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

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INTRODUCTION

Caliban, a primitive, describing his anthropomorphic god, articulates the archetypal fear of unbridled power:

> He is strong and Lord.
> 'Am strong myself compared to yonder crabs
> That march now from the mountain to the sea;
> 'Let twenty pass, and stone the twenty-first,
> Loving not, hating not, just choosing so.
> 'Say, the first straggler that boasts purple spots
> Shall join the file, one pincer twisted off;
> 'Say, this bruised fellow shall receive a worm,
> And two worms he whose nippers end in red;
> As it likes me each time, I do: so He.[1]

What Caliban expresses—the equation of unchecked power with corruption—is a gnomic awareness that underlies the overall structure and specific provisions of the United States Constitution.

Separation of powers among the branches of government is not mentioned in the Constitution. It derives from the tripartite structure of the Constitution[2] and from political tracts like *The Federalist*.[3] Many theorists, who

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1. *Caliban upon Setebos; or Natural Theology In the Island* in POEMS OF ROBERT BROWNING at 288 (Riverside eds. 1956).

2. "All legislative Powers ... shall be vested in a Congress of the United States...." U.S. CONST. art. I, § 1. "The executive Power shall be vested in a President of the United States of America." *Id.* art. II, § 1. "The judicial Power ... shall be vested in one supreme Court...." *Id.* art. III, § 1.

3. THE FEDERALIST (Tudor Publishing Co., 1937). *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 3.5 (4th ed. 1991); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155 (1992); Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, SOC.

view the separation of powers concept as essential to the preservation of liberty, attribute the concept to the Framers' awareness of the dangers inherent in the undue concentration of power.[4] As two theorists have said, "the Framers were virtually obsessed with a fear—bordering on what some might uncharitably describe as paranoia—of the concentration of political power" and therefore, "[a]lmost every aspect of their ingenious political structure was in some way related to their implicit assumption that, simply put, 'power corrupts.'"[5] Thus, by preventing any one branch from encroaching upon the other two, the separation of powers doctrine safeguards liberty and serves as a check against the tyranny of concentrated governmental power.[6]

The eighteenth century theory of John Locke, which is often associated with the separation of powers doctrine, pervades the Constitution.[7] According to Locke, societies in their original condition were comprised of individuals in a "state of nature," possessing certain inherent rights and liberties and existing without government.[8] Then, in forming governments, such individuals relinquished their natural autonomy to the governments in exchange for protection of inherent rights and liberties.[9] Since such a formation or "social contract" was by the consent of the governed, government had to act in a manner consistent with its raison d'être—the preservation of the "lives, liberties and estates" of individuals.[10] Significantly, although Locke's paradigm puts the main of governmental power into the legislative branch,[11] it envisions an individual turning to the judiciary for succor in the event that government oversteps its bounds and abuses individual interests.[12] Although Locke conceived of a

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PHIL. & POL'Y, Spring 1991, at 196; Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991); Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301 (1989).

4. *See generally* NOWAK & ROTUNDA, *supra* note 3, § 3.5; Michael B. Browde & M. E. Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need For Prudential Constraints*, 15 N.M. L. REV. 407 (1985); Redish & Cisar, *supra* note 3.

5. Redish & Cisar, *supra* note 3, at 451.

6. Verkuil, *supra* note 3, at 303–05, discusses a duality behind the separation of powers, which promotes efficiency and avoids the tyranny of too much efficiency. *See also* the excellent article, Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991) and discussion by Paul Gewritz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343 (1989).

7. *See, e.g.*, W. B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 66-81 (1965); NOWAK & ROTUNDA, *supra*, note 3, § 3.5; Redish and Cisar, *supra* note 3, at 457–460; Nicholas L. DiVita, Note, *John Locke's Theory of Government and Fundamental Constitutional Rights: A Proposal for Understanding*, 84 W. VA. L. REV. 825 (1982). Others have traced the doctrine back to the ancient Greek and Roman governments. *See* Malcolm P. Sharp, *The Classical American Doctrine of 'The Separation of Powers,'* 2 U. CHI. L. REV. 385 (1935).

8. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 8–14 (C.B. Macpherson, ed. 1980). *See also* GWYN, *supra* note 7, at 66–81; M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 59-60 (1967); DiVita, *supra* note 7, at 827.

9. LOCKE, *supra* note 8, at 65–68. *See also* DiVita, *supra* note 7, at 827.

10. LOCKE, *supra* note 8, at 66. *See also* BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 629–633 (1945); Walton H. Hamilton, *Property—According to Locke*, 41 YALE L.J. 864 (1932).

11. LOCKE, *supra* note 8, at 78. *See also* Redish & Cisar, *supra* note 3, at 460.

12. LOCKE, *supra* note 8, at 69–77. *See also* RUSSELL, *supra* note 10, at 630; DiVita, *supra* note 7, at 828. As Jesse H. Choper has stated:

> The Supreme Court has been and should be the ultimate guardian of individual liberty not because its members are possessed of deeper wisdom or broader vision, nor simply because they command greater constitutional expertise than other institutional bodies in our society. Since, almost by definition, the

government of limited powers, he did not emphasize that the prevention of tyranny hinged upon the separateness of government's composite bodies.

The debate over the real meaning of separation of powers is not a new one. James Madison, himself a Framer, who wrote that "[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny,"[13] looked to Montesquieu for guidance. After noting that Montesquieu, whom Madison considered the "oracle ... on [the] subject," viewed the Constitution of England as the "standard" or "mirrour of political liberty," Madison pointed out that the English Constitution allowed some commingling of the branches of government.[14] Thus, according to Madison, the limited ability to commingle did not pose a threat unless one branch exercised the whole power of another.[15]

The question troubling Madison—how separate is separate—prefigured the formalist and functionalist approaches to separation of powers jurisprudence.[16] The formalists are committed to keeping the three governmental branches as separate as possible. They stress the need to require that each branch only exercise the powers spelled out in the Constitution. The functionalists, however, do not condemn the sharing of powers or alliances among the respective branches of government. For the functionalists, the separation of powers doctrine prohibits one branch from interfering with one of the core functions of another.

While much of the scholarship in this area focuses on the separation

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processes of democracy bode ill for the security of personal rights and, as experience shows, such liberties are not infrequently endangered by popular majorities, the task of custodianship has been and should be assigned to a governing body that is insulated from political responsibility and unbeholden to self-absorbed and excited majoritarianism.

JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 67–68 (1980). *See also* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 119 (1973) (the framers and ratifiers "feared Congress and trusted judges.").

13. THE FEDERALIST NO. 47, *supra* note 3, at 329 (James Madison).

14. *Id. See also* MONTESQUIEU, THE SPIRIT OF THE LAWS 75–82 (David W. Carrithers ed., 1977). *See also* discussion in NOWAK & ROTUNDA, *supra* note 3, §3.5; VILE, *supra* note 8, at 76–97; Browde & Occhialino, *supra* note 4, at 408–09, 407 n.2; Arthur C. Leahy, Note, Mistretta v. United States: *Mistreating the Separation of Powers Doctrine?*, 27 SAN DIEGO L. REV. 209, 222–36 (1990).

15. The Supreme Court has rejected the argument that the role of each branch of government should be delineated so that there is no overlapping or blending of functions. *See* Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977) ("the Court [has] squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches."). *But see* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 672–73 (1980) (Rehnquist, J., concurring) (relying on the theories of John Locke to urge a return to the earlier separation of powers doctrine).

16. For discussions and critiques of the formalist and functionalist approaches, see VILE, *supra* note 8, at 13 (discussion of "pure doctrine" of the separation of powers); E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506 (1989); Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984); R. Randall Kelso, *Separation of Powers Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-making*, 20 PEPP. L. REV. 531 (1993) (forthcoming); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853 (1990); Leahy, *supra* note 14, at 220–240; Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987). *See generally* Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

between the legislative and the executive branches of government,[17] this article addresses the question of when Congress impermissibly intrudes upon judicial power.[18] Because Congress is traditionally viewed as "the most dangerous branch"[19] and the judiciary as the guardian of individual rights, the partition between legislative and judicial power is a crucial one. In this context, the formalist and functionalist perspectives are not especially helpful. This is partially due to the fact that an analysis of when Congress has violated Article III inevitably leads to what the functionalists have branded the pivotal question—that is, when does exerted power infiltrate the core function or domain of the other branch.

When describing judicial power, courts and commentators have delineated a sacred core or a "judicial sanctuary."[20] As two theorists once said, "[t]here are spheres of activity so fundamental and so necessary to a court, so inherent in its very nature as a court, that to divest it of its absolute command within these spheres is to make meaningless the very phrase *judicial power.*"[21] It is this author's thesis that after the seminal decision in *United States v. Klein*,[22] the border between legislative and judicial power has not merely been eroded, but actually destroyed. Ironically, the courts themselves are accomplishing their own demise by approving legislation which infiltrates that judicial sanctuary or innermost core of judicial power.

Although the United States Supreme Court and other federal courts have had many occasions to address the question of when Congress violates the separation of powers doctrine embodied in Article III, this article is limited primarily to an analysis of three such events.

In Part I, I discuss the decision in *United States v. Klein*,[23] in which the United States Supreme Court struck down legislation as violative of the separation of powers doctrine. Specifically, instead of merely trying to define the test that the Supreme Court formulated in *Klein*, I isolate the factors which the

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17. *See* discussion and scholarship cited in Thomas O. Sargentich, *The Contemporary Debate About Legislative - Executive Separation of Powers*, 72 CORNELL L. REV. 430 (1987). *See also* Erwin Chemerinsky, *A Paradox Without Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083 (1987); Alan B. Morrison, *A Non-Power Looks at Separation of Powers*, 79 GEO. L.J. 281 (1990).

18. A connected issue is the scope of Congress' power to restrict the jurisdiction of the federal courts. *See infra* notes 60–62. *See generally* Calabresi & Rhodes, *supra* note 3, at 1159–64; PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 362–424 (3d ed. 1988) [hereinafter HART & WECHSLER]; ERWIN CHEMERINSKY, FEDERAL JURISDICTION §§ 3.1–3.3, at 147–77 (1989); MARTIN D. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 24–52 (2d ed. 1990); and Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

19. Calabresi & Rhodes, *supra* note 3, at 1156. *See also* THE FEDERALIST NO. 48, *supra* note 3, at 340 (James Madison) ("[I]t is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions."). *See generally* Verkuil, *supra* note 3, at 308–09; Krent, *supra* note 16, at 1262–63; DiVita, *supra* note 7, at 828–29.

20. This term was employed by Judge Young in United States v. Howard, 440 F. Supp. 1106, 1110 (D. Md. 1977). *See also* Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958).

21. Levin & Amsterdam, *supra* note 20, at 30.

22. 80 U.S. (13 Wall.) 128 (1871).

23. *Id.*

Court looked to in *Klein*. I later propose that these factors should become elements of a new test used to determine when legislation impermissibly intrudes upon the judicial process.

In Part II of this article, I explore the dubious viability of the *Klein* decision after the United States Supreme Court decision in *Robertson v. Seattle Audubon Society*.[24] Although I interpret the *Robertson* decision as the implicit overruling of *Klein*, I do not believe that *Robertson* means that there is and can no longer be a point at which legislation impermissibly impinges upon the exercise of judicial power.

In Part III of this article, I discuss the Supreme Court's decisions in *Lampf v. Gilbertson*,[25] which set forth a uniform statute of limitations for 10(b) claims, and in *James B. Beam Distilling Co. v. Georgia*,[26] which formulated a new principle of retroactivity. Then I describe how the combined effect of *Lampf* and *Beam* prompted the enactment of a provision, contained in the Federal Deposit Insurance Corporation Improvement Act of 1991, which purports to amend the Securities Exchange Act of 1934 and revive time-barred 10(b) claims.[27] This intervening enactment, however, does more than just tell courts how to dispose of certain pending claims; it actually nullifies the judicial principle of retroactivity with respect to certain cases.

Also, in Part III of this article, I analyze the reasoning in three federal appellate court decisions, *Anixter v. Home-Stake Production Co.*,[28] *Henderson v. Scientific-Atlanta, Inc.*[29] and *Gray v. First Winthrop Corp.*,[30] which have rejected separation of powers' challenges to that putative amendment to the Securities Exchange Act of 1934.[31] In connection with this discussion, I maintain that judicial approval of this legislation is tantamount to an almost complete obliteration of the partition between legislative and judicial power. In that same part, I also discuss the federal appellate court decision in *Plaut v. Spendthrift Farm, Inc.*,[32] the only case deeming the legislation to be unconstitutional. I then show how the *Plaut* analysis implicitly endorses some of the most destructive aspects of the statute.

After tracing the three events, which, I submit, illustrate the progressive annihilation of judicial power, I return to one of the most significant policies behind the separation of powers doctrine—that trepidation about government's tropistic tendency to lean toward tyranny and oppression. Without advocating a

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24. 112 S. Ct. 1407 (1992).
25. 111 S. Ct. 2773 (1991).
26. 111 S. Ct. 2439 (1991).
27. Pub. L. No. 102–242, § 476, 105 Stat. 2236, 2387 (1991).
28. 939 F.2d 1420 (10th Cir. 1991).
29. 971 F.2d 1567 (11th Cir. 1992).
30. 989 F.2d 1564 (9th Cir. 1993).
31. Other circuits have found the provision in the FDIC Act of 1991 to be constitutional. *See* Cooke v. Manufactured Homes, Inc., 998 F.2d 1256 (4th Cir. 1993); Pacific Mutual Life Insurance Co. v. First Republicbank Corp., 997 F.2d 39 (5th Cir. 1993); Cooperativa De Ahorro y Credito Aguada v. Kidder, Peabody & Co., 993 F.2d 269 (1st Cir. 1993); Berning v. A.G. Edwards & Sons, Inc., 990 F.2d 272 (7th Cir. 1993). *See also* Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc., 967 F.2d 742, 751 n.6 (2d Cir. 1992) (noting in dicta that it was "unimpressed" by the district court decisions holding the legislation unconstitutional). Part III of this article does not contain a separate discussion of these decisions because they either expressly adopt the separation of power reasoning of the Ninth, Tenth and Eleventh Circuits or merely reiterate the analysis of those courts.
32. 1 F.3d 1487 (6th Cir. 1993).

formalist approach, I take the position that the separation between legislative and judicial power is just as essential to liberty today as it must have been to the Framers.[33] I conclude this article by advancing a test, which is an atavistic, but modified version of the one in *Klein* and which courts can use to determine when Congress has impermissibly intruded upon judicial power.

I. THE *KLEIN* TEST: RESTRAINT ON CONGRESSIONAL POWER

A. Klein *In The Court Of Claims And The Subsequent Legislation*

The Abandoned Property Collection Act (hereinafter referred to as the "1863 Act") was one of several federal statutes dealing with confederate war property.[34] This statute permitted treasury agents to collect all property captured or abandoned as Union forces moved into areas of rebellion, to sell the property and then put the proceeds into the United States' Treasury.[35] Under the Act, a loyal property owner could recover compensation for the seized property within two years upon proof "that he has never given any aid or comfort to the present rebellion."[36]

The dispute in *United States v. Klein* began when Union agents, acting under the aegis of the 1863 Act, seized Victor Wilson's cotton after Grant's victory at Vicksburg. Pursuant to the Act, the agents sold the cotton and put the proceeds in the Treasury. Wilson, however, claimed that he was loyal and enti-

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33. *See generally* Redish & Cisar, *supra* note 3, at 453 ("[T]he fears of creeping tyranny that underlie [the separation of powers provisions] are at least as justified today as they were at the time the Framers established them. For as the old adage goes, 'even paranoids have enemies.'"); VILE, *supra* note 8, at 11 ("The concentration of *more* power into such hands, or of certain sorts of power, may be 'inevitable', given certain assumptions about the military, social, and economic needs of modern societies, but which powers, how much of them, and how they can be effectively limited, are the questions we should be asking.") (emphasis in original). *See also* Plaut v. Spendthrift Farm, Inc., *supra* note 32, the only recent federal decision to explore the historical background of the separation of powers doctrine in depth.

34. The *Klein* case primarily focused on the 1863 Act. The Act of August 6, 1861, 12 Stat. 319 (1861), which was not involved in the *Klein* case, addressed property which was devoted to war use with the consent of the owner. The second Act of July 17, 1862, Ch. 195, §§ 5–14, 12 Stat. 589 (1862), most of which the court did not address in *Klein*, provided for the confiscation of property of high level officials of the confederacy. Under that Act, the President could trigger the confiscation scheme by issuing a warning to those who participated in or aided or abetted the rebellion or would do so in the future. Any such person who did not cease the proscribed acts within sixty days of the warning could have property condemned. *Id.* §§ 6–7. Although the government did not invoke this portion of the 1862 Act in *Klein*, a separate provision of the 1862 Act, which permitted the President to pardon certain persons, was addressed in *Klein*. *Id.* § 13; 80 U.S. (13 Wall.) 128 at 139.

35. The pertinent portion of the Act provided:

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

The Abandoned Property Collection Act, Ch. 120 § 3, 12 Stat. 820 (1863) (emphasis added).

36. *Id.*

tled to compensation. After Wilson's death, John A. Klein, his administrator, sued in the Court of Claims to recover the proceeds of the Union's sale of Wilson's cotton.[37] The court found that Wilson had given no aid or comfort to the rebellion. The Court of Claims also acknowledged that Wilson had received a presidential pardon in 1862, but did not award him compensation on *this* basis. Instead, the court compensated Wilson because it found him to be loyal in fact.[38]

After the Court of Claims awarded Klein compensation in the amount of $125,300, the government appealed to the United States Supreme Court. While the appeal was pending, the government moved in the Court of Claims to "open up" Klein's judgment. Apparently, the government had discovered that Wilson had become a surety on the bonds of two Confederate officers, which were facts to which Klein stipulated.[39] The Court of Claims held that this undisputed suretyship, even if it amounted to disloyalty, should not change the results of the case because Wilson had received the presidential pardon *after* becoming the surety and concluded that the subsequent pardon removed any consequences of disloyalty.[40]

Before the passage of the Act of July 12, 1870 (hereinafter referred to as the "1870 Act"), the constitutionality of which was one of the issues in the *Klein* appeal, the government had two possible arguments for appeal: first, it could assert that Congress intended to exclude the pardonees from compensation under the 1863 Act; second, the government could assert that the constitutional provisions governing presidential pardons did not forbid Congress from enacting such legislation. Despite these potential arguments, another decision, *United States v. Padelford*,[41] enervated the government's position, and dispelled its hopes of prevailing on appeal in *Klein*.

In *Padelford*, after the claimant, like Wilson, had voluntarily become a surety of certain bonds of the rebel officers, he took Lincoln's loyalty oath.[42] Later, the Union forces seized Padelford's cotton under the 1863 Act.[43]

The Supreme Court concluded that becoming a surety upon a rebel officer's bond was equivalent to "giving comfort" to the rebellion within the meaning of the 1863 Act.[44] Without addressing constitutional issues, the Court concluded that the 1863 Act's provision for payment to the innocent included such pardoned claimants.[45]

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

38. For an excellent discussion of the facts and background of *Klein* and the Court of Claims' decisions, see Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States v. Klein *Revisited*, 1981 WIS. L. REV. 1189, 1190–1199 (1981).

39. *See* Young, *supra* note 38, at 1199.

40. *See* Young, *supra* note 38, at 1199.

41. 76 U.S. (9 Wall.) 531 (1869). *See* discussion in Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 525 (1974).

42. *Padelford*, 76 U.S. (9 Wall.) at 533, 539.

43. *Id.* at 534, 541.

44. *Id.* at 539.

45. *Id.* at 542–43. The Court mentioned later legislation, the 1868 Act, which required affirmative proof of loyalty in 1863 Act cases. Section 3 of the 1868 Act stated:

> That whenever it shall be material in any suit or claim before any court to ascertain whether any person did or did not give any aid or comfort to the late rebellion, the

The radical republicans, aiming to circumvent the effect of the *Padelford* decision, successfully sponsored the 1870 Act.[46] They based the 1870 Act on their belief that the Constitution bestows power upon Congress to not only regulate the Supreme Court's appellate jurisdiction, but also to refuse consent to suits seeking money from the federal treasury. In effect, the 1870 Act gave the Supreme Court jurisdiction to review cases like *Klein*, but only to reverse those judgments.[47]

The 1870 Act provided that a presidential pardon was inadmissible as proof of loyalty, and that in most instances, the acceptance of such a pardon was conclusive evidence of disloyalty.[48] Specifically, the Act directed the courts to find that a claimant who had accepted a presidential pardon without disclaiming previous disloyalty could not recover compensation under the 1863 Act. The 1870 Act went still further by providing that in any case in which a claimant had prevailed in the Court of Claims by proving loyalty by presidential pardon, the United States Supreme Court had to remand the matter to the Court of Claims for a dismissal for lack of jurisdiction.[49]

Once armed with the 1870 Act, the government sought to have the Supreme Court remand the *Klein* case to the Court of Claims with directions to dismiss it.

> claimant or party asserting the loyalty of any such person to the United States during such rebellion, shall be required to prove affirmatively that such person did, during said rebellion, consistently adhere to the United States, and did give no aid or comfort to persons engaged in said rebellion; and the voluntary residence of any such person in any place where, at any time during such residence, the rebel force or organization held sway, shall be prima facie evidence that such person did give aid and comfort to said rebellion and to the persons engaged therein.

Act of June 25, 1868, ch. 71, § 3, 15 Stat. 75 (1868). In *Padelford*, the Court held that the 1868 Act did not change the nature of proof that the 1863 Act required. 76 U.S. (9 Wall.) at 538.

46. *See* Young, *supra* note 38, at 1200 ("If there had been no legislative response to *Padelford*, Klein almost certainly would have succeeded on the ground that the statutes themselves viewed either loyalty-in-fact *or* pardon-conferred-loyalty as a sufficient ground for compensation.").

47. For an excellent discussion of the background of the 1870 Act, see Young, *supra* note 38, at 1203–1209.

48. The 1870 Act provides in part:

> [N]o pardon or amnesty granted by the President ... shall be admissible in evidence on the part of any claimant in the court of claims as evidence in support of any claim against the Untied States, or to establish the standing of any claimant in said court, or his right to bring or maintain suit therein; nor shall any such pardon, amnesty ... heretofore offered or put in evidence on behalf of any claimant in said court, be used or considered by said court, or by the appellate court on appeal from said court, in deciding upon the claim of said claimant, or any appeal therefrom, as any part of the proof to sustain the claim of the claimant, or to entitle him to maintain his action in said court of claims, or on appeal therefrom.

Act of July 12, 1870, Ch. 251, 16 Stat. 230, 235 (1870).

49. The 1870 Act also provided:

> [I]n all cases where judgment shall have been heretofore rendered in the court of claims in favor of any claimant on any other proof of loyalty than such as is above required and provided, and which is hereby declared to have been and to be the true intent and meaning of said respective acts, the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction.

Id.

B. Klein *In The Supreme Court*

In *Klein*, the government lost in the United States Supreme Court. The Court acknowledged that "the legislature has complete control over the organization and existence of [the Court of Claims] and may confer or withhold the right of appeal from its decisions."[50] The 1870 Act, however, did not merely deny "the right of appeal in a particular class of cases," but instead intended "to withhold appellate jurisdiction ... as a means to an end."[51]

In his opinion for the Court, Chief Justice Chase stated that "[the Act's] great and controlling purpose [was] to deny to pardons granted by the President the effect which this Court had adjudged them to have."[52] Thus, the denial of jurisdiction to the Supreme Court, as well as to the Court of Claims, is "founded solely on the application of a rule of decision in causes pending, prescribed by Congress."[53] The Court concluded "that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power" and that "Congress had inadvertently passed the limit which separates the legislative from the judicial power" by actually directing the disposition in a particular case.[54] Moreover, the Court opined that the statute was "liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive."[55]

Chief Justice Chase also distinguished the situation in *Pennsylvania v. The Wheeling & Belmont Bridge Co.*[56] from the one before the Court. In *Wheeling Bridge*, after the United States Supreme Court had deemed a certain bridge to be a nuisance, Congress passed an Act legalizing the structure and making it a post-road for passage of the United States mail. The *Wheeling Bridge* Court had concluded that the new enactment had changed the law.[57] The Court in *Klein* described the contrast between the effect of the legislation in *Wheeling Bridge* and the one in *Klein*:

> No arbitrary rule of decision was prescribed in [*Wheeling Bridge*] but the Court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.[58]

As explained below, the Court's formulation of a putative dichotomy between the permissible Act in *Wheeling Bridge* and the proscribed Act in *Klein* became what courts later understood to be the key to the *Klein* test.

C. The Klein *Test*

Commentators have tended to approach *Klein* as a cabalistic impenetrability. From the scholarship, however, there emerge four overlapping theories about the real import of *Klein*.

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50. 80 U.S. (13 Wall.) at 145.
51. *Id.*
52. *Id.*
53. *Id.* at 146.
54. *Id.* at 146, 147.
55. *Id.* at 147.
56. 59 U.S. (18 How.) 421 (1855).
57. *Id.* at 431. *See* discussion in Young, *supra* note 38, at 1239.
58. 80 U.S. (13 Wall.) at 146–47.

First, there are commentators who subscribe to the view that "the safest reading of *Klein* is that it precludes Congress from impairing the Executive's power to pardon."[59] The problem, however, with this perspective is its myopic fixation with one aspect of the 1870 Act to the exclusion of Justice Chase's comparatively extensive discussion of the separation between legislative and judicial power.

Second, there are others who believe that the theme of *Klein* is sovereign immunity and interpret the decision as requiring the government to provide a judicial forum for claims against the federal government.[60] A narrower offshoot of such a theory is that the Court in *Klein* espouses an "antidiscrimination position on sovereign immunity" by prohibiting Congress from "open[ing] the courts to truly innocent plaintiffs while closing them to those whose innocence comes by way of a pardon."[61] Such discussions, however, also appear to block Chief Justice Chase's analysis of judicial power and the distinction he forges between the Congressional act in *Klein* and that in *Wheeling Bridge.*

Third, other commentators portray *Klein* as a treatise on the Congressional use of jurisdictional powers.[62] At the extreme, it has been suggested that there is language in *Klein* to support an interpretation that "a pure withholding of jurisdiction was unconstitutional."[63] A more moderate version of this view is that of Henry Hart and his successors, who read *Klein* as proscribing Congressional use of jurisdictional power to compel a court to decide a case in an unconstitutional manner.[64]

Fourth, and perhaps akin to the holding described by Hart and his successors, most commentators see *Klein* as the Court's attempt to define the exercise of judicial power and when Congress has impermissibly encroached on the exercise of such power.[65] Within this group, there are those who read *Klein* as

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59. Eisenberg, *supra* note 41, at 526–27. *See also* HART & WECHSLER, *supra* note 18, at 313; C. FAIRMAN, A HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 845 (1971); Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1351 n.32 (1989).

60. *See generally* discussion in Young, *supra* note 38, at 1224–33.

61. *See generally* discussion in Young, *supra* note 38, at 1230. Although Young does not specifically endorse this interpretation, he discusses it.

62. *See* NOWAK & ROTUNDA, *supra* note 3, § 2.9, David P. Currie, *The Constitution in the Supreme Court: Civil War and Reconstruction, 1865–1873*, 51 U. CHI. L. REV. 131, 158–63 (1984); Eisenberg, *supra* note 41, at 526–28; Ronald D. Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 GEO. L.J. 839, 847–48 (1976); Lawrence Sager, *The Supreme Court 1980 Term, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 29 (1981); Young, *supra* note 38, at 1215–24.

63. Young, *supra* note 38, at 1219–20. There are those who advocate broad congressional power to restrict federal court jurisdiction. *See, e.g.*, Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982); David P. Currie, *The Constitution in the Supreme Court: 1789–1801*, 48 U. CHI. L. REV. 819, 845–49 (1981); Gerald Gunter, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984). There are others who disagree. *See, e.g.*, Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Akhil R. Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); Sager, *supra* note 62.

64. Hart, *supra* note 18, at 1373; HART & WECHSLER, *supra* note 18, at 316. *See also* discussion in Young, *supra* note 38, at 1215–19.

65. *See, e.g.*, Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425,

broadly banning Congressional attempts to prescribe rules of decision to the judiciary in pending cases.[66] The difficulty, however, of reconciling such an interpretation with the basic principle that appellate courts must follow changes in the law enacted during the pendency of an appeal has caused some commentators to find a narrower holding in *Klein*.[67] One such view, followed by courts in subsequent decisions, is based on the purported contrast between *Klein* and *Wheeling Bridge*. This view is that Congress can prescribe rules of decision in pending cases as long as it does so by amending or changing the law.[68]

There are other commentators, however, who believe that the crucial aspect of *Klein* was that the United States was a party. These commentators urge that *Klein* proscribes an enactment which allows the government, as a litigant, to regulate the decision in its own case.[69] There are also those who dwell not on whether the government is a party to the pending litigation, but instead on the pure effect of the challenged enactment. This group of commentators suggests that *Klein* prohibits Congress from telling the court how to decide an issue of fact or determine an evidentiary matter.[70]

Although aligned with those commentators who interpret *Klein* as a case raising the question of when Congress has improperly intruded on judicial power, I do not believe it is *now* fruitful to try to pin down precisely how the Court formulated the answer to the question. Instead, what is significant about the *Klein* case are the factors present in it because, as I will show, the five *Klein* factors should become the components of a workable test for the courts to use to determine when Congress has violated Article III. One, it is important that the Court in *Klein* examined the statute that Congress in fact enacted. Two, it is important that the Court determined that the means does not justify the ends;[71]

1474 n.202 (1987); Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decision*, 53 U. CHI. L. REV. 819, 857 (1986); Stephen L. Carter, *From Sick Chicken to Syner: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719, 727; Eisenberg, *supra* note 41, at 526; Archie Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360, 1379 n.116 (1980); Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 158 (1960). *See also* discussion in Young, *supra* note 38, at 1233–44.

66. *See, e.g.*, Ratner, *supra* note 65, at 181 ("[T]he constitutional principle ... asserted [in *Klein*] would preclude any congressional attempt to control the decision in a particular case through the guise of a jurisdictional limitation ...."); Note, *The Nixon Busing Bills and Congressional Power*, 81 YALE L.J. 1542, 1556–57 (1972); Note, *Moratorium on School Busing for the Purpose of Achieving Racial Balance: A New Chapter in the Congressional Court-Curbing*, 48 NOTRE DAME LAWYER 208, 229 (1972).

67. *See* HART & WECHSLER, *supra* note 18, at 316 n.4; Eisenberg, *supra* note 41, at 526. *See also* discussion in Young, *supra* note 38, at 1238–1244.

68. *See, e.g.*, Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311 (9th Cir. 1990) and discussion *infra*.

69. *See Klein*, 80 U.S. (13 Wall.) at 146 ("Can we [dismiss the appeal] without allowing one party to the controversy to decide it in its own favor?"); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 955 n.318 (1986) ("[O]bjecting to one party deciding the controversy in its own favor by a congressional change in rules."); Ratner, *supra* note 65, at 181. *See also* discussion in Eisenberg, *supra* note 41, at 526; Young, *supra* note 38, at 1244–49.

70. *See* HART & WECHSLER, *supra* note 18, at 316; David P. Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889–1910*, 52 U. CHI. L. REV. 324, 374 n.300 (1985) ("legislature may not forbid the Court 'to give the effect to evidence which, in its own judgment, such evidence should have.'"). *See also* discussion in Young, *supra* note 38, at 1233–38.

71. *Klein*, 80 U.S. (13 Wall.) at 145 (the Act did not merely deny "the right of appeal,"

or stated otherwise, under *Klein*, a separation of powers analysis entails the scrutiny of the actual *effect* of the legislation. Three, it is important that the Act invalidated in *Klein* was so precisely tailored to address the issues in the pending matter that it could be said to fit glove-like around the live case or controversy. Four, it is important that the 1870 Act in *Klein* had the effect of favoring the government, who was a party to the pending suit. Five, it is extremely important that the 1870 Act directed the decision in a pending case through the infiltration of a domain that has been viewed as a traditionally judicial one—namely, that of determining an evidentiary matter.

II. THE SEPARATION OF POWERS DOCTRINE AFTER *ROBERTSON*

A. Robertson *In The Ninth Circuit And The Subsequent Legislation*

The Supreme Court decision in *Seattle Audubon Society v. Robertson*[72] abraded the partition between Congress and the judiciary.

In *Robertson*, the Seattle Audubon Society ("Seattle Audubon") sued, challenging the United States Forest Service's administrative decision to adopt certain guidelines for timber management on the basis that the guidelines afforded inadequate protection to the northern spotted owl. The Washington Loggers Association also sued, alleging that the guidelines constituted an overly burdensome restriction on timber harvesting.

After the district court granted Seattle Audubon's motion for a preliminary injunction and enjoined some planned timber sales, Congress responded by enacting the Northwest Timber Compromise (hereinafter referred to as "the Compromise"), which expanded and restricted harvesting in certain national forests and public lands that contained spotted owls.[73]

Section 318(b)(6)(A) of the Compromise specified the two pending cases and provided in part:

> [T]he Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al. v. F. Dale Robertson*, Civil No. 89–160 and *Washington Contract Loggers Assoc. et al., v. F. Dale Robertson*, Civil No. 89–99 (order granting preliminary injunction) and the case *Portland Audubon Society et. al. v. Manuel Lujan, Jr.*, Civil No. 87–1160–FR. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court

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but intended "to withhold appellate jurisdiction ... as a means to an end.").

72. 914 F.2d 1311 (9th Cir. 1990), *rev'd*, 112 S. Ct. 1407 (1992).

73. Specifically, under section 318(b)(3) of the Compromise, "no sales [were] to come from Spotted Owl Habitat Areas identified in the Environmental Impact Statement and Record of Decision of 1988, prepared in relation to proposed timber sales on Forest Service land." 914 F.2d at 1313. That same section also added about 3,200 acres to protected forest area. *Id.* Under section 318(b)(5), "no sales [were] to come from areas identified as Spotted Owl Habitat Areas in an agreement between [the Bureau of Land Management] and the Oregon Department of Fish and Wildlife...." *Id.* That same section also directed the Bureau of Land Management to identify an additional twelve protected areas. *Id.*

of the United States.[74]

After the passage of the Compromise, the district court vacated the preliminary injunction and rejected Seattle Audubon's argument that section 318(b)(6)(A) was unconstitutional as a violation of the separation of powers doctrine. In the related Portland Audubon matter, the district court granted the government's motion to dismiss and also rejected the separation of powers challenge to section 318(b)(6)(A).[75] Both Seattle Audubon and Portland Audubon appealed.

On appeal, the Ninth Circuit struck down the pertinent portion of the Compromise as a violation of the separation of powers doctrine. In so doing, the court concentrated on what it believed was the critically important distinction between the enactment in *Klein* and that in *Wheeling Bridge*: "No arbitrary rule of decision was prescribed in [*Wheeling Bridge*], but the court was left to apply its ordinary rules to the new circumstances created by the act. In [*Klein*], no new circumstances ha[d] been created by legislation."[76]

The Ninth Circuit, viewing the contrast between *Wheeling Bridge* and *Klein* as crucial, abided by the *Klein* Court's reading of the intervening statute in *Wheeling Bridge* as changing the law. The Ninth Circuit determined that although Congress could, of course, change the law, it could not require the court to decide a pending case differently under the same law. As the Ninth Circuit articulated it, "Congress can *amend or repeal* any law, even for the purpose of ending pending litigation," but it "cannot 'prescribe a rule for a decision of a cause in a certain way' where 'no new circumstances have been created by legislation.'"[77]

The Ninth Circuit also confirmed its own rejection of a restrictive reading of *Klein*. In an earlier decision, *Konizesky v. Livermore Labs (In re Consolidated United States Atmospheric Testing Litigation)*,[78] the Ninth Circuit had concluded that Congress violates Article III when it presumes to tell the courts how to decide "an issue of fact (under threat of loss of jurisdiction)" *and* also purports to compel the courts "to decide a case in accordance with a rule of

74. *Id.*

75. Portland Audubon Society and other environmental groups had also sued for declaratory and injunctive relief, challenging the forest management activities of the Bureau of Land Management, U.S. Department of the Interior, as violating the National Environmental Protection Act ("NEPA"), 42 U.S.C. §§ 4321–4347, the Oregon & California Lands Act, 43 U.S.C. §1181, the Federal Land Policy and Management Act, 43 U.S.C. §§1701–1782, and the Migratory Bird Treaty Act, 16 U.S.C. §§703–712. The district court dismissed the action and the Ninth Circuit reversed. Portland Audubon Soc'y v. Hodel, 866 F.2d 302 (9th Cir.), *cert. denied,* 109 S. Ct. 3229 (1989).

On remand, the district court dismissed the action again. Portland Audubon Society v. Lujan, 712 F. Supp. 1456 (P. Ore. 1989). The Ninth Circuit affirmed the dismissal of the claim under the National Environmental Protection Act, but reversed the dismissal of the other claims. Portland Audubon Soc'y v. Lujan, 884 F.2d 1233 (9th Cir. 1989), *cert. denied,* 110 S. Ct. 1470 (1990). Portland Audubon renewed its motion for summary judgment in the district court under the Oregon & California Lands Act, the Federal Land Policy and Management Act and the Migratory Bird Treaty Act. In the *Portland Audubon* case, after Congress passed the Northwest Timber Compromise, the district court granted the government's motion to dismiss on the basis of section 318. In so doing, the district court rejected Portland Audubon's constitutional challenge to section 318(b)(6)(a). *Portland Audubon's* appeal was consolidated with the one in *Seattle Audubon*. Seattle Audubon v. Robertson, 914 F.2d 1311 (9th Cir. 1990).

76. 914 F.2d at 1315 (quoting United States v. Klein, 80 U.S. (13 Wall.) at 146–47).

77. *Id.* (quoting United States v. Klein, 80 U.S. (13 Wall.) at 147).

78. 820 F.2d 982 (9th Cir. 1987), *cert. denied,* 485 U.S. 905 (1988).

law independently unconstitutional on other grounds."[79] Then, referring to the later decision, *Grimesy v. Huff*,[80] in which it had made the holding in *Atmospheric Testing* disjunctive instead of conjunctive, the Ninth Circuit clarified that "[r]eading *Klein* in the conjunctive would require that Congress' action be unconstitutional on two grounds—an illogical requirement."[81]

In applying its interpretation of the *Klein* test to the Compromise, the Ninth Circuit concluded that Congress did not repeal or amend the laws underlying the litigation. What Congress had done, according to the Ninth Circuit, was direct that if the government abided by the plan set forth in subsections 318(b)(3) and (b)(5), then the government will be deemed to have met the requirements of several environmental statutes. As such, the Compromise "directs the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court."[82]

In its discussion of *Wheeling Bridge*, the Ninth Circuit posited a conun-

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79. *Id.* at 992, (quoting United States v. Brainer, 691 F.2d 691, 695 (4th Cir. 1982) (quoting HART & WECHSLER, *supra* note 18, at 316 n.4)).

80. 876 F.2d 738 (9th Cir. 1989).

81. Seattle Audubon Society v. Robertson, 914 F.2d at 1315-16. The Ninth Circuit also determined that its disjunctive reading of *Klein* was consistent with the decision in United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). In *Sioux Nation*, the tribe sued the United States, alleging that the government had taken the Black Hills from them without providing just compensation. After the Court of Claims dismissed the Sioux claim in 1942, Congress passed the Indian Claims Commission Act, which created a new forum to hear and determine all previous tribal grievances. The Court of Claims held, *inter alia*, that the res judicata effect of its 1942 decision barred the Sioux just compensation claim. Then, in 1978, Congress passed a statute authorizing the Court of Claims to take new evidence in the case and conduct its review of the merits de novo and do so without regard to the res judicata defense. Subsequently, the Court of Claims affirmed the Commission's award of interest owed as a result of the government's taking.

On certiorari, the United States Supreme Court affirmed. In the opinion, authored by Justice Blackmun, the Court determined that Congress' waiver of the res judicata effect of a prior decision rejecting the validity of a claim against the government does not violate the separation of powers doctrine. The Court distinguished the unconstitutional proviso in *Klein* as follows:

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

Id. at 405. The Court emphasized that Congress was "only ... providing a forum so that a new judicial review of the Black Hills claim could take place" and was not "attempt[ing] to prescribe the outcome of the Court of Claims' new review of the merits." *Id.* at 407. Justice Rehnquist, dissenting, maintained that *Klein* precluded such congressionally mandated relitigation. *Id.* at 430–31. *See also* discussion in Young, *supra* note 38, at 1249–54.

82. 914 F.2d at 1316. The Ninth Circuit explained:

> [I]f the Secretary follows subsection (b)(3) and (b)(5), then the Secretary will be found to have used the 'principles of multiple use and sustained yield' and the 'systematic interdisciplinary approach' mandated by the Federal Land Policy and Management Act, 43 U.S.C. § 1712(c)(1) and (2). In addition, the agency will be deemed to have included detailed statements of adverse environmental effects and alternatives required under NEPA, 42 U.S.C. § 4332. Also, there will have been no taking of habitat as proscribed under the Migratory Bird Treaty Act, 16 U.S.C. § 703.

Id.

drum in lieu of an exegesis. In *Wheeling Bridge*, after the Court had deemed the bridge to be an obstruction, the intervening legislation made it a post-road for passage of the United States mail. In approving this statute as one that changed the law, the Court in *Wheeling Bridge* said, "[A]lthough [the bridge] still may be an obstruction in fact, [it] is not so in the contemplation of law."[83]

The Ninth Circuit, quoting this language from *Wheeling Bridge*, stated that in the *Wheeling Bridge* situation, Congress had not told the court to decide a case differently under the same law. What makes this perplexingly nonsequitorial is that the whole thrust of the law in *Wheeling Bridge* was to tell the courts that the object it had deemed to be an obstruction should not be deemed an obstruction. Stated otherwise, the intervening legislation in *Wheeling Bridge* directs the Court to pin a new adjective onto the same bridge and thus, also tells the court to make a different factual finding.

The Ninth Circuit's attempted differentiation of the Compromise and other legislation it had upheld in another case, *Stop H–3 Ass'n v. Dole*[84] is just as enigmatic. In *Stop H–3*, which was litigation under various environmental protection statutes, a provision of an appropriations bill directed the Secretary of Transportation to build a highway "notwithstanding" the requirements set forth in the environmental statutes.[85]

In *Robertson*, the Ninth Circuit said that the statute assailed in *Stop H–3* had "simply ordered construction of the highway and specifically, as a matter of permanent law *withdrew* the statutory environmental protection provisions underlying the ongoing litigation as to the challenged project by exempting the project from the provisions requirements."[86] Thus, according to the Ninth Circuit, the saving grace of the *Stop H–3* legislation was supposedly that it "did *not* leave the underlying statute intact (as to the H–3 project), order a course of government action, and then direct a court finding that the environmental statutes' requirements were satisfied by the government action ordered."[87]

If there is any difference between the effect of the legislation in *Stop H–3* and *Robertson*, it is either meaningless or illusory. Specifically, the underlying legislation in *Stop H–3*, the "so-called '4(f)' provisions," which required the Secretary of Transportation to take various steps to protect the environment before building a highway through certain ecologically important areas, was indeed left intact. All the appropriations bill accomplished was the direction of a course of action by government—namely, the approval of the construction of the highway—and then, in effect, the direction to the court to find that the particular project was exempt from the still extant requirements.

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83. 59 U.S. (18 How.) 421, 430 (1855).

84. 870 F.2d 1419 (9th Cir. 1989).

85. Section 114 of the Continuing Appropriations Bill for Fiscal Year 1987, Pub. L. No. 99–500, § 106, 100 Stat. 1783 (later reenacted as Pub. L. No. 99–591, 100 Stat. 3341) stated in relevant part:

> (a) The Secretary of Transportation shall approve the construction of Interstate Highway H–3 between the Halawa interchange to, and including the Halekou interchange (a distance of approximately 10.7 miles), and such construction shall proceed to completion notwithstanding section 138 of title 23 and section 303 of title 49, United States Code.

914 F.2d at 1316, n.2.

86. *Id.* at 1316.

87. *Id.* at 1316–17.

Perhaps because it was aware of the tenuousness of its distinctions between the putatively valid and invalid Congressional acts, the Ninth Circuit elaborated on what appears to be its real thesis—that means is what matters. By acknowledging that "Congress could possibly have written a valid statute,"[88] the court suggests that Congress could have properly accomplished the same objective by different means—through amendment or repeal. Thus, the Ninth Circuit construed *Klein* as holding that Congress *can* "prescribe a rule for the decision of a cause in a particular way" or *can* dictate "how the Court should decide an issue of fact" in a pending case as long as Congress does it by amendment or repeal.[89]

From the Ninth Circuit's reading of *Klein* springs a more general, albeit implicit, concept that the determination of when Congress violates the separation of powers doctrine in Article III entails solely a scrutiny of the means—not the ends. Conversely, the result or the impact the intervening legislation has on pending cases is practically irrelevant. The Ninth Circuit's approach thus eschews one of the salient aspects of *Klein*—the determination in *Klein* that means do *not* justify the ends.

B. Robertson *In The Supreme Court*

In reversing, the Supreme Court concluded that a provision of the Compromise "replaced the legal standards underlying the two original challenges with those set forth in subsections (b)(3) and (b)(5), without directing particular applications under either the old or the new standards."[90] As the Supreme Court saw it, before the enactment of the Compromise, the Migratory Bird Treaty Act had made it unlawful to "kill" or "take" any "migratory bird."[91] According to the Court, the Compromise changed the law by providing that if the harvesting constitutes "management ... according to" subsections (b)(3) and (b)(5), then it meets the Migratory Bird Treaty Act even if it caused what that Act proscribes as a "killing" or "taking."[92] As the Court put it:

> [S]ubsection (b)(6)(A) compelled changes in law, not findings or results under old law. Before subsection (b)(6)(A) was enacted, the original claims would fail only if the challenged harvesting violated none of five old provisions. Under subsection (b)(6)(A), by contrast, those same claims would fail if the harvesting violated neither of two new provisions. Its operation, we think, modified the old provisions.[93]

The Court, however, did not focus just on the means that it believed Congress had used, but also on what it understood to be the effect of the legislation—that "nothing in subsection (b)(6)(A) ... purported to direct any

88. *Id.* at 1317.
89. *Id.* at 1315. The Ninth Circuit also noted that even if it interpreted section 318 of the Compromise as an "implied partial repeal of the environmental statutes," it would still be struck down because Congress could not accomplish this "in an appropriations measure." Seattle Audubon Soc'y v. Robertson, 914 F.2d. at 1317, citing Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 307 (9th Cir. 1989). Consequently, the court could find no "saving interpretation" of section 318 (b)(6)(a).
90. *Robertson*, 112 S. Ct. 1407, 1413 (1992).
91. *Id.*
92. *Id.*
93. *Id.*

particular findings of fact or applications of law, old or new, to fact."[94]

The Court also addressed the "three textual features" of the Compromise, which the environmental groups had argued in support of their position that the Compromise did not supply new law.[95] First, the groups had argued that the language, "determine[d] and direct[ed]" had an "imperative tone," that was aimed only at the courts.[96] Their opponents, on the other hand, justified this "as a directive [only] to the Forest Service and [the Bureau of Land Management]."[97] The Court, however, concluded that the language was not synonymous with a Congressional attempt to direct "specific results under old law"[98] and that even without that decretive preface, Congress could effectuate the same result because "[a] statutory directive binds *both* the executive officials who administer the statute *and* the judges who apply it in particular cases ...."[99]

Second, the groups had argued that the challenged provision "did not modify old requirements because it deemed compliance with new requirements to 'mee[t]' the old requirements."[100] Significantly, in rejecting this analysis, the Court nullified the Ninth Circuit's determination that the fact that "Congress could possibly have written a valid statute ... does not mean that [the court] can 'fairly' interpret the statute that Congress in fact enacted as constitutionally valid."[101] That is, in approach, the Supreme Court focused on the statute that Congress *could* have possibly written. As the Court put it, "Congress might have modified [the Migratory Bird Treaty Act] directly ..." and achieved the identical results.[102] Embedded in this approach is the concept that it does not matter whether Congress actually amended or repealed the law as long as it could have achieved the same result through amendment or repeal.

Third, the environmental groups had argued that the reference to the actual pending cases by name and caption number showed that the Compromise offended Article III. The Supreme Court, brushing this particular feature of the legislation aside as a legislative shortcut, concluded that it "served only to identify the five 'statutory requirements that are the basis for' those cases—namely, pertinent provisions of [the Migratory Bird Treaty Act, the National Environmental Policy Act of 1969, the National Forest Management Act of 1976, the Federal Land Policy and Management Act of 1976 and the Oregon-California Railroad Land Grant Act]."[103] Thus, according to the Court, by naming two pending cases, Congress saved itself the labor of having to identify five statutory provisions.

What is most troublesome here is that the Court's reasoning does not merely appear to impugn *Klein*, but also turns against itself. That is, in reasoning through its rejection of the three textual arguments, the Court deemed Congressional means to be irrelevant. Then, after deeming it irrelevant, the Court apotheosized Congressional means into the very crux of the

94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 1413–14.
98. *Id.* at 1414.
99. *Id.*
100. *Id.*
101. *Robertson*, 914 F.2d at 1317.
102. *Robertson*, 112 S. Ct. at 1414.
103. *Id.*

issue. The Court stated that "[t]o the extent that subsection ... affected the adjudication of the cases, it did so by effectively modifying the provisions at issue in those cases"[104] and approved the legislation on this basis. In so doing, the Court resurrected the approach—the means analysis—that it had just implicitly abandoned.

C. The Separation Of Powers Doctrine After Robertson

One way of looking at the Supreme Court's decision in *Robertson* is that it signifies practically nothing.[105] Its internal repugnancy compounded by the Court's explicit refusal "to address any broad question of Article III jurisprudence"[106] proclaims vacuity.

Another perspective on the Supreme Court's decision in *Robertson* is that it confronts the very question it purports to avoid. The Supreme Court acknowledged that the Ninth Circuit read *Klein* to hold that a statute is unconstitutional when "it direct[s] decisions in pending cases without amending any law" but declined to consider whether this reading was correct for the express reason that the Compromise "*did* amend applicable law."[107] The Court's description of the challenged provision as one that "affected the adjudication of the cases,"[108] when combined with the Court's validation of the provision for the reason that it amended the law, amounts to the Court putting its imprimatur on the Ninth Circuit's interpretation of the *Klein* test. If we view it this way, *Robertson* boils down to the proposition that there can be no separation of powers infirmity as long as Congress can be said to have amended or repealed the law.

Still another interpretation of the Supreme Court's decision in *Robertson* is that it is the implicit overruling of *Klein*. First, the close resemblance between the effect of the intervening legislation in *Klein* and that in *Robertson* supports such a theory. Like the 1870 Act in *Klein*, the Compromise in *Robertson* was so precisely tailored to address the issues in the pending matters that it could be said to fit glove-like around the live cases or controversies. Like the 1870 Act in *Klein*, which directed the courts to find that a claimant who had accepted a presidential pardon without disclaiming previous loyalty was disloyal, the Compromise in *Robertson* directed the courts to find that the government's compliance with two provisions constituted compliance with controlling environmental laws. Thus, the Compromise in *Robertson*, no less than the 1870 Act in *Klein*, directs the decision in a pending case. Second, like the 1870 Act, the Compromise had the effect of favoring the government as a party in pending litigation.

There is a separate reason why *Klein* might not survive *Robertson*. In *Robertson*, in rejecting the environmental groups' contention that certain textual features of the Compromise showed that Congress had improperly intruded upon the judicial domain, the Supreme Court focused *not* on what

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104. *Id.*

105. Gordon G. Young states that Justice Blackmun's opinion in United States v. Sioux Nation of Indians, 448 U.S. 371 (1980), "rivals Chase's opinion in *Klein* for its lack of clarity." Young, *supra* note 38, at 1254. *See supra* note 81. The same may be said of Justice Thomas' opinion in *Robertson*.

106. *Robertson*, 112 S. Ct. at 1414.

107. *Id.*

108. *Id.*

Congress *actually* did, but on what Congress *might* have done. Stated otherwise, because Congress *might* have issued a directive without the explicit imperative preface or *might* have modified the old laws instead of directing that compliance with new provisions satisfies the old laws or *might* have identified the five statutory requirements instead of naming the pending cases, then all is kosher. Thus, at least from this portion of the reasoning in *Robertson*, emerges the notion that *how* Congress *actually* does what it did is virtually meaningless. Consequently, to the extent that *Klein* required courts to scrutinize "the statute that Congress *in fact* enacted"[109] then *Robertson* invalidates the *Klein* approach.

As we said, one of the prominent factors in *Klein* was that the 1870 Act fit glove-like around the fingers of the live case or controversy. This attribute surfaces in *Robertson* in the form of a theory espoused by the amicus Public Citizen. The amicus had challenged the proposition that a statute is constitutional under *Wheeling Bridge* if it amends the law. According to the amicus, "even a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases."[110] Such a theory, which the Court denominated an "alternative" but declined to address because it "was neither raised below nor squarely considered by the Court of Appeals nor advanced by respondents in [the Supreme] Court"[111] is certainly the most interesting one in *Robertson*. What this theory suggests is that amendment or repeal is not the end all or be all: regardless of whether a Congressional act amends or repeals, there can, according to the amicus theory, come a point at which Congress can be deemed to be impermissibly performing a purely judicial function.

III. THE SEPARATION OF POWERS DOCTRINE AFTER THE CHALLENGES TO THE NEW SECTION OF THE SECURITIES EXCHANGE ACT OF 1934

A. Lampf, Beam *And The New Principles Of Retroactivity*

The decisions in *Lampf v. Gilbertson*[112] and *James B. Beam Distilling Co. v. Georgia*[113] spawned a Congressional act, which was challenged as a violation of the separation of powers doctrine.

Lampf arose out of the sale of Connecticut limited partnerships, which investors had purchased for the purpose of realizing federal income tax benefits. When the partnerships failed and the Internal Revenue Service disallowed the claimed tax benefits, investors sued those who had aided in the organization of the partnerships and the preparation of offering memoranda. In their complaints, the investors alleged that they were induced to purchase the units in the partnerships by misrepresentations in the offering memoranda in violation of, *inter alia*, section 10(b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission Rule 10b–5.[114]

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109. *Robertson*, 914 F.2d at 1317 (emphasis added).
110. *Robertson*, 112 S. Ct. at 1415.
111. *Id.*
112. 111 S. Ct. 2773 (1991).
113. 111 S. Ct. 2439 (1991).
114. Securities Exchange Act of 1934, ch. 404, title I, § 10, 48 Stat. 891, 15 U.S.C. §78(j)(b) (1988); 17 CFR § 240.10b–5 (1992).

Before the Supreme Court decision in *Lampf*, most federal courts applied an analogous state statute of limitations to federal 10(b) claims because the 1934 Act did not have its own provision.[115] Consequently, the district court, applying Oregon's two-year limitations period for fraud claims, granted summary judgment for the defendants on the ground that the complaint was untimely. Although the Ninth Circuit reversed and remanded because it found that there were unresolved issues of fact as to when the investors discovered or should have discovered the alleged fraud, it agreed that Oregon's two-year limitation period was controlling.[116]

The Supreme Court granted certiorari to determine the proper limitations period for Rule 10b–5 claims.[117] After reciting "the usual rule that when Congress has failed to provide a statute of limitations for a federal cause of action, a court 'borrows' or 'absorbs' the local time limitation most analogous to the case at hand" the Court noted "a closely circumscribed exception," compelling courts to look to federal law for an appropriate limitations period "when the operation of a state limitations period would frustrate the policies embraced by the federal enactment."[118] The Court, however, opined that the "nontraditional origins" of the 10(b) cause of action "complicated" the task before it:[119] specifically, because section 10(b) does not provide for private claims, such claims are of judicial creation.[120] The Court then formulated the

115. *See, e.g.*, Bath v. Bushkin, 913 F.2d 817 (10th Cir. 1990) (applying state limitations period governing common law fraud); Nesbitt v. McNeil, 896 F.2d 380 (9th Cir. 1990) (same); Forrestal Village, Inc. v. Graham, 551 F.2d 411 (D.C. Cir. 1977) (same); O'Hara v. Kovens, 625 F.2d 15 (4th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981) (applying state blue sky law limitations period).

116. Reitz v. Leasing Consultants Assocs., 895 F.2d 1418 (9th Cir. 1990).

117. At that point, there was a divergence of opinions among the circuits. *See* cases cited, *supra* note 115. *Contra In re* Data Access Sys. Sec. Litig., 843 F.2d 1537 (3d Cir. 1988), *cert. denied*, Vitiello v. Kahlowsky & Co., 488 U.S. 849 (1988) (establishing a uniform federal period); Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385 (7th Cir. 1990), *cert. pending* (No. 90–526) (same).

118. *Lampf*, 111 S. Ct. at 2778. The Court stated that this federal borrowing approach should be used "only 'when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.'" *Id.* (quoting Reed v. United Transp. Union, 488 U.S. 319, 324 (1989)).

119. *Lampf*, 111 S. Ct. at 2779.

120. Section 10 of the 1934 Act provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange ...
>
> (b) To use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. 15 U.S.C. § 78j.

Commission Rule 10b–5, first promulgated in 1942, now provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale or any security. 17 CFR § 240.10b–5

rule that "where ... the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period."[121]

The Court noted that the 1934 Act had a number of express causes of action, each with an express limitations period. With one exception,[122] each had "some variation of a 1-year period after discovery combined with a 3-year period of repose."[123] Also, the amended limitation provision of the 1933 Act had the same "1- and-3-year structure."[124] The Court thus concluded that since the provisions in the 1933 and 1934 Acts were designed to accommodate interests similar to those at stake in 10(b) litigation, they were closer analogues than state law fraud provisions or the five-year time-frame in the 1934 Act's insider trading provision.[125]

In *Lampf*, the Supreme Court not only adopted the one- and-three-year time-frame, but also determined that the limitations period should not be subject to the doctrine of equitable tolling.[126] Thus, significantly, the Court in

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(1990).

111 S. Ct. at 2779, note 4.

121. *Id.* at 2780.

122. Section 16(b), 15 U.S.C. § 78p(b) (1988), has a 2-year period of repose. The Court did not believe that section 16(b) was an analogue because it "requires the disgorgement of unlawful profits and differ[ed] in focus from § 10(b) and ... other express causes of action." *Id.* at n.5.

123. *Id.* at 2780. Section 9(e) of the 1934 Act provides:

> No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation. 15 U.S.C. § 78i(e).

Section 18(c) of the 1934 Act provides:

> No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued. 15 U.S.C. § 78r(c).

Id. at n.6.

124. *Id.* at 2780. Section 13 of the 1933 Act, as so amended, provides:

> No action shall be maintained to enforce any liability created under section 77k or 77*l*(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77*l*(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77*l*(1) of this title more than three years after the security was bona fide offered to the public, or under section 77*l*(2) of this title more than three years after the sale. 15 U.S.C. §77m.

Id. at 2780–81, note. 7.

125. In rejecting the commission's contention that the 5-year period contained in § 20A was the most appropriate one, the Court stated:

> The Insider Trading and Securities Fraud Enforcement Act of 1988, which became law more than 50 years after the original securities statutes, focuses upon a specific problem, namely, the "purchasing or selling [of] a security while in possession of material, nonpublic information," 15 U.S.C. § 78t–1(a), that is, "insider trading." Recognizing the unique difficulties in identifying evidence of such activities, the 100th Congress adopted § 20A as one of "a variety of measures designed to provide greater deterrence, detection and punishment of violations of insider trading." H.R. Rep. No. 100–910, p. 7 (1988). There is no indication that the drafters of § 20A sought to extend that enhanced protection to other provisions of the 1934 Act. Indeed, the text of § 20A indicates the contrary.

Id. at 2781.

126. Under the doctrine of equitable tolling,

Lampf decided upon a uniform limitations period and deemed it to be inflexible—with no arguable prolongation of life.

Lampf also gave rise to a principle of retroactivity. In reversing, the Court applied the new federal rule to the case before it and found the investors' claims to be untimely. In so doing, the Supreme Court treated the new uniform limitations period as if it were retroactive. Justice O'Connor, joined by Justice Kennedy, dissented on this retroactivity issue and complained that the Court was "shut[ting] the courthouse doors on [the investors] because they were unable to predict the future."[127] The dissenters also pointed out that the Court's "treatment of the retroactivity question [could not] be an oversight" because "[t]he parties briefed the issue in [the] Court" and the Court had apparently rejected the amicus curiae arguments of the Securities and Exchange Commission, which had "urg[ed] the Court to remand so that the lower court may address the retroactivity question in the first instance."[128]

In *James B. Beam Distilling Co. v. Georgia*,[129] a case decided on the same day as *Lampf*, the Supreme Court articulated the new principle of retroactivity. Involved in *Beam* was a Georgia law imposing an excise tax on imported liquor at a rate double that imposed on liquor manufactured from Georgia-grown products. In 1984 in *Bacchus Imports, Ltd. v. Dias*,[130] the United States Supreme Court had held that a similar Hawaii law violated the Commerce Clause. Shortly thereafter, a manufacturer of Kentucky Bourbon, trying to avail itself of the benefits of the *Bacchus* decision, sued in the Georgia State Court seeking a refund of the taxes it had paid under Georgia law[131] for 1984 and the two prior years.

Although the trial court agreed with the manufacturer that the tax was unconstitutional, it, employing the analysis set forth in *Chevron Oil Co. v. Huson*,[132] refused to apply its ruling retroactively and denied the refund

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> where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.

Id. at 2782. The Court found the doctrine of equitable tolling to be "fundamentally inconsistent" with the one- and-three-year structure because the one-year period starts after the discovery of the facts constituting the violation, which makes tolling unnecessary, and because the three-year limit is a period of repose, which is incompatible with the whole concept of tolling. *Id.*

127. *Id.* at 2786.

128. *Id.* at 2787. Justice Stevens and Justice Souter opined that the Court "ha[d] undertaken a lawmaking task that should properly be performed by Congress." *Id.* at 2783. They stated that the Court was not justified in "reject[ing] the traditional rule of applying a state limitations period when a federal statute is silent." *Id.* at 2784. The Court "inevitably raises questions concerning the retroactivity of its new rule that are difficult and ... inconsistent with the neutral, non-policy making role of the judge." *Id.* Justice Kennedy was persuaded that the "rule adopted [by the Court] will 'thwart the legislative purpose of creating an effective remedy' for victims of securities fraud." *Id.* at 2790. He viewed the three-year time bar as "inconsistent with the practical realities of § 10(b) litigation and the congressional policies underlying that remedy," as it "tips the scale too far in favor of wrongdoers." *Id.*

129. 111 S. Ct. 2439 (1991).

130. 468 U.S. 263 (1984).

131. Ga. Code Ann. § 3–4–60 (1982).

132. 404 U.S. 97 (1971). In *Chevron Oil*, the Court applied a 3-step analysis in determining nonretroactivity. First, does the decision to be applied nonretroactively "establish a new principle of law, either by overruling clear past precedent upon which litigants may have

request. The Supreme Court of Georgia affirmed.[133]

On certiorari, the Supreme Court reversed the decision alone. In so doing, the Court addressed the question of retroactivity, which the majority concluded was a matter of choice of law and not rooted in the Constitution.[134] Justice Souter, who announced the judgment of the Court, described "retroactivity ... as a matter of choice of law, 'a choice ... between the principle of forward operation and that of relation backward.'"[135] He also found that "[a]s a matter purely of judicial mechanics," there were three possible resolutions to such choice-of-law problems.[136]

First, a decision may be "fully retroactive."[137] If so, it "appl[ies] both to the parties before the Court and to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitations."[138] This approach is the one the Court endorsed as "overwhelmingly the norm."[139]

Second, a decision may be "purely prospective."[140] Under this approach, "a new rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision."[141] This "albeit infrequent[]" method, the one employed in *Chevron Oil*, is justified when an application of "[a] new rule to parties who relied on the old would offend basic notions of justice and fairness."[142]

Third, a decision may be "selectively prospective."[143] Under this approach, "a court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement."[144] The Court explained that this method "enjoyed its temporary ascendancy in the criminal law during a period in which the Court formulated new rules, prophylactic or otherwise, to insure protection of the rights of the accused."[145] The concern was that full retroactive application of expanded protection for criminal defendants would result in the retrial or release of numerous prisoners and consequently, create a "'serious[] ... disrupt[ion of] the administration of [the] criminal laws.'"[146] On the other hand,

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relied," or by "deciding an issue of first impression?" *Id.* at 106. Second, do the merits of the case warrant the effects of retrospective application of the new rule? *Id.* at 106–07. Finally, does a retroactive imposition of the rule produce substantial inequitable results which could be avoided by holding on nonretroactivity? *Id.* at 107.

133. *Beam*, 259 Ga. 363, 365, 382 S.E.2d 95, 97 (1989).

134. Only three justices—Justices Blackmun, Marshall and Scalia—adhered to the position that the Court's retroactivity principles were of Constitutional import. *Beam*, 111 S. Ct. at 2449–51.

135. *Id.* at 2443.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 2443–44. *See* discussion of *Chevron Oil* test, *supra* note 132.

143. *Id.* at 2444.

144. *Id.*

145. *Id.*

146. *Id.* (quoting Johnson v. New Jersey, 384 U.S. 719, 731 (1966)). The Court mentioned the landmark decisions in Miranda v. Arizona, 384 U.S. 436 (1966), Escobedo v. Illinois, 378 U.S. 478 (1964) and Katz v. United States, 389 U.S. 347 (1967) as examples of

the antithesis, pure prospectivity, would dilute the incentive for criminal defendants to seek appellate review because it would deprive them of the benefit of an appeal, which is a reversal of their convictions.

In *Beam*, the Court also explained that it had abandoned selective prospectivity in the criminal context in *Griffith v. Kentucky*[147] because it "breache[d] the principle that litigants in similar situations should be treated the same," which is "a fundamental component of *stare decisis* and the rule of law generally."[148] The Court confirmed that the principles of *Griffith* should not be confined to the criminal arena.[149]

Further, the Court in *Beam* determined that once res judicata or statutes of limitation or repose close the courthouse doors, a new rule cannot reopen them. Apparently grappling with what could be perceived as a purely arbitrary distinction between the treatment of door-opening and door-closing rules, the Court ultimately landed on the basic tenet that "[p]ublic policy dictates that there be an end of litigation."[150]

In sum, in *Beam* the Supreme Court elaborated on what it had done in *Lampf*. In *Beam*, the Court concluded that "when the Court has applied a rule

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ones, which if fully retroactive, would have engendered administrative chaos.

147. 479 U.S. 314 (1987).

148. *Beam*, 111 S. Ct. at 2444. For a discussion of this issue, *see, e.g.*, von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409 (1924).

149. In the criminal context, cases that come to the Court directly and those that come in a collateral posture are treated differently. Specifically, although under *Griffith* "new rules must apply retroactively to all criminal cases pending on direct review," such "new rules will not relate back to convictions challenged on habeas corpus." *Beam*, 111 S. Ct. at 2446, citing Teague v. Lane, 489 U.S. 288 (1989). The Court reasoned that this disparate treatment of cases on direct appeal and those that come to the Court collaterally should not exist in the civil context, which has relatively few avenues for collaterally attacking final judgments.

The Court further opined that selective prospectivity is not as necessary in the civil as it once was in the criminal arena to create incentives to litigate. By way of example, the Court pointed out that even if the petitioners in *Bacchus Imports, Ltd. v. Dias* had lost on the retroactivity issue, they would still have gleaned some benefit from the litigation by being protected from the future imposition of unconstitutional taxes. The Court thus concluded that "[if] pure prospectivity may be had at all, ... its scope must necessarily be limited to a small number of cases" so that its possibility will not discourage those who wish to assail civil precedent. *Beam*, 111 S. Ct. at 2446.

150. *Beam*, 111 S. Ct. at 2447 (quoting Federated Dept. Stores v. Moitie, 452 U.S. 394, 401 (1981)). In dicta, the Court took another step by clarifying that the decision in *Beam* "does limit the possible applications of the *Chevron Oil* analysis, however irrelevant *Chevron Oil* may otherwise be to [the] case" and chiseled away at the *Chevron Oil* test. *Id.* See *supra* note 132 (discussion of *Chevron Oil* test). The Court stated:

> Nor, finally, are litigants to be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new .... Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case. 111 S. Ct. at 2447.

Justice O'Connor, however, believed that had the *Bacchus* Court applied the *Chevron Oil* test, it would have determined that the rule should not be applied retroactively; further, she stated that "[i]t should not have been applied even to the parties in that case. [A] mistake was made." 111 S. Ct. at 2456. Thus, according to Justice O'Connor, "the Court [was] compound[ing] the problem by imposing widespread liability on parties having no reason to expect it." *Id. See* David M. Mark, *Retroactivity of Statute of Limitations Rulings Under the Influence of* Jim Beam, 29 IDAHO L. REV. 361 (1992–93) (contending that retroactivity of statute of limitations rulings should still be decided under the *Chevron Oil* three-factor equitable test).

of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata."[151] Consequently, as a "matter of judicial mechanics," because in *Lampf* the Supreme Court chose retroactive application of the new statute of limitations, *Beam* required courts to apply that new rule to all parties similarly situated.

B. Anixter, Henderson *And The Subsequent Legislation*

Anixter v. Home-Stake Production Co.[152] and *Henderson v. Scientific-Atlanta, Inc.*,[153] were two cases in which federal courts had originally applied *Lampf* and *Beam* and found pending securities claims to be time-barred.

In *Anixter*, the Tenth Circuit had reversed a judgment in favor of investors because certain claims under the Securities Act of 1933 were time-barred.[154] When the Supreme Court issued *Lampf* and *Beam*, the Tenth Circuit directed a dismissal of the 10(b) claims as well.

Similarly, in *Henderson*, investors had lodged section 10(b) and rule 10b–5 claims against a corporation. The district court, however, applied *Lampf* and *Beam*, which were decided shortly before the *Henderson* trial. Recognizing that "*Beam* require[d] retroactive application of the new statute of limitations rule announced in *Lampf*"[155] the district court deemed the defendants entitled to summary judgment on the ground of untimeliness. The investors appealed.

After the Tenth Circuit directed the dismissal of the 10(b) claims in *Anixter* and while the appeal was before the Eleventh Circuit in *Henderson*, Congress enacted the Federal Deposit Insurance Corporation Improvement Act of 1991. Section 476 of that Act (hereinafter referred to as "section 27A") purported to amend the Securities Exchange Act of 1934 by adding the following provision:

> Sec. 27A. (a) Effect on Pending Causes of Action. The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991. (b) Effect on Dismissed Causes of Action. Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991 (1) which was dismissed as time barred subsequent to June 19, 1991, and (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.[156]

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151. *Beam*, 111 S. Ct. at 2448.

152. *In re* Home-Stake Production Co., 76 F.R.D. 337 (N.D. Okla. 1975), *rev'd*, Anixter v. Home-Stake Prod. Co., 939 F.2d 1420 (10th Cir. 1991), *order amended on denial of rehearing*, 947 F.2d 897 (10th Cir. 1991), *cert. granted and judgment vacated*, 112 S. Ct. 1658 (1992), *on remand*, 977 F.2d 1533 (10th Cir. 1992).

153. 971 F.2d 1567 (11th Cir. 1992).

154. 939 F.2d 1420 (10th Cir. 1991).

155. *Henderson*, 971 F.2d at 1569.

156. Pub. L. No. 102–242, § 476, 105 Stat. 2236, 2387 (1991). Theodore B. Olson, a member of the section of Litigation of the American Bar Association, has been quoted as saying that "the amendment is an 'unprecedented intrusion by Congress' into the judiciary's sphere of authority" and that a "decision upholding the law could invite mischief by Congress retroactively changing other court decisions.... It would create a wonderful field for lobbyists for people who

In *Anixter*, the Tenth Circuit, considering the investors' motion to reinstate, directed the parties to address the question of whether section 27A of the Securities Exchange Act of 1934 mandated the reinstatement of section 10(b) claims and specifically, whether it violated the separation of powers doctrine.[157] The defendants responded by relying primarily on *Klein* and urging the Tenth Circuit to find that "Congress [had] overstepped its legislative function to mandate judicial decisions."[158] Specifically, the defendants maintained that "the *Lampf* interpretation of § 9(e) of the 1934 ... Act was and remained the law for all cases pending or to be filed" and that the new enactment "did not change [the law,] but only directed the courts to ignore it for a designated class of cases."[159]

The Tenth Circuit, however, disagreed and concluded that the case before it "[was] not *Klein*" and that "[s]ection 27A [did] not direct courts to make specific factual findings or mandate a result in a particular case."[160] Instead, the court saw the intervening enactment as changing the law and as making that change applicable to pending cases. The Tenth Circuit, almost entirely avoiding the hurdle of distinguishing *Klein*, applied the Supreme Court's analysis in *Robertson* to section 27A, concluded that it was similar to the Compromise and reinstated the original verdict with regard to the relief awarded for violations of section 10(b) and rule 10b–5.[161]

The majority of the Eleventh Circuit in *Henderson* also rejected the defendants' argument that section 27A violated the separation of powers

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lose in court." Dan Oberdorfer, Lampf *Triggers Constitutional Debate: Plaintiff, Defense Counsel Clash Over Separation of Powers*, 18 LITIG. NEWS 1, 6 (1993). But others, like Peter van Lockwood, "who helped persuade the Tenth Circuit Court of Appeals that the statute is constitutional, respond[ed] that what [was] at stake [was] Congress's power to correct misinterpretations of its own statutes[,]" and that "[t]he Court was not making constitutional law here." *Id.* As van Lockwood put it, "[The Court] was trying to interpret what Congress did in the securities area. It seems imminently reasonable for Congress to respond." *Id.*

As the Fifth Circuit has stated:

> What little legislative history exists for Sec. 27A confirms that Congress intended to obliterate *Lampf* and *Beam* for all cases filed before the Court rendered *Lampf*. See, e.g., 137 CONG. REC. S17382 (daily ed. Nov. 21, 1992)(Sen. Riegle, Sec. 27A sponsor) ("The Language of the bill is designed to return plaintiffs and defendants to exactly the position they had on June 19, 1991," the day before the Court rendered *Lampf*.); id. at H11813 (daily ed. Nov. 26, 1991)(Rep. Markey) ("The language ... unambiguously reverses the *Lampf* ruling's application of the 1–year and 3–year statute of limitations....").

Pacific Mutual Life Insurance Co. v. First Republicbank Corp., 997 F.2d 39, 43-44 (5th Cir. 1993). For a discussion of the legislative history of section 27A, *see* Anthony Michael Sabino, *A Statutory Beacon or a Relighted* Lampf*? The Constitutional Crisis of the New Limitary Period for Federal Securities Law Actions*, 28 TULSA L.J. 23, 27-30 (1992).

157. Specifically, the Tenth Circuit directed the parties to address the decisions in Bank of Denver v. Southeastern Capital Group, Inc., 789 F. Supp. 1092 (D. Colo. 1992) and TGX Corp. v. Simmons, 786 F. Supp. 587 (E.D. La. 1992), which had found section 27A to be unconstitutional as a violation of the separation of powers doctrine.

158. *Anixter*, 977 F.2d at 1544.

159. *Id.*

160. *Id.* In Cooperativa De Ahorro y Credito Aguada v. Kidder, Peabody & Co., 993 F.2d 269, 272 (1st Cir. 1993), the First Circuit also rejected the argument that Section 27A was constitutionally infirm and without discussion followed the reasoning in *Anixter*. *See also* Cooke v. Manufactured Homes Inc., 998 F.2d 1256 (4th Cir. 1993) (without analysis, the court merely adopts the reasoning of the other circuits that have deemed section 27A to be constitutional).

161. *Anixter*, 977 F.2d at 1546. Citing Chase Securities Corp. v. Donaldson, 325 U.S. 304, 315-16 (1945), the Tenth Circuit rejected the defendants' additional arguments that Section 27A denied them due process and equal protection. *See infra* note 165.

doctrine. The court responded to the defendants' contention that Congress had "sought to render ... [*Lampf*] a nullity as a binding precedent on the lower federal courts . . .,"[162] as follows:

> Assuming this is true, we see nothing wrong in it. The *Lampf* Court was simply interpreting the Securities Exchange Act of 1934. If Congress disagrees with the Supreme Court's interpretation, it is free to amend the statute as it sees fit. Indeed, this is how our federal system is designed to operate.[163]

The majority thus eschewed *Klein*, rejected the invitation to distinguish *Robertson* on the basis that the Compromise "had both retroactive and prospective effect whereas section 27A ha[d] only a retroactive effect,"[164] and remanded the case with instructions to reinstate the action.[165]

Although Judge Wellford concurred with the *Henderson* majority in its rejection of the Fifth Amendment challenges to section 27A,[166] he dissented on the separation of powers issue. As Judge Wellford saw it, "[t]he apparent legislative purpose of section 27A 'was to return to the *status quo* as it existed prior to *Lampf*.'"[167] In his view, Congress had "directed that the law that existed immediately before *Lampf* should be applied to pending cases, applying its own principles of retroactivity."[168] Thus, he would "find the congressional enactment in controversy, designed to affect pending litigation and to overrule Supreme Court decisions, to be unconstitutional."[169] Significantly, Judge Wellford alone looked to *Klein* and admonished that section 27A is what *Klein* proscribes—a Congressional act which "set[s] out specific rules of decision in pending cases."[170]

C. Gray *And The Principles Of Retroactivity*

The Ninth Circuit decided *Gray v. First Winthrop Corp.*[171] in the wake of *Henderson* and *Anixter*. Since the three cases involved in *Gray* were pending in the district courts when the Supreme Court decided *Lampf* and *Beam*, they

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162. *Henderson*, 971 F.2d at 1571.
163. *Id.* at 1571–72.
164. *Id.* at 1573. In Pacific Mut. Life Ins. Co., v. First Republicbank Corp., 997 F.2d 39, 53 (5th Cir. 1993), the Fifth Circuit expressly adopted the analysis of the Eleventh Circuit in *Henderson* and determined that Section 27A was not "an affront to ... Article III authority." In Berning v. A.G. Edwards & Sons, Inc., 990 F.2d 272, 278 (7th Cir. 1993), the Seventh Circuit expressly "joined" the Tenth and Eleventh Circuits in their rejection of the argument that Section 27A "falls afoul of *Klein's* prohibition against ... legislative interference in the judicial sphere." Although the Seventh Circuit discusses the issue, it essentially reiterates the reasoning of the courts in *Henderson* and *Anixter*.
165. In *Henderson*, the defendant also challenged the legislation on Fifth Amendment grounds: first, it argued that the "Act's retroactive application violate[d] its right to due process because the Act's purpose [was] not furthered by rational means." 971 F.2d at 1573. Second, it argued that the Act deprived it of equal protection under the law because it was "not rationally related to the achievement of legitimate government purposes since it treat[ed] citizens of different circuits differently and distinguishe[d] between persons who filed suit before June 19, 1991 and those who filed suit after that date." *Id.* The court rejected both arguments. *See also* Pacific Mut. Life Ins. Co. v. First Republic bank Corp., 997 F.2d 39 (5th Cir. 1993) (Section 27A does not violate due process clause).
166. *See supra* note 165.
167. *Henderson*, 971 F.2d at 1575.
168. *Id.*
169. *Id.* at 1575-76.
170. *Id.* at 1576.
171. 989 F.2d 1564 (9th Cir. 1993).

were dismissed as untimely. After the enactment of section 27A, however, the district courts denied reinstatement on the ground that the new legislation was unconstitutional.[172]

On appeal, the Ninth Circuit, explaining that Congress "may ... override a judicial interpretation of a statute," stated that "it is of no constitutional consequence that section 27A affects, or is even directed at, a specific judicial ruling so long as that legislation modifies the law" and concluded that section 27A "changes the underlying substantive law."[173] The change in law, according to the court, was the modification of the "retroactive effect" of *Lampf*.[174]

Also, the court dismissed the theory that "Congress had to couple section 27A's retroactive provision with a prospective change in the law" to satisfy the *Klein* requirement that it "change ... the underlying law."[175] In this respect, the reasoning implodes as the court spirals from its determination that retroactive application is valid as long as there is a change in the law to its overall conclusion that the change in the law *is* its retroactive effect.

Further, the court rejected the argument that section 27A violates the separation of powers principle by "'impermissibly directing the courts to reverse final judgments.'"[176] The court reasoned that "[b]ecause none of the cases here have completed their journey through the appellate process, Congress has the authority to change the underlying substantive law by altering the statute of limitations in a way that affects those pending cases."[177]

Finally, the Ninth Circuit repudiated the assertion that section 27A was an unconstitutional violation of the principles of retroactivity announced in *Beam*. According to the Ninth Circuit, Congress could properly undermine the *Beam* principles because the *Beam* majority did not determine that the Constitution was what compelled the retroactivity principles and instead framed the issue as one of pure choice of law. Thus, the Ninth Circuit concluded that since "*Beam's* retroactivity principles [were] not constitutionally based, they

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172. In two cases, the same district court had concluded that section 27A was unconstitutional because:

> (1) it violated *Klein's* separation of powers principles by directing a result in pending cases without changing the underlying substantive law; (2) it impermissibly reversed final judgments of federal courts; and (3) it impermissibly contravened the Court's retroactivity principles in *Beam*, which the district court concluded were constitutionally based.

Id. at 1567, citing *In re* Brichard Securities Litigation, 788 F. Supp. 1098 (N.D. Cal. 1992). In *Gray*, the district court concluded that there was no violation of the *Klein* test because "Congress had changed the underlying substantive law," but found that the provision violated the retroactivity principles in *Beam*, "which the court deemed to be constitutionally based." 989 F.2d at 1567.

173. *Id.* at 1568.

174. *Gray*, 989 F.2d at 1569.

175. *Id.* at 1570.

176. *Id.* at 1570 (citing In Re Brichard Sec. Litig., 788 F. Supp. 1098, 1106 (N.D. Calif. 1992)).

177. 989 F.2d at 1571. The court cited United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) ("[I]f, subsequent to the judgment and before the decision of the appellate court, a law intervenes and pofitively [sic] changes the rule which governs, the law must be obeyed, or its obligation denied."). *See also* Pacific Mut. Life Ins. Co., v. First Republicbank Corp., 997 F.2d 39, 54 (5th Cir. 1993) and Berning v. A.G. Edwards & Sons, Inc., 990 F.2d 272, 277 (7th Cir. 1993) in which the Fifth and Seventh Circuits abided by the same analysis.

[were] not immune from legislative modification or revision."[178]

D. Plaut *And Congressional Interference With Settled Judgments*

After *Henderson, Anixter* and *Gray*, the Sixth Circuit decided in *Plaut v. Spendthrift Farm, Inc.*[179] that section 27A "violates the doctrine of separation of powers and deprives the defendants of their vested rights in the court's final judgment."[180] Although an intrepid departure from the approach of the other circuits, the *Plaut* analysis disappointingly does not define the test of when Congress impermissibly intrudes upon judicial power.

In *Plaut*, the district court, applying *Lampf* retroactively, dismissed the shareholders securities claims with prejudice and the shareholders did not pursue what they believed would be a meritless and sanctionable appeal. After the passage of the FDIC Improvement Act, the district court denied reinstatement of the claims, finding section 27A to be unconstitutional as applied. In affirming, the Sixth Circuit based its decision on "the rule that Congress may not retroactively disturb final judgments of the Federal courts"[181] and on the distinctions between the case before it and the decisions in *Wheeling Bridge*,[182] *Sioux Nation*[183] and *Robertson*[184].

The government, the intervening party, had cited *Wheeling Bridge* in support of its argument that section 27A should be deemed constitutional because "'the Supreme Court has explicitly upheld a wide range of federal and state statutes that have divested litigants of final judgments.'"[185] In explaining that the government had "completely mischaracterize[d]" *Wheeling Bridge*, the Sixth Circuit focused primarily on the unique nature of injunctive relief, which Pennsylvania had at first sought and obtained in *Wheeling Bridge*.[186] As the court put it, "injunctive relief necessarily depends on a continuing affront to one's legal rights, while legal relief depends only on a judicial determination that one's legal rights have been violated with resulting cognizable damage to the claimant."[187] Thus, in *Wheeling Bridge*, "Congress could permissibly change the law so as to deprive a party of its right to injunctive relief."[188] Specifically, the injunctive relief in *Wheeling Bridge*, "which entitled [Pennsylvania] to demand that the builders alter or destroy the bridge as necessary to preserve Congress' mandate that there be unhindered navigation of

178. *Gray*, 989 F.2d at 1572. In Berning v. A.G. Edwards & Sons, Inc., 990 F.2d 272, 277 (7th Cir. 1993), the court also determined that the *Beam* "bar against selective prospectivity ... is [not] a constitutionally mandated rule" and thus, section 27A's conflict with *Beam* is permissible. The Seventh Circuit also opined that "[e]ven those Justices who discerned a constitutional bar to selective prospectivity were concerned solely with the limits on the *judicial* power under Article III not with limits on the legislative power under Article I." *Id.* at 277-78.

179. Plaut v. Spendthrift Farm, Inc., 1 F.3d 1487 (6th Cir. 1993).

180. *Id.* at 1490.

181. *Id.* at 1493. For this rule, the Sixth Circuit cited Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) and discusses it at length. The court's reasoning in *Plaut* resembles the due process analysis that other circuits have rejected. *See supra* notes 161 and 165.

182. Pennsylvania v. The Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855).

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

184. Robertson v. Seattle Audubon Soc'y, 112 S. Ct. 1407 (1992).

185. Plaut, 1 F.3d at 1494.

186. *Id.*

187. *Id.* at 1495.

188. *Id.*

the Ohio River, had no force once Congress had redefined the river's navigability to include the presence of the bridge."[189] As such, *Wheeling Bridge*, according to the Sixth Circuit, constitutes a reaffirmation of the "general rule against legislative modification of settled judgments."[190]

The shareholders and the government had also cited *United States v. Sioux Nation of Indians*[191] in support of its position that Congress can re-open final judgments of the federal courts. As the Sixth Circuit viewed it, the decision in *Sioux Nation* narrowly recognized Congress' power "'to waive the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States'" and "in no way cast doubt on the continuing vitality of the [proscription of Congressional interference with final judgments]."[192] As such, *Sioux Nation* recognizes Congress' power "to ratchet the Government's liability to claimants in favor of private parties," but does not permit "Congress to act as a judge in its own case to decide a dispute in its favor."[193]

Further, the Sixth Circuit was not impressed with the shareholders and government's reliance on *Robertson* because in *Robertson* Congress did not "compel the Federal courts to vacate, revise or reconsider final judgments rendered in cases between private parties."[194] Specifically, "[t]he cases Congress named ... in the statute in [*Robertson*] were pending cases, not decided cases."[195] In pointing out, however, that in *Robertson* the petitioners did not assail the statute as an impermissible interference with settled judgments but instead as a violation of the *Klein* doctrine, the Sixth Circuit conveyed its own reluctance to revisit *Klein* or pass on the vitality of the *Klein* test.[196] That is, the Sixth Circuit essentially extricated itself from the constitutional dilemma before it by narrowing the issue into what it viewed as a *Hayburn* case situation where Congress' putative offense was an attempt to upset a settled federal court judgment.[197]

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189. *Id.*

190. *Id.* The Sixth Circuit also "reject[ed] the Government's argument, based on Congress's power to amend statutes of limitation, that '[a] judgment resting on a statute of limitations is no more "fundamental," and no more immune from legislative revision, than the statute of limitations itself.'" *Id.* at 1495-96. The court also said that it could not find a single federal case outside of the section 27A controversy holding that a decision adjudging a claim to be time-barred is not a final judgment and distinguished Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945) on the basis that "the Minnesota courts (whence the appeal arose) had not finally determined whether the plaintiff's case was time-barred." *Id.* at 1496.

191. Plaut, 1 F.3d at 1497 (quoting United States v. Sioux Nation of Indians, 448 U.S. 371, 396-97 (1980). *See supra* note 81.

192. Plaut, 1 F.3d at 1497.

193. *Id.* at 1498.

194. *Id.* at 1497.

195. *Id.* Judge Keith concurring and dissenting in part, wrote separately to explain that "section 27A(b) [does not] violate[] separation of powers principles in all contexts." *Id.* at 1499. Thus, according to Judge Keith, "[t]he issue of finality is only relevant in this case because the plaintiffs did not appeal the district court's initial dismissal of their claim." *Id.*

196. Implicit in the Sixth Circuit's approach to *Robertson* is the notion that Congress cannot violate Article III by interfering with a pending or *non*-final decision. The lamentable irony is that the Sixth Circuit decision contains an extensive discussion of the intent of the Framers and the paramount importance of the separation of powers doctrine.

197. Although the United States Supreme Court has not yet addressed the issue of the constitutionality of section 27A, Justice Kennedy, who delivered the opinion of the Court, mentioned it approvingly in Musick, Peeler & Garrett v. Employers Insurance of Wausau, 113 S. Ct. 2085, 2089 (1993) ("Congress intervened by limiting the retroactive effect of our

E. Separation Of Powers Doctrine After Anixter, Henderson, Gray, *And* Plaut

The *Anixter*, *Henderson* and *Gray* trilogy became a kind of judicial harakiri. In *Henderson*, the Eleventh Circuit held that a Congressional act does not violate the separation of powers doctrine as long as "[*a*]*ny* effect [it has] on pending cases is solely a result of a change in the underlying law."[198] In so doing, the court contravened one of the basic premises in *Klein*, that the means does not justify the ends, and that separation of powers analysis entails the scrutiny of the effect of the legislation.

In *Anixter*, the Tenth Circuit, isolating the language in *Klein*, which prohibits Congress from "prescrib[ing] a rule for the decision of a cause in a particular way,"[199] determined that what made the 1870 Act in *Klein* invalid was that it ordered:

> (1) the Court of Claims to find evidence of a Presidential pardon or amnesty inadmissible for claimants seeking redress under the Abandoned and Captured Property Act; (2) the Supreme Court to dismiss for lack of jurisdiction any appeal from a Court of Claims judgment based on the claimant's reliance on a pardon; and (3) the Court of Claims was to treat a claimant's receipt of a Presidential pardon as conclusive evidence of disloyalty.[200]

While the Tenth Circuit appears to acquiesce in the notion that the Act invalidated in *Klein* was so precisely tailored to address the issues in the pending matter, it omitted any acknowledgment of parallels between the 1870 Act in *Klein* and section 27A. But in a similar vein, it could be said that section 27A, like the 1870 Act, commands the courts to: one, ignore the decisions in *Lampf* and *Beam* for 10(b) actions commenced on or before a certain date; two, apply the limitations period in the jurisdiction which was in effect before *Lampf*; and three, reinstate 10(b) claims which were dismissed as time-barred after June 19, 1991 if the action was commenced on or before that date, if the claims were timely under the then controlling time-frame and if the reinstatement motion is filed within sixty days of section 27A's enactment. As such, section 27A, like the 1870 Act, can be described as affecting the outcome of pending matters and fitting glove-like around a certain class of cases and controversies.

Also in *Anixter*, almost nonchalantly tucked into a footnote, is a putative distinction between section 27A and the Act in *Klein*. Significantly though, inherent in the court's statement that "'[n]otably absent from § 27A, unlike the statute held unconstitutional in *Klein*, is a specific directive as to what evidence a court may consider in determining the timeliness of the suit's filing or the case's merits,'"[201] is the notion that there still exists some sacred province into which Congress may not tread. Thus, implicitly according to the court in

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decision, and the caution in its intervention is instructive .... Congress did no more than direct the applicable 'limitation period for any private civil action implied under ... [§ 10(b) of the 1934 Act] that was commenced on or before ... [the day prior to issuance of *Lampf, Pleva*].'").

198. *Henderson*, 971 F.2d at 1573 (emphasis added).

199. *Anixter*, 977 F.2d at 1545 (quoting United States v. Klein, 80. U.S. (13 Wall.) at 146).

200. *Id.* at 1544–45.

201. *Id.* at 1545 n.6 (quoting Axel Johnson, Inc. v. Arthur Andersen & Co., 790 F. Supp. 476, 479 (S.D.N.Y. 1992)).

Anixter, there is an inviolable sphere of judicial activity, which in *Klein* was the function of determining an evidentiary matter, and it is this factor that makes the Act in *Klein* offend the separation of powers doctrine.

Ironically, the Tenth Circuit's attempted illumination of a contrast between the 1870 Act and section 27A turns into an inadvertent disclosure of the real common denominator—that is, an aspect shared by both enactments and one that imperils judicial integrity. Section 27A purports to freeze the combined effect of *Lampf* and *Beam* for certain 10(b) claims. In *Lampf*, the Supreme Court, however, did not just determine the uniform statute of limitations period for federal securities claims, but further rejected the applicability of equitable tolling principles. Thus, in purporting to command the courts to treat *Lampf* as a nullity for certain pending cases, section 27A effectually transforms itself into a surrogate tolling provision for claims that would otherwise be subject to dismissal as untimely under *Lampf*. As such, section 27A infiltrates that domain within the judicial process that involves the formulation of principles governing not just time, but the effect of time on judicial decisions.

In *Beam*, the Supreme Court, describing it as a "matter purely of judicial mechanics" or as "'a choice ... between the principle of forward operation and that of relation backward,'"[202]formulated a principle of retroactivity. This principle, that "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata[,]"[203] also implicates the governance of time and its impact on judicial decisions. The *Beam* principle subsumes still another concept, one of basic fairness, the "fundamental component of stare decisis," or the "principle that litigants in similar situations should be treated the same."[204] Thus, in *Beam*, the very process of deriving the principle of judicial retroactivity, assimilates the "basic judicial tradition" of not "simply pick[ing] and choos[ing] from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law."[205]

Consequently, in commanding the courts to treat the *Beam* principle of "judicial mechanics"[206] as if it did not exist for a particular class of pending cases, section 27A plunges deep into that judicial domain, which involves the formulation of principles with respect to treatment of time. Further, section 27A, which exempts some litigants from the *Beam* rule, strikes at the very root of the principle of retroactivity and in so doing, shatters the bedrock precept of fairness or the concept that "litigants in similar situations should be treated the same."[207] As discussed above, when describing judicial power, courts and commentators have delineated a "judicial sanctuary"[208] or a "sphere[] of activity so fundamental and so necessary to a court, so inherent in its very nature as a court that to divest it of its absolute command within [this] sphere[] is to make

202. *Beam*, 111 S. Ct. at 2443 (quoting Great Northern R. Co. v. Sunburst Oil Refining Co., 287 U.S. 358, 364 (1932)).
203. *Beam*, 111 S. Ct. at 2448.
204. *Id.* at 2444.
205. *Id.* (quoting Desist v. United States, 394 U.S. 224, 258-59 (1969)).
206. *Id.* at 2443.
207. *Id.* at 2444.
208. *See supra* note 20.

meaningless the very phrase *judicial power*."[209] Within this sphere of Article III activity has always been the matters pertaining to judicial management of time.[210] The principle of retroactivity that emerges in *Beam* is of this genre. Moreover, it is as if the court in *Gray* intuited the real offense of section 27A by acknowledging that "even if *Beam* were constitutionally based, ... that case speaks only to the power of the judiciary under Article III."[211]

As explained above, one of the extremely important factors in *Klein* was that the unconstitutional Act directed the decision in a pending case through the infiltration of a domain that has been viewed as a traditionally judicial one. In approving a Congressional Act, which also insinuates itself into the sacred judicial realm, the courts in *Anixter*, *Henderson* and *Gray* have devastated what little remained of the partition between Congressional and judicial power.

Although the court in *Plaut* invalidated section 27A on separation of powers grounds, it identifies only one real infirmity—Congressional interference with a vested right in a final judgment. Because of this narrow fixation with this one aspect of the legislation and its shunning of not only the *Klein* doctrine but also the legislation's impact on *Beam's* principles of retroactivity, the *Plaut* decision is also demolitionary. The decision, moreover, appears to disavow that when intervening legislation infiltrates a domain that is and can be viewed as a traditionally judicial one, such infiltration can and does occur in *pending* litigation. Thus, *Plaut* too, mostly through silence, constitutes a judicial imprimatur on the demise of judicial power.

CONCLUSION

When faced with the question of when Congress impermissibly intrudes on judicial power, the Court in *Klein* endorsed an approach that requires the examination of "the statute that Congress *in fact* enacted"[212] and the *effect* that the legislation has on the pending case.[213] Although one aspect of the Act in *Klein* was that it purportedly did not amend the law, the Act was also precisely tailored to address the issues in a pending matter. Further, the Act favored the government as a party and encroached on what has been viewed as traditionally

209. *See* Levin & Amsterdam, *supra* note 20, at 30. These commentators expand upon this by suggesting that "there is a third realm of judicial activity, neither substantive nor adjective law, a realm of 'proceedings which are so vital to the efficient functioning of a court as to be beyond legislative power.'" *Id.* at 31–32, citing *Ex parte* Foshee, 246 Ala. 604, 607, 21 So. 2d 827, 829 (1945).

210. *See* Levin & Amsterdam, *supra* note 20, at nn.148 & 155 (One "hampering condition" imposed on the judiciary by Congress which "clearly offends the constitutional scheme of the separation of powers" is a time limit within which the judiciary must act.). *See also* HENRY ROTTSCHAEFER, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 55–56 (1939); Landis v. North Am. Co., 299 U.S. 248, 254 (1936) (Justice Cardozo's statement that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.").

211. *Gray*, 989 F.2d at 1572. *See also* Berning v. A.G. Edwards & Sons, Inc., 990 F.2d 272, 277–78 (7th Cir. 1993) ("Even those Justices who discerned a constitutional bar to selective prospectivity were concerned solely with the limits of the *judicial* power under Article III, not with limits on the legislative power under Article I.").

212. Seattle Audubon Society v. Robertson, 914 F.2d 1311, 1317 (9th Cir. 1990), *rev'd* 112 S. Ct. 1407 (1992) (emphasis added).

213. According to the Court in *Klein*, 80 U.S. (13 Wall.) at 145, the Act did not merely deny "the right of appeal," but attempted "to withhold appellate jurisdiction ... as a means to an end."

a judicial domain.

The Supreme Court's decision in *Robertson* either overrules or substantially erodes *Klein*. Although purporting to distinguish the Compromise from the Act in *Klein* on the basis that the Compromise amended the law, the Court approved legislation, which was practically the 1870 Act's doppelganger. In affecting the outcome of pending matters, the Compromise, like the 1870 Act, was precisely tailored to address the issues in the cases. The Compromise was also designed to favor the government as a litigant and arguably infiltrated the sacred domain by "direct[ing] the court to ... make certain factual findings."[214]

Also, the Court's approach in *Robertson* is diametrically opposed to the one the Court advances in *Klein*. In *Robertson*, the Court did not limit its ken to "the statute that Congress *in fact* enacted,"[215] but instead validated it on the basis of a statute Congress *might* have enacted. Moreover, the implicit holding in *Robertson*—that an enactment can direct decisions in pending cases as long as it can be said to amend the law—is a repudiation of the *Klein* approach of scrutinizing the *effect* of the challenged statute. Thus, the distillation of *Robertson* is the inane proposition that as long as legislation is legislation, then it is properly legislation.

The reasoning in *Anixter*, *Henderson* and *Gray* fosters the complete demolition of what could conceivably remain of the membrane between Congressional and judicial power. It is now the law in the Eleventh Circuit that legislation does not offend Article III as long as "[*a*]*ny* effect it has on pending cases is solely a result of a change in the underlying law."[216] Although in the Tenth Circuit, a specific "directive as to what evidence a court may consider"[217] might not survive a separation of powers challenge, a more insidious incursion into another purely judicial domain could emerge with a judicial blessing. Now in the Ninth Circuit, a Congressional mandate to ignore a principle which "speaks *only* to the power of the judiciary under Article III" is valid.[218] The invalidation of the legislation in *Plaut* is an illusory advancement at best. It now appears to be the law in the Sixth Circuit that only a Congressional interference with a vested right in a final judgment violates Article III or stated otherwise, that *Hayburn* has somehow swallowed *Klein*. It also is arguably the law in the Sixth Circuit that Congress cannot ever impermissibly intrude on a pending or non-final matter. As such, all of the circuits have really inaugurated an era of self-demise.

Significantly, we probably need to remember that the Framers "feared Congress and trusted judges."[219] But even if we do not abide by this lauding of one branch over another, we more likely assent to the aphoristic resonance of Madison's statement that "[t]he accumulation of all powers ... in the same hands ... may justly be pronounced the very definition of tyranny."[220] A separation of powers test, which allows a Congressional act to intrude on judicial power as long as it can be construed as amending or repealing the law is not merely a nullity, but an invitation to Congress to aggrandize itself into *The* Court of Last

214. *Robertson*, 914 F.2d at 1316.
215. *Id.* at 1317 (emphasis added).
216. *Henderson*, 971 F.2d at 1573 (emphasis added).
217. *Anixter*, 977 F.2d at 1545 n.6.
218. *Gray*, 989 F.2d at 1572 (emphasis added).
219. BERGER, *supra* note 12, at 119. *See also* CHOPER, *supra* note 12, at 67–68.
220. THE FEDERALIST NO. 47, *supra* note 3, at 329.

Resort.

The test I propose is an attempt to empower the courts with discretion, which is especially appropriate here because the Article III inquiry entails nothing less than the assertion of self-identity. When an intervening enactment is challenged as an impermissible intrusion on judicial power, the test requires the courts to examine "the statute that Congress *in fact* enacted"[221] and its effect on pending litigation. If the enactment directs the decision in a pending case without amending or repealing the law, it is unconstitutional. Partly because, as the *Klein* case and its progeny reveal, it is often not clear whether an enactment actually amends or repeals the law, the test should *not* depend on that one attribute.[222] Amendment or repeal should not be the axis of the separation of powers test also because, as the amicus put it in *Robertson*, even a change in the law can be unconstitutional "if the change [sweeps] no more broadly, or little more broadly, than the range of applications at issue in the pending cases."[223]

Under the test I propose, intervening legislation, which amends or repeals the law and affects the outcome in pending cases, can nevertheless violate the separation of powers doctrine if it is so precisely tailored to address the issues in the pending matter that it can be said to fit glove-like around a live case or controversy[224] *and* if at least one of the following factors is met.

The first factor is that the legislation has the effect of favoring the government as a party.[225] This factor is, of course, important not only because as one theorist stated, "the notion that no man can be judge in his own cause was among the earliest expressions of the rule of law in Anglo-American jurisprudence,"[226] but also because the image of government securing for itself a victory by a Congressional change in rules harks back to the fear of oppression, which underlies the constitutional structure.

The second factor is that the intervening legislation infiltrates a domain that is and can be viewed as a traditionally judicial one.[227] This domain need not

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221. *Robertson*, 914 F.2d at 1317 (emphasis added).

222. See the Ninth Circuit's discussion of the purported distinction between the legislation in *Klein* and *Wheeling Bridge*, *Id.* at 1314–15, and between the legislation it had upheld in *Stop H–3* and the Compromise, *Id.* at 1316–17.

223. *Robertson*, 112 S. Ct. at 1415.

224. The enactments in *Klein*, *Robertson* and section 27A fit this description.

225. While the legislation in *Klein* and *Robertson*, of course, satisfy this criterion, it can be argued that section 27A, which is designed to favor private 10(b) parties, should also be deemed to satisfy it. While the text of section 10(b) does not provide for private claims, such claims have been "implied under the statute for nearly half a century." Lampf v. Gilbertson, 111 S. Ct. 2773, 2779 (1991). It is basic that such private actions under the federal securities laws supplement those brought by the SEC and the Department of Justice because "[l]imited resources prevent the government from detecting and prosecuting all violations of the federal securities laws." J. William Hicks, *Securities Regulations: Challenges in the Decades Ahead*, 68 IND. L.J. 791, 807 (1993). Thus, it could be argued that section 27A's effect of favoring private plaintiffs who are functioning as private attorneys general or constitute the surrogates of government, is tantamount to favoring the government as a party. Also, the legislation, upheld in United States v. Sioux Nation of Indians, 448 U.S. 371 (1980), could be distinguished on the basis that the intervening enactment was not an attempt on the part of Congress to decide the controversy in the government's favor. *Id.* at 405. *See* discussion of *Sioux Nation*, *supra* note 81. *See also* analysis of *Sioux Nation* in *Plaut*, 1 F.3d 1487, 1497–98 (6th Cir. 1993).

226. Verkuil, *supra* note 3, at 305. *See also* Field, *supra* note 69, at 955 & n.318.

227. Although the enactment in *Klein* met this second factor and I submit that section 27A does as well, it is not as clear whether the *Compromise* in *Robertson* infiltrates a domain that is and can be viewed as a traditionally judicial one. The Ninth Circuit's description of the

be confined to the one, upon which the Act in *Klein* intruded—the judicial function of determining an evidentiary matter. The sacred domain can also be a newly fledged principle, like the *Beam* one of retroactivity, which emanates from Article III. Significantly, in *Beam*, the Court's formulation of its principle of retroactivity imbibed basic notions of fairness or "that litigants in similar situations should be treated the same."[228] As such, rules, which emerge from the core of Article III, tend to ensue from the rudiments of fairness and due process and bear safeguards of individual liberty. Thus, a test, which protects the judiciary from an impermissible Congressional intrusion, will also ward off the contraction of individual liberties.[229]

I embarked on this article with an allusion to Browning's Caliban who, personifying the inevitably corrupting effect of unchecked power, lets some thralls pass while arbitrarily maiming one or slaying another. I will close with the thought that the separation between Congressional and judicial power should be as indelible as Browning's poetic creation.

Compromise as "direct[ing] the court to ... make certain factual findings under existing law in connection with two cases pending in federal court," 914 F.2d at 1316, suggests that a court could interpret the Compromise as meeting the second factor in the proposed test.

228. *Beam*, 111 S. Ct. at 2444.

229. *See* Leahy, *supra* note 14, at 241. Leahy states:

> It is hard to believe, in this day and age, that a Supreme Court decision on separation of powers is a threat to individual rights and freedoms. Nevertheless, it is, and for several reasons. Separation of powers provides the governmental structure that prevents tyranny, or dictatorships. The lack of tyranny allows for the development and embellishment of individual rights.

Id. See also MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 52–53 (Yale University Press 1982); Brown, *supra* note 6; Essay, *Separation of Powers and Federalism: Their Impact on Individual Liberty and the Functioning of Our Government*, 29 WM. & MARY L. REV. 635 (1988).