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Congress's Power over Courts: Jurisdiction Stripping and the Rule of *Klein*

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Summary

Article III of the Constitution establishes the judicial branch of the federal government. Notably, it empowers federal courts to hear "cases" and "controversies." The Constitution further creates a federal judiciary with significant independence, providing federal judges with life tenure and prohibiting diminutions of judges' salaries. But the Framers also granted Congress the power to regulate the federal courts in numerous ways. For instance, Article III authorizes Congress to determine what classes of "cases" and "controversies" inferior courts have jurisdiction to review. Additionally, Article III's Exceptions Clause grants Congress the power to make "exceptions" and "regulations" to the Supreme Court's appellate jurisdiction. Congress sometimes exercises this power by "stripping" federal courts of jurisdiction to hear a class of cases. Congress has gone so far as to eliminate a court's jurisdiction to review a particular case in the midst of litigation. More generally, Congress may influence judicial resolutions by amending the substantive law underlying particular litigation of interest to the legislature.

Congress has, at times, used these powers to influence particular judicial outcomes, raising concerns about whether Congress is acting in violation of the doctrine of separation of powers by interfering with the judiciary's power to resolve cases and controversies independently. In *Marbury v. Madison,* the Supreme Court announced that the Constitution, by granting the judicial branch the power to decide "cases" and "controversies," in turn grants the judiciary the power to "say what the law is." Sometimes competing with this principle is the understanding that the Constitution empowers a democratically elected branch—Congress—to decide what classes of cases the federal courts may review, as well as to enact legislation that courts may need to interpret.

This report highlights a series of Supreme Court rulings that have examined separation-of-powers-based limitations on the Exceptions Clause, congressional jurisdiction stripping, and the ability of Congress to amend laws with the purpose of directly impacting litigation. The Court's jurisprudence largely begins with the Reconstruction-era case, *United States v. Klein*, and leads to *Patchak v. Zinke*, from the October 2017 term.

In *Klein,* the Supreme Court generally held that Congress may not, by limiting appellate jurisdiction, dictate a "rule of decision" that undermines the independence of the judiciary. But in the 2016 opinion *Bank Markazi v. Peterson*, the Court appeared to minimize *Klein*'s significance, noting that while Congress cannot invade the judicial role by dictating how courts rule in a particular case, Congress has significant authority to amend the substantive law in a manner that may alter the outcome of pending litigation, *even if* the amendment specifically mentions a particular case. The *Patchak* litigation highlighted the potential for tension between the judiciary's and legislature's powers when Congress removes a class of cases from federal jurisdiction in a way that impacts pending litigation. The Supreme Court ultimately issued a fractured 4-2-3 opinion, adding little clarity to this complex area of the law. Although nine Justices agreed that Congress cannot dictate the outcome of a particular case, for instance, by enacting a law that says, "In *Smith v. Jones*, Smith wins," a majority of Justices could not agree on when a facially neutral law that functionally ends pending litigation in the favor of one party violates Article III.

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Article III of the Constitution establishes the judicial branch of the federal government.[1] Notably, it empowers federal courts to hear "cases" and "controversies."[2] Additionally, the Constitution creates a federal judiciary with significant independence, providing federal judges with life tenure and prohibiting diminutions of judges' salaries.[3] In presiding over cases and controversies, federal courts possess significant power over the citizenry's life, liberty, and property,[4] and that power can be exercised in a manner that could be in tension with the interests of the legislative branch. One way Congress potentially can temper the judiciary's influence is by regulating federal court jurisdiction. The Exceptions Clause in Article III grants Congress the power to make "exceptions" and "regulations" to the Supreme Court's appellate jurisdiction.[5] And more generally, with the power to create lower federal courts, Congress possesses the power to eliminate the jurisdiction of the lower courts.[6] Congress sometimes exercises this power by "stripping" federal courts of jurisdiction to hear a class of cases. Indeed, Congress has even eliminated a court's jurisdiction to review a particular case in the midst of litigation.[7] More generally, Congress may influence judicial outcomes by amending the substantive law underlying particular litigation of interest to the legislature.[8]

These practices have, at times, raised separation-of-powers concerns about whether the legislative branch is impermissibly interfering with the judicial power to resolve cases and controversies independently.[9] Long ago in *Marbury v. Madison,* the Supreme Court announced that the Constitution, by granting the judicial branch the power to decide "cases" and "controversies," necessarily grants the judiciary the power to "say what the law is."[10] Sometimes butting up against this principle is the understanding that "Congress has the power (within limits) to tell the

[1] U.S. CONST. art. III.

[2] *Id.* § 2.

[3] *Id.* § 1 ("The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.").

[4] *See, e.g.,* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc. 454 U.S. 464, 473 (1982) ("The exercise of judicial power ... can ... profoundly affect the lives, liberty, and property of those to whom it extends.").

[5] *See* U.S. CONST. art. III, § 2.

[6] *See* Sheldon v. Sill, 49 U.S. 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers.").

[7] *See* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction,* 124 HARV. L. REV. 869, 888-916 (2011) (describing various congressional jurisdiction-stripping efforts).

[8] *See, e.g.,* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992) (upholding law that replaced legal standards underlying particular litigation).

[9] *See, e.g.,* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1334-35 (Roberts, C.J., dissenting) ("Applying a retroactive law that says 'Smith wins' to the pending case of *Smith v. Jones* implicates profound issues of separation of powers."); Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court,* 109 U. PA. L. REV. 157, 158-59 (1960) (noting concerns if Congress were to have "plenary control over the appellate jurisdiction of the Supreme Court"). *But see* Ralph A. Rossum, *Congress, the Constitution, & the Appellate Jurisdiction of the Supreme Court: The Letter & the Spirit of the Exceptions Clause,* 24 WM. & MARY L. REV. 385, 413-19 (1983) (dismissing arguments that the Exceptions Clause is limited by separation of powers, noting that "[i]n our constitutional system, the judiciary is not supposed to be entirely independent "and that "[s]eparation of powers does not entail complete independence").

[10] Marbury v. Madison, 5 U.S. 137, 177 (1803); *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995) ("[T]he Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy.").

courts what classes of cases they may decide,"[11] as well as to enact legislation that may have an effect on pending cases being adjudicated by the federal courts.[12] But the limits of Congress's power to legislate may be tested when Congress enacts measures that target individualized concerns and small subsets of individuals, as opposed to legislating for the country as a whole and the general welfare.[13]

This report examines a series of Supreme Court rulings that have considered separation-of-powers-based limitations on the Exceptions Clause, congressional jurisdiction stripping, and the ability of Congress to amend laws with the purpose of directly impacting pending litigation.[14] The Court's jurisprudence in this area largely begins with the Reconstruction-era case *United States v. Klein,*[15] and culminates in the Court's 2018 ruling, *Patchak v. Zinke*.[16] In *Klein,* the Supreme Court generally held that Congress may not, by limiting appellate jurisdiction, dictate a "rule of decision" that undermines the independence of the judiciary.[17] But in the 2016 opinion, *Bank Markazi v. Peterson*—the Court's penultimate ruling interpreting *Klein*—the Court seemed to minimize the import of *Klein,* noting that while Congress cannot invade the judicial role by dictating how courts rule in a particular case, Congress is permitted to amend the substantive law in a manner that may alter the outcome of pending litigation.[18] The *Patchak* litigation highlighted the potential for tension between the judiciary's and legislature's powers when Congress removes a class of cases from federal jurisdiction in a way that functionally shapes the outcome of pending litigation. In particular, *Patchak* raised questions about the constitutionality of a law that stripped the courts of jurisdiction to hear disputes over a specific parcel of land, when litigation concerning the disputed land was pending in federal court at the time the law was enacted.[19] Though poised to clarify the limits of *Klein* when it granted the petition for certiorari in *Patchak*, ultimately, the Supreme Court issued a fractured 4-2-3 opinion, adding relatively little clarity to this complex area of the law.[20] Although all nine Justices agreed that Congress cannot expressly dictate the outcome of a particular case, a majority of Justices could not agree on when a facially neutral law that functionally ends pending litigation in the favor of one party violates Article III.[21]

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[11] City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1868 (2013).

[12] *Plaut*, 514 U.S. at 226 ("When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.").

[13] *See* INS v. Chadha, 462 U.S. 919, 966 (1983) (Powell, J., concurring) ("The only effective constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to 'the tyranny of a shifting majority.'"); Fletcher v. Peck, 10 U.S. 87, 136 (1810) ("It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules would seem to be the duty of other departments.").

[14] Jurisdiction stripping can raise other difficult constitutional questions that are not relevant to the issues raised by *Klein* and its progeny, such as other internal Article III constraints and external constraints imposed by other provisions within the Constitution. *See generally,* RICHARD H. FALLON, JR., ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 295-345 (Robert C. Clark, et al. eds., 7th ed. 2015). This report is focused on the *Klein*-based limits on jurisdiction stripping, and, thus other limits on the power of Congress concerning the control of federal court jurisdiction are beyond the scope of this report.

[15] 80 U.S. 128 (1871).

[16] 138 S. Ct. 897 (2018).

[17] United States v. Klein, 80 U.S. 128 (1871).

[18] Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016).

[19] Patchak v. Jewell, 828 F.3d 995 (D.C. Cir. 2016).

[20] Patchak v. Zinke, 138 S. Ct. 897 (2018).

[21] *Compare* Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) (distinguishing the Gun Lake Act from a law that says, '"In *Smith v. Jones,* Smith wins," concluding that the Gun Lake Act "changes the law" and thus is permissible under III),

Accordingly, this report concludes by analyzing the potential implications of *Patchak* and by providing general guidance for crafting jurisdiction-stripping legislation and measures designed to impact pending litigation.

Congressional Power over "Cases" and "Controversies": Separation-of-Powers Analysis

The Constitution does not mention "separation of powers." But it is generally considered inherent in the Constitution's tripartite division of federal power to the executive, legislative, and judicial branches that each branch of government has discrete powers that no other branch can invade.[22] Additionally, the Founders envisioned a separation of the three branches of government as an "essential precaution in favor of liberty."[23] Furthermore, the Framers viewed the need to separate the legislative and judicial powers as a "sharp necessity."[24] In the days before the Constitution, the Framers had observed that many states did not separate the judiciary from the legislature and, as a result, the adjudication of individual rights was subject to a "tyranny of shifting majorities."[25] Consequently, in designing an independent judiciary, the Framers, at least in part, were reacting to a common practice in the colonies, and then the states, of "legislative correction of judgments," in which legislative bodies would set aside judgments through legislation.[26]

Still, the Framers recognized that separation of the three branches of government would not be perfect or complete.[27] This concession is evinced in the powers granted to Congress in Article III of the Constitution. For example, Article III's Exceptions Clause, which allows Congress to make exceptions to the Supreme Court's appellate jurisdiction,[28] traditionally has been viewed as

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and id. at 911 (Breyer, J., concurring) ("The statutory context makes clear that this is not simply a case in which Congress has said, 'In *Smith v. Jones,* Smith wins.'"), *with id.* at 914 (Roberts, C.J., dissenting) ("Two Terms ago, this Court unanimously agreed that Congress could not pass a law directing that, in the hypothetical case of *Smith v. Jones,* 'Smith wins.' Today the plurality refuses to enforce that limited principle in the face of a very real statute that dictates the disposition of a single pending case.") (internal citations omitted).

[22] *See, e.g.,* Miller v. French, 530 U.S. 327, 341 (2000) ("The Constitution enumerates and separates the powers of the three branches of Government in Article I, II, and III, and it is this 'very structure' of the Constitution that exemplifies the concept of separation of powers."); Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional & Architectural Interpretation,* 83 GEO. WASH. L. REV. 305, 332-33 (2015) ("The separation of powers frames Madison's vision of the tripartite system.... [T]he separation of powers was not mentioned in the text of the Constitution ... [but] the absence of an explicit reference to separation of powers is not surprising when placed in the context of the contemporary views of the time.").

[23] THE FEDERALIST NO. 47 (James Madison).

[24] *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 221 (1995).

[25] *See* INS v. Chadha, 462 U.S. 919, 961 (1983) (Powell, J., concurring) (internal quotation marks omitted); *see also Plaut*, 514 U.S. at 219 ("The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression."); THE FEDERALIST NO. 48 (James Madison) (asserting that, in states where the judicial branch was not independent of the legislature, "in many instances" the legislative body "decided rights which should have been left to judiciary controversy").

[26] *See Plaut*, 514 U.S. at 219-20.

[27] *See* THE FEDERALIST NO. 48 (James Madison) ("[T]he degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.").

[28] U.S. CONST. art. III, § 2; *see also Ex Parte* McCardle, 74 U.S. 506, 512-13 (1868) ("It is quite true ... that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred 'with such exception and under such regulations as Congress shall make.'").

authorizing Congress to remove a class of cases from federal jurisdiction.[29] And because Article III grants Congress the power to establish inferior federal courts,[30] those inferior courts have only the jurisdiction that Congress affirmatively grants by statute.[31]

Additionally, Congress's power to regulate federal court jurisdiction and to enact substantive laws that the judiciary must then apply, in practice, allows Congress to control the work of the courts.[32] This principle extends to laws that retroactively change legal rights, as the Supreme Court has long recognized that courts generally must apply retroactive laws to pending cases, even when the law was different at the litigation's outset.[33] Thus, Congress "can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly."[34] Similarly, Congress can lawfully influence litigation by enacting legislation that necessarily impacts the effect, going forward, of injunctions issued by a federal court.[35] Thus, the tension in Article III, which creates an independent federal judiciary but also subjects the judicial branch, at times, to legislative control, generates difficult questions related to separation of powers, and the Court has had to determine when Congress's powers impermissibly invade the powers of the judiciary.

United States v. Klein

The Supreme Court first recognized the separation-of-powers limitations on jurisdiction-stripping legislation in the Reconstruction-era case *United States v. Klein*.[36] That lawsuit had been brought according to procedures that allowed persons who had participated in the rebellion by the southern states to receive compensation for certain property that the government had seized and sold off during the Civil War.[37] Under the Abandoned and Captured Property Act of 1863,[38] special agents appointed by the Secretary of the Treasury could seize abandoned or captured property in rebel territories, sell it, and deposit it into the U.S. treasury.[39] Under that act, individuals who had not "given any aid and comfort" to the rebellion could obtain the proceeds

[29] *See* Ex Parte *McCardle*, 74 U.S. at 513-14.

[30] U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.").

[31] *See* Sheldon v. Sill, 49 U.S. 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers.").

[32] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 226 (1995); United States v. Klein, 80 U.S. 128, 145 (1871).

[33] *See* United States v. Schooner Peggy, 5 U.S. 103, 109 (1801) ("[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed."). The Constitution imposes other limits on retroactive legislation, including the Ex Post Facto Clause, the Takings Clause, prohibitions on Bills of Attainder, and the Due Process Clause. *See* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1324-25 (2016); Landgraf v. USI Film Prods., 511 U.S. 244, 266-67 (1994)

[34] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 226 (1995).

[35] *See id.* at 222; Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1855).

[36] 80 U.S. 128 (1871).

[37] *Id*.

[38] Abandoned Property Collection Act, ch. 120, 12 Stat. 820 (1863), *available at* http://www.loc.gov/law/help/statutes-at-large/37th-congress/session-3/c37s3ch120.pdf.

[39] *Id.*; *see also* Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, & the Democratic Process: Harnessing the Political Theory of* United States v. Klein, 100 NW. U. L. REV. 437, 441-42 (2006) (describing the 1863 act).

from any captured property.[40] Several presidential proclamations declared that a person could become eligible to receive the proceeds of his property after receiving a full presidential pardon (which restored all property rights, except as to slaves) and taking an oath of loyalty to the United States.[41] Once pardoned, that person could petition the U.S. Court of Claims for the proceeds.[42] Klein, as the administrator of the estate of a deceased participant in the Confederacy—who had taken this oath in 1864—filed a claim on the decedent's behalf, seeking the proceeds of cotton that had been confiscated and sold by the government.[43] The Court of Claims, in a May 1869 ruling, concluded that the estate was entitled to receive the cotton's proceeds.[44] The government appealed to the Supreme Court.[45]

While Klein's case was pending, the Supreme Court reviewed a similar case, *United States v. Padelford*, which involved a person who, like the decedent in *Klein*, had participated in the rebellion, taken the loyalty oath, and sought the proceeds of captured property.[46] The Court held that taking the oath and receiving the pardon made him "innocent in law as though he had never participated," and so the claimant's "property was purged of whatever offence he had committed and relieved from any penalty that he might have incurred."[47] As a result, the Court held that Padelford was entitled to the proceeds from the government's sale.[48]

Shortly after the *Padelford* ruling, Congress added a proviso (i.e., a rider or amendment) to a pending appropriations bill related to the payment of judgments in the Court of Claims.[49] As relevant here, the proviso stated that, whenever a person who had participated in the rebellion introduces evidence of a presidential pardon in a suit brought in the Court of Claims for proceeds of abandoned or captured property taken according to laws enacted during the Civil War, the court shall treat it as "conclusive evidence" that the person aided the rebellion, and, upon such proof, "the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant."[50] The proviso further stated that in all cases where the Court of Claims had rendered a favorable judgment for a claimant based solely on a presidential pardon—without additional proof of loyalty to the United States—"the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction."[51] Accordingly, after the appropriations bill became law in July 1870, the government asked the Supreme Court to remand Klein's case with instructions for the Court of Claims to dismiss the suit for lack of jurisdiction.[52]

The Supreme Court concluded, however, that the way in which Congress stripped the courts of jurisdiction in this circumstance was unconstitutional. The Court acknowledged that "the legislature has complete control over the organization and existence of [the Court of Claims] and

[40] 12 Stat. 820, § 3; *Klein,* 80 U.S. at 131.

[41] *Klein,* 80 U.S. at 131-32.

[42] *Id.* at 131.

[43] *Id.* at 132.

[44] *Id*.

[45] *Id*.

[46] United States v. Padelford, 76 U.S. 531 (1869).

[47] *Id.* at 543.

[48] *Id.*

[49] *Klein,* 80 U.S. at 133

[50] *Id*. at 134 (internal quotation marks and citation omitted).

[51] *Id*. (internal quotation marks and citation omitted).

[52] *Id*. at 133-34.

may confer or withhold the right of appeal from its decisions."[53] And had Congress "simply denied the right of appeal in a particular class of cases," the Court continued, "there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient."[54] But, in the Court's view, Congress had gone further by purporting to remove jurisdiction only when certain evidence is furnished—that a pardon was granted—without allowing the court to rule on the meaning of the pardon but, instead, requiring the suit's dismissal.[55] In so doing (in language that would invite centuries of debate over its exact meaning)[56] the *Klein* Court held that Congress had "prescribe[d] a rule for the decision of a cause in a particular way,"[57] and thus "passed the limit which separates the legislative from the judicial power."[58]

The Court also emphasized the questionable nature of the jurisdiction-stripping proviso, which required a favorable verdict for the government:

> Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.[59]

Since *Klein,* no congressional enactment related to federal court jurisdiction appears to have been struck down under the separation-of-powers principles announced in *Klein.*[60] Meanwhile, legal scholars have wrestled with *Klein's* language, trying to decipher what, precisely, the 19th century Court meant.[61] The general consensus, though, is that *Klein* holds that Congress's authority to regulate federal court jurisdiction is limited by principles of separation of powers, in that it may not direct a court how to rule in a particular case or how to apply the law to the facts in the case at hand.[62] Others, though, interpret *Klein's* holding more narrowly. For instance, one view is that

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[53] *Id*. at 145.

[54] *Id*.

[55] *Id*. at 145-46.

[56] *See, e.g.,* FALLON, *supra* note 14, at 323 ("[T]he Court's [*Klein*] opinion raises more questions than it answers, and it can be read to support a wide range of holdings.").

[57] *Klein,* 80 U.S. at 146. The Supreme Court also opined that Congress had infringed on the Executive's pardon power by nullifying the full effect of certain presidential pardons. *Id.* at 147-48.

[58] *Id*. at 147.

[59] *Id*.

[60] *See* Howard M. Wasserman, *The Irrepressible Myth of* Klein, 79 U. CIN. L. REV. 53, 70 (2010) ("But such blatantly violative enactments seem unlikely, which perhaps explains why no actual laws have been invalidated under this principle."). In *Plaut v. Spendthrift Farm, Inc.,* discussed later in the report, the Supreme Court invalidated a law based on separation-of-powers concerns that were related to, but distinct from, those at the heart of *Klein*. 514 U.S. 211, 265-66 (1995) (concluding that the statute at issue does not violate the constitutional restrictions *Klein* imposed but, nevertheless, "offends a postulate of Article III just as deeply rooted in our law as those we have mentioned").

[61] *See, e.g.,* Redish & Pudelski, *supra* note 38, 437-48 ("*United States v. Klein* ... is a case whose importance to the shaping of American political theory has never been fully grasped or articulated by scholars, and whose meaning has been comprehended by the federal judiciary—including the Supreme Court itself—virtually not at all."); Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction & Processes:* United States v. Klein *Revisited,* 1981 WIS. L. REV. 1189, 1195 (1981) ("[T]he *Klein* opinion combines the clear with the delphic.").

[62] *See, e.g.,* Stephen I. Vladeck, *Why* Klein *(Still) Matters: Congressional Deception & the War on Terrorism,* 5 J. NAT'L SECURITY L. & POL'Y 251, 252 (2011) ("[V]irtually all observers agree that *Klein* bars Congress from commanding the court to rule for a particular party in a pending case."); Wasserman, *supra* note 59, 69-70 ("What really is going on under *Klein* is a prohibition on Congress using its legislative power to predetermine litigation outcomes through explicit commands to courts as to how to resolve particular factual and legal issues or telling courts

Klein forbids Congress only from "dictat[ing] substantively unconstitutional results in a category of cases over which the courts have been given jurisdiction."[63] Another view is that *Klein* prohibits Congress from conditioning the Supreme Court's jurisdiction to hear certain matters on the Court eschewing the application of certain constitutional provisions.[64] Still another view is that *Klein*'s holding spoke to congressional attempts to "use its jurisdictional powers to compel a court to take jurisdiction of case and to decide it in a way which was at odds with the pardon provisions of the Constitution."[65] Relatedly, another view is that *Klein* forbids Congress from telling the courts how the Constitution must be interpreted.[66]

United States v. Sioux Nation of Indians

More than a century elapsed before the Supreme Court meaningfully discussed the separation-of-powers principles announced in *Klein* related to congressional control over federal court jurisdiction. In its 1980 ruling, *United States v. Sioux Nation of Indians,* the Court addressed *Klein's* implications on legislation that directly impacted a lawsuit related to treaty and property disputes between the Sioux Nation of Indians and the United States dating back to 1868.[67]

The Sioux Nation and the United States entered into the Fort Laramie Treaty of 1868, which established the Great Sioux Reservation for the "absolute and undisturbed use and occupation" of the tribe.[68] Among other things, the Sioux Nation agreed to relinquish its right to occupy permanently any territory outside the reservation, and, in exchange,[69] the United States agreed that no unauthorized persons would be permitted to "pass over, settle upon, or reside in" the reservation.[70] The parties further agreed that any future cessation of reservation land to the United States would be legally binding only if a new treaty were executed and signed by at least three-fourths of the adult male tribe members.[71]

The United States sought to renegotiate the Fort Laramie Treaty after an army expedition confirmed that the Black Hills region of the Sioux Reservation contained large quantities of gold.[72] Eventually, in 1876, a U.S. commission and Sioux leaders agreed in the Manypenny Agreement[73] that the tribe would cede the Black Hills region to the United States in exchange for government provision of subsistence rations.[74] Congress codified the agreement the following

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who should prevail on given facts under existing law.").

[63] *See, e.g.,* Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts,* 54 MD. L. REV. 132, 157 (1995).

[64] *See* J. Richard Doidge, Note, *Is Purely Retroactive Legislation Limited by the Separation of Powers?" Rethinking* United States v. Klein, 79 CORNELL L. REV. 910, 923 (1994).

[65] *See* Young, *supra* note 60, at 1223 n.179.

[66] *See* Redish & Pudelski, *supra* note 38, at 443.

[67] United States v. Sioux Nation of Indians, 448 U.S. 371, 374 (1980).

[68] Treaty of Fort Laramie, art. II, U.S.-Sioux Nation of Indians, May 25, 1868. To view the full text of the treaty, see *Transcript of Treaty of Fort Laramie (1968),* OUR DOCUMENTS, https://www.ourdocuments.gov/doc.php?flash=true&doc=42&page=transcript (last visited Sept. 7, 2017).

[69] Treaty of Fort Laramie, art. XI, *supra* note 67.

[70] *Id.,* art. II.

[71] *Id.,* art. XII.

[72] *See Sioux Nation of Indians,* 448 U.S. at 376-83.

[73] This agreement is referred to as the "Manypenny Agreement," as the commission had been headed by George Manypenny. *See id.* at 381.

[74] *Id.* 381-82.

year, thus abrogating the original treaty.[75] But the agreement had been signed by only 10% of the adult male Sioux population—in violation of the Fort Laramie Treaty's terms—and many members of the Sioux Nation viewed the United States' occupation of the Black Hills as "a breach of [the United States'] solemn obligation to reserve the Hills in perpetuity for occupation by the Indians."[76]

The Sioux Nation had no legal means to redress their grievances about the Black Hills cessation until, decades later in 1920, Congress provided jurisdiction in the U.S. Court of Claims for the tribe to bring claims against the United States "under any treaties, agreements, or laws of Congress, or for the misappropriation of any funds or lands of" the Sioux Nation tribe.[77] The Sioux Nation then brought a lawsuit alleging that the United States had committed a "taking" of the Black Hills without just compensation in violation of the Fifth Amendment.[78] But the Court of Claims ultimately dismissed the lawsuit after concluding that the claim fell outside of the grant of jurisdiction.[79]

Congress later created the Indian Claims Commission in 1946 to provide a forum for all past tribal grievances.[80] The Sioux Nation renewed its claims before the Commission, which ultimately found in its favor.[81] But on appeal, the Court of Claims partially reversed on the ground that the doctrine of res judicata—the legal doctrine that bars relitigating certain matters[82]—precluded the Sioux Nation from relitigating its takings claims about the Black Hills.[83] However, the Court of Claims affirmed the Commission's other ruling that "a want of fair and honorable dealings in this case was evidenced, and … the Sioux would be entitled to an award of at least $17.5 million for the lands surrendered and for the gold taken by trespassing prospectors prior to passage of the 1877 Act."[84]

While the case was pending before the Indian Claims Commission to resolve other related disputes, Congress, in 1978, amended the Indian Claims Commission Act of 1946 to grant the Court of Claims jurisdiction to review the merits of the Commission's initial ruling that the 1877 Act amounted to a taking of the Black Hills *despite* the res judicata bar.[85] Acting under that statute's authority, the Court of Claims (sitting en banc) affirmed the Commission's merits ruling.[86] Because the government's actions were now considered to be a taking, the Sioux Nation

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[75] *Id.* at 383.

[76] *Id.* at 382-83.

[77] Act of June 3, 1920, ch. 222, 41 Stat. 738.

[78] *Sioux Nation of Indians*, 448 U.S. at 384. The Takings Clause of the Constitution states that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V.

[79] Sioux Tribe of Indians v. United States, 97 Ct. Cl. 613, 666 (Ct. Cl. 1942).

[80] Indian Claims Commission Act, 60 Stat. 1049 (1946).

[81] Sioux Nation v. United States, 33 Ind. Cl. Comm'n 151 (1974).

[82] Res judicata (sometimes called claim preclusion) advances the finality of judgments by barring a party from relitigating any claims that were raised, or could have been raised, in an earlier action between the same parties. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 13(1982); *see also* ASARCO, L.L.C. v. Mont. Res., Inc., 858 F.3d 949, 955 (5th Cir. 2017); United States v. Beane, 841 F.3d 1273, 1282-83 (11th Cir. 2016); Alexandra Bursak, Note, *Preclusions*, 91 N.Y.U. L. REV. 1651, 1653 (2016).

[83] United States v. Sioux Nation, 518 F.2d 1298, 1305-06 (Ct. Cl. 1975) ("It is elementary that in Indian Claims Commission Act proceedings a former decision on the merits by a court having jurisdiction is a *res judicata* bar to further litigation of the same claim.").

[84] United States v. Sioux Nation of Indians, 448 U.S. 371, 388 (1980).

[85] *Id.* at 389 (citing P.L. 95-243, 92 Stat. 153 (1978)).

[86] *Id.* at 389-90.

was entitled to interest on the $17.5 million judgment since it started accruing a century earlier in 1877.[87]

The Supreme Court granted the government's petition for certiorari to address whether Congress, in amending the Indian Claims Commission Act, had "inadvertently passed the limit which separates the legislative from the judicial power" by "prescribing a rule for decision that left the court no adjudicatory function to perform," as *Klein* had prohibited.[88] The Court ultimately distinguished *Klein* and answered in the negative.[89] The Court reasoned that the amendment removed only a single issue from the court's review—the res judicata bar—and otherwise "left no doubt that the Court of Claims was free to decide the merits of the takings claim in accordance with the evidence it found and applicable rules of law."[90] Additionally, the Court relied on other precedents holding that Congress may "waive the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States" without violating the separation of powers by intruding into the judiciary's sphere.[91] Further, the Court distinguished *Klein* on its facts, finding that in *Klein,* "Congress was attempting to decide the controversy in the Government's own favor," whereas in this case, Congress had only waived a defense so that the legal claim could be resolved on the merits in the first instance.[92]

Robertson v. Seattle Audubon Society

In *Robertson v. Seattle Audubon Society,* decided 12 years later, the Supreme Court explored the separation of powers between the legislative and judicial branches in another instance of Congress enacting a law purposefully designed to impact pending litigation.[93] *Robertson* involved consolidated cases in which environmental and timber-harvesting industry groups had contested the Bureau of Land Management's and Forest Service's management of certain federal lands in Oregon and Washington that were home to the endangered northern spotted owl.[94] In general, the environmental groups asserted that the owl was not being adequately protected, whereas the industry groups maintained that the owl's level of protection overly restricted timber harvesting.[95] The parties invoked several environmental statutes to advance their claims, including the Migratory Bird Treaty Act,[96] the National Environmental Policy Act,[97] the National Forest

[87] *Id.* at 387-90; *see also* Milens of Cal. v. Richmond Redev. Agency, 665 F.2d 906, 909 (1982) ("It is well established that just compensation in eminent domain is the full value of the property taken at the time of the taking plus interest from the date of taking.").

[88] *Sioux Nation of Indians,* 448 U.S. at 391-92 (quoting United States v. Klein, 80 U.S. 128, 147 (1872)).

[89] *Id.* at 391-407.

[90] *Id.* at 392.

[91] *Id.* at 396-402 (citing Cherokee Nation v. United States, 270 U.S. 476 (1926), Nock v. United States, 2 Ct. Cl. 451 (Ct. Cl. 1867), and Pope v. United States, 323 U.S. 1 (1944)).

[92] *Id.* at 405.

[93] Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992).

[94] *Id.* at 431-33.

[95] *Id*. at 431-32.

[96] 16 U.S.C. §§ 703-712.

[97] 83 Stat. 852, P.L. 91-190 (1970), as amended.

Management Act,[98] the Federal Land Policy and Management Act,[99] and the Oregon-California Railroad Land Grant Act.[100]

While the lawsuits were pending, Congress, as part of an appropriations package, enacted the "Northwest Timber Compromise," which established harvesting rules for timber in the contested lands inhabited by the northern spotted owl.[101] Section 318(b)(6)(A) directly mentioned the pending cases:

> [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.[102]

The environmental and industry plaintiffs interpreted this language as instructing courts to conclude that, if the federal parties complied with the newly enacted Northwest Timber Compromise, then they will have satisfied the statutory requirements central to the lawsuits.[103] Consequently, the environmental and industry plaintiffs challenged the provision, contending that Section 318(b)(6)(A) violated Article III of the Constitution "because it purported to direct the results in two pending cases."[104] The district courts disagreed, principally concluding that Section 318(b)(6)(A) modified the relevant environmental laws, and, under that statutory interpretation, the provision was constitutional.[105]

The U.S. Court of Appeals for the Ninth Circuit,[106] upon consolidating the cases for review, reversed, holding that Section 318(b)(6)(A) was unconstitutional under *Klein.* The appellate court concluded that "Section 318 does not, by its plain language, repeal or amend the environmental laws underlying th[e] litigation," but rather "seeks to perform functions reserved to the Courts by Article III of the Constitution" by "direct[ing] the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court."[107] This result is achieved because, the Ninth Circuit continued, "[t]he clear effect of subsection (b)(6)(A) is to direct that, if the government follows the plan incorporated in subsections (b)(3) and (b)(5),

[98] 90 Stat. 2949, P.L. 94-588 (1976), as amended.

[99] 90 Stat. 2744, P.L. 94-579 (1976), as amended.

[100] 50 Stat. 874, 43 U.S.C. § 1181a.

[101] Department of the Interior and Related Agencies Appropriations Act of 1990, § 318, 103 Stat. 745; *see* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 433 (1992).

[102] Department of the Interior and Related Agencies Appropriations Act of 1990 § 318(b)(6)(A); *see Robertson,* 503 U.S. at 434-35.

[103] *See* Department of the Interior and Related Agencies Appropriations Act of 1990 § 318(b)(6)(A).

[104] *Robertson,* 503 U.S. at 436.

[105] *Id*.

[106] This report references a number of decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Ninth Circuit) refer to the U.S. Court of Appeals for that particular circuit.

[107] Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1316 (9th Cir. 1990).

then the government will have done what is required under the environmental statutes involved in these cases."[108]

The Supreme Court unanimously disagreed with the district and appellate courts' interpretations of Section 318(b)(6)(A). The Court, without opining on the Ninth Circuit's application of *Klein*, held that Section 318(b)(6)(A) *replaced* the legal standards underlying the lawsuits and did so without directing the courts how to apply the new standards.[109] The Court reasoned that, in enacting the Northwest Timber Compromise, Congress created new standards for complying with the five statutes underlying the lawsuits: Rather than having to comply with those statutes, the contested land could, instead, be managed according to the new law.[110] As a result, the Court in *Robertson* concluded that the provision did not present a *Klein*-like separation-of-powers problem, suggesting that Congress has the power to target particular cases so long as the new legislation makes changes to the law applicable to those cases that the courts, in turn, can independently apply.[111]

Plaut v. Spendthrift Farm, Inc.

A few years later the Supreme Court considered in *Plaut v. Spendthrift Farm, Inc.* a corollary to the rule of *Klein*: whether legislation that directs courts to reopen a final judgment unconstitutionally intrudes on the judiciary.[112] *Plaut* involved an amendment to the Securities Exchange Act of 1934 that Congress enacted after a duo of Supreme Court opinions announced a time limit for bringing civil actions seeking damages under Section 10(b) of the act.[113] The first of the Supreme Court rulings was *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* which established a statute of limitations for bringing Section 10(b) claims.[114] That same day, in *James B. Beam Distilling Company v. Georgia,* the Court held that when a case announces a new rule and applies that rule to the parties in that case—which happened in *Lampf*—the new rule also must be applied to all pending cases.[115]

Six months after the Supreme Court issued the *Lampf* and *Beam Distilling* opinions, Congress added Section 27A to the Securities Exchange Act.[116] Section 27A functionally nullified the Court's ruling that the statute of limitations announced in *Lampf* must be applied to pending Section 10(b) civil claims. In particular, Section 27A directed courts to reinstate cases (upon a timely filed petition) that had been dismissed because of *Lampf* and *Beam Distilling* but would have been timely under the governing statute of limitations when initially filed.[117]

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[108] *Id*.

[109] *Robertson,* 503 U.S. at 437-38 ("We conclude that subsection (b)(6)(A) compelled changes in law, not findings or results under old law.").

[110] *Id*.

[111] *Id*.

[112] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

[113] *Id.* at 213-14.

[114] Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 364 (1991).

[115] James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 544 (1991); *see Plaut,* 514 U.S. at 214.

[116] Congress did so through Section 476 of the Federal Deposit Insurance Improvement Act of 1991, P.L. 102-242, 105. Stat. 2236.

[117] *See id.* § 476.

The *Plaut* litigation involved a group of investors who had filed a Section 10(b) suit for securities fraud before *Lampf* and *Beam Distilling* but, after those rulings, had their suits dismissed.[118] After Section 27A became law, the *Plaut* plaintiffs timely filed a motion to reopen.[119] But the district court nevertheless dismissed their suit on the ground that Section 27A's reopening provision violates the doctrine of separation of powers.[120] The Sixth Circuit,[121] and ultimately the Supreme Court, affirmed the judgment of the district court.[122]

The Supreme Court held that Section 27A, by applying retroactively to *final decisions*, "reverses a determination once made, in a particular case," and thus violates the separation of powers.[123] The Court distinguished the command in Section 27A from other retroactive laws that mandate "an appellate court [to] apply [the new] law in reviewing judgments *still on appeal* that were rendered before the law was enacted."[124] By directing courts to reopen nonpending, previously decided cases, the Court continued, Congress violates the separation of powers by "depriving judicial judgments of the conclusive effect that they had when they were announced."[125]

The Court noted that the separation-of-powers concerns in *Plaut* were related to, but distinct from, those at the heart of *Klein*.[126] Like the Supreme Court's concerns in *Klein,* the Court in *Plaut* appeared leery of Congress legislating to curb the judiciary's reserved Article III powers, particularly those related to rendering final, dispositive judgments.[127] And also like the Supreme Court in *Klein,* the Court in *Plaut* expressed the need for an independent judiciary, noting that the Framers, who "lived among the ruins of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression" were thus keenly aware of the need for a judicial branch independent from the legislature.[128] However, the Supreme Court emphasized that its ruling did not disturb its long-held view that Congress, by enacting new legislation, may "alter[] the prospective effect of injunctions entered by Article III courts."[129]

Miller v. French

Miller v. French begins where *Plaut* left off, by examining Congress's ability "to alter the prospective effect of previously entered injunctions."[130] The case involved a challenge to a provision of the Prison Litigation Reform Act of 1995 (PLRA)[131] that requires courts to automatically stay a court-ordered injunction for a specified period upon receiving a motion to

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[118] *See* Plaut v. Spendthrift Farm, Inc., 1 F.3d 1487, 1489 (6th Cir. 1993).

[119] *Plaut*, 514 U.S. at 215.

[120] *Spendthrift Farm*, 1 F.3d at 1490.

[121] *Id*.

[122] *Plaut*, 514 U.S. at 240.

[123] *Id.* at 225 (quoting THE FEDERALIST No. 81, at 545).

[124] *Id.* at 226 (emphasis added).

[125] *Id*. at 227-28.

[126] *Id.* at 265-66 (concluding that the statute at issue does not violate the constitutional restrictions *Klein* imposed but, nevertheless, "offends a postulate of Article III just as deeply rooted in our law as those we have mentioned").

[127] *Id.* at 218.

[128] *Id.* at 219-24.

[129] *Id.* at 222 (citing State of Pennsylvania v. The Wheeling & Belmont Bridge Co., 59 U.S. 421 (1855)).

[130] Miller v. French, 530 U.S. 327, 344 (2000).

[131] P.L. 104-134, 110 Stat. 1321, Title VIII (1995).

terminate the injunction.[132] In general, the PLRA governs lawsuits brought by prisoners challenging conditions of confinement.[133] The statute spells out the requirements for obtaining[134] and terminating prospective relief[135] (i.e., relief designed to prevent ongoing or future injuries), such as an injunction.[136] At issue in *Miller* was 18 U.S.C. § 3626(e)(2), which, as relevant here, mandates that any motion to terminate the injunction "shall operate as a stay" beginning 30 days after the motion is filed and lasting until the court rules on it.[137]

In the *Miller* lawsuit, inmates at an Indiana prison had obtained an injunction in the mid-1980s requiring the prison to rectify prison conditions that violated the Eighth Amendment, including conditions related to overcrowding, use of mechanical restraints, and the quality of food and medical services.[138] In 1997, the state moved to terminate the injunction under the proceedings set forth in the PLRA and codified at 18 U.S.C. § 3626(b).[139] The inmates objected and asked the district court to enjoin application of the PLRA's automatic stay provision (Section 3626(e)(2)) on the ground that it violates separation-of-powers principles.[140] The district court agreed and enjoined the stay, which the Seventh Circuit affirmed.[141] The appellate court first construed the language in Section 3626(e)(2), which instructed that motions to terminate prospective relief "*shall* operate as a stay,"[142] as unequivocally "restrict[ing] the equitable powers of the federal courts."[143] So construed, the Seventh Circuit concluded that the provision violated the separation-of-powers principle announced in *Plaut* that Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy."[144] The Seventh Circuit further concluded that Section 3626(e)(2) violates the principles of *Klein* because, according to the court, it mandated a rule of decision by requiring the previously ordered prospective relief to be terminated.[145]

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[132] 18 U.S.C. § 3626 (e)(2) ("Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period ...").

[133] 42 U.S.C. § 1997e.

[134] 18 U.S.C. § 3626(a).

[135] *Id.* § 3626(b).

[136] *See, e.g.,* Colo. Cross Disability Coal. v. Abercrombie & Fitch Co., 765 F.3d 1205, 1211 (10th Cir. 2014) ("When prospective relief—such as an injunction—is sought, 'the plaintiff must be suffering a continuing injury or be under a real and immediate threat of being injured in the future.'" (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983))).

[137] 18 U.S.C. § 3626(e)(2). There is an exception, however, allowing the court to postpone the effective date of the automatic stay for no more than 60 days "for good cause." *Id.* § 3626(e)(4).

[138] Miller v. French, 530 U.S. 327, 332 (2000); French v. Owens, 777 F.2d 1250 (7th Cir. 1985).

[139] French v. Duckworth, 178 F.3d 437, 438 (7th Cir. 1999).

[140] *Miller,* 530 U.S. at 334.

[141] *Id.* at 334-35.

[142] 18 U.S.C. 3626(e)(2) (emphasis added).

[143] *Duckworth,* 178 F.3d at 443.

[144] *Id*. at 446 (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995)). According to the Seventh Circuit, "[Section 3626](e)(2) places the power to review judicial decisions outside of the judiciary" because "it is a self-executing legislative determination that a specific decree of a federal court—here the decree addressing conditions at [the Indiana prison]—must be set aside at least for a period of time, no matter what the equities, no matter what the urgency of keeping it in place," thus "amount[ing] to an unconstitutional intrusion on the power of the courts to adjudicate cases." *Id.*

[145] *Id.*

The Supreme Court rejected the Seventh Circuit's constitutional holding.[146] Contrary to the Seventh Circuit's opinion, the Supreme Court concluded that Section 3626(e)(2) comports with *Plaut* because, in that case, the Supreme Court had been "careful to distinguish the situation before the Court in [*Plaut*]—legislation that attempted to reopen the dismissal of a suit *seeking money damages*—from legislation that 'altered the prospective effect of *injunctions* entered by Article III courts.'"[147] The Supreme Court in *Miller* further explained that "[p]rospective relief under a continuing executory decree," like the district court's injunction against the prison, "remains subject to alteration due to changes in the underlying law."[148] The Court concluded that the automatic stay provision in Section 3626(e)(2) "helps implement the change" in the underlying law for prisoner litigation, which "restricted courts' authority to issue and enforce prospective relief concerning prison conditions, requiring that such relief be supported by findings and precisely tailored to what is needed to remedy the violation of a federal right."[149] Thus, Section 3626(e)(2), "[b]y establishing new standards for the enforcement of prospective relief" in PLRA lawsuits, "Congress has altered the relevant underlying law."[150] Nor, the Supreme Court concluded, did Section 3626(e)(2) run afoul of *Klein*'s admonishment that Congress cannot dictate a rule of decision because "later decisions have made clear that its prohibition does not take hold when Congress amends applicable law."[151]

Bank Markazi v. Peterson

The Supreme Court's latest word on separation-of-powers limitations on Congress's authority to regulate federal court jurisdiction was in its 2016 opinion, *Bank Markazi v. Peterson*.[152] The lawsuit involved an amendment to the "terrorism exception" to the Foreign Sovereign Immunities Act of 1976 (FSIA).[153] Under the FSIA, foreign governments are generally immune from suit in U.S. courts.[154] But the terrorism exception lifts that immunity for suits seeking monetary damages for personal injury or death caused by state-sponsored terrorism.[155] Still, claimants filing suit under that exception often face difficulties enforcing favorable judgments because (1) initially, only foreign-state property located in the United States that was used for commercial activity could be used to satisfy judgments;[156] and (2) the FSIA exempts property of a "foreign central bank or monetary authority held for its own account."[157]

To ease difficulties in enforcing judgments, Congress enacted the Terrorism Risk Insurance Act of 2002 (TRIA),[158] which authorizes judgments to be satisfied using "blocked assets" of a terrorist party or instrumentality that the executive branch seized under the authority of either the Trading

[146] Miller v. French, 530 U.S. 327, 350 (2000).

[147] *Id.* at 344 (quoting *Plaut*, 514 U.S. at 232) (emphasis added).

[148] *Id.*

[149] *Id.* at 347-48

[150] *Id.* at 347.

[151] *Id.* at 349 (internal alteration, quotation marks, and citations omitted).

[152] 136 S. Ct. 1310 (2016).

[153] *See* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1317 (2016) (citing 28 U.S.C. § 1605A).

[154] 28 U.S.C. § 1604.

[155] *Id.* § 1605A

[156] *Id.* § 1610(a); *see Bank Markazi*, 136 S. Ct. at 1318.

[157] 28 U.S.C. § 1611(b)(1); *see Bank Markazi*, 136 S. Ct. at 1318.

[158] Terrorism Risk Insurance Act of 2002, P.L. 107-297, 116 Stat. 2322; *see Bank Markazi*, 136 S. Ct. at 1318.

with the Enemy Act[159] or the International Emergency Economic Powers Act.[160] Both authorities allow the President "to freeze the assets of foreign enemy states and their agencies and instrumentalities."[161] President Obama exercised this authority in February 2012 by issuing an Executive Order designed to block "[a]ll property and interests in property of an Iranian financial institution, including the Central Bank of Iran, that are in the United States."[162]

Nevertheless, difficulties enforcing judgments against Iranian financial institutions persisted, and, as a result, Congress enacted Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, codified at 22 U.S.C. § 8772[163]—a standalone measure not tied to TRIA or the FSIA—that was the subject of the *Bank Markazi* litigation.[164] In particular, Section 8772 mandates that, upon specified court findings related to the ownership of certain contested assets, particular Iranian financial assets "shall be subject to execution ... in order to satisfy any judgment ... awarded against Iran for damages for personal injury or death caused by" acts of terrorism covered by FSIA terrorism exception.[165] Section 8772 explicitly defines the financial assets to be made available as those that had been identified in the *Bank Markazi* litigation.[166] The law also clarifies that it does not apply to any other assets or other lawsuits outside of the *Bank Markazi* litigation.[167]

The claimants in *Bank Markazi* were a group of more than 1,000 victims of Iran-sponsored acts of terrorism, largely in connection with the 1983 bombing of the U.S. Marine barracks in Beirut, Lebanon.[168] They invoked Section 8772 to seek satisfaction of unpaid judgments totaling $1.75 billion from assets held in a New York bank for the Central Bank of Iran, also known as Bank Markazi.[169] The district court made the applicable statutory findings and ordered Bank Markazi to turn over the requested bond assets.[170]

Relying on *Klein,* Bank Markazi contested this ruling on the ground that Section 8772 violated the separation of powers by "effectively dictat[ing] specific factual findings in connection with a specific litigation—invading the province of the courts."[171] But the district court disagreed, reasoning that under Section 8772, courts still may independently make the ownership findings that the statute requires, free of congressional interference.[172] The Second Circuit affirmed, concluding that Section 8772 "does not usurp the judicial function," but "rather, it retroactively

[159] P.L. 65-91, 40 Stat. 411, (1917).

[160] P.L. 95-223, 91 Stat. 1625 (1977).

[161] *Bank Markazi,* 136 S. Ct. at 1318 (internal quotation marks and alterations omitted).

[162] Exec. Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 8, 2012).

[163] P.L. 112-158, 126 Stat. 1258 (codified at 22 U.S.C. § 8772).

[164] *See Bank Markazi,* 136 S. Ct. at 1318.

[165] 22 U.S.C. § 8772(a); *see Bank Markazi,* 136 S. Ct. at 1318-19.

[166] 22 U.S.C. § 8772(b); *see Bank Markazi,* 136 S. Ct. at 1319.

[167] 22 U.S.C. § 8772(c).

[168] *Bank Markazi,* 136 S. Ct. at 1319-20.

[169] *Id*. at 1316, 1320-21.

[170] *Id*. at 1321.

[171] *Id*. at 1322 (internal quotation marks and citation omitted).

[172] *Id*.

changes the law applicable in this case."[173] Doing so, the Second Circuit added, is "a permissible exercise of legislative authority."[174]

The Supreme Court agreed, rejecting Bank Markazi's argument that *Klein* mandated otherwise. Bank Markazi had principally argued that Section 8772, by "purport[ing] to alter the law for a single pending case concerning the payment of money from one party to another," allows Congress to "commandeer the judiciary and dictate how courts must decide individual cases before them."[175] This, Bank Markazi said, was foreclosed by *Klein,* given the Court's command that Congress cannot "prescribe rules of decision to the Judicial Department of the government in cases pending before it."[176] And the required statutory factfinding did not cure this deficiency because, Bank Markazi asserted, the underlying facts were undisputed and thus left nothing for the court do to other than compel Bank Markazi to pay the judgment award.[177]

But the Supreme Court did not similarly interpret *Klein*. Rather, the Court declared that "[o]ne cannot take the language from *Klein*" about Congress's inability to prescribe a rule of decision "at face value" given the legitimate "congressional power to make valid statutes retroactively applicable to pending cases."[178] Thus, the Court appeared to minimize the import of *Klein* while confirming Congress's power to "direct courts to apply newly enacted, outcome-altering legislation in pending civil cases."[179] Further, the Court added that Congress "does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts," as Congress did when enacting Section 8772.[180] In other words, the Court is unlikely to find a *Klein* violation when Congress creates a new substantive law for courts to apply in one specific set of cases, even when, functionally, only one outcome could be likely given the undisputed facts. With these principles in mind, the Court concluded that Section 8772 lawfully "provides a new standard clarifying that, if Iran owns certain assets, the victims of Iran-sponsored terrorist attacks will be permitted to execute against those assets."[181] However, in doing so, the Court also "stress[ed] ... that § 8772 is an exercise of congressional authority regarding *foreign affairs*, a domain in which the controlling role of the political branches is both necessary and proper."[182]

Chief Justice Roberts, joined by Justice Sotomayor, dissented.[183] In the dissent's view, Section 8772 was akin to Congress enacting a law that said "respondents win" and thus unconstitutionally invaded the judiciary by "enacting a bespoke statute tailored to this case that resolves the parties' specific legal disputes to guarantee respondents victory."[184] The dissent acknowledged that courts "generally must apply a retroactively applicable statute to pending cases," but if that retroactive law reads as "respondents win" in a pending lawsuit, that

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[173] Peterson v. Islamic Republic of Iran, 758 F.3d 185, 191 (2d Cir. 2014).

[174] *Id*.

[175] Brief for Petitioner at 11, Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016) (No. 13-770).

[176] *Id.* at 43 (quoting United States v. Klein, 80 U.S. 128, 146 (1871)).

[177] *Id.* at 47-48.

[178] Bank Markazi v. Peterson, 136 S. Ct. 1310, 1324 (2016).

[179] *Id*. at 1325.

[180] *Id*.

[181] *Id*. at 1326.

[182] *Id*. at 1328 (emphasis added). The Court further noted that "[i]n pursuit of foreign policy objectives, the political branches have regulated specific foreign-state assets by, *inter alia,* blocking them or governing their availability for attachment," and "[s]uch measures have never been rejected as invasions upon the Article III judicial power." *Id.*

[183] *Id*. at 1329-38 (Roberts, C.J., dissenting).

[184] *Id.* at 1330.

hypothetical law—like Section 8772—would "implicat[e] profound issues of separation of powers."[185] Further, the dissent warned that, "[h]ereafter, with this Court's seal of approval, Congress can unabashedly pick the winners and losers in particular pending cases."[186]

Patchak v. Zinke

Underlying Litigation: *Patchak v. Jewell*

The Supreme Court revisited separation-of-powers-based limitations on congressional jurisdiction stripping when it decided *Patchak v. Zinke* during the October 2017 term.[187] In particular, the Court examined the following question as posed by the petitioners:

> Does a statute directing the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including the Court's determination that the "suit may proceed")—without amending underlying substantive or procedural laws—violate the Constitution's separation of powers principles?[188]

Patchak involved a challenge to the Department of the Interior's (DOI's) decision in 2005 to place a tract of land in Wayland Township, Michigan—known as the "Bradley Property"—in trust under the Indian Reorganization Act (IRA) for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (known as the "Gun Lake Tribe").[189] After the Gun Lake Tribe began building a casino on the Bradley Property, David Patchak, who lives in Wayland Township, sued officials from the Bureau of Indian Affairs under the Administrative Procedure Act (APA), asserting that the DOI lacked authority under the IRA to place the Bradley Property in trust for the Gun Lake Tribe.[190] He additionally claimed that the casino would cause him injury by "irreversibly chang[ing] the rural character of the area, increas[ing] traffic and pollution, and divert[ing] local resources away from existing residents."[191] The district court initially dismissed the suit, concluding that Patchak lacked prudential standing, meaning that his asserted interests did not fall within the zone of interests to be protected or regulated by the underlying statute.[192] The dispute reached the Supreme Court in 2012, and the Court reversed, concluding that Patchak, indeed, had prudential standing to sue.[193] With prudential standing ensured, the Supreme Court remanded the case to the district court for resolution on the merits.[194]

Meanwhile, on September 26, 2014, President Obama signed into law the Gun Lake Trust Land Reaffirmation Act ("Gun Lake Act"), which ratified and confirmed the DOI's decision to place

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[185] *Id.* at 1334-35. The majority agreed that a law directing judgment for a particular party upon certain findings "would be invalid" but concluded that Section 8772 did not actually do that. *Id.* at 1326 (majority opinion). Rather, in the majority's view, Section 8772 "suppl[ies] a new legal standard effectuating the lawmakers' reasonable policy judgment." *Id.*

[186] *Id.* at 1338 (Roberts, C.J., dissenting).

[187] Patchak v. Zinke, 137 S. Ct. 2091 (2017).

[188] Order Granting Writ of Certiorari, Patchak v. Zinke, 137 S. Ct. 2091 (No. 16-498) (limiting grant of certiorari to question one in the petition), https://www.supremecourt.gov/docket/docketfiles/html/qp/16-00498qp.pdf.

[189] Patchak v. Jewell, 828 F.3d 995, 999 (D.C. Cir. 2016).

[190] *Id.* at 999-1000.

[191] *Id.* at 1000.

[192] Patchak v. Salazar, 646 F. Supp. 2d 72 (D. D.C. 2009), *rev'd* 567 U.S. 209 (2012); *see* Bennett v. Spear, 520 U.S. 154, 162-63 (1997) (describing prudential standing and its zone of interests).

[193] Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 212, 224-28 (2012).

[194] *Id.* at 228.

the Bradley Property in trust for the Gun Lake Tribe.[195] Specifically, in Section 2(a), the Gun Lake Act declares "[t]he land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Indians ... is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed."[196] Additionally, in Section 2(b), the Gun Lake Act stripped federal courts of jurisdiction to hear claims related to the Bradley Property:

> Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of [the] Act) relating to the [Bradley Property] shall not be filed or maintained in a Federal court and shall be promptly dismissed.[197]

The legislation was necessary, according to a House report on the Gun Lake Act, out of concern that the underlying DOI decision may have been unlawful under then-existing precedent.[198] The report even referenced Patchak's lawsuit, noting that the legislation would "void [the] pending lawsuit."[199]

Because *Patchak* was still pending in the district court at the time of the enactment of the Gun Lake Act, the district court concluded that it no longer had jurisdiction to hear the case because of the new law and dismissed the suit.[200] The D.C. Circuit affirmed, explaining that so long as the act is not otherwise unconstitutional, "[t]he language of the Gun Lake Act makes plain that Congress has stripped the federal courts of subject matter jurisdiction to consider the merits" of Patchak's complaint.[201] Noting that "federal courts have 'presumptive jurisdiction ... to inquire into the constitutionality of a jurisdiction-stripping statute,'" the court next considered—and rejected—each of Patchak's constitutional challenges to the act.[202]

As relevant here, Patchak contended in the lower court the Gun Lake Act violates the separation-of-powers doctrine by encroaching on the judiciary's Article III powers.[203] The D.C. Circuit concluded otherwise, principally relying on *Klein* and its progeny. For instance, the court reasoned that *Bank Markazi'*s pronouncement that "a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts,"[204] is equally applicable to "when the newly enacted legislation in question removes the judiciary's authority to review a particular case or class of cases," as Congress did with the Gun Lake Act.[205] Patchak protested, contending that "the Gun Lake Act did not provide any new legal standard to apply, but rather impermissibly directed the result of his lawsuit under pre-existing law."[206] But the court disagreed, concluding that Congress, indeed, supplied a new legal standard to apply when it enacted the Gun Lake Act, even though the act did not directly amend the APA or IRA (the

[195] Gun Lake Trust Land Reaffirmation Act, P.L. 113-179, 128 Stat. 1913, § 2(a) (Sept. 26, 2014).

[196] *Id.* § 2(a).

[197] *Id.* § 2(b).

[198] H.R. REP. NO. 113-590 (2014).

[199] *See id*. at 2.

[200] Patchak v. Jewell, 109 F. Supp. 3d 152, 165 (D.D.C. 2015).

[201] Patchak v. Jewell, 828 F.3d 995, 1001 (D.C. Cir. 2016).

[202] *Id.* at 1001-07.

[203] *Id.* at 1001

[204] Bank Markazi v. Peterson, 136 S. Ct. 1310, 1325 (2016)).

[205] *Patchak,* 828 F.3d at 1002.

[206] *Id*.

substantive laws underlying the lawsuit).[207] The circuit court explained that it was sufficient that the Gun Lake Act "provide[d] a new legal standard that we are obligated to apply: If an action relates to the Bradley Property, it must promptly be dismissed."[208] Because Patchak's lawsuit related to the Bradley Property, the court concluded, federal courts lacked jurisdiction to hear it.[209]

Supreme Court Proceedings: *Patchak v. Zinke*

In a 4-2-3 ruling authored by Justice Thomas and joined by Justices Breyer, Alito, and Kagan, a plurality of the Supreme Court concluded that the jurisdiction-stripping provision of the Gun Lake Act does not violate Article III of the Constitution.[210] Together, with the separate votes of Justices Ginsburg and Sotomayor concurring in the judgment, the Court affirmed the D.C. Circuit's ruling.[211]

Before the Supreme Court, Patchak reiterated his contention that the Gun Lake Act violates the separation of powers between the legislature and the judiciary.[212] Patchak likened the Gun Lake Act to the statute deemed unconstitutional in *Klein*, contending that both directed the judiciary to dismiss litigation without altering the underlying legal landscape.[213] Further, Patchak invoked Chief Justice Roberts's dissent in *Bank Markazi* to argue that Congress unlawfully directed a favorable outcome for the Gun Lake Tribe when it enacted the Gun Lake Act by "direct[ing] the federal courts to 'promptly dismiss' a pending lawsuit following substantive determinations by the courts ... without amending underlying substantive or procedural laws"—here, the APA or IRA.[214]

In response, the government characterized Patchak's reliance on *Klein* as "misplaced," arguing that the D.C. Circuit's analysis fits squarely within the Supreme Court's more recent interpretations of *Klein* and its limitations.[215] The government distinguished the statute struck down in *Klein* from the Gun Lake Act's jurisdiction-stripping provision.[216] In *Klein,* the government contended, "it was the predicate for the dismissal for lack of jurisdiction ... that rendered the statute unconstitutional" because Congress had directed the courts to find that a pardon has a particular effect and, *upon that finding,* dismiss a lawsuit.[217] Whereas the Gun Lake Act, in the government's view, does not "rest on a predicate determination that Congress was

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[207] *Id.* at 1002-03.

[208] *Id.* at 1003.

[209] *Id.* at 999, 1001-03, 1008. The D.C. Circuit also relied on its previous ruling in *National Coalition to Save Our Mall v. Norton,* which addressed whether a statute removing judicial review for statutory challenges to the placement of the World War II Memorial—enacted in the midst of pending litigation—violated Article III. Nat'l Coal. to Save Our Mall v. Norton, 269 F.3d 1092 (D.C. Cir. 2001). The court in *National Coalition* concluded that the statute under review was constitutional and, in doing so, "emphasized that there is no 'prohibition against Congress's changing the rule of decision in a pending case, or (more narrowly) changing the rule to assure a pro-government outcome.'" *Patchak*, 828 F.3d at 1003 (quoting *Nat'l Coal. to Save Our Mall*, 269 F.3d at 1096).

[210] Patchak v. Zinke, 138 S. Ct. 897 (2018).

[211] *Id*.

[212] Brief for Petitioner at 12-31, Patchak v. Zinke, 137 S. Ct. 2091 (2017) (No. 16-498).

[213] *Id.* at 16.

[214] *Id*.

[215] Brief for Federal Respondents Opposing Grant of Certiorari at 9-17, Patchak v. Zinke, 137 S. Ct. 2091 (2017) (No. 16-498).

[216] Brief for Federal Respondents at 36-38, Patchak v. Zinke, 137 S. Ct. 2091 (2017) (No. 16-498).

[217] *Id.* at 37.

without authority to make" and, thus, Congress was acting within its "authority to withdraw its grant of jurisdiction to the federal court ... with respect to a particular subject matter—here, the Bradley Property."[218] In this sense, the government viewed *Klein* as being about the scope of the pardon power and little else. Further, the government asserted that, contrary to Patchak's contention, the Gun Lake Act does not direct a favorable outcome for a particular party.[219] Rather, the government asserted, the Gun Lake Act "ensures that *no* party receives a judgment on the merits" by removing the court's jurisdiction to review the merits of the lawsuit.[220]

Justice Thomas's plurality opinion distilled *Klein* and its progeny as creating the following rule: "Congress violates Article III when it compels[] findings or results under old law. But Congress does not violate Article III when it changes the law."[221] Accordingly, when congressional action compels an Article III court to make certain findings under old law, the Justices in the plurality agreed with the dissenters that Congress cannot usurp the judiciary's power by saying "in *Smith v. Jones*, Smith wins."[222] Nonetheless, Justice Thomas did not think the rule of *Klein* required looking behind the express language of a law and inquiring into "Congress' unexpressed motives."[223] Instead, Justice Thomas viewed the Gun Lake Act to be a facially neutral enactment that simply made a change to current law: "Before the Gun Lake Act, federal courts had jurisdiction to hear these actions [about the Bradley Property]. Now they do not. This kind of legal change is well within Congress' authority and does not violate Article III."[224] In this vein, the plurality described the Gun Lake Act as a jurisdiction-stripping statute,[225] which "'change[d] the law' for the purpose of Article III, just as other exercises of Congress' legislative authority."[226] Thus, the plurality rejected Patchak's argument that the Gun Lake Act's phrase, "shall be promptly dismissed," directs courts to reach a particular outcome.[227] Rather, the plurality concluded, the phrase's mandatory language "'simply imposes the consequences' of a court's determination that it lacks jurisdiction because a suit relates to the Bradley Property."[228]

The plurality also rejected Patchak's contention that Section 2(b) has the same constitutional flaws as the law at issue in *Klein*. The plurality distinguished *Klein* in two ways. First, Justice Thomas emphasized that in *Klein*, Congress unlawfully had attempted to determine the meaning and effect of a pardon—which the judiciary, not Congress, has the power to do—indirectly, by stripping courts of jurisdiction whenever claimants cited pardons as evidence of loyalty.[229] Conversely, the Gun Lake Act, he explained, "does not attempt to exercise a power that the

[218] *Id.* at 38.

[219] *Id.* at 40-41.

[220] *Id.* at 40.

[221] Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) (internal citations, quotation marks, and alterations omitted).

[222] *Id.* at 905.

[223] *Id.* at 910.

[224] *Id*. at 905.

[225] The plurality viewed the Gun Lake Act to be a jurisdiction-stripping statute despite its failure to explicitly use the word "jurisdiction," noting that the "Court does not require jurisdictional statute to incant magic words." *Id*. (internal quotation marks and citation omitted) (citing cases using similar language to Section 2(b) that the Supreme Court has interpreted as jurisdictional).

[226] *Id*. at 906 (citing Plaut at 218). Justice Thomas added that "[t]he constitutionality of jurisdiction-stripping statutes like this one is well established." *Id*. at 908.

[227] *Id*.

[228] *Id*. (quoting Miller v. French, 530 U.S. 327, 349 (2000)).

[229] *Id*. at 909.

Constitution vests in another branch."[230] Second, the statute in *Klein* purported to confer jurisdiction to federal courts to hear claims related to pardons but removed that jurisdiction in the event that a court found that a pardoned claimant should prevail.[231] But, the plurality opined, the Gun Lake Act removed an entire class of cases from judicial review; it did not selectively strip jurisdiction based on how a particular party fared.[232]

Justice Breyer concurred, emphasizing that when Section 2(a) and 2(b) are read together, Section 2(b) simply provides "an alternative legal standard for courts to apply that seeks the same real-world result" as applying Section 2(a)—which no one disputed is constitutional.[233] Under both provisions the Bradley Property remains in trust for the Gun Lake Tribe: under Section 2(a), a court could have concluded that the Gun Lake Act gave the DOI Secretary authority to take the Bradley Property in trust; under Section 2(b), a court must simply dismiss the lawsuit for lack of jurisdiction, simplifying the analysis while maintaining the intended status quo of the Bradley Property.[234]

Justice Ginsburg and Justice Sotomayor only concurred in the judgment, concluding that the Gun Lake Act should be construed as restoring the United States' immunity from suit.[235] Although Patchak initially had invoked the APA's waiver of sovereign immunity, Justice Ginsburg reiterated that "consent of the United States to suit may be withdrawn at any time."[236] And in enacting the Gun Lake Act, Justice Ginsburg opined, Congress had reinstated the government's sovereign immunity for *all* suits related to the Bradley Property.[237] With sovereign immunity reinstated, Patchak could not, in the view of the two concurring Justices, sustain a lawsuit against the government to challenge the Gun Lake Act. Neither concurring Justice fully explained why viewing the Gun Lake Act through the lens of it being a law about sovereign immunity alleviates *Klein* concerns, although Justice Sotomayor voiced her agreement with the dissenting Justices that jurisdiction-stripping statutes that "deprive[] federal courts of jurisdiction over a single proceeding" violate the principle of *Klein* and "should be viewed with great skepticism."[238]

Chief Justice Roberts, joined by Justices Kennedy and Gorsuch, dissented. The dissent contended that the Gun Lake Act, indeed, prohibitively directs the outcome of a single pending case, and thus unconstitutionally intrudes on the exclusive power of the judicial branch.[239] Chief Justice Roberts explained that the act directly targets the outcome of a single case because, when Congress enacted the Gun Lake Act, Patchak's lawsuit was the sole one challenging the DOI's action and no more suits could be filed because the APA's six-year statute of limitations had expired.[240] Further, Chief Justice Roberts would have held "that Congress exercises the judicial power when it manipulates jurisdictional rules to decide the outcome of a particular pending

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[230] *Id*.

[231] *Id*.

[232] *Id*.

[233] *Id*. at 911 (Breyer, J. concurring).

[234] *Id*.

[235] *Id*. at 912-13 (Ginsburg, J., concurring).

[236] *Id*. at 912 (internal quotation marks and citations omitted).

[237] *Id*. at 913.

[238] *Id*. at 913 (Sotomayor, J., concurring).

[239] *Id*. at 914-22 (Roberts, C.J., dissenting).

[240] *Id*. at 916-18; *see* 28 U.S.C. § 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.").

case."[241] In his view, there was no material difference between a law stating that "'The court lacks jurisdiction over Jones's pending suit against Smith' and one stating 'In the case of *Smith v. Jones,* Smith wins,'" because in both examples, "Congress has resolved the specific case in Smith's favor."[242] The Chief Justice also disagreed with the plurality's conclusion that the act is jurisdictional, noting that "this Court in recent cases has adopted a 'bright line' rule treating statutory limitations as nonjurisdictional unless Congress 'clearly states' otherwise."[243] Yet, he observed, the Gun Lake Act was enacted after these cases and "does not clearly state that it imposes a jurisdiction restriction—the term is not mentioned anywhere in the title, headings, or text of the Act."[244] Accordingly, the dissenters would have invalidated the Gun Lake Act on Article III grounds.

Conclusion

Despite the recent trend to limit the scope of *Klein*, the 1871 case remains good law and its progeny provides some useful guideposts for Congress in fashioning jurisdiction-stripping legislation and measures that target pending litigation. Based on the language of *Klein*, Congress cannot "prescribe a rule for the decision of a cause in a particular way."[245] Cases interpreting *Klein* appear to interpret this passage to mean that Congress cannot impede the judiciary's power to decide cases independently, for example, by telling a court how it should rule in a specific case or how to apply the law to the facts in a given case.[246] In this vein, Congress cannot interfere with the finality of judgments by requiring courts to reopen finally decided lawsuits.[247]

Still, Congress may influence how the judiciary resolves lawsuits without violating the separation of powers. Congress can do this by regulating a court's jurisdiction[248] or by enacting substantive measures that the judiciary must apply to resolve a legal dispute.[249] For instance, Congress may create or amend a law that retroactively applies to lawsuits that began before the new law was enacted.[250] Moreover, the new substantive law can target a specific case or set of cases that are relevant to a small subset of the population.[251] Additionally, legislation can be designed in a manner that ensures victory for a particular party, so long as the reviewing court may still independently apply the new law to the facts of the case.[252] This principle applies even if the new law largely predetermines the outcome for a pending lawsuit.[253] Legislation designed to ensure a

[241] *Patchak*, 138 S. Ct. at 916-18 (Roberts, C.J., dissenting).

[242] *Id*. at 920.

[243] *Id*. at 918-19.

[244] *Id*. at 919-20.

[245] *See* United States v. Klein, 80 U.S. 128, 146 (1871).

[246] *See* Bank Markazi v. Peterson, 136 S. Ct. 13010, 1323 n.17; *id.* at 1330 (Roberts, C.J., dissenting); *Klein*, 80 U.S. at 145-48.

[247] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225-32 (1995).

[248] *See* Sheldon v. Sill, 49 U.S. 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers.").

[249] *See, e.g.*, Miller v. French, 530 U.S. 327, 349 (2000).

[250] *See Bank Markazi*, 136 S. Ct. at 1324-26; *Miller*, 530 U.S. at 346-49; *Plaut*, 514 U.S. at 226; Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 437-39 (1992).

[251] *Bank Markazi*, 136 S. Ct. at 1327-28; *Plaut*, 514 U.S. at 239 n.9.

[252] *Bank Markazi*, 136 S. Ct. at 1324-26 (2016).

[253] *Id.* at 1325 ("Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases.").

particular judicial outcome may be accomplished, for example, by enacting a procedural rule, such as eliminating a defense like res judicata.[254]

Patchak does relatively little to clarify with any precision the outward bounds of Congress's ability to enact legislation that amends the substantive law underlying particular litigation without impeding the judiciary's power to decide cases independently. By rejecting Patchak's views that the Gun Lake Act unconstitutionally directs a verdict for a particular party by commanding a pending case to be promptly dismissed, a majority of the Court averred that Congress is authorized to limit the reviewability for a class of pending cases, whether through a jurisdiction-stripping statute or a statute that restores the government's immunity to suit.[255] And *Patchak* suggests that this principle appears to remain true *even if* when Congress legislates in such a way that the government will necessarily prevail in the only lawsuit that the legislation affects.[256]

A wrinkle that complicates how to determine *Patchak*'s ultimate influence on the separation-of-power-based limitations on Congress's power over courts, however, is the Supreme Court's inability to garner a majority opinion. In *Patchak,* all the Justices appear to agree that Congress cannot say "In *Smith v. Jones,* Smith wins." However, there is no majority view as to when a facially neutral law that functionally ends pending litigation in the favor of one party amounts to a separation-of-powers violation.[257] Four Justices concluded more broadly that a facially neutral law that strips the courts of jurisdiction did not raise an Article III concern, even when the natural result of the law was to ensure that the government would win the only pending case the law would implicate. Two other Justices concurred in the judgment on the narrow ground that the particular language Congress used in the Gun Lake Act was geared toward restoring the government's sovereign immunity. Justice Sotomayor's concurring opinion suggests that she agrees with the general principles outlined by the dissent that Congress cannot direct the outcome of a single pending case under the guise of stripping a court of jurisdiction. However, until such a law comes before the Court under a *Klein* challenge, it is unclear whether the dissent's general view of *Klein* or that of the plurality will command a majority of the Court.

[254] *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 397-402 (1980).

[255] Patchak v. Zinke, 138 S. Ct. 897, 902-11 (2018); *Id*. at 912-13 (Ginsburg, J., concurring); *Id*. at 913-14 (Sotomayor, J., concurring).

[256] *Patchak*, 138 S. Ct. at 910.

[257] *Compare* Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) (distinguishing the Gun Lake Act from a law that says, '"In *Smith v. Jones,* Smith wins," concluding that the Gun Lake Act "changes the law" and thus is permissible under III), *and id*. at 911 (Breyer, J., concurring) ("The statutory context makes clear that this is not simply a case in which Congress has said, 'In *Smith v. Jones,* Smith wins.'"), *with id.* at 914 (Roberts, C.J., dissenting) ("Two Terms ago, this Court unanimously agreed that Congress could not pass a law directing that, in the hypothetical case of *Smith v. Jones,* 'Smith wins.' Today the plurality refuses to enforce that limited principle in the face of a very real statute that dictates the disposition of a single pending case.") (internal citations omitted).

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