By contrast, rather than shifting public costs to private parties, the Compromise forced the government to continue to bear the costs associated with the deal struck over timber and the spotted owl.⁴⁴² Because of the widely distributed benefits of the Compromise, relief of the government's obligation was not a substantial part of the Compromise within the meaning of the *Klein* self-dealing principle. The implications of the "substantial part" analysis are explored in the next section, which applies the self-dealing principle to hypothetical future cases.⁴⁴³

c. The Changed Law Rule Reconsidered

The broader governmental objective analysis, which distinguishes *Robertson* from *Klein*, also helps explain why the Changed Law Rule can coexist with *Klein*. *Robertson* held that *Klein* did not apply because the Compromise "amend[ed] applicable law."⁴⁴⁴ A broad rendering of the concept of amending applicable law would swallow the *Klein* rule altogether, as Chief Justice Roberts opined in *Bank Markazi*⁴⁴⁵ and as commentators have argued.⁴⁴⁶ But, the broader governmental objective analysis that distinguishes between *Klein* and *Robertson* suggests that not

439. See Department of the Interior and Related Agencies Appropriations Act, 101 Pub. L. No. 121, § 318(b)(6)(A), 103 Stat. 701, 749 (1990) (providing mechanism for challenging the government's implementation of the Compromise).

440. See *Klein*, 80 U.S. at 146 (describing proviso's effect on government obligations).

441. See *id.* (describing the proviso's effect on government obligations).

442. See § 318(b)(6)(A), 103 Stat. at 749 (providing mechanism for challenging the government's implementation of the Compromise).

443. *Infra* Part III.D.

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

445. See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1335 (2016) (Roberts, C.J., dissenting) (opining that a broad reading of the changed law rule swallows the *Klein* principle).

446. See Araiza, *supra* note 72, at 1079 (suggesting that the space between lawmaking and amending law may be non-existent).

every statutory amendment “amends applicable law” within the meaning of *Klein*. Rather, a change in law “amends applicable law” only if it sets policy. In other words, as long as the benefit to the government of a change in law is merely incidental to the accomplishment of a broader governmental objective (as in *Robertson*), a change in law amends applicable law within the meaning of *Klein*. By contrast, if a substantial part of the effect of the change is merely to relieve the government of an obligation (as in *Winstar* or *Klein*), the change in law does not amend applicable law and does not meet the requirements of the Changed Law Rule. In the language of Corollary B, even though the Compromise abrogated an obligation of the government, it also amended applicable law because it accomplished a broader governmental objective. Because the Compromise amended applicable law, it was properly applied by the Court.

2. *Eslin and Congress’s Grace*

Eslin presents the greatest doctrinal challenge to the formulation of a *Klein* principle consistent with rule of decision cases.⁴⁴⁷ In *Eslin*, Congress enacted an appropriations bill that repealed a previous grant of jurisdiction to the Court of Claims to hear suits making claims on government funds.⁴⁴⁸ The appropriations bill vacated proceedings pending before the Court of Claims, including a judgment for *Eslin*, which was pending on appeal.⁴⁴⁹ Despite its striking similarity to *Klein*, the Court upheld the appropriations bill,⁴⁵⁰ placing *Eslin* and *Klein* in significant tension. The *Klein* self-dealing principle provides a framework that brings into focus the difference between these cases, even if it is ultimately impossible to reconcile them.⁴⁵¹ Although it did benefit the Treasury, *Eslin*’s appropriations proviso can be considered something other than governmental self-dealing because the

447. See Jackson, *supra* note 11, at 585–86 (noting the tension between *Eslin* and *Klein*); Eisenberg, *supra* note 180, at 526 (same).

448. See generally *District of Columbia v. Eslin*, 183 U.S. 62 (1901).

449. *Id.* at 63–64.

450. *Id.* at 66.

451. See *supra* Part III.D (formulating a principle against governmental self-dealing).

obligation to pay Eslin's claims was not an obligation of the United States.⁴⁵² Moreover, the fine distinction between *Eslin* and *Klein* reveals an important insight about the key phrase in *Klein* rejecting the argument that Congress's payment of funds is always a matter of grace.⁴⁵³ In order to understand the distinction between *Eslin* and *Klein*, and to understand what it means for Congress to have an obligation to allocate federal funds, it is necessary to know a bit about the intertwined histories of the two main characters in the *Eslin* case: the District of Columbia and the Court of Claims.

a. The District of Columbia

The District of Columbia is a federal district authorized by the Constitution⁴⁵⁴ and created by a joint agreement among the United States, Virginia, and Maryland.⁴⁵⁵ From its inception in 1790, the District possessed a character distinct from the federal government.⁴⁵⁶ At the time it was created, it was composed of five distinct geographic areas with different municipal structures.⁴⁵⁷ After the District's creation, the areas of the District that were formerly part of Maryland continued to be governed by Maryland law; so, too, were the portions of the District formerly part of Virginia governed by Virginia law.⁴⁵⁸ These distinct municipal areas were abolished in 1871, when the District was granted a single government empowered, for the first time, to make its own laws, appoint its own officers, and govern its own internal affairs.⁴⁵⁹ The central organ of the new government was the

452. See *infra* Part IV.C.2.d (describing the distinction between government obligations and acts of grace).

453. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 144 (1871) (explaining that it is "not entirely accurate" to say that the right to sue the government in the Court of Claims is a "matter of favor").

454. See U.S. CONST. art. I, § 8 (granting Congress the authority over federal district).

455. Zoldan, *Permanent Seat*, *supra* note 322, at 173–77.

456. See WALTER FARLEIGH DODD, *THE GOVERNMENT OF THE DISTRICT OF COLUMBIA* 27 (1909) (describing that distinct municipal areas of the District continued to be governed by state law).

457. Zoldan, *Permanent Seat*, *supra* note 322, at 173–77.

458. DODD, *supra* note 456, at 27.

459. *Id.* at 42; Gregory E. Mize, *A Guide to Deciphering the Laws of a Unique*

powerful Board of Public Works (Board), a committee of five appointees charged with overseeing the repair and maintenance of the District's streets, sewer system, and all other public works projects.⁴⁶⁰

In what would become the undoing of the District's government, the Board was also permitted to enter into contracts on behalf of the District for the completion of the projects it oversaw.⁴⁶¹ Almost immediately after its creation, the Board ran over budget and was accused of financial mismanagement.⁴⁶² A series of congressional investigations followed, instigated by the belief that the Board was wasteful and given over to cronyism.⁴⁶³ Whether the Board was corrupt is unclear;⁴⁶⁴ what is clear is that the Board ran the District deep into debt.⁴⁶⁵ In three short years, the Board bankrupted the District and precipitated its end as an autonomous political entity.⁴⁶⁶ In 1874, after completing a third investigation of the District in four years, Congress abolished the District's government, eliminating its legislative assembly, governor, and, most relevantly, the Board.⁴⁶⁷

City-State Legislature—The Council of the District of Columbia, 2 POTOMAC L. REV. 1, 7 (1979).

460. DODD, *supra* note 456, at 42–43; E.E. Naylor, *The District of Columbia, Its Legal Status*, 21 GEO. L.J. 21, 26 (1932).

461. DODD, *supra* note 456, at 43; Naylor, *supra* note 460, at 26–27.

462. See DODD, *supra* note 456, at 45 (discussing allegations of the Board's "extravagance, violation of law, and corruption").

463. See *id.* at 43–46 (describing allegations against Board); D.C. BD. OF COMM'RS, REPORT OF THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA FOR THE YEAR ENDED JUNE 30, 1896, at 49 (1896) [hereinafter 1896 D.C. COMMISSIONERS REPORT] (noting that the Board promised rates above contract rates and awarded no-bid contracts).

464. See DODD, *supra* note 456, at 50 (noting that the congressional investigation did not confirm illegal activity); Naylor, *supra* note 460, at 28 (explaining that Board's members were ultimately cleared of wrongdoing).

465. See DODD, *supra* note 456, at 46 (describing debt incurred by the Board); Mize, *supra* note 459, at 7 (same).

466. See DODD, *supra* note 456, at 49 (describing bankruptcy of District's government).

467. See Act of June 20, 1874, ch. 337, § 1, 18 Stat. 116 (abolishing the government of the District); DODD, *supra* note 456, at 49 (describing abolition of the District's government); Mize, *supra* note 459, at 7 (same).

The claims at issue in *Eslin* arose from contracts made during the Board's short, unhappy existence. Eslin was the administrator of the estate of Daniel Connolly, who had been contracted by the Board to make improvements to the streets of Washington.⁴⁶⁸ The claims that were the basis of Connolly's suit were obligated between 1871 and 1874 by the Board.⁴⁶⁹ When the District's government was abolished, its debts to contractors like Connolly went unpaid.⁴⁷⁰ In response to the perception of the Board's profligacy and corruption, Congress—now solely in charge of the District's debts—made no provision for paying the District's outstanding contract debts.⁴⁷¹

b. The Court of Claims

In 1863, Congress gave the Court of Claims the power to issue final judgments⁴⁷² against the United States for money damages.⁴⁷³ But, at the time the District became bankrupt and its government was abolished, the Court of Claims had no authority to hear claims against the District.⁴⁷⁴ It was not for six years after the abolition of the District's government that Congress agreed to assume its debts. In 1880, Congress expanded the jurisdiction of the Court of Claims to include "jurisdiction of all claims now existing against the District of Columbia arising out of contracts, made by the late Board of Public Works."⁴⁷⁵

468. *Eslin v. District of Columbia*, 22 Ct. Cl. 395, 399 (1887).

469. *Id.*

470. *See* DODD, *supra* note 456, at 50 (describing outstanding contracts of the District after abolition of its government).

471. *Id.*

472. *See* Evan C. Zoldan, *The King is Dead, Long Live the King!: Sovereign Immunity and the Curious Case of Nonappropriated Fund Instrumentalities*, 38 CONN. L. REV. 455, 493–95 (2006) (describing the origin of the authority of the Court of Claims to render final judgments).

473. *See* Act of Mar. 3, 1863, ch. 92, § 2, 12 Stat. 765 (establishing a court to render final judgments on claims against the United States).

474. *See id.* (setting out jurisdiction of Court of Claims).

475. Act of June 16, 1880, ch. 243, § 1, 21 Stat. 284; *see also In re* District of Columbia, 180 U.S. 250, 251–52 (1901) (describing jurisdiction over claims arising out of Board obligations).

c. Eslin in the Court of Claims

It was under this 1880 jurisdictional statute that the claims in *Eslin* were brought before the Court of Claims.⁴⁷⁶ The claimant sought the “Board Rate” rather than the “contract rate” for the work that was completed on behalf of the District.⁴⁷⁷ The contract rate was the rate specified by the actual written terms of Connolly’s contracts with the Board.⁴⁷⁸ The Board Rate was an amount later determined by the Board to be a fair amount for particular types of work.⁴⁷⁹ The Court of Claims held that the District was liable to Eslin for the lower contract rate rather than the Board Rate.⁴⁸⁰

That would have been the end of Eslin’s claims but for an 1895 federal statute reviving them. At the urging of contractors disappointed at receiving only the lower contract rates, Congress amended the 1880 jurisdictional statute to require the Court of Claims to grant new trials for all claims brought under the 1880 statute.⁴⁸¹ In addition, the Court of Claims was required to award judgment based on the higher Board Rate.⁴⁸² As was recognized at the time, the 1895 statute created a windfall for contractors, like Connolly, who had already been paid for their work.⁴⁸³ Under the 1895 law, Eslin, whose claims had been paid at their contract rate, again brought suit, this time for the Board Rate associated with

476. See *District of Columbia v. Eslin*, 183 U.S. 62, 62–63 (1901) (describing claims in *Eslin*).

477. 1896 D.C. COMMISSIONERS REPORT, *supra* note 463, at 49.

478. *Eslin v. District of Columbia*, 22 Ct. Cl. 395, 399 (1887).

479. *Id.* at 399–400; see also Franklin T. Howe, *The Board of Public Works*, 3 RECS. COLUM. HIST. SOC’Y 257, 264 (1900) (describing the Board Rate).

480. *Eslin*, 22 Ct. Cl. at 399–400.

481. 1896 D.C. COMMISSIONERS REPORT, *supra* note 463, at 49–50 (describing the impetus behind the 1880 amendment).

482. See Act of Feb. 13, 1895, ch. 87, 28 Stat. 664 (amending the 1880 Act providing for the settlement of outstanding claims); see also 1896 D.C. COMMISSIONERS REPORT, *supra* note 463, at 49 (describing the impetus behind the 1880 amendment).

483. See 1896 D.C. COMMISSIONERS REPORT, *supra* note 463, at 49–50 (noting that some contractors had persuaded the Board to award contracts based on the representation that they could be performed at a rate lower than Board Rate, only to bring suit for the higher rate after the 1895 Act).

Connolly's work.⁴⁸⁴ Pursuant to this new measure of damages, Eslin received judgment for \$13,000.⁴⁸⁵

The final scene in this drama took place in 1897. Regretting the decision to reopen the claims against the District settled in 1880, Congress reclosed the reopened claims, providing that the 1895 act is "repealed, and all proceedings pending shall be vacated, and no judgment heretofore rendered in pursuance of said act shall be paid."⁴⁸⁶ Because Eslin's claims were among those reopened by the 1895 act, the 1897 act had the effect of vacating the trial court's judgment for Eslin.⁴⁸⁷ On appeal, the Supreme Court considered the effect of the 1897 act on the power of the Court to reexamine the Court of Claims's judgments. The Court upheld the 1897 act, holding that it "was an act of grace upon the part of the United States to provide for the payment by the Secretary of the Treasury of the amount of any final judgment" in favor of Eslin.⁴⁸⁸ As a result, the Court held, Congress's decision to withdraw its grace also must be given effect by the Court.⁴⁸⁹ The Court did just that, ordering Eslin's appeal dismissed and leaving him without payment under the 1895 statute.⁴⁹⁰

d. Fulfilling an Obligation or an Act of Grace?

What light does this history shed on the viability of *Klein*? Unlike *Robertson's* Compromise, *Eslin's* 1897 act appears to have withdrawn jurisdiction over pending claims without any broader governmental objective. As a result, if *Eslin* can be distinguished from *Klein*, it is because the 1897 act did not abrogate an obligation owed by the United States government within the meaning of the *Klein* self-dealing principle. This conclusion is supported by the

484. See *District of Columbia v. Eslin*, 183 U.S. 62, 63 (1901) (recounting the procedural history of Eslin's claims).

485. *Id.*

486. See Act of Mar. 3, 1897, ch. 387, 29 Stat. 669; accord *Eslin*, 183 U.S. at 64 (describing the withdrawal of jurisdiction for claims reopened in 1895).

487. See *Eslin*, 183 U.S. at 64–65 (describing the effect of the 1897 withdrawal of jurisdiction).

488. *Id.* at 65.

489. *Id.*

490. *Id.* at 65–66.

legal differences between the District and the United States. When the District became indebted for the work that was the subject of *Eslin's* claims, the District was, for relevant purposes, not the United States government. It had a different source of lawmaking authority than federal agencies or federal territories. Its law was not federal law and its courts did not bind the federal government. The District had its own budget, authority to contract, and court system for resolving disputes against it.⁴⁹¹ Although Congress had provided a forum for claims against the United States, this forum, the Court of Claims, could not be used for claims against the District.⁴⁹² Indeed, if Connolly had sued the District in 1874 in the Court of Claims for breach of contract, the Court would have been required to dismiss the claims for lack of jurisdiction. This difference is reflected even in *Eslin's* caption: unlike claims against the United States for money damages, *Eslin's* suit was one against the District of Columbia.⁴⁹³

All of this suggests that the District was not, at the time it became obligated to Connolly, the United States; and the District's obligations to Connolly, therefore, were not obligations of the United States. Because the United States had no preexisting legal or financial duty to assume the District's debts, Congress's 1880 decision to expand the jurisdiction of the Court of Claims to include the District's debts conferred a gratuity on the District's claimants and did not create for itself an obligation. On this reading, the Court correctly applied *Eslin's* change in law because it inured to

491. See Act of Feb. 21, 1871, ch. 62, § 40, 16 Stat. 428 (creating government institutions for the District of Columbia).

492. See Act of Mar. 3, 1863, ch. 92, § 2, 12 Stat. 284 765 (establishing a court for the investigation of claims against the United States).

493. See *District of Columbia v. Eslin*, 183 U.S. 62, 63 (1901) (noting that *Eslin's* claims were against the District of Columbia). If the *Klein* principle against self-dealing as described above does not adequately address the difference between these cases, I suggest that it is *Eslin* rather than *Klein* that should be read narrowly to accommodate the difference between them. *Klein* aligns better with the constitutional self-dealing cases, which restrict Congress's power to benefit itself by changing the law. A broad reading of *Klein* also comports better with *Sioux Nation*, in which the Court made clear that it was of "obvious importance to the *Klein* holding" that "Congress was attempting to decide the controversy in its own favor." *United States v. Sioux Indians*, 448 U.S. 371, 405 (1980).

the benefit of the District of Columbia rather than the United States.

Reading *Eslin* in this way is not free of difficulty.⁴⁹⁴ Because the 1895 jurisdictional statute reopened claims against the District and provided a rule of decision for the Court of Claims to follow, it could be said that the United States took on the obligation to pay those claims in 1895, even though it had no obligation in 1874. This is perhaps similar to *Klein*: Congress may not have had an obligation to Wilson at the time it enacted the ACPA, but it surely did after *Padelford*, in which its obligations to pardoned southerners were clarified.⁴⁹⁵ There is an apparent incongruity in characterizing the government's obligations in *Klein* in formalist terms (the government had the obligation to Klein after *Padelford* whether or not it was correctly decided) while characterizing the government's obligation in *Eslin* in functionalist terms (Eslin's claim remained one against the District despite Congress's formal assumption of the debt in the 1895 act).

But, despite this challenge, understanding the 1895 expansion of jurisdiction as a gratuitous act that created no obligation on the part of the United States is the best way to make sense of the results in *Eslin* and *Klein*. In both cases, the Court distinguished between gratuitous acts and obligations. In *Eslin*, the Court held that the 1895 statute, by which the United States agreed to pay the higher Board Rate, was "an act of grace upon the part of the United States."⁴⁹⁶ As a result, Congress was later free to withhold its grace and deny Eslin's claims.⁴⁹⁷ By contrast, the *Klein* Court rejected the very same argument. In *Klein*, the government argued that the United States subjects itself to suit "*ex gratia*"—that is, as a matter of grace—and therefore has the right to permit or deny suit as it sees fit.⁴⁹⁸ The Court specifically rejected this argument, holding that it is "as much the duty of the government as of individuals to fulfill its obligations."⁴⁹⁹

494. A special thanks to Evan Caminker for suggesting this point.

495. See *United States v. Padelford*, 76 U.S. 531, 533 (1869) (broadly interpreting the ACPA to include claims like those in *Klein*).

496. *Eslin*, 183 U.S. at 65.

497. *Id.* at 66.

498. *United States v. Klein*, 80 U.S. 128, 135 (1871).

499. *Id.* at 144. The gratuity/obligation distinction made in *Eslin* and *Klein*

Given the striking similarities between *Eslin* and *Klein*, the difference between them seems to be only that the Court viewed the ACPA in *Klein* as an obligation and the 1895 statute in *Eslin* as a gratuity. And this gratuity/obligation distinction explains the results in both cases if (and perhaps only if) the *Eslin* Court viewed Congress's assumption of the District's debts as something other than an obligation of the United States. The judgment rendered by the Court of Claims in *Klein* was an obligation of the government because of the Supreme Court's interpretation of the ACPA in *Padelford*, which required the United States to pay the class of claims that included Klein's claim.⁵⁰⁰ By contrast, when Congress agreed to pay the debts of the District of Columbia, it did so not out of legal obligation, but rather moral obligation. And this undertaking did not create a legal obligation because it was *ex gratia*, merely an "act of grace," to take on the debts incurred by another entity.⁵⁰¹ As a result, Congress had no legal obligation to pay these debts, even after it agreed to pay them in 1895. On this reading, the Court upheld the *Eslin* appropriation proviso because it did not abrogate an obligation owed by the government within the meaning of the *Klein* self-dealing principle. *Eslin* is, in other words, less like *Klein* than it is like *Schooner Peggy*, in which Congress conferred a benefit on a person other than the United States itself.⁵⁰² In the language of Corollary A, the change in law inured to the benefit of the District rather than the government; as a result, the Court correctly applied the change in law.⁵⁰³

Eslin raises a final point. Distinguishing between *Klein* and *Eslin* based on the Court's distinction between a gratuity and an

continues to exist in other areas of the law. See *Burkhardt v. United States*, 113 Ct. Cl. 658, 666 (1949) (identifying the distinction between payments made out of legal and moral obligation); *Granite State Ins. Co. v. ACE Am. Reinsurance Co.*, 849 N.Y.S.2d 201, 203 (2007) (noting that an "*ex gratia*" payment is "one made by a party that recognizes no legal obligation to pay").

500. See *United States v. Padelford*, 76 U.S. 531, 533 (1869) (broadly interpreting the ACPA to include claims like those in *Klein*).

501. *District of Columbia v. Eslin*, 183 U.S. 62, 65 (1901).

502. See *United States v. Schooner Peggy*, 5 U.S. 103, 104–05 (1801) (upholding change in law that benefitted a party other than the government).

503. See *id.* (upholding change in law that benefitted a party other than the government); *United States v. Sioux Indians*, 448 U.S. 371, 404–05 (same); *Pope v. United States*, 323 U.S. 1, 14 (1944) (same).

obligation suggests that the government can obligate itself in a way that cannot lawfully be undone, but that not every government promise is irrevocable. This is not novel; we have seen the Court make this distinction already in *Winstar*, *United States Trust*, and *Carmell*.⁵⁰⁴ But, the gratuity/obligation distinction suggests an important unanswered question: under the *Klein* self-dealing principle formulated above, what types of obligations will the government be forced to honor? The possibility of broad and narrow formulations of the *Klein* self-dealing principle are discussed below, in which the principle is applied to hypothetical future cases.

V. The Klein Self-Dealing Principle Applied to Future Cases

The *Klein* self-dealing principle articulated above can help lower courts approach future cases that implicate legislative interference in the judicial process.⁵⁰⁵ The principle can resolve some recurring problems easily. Consider the federal statute enacted to resolve the debate over Terri Schiavo.⁵⁰⁶ While Schiavo lay in a persistent vegetative state for a decade, her parents and husband engaged in a protracted legal battle in state court over whether she would have wished to be kept alive by artificial means.⁵⁰⁷ After the court ordered the hospice facility in which she resided to withhold food and water, Congress enacted Terri's Law, which permitted "any parent" of Terri Schiavo to bring suit in federal district court to redress the decision to withhold her life support.⁵⁰⁸ Through Terri's Law, Congress set aside the previous decade of state court litigation over Schiavo's intentions,

504. See *United States v. Winstar Corp.*, 518 U.S. 839, 896–97 (1996) (invalidating statute reflecting government self-interest); *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25–26 (1977) (same); *Carmell v. Texas*, 529 U.S. 513, 533 n.23 (2000) (same).

505. See *infra* Part V (applying principle against self-dealing to future cases).

506. See Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15, 15–16 (2005) (providing special exemption for named individuals from generally applicable jurisdictional rules).

507. *In re Guardianship of Schiavo*, 780 So. 2d 176, 177, 180 (Fla. Dist. Ct. App. 2001).

508. See Pub. L. No. 109-3, 119 Stat. 15, 15–16 (providing a special rule that applied to two people only).

permitting relitigation of previously adjudicated issues.⁵⁰⁹ Limited to one event, and providing relief for two people only, Terri's Law provided a special exemption from generally applicable preclusion rules that otherwise apply to suits in district court.⁵¹⁰ Although Terri's Law interfered with the normal fact-finding process, eliciting considerable scholarly criticism,⁵¹¹ it did not run afoul of a *Klein* principle against self-dealing because it did not benefit the government in a pending case.

Analysis of Terri's Law reveals that a *Klein* self-dealing principle is not an all-powerful tool to protect the judiciary from the legislature; nor does it prevent Congress from picking winners and losers in particular cases generally. It is possible, of course, to imagine a stronger limitation on the legislative power—one that would prevent Congress from singling out individuals for special treatment. I have argued elsewhere that such a rule is supportable and desirable.⁵¹² Nevertheless, such a rule would require a wholesale abandonment of rule of decision doctrine and is, therefore, outside the scope of this Article's inquiry.

But, even though it stays largely, if not entirely, within the constraints of doctrine, the *Klein* self-dealing principle articulated above provides a meaningful check on legislative intrusion into the judicial function. The following hypothetical cases reveal the power and limitations of a *Klein* self-dealing principle. These hypotheticals also answer the questions raised above about the application of the "substantial part" standard and the kinds of government promises that can be considered obligations.⁵¹³ For

509. *See id.* (permitting a suit over previously litigated issues).

510. *Id.*

511. *See* Caminker, *supra* note 11, at 529 (arguing that if Terri's Law does not violate *Klein* by "impermissibly dictating to the federal courts a rule of decision," then *Klein* must be "virtually impossible to violate").

512. There are historical, textual, and jurisprudential reasons to conclude that the Constitution disfavors targeted legislation like Terri's Law. *See* Zoldan, *Reviving Legislative Generality*, *supra* note 112, at 690 (suggesting that Terri's Law violates a principle of legislative generality). Moreover, stronger protection against targeted legislation is attractive because of its association with corruption, punishment without trial, and unjustified unequal treatment. *See* Zoldan, *The Equal Protection Component*, *supra* note 112, at 500–01, 510–18 (describing costs of special legislation).

513. *See supra* Parts IV.C.1–2 (noting unanswered questions about the scope of a *Klein* principle against self-dealing).

each case, consider the following excerpt from the hypothetical federal statute, the “No Structures in Public Streams Act:”

“§ 1. No structure that impedes wildlife may be built in a public stream.

§ 2. Any person may bring an action in federal district court to enforce this Act.”

A. Case A—*The Local Power Amendment*

After the No Structures in Public Streams Act became law, the United States Army Corps of Engineers, which is authorized by statute to maintain navigable channels in the United States, built a dam in the Huron River to generate power for the local community. Fred Fisherman brought suit under the Act to require the Army Corps to remove the dam. Fred demonstrated that the Huron is a public stream and that the dam impeded salmon in the river; accordingly, Fred prevailed before the district court. The Corps appealed. While the appeal was pending, Congress enacted the Local Power Amendment, which amended the Act by adding the following language to section 1: “*provided that*, no structure that is built for the purpose of generating power to serve the local community impedes wildlife within the meaning of this Act.”

The *Klein* self-dealing principle would not prevent the Court of Appeals from applying the Local Power Amendment. The general rule provides that the court must apply the law to cases pending on appeal at the time of the change.⁵¹⁴ The *Klein* exception would apply only if the Amendment reflects governmental self-dealing, that is, if the Amendment has the effect of benefitting the government as a party in the case that is pending.⁵¹⁵ In order to answer this question, the court would have to determine whether the Amendment has the effect of abrogating an obligation owed by the government in a way that is not merely incidental to the accomplishment of a broader governmental objective.⁵¹⁶ The

514. See *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 104–05 (1801) (applying a change in law in a pending case).

515. See *United States v. Winstar Corp.*, 518 U.S. 839, 896–97 (1996) (invalidating statute reflecting government self-interest); *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25–26 (1977) (same); *Carmell v. Texas*, 529 U.S. 513, 533 n.23 (same).

516. See *Winstar*, 518 U.S. at 896–98 (distinguishing between self-interested

court would examine whether the Amendment necessarily benefits the government and whether a substantial part of the impact of the change in law is to relieve the government of its obligation.⁵¹⁷

Assuming that the requirement to refrain from building structures in public streams is an “obligation” within the meaning of *Klein* (an assumption I will question below), applying the Amendment will relieve the government of its obligation by permitting the Army Corps’s dam. However, the abrogation of the government’s obligation is incidental to the accomplishment of a broader governmental objective within the meaning of the *Klein* self-dealing principle. First, the Amendment will not necessarily relieve the government of its obligation to refrain from building a dam. To take advantage of the amendment, the government will have to demonstrate that the purpose of the dam is to generate power for the local community. In the absence of such a showing, the government would not be relieved of its obligation. The requirement that the government make a demonstration to take advantage of the change in law preserves a small, but important role for the judiciary in the adjudication process.⁵¹⁸ Second, the court would likely find that relieving the government of its obligation is not a substantial part of the effect of the Amendment. Because it applies to any number of locations, the Amendment does far more than allow the government to build this particular dam. And, because it applies to all structures built for power generation, it does more than provide an exemption for the government alone. As a result, the Amendment’s abrogation of the government’s obligation is incidental to the accomplishment of a broader governmental objective and it is not prohibited by the *Klein* self-dealing principle.

Case *A* provides a relatively easy example of the difference between a statute that amends applicable law and one that

laws and statutes “incidental to the accomplishment of a broader governmental objective”).

517. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871) (invalidating change in law that relieved the government of its obligations in a pending case); *Winstar*, 518 U.S. at 896–98 (same); *Carmell*, 529 U.S. at 546 (same).

518. Cf. *Robertson v. Seattle Aububon Soc’y*, 503 U.S. 429, 441 (1992) (upholding the statute that conditionally resolved a pending case against the government).

provides a rule of decision in pending cases. As described above, a viable *Klein* principle depends on the ability to meaningfully distinguish between these concepts.⁵¹⁹ A number of scholars, and Chief Justice Roberts, have argued that there is no space between them and, therefore, the Changed Law Rule swallows the *Klein* rule of decision principle altogether.⁵²⁰ But, viewed in light of a principle against self-dealing, the Changed Law Rule can be read more narrowly to mean that a statute amends applicable law only when it achieves a governmental objective other than simply relieving the government of its obligations—in other words—when it sets policy. By contrast, a change in law that does little more than relieve the government of an obligation does not amend applicable law within the meaning of *Klein*.

Is it possible to distinguish a statute that sets policy from one that does not? At the margins, it surely is difficult to parse statutes to determine whether they set policy. But the *Klein* self-dealing principle, as applied to Case A, suggests some basic parameters for making this distinction. A change in law like the Local Power Amendment sets policy because it applies generally to an indeterminate number of locations and an indeterminate class of dam builders. In short, it appears to be setting a policy to encourage power production. As a result, it changes applicable law within the meaning of the Changed Law Rule. In the language of Corollary B, because the Local Power Amendment does more than relieve the government of an obligation, it amends applicable law and must be applied by the court.⁵²¹

519. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (reading the Changed Law Rule as an exception to *Klein*); *Robertson*, 503 U.S. at 441 (implying that the Changed Law Rule is an exception to *Klein*); *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1324 (2016) (relying on the Changed Law Rule).

520. See *Bank Markazi*, 136 S. Ct. at 1335 (Roberts, C.J., dissenting) (opining that changing the law is how Congress acts); Araiza, *supra* note 7, at 1079 (arguing that changing the law may be coextensive with prescribing a rule of decision); Vermeule, *Judicial Power*, *supra* note 28, at 424 (arguing that efforts to distinguish *Klein* from regular lawmaking have not succeeded).

521. See *Bank Markazi*, 136 S. Ct. at 1323 (holding that *Klein* does not prohibit Congress from amending applicable law); *Robertson*, 503 U.S. at 441 (stating that *Klein*'s "prohibition does not take hold when Congress 'amend[s] applicable law'").

B. Case B—The Federal Dam Power Amendment

Imagine again that Congress passed the No Structures in Public Streams Act, the Corps built its dam, and Fred successfully brought suit for its removal. This time, while the appeal was pending, Congress enacted the Federal Dam Power Amendment, which added the following language to section 1: “*provided that*, no structure built by the federal government for the purpose of generating power to serve the local community impedes wildlife within the meaning of this Act.” As in Case A, the *Klein* self-dealing question turns on whether the Amendment abrogated an obligation of the government in a way that was merely incidental to the accomplishment of a broader governmental objective. And again, the court will consider whether the Amendment necessarily benefits the government or if a substantial part of the impact of the change in law is to relieve the government of its obligation.

This is a much closer case under the *Klein* self-dealing principle than Case A. Like Case A, and for the same reason, the Federal Dam Power Amendment will not necessarily relieve the government of its obligation. But, unlike Case A, the Amendment abrogated the government’s—and only the government’s—obligation. This example brings into sharp focus the difficulty of determining, at the margins, whether a substantial part of the impact of a statute is to relieve the government of an obligation. On one hand, it is a perfectly cogent policy to suggest that the government, but not private parties, should be permitted to generate power. On the other hand, the concentration of the impact on federal obligations suggests self-relief from Fred’s suit and suits like it.

The *Klein* self-dealing principle does not provide an easy answer to this difficult question. Whether a “substantial part” of the impact of the statute is to relieve the government of an obligation is necessarily a question of degree rather than category.⁵²² And the very fact that “substantial part” is a standard rather than a categorical rule means that there will be close cases. But the fact that the phrase “substantial part” is indefinite does

522. See *United States v. Winstar Corp.*, 518 U.S. 839, 896–97 (1996) (considering multiple factors as part of its substantial part analysis).

not make it meaningless. Courts interpret and apply indefinite standards, like the term “substantial part,” in many contexts,⁵²³ including when it makes self-dealing determinations.⁵²⁴

In *Winstar*, the Court held that the government was liable for breaching an agreement over the regulatory treatment of debt because Congress’s repudiation of the government’s agreement was self-dealing.⁵²⁵ Although the statute had far reaching consequences, the government was engaged in self-relief because “a substantial part of the impact” of the government’s breach of promise fell “on its own contractual obligations.”⁵²⁶ In making this determination, the Court considered the number of government agreements that would be nullified, the significant costs that would be shifted to private parties, evidence that the purpose of the statute was to violate contractual obligations, and the lack of evidence of any purpose other than to relieve the government of an obligation.⁵²⁷ A substantial part analysis, like the Court’s analysis in *Winstar*, provides a framework for courts to decide even difficult cases, like the case of the Federal Dam Power Amendment. As in *Winstar*, the court could consider the extent of relief it provides to the government from its previous obligations, the extent to which private parties would bear the cost of the Amendment, and evidence of the purpose of the statute.

Comparing cases A and B also helps resolve the vexing problem of *Klein*’s relationship with particularized legislation. As noted, the Court has often expressed concern with particularized legislation. Indeed, in *Hurtado*, the Court stated unequivocally that “a special rule for a particular person or a particular case” cannot properly be considered “law.”⁵²⁸ Nevertheless, the modern Court gives little weight to arguments based on specificity in the *Klein* context, in part because of the difficulty in determining

523. See, e.g., 5 U.S.C. § 5545(c) (2012) (describing “substantial part” of time spent); 49 U.S.C. § 5302(2) (describing “substantial part” of weekday time); *id.* § 106(p)(7)(C)(iii) (describing “substantial part” of activities); 34 U.S.C. § 10511 (describing “substantial part” of a program).

524. See *Winstar Corp.*, 518 U.S. at 896–97 (describing analysis when statute reflects government’s self-interest).

525. *Id.* at 843–45.

526. *Id.* at 899–900.

527. *Id.* at 891, 896, 923.

528. *Hurtado v. California*, 110 U.S. 516, 535–36 (1884).

whether a statute is impermissibly targeted.⁵²⁹ The *Klein* self-dealing principle avoids this dilemma by assuming that legislation that affects only private parties, even if particularized, is implementing a broad governmental objective. Compare Case *B* to *Bank Markazi*: in *Bank Markazi*, the statute at issue made the assets of the Bank available to satisfy judgments against Iran.⁵³⁰ On one hand, the statute was special to one case, designated by name, and to one defendant.⁵³¹ On the other hand, the statute resolved claims by hundreds of claimants. But then again, the claimants were already known at the time the statute was enacted.⁵³² The difficulty in determining whether a large but closed class was impermissibly targeted led the Court to downplay the constitutional infirmity of targeted legislation.⁵³³ By focusing on governmental self-dealing, however, the *Klein* self-dealing principle eliminates the difficult line-drawing question for cases between private parties. Only when the government is a party is particularity an issue. Put another way, the *Klein* self-dealing principle accommodates the decision in *Bank Markazi*, but confines it to circumstances in which the government is not a party. When the government is a party, consistent with *Hurtado* and *Winstar*, legislative generality remains an important part of the self-dealing analysis.

C. Case C—*The Huron Dam Project Amendment*

Finally, imagine again that Congress passed the No Structures in Public Streams Act, the Corps built its dam, and

529. See Transcript of Oral Argument at 15–18, *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016) (No. 14-770) (including statements of Kagan, J., Roberts, C.J., Alito, J., and Scalia, J., which evince the difficulty in determining whether legislation can be impermissibly narrow); see also Zoldan, *The Equal Protection Component*, *supra* note 112, at 496–97 (addressing, but not finally resolving, the issue of particularity).

530. See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1316 (2016) (describing the effect of a narrowly targeted law).

531. See *id.* at 1330 (Roberts, C.J., dissenting) (noting that the statute was targeted to resolve a specific litigation).

532. *Id.*

533. See *id.* at 1317 (suggesting that targeted statutes are not constitutionally problematic).

Fred successfully brought suit for its removal. This time, while the appeal was pending, Congress enacted the Huron Dam Project Amendment, which added the following language to section 1: “*provided that*, no structure that is described in the pending case of *Fisherman v. United States Army Corps of Engineers* impedes wildlife within the meaning of this Act.” Again, the self-dealing test provides a framework for resolving the constitutionality of this amendment.⁵³⁴ Applying the *Klein* self-dealing principle, the court will ask whether the Amendment has the effect of abrogating an obligation owed by the government in a way that is not merely incidental to the accomplishment of a broader governmental objective. The court will examine whether the Amendment necessarily benefits the government and whether a substantial part of the impact of the change in law is to relieve the government of its obligation.

Case *C* is most likely to violate a *Klein* self-dealing principle of the three cases described. By exempting the Huron Dam Project alone from the Act, the Amendment abrogates a government obligation in a way that is not merely incidental to the achievement of a broader governmental objective as defined by the self-dealing test. Unlike Cases *A* and *B*, the Huron River Dam Amendment necessarily benefits the government. There is no role for the court other than to enter judgment for the government; the court is cut completely out of the process of adjudicating the dispute between the government and Fred. As a result, it is a foregone conclusion that the government will win the pending case. Moreover, a substantial part of the impact of the change in law is to benefit the government. Unlike Case *A*, the Huron Dam Amendment cannot be described as setting policy. The Amendment does not encourage power generation generally; nor does it even permit the government broad leeway to generate power. Rather, the Amendment provides only a benefit to the government in one particular, pending case. Because the Amendment does not achieve a government objective other than to benefit the government in a particular, pending case, it is likely

534. See *supra* Part III.D (formulating a principle against self-dealing). If this level of specificity seems fanciful, recall that the statute upheld by the Court in *Bank Markazi* also referred to a particular, pending case by name and docket number.

self-dealing within the meaning of the *Klein* self-dealing principle and therefore invalid.

Comparing Case *C* with Cases *A* and *B* reveals a few final points about the *Klein* self-dealing principle. First, Case *C* brings to the fore a question reserved earlier: what types of government obligations will the government be forced to honor. In *Klein*, the obligation that the government abrogated was an obligation to pay money.⁵³⁵ The fact that only money was at stake makes *Klein* a natural fit with the other self-dealing cases that implicate the government's financial obligations, like *Winstar*, *Perry*, and *United States Trust*.⁵³⁶ On one hand, it makes sense to limit a *Klein* self-dealing principle to financial obligations. When the government's choice is binary—to pay or not to pay a claim—a court's decision to require the government to pay is a limited intrusion on a government decision. Indeed, Congress has already undertaken to pay claims on the Treasury by waiving its sovereign immunity through the Tucker Act.⁵³⁷ A court order to the government to pay a claim that Congress has tried to nullify through self-dealing is consistent with the general policy set out by the Tucker Act to pay claims against the government.⁵³⁸ A *Klein* self-dealing principle that considers the government bound only by its financial obligations would be easy to apply without intruding on policymaking. Although a *Klein* principle limited to financial obligations is important, it would fail to prevent situations like Case *C*.

On the other hand, it is possible to conceive of a *Klein* principle that applies to non-financial obligations as well as financial obligations. This broader reading is suggested by *Carmell*, which prevented the government from undoing a non-financial obligation.⁵³⁹ Although courts might be chary of invalidating

535. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 142 (1871).

536. *See* *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25–26 (1977) (invalidating financially self-dealing statute); *United States v. Winstar Corp.*, 518 U.S. 839, 896–98 (1996) (same); *Perry v. United States*, 294 U.S. 330, 347 (1935) (same).

537. *See* Tucker Act, 28 U.S.C. § 1491 (2012) (permitting claims against the government for money damages).

538. *See id.* (permitting claims against the government for money damages).

539. *See Carmell v. Texas*, 529 U.S. 513, 546–47 (2000) (invalidating self-dealing statute outside of financial context).

statutes that breach non-financial obligations, the *Klein* self-dealing principle articulated above would keep courts from crossing the line into policymaking. The *Klein* self-dealing principle prevents self-dealing only in pending cases, does not prevent the government from abrogating its obligations if there is a broader governmental objective, and provides a framework for determining whether there is a broader governmental objective.⁵⁴⁰ As a result, courts can apply the *Klein* self-dealing principle in non-financial, as well as financial, cases without fear that they will intrude on government policy. By definition, so long as the government is setting policy through its change in law, the court will apply it. For example, even under the broader rendering of the *Klein* self-dealing principle, Congress could easily authorize the Army Corps to build a dam in the Huron River. For example, it could repeal the No Structures in Public Streams Act altogether; permit anyone to build a structure in the Huron River; or, as described in Case A, permit anyone to build a dam anywhere for power generation purposes. Although a viable *Klein* principle that only applied to financial obligations would be worth preserving, its application outside the context of financial obligations serves as an additional important restraint on government action.

Second, as Case C suggests, it is not necessary to look to Congress's motives to find a *Klein* violation. Although self-dealing may often elide with corruption, the two need not be joined. Designating an act as self-dealing is not a moral statement about the intention of the self-dealer, but rather a statement about the status of the self-dealer; that is, a self-dealer is merely an entity in the position to exercise a public power for private benefit. By stripping self-dealing of its moral stigma, a court can apply a *Klein* principle against self-dealing based solely on the impact of the statute rather than the motivation of the body that enacted it. A court would not have to impugn a legislature to find that a statute violated *Klein*; nor would a court need to search legislative materials to find evidence of a corrupt motivation to make the *Klein* assessment.

540. See *supra* Part III.D (formulating principle against self-dealing).

VI. Conclusion

Defining the contours of *Klein*'s rule of decision principle has vexed courts and scholars for generations. The puzzle of *Klein* persists not only because it is doctrinally challenging, but because it implicates the most basic, irresolvable questions about the line separating Congress from the courts. Conceptualizing *Klein* as an implementation of a principle against self-dealing reveals that it can serve as a model for the relationship between the individual and the government. A properly stated *Klein* principle acknowledges Congress's broad powers and recognizes the impracticality of second-guessing Congress's methods of achieving legitimate goals. However, it also recognizes that a legislature of the people does not merit deference in all cases. By helping to carve the indistinct line demarcating the boundaries of legislative power, *Klein* recognizes that securing justice from a government comprised of people, comprised of us, with all of our weaknesses, requires continuous vigilance. Seen in this light, *Klein* is an embodiment of Madison's ever-timely exhortation: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."⁵⁴¹

541. THE FEDERALIST NO. 51, at 320 (James Madison) (Isaac Kramnick ed., 1987).