AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Judicial Power and Constitutional Authority/Constitutional Litigation

**Patchak v. Zinke, \_\_\_ U.S. \_\_\_** (2018)

*David Patchak was a landowner was resided near the Bradley Property, land that the United States government in 2009 took in trust for the Pottawatomi Indians to open a casino. Patchak sued the Secretary of the Interior, who when the case reached the Supreme Court, was Ryan Zinke. He claimed the federal government had no power to take the land in trust for a Native American tribe. The lawsuit was initially dismissed, but after a series of appeals, the Supreme Court ruled that the suit could proceed. Shortly thereafter, Congress enacted the Gun Lake Act of 2014. The crucial provision of that measure mandated the federal courts dismissal pending and future appeals related to the land in controversy. The federal district court promptly dismissed Patchak’s lawsuit and that decision was affirmed by the Court of Appeals for the District of Columbia. Patchak appealed to the Supreme Court of the United States on the ground that the federal law violated the separation of powers by dictating a result in a pending lawsuit.*

 *The Supreme Court by a 6-3 decision held that Gun Lake Act was constitutional. Justice Clarence Thomas, speaking for the plurality, maintained that Congress was free to change the jurisdiction of federal courts, even when that required dismissing pending cases. Justices Ruth Bader Ginsburg and Sonya Sotomayor maintained that the United States had withdrawn permission to see the United States. Chief Justice John Roberts insisted that the Supreme Court had unconstitutionally dictated a rule in a specific case. The plurality and dissenting opinions dispute whether Congress had made a general rule or a rule for a specific case. Whose opinion do you believe best described what Congress did? The justices also dispute the meaning and significance of* ex parte McCardle *(1869). What was the rule of* McCardle *and how does that rule apply to* Patchak*. Would Roberts overrule* McCardle*? Given the different opinions, what do you believe is the rule for congressional power to influence the results of pending lawsuits after* Patchak*?*

JUSTICE [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I74b7f6481bd411e8a7a8babcb3077f93&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) announced the judgment of the Court and delivered an opinion, in which Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I74b7f6481bd411e8a7a8babcb3077f93&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), JUSTICE [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I74b7f6481bd411e8a7a8babcb3077f93&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and JUSTICE [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I74b7f6481bd411e8a7a8babcb3077f93&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) join.

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The separation of powers, among other things, prevents Congress from exercising the judicial power. One way that Congress can cross the line from legislative power to judicial power is by “usurp[ing] a court's power to interpret and apply the law to the [circumstances] before it.” The simplest example would be a statute that says, “In Smith v. Jones, Smith wins.” At the same time, the legislative power is the power to make law, and Congress can make laws that apply retroactively to pending lawsuits, even when it effectively ensures that one side wins.

To distinguish between permissible exercises of the legislative power and impermissible infringements of the judicial power, this Court's precedents establish the following rule: Congress violates Article III when it “compel[s] ... findings or results under old law.” But Congress does not violate Article III when it “changes the law.”

Section 2(b) (of the Gun Lakes Law] changes the law. Specifically, it strips federal courts of jurisdiction over actions “relating to” the Bradley Property. Before the Gun Lake Act, federal courts had jurisdiction to hear these actions. Now they do not. This kind of legal change is well within Congress' authority and does not violate Article III.

Section 2(b) strips federal jurisdiction over suits relating to the Bradley Property. The statute uses jurisdictional language. It states that an “action” relating to the Bradley Property “shall not be filed or maintained in a Federal court.” It imposes jurisdictional consequences: Actions relating to the Bradley Property “shall be promptly dismissed.” . . . Although § 2(b) does not use the word “jurisdiction,” this Court does not require jurisdictional statutes to “incant magic words.” . . .

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Statutes that strip jurisdiction “chang[e] the law” for the purpose of Article III, just as much as other exercises of Congress' legislative authority. . . . Congress' greater power to create lower federal courts includes its lesser power to “limit the jurisdiction of those Courts.” So long as Congress does not violate other constitutional provisions, its “control over the jurisdiction of the federal courts” is “plenary.” Thus, when Congress strips federal courts of jurisdiction, it exercises a valid legislative power no less than when it lays taxes, coins money, declares war, or invokes any other power that the Constitution grants it.

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Congress generally does not infringe the judicial power when it strips jurisdiction because, with limited exceptions, a congressional grant of jurisdiction is a prerequisite to the exercise of judicial power. In sum, § 2(b) strips jurisdiction over suits relating to the Bradley Property. It is a valid exercise of Congress' legislative power. And because it changes the law, it does not infringe the judicial power. The constitutionality of jurisdiction-stripping statutes like this one is well established.

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Section 2(b) does not flatly direct federal courts to dismiss lawsuits under old law. It creates new law for suits relating to the Bradley Property, and the District Court interpreted and applied that new law in Patchak's suit. Section 2(b)'s “relating to” standard effectively guaranteed that Patchak's suit would be dismissed. But “a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts.” Patchak argues that the last four words of § 2(b)—“shall be promptly dismissed”—direct courts to reach a particular outcome. But a statute does not violate Article III merely because it uses mandatory language. Instead of directing outcomes, the mandatory language in § 2(b) “simply imposes the consequences” of a court's determination that it lacks jurisdiction because a suit relates to the Bradley Property.

Patchak compares § 2(b) to the statute this Court held unconstitutional in *United States v. Klein* (1871). In that case, the administrator of the estate of V.F. Wilson, a former Confederate soldier, sued to recover the value of some cotton that the Government had seized during the war. The relevant statute required claimants to prove their loyalty in order to reclaim their property. Wilson had received a pardon before he died, and this Court had held that pardons conclusively prove loyalty under the statute. But after Wilson's administrator secured a judgment in his favor, Congress passed a statute making pardons proof of disloyalty and declaring that, if a claimant had accepted one, “the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant.”

This Court has since explained that “the statute in *Klein* infringed the judicial power, not because it left too little for courts to do, but because it attempted to direct the result without altering the legal standards governing the effect of a pardon—standards Congress was powerless to prescribe.” Congress had no authority to declare that pardons are not evidence of loyalty, so it could not achieve the same result by stripping jurisdiction whenever claimants cited pardons as evidence of loyalty.

Patchak's attempts to compare § 2(b) to the statute in *Klein* are unpersuasive. Section 2(b) does not attempt to exercise a power that the Constitution vests in another branch. And unlike the selective jurisdiction-stripping statute in *Klein*, § 2(b) strips jurisdiction over every suit relating to the Bradley Property. Indeed, Klein itself explained that statutes that do “nothing more” than strip jurisdiction over “a particular class of cases” are constitutional. That is precisely what § 2(b) does.

Section 2(b) does not unconstitutionally interfere with this Court's decision in *Patchak* *I.* Article III . . . prohibits Congress from “retroactively commanding the federal courts to reopen final judgments.” But *Patchak I* did not finally conclude Patchak's case. When this Court said that his suit “may proceed,” it meant that the Secretary's preliminary defenses lacked merit and that Patchak could return to the District Court for further proceedings. It did not mean that Congress was powerless to change the law that governs his case. Article III does not prohibit Congress from enacting new laws that apply to pending civil cases. When a new law clearly governs pending cases, Article III does not prevent courts from applying it because “each court, at every level, must ‘decide according to existing laws.’”

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We doubt that the constitutional line separating the legislative and judicial powers turns on factors such as a court's doubts about Congress' unexpressed motives, the number of “cases [that] were pending when the provision was enacted,” or the time left on the statute of limitations. But even if it did, we disagree with the dissent's characterization of § 2(b). Nothing on the face of § 2(b) is limited to Patchak's case, or even to his challenge under the Indian Reorganization Act. Instead, the text extends to all suits “relating to” the Bradley Property. Thus, § 2(b) survives even under the dissent's theory: It “prospectively govern[s] an open-ended class of disputes” and its “relating to” standard “preserv[es] ... an adjudicative role for the courts.”

JUSTICE [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I74b7f6481bd411e8a7a8babcb3077f93&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), concurring.

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Here Congress has used its jurisdictional power to supplement, without altering, action that no one has challenged as unconstitutional. Under these circumstances, I find its use of that power unobjectionable. And, on this understanding, I join the plurality's opinion.

JUSTICE [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I74b7f6481bd411e8a7a8babcb3077f93&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom JUSTICE [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I74b7f6481bd411e8a7a8babcb3077f93&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins, concurring in the judgment.

What Congress grants, it may retract. That is undoubtedly true of the Legislature's authority to forgo or retain the Government's sovereign immunity from suit. The Court need venture no further to decide this case.

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Just as it is Congress' prerogative to consent to suit, so too is it within Congress' authority to withdraw consent once given. Retraction of consent to be sued (effectively restoration of immunity) is just what Congress achieved when it directed in the Gun Lake Act: “Notwithstanding any other provision of law, an action ... relating to the [Bradley Property],” including any pending action, “shall not be ... maintained in a Federal Court and shall be promptly dismissed.” Notably, the language Congress employed in the Gun Lake Act (any “action ... relating to the [Bradley Property] ... shall be promptly dismissed”) is the mirror image of the Administrative Procedure Act's immunity waiver, which instructs that suits “against the United States” for declaratory or injunctive relief “shall not be dismissed.”

JUSTICE [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I74b7f6481bd411e8a7a8babcb3077f93&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), concurring in the judgment.

I agree with the dissent that Congress may not achieve through jurisdiction stripping what it cannot permissibly achieve outright, namely, directing entry of judgment for a particular party. I also agree that an Act that merely deprives federal courts of jurisdiction over a single proceeding is not enough to be considered a change in the law and that any statute that portends to do so should be viewed with great skepticism. I differ with the dissent's ultimate conclusion only because, as Justice Ginsburg explains, the Gun Lake Trust Land Reaffirmation Act should not be read to strip the federal courts of jurisdiction but rather to restore the Federal Government's sovereign immunity.

CHIEF JUSTICE [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I74b7f6481bd411e8a7a8babcb3077f93&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom JUSTICE [KENNEDY](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=I74b7f6481bd411e8a7a8babcb3077f93&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and JUSTICE [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I74b7f6481bd411e8a7a8babcb3077f93&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) join, dissenting.

Two Terms ago, this Court unanimously agreed that Congress could not pass a law directing that, in the hypothetical pending case of Smith v. Jones, “Smith wins.” *Bank Markazi v. Peterson* (2016). Today, the plurality refuses to enforce even that limited principle in the face of a very real statute that dictates the disposition of a single pending case. Contrary to the plurality, I would not cede unqualified authority to the Legislature to decide the outcome of such a case. Article III of the Constitution vests that responsibility in the Judiciary alone.

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The Framers' decision to establish a judiciary “truly distinct from both the legislature and the executive” was born of their experience with legislatures “extending the sphere of [their] activity and drawing all power into [their] impetuous vortex.” Throughout the 17th and 18th centuries, colonial legislatures routinely functioned as courts of equity, “grant[ing] exemptions from standing law, prescrib[ing] the law to be applied to particular controversies, and even decid[ing] the merits of cases.” Given the “disarray” produced by this “system of legislative equity,” the Framers resolved to take the innovative step of creating an independent judiciary. . . .

The Constitution's division of power thus reflects the “concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person.” The Framers protected against that threat, both in “specific provisions, such as the Bill of Attainder Clause,” and in the “general allocation” of the judicial power to the Judiciary alone. . . .

 . . . . When Congress passed the [Gun Lakes] Act in 2014, no other suits relating to the Bradley Property were pending, and the six-year statute of limitations on challenges to the Secretary's action under the Administrative Procedure Act had expired. The Committees that recommended the legislation affirmed that the statute would make no “changes in existing [Indian] law.”

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. . . § 2(b) targets a single pending case. Although the formal language of the provision—reaching any action “relating to” the Bradley Property—could theoretically suggest a broader application, its practical operation unequivocally confirms that it concerns solely Patchak's suit. In an effort to identify a set of disputes to which § 2(b) might apply, the plurality asserts that the provision extends to any action relating to the trust status of the property. Yet as the D.C. Circuit recognized, no other cases were pending when the provision was enacted; § 2(b) affected “only ... Patchak's lawsuit.” And as the Band concedes, no additional suits challenging the transfer could have been filed under the APA—or any other statute of which we are aware—due to the expiration of the statute of limitations. . . .

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[N]othing in § 2(b) specifies that the statute is jurisdictional. That has special significance: To rein in “profligate use of the term ‘jurisdiction,’ ” this Court in recent cases has adopted a “bright line” rule treating statutory limitations as nonjurisdictional unless Congress “clearly states” otherwise. The Gun Lake Act does not clearly state that it imposes a jurisdictional restriction—the term is not mentioned anywhere in the title, headings, or text of the Act. Indeed, we have previously found that nearly identical statutory language “says nothing about whether a federal court has subject-matter jurisdiction. . . .

. . . .”[W]hile the greater power to create inferior federal courts generally includes the power to strip those courts of jurisdiction, at a certain point that lesser exercise of authority invades the judicial function. “Congress has the power (within limits) to tell the courts what classes of cases they may decide, but not to prescribe or superintend how they decide those cases.” In other words, Congress cannot, under the guise of altering federal jurisdiction, dictate the result of a pending proceeding.

*Klein*, after all, drew precisely the same distinction when it considered the provision stripping jurisdiction over any suit based on a pardon. Chief Justice Chase's opinion for the Court explained that if the statute had “simply” removed jurisdiction over “a particular class of cases,” it would be regarded as “an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.” But because the withdrawal of jurisdiction was a “means to an end,” founded “solely on the application of a rule of decision,” the Court held that the law violated the separation of powers.

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Over and over, the plurality intones that § 2(b) does not impinge on the judicial power because the provision “changes the law.” But all that § 2(b) does is deprive the court of jurisdiction in a single proceeding. If that is sufficient to change the law, the plurality's rule “provides no limiting principle” on Congress's ability to assume the role of judge and decide the outcome of pending cases.

In my view, the concept of “changing the law” must imply some measure of generality or preservation of an adjudicative role for the courts. The weight of our jurisdiction stripping precedent bears this out. . . . The closest analogue is of course *Ex parte McCardle* (1869). . . . The Court's decision in *McCardle* has been alternatively described as “caving to the political dominance” of the Radical Republicans or “acceding to Congress's effort to silence the Court.” Read for all it is worth, the decision is also inconsistent with the approach the Court took just three years later in *Klein*, where Chief Justice Chase (a dominant character in this drama) stressed that “[i]t is of vital importance” that the legislative and judicial powers “be kept distinct.”

The facts of *McCardle*, however, can support a more limited understanding of Congress's power to divest the courts of jurisdiction. For starters, the repealer provision covered more than a single pending dispute; it applied to a class of cases, barring anyone from invoking the Supreme Court's appellate jurisdiction in habeas cases for the next two decades. In addition, the Court's decision did not foreclose all avenues for judicial review of McCardle's complaint. As Chase made clear in the penultimate paragraph of the opinion—and confirmed later that year in his opinion for the Court in [*Ex parte Yerger* (1869)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1868140515&pubNum=0000780&originatingDoc=I74b7f6481bd411e8a7a8babcb3077f93&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) the statute did not deny “the whole appellate power of the Court.” *McCardle*, by taking a different procedural route and filing an original habeas action, could have had his case heard on the merits.

Section 2(b), on the other hand, has neither saving grace. It ends Patchak's suit for good. Because § 2(b) singles out Patchak's suit, specifies how it must be resolved, and deprives him of any judicial forum for his claim, the decision to uphold that provision surpasses even *McCardle* as the highwater mark of legislative encroachment on Article III.

Indeed, although the stakes of this particular dispute may seem insignificant, the principle that the plurality would enshrine is of historic consequence. In no uncertain terms, the plurality disavows any limitations on Congress's power to determine judicial results, conferring on the Legislature a colonial-era authority to pick winners and losers in pending litigation as it pleases. The Court in *Bank Markazi* said it was holding the line against this sort of legislative usurpation.

While the plurality reaches to read the Gun Lake Act as stripping jurisdiction, Justice Ginsburg concurrence, joined by Justice Sotomayor, strains further to construe § 2(b) as restoring the Government's sovereign immunity from suit. To reinstate sovereign immunity after it has been waived, Congress must express “an unambiguous intention to withdraw” a remedy. Congress has not made that showing here. Section 2(b)—which provides that “an action ... relating to the [Bradley Property] ... shall be promptly dismissed”—bears none of the unmistakable hallmarks of a provision withdrawing the sovereign's consent to suit.

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