

THE VANISHING CORE OF JUDICIAL INDEPENDENCE

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With Congress firmly in control of the jurisdiction, resources, and structure of the federal courts, the scope of the judiciary's independence is limited indeed. If there is an attribute that can be considered the core of judicial independence, it is the power of the federal courts to decide cases pending before them. In a pair of recent decisions, however, the Supreme Court has called into question whether the federal judiciary possesses even this limited attribute of independence. This Article examines how the Court has blurred the line between the judicial and legislative powers by ceding to Congress the authority to direct federal courts to decide pending cases for particular parties. After identifying the thorny issues that the Court has left unsettled, this Article suggests an approach to resolving them that preserves both Congress's role in lawmaking as well as the core of the judiciary's independence.

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INTRODUCTION

When the history of the Roberts Court is written, the independence of the judiciary will be one of its central themes. Indeed, Roberts’s preoccupation with the *decisional* independence of judges—that is, whether individual judges make decisions free of bias—was evident even before his confirmation as Chief Justice. In a well-known exchange during his Senate confirmation hearing, then-Judge Roberts proclaimed his vision of judicial independence: “Judges are like umpires. Umpires don’t make the rules, they apply them. . . . [A]nd I will remember that it’s my job to call balls and strikes, and not to pitch or bat.”¹ As Chief Justice, Roberts has continued to emphasize his vision of the judicial role, explaining that judges “do not advance political positions;”² “[we] do not sit on opposite sides of an aisle, we do not caucus in separate rooms, we do not

¹ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary, 109th Cong.* 55–56 (2005) [hereinafter *John Roberts Confirmation Hearing*] (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

² JOAN BISKUPIC, *THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS* 11 (2019).

serve one party or one interest. We serve one nation.”³ And in a remarkably pointed public defense of the courts in the face of growing accusations of their partisan leanings, the Chief Justice responded: “[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.”⁴

Although Roberts is not alone in asserting that judges exercise decisional independence,⁵ skeptics often overshadow the defenders of this position.⁶ Perhaps most vociferously, former President Trump made clear his position that judges who ruled against his favored policies in litigation are “activists,” that the Court of the Appeals for the Ninth Circuit is “out of control,” and that the United States court system itself is “broken and unfair.”⁷ Perhaps not surpris-

³ University of Minnesota Law School, *The 2018 Stein Lecture: John G. Roberts, Jr., Chief Justice of the United States*, YOUTUBE (Oct. 22, 2018), https://www.youtube.com/watch?v=9i3RwW0y_kE [<https://perma.cc/2LWX-X4C5>]; see also Jeffrey Rosen, *Roberts’s Rules*, ATLANTIC (Jan./Feb. 2007), <https://www.theatlantic.com/magazine/archive/2007/01/roberts-rules/305559/> [<https://perma.cc/FFF8-6DLC>] (describing Roberts’s interest in the public’s perception of the Court as an “impartial institution that transcends partisan politics”).

⁴ Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap Over Judges*, ASSOCIATED PRESS (Nov. 21, 2018), <https://apnews.com/c4b34f9639e141069c08cf1e3deb6b84> [<https://perma.cc/BUG6-AEZW>]. Perhaps Chief Justice Roberts’s insistence on the independence of the judiciary stems from the concern that a loss of the public’s support could lead to a loss of the judiciary’s power. Political science literature suggests that Supreme Court justices “have strong incentives to be concerned with their public standing. They recognize that erosion of public support and institutional legitimacy has negative consequences for the Court’s power and institutional integrity.” Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 973 (2009).

⁵ Bill Mears, *O’Connor: Don’t Call Us ‘Activist Judges,’* CNN (Nov. 28, 2006, 2:31 PM), <http://www.cnn.com/2006/POLITICS/10/27/mears.judicialindependence/index.html> [<https://perma.cc/8XLU-EACS>] (reporting statements from Justices O’Connor and Breyer about the importance of judicial independence).

⁶ Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 315 (1999) (noting that attacks on judicial independence have “become part of orchestrated strategies of political parties and other groups”).

⁷ *In His Own Words: The President’s Attacks on the Courts*, BRENNAN CTR. FOR JUST. (Feb. 14, 2020), <https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts> [<https://perma.cc/664M-PZ78>]. While much of President Trump’s rhetoric is unique to him, the amorphous accusation of “judicial activism” has a long history: Republican Party platforms since at least 1996 have insisted that judicial activism is a feature of judges appointed by Democrats. President George W. Bush campaigned on the promise of appointing “strict constructionist” judges rather than “liberal activist judges.” Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555, 557–58, 564 (2010). Accusations of judicial activism come from the political left, as well. Dean Chemerinsky characterized the Supreme Court’s *Citizens United* decision as “a stunning example of judicial activism by its five most conservative justices.” Erwin Chemerinsky, *Conservatives Embrace Judicial Activism in Campaign Finance Ruling*, L.A. TIMES (Jan. 22, 2010, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2010-jan-22-la-oe-chemerinsky22-2010jan22-story.html> [<https://perma.cc/A9N2-GDUG>]; see also Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regu-*

ingly, some commentators have argued that the general public also tends to view the Supreme Court in partisan terms, reposing their confidence in the Court when a president from their preferred party successfully appoints a justice and withdrawing their confidence when the appointment is made by a president from the opposing party.⁸

Even if Roberts's "balls and strikes" metaphor rings hollow to many,⁹ there is widespread agreement that judges should exercise decisional independence when adjudicating individual disputes.¹⁰ However, there is less agreement about whether the judiciary has or should have *institutional* independence,¹¹ that is, whether there is some judicial authority that cannot be controlled by the political branches.¹² There are a number of values that have been attributed to

lation of Congress, 78 IND. L.J. 153, 155 (2003) (noting the bipartisan nature of accusations of judicial activism).

⁸ Jeffrey M. Jones, *Trust in Judicial Branch Up, Executive Branch Down*, GALLUP (Sept. 20, 2017), <https://news.gallup.com/poll/219674/trust-judicial-branch-executive-branch-down.aspx> [<https://perma.cc/7BQU-NM49>] ("With conservative Justice Neil Gorsuch joining the Supreme Court in April, Republicans' trust in the judicial branch has surged over the past year . . . Democrats are now less trusting in the federal judiciary."). Scholars debate the extent to which members of the public tend to support the Court even if it does not rule "their way." Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2252 (2019) (reviewing RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018)).

⁹ Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641, 641 (2012) ("John Roberts has been both praised and scorned for the metaphor he presented to the Senate Judiciary Committee at the hearing on his confirmation to be Chief Justice of the United States: '[I]t's my job to call balls and strikes.'"); Jon D. Michaels, *Baller Judges*, 2020 WIS. L. REV. 411, 413 ("[Judges] shouldn't style themselves umpires because, quite frankly, umpire-judging is often impossible in any case involving anything more than fact or credibility adjudication.").

¹⁰ E.g., Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 967 (2007) ("[A]ll who act as judges are expected to exercise independent judgment, in the sense of being impartial as between the parties and not having a personal stake in the dispute . . ."); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 965 (2002) (arguing that it is universally agreed that "decisional independence, meaning judges' ability to adjudicate facts and interpret law in particular cases 'free from any outside pressure: personal, economic, or political, including any fear of reprisal' " is a virtue).

¹¹ Jackson, *supra* note 10 ("While all who act as judges are expected to exercise independent judgment . . . there is disagreement about how independent from the public, or from elected political branches, judges should be in interpreting and applying the law."); Geyh, *supra* note 7, at 160 ("We can only hypothesize as to whether Congress has the power or authority to punish a judge for making an unpopular decision by labeling it a high misdemeanor and removing her on that basis, or by cutting her budget, or abolishing the judgeship she occupies, or by depriving the federal courts of jurisdiction . . .").

¹² Burbank, *supra* note 6, at 320 (arguing that the standard view of judicial independence assures that "judges free of congressional and executive control will be in a position to determine whether the assertion of power against the citizen is consistent with law"); Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 32 (1998) (proposing that judicial review requires

independence in this institutional sense; most saliently, institutional independence allows judges to uphold rights of citizens against the government¹³ and police disputes among its three branches.¹⁴ Chief Justice Roberts emphasized the importance of the institutional independence of the courts as well, explaining that the federal courts are tasked with ensuring that the political branches act within the confines of the law.¹⁵

Despite these justifications for institutional independence, there are also good reasons for the political branches to exert at least some control over the judiciary. After all, another way to describe judicial dependence is judicial *accountability*. Judges are unelected and cannot be removed except under unusual circumstances; as a result, dependence on the political branches can be seen as an indispensable mechanism for ensuring that judges apply law that has been enacted through democratic channels.¹⁶ Moreover, it is possible to overstate the tension between judicial accountability and judicial independence. Professor Burbank has argued that judicial independence and judicial accountability can be thought of as “complementary concepts” rather than “concepts at war with each other.”¹⁷

But, no matter whether judicial independence and judicial accountability are complementary or in tension with one another, the relationship between these two concepts manifests itself in a number of seemingly intractable conceptual and doctrinal problems. This Article considers one of these perennial problems: whether Congress may direct a federal court to decide a pending dispute for a particular party. On one hand, the power to write laws for courts to follow is squarely part of Congress’s lawmaking authority.¹⁸ On the other hand,

that “the courts possess the means to protect their institutional integrity against unconstitutional political branch encroachments”).

¹³ Ferejohn & Kramer, *supra* note 10, at 968 (“[P]olitical actors face pressures to abandon or subvert legal rules for legally inappropriate reasons.”); Jackson, *supra* note 10, at 969 (noting that judges were made independent to, *inter alia*, “protect minorities from popular passions”).

¹⁴ Jackson, *supra* note 10, at 969 (noting that judges were made independent to, *inter alia*, “check the other branches of government when they departed from the fundamental commitments set forth in the Constitution”).

¹⁵ University of Minnesota Law School, *supra* note 3.

¹⁶ Ferejohn & Kramer, *supra* note 10, at 965 (“Yet everyone also agrees that certain forms of popular or legislative pressure are not only permissible, but indispensable.”); Jackson, *supra* note 10, at 997 (“Legitimate constitutional government, moreover, requires both independent courts and effective democratic participation in governance.”).

¹⁷ Stephen B. Burbank, *What Do We Mean by “Judicial Independence”?*, 64 OHIO ST. L.J. 323, 325 (2003) (“An accountable judiciary without any independence is weak and feeble. An independent judiciary without any accountability is dangerous.”).

¹⁸ See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States”); JAMES E. PFANDER, PRINCIPLES OF FEDERAL JURISDICTION 405 (3d ed. 2016) (noting that applying rules of decision is precisely what courts do).

courts are empowered to adjudicate disputes pending before them.¹⁹ Most of the time, these two powers coexist without any conceptual or practical difficulty: after Congress writes a generally applicable law, a court applies the law to a particular factual situation. However, conflict arises when Congress writes a law that is so narrow that it guarantees the outcome in a particular, pending case. When it writes a statute with this level of specificity, Congress walks perilously close to the line that separates the judicial power from the legislative power.²⁰

Now is the right time to reconsider the fuzzy line separating the legislative and judicial functions. Widespread criticism of the federal courts, including increasingly pointed accusations of political bias, have precipitated renewed popular and scholarly interest in measures to curb the influence of the federal courts,²¹ including proposals to strip the federal courts of jurisdiction over particular subject matters.²² The Supreme Court, too, has waded into the murky subject of judicial independence in a pair of recent cases, *Bank Markazi v. Peterson*²³ and *Patchak v. Zinke*.²⁴ In these cases, the Court considered statutes that explicitly picked a winning party in a pending case and directed the federal court to rule accordingly. In both of these cases, the Court upheld the statutes. In doing so, the Court expanded the scope of Congress's authority to make law at the expense of the judiciary's power to adjudicate. How far Congress may expand its authority at the expense of the judicial power is the subject of this Article.

In Part I, I will argue that the core of judicial independence is vanishing. By constitutional design, Congress is firmly in control of the jurisdiction, re-

¹⁹ U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in . . . inferior Courts . . .”).

²⁰ For a discussion of the line between the judicial and legislative power, see Evan C. Zoldan, *The Klein Rule of Decision Puzzle and the Self-Dealing Solution*, 74 WASH. & LEE L. REV. 2133, 2148–72 (2017) [hereinafter Zoldan, *Klein*].

²¹ TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* 5–6 (2011).

²² Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1780–81 (2020) (arguing for broad congressional power under the Exceptions Clause); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 471 (2018) (arguing that political actors treat many court-curbing measures as out of bounds although this restraint is not compelled by constitutional text, structure, or history); Ronald J. Krotoszynski, Jr. & Atticus DeProspero, *Against Congressional Case Snatching*, 62 WM. & MARY L. REV. 791 (2021) (arguing for a broad rendering of a principle that prevents Congress from directing federal courts to reach particular judgments in pending cases).

²³ *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322–23 (2016). For a discussion and critique of *Bank Markazi*, see Evan C. Zoldan, *Bank Markazi and the Undervaluation of Legislative Generality*, 35 YALE L. & POL'Y L. REV. INTER ALIA 1, 1 (2016) [hereinafter Zoldan, *Bank Markazi*].

²⁴ *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018).

sources, and structure of the federal courts.²⁵ Congress's control is so pervasive, in fact, that scholars have long struggled to articulate what authority, if any, stands at the core of the judiciary's independence.²⁶ After considering different possible formulations of judicial independence, I conclude that the core of judicial independence should be seen as the courts' authority to decide disputes pending before them without legislative direction. This version of the core of judicial independence comports with persuasive normative accounts of judicial independence,²⁷ is consistent with the Supreme Court's prohibition on the revision or reopening of final judgments,²⁸ and is rooted in the "*Klein* rule of decision" principle, named for a Reconstruction-era case that invalidated an attempt by Congress to direct the result in pending cases.²⁹ After describing the contours of the core of judicial independence, I will then argue that this core is vanishing. The modern Supreme Court has narrowed it through a series of doctrinal limitations on its scope, culminating in its *Bank Markazi* opinion.

In Part II, I will unpack the potential implications of the Court's *Patchak* case on the vanishing core of judicial independence. *Patchak*'s fractured opinions raise more questions than they answer about the vitality and scope of the rule of decision principle. I will explore whether *Patchak* reflects the last gasp of air for judicial independence or whether, instead, *Patchak* breathes new life into its core. *Patchak*, although it should have been an easy case after *Bank Markazi*, unsettles the issues that *Bank Markazi* seemingly laid to rest. The *Patchak* opinions assert, in stark terms, diametrically opposed visions of the rule of decision principle and judicial independence more generally.

In Part III, I will address the issues that *Patchak* tees up, but does not settle, about the scope of the *Klein* rule of decision principle and, along with it, the core of judicial independence. After exploring the dispute underlying each of these issues, I will suggest how the courts, including the Supreme Court, should

²⁵ Geyh, *supra* note 7, at 160 (arguing that judicial independence "is diminished by Congress's powers to establish, and by negative implication, disestablish the lower courts, and to curb the Supreme Court's jurisdiction").

²⁶ For thorough discussions of the structural relationships and practices that make up judicial independence, see Jackson, *supra* note 10, at 992 (describing the features that make up judicial independence); John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 355 (1999) (same); Geyh & Van Tassel, *supra* note 12, at 31–32 (same); ABA COMM'N ON SEPARATION OF POWERS AND JUD. INDEP., AN INDEPENDENT JUDICIARY 10–11 (1997) [hereinafter ABA COMM'N].

²⁷ Ferejohn, *supra* note 26, at 366–67 (arguing that judicial independence protects the "rule of law," that is, "making sure that powerful people—particularly elected officials—cannot manipulate legal proceedings to their advantage").

²⁸ *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 411–12 (1792) (holding that "revision and control" of federal court judgments by the executive is inconsistent with judicial independence); *Plaut v. Spendthrift Farm, Inc.* 514 U.S. 211, 225–26 (1995) (holding that Congress may not require the federal courts to reopen final judgments).

²⁹ *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871) (holding unconstitutional a withdrawal of jurisdiction "founded solely on the application of a rule of decision, in causes pending, prescribed by Congress").

approach them in a future case. There are no easy answers to the issues raised in *Patchak*, but their proper resolution can preserve the core of judicial independence while still recognizing Congress's lawmaking role.

I. THE VANISHING CORE OF JUDICIAL INDEPENDENCE

Judicial independence is easy to praise and difficult to define. It is clear that no impermeable barrier stands between judges and outside influence; yet, there is no agreement about whether there are, or should be, any limits to Congress's ability to control the federal courts. In this Part, I argue that the core of judicial independence is the power of the courts to decide cases that are pending before them without legislative direction. But, this core of judicial independence is vanishing. The Supreme Court has blurred, if not erased, the line separating the judicial and legislative functions. Through a series of decisions upholding statutes that intrude on the power of the courts to decide pending cases, the Supreme Court has all but ceded the core function of the courts to Congress.

A. *The Core of Judicial Independence*

Rather than turning on a single necessary and sufficient feature, judicial independence is better characterized as the product of structures and practices that describe both judicial behavior and the larger governmental system in which it resides. As a result, before articulating the core of judicial independence, I begin with a description of its attributes.

1. *Attributes of Judicial Independence*

Judicial independence is often celebrated as the "backbone of our uniquely American liberties"³⁰ or even essential to a free society.³¹ And it is no wonder; an independent judiciary is believed to protect any number of widely held values. These values are often stated in negative terms—that is—they free judges from certain unacceptable influences. If judges are financially independent of the parties whose cases they adjudicate, for example, they can resolve disputes free of bias caused by self-interest or fear of reprisal.³² Moreover, a judge

³⁰ Joseph M. Hood, *Judicial Independence*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 137, 144–45 (2003).

³¹ ABA COMM'N, *supra* note 26, at iii ("Over two hundred years of experience confirm the wisdom of our nation's founders that judicial independence is the 'most essential characteristic of a free society.'").

³² Ferejohn, *supra* note 26, at 355 ("[J]udicial independence is the idea that a judge ought to be free to decide the case before her without fear or anticipation of (illegitimate) punishments or rewards."); Geyh & Van Tassel, *supra* note 12, at 31 ("[Judicial] independence concerns the impartiality of judges—the capacity of individual judges to decide specific cases on the merits, without 'fear or favor.'"); Ferejohn & Kramer, *supra* note 10, at 965 (argu-

whose position and salary are not dependent on any particular case's outcome can render decisions free from political pressure, whether from elected officials directly³³ or from interest groups.³⁴ Stated in positive rather than negative terms, independent judges are free to interpret the law and decide cases according to the substantive legal commitments embodied in the rules they apply.³⁵

Despite these laudable justifications for an independent judiciary, judicial independence is not absolute. As scholars have often described, the robustness of judicial independence turns on whether it refers to the *decisional* independence of individual judges or the *institutional* independence of the judicial branch as a whole.³⁶ A judge has decisional independence to the extent she is “free to decide the case before her without fear or anticipation of (illegitimate) punishments or rewards.”³⁷ It is decisional independence that Chief Justice Roberts invokes when he stresses that judges are merely calling balls and strikes.³⁸ And it is decisional independence that is questioned when judges are accused of ruling in line with political biases rather than impartially, on the facts and law before them.³⁹

ing that judicial independence includes freedom from “any outside pressure: personal, economic, or political, including any fear of reprisal”).

³³ Geyh & Van Tassel, *supra* note 12, at 31–32 (arguing that judicial independence protects the “capacity of the judiciary to remain autonomous, so that it might serve as an effective check against the excesses of the political branches”).

³⁴ Burbank, *supra* note 6, at 329 (arguing that judicial independence plays a role in “protecting us from the day-to-day depredations of interest-group politics”); Jackson, *supra* note 10, at 969 (noting that judicial independence was intended, in part, to “protect minorities from popular passions that would violate their legal rights”).

³⁵ Jackson, *supra* note 10, at 969 (arguing that judges were made independent, in part, “to judge according to law; they were to have the independence to *interpret* the law in order to render judgment”); Ferejohn & Kramer, *supra* note 10, at 967 (arguing that interference from political actors “threatens to undermine the substantive commitments embodied in law through partial applications”).

³⁶ Ferejohn, *supra* note 26, at 355 (“Independence seems to have at least two meanings. One meaning . . . is that a person is independent if she is able to take actions without fear of interference by another. . . . Another meaning . . . applies naturally to courts and to the judicial system as a whole.”); Geyh & Van Tassel, *supra* note 12, at 31 (“Decisional independence concerns the impartiality of judges Branch or institutional independence, on the other hand, concerns the general, non-case specific separation of the judicial branch . . .”).

³⁷ Ferejohn, *supra* note 26, at 355; *see also* Ferejohn & Kramer, *supra* note 10, at 965 (defining decisional independence as “judges’ ability to adjudicate facts and interpret law in particular cases ‘free from any outside pressure: personal, economic, or political, including any fear of reprisal’”).

³⁸ *John Roberts Confirmation Hearing*, *supra* note 1 (“Judges are like umpires. Umpires don’t make the rules, they apply them. . . . [A]nd I will remember that it’s my job to call balls and strikes, and not to pitch or bat.”); Geyh, *supra* note 7, at 162 (“If we want judges to ‘call ‘em like they see ‘em’—to decide cases on the basis of facts as they find them and law as they construe it to be written—then we must insulate them from external influences that could corrupt their integrity or impartiality.”). *Cf.* Michaels, *supra* note 9, at 411, 413.

³⁹ *See* Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853, 858 (2008) (“Po-

The decisional independence of individual judges is supported by the Constitution's salary and tenure protections as well as unwritten cultural norms.⁴⁰ Once confirmed, Article III of the Constitution provides tenure during "good behavior" and compensation that cannot be diminished.⁴¹ These tenure and salary protections are designed to permit judges to make decisions without fear of retaliation from the political branches.⁴² Although tenure is qualified by the possibility of removal after impeachment and conviction,⁴³ this power is seldom used.⁴⁴ Indeed, of the thousands of Article III judges who have served since the beginning of the Republic, only fifteen have been impeached and, of those, only seven have been removed from office.⁴⁵

Compared with the decisional independence of individual judges, the institutional independence of the judiciary is far less secure. The judiciary is independent in the institutional sense to the extent that it has authority that cannot be invaded by the political branches.⁴⁶ But, because Congress is in control of

litical bias refers to partisan or ideological bias: the desire for an outcome to the left (or right) of a (stipulated) impartial outcome."); Jackson, *supra* note 10, at 967 ("[A]ll who act as judges are expected to exercise independent judgment, in the sense of being impartial as between the parties and not having a personal stake in the dispute . . .").

⁴⁰ Grove, *supra* note 22, at 467–68 (arguing that political actors treat many court-curbing measures as out of bounds although this restraint is not compelled by constitutional text, structure, or history).

⁴¹ U.S. CONST. art. III, § 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."); see Ferejohn, *supra* note 26, at 355 (noting that judges are more or less independent while the judiciary as an institution is more or less dependent on the political branches).

⁴² Jackson, *supra* note 10, at 967 (noting that tenure and salary protections protect judges from consequences of unpopular decisions).

⁴³ Compare U.S. CONST. art. I, § 2 ("The House of Representatives . . . shall have the sole Power of Impeachment."), with U.S. CONST. art. I, § 3 ("The Senate shall have the sole Power to try all Impeachments.").

⁴⁴ See JOSH CHAFETZ, CONGRESS'S CONSTITUTION 148–50 (2017) (describing impeachment as a seldom used but important congressional power); Ferejohn & Kramer, *supra* note 10, at 980 ("Over the course of American history only thirteen [now fifteen] judges have been impeached and only seven removed from office; four were acquitted and two more resigned before their trials in the Senate.").

⁴⁵ *Impeachments of Federal Judges*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/judges/impeachments-federal-judges> [<https://perma.cc/88S6-M5QY>] (listing each impeachment and conviction of a federal judge). Because the House and Senate could, but do not, use the impeachment and conviction process more aggressively, their forbearance can be seen as part of the customary independence of the judiciary. See Geyh, *supra* note 7, at 158 (noting the "gradual decline over the nineteenth and twentieth centuries in the acceptability of holding the judiciary accountable for its decisions by means of impeachment . . ."). Professor Grove has pointed out that some judges might resign rather than face the impeachment process.

⁴⁶ Burbank, *supra* note 6, at 320 (arguing that the standard view of judicial independence assures that "judges free of congressional and executive control will be in a position to determine whether the assertion of power against the citizen is consistent with law"); Geyh & Van Tassel, *supra* note 12, at 32 (proposing that judicial review requires that "the courts

the budget, jurisdiction, and structure of the federal courts, the judiciary as a branch is better described as largely *dependent* on Congress rather than independent of it.⁴⁷ Although the Constitution, not Congress, creates the Supreme Court,⁴⁸ it is Congress that decides whether to create lower federal courts, how to arrange them, how many judges will be appointed to them, and whether to abolish them.⁴⁹ Congress also has the power to grant jurisdiction to⁵⁰ and withdraw jurisdiction from,⁵¹ lower federal courts.⁵² Moreover, although judges have the power to issue final judgments, they must rely on the executive for enforcement.⁵³

possess the means to protect their institutional integrity against unconstitutional political branch encroachments”).

⁴⁷ Geyh, *supra* note 7, at 163 (“The judiciary’s institutional independence is, therefore, more closely circumscribed by accountability-promoting mechanisms for congressional control of the judiciary’s budget, structure, administration and jurisdiction.”).

⁴⁸ 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.”).

⁴⁹ Ferejohn, *supra* note 26, at 359 (“The Constitution gives Congress the authority to create (or not create) federal courts other than the Supreme Court, to create and regulate their jurisdictions, to decide how many federal judges there will be . . .”). Congress famously used its power over the structure and existence of the courts to repeal the Judiciary Act of 1801, including eliminating judgeships. Jackson, *supra* note 10, at 991 (“Yet after the Jeffersonians’ ascent to power, in 1802 Congress enacted a statute to repeal legislation from the closing days of the Adams Administration that had created several new judgeships (filled with Federalist appointees); it thus effectively abolished Article III judgeships.”).

⁵⁰ Jackson, *supra* note 10, at 992 (“[Congress] has broad powers to control the jurisdiction of the federal courts . . .”); Ferejohn & Kramer, *supra* note 10, at 986 (“[E]ven the most aggressive readings of Article III recognize that Congress has wide latitude to regulate the business of the federal courts.”).

⁵¹ Ferejohn & Kramer, *supra* note 10, at 988 (“Congress routinely dispossesses federal courts of authority to hear cases or award remedies because of concern for how the judges might rule, or in order to circumscribe their ability to interfere with congressional objectives.”). Moreover, in limited circumstances, Congress can also cut the courts out of the decision to imprison by suspending the privilege of the writ of habeas corpus. U.S. CONST. art. I, § 9 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

⁵² Whether Congress can withdraw jurisdiction *without limit* is another question, and one that is the subject of this Article. See Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What The Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1, 29 (2019) (“[T]he Court – a coordinate branch of the national government – will excise subject-matter limitations on its appellate jurisdiction when a substantial, undefended purpose of such jurisdiction-stripping legislation is to limit the Court’s ability to consider a properly preserved constitutional claim.”). Cf. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1868) (holding that the Court will not look for Congress’s motivation when it withdraws jurisdiction).

⁵³ BENJAMIN GINSBERG, *PRESIDENTIAL GOVERNMENT* 285 (2016) (noting that federal courts generally must turn to executive agencies or the President to enforce judgments); see also Burbank, *supra* note 6, at 323–24 (noting that the President has only rarely refused to execute federal court judgments).

While Congress may not diminish the salaries of sitting federal judges, it can increase their workload by failing to appoint new judges to overloaded courts⁵⁴ and by cutting funding for court clerks, court security, and information technology.⁵⁵ Conversely, Congress can reduce the influence of Article III courts by creating other institutions with the power to interpret federal law, like administrative agencies and legislative courts, and vesting them with authority to resolve vast numbers of legal disputes that otherwise would fall to Article III courts.⁵⁶

Perhaps most fundamentally, federal courts are dependent on Congress for providing them the law to apply.⁵⁷ Courts are constrained not only by substan-

⁵⁴ ALICIA BANNON, BRENNAN CTR. JUST., *THE IMPACT OF JUDICIAL VACANCIES ON FEDERAL TRIAL COURTS*, 1–2 (2014), <https://www.brennancenter.org/sites/default/files/publications/Impact%20of%20Judicial%20Vacancies%20072114.pdf> [<https://perma.cc/X36K-AAHG>] (arguing that sustained vacancies in federal trial courts leads to judicial burn-out, delays, less time spent on each case, and increased administrative burdens).

⁵⁵ Ferejohn & Kramer, *supra* note 10, at 985 (“Judges must worry about funds to keep this machine running and, especially, to hire capable staff and supply them with adequate resources (which include computer and research support, courthouse security, storage facilities, press offices, and much more.)”; *see also* JOHN G. ROBERTS, 2013 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5–6, <https://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf> [<https://perma.cc/J3MQ-8LWC>] (noting that sequestration of funds had a deleterious effect on the administration of the federal courts, including leading to fewer public defenders, decreasing court security, and delaying trials).

⁵⁶ Ferejohn & Kramer, *supra* note 10, at 989 (“[F]ederal lawmakers have constituted a variety of non-Article III tribunals—so-called legislative or Article I courts—to adjudicate federal claims and interpret and apply federal law.”). For example, the United States Court of Federal Claims, a legislative court, shares jurisdiction with the district courts over suits for money against the government. 28 U.S.C. § 1491(a)–(b). Bankruptcy Courts, also legislative courts, hear suits that otherwise fall within the jurisdiction of district courts. 28 U.S.C. §§ 151, 1334 (the former creating bankruptcy courts within district courts and the latter granting jurisdiction to district courts).

⁵⁷ *See* PFANDER, *supra* note 18, at 405 (noting that applying rules of decision is precisely what courts do).

tive law,⁵⁸ but also the evidentiary⁵⁹ and procedural⁶⁰ rules that Congress writes.⁶¹

Considering the differences between decisional independence and institutional independence, scholars largely have concluded that judicial independence means something very different in the context of individual judges than it does for the judiciary as an institution. As Professors Ferejohn and Kramer put it, the federal system “protects individual judges from direct outside interference while making the institution in which they work vulnerable to control by the political branches of government.”⁶²

Although the dichotomy between decisional and institutional independence is a useful heuristic, the line separating these concepts “often blurs in application,” as Professor Geyh has noted.⁶³ In this view, incursions on the courts’ institutional independence can have ripple effects on the decisional independence of individual judges. For example, if Congress threatens to withdraw jurisdiction from the federal courts over a politically sensitive subject matter, then individual judges may be inclined, in a particular case, to reach a conclusion that protects the judiciary as an institution. Indeed, research suggests that the Supreme Court does voluntarily diminish its own power in response to threats of “Court-curbing” legislation, that is, “legislative attempts to limit or remove the Supreme Court’s power.”⁶⁴

⁵⁸ Pamela S. Karlan, *Judicial Independences*, 95 GEO. L.J. 1041, 1049 (2007) (“[T]he job of the courts is to vindicate the statutory scheme enacted by the legislature.”); Zoldan, *Klein*, *supra* note 20, at 2150 (“As a number of scholars have recognized, writing rules of decision for courts to follow—that is, writing the substantive law—is precisely what a legislature does.”).

⁵⁹ Zoldan, *Klein*, *supra* note 20, at 2150 (“Congress can, and does, write rules of evidence, defining what is relevant, what is admissible and inadmissible, and who is competent to give testimony.”); *see also* Act of Jan. 2, 1975, Pub. L. 93-595, 88 Stat. 1926 (establishing and enacting the Federal Rules of Evidence).

⁶⁰ *E.g.*, 28 U.S.C. § 1651 (authorizing federal courts to issue writs); 28 U.S.C. § 1696 (providing for service of process in foreign and international litigation); 28 U.S.C. § 1713 (providing rules for class actions); 28 U.S.C. § 1863 (establishing standards for jury selection); 28 U.S.C. § 1914 (setting out district court filing fees).

⁶¹ Although Congress does create evidentiary and procedural rules itself, it also can, and does, delegate authority to the courts to write them. 28 U.S.C. § 2072.

⁶² Ferejohn & Kramer, *supra* note 10, at 964; *see also* Geyh, *supra* note 7, at 163 (“The net effect . . . is a system of (more or less) independent judges, superimposed on a (more or less) dependent judiciary.”). On the historical origins of the distinction between decisional and institutional independence, *see* Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061, 1063 (2007) (“Securing the independence of individual judges, however, did not mean that the judiciary had become a separate department of government.”).

⁶³ Charles Gardner Geyh, *Judicial Independence as an Organizing Principle*, 10 ANN. REV. L. & SOC. SCI. 185, 192 (2014).

⁶⁴ CLARK, *supra* note 21, at 25.

2. *The Core of Judicial Independence*

Considering the imperfect way that the judiciary is protected from political influence, some scholars have concluded that the independence of the judiciary is more mythical than real.⁶⁵ Nevertheless, there is also a long scholarly tradition of searching for the *core* of judicial independence—that is—some function of the judiciary that the political branches may not lawfully invade.⁶⁶ After describing the parameters of the debate, I offer and defend a vision of the core of judicial independence.

a. *Competing Visions of the Core of Judicial Independence*

Professor Burbank argues that “the core of federal judicial independence is freedom of judicial decisions from control by the executive or legislative branches.”⁶⁷ While acknowledging that “control” is an indeterminate concept, Burbank notes that the range of debate over the core of judicial independence is quite narrow.⁶⁸ As he notes, it is widely accepted that Congress lacks the power to reopen final judgments.⁶⁹ Moreover, it is also widely accepted that Congress has the power to change the law prospectively.⁷⁰ As a result, he argues, the debate over the core of the judiciary’s independence should be limited to “(1) the judicial power to interpret and implement the Constitution, and (2) the irreducible powers of federal courts to act as such.”⁷¹

Much of the current debate over the core of judicial independence takes place in the range that Burbank sets out, focusing on the scope of Congress’s power to withdraw jurisdiction from the federal courts under the Constitution’s

⁶⁵ See, e.g., Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 700, 702–03 (1995) (arguing that judicial independence is limited to good behavior and compensation clauses).

⁶⁶ See, e.g., Geyh & Van Tassel, *supra* note 12, at 86 (“The Framers neither considered nor guarded against other, more speculative political branch encroachments upon the judiciary’s institutional autonomy . . .”). For an assessment of the relationship between *de jure* and *de facto* judicial independence, see James Melton & Tom Ginsburg, *Does De Jure Judicial Independence Really Matter?*, J.L. & CTS., Fall 2014, at 187, 190 (“Judicial independence is a complex and contested concept, but at its core, it involves the ability and willingness of courts to decide cases in light of the law without undue regard to the views of other government actors.”).

⁶⁷ Burbank, *supra* note 6, at 331.

⁶⁸ *Id.* at 335.

⁶⁹ *Id.* at 325 (citing *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995), for the proposition that Congress cannot reopen final judgments).

⁷⁰ *Id.* (citing THE FEDERALIST NO. 81, at 484 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“A legislature . . . may prescribe a new rule for future cases.”)); see also Zoldan, *Klein*, *supra* note 20, at 2150 (“[W]riting rules of decision for courts to follow—that is, writing the substantive law—is precisely what a legislature does.”).

⁷¹ Burbank, *supra* note 6, at 325–26.

Exceptions Clause.⁷² *Ex Parte McCordle*⁷³ can be taken to stand for the proposition that Congress's Exceptions Clause power is nearly unlimited, even if the result is to direct a federal court to reach a particular conclusion in a pending case.⁷⁴ However, Professor Monaghan reads the Exceptions Clause more narrowly, arguing that Congress may run afoul of Article III by withdrawing federal court jurisdiction for the purpose of defeating judicial review of constitutional claims. He predicts that "the Court—a coordinate branch of the national government—will excise subject-matter limitations on its appellate jurisdiction when a substantial, undefended purpose of such jurisdiction-stripping legislation is to limit the Court's ability to consider a properly preserved constitutional claim."⁷⁵ Importantly, Monaghan stops short of extending this prediction to statutory claims. Instead, he suggests that Congress might be justified in upholding a statute that strips jurisdiction when no constitutional rights are at stake.⁷⁶

Other scholars have read the Exceptions Clause either more broadly or more narrowly than Monaghan. Some have argued that Congress may not enact a statute that tells the federal courts how to rule in a particular case, even in the context of purely statutory claims.⁷⁷ By contrast, a number of scholars view Congress's power under the Exceptions Clause more broadly. Professor Sprigman argues that Congress may strip jurisdiction from the federal courts even over claims asserting violations of the Constitution.⁷⁸ In this way, Sprigman concludes, Congress may "displace a judicial interpretation of the Constitution's meaning with its own."⁷⁹ Professor Grove makes the related point that, unlike some incursions on judicial independence, there is not a broad political

⁷² Krotoszynski & DeProspo, *supra* note 22 (arguing for a broad rendering of a principle that prevents Congress from directing federal courts to reach particular judgments in pending cases); Evan H. Caminker, Schiavo *and* Klein, 22 CONST. COMMENT. 529, 542–43 (2005) (arguing that Congress has the constitutional power to direct a federal court decision provided that it is framed in a particular way); *see also* Howard M. Wasserman, *The Irrepressible Myth of Klein*, 79 U. CIN. L. REV. 53, 53–56 (2010).

⁷³ *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1868) (holding that the Court will not consider Congress's motivation when it withdraws jurisdiction).

⁷⁴ Zoldan, Klein, *supra* note 20, at 2159 n.159 (describing the tension between *McCordle* and a principle that Congress may not direct a federal court to reach a particular decision in a pending case).

⁷⁵ Monaghan, *supra* note 52, at 29.

⁷⁶ *Id.* at 67 (noting that jurisdiction stripping in the statutory context presents different issues than in the constitutional context and "[p]erhaps . . . should be upheld").

⁷⁷ *E.g.*, Krotoszynski & DeProspo, *supra* note 22 (arguing for a broad rendering of a principle that prevents Congress from directing federal courts to reach particular judgments in pending cases).

⁷⁸ Sprigman, *supra* note 22 (arguing for broad congressional power under the Exceptions Clause).

⁷⁹ *Id.*

consensus against jurisdiction-stripping.⁸⁰ She concludes that attempts by the political branches to strip the federal courts of jurisdiction, even over constitutional questions, may be met with little popular resistance, even if the political process presents additional barriers.⁸¹

b. A Proposed Core of Judicial Independence

I propose that the core of judicial independence is the authority of the federal courts to adjudicate specific legal disputes that have been presented to them free from legislative direction. In this proposal, Congress has broad authority to set policy by writing rules of decision for courts to follow. However, the court should not apply a change in law to a pending case when Congress has failed to address a governmental objective other than merely resolving pending cases.⁸² Moreover, the courts must apply a generally applicable law, but not a law that creates special exemptions for a closed class of identifiable individuals.⁸³ In addition, Congress may withdraw jurisdiction over a class of cases, even if some of those cases are pending. But, the court should not give effect to a withdrawal of jurisdiction if the only result is the termination of pending cases.⁸⁴ Finally, Congress has wide latitude to assert the government's sovereign immunity. However, a court should not recognize an assertion of sovereign immunity that is better characterized as governmental self-dealing.⁸⁵

My proposed formulation is largely within the range of debate over the core of judicial independence articulated by Professor Burbank. In a sense, my formulation can be considered a gloss on Burbank's proposition that the federal courts must have the irreducible power to act as federal courts. My formulation complements the proposal offered by Professor Monaghan; but, it is perhaps more protective of judicial independence because it suggests a limitation on Congress's power over the jurisdiction of the courts in both statutory and con-

⁸⁰ Grove, *supra* note 22, at 471, 518 (noting that there is no bipartisan norm that jurisdiction-stripping is "off the wall").

⁸¹ *Id.* at 523 (noting that modern attempts at jurisdiction stripping have been unsuccessful); see also Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 870–74, 886 (2011) (describing how political actors have used normal legislative processes to block jurisdiction-stripping measures). A number of scholars have argued for a narrow, but more definite, core of judicial independence centered around the court's practices and procedures. See, e.g., Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1322 (1993) ("[T]he theory of inherent court power nonetheless requires that congressional involvement in rulemaking acknowledge the 'significance of a certain degree of judicial autonomy' over internal court rules of practice and procedure."); Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 972–73 (1996) ("[T]here is a core of control vested in the Supreme Court that is beyond the constitutional reach of Congress.").

⁸² See *infra* Section III.A.

⁸³ See *infra* Section III.B.

⁸⁴ See *infra* Section III.C.

⁸⁵ See *infra* Section III.D.

stitutional cases. Moreover, my proposal, unlike Monaghan's, does not turn on finding an illicit motive on the part of Congress. Similarly, my conception of the core of judicial independence is more protective of the judiciary than the vision advanced by Professor Sprigman. Sprigman does not distinguish between Congress's power over general policy matters and matters affecting identifiable individuals; in my view, by contrast, Congress should have less leeway to legislate for an identifiable individual than it does for a class of indeterminate membership.⁸⁶ As described below, there are normative, structural, and doctrinal justifications for preserving the core of judicial independence as I have described it.

First, allowing the courts to adjudicate specific legal disputes that have been presented to them without legislative direction vindicates persuasive normative views about the goals of an independent judiciary. Elaborating on the values protected by judicial independence, Professor Ferejohn argues that it protects the "rule of law," by which he means "making sure that powerful people—particularly elected officials—cannot manipulate legal proceedings to their advantage."⁸⁷ In addition, without judicial independence, he argues, government officials "may interfere in the enforcement of statutes enacted by previous legislatures without bothering to go through procedural formalities."⁸⁸ Preserving the core of judicial independence as I describe it—that is, the courts' ability to actually decide cases pending before them—protects the values identified by Professor Ferejohn. If courts retain the power to decide cases pending before them, then they can ignore elected officials' attempts to manipulate legal proceedings to reach a result that favors them in a particular pending case. Moreover, if courts have the power to decide pending cases, then they can prevent Congress from effectively changing the substantive law in particular cases in the guise of altering jurisdictional rules.

The values that Professor Ferejohn describes are similar to an argument in *The Dialogue*, Professor Henry Hart's foundational essay on federal court jurisdiction.⁸⁹ In *The Dialogue*, one of Hart's speakers argues that Article III can be read to create a space for a federal court not just to declare one party to a case the winner, but actually, acting like a court, to *decide* the case. In his words, "if Congress directs an Article III court to decide a case, I can easily read into Article III a limitation on the power of Congress to tell the court *how* to decide it."⁹⁰ Protecting the core of judicial independence, as I define it, supports the value identified in Hart's *Dialogue*. Preventing Congress from directing a court to pick the winner and loser in a particular pending case preserves

⁸⁶ See *infra* Sections III.A–B.

⁸⁷ Ferejohn, *supra* note 26, at 366.

⁸⁸ *Id.* at 367.

⁸⁹ Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372–73 (1953).

⁹⁰ *Id.* at 1373.

the court's ability to act like a court, including its power to make factual findings and draw legal conclusions that bear on the outcome of the case.⁹¹ Moreover, insulating a court's ability to adjudicate particular, pending cases allows the court to proceed according to known procedural rules, a valued characteristic of courts.⁹² Conversely, if Congress could interfere in a pending case to direct the court to declare one litigant a winner, the court's normal procedural rules, findings of fact, and legal conclusions are all made irrelevant to the judgment it renders.

Framed another way, the courts' ability to decide cases pending before them can be considered the core of judicial independence because it protects values associated with both institutional and decisional independence.⁹³ Preserving the case-adjudicating function of the courts protects the judiciary's institutional independence by placing a limit on Congress's otherwise unlimited power to arrange federal court jurisdiction under the Exceptions Clause. Allowing courts to disregard some congressional limits on their jurisdiction in pending cases secures for them a measure of freedom from political interference.⁹⁴

Perhaps less obviously, preventing Congress from directing the result in pending cases also protects the decisional independence of individual judges. When Congress threatens to withdraw jurisdiction from the courts in a way that would terminate pending cases, the judges considering those cases are made acutely aware of the political salience of their pending decisions. It is likely that a judge who knows a case on her docket has been targeted by Congress will feel pressure to rule in a way that comports with the threatened jurisdictional tinkering. This kind of outside political pressure, whether effective or not in any given case, compromises the value of decisional independence, which requires freedom from "outside pressure: personal, economic, or political."⁹⁵

Second, preserving the courts' ability to decide cases pending before them is consistent with the Supreme Court's treatment of the political branches' at-

⁹¹ Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 563 (2007) ("[T]he sort of finality that is typically associated with judicial decisions" includes the powers "to make factual findings that courts are bound to accept in subsequent litigation, or to resolve legal disputes.").

⁹² See Mullenix, *supra* note 81, at 1322 ("[T]he theory of inherent court power nonetheless requires that congressional involvement in rulemaking acknowledge the 'significance of a certain degree of judicial autonomy' over internal court rules of practice and procedure.").

⁹³ Geyh, *supra* note 63, at 185, 192 (noting the potential overlap between institutional and decisional independence). A special thanks to Charles Geyh and Henry Monaghan for suggesting this line of inquiry.

⁹⁴ Burbank, *supra* note 6, at 320 (arguing that the standard view of judicial independence assures that "judges free of congressional and executive control will be in a position to determine whether the assertion of power against the citizen is consistent with law").

⁹⁵ Ferejohn & Kramer, *supra* note 10, at 965 (defining decisional independence as "judges' ability to adjudicate facts and interpret law in particular cases 'free from any outside pressure: personal, economic, or political, including any fear of reprisal'"); see also Ferejohn, *supra* note 26, at 355.

tempts to control judicial outcomes *after* judgment. *Hayburn's Case* has long stood for the proposition that a statute may not constitutionally vest authority in the judiciary to enter judgment if that judgment can later be revised by executive action.⁹⁶ Analogously, in *Plaut v. Spendthrift Farm*, the Court clarified that Congress may not direct a federal court to reopen judgments that have already been finalized.⁹⁷

A parallel can be drawn between the Court's prohibition on political interference with final judgments and my proposal for a prohibition on legislative direction of judicial outcomes before judgment.⁹⁸ Whether before or after judgment, political interference can deprive the court of its power to actually *decide* a case, as Hart explained.⁹⁹ In both circumstances, the judicial process is mooted by political considerations and the court's law-application process is disconnected from the result: in short, political interference, whether before or after judgment, makes the court all-but-superfluous to a case's outcome.

Indeed, in one respect, the comparison between pre- and post-judgment political interference suggests that the Court should be more suspicious of pre-judgment interference. When the executive revises, or Congress reopens, a federal court judgment, at least it is clear that the court's judgment and the political reaction to it are two different events. From a political accountability perspective, then, the public could reward or punish political actors for whatever position they took on the court's underlying decision. By contrast, when Congress directs courts to enter judgment for one of the parties in a pending case, the public cannot know how the case would have come out in the absence of the political interference. As a result, the electorate cannot know whether the result is purely a function of a political act, or instead, whether the court would have reached the same result in the absence of political interference.¹⁰⁰

⁹⁶ *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792) (holding that "revision and control" of federal court judgments by the executive is inconsistent with judicial independence). More clearly, the Court has held that constitutional courts may "render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action." *Chi. & S. Airline v. Waterman S.S. Corp.*, 333 U.S. 103, 113–14 (1948).

⁹⁷ *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (holding that Congress may not require the federal courts to reopen final judgments). *Cf. Miller v. French*, 530 U.S. 327, 346–47 (2000) (upholding a statute that revised final judgments, temporarily, for the purpose of facilitating other changes that were the main purpose of the law).

⁹⁸ Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1189, 1243–44 (1981) (arguing that *Klein* represents an extension of the principle against nonjudicial revision of court judgments).

⁹⁹ See Hart, *supra* note 89 at 1373 ("[I]f Congress directs an Article III court to decide a case, I can easily read into Article III a limitation on the power of Congress to tell the court *how* to decide it.").

¹⁰⁰ See Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437, 438–40 (2006) (arguing that *Klein* can be read to require the judiciary to prevent Congress from deceiving the electorate). I do not make the broader

Third, formulating the core of judicial independence as the power of courts to actually decide cases pending before them without legislative direction gives modern meaning to the Reconstruction-era case of *United States v. Klein*, the Supreme Court's first—and as it turns out its last—strong statement defending a court's power to actually decide pending cases.¹⁰¹ In *Klein*, the Supreme Court invalidated a statute that withdrew jurisdiction from the federal courts in a group of pending cases, holding that it violated the principle of separation of powers. Specifically, the Court held that Congress unconstitutionally encroached on the judicial power because its withdrawal of jurisdiction was “founded solely on the application of a rule of decision, in causes pending, prescribed by Congress.”¹⁰²

The *Klein* “rule of decision” principle, as this curious statement is called, has intrigued scholars for generations,¹⁰³ but there has been little agreement about exactly what, if anything, *Klein* prohibits.¹⁰⁴ Despite disagreement about its contours,¹⁰⁵ *Klein* is the strongest doctrinal source for my definition of the

claim that the public actually would tend to be aware of decisions of the courts or the political branches.

¹⁰¹ *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871) (invalidating statute that withdrew jurisdiction “founded solely on the application of a rule of decision, in causes pending, prescribed by Congress”).

¹⁰² *Id.* at 146–47.

¹⁰³ Some scholars have searched for a principle that is largely consistent with not only *Klein* but also other rule of decision principle cases. Zoldan, *Klein*, *supra* note 20, at 2194–208 (arguing that *Klein* reflects a principle against government self-dealing); Young, *supra* note 98, at 1244 (arguing that *Klein* represents an extension of the principle against nonjudicial revision of court judgments). Others suggest that *Klein* is a reminder of important but unenforceable constitutional values. Caminker, *supra* note 72, at 542–43 (arguing that *Klein* is a rule of “drafting etiquette” that does not actually prevent Congress from directing a decision, only phrasing its direction in a particular way); *see also* Wasserman, *supra* note 72, at 85 (“*Klein* does no more than *Marbury* and dozens of cases in which the Court has struck down substantive federal statutory law as violating individual constitution rights.”). Still others suggest that *Klein* stands for no coherent principle about the line between the legislature and the judiciary and should be ignored. Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 380–81.

¹⁰⁴ *Klein* is so vexing because it seems both intuitively correct and literally false. On one hand, by preventing Congress from dictating a rule of decision in a pending case, *Klein* preserves judicial independence by creating space for the courts actually to decide cases pending before them. On the other hand, *Klein* seems to conflict with longstanding precedent that requires courts to apply the law as Congress writes it, even if that means applying a newly enacted law to a case on appeal from a final judgment. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109–10 (1801) (“[When] 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 . . .”).

¹⁰⁵ There are many possible things wrong with the statute invalidated in *Klein*. These have been identified by other scholars and I have explained and questioned them in previous work. These include: the fact that Congress provided a rule of decision for the court to follow, the specificity of the statute, the retroactivity of the statute, the political motivation underlying the statute, the fact that the statute may have required the Court to reach an other-

core of judicial independence because it suggests that, at least in some circumstances, Congress may not intercede in a pending federal case without violating the Constitution. As a result, the core of the institutional independence of the judiciary, as a doctrinal matter, rests on the viability of some formulation of *Klein*. In the rest of this Part, I describe the *Klein* case and explain how the modern Supreme Court has chipped away at its meaning, and along with it, the core of judicial independence.

B. The Vanishing Core of Judicial Independence

Because *Klein*'s holding resists easy generalization into a broader principle, recounting the unusual posture of the case helps clarify its possible reach. After describing *Klein*, I will demonstrate how its rule of decision principle, along with the core of judicial independence, has been eroded.

1. Klein's Rule of Decision Principle

Klein arose out of a Civil War-era statute that permitted federal agents to seize and sell abandoned or captured civilian property confiscated in areas rebelling against the United States.¹⁰⁶ In order to facilitate the recovery of damages by loyal residents of rebellious areas, Congress permitted claimants to bring suit against the United States for the value of confiscated property so long as the claimant demonstrated that he had "never given any aid or comfort to the present rebellion."¹⁰⁷ In *United States v. Padelford*, the Supreme Court interpreted the compensation statute broadly, holding that even a person who had committed a disloyal act would be eligible to recover the value of his property so long as he later took an oath of loyalty pursuant to a presidential pardon.¹⁰⁸

In a scenario similar to *Padelford*, a man named Wilson, whose property was confiscated and sold by the Union, took an oath of loyalty.¹⁰⁹ After Wilson's death, Klein, the executor of his estate, relied on this oath and *Padelford*'s broad reading of the compensation statute to prevail in a suit against the United States.¹¹⁰ While Klein's case was pending on the government's appeal, Congress passed an appropriations bill funding judgments rendered against the United States by the Court of Claims.¹¹¹ The appropriations bill, however, also

wise unconstitutional result, and the fact that it inured to the benefit of the government. Zoldan, *Klein*, *supra* note 20, at 2150.

¹⁰⁶ Abandoned and Captured Property Act of 1863, ch. 120, § 1, 12 Stat. 820, 820.

¹⁰⁷ *Id.* § 3.

¹⁰⁸ *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 543 (1869) (broadly interpreting the Abandoned and Captured Property Act).

¹⁰⁹ Amanda L. Tyler, *The Story of Klein: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, in *FEDERAL COURTS STORIES* 87, 91–92 (Vicki C. Jackson & Judith Resnik eds., 2010).

¹¹⁰ *Id.* at 92–94.

¹¹¹ Act of July 12, 1870, ch. 251, § 1, 16 Stat. 230, 235.

contained a proviso that specifically disallowed proof of a loyalty oath to serve as the basis for recovering the value of confiscated property.¹¹² Instead, the proviso made evidence that a person took a loyalty oath pursuant to a presidential pardon conclusive proof of *disloyalty*, directed the trial court to dismiss these claims, and withdrew jurisdiction from the Supreme Court over claims in which the claimant had previously prevailed based on evidence of a loyalty oath.¹¹³

In *Klein*, the Supreme Court invalidated the proviso because its withdrawal of jurisdiction was “founded solely on the application of a rule of decision, in causes pending, prescribed by Congress.”¹¹⁴ Because of the opacity of this language, and the Court’s refusal to strike down any other statutes under *Klein*, the contours of the rule of decision principle have remained somewhat of a mystery. Although the Court has not relied on the *Klein* rule of decision principle to invalidate any other statute, it has made offhanded references to the case a few times, suggesting the viability of some principle rooted in the case.¹¹⁵ In the absence of concrete Supreme Court guidance, theories about the health and scope of *Klein* have flourished.

2. *The Evisceration of Klein*

It was only in the modern era that the Court explicitly began to chip away at the rule of decision principle by slowly conforming it to the earlier case of *Schooner Peggy*.¹¹⁶ In *Schooner Peggy*, the Court upheld the application of a newly enacted law on appeal, even though the trial court correctly applied the old law at the trial stage. The Court held that, when “subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the [new] law must be obeyed”¹¹⁷ This requirement is often referred to as the “Changed Law Rule.”¹¹⁸

Klein (which post-dates *Schooner Peggy*) can be read as an exception to the Changed Law Rule, preventing the application of new law to pending cases in certain circumstances. Read in this way, the *Klein* rule of decision principle and the Changed Law Rule can coexist, neither swallowing the other, so long

¹¹² Tyler, *supra* note 109, at 93–94.

¹¹³ *Id.* at 94.

¹¹⁴ United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871).

¹¹⁵ United States v. Sioux Nation of Indians, 448 U.S. 371, 403–05 (1980) (mentioning *Klein*); Pope v. United States, 323 U.S. 1, 8–9 (1944) (same).

¹¹⁶ United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 109 (1801).

¹¹⁷ *Id.* at 110.

¹¹⁸ PETER GERANGELOS, THE SEPARATION OF POWERS AND LEGISLATIVE INTERFERENCE IN JUDICIAL PROCESS: CONSTITUTIONAL PRINCIPLES AND LIMITATIONS 181–83 (2009) (referring to the Changed Law Rule); J. Richard Doidge, Note, *Is Purely Retroactive Legislation Limited by the Separation of Powers?: Rethinking United States v. Klein*, 79 CORNELL L. REV. 910, 959–60 (1994) (same).

as the rule of decision principle is narrower than the Changed Law Rule. By many accounts, however, if the Changed Law Rule is an exception to *Klein*, the Changed Law Rule swallows *Klein* altogether.¹¹⁹ Professor Araiza expressed this view when describing the vitality of *Klein*: “if lawmaking is the power to create liability rules and the procedural structure for enforcing those rules, then overturning a statutory interpretation and amending the underlying statute both constitute lawmaking.”¹²⁰ In this view, there is no space between “amending applicable law,” which is permissible under *Schooner Peggy*, and “prescribing a rule of decision in causes pending,” which is prohibited under *Klein*.

The modern evisceration of the rule of decision principle resulted from the inversion of the relationship between *Klein* and *Schooner Peggy*, making the Changed Law Rule an exception to the rule of decision principle rather than the other way around. The evisceration proceeded in three stages: first as a suggestion, next as dictum, and finally as a holding.

a. Stage 1: The Suggestion

In stage one, the Court suggested that *Schooner Peggy*'s Changed Law Rule was an exception to the rule of decision principle. The statute considered in *Robertson v. Seattle Audubon* modified and codified an agreement between the United States Bureau of Land Management (BLM) and the state of Oregon over logging rights and the conservation of spotted owls.¹²¹ In order to help enforce the new policy, the statute, known as the Northwest Timber Compromise, provided that a group of lawsuits brought by logging and conservation groups would be dismissed so long as BLM abided by the terms of the Compromise.¹²² The Court upheld the district court's dismissal of the named, pending cases because the Compromise amended the statutory provisions that formed the basis for the pending suits.¹²³ Although it did not squarely address the issue, the Court, for the first time, suggested that the Changed Law Rule was an exception to *Klein*, noting in passing that Congress may always amend or repeal existing law, even for the purpose of ending ongoing litigation.¹²⁴

¹¹⁹ *Bank Markazi v. Peterson*, 136 S. Ct 1310, 1335 (2016) (Roberts, C.J., dissenting) (“Saying Congress ‘creates new law’ in one case but not another simply expresses a conclusion on that issue”); William D. Araiza, *The Trouble with Robertson: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1104–06 (1999).

¹²⁰ Araiza, *supra* note 119, at 1079.

¹²¹ *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 432 (1992).

¹²² *Id.* at 439–40 (recounting the circumstances surrounding the Northwest Timber Compromise).

¹²³ *Id.* at 441.

¹²⁴ *Id.* (“Because we conclude that subsection (b)(6)(A) *did* amend applicable law, we need not consider whether this reading of *Klein* is correct.”).

b. Stage 2: The Dictum

Stage two of the evisceration of the rule of decision principle was the Court's assertion that the Changed Law Rule is an exception to it rather than the other way around. In *Plaut*, the Court invalidated legislation that reopened a class of final judgments.¹²⁵ The Court did not rest on *Klein*, however, instead articulating a new separation-of-powers-based restriction on reopening final judgments.¹²⁶ As for *Klein*, the Court asserted that the rule of decision principle did not apply because "its prohibition does not take hold when Congress amends applicable law."¹²⁷ Because the statute in *Plaut* changed the substantive legal standard for the judiciary to apply, the Court noted, it changed the law within the meaning of *Klein*, rendering *Klein* inapplicable.¹²⁸

c. Stage 3: The Holding

Stage three of the evisceration of the rule of decision principle was the Court's explicit reliance on the Changed Law Rule as an exception to the application of *Klein*. In *Bank Markazi v. Peterson*,¹²⁹ claimants brought suit against the country of Iran for damages arising from injuries and deaths caused by state-sponsored terrorist acts.¹³⁰ Although claimants were awarded judgments amounting to billions of dollars, these judgments could not be satisfied by assets located in the United States.¹³¹ The claimants filed actions, later consolidated into single case, against Bank Markazi, the Central Bank of Iran. Under generally applicable law, however, Bank Markazi, as a Central Bank, could not be reached to satisfy the existing default judgments against Iran.¹³² In response, Congress enacted a statute permitting claims against Iran to be satisfied by the assets of Bank Markazi. The statute explicitly named the pending case against Bank Markazi and provided that it applied to that case and none other.¹³³

Before the Supreme Court, Bank Markazi argued that the statute violated *Klein*'s rule of decision principle because it prescribed a rule that applied to a

¹²⁵ *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995).

¹²⁶ *Id.* at 219 ("By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle [of separation of powers].").

¹²⁷ *Id.* at 218 (internal quotation marks omitted).

¹²⁸ *Id.*

¹²⁹ *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016).

¹³⁰ *Id.* at 1319 (setting out statutory framework at issue in *Bank Markazi*).

¹³¹ *Id.* at 1317–18 (describing statutory barriers to execution of judgments).

¹³² *Id.* at 1318 (describing that the Foreign Sovereign Immunities Act shields property of a foreign central bank from execution).

¹³³ Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-158, § 502, 126 Stat. 1214, 1258–60 (codified as amended at 22 U.S.C. § 8772) (authorizing attachment of "financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Peterson et al. v. Islamic Republic of Iran et al.*"); see also 28 U.S.C. § 1611(b)(1).

single pending case, indeed, one identified in the statute itself.¹³⁴ The Court rejected the argument, holding that the statute did not violate *Klein*. By permitting claimants to reach assets of one entity to satisfy judgments owed by another, Congress had amended applicable law, the Court reasoned, making *Klein*'s restrictions inapplicable.¹³⁵

After *Bank Markazi*, it appeared that the rule of decision principle had been swallowed whole by the Changed Law Rule. As Chief Justice Roberts noted in his *Bank Markazi* dissent, a Changed Law Rule exception to *Klein* is coextensive with *Klein* itself: “[c]hanging the law is simply how Congress acts.”¹³⁶ If this view is correct—if every statute “changes the law” within the meaning of *Klein*—then *Klein* never applies in the only circumstance in which it might apply, that is, when Congress writes new law for the court to apply to a pending case.

Bank Markazi's definitive restatement of the relationship between the Changed Law Rule and the rule of decision principle is more than a fine doctrinal point. It is a remarkable (re)statement of the relationship between the federal courts and Congress. Although the branches have never been hermetically sealed from one another,¹³⁷ *Klein* seemed to stand for the proposition that there was some core of judicial power that Congress could not (or at least would not) invade. The viability of *Klein*, therefore, is of the gravest consequence to the independence of the judiciary. Without a core power to decide cases pending before it, it is hard to articulate what is left of the judiciary's independence from Congress.

Bank Markazi's summary treatment of the rule of decision principle seemed to spell the end of *Klein* and the independence of the judiciary. But just as the restraining power of *Klein* has long been exaggerated,¹³⁸ its death may be exaggerated as well; the Court's decision in *Patchak v. Zinke*¹³⁹ has unsettled the issues that *Bank Markazi* seemed to have resolved. *Patchak*'s fractured opinions set out competing visions of *Klein* and raise the possibility that the rule of decision principle (including the core of judicial independence) has some life in it yet. Part II describes *Patchak*, a puzzling case that can be read either as the last gasp of breath for judicial independence or, instead, as the case that breathes new life into its core.

¹³⁴ *Bank Markazi*, 136 S. Ct. at 1323 (citing *Klein* for proposition that statutes that prescribe a rule of decision in pending cases are unconstitutional).

¹³⁵ *Id.* (“More recent decisions, however, have made it clear that *Klein* does not inhibit Congress from amend[ing] applicable law.” (internal quotation marks omitted)).

¹³⁶ *Id.* at 1335 (Roberts, C.J., dissenting).

¹³⁷ *Buckley v. Valeo*, 424 U.S. 1, 121 (1976).

¹³⁸ Wasserman, *supra* note 72, at 55 (“[*Klein*] contains broad language and exaggerated rhetorical flourishes, with statements of principles that cannot literally be true and often are dead wrong.”).

¹³⁹ *Patchak v. Zinke*, 138 S. Ct. 897, 901 (2018).

II. *PATCHAK*: A LAST GASP OR NEW LIFE FOR JUDICIAL INDEPENDENCE?

Patchak arose from a decision of the Department of the Interior to take into trust a tract of land known as the Bradley Property.¹⁴⁰ Interior made this decision at the request of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, who desired land for building a casino.¹⁴¹ *Patchak*, who lived near the Bradley Property, challenged the legality of Interior's action under the Administrative Procedure Act.¹⁴² While *Patchak*'s lawsuit was pending, Congress passed The Gun Lake Act,¹⁴³ which identified and declared lawful the specific decision to take the Bradley Property into trust.¹⁴⁴ Making clear Congress's intention to pick the winner in *Patchak*'s suit against Interior, the Gun Lake Act also required the federal courts to "promptly dismiss" claims relating to the Bradley Property.¹⁴⁵ Specifically, it provides:

NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the [Bradley Property] shall not be filed or maintained in a Federal court and shall be promptly dismissed.¹⁴⁶

Pursuant to this statute, the district court dismissed *Patchak*'s suit against Interior and the D.C. Circuit affirmed.¹⁴⁷

Before the Supreme Court, *Patchak* argued that the Gun Lake Act violated the *Klein* rule of decision principle by directing federal courts to dismiss a pending case without applying new law.¹⁴⁸ But, following the broad definition of changing the law set out in *Bank Markazi*, Congress *did* make new law: the new law requires the court to dismiss cases relating to the Bradley Property.¹⁴⁹ After *Bank Markazi*, therefore, *Patchak* should have been an easy case. Nevertheless, no opinion garnered a majority of the Court, and the multiple concurrences and dissent highlight the fact that the *Klein* rule of decision principle, seemingly laid to rest in *Bank Markazi*, is still unsettled. In this Part, I describe the *Patchak* opinions and highlight the issues they raise. In Part III, I offer sug-

¹⁴⁰ *Id.* at 902–03. For a good explanation of *Patchak*'s potential effect on *Klein*'s rule of decision principle, see Monaghan, *supra* note 52, at 19–20 (noting that Thomas's plurality opinion seems to have articulated new and broad justifications for jurisdiction stripping provisions, despite *Klein*).

¹⁴¹ *Patchak*, 138 S. Ct. at 903.

¹⁴² *Id.* (describing procedural posture).

¹⁴³ *Id.* at 904 (citing Gun Lake Act, Pub. L. 113-179, 128 Stat. 1913 (2014) (requiring dismissal of *Patchak*'s claim against Interior)).

¹⁴⁴ *Id.* (affirming Interior's decision to take the Bradley Property into trust).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 908–09 (describing and rejecting argument based on *Klein*'s rule of decision principle).

¹⁴⁹ *Id.* at 908 (citing *Bank Markazi* for broad reading of Changed Law Rule).

gestions about how *Patchak*'s unsettled issues might be, and should be, resolved.

A. *The Plurality*

Justice Thomas wrote an opinion for a plurality of four, including Justices Breyer, Alito, and Kagan. After framing *Patchak* as an issue of separation of powers, Justice Thomas offered several independent reasons why the Gun Lake Act did not violate the *Klein* rule of decision principle.¹⁵⁰

First, adopting *Bank Markazi*'s broad definition of changing the law, Justice Thomas opined that *Klein*'s restrictions apply only when Congress directs the courts to reach a result under old law, but not when Congress "changes the law."¹⁵¹ A jurisdiction-stripping statute like the Gun Lake Act, Thomas wrote, changes the law because it eliminates jurisdiction for cases relating to the Bradley Property.¹⁵² Whatever *Klein*'s restrictions may be, therefore, they do not prevent Congress from withdrawing jurisdiction over cases relating to the Bradley Property.¹⁵³

Second, Thomas distinguished *Klein* on the ground that the appropriations proviso disapproved in *Klein* was a "selective" jurisdiction-stripping statute.¹⁵⁴ By contrast, he opined, the Gun Lake Act stripped jurisdiction over "every suit relating to the Bradley Property," which he characterized as a "class of cases."¹⁵⁵ Because a statute that strips jurisdiction over a class of cases is a lawful exercise of Congress's power to arrange the jurisdiction of the federal courts, the Gun Lake Act, too, is lawful.¹⁵⁶

Third, Thomas addressed the fact that the Gun Lake Act seemed specially designed to reach a single pending case. Thomas expressed doubt that the constitutional line separating the legislative from the judicial branches can be based either on Congress's motives or the number of cases affected by the change in law.¹⁵⁷ Moreover, Thomas asserted, as a factual matter, the statute did not address a single case.¹⁵⁸ Because it required dismissal of cases "relating

¹⁵⁰ *Id.* at 905.

¹⁵¹ *Id.* (interpreting the Changed Law Rule).

¹⁵² *Id.*

¹⁵³ *Id.* ("Section 2(b) changes the law. Specifically, it strips federal courts of jurisdiction over actions 'relating to' the Bradley Property.>").

¹⁵⁴ *Id.* at 909 ("And unlike the selective jurisdiction-stripping statute in *Klein*, § 2(b) strips jurisdiction over every suit relating to the Bradley Property.>").

¹⁵⁵ *Id.* (emphasis added).

¹⁵⁶ *Id.* (concluding that the Gun Lake Act strips jurisdiction in a class of cases).

¹⁵⁷ *Id.* at 910 ("We doubt that the constitutional line separating the legislative and judicial powers turns on factors such as a court's doubts about Congress's unexpressed motives, [or] the number of 'cases [that] were pending when the provision was enacted' . . ." (internal citations omitted)).

¹⁵⁸ *Id.*

to” the Bradley Property, it applied, at least in theory, to an open-ended class of cases.¹⁵⁹

B. Ginsburg and Sotomayor’s Concurrences

In a concurring opinion for herself and Justice Sotomayor, Justice Ginsburg steered clear of the separation of powers implications of *Patchak*, opining instead that it could be resolved as an issue of sovereign immunity.¹⁶⁰ Because it withdrew jurisdiction from the federal courts to hear a suit against the United States, Ginsburg opined, the Gun Lake Act had the functional effect of asserting the government’s sovereign immunity.¹⁶¹ And because the United States can always assert its immunity from suit, she concluded that the Gun Lake Act was valid even though it directed a federal court to dismiss a particular, pending suit.¹⁶²

Justice Sotomayor wrote a limited separate concurrence, emphasizing that, had the suit been one between private parties, she would have joined the dissent, as she did in *Bank Markazi*.¹⁶³ She concurred only because the United States was a party. In her view, the Gun Lake Act “restored” the sovereign immunity of the United States, noting, like Ginsburg, that the assertion of sovereign immunity moots any separation of powers concerns.¹⁶⁴

C. Breyer’s Concurrence

Justice Breyer wrote a separate concurrence in which he opined that Congress often “confirms” administrative action. Because Interior’s action to take

¹⁵⁹ *Id.* Thomas raised two other points. First, he opined that *Klein* didn’t actually prohibit Congress from directing the federal courts to reach a particular decision in pending cases. *Id.* at 909. Rather, Thomas interpreted *Klein* to mean only that Congress could not declare that pardons are not evidence of loyalty or strip the court of jurisdiction to reach the same result. *Id.* Contrary to this view, *Klein* rested on two separate grounds for its result: one, that by providing a rule of decision for the courts to follow, “Congress has inadvertently passed the limit which separates the legislative from the judicial power;” and two, and in the alternative, that by “impairing the effect of a pardon,” the proviso infringed on “the constitutional power of the Executive.” *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871). Second, Thomas also addressed the argument that Congress impermissibly interfered with the Court’s previous decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) (*Patchak I*), which held that Patchak’s case “may proceed.” *Patchak*, 138 S. Ct. at 903–04. He opined that Patchak’s suit was not final, so *Plaut*’s rule against reopening final judgments did not apply. *See id.* at 908.

¹⁶⁰ *Patchak*, 138 S. Ct. at 912–13 (Ginsburg, J., concurring).

¹⁶¹ *Id.* at 913.

¹⁶² *Id.* at 912–13 (“Just as it is Congress’ prerogative to consent to suit, so too is it within Congress’ authority to withdraw consent once given.”).

¹⁶³ *Id.* at 913 (Sotomayor, J., concurring); *see also* *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1329–30 (2016) (Sotomayor, J., dissenting).

¹⁶⁴ *Patchak*, 138 S. Ct. at 914 (Sotomayor, J., concurring).

the Bradley Property into trust was itself constitutional, Congress's action confirming or ratifying this administration action was likewise constitutional.¹⁶⁵

D. Roberts's Dissent

Chief Justice Roberts authored a dissent joined by Justices Kennedy and Gorsuch. He would have held that Congress violates the principle of separation of powers when it “manipulates jurisdictional rules to decide the outcome of a particular pending case.”¹⁶⁶ In a reprise of his dissenting opinion in *Bank Markazi*, Roberts recounted the history of the Confederation period. He emphasized the social and economic dislocations caused by early state legislatures' usurpation of judicial functions.¹⁶⁷ But, in *Patchak*, the Chief Justice drew a different conclusion than he did in his *Bank Markazi* dissent, and it was a conclusion with potentially far-reaching consequences: the Constitution prohibits the legislature from applying the law in a particular case.¹⁶⁸ Drawing on the general principle that the legislature sets rules for society while the judiciary and executive apply those rules in individual cases, Roberts suggested that Article III limits the legislature's power to decide individual cases.¹⁶⁹ Roberts connected this principle with *Klein*, opining that *Klein* stands for the proposition that the legislature may not intervene in a particular pending case in a way that cuts out the role of the judiciary.¹⁷⁰

Roberts went on to respond to the plurality and concurring opinions. First, Roberts rejected Thomas's argument that the Gun Lake Act withdrew jurisdiction over a class of cases. Rather, he opined, the Gun Lake Act was intended to withdraw jurisdiction over a particular case, despite being framed in a general way.¹⁷¹ The specificity, opined Roberts, distinguishes the Gun Lake Act from the statute upheld in *Bank Markazi*, which resolved consolidated cases from more than one thousand claimants.¹⁷²

Second, Roberts countered Thomas's argument that all Congress must do to “amend applicable law” within the meaning of *Klein* is enact a statute. Contrary to Thomas's assertion that the Changed Law Rule is a wholesale exception to *Klein*, Roberts would have held that “the concept of ‘changing the law’

¹⁶⁵ *Id.* at 911–12 (Breyer, J., concurring).

¹⁶⁶ *Id.* at 919–20 (Roberts, C.J., dissenting).

¹⁶⁷ *Id.* at 914–15 (noting “disarray produced by this system of legislative equity” (internal quotation marks omitted)).

¹⁶⁸ *Id.* at 915, 919–20 (“Congress exercises the judicial power when it manipulates jurisdictional rules to decide the outcome of a particular pending case.”).

¹⁶⁹ *Id.* at 915.

¹⁷⁰ *Id.* at 915–916.

¹⁷¹ *Id.* at 917.

¹⁷² *Id.* at 918.

must imply some measure of generality or preservation of an adjudicative role for the courts.”¹⁷³

Third, the Chief Justice rejected Justices Ginsburg and Sotomayor’s conclusion that the Gun Lake Act restored the government’s sovereign immunity.¹⁷⁴ Roberts did not respond directly to the constitutional argument—whether Congress *may* assert sovereign immunity in particular pending case—but rather rested on statutory interpretation grounds. Specifically, Roberts opined that the Gun Lake Act, in fact, failed to restore the sovereign immunity of the United States because it did not use the words like “immunity” or “consent.”¹⁷⁵

Fourth, Roberts responded to Justice Breyer’s opinion that Congress was merely confirming, without augmenting, the law. If Congress did not alter the law, responded Roberts, then it could not have “changed the law” within the meaning of the Changed Law Rule.¹⁷⁶ More fundamentally, Roberts objected that congressional action is not necessarily constitutional merely because it ratifies or simplifies administrative action. Instead, the touchstone of constitutionality is whether Congress is exercising judicial power.¹⁷⁷ Because the Gun Lake Act applied the law to a particular case, Roberts opined that it is unconstitutional irrespective of whether it also confirmed administrative action.¹⁷⁸

I explain this fractured set of opinions at length to demonstrate how some fundamental issues about judicial independence are still unresolved. Indeed, *Patchak*’s various opinions touch on many of the same themes as Hart’s *Dialogue*, confirming both the fundamental nature of the issues *Patchak* raises and *The Dialogue*’s contemporary relevance.¹⁷⁹ The disagreements in *Patchak*, although couched in fine doctrinal terms, are in reality disagreements about nothing less important than the line between the judicial and legislative powers. In Part III, I explain how the fundamental issues raised in *Patchak* can be resolved in a way that protects the core of judicial independence while still providing ample room for Congress to legislate.

III. A CHANCE FOR JUDICIAL INDEPENDENCE

Patchak’s fractured opinions broach an array of issues relating to the *Klein* rule of decision principle and judicial independence more generally. But, because a majority of the Court agreed on *Patchak*’s result without agreeing on a rationale, *Patchak* offers little guidance on what the Court might do in a slightly different future case and even less guidance to lower courts on how to ap-

¹⁷³ *Id.* at 920.

¹⁷⁴ *Id.* at 921–22.

¹⁷⁵ *Id.* at 922.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Monaghan, *supra* note 52, at 4 (noting the contemporary relevance of Hart’s *The Dialogue*).

proach these important issues.¹⁸⁰ In this Part, I address the issues joined, but not settled, in *Patchak*, including: the scope of the Changed Law Rule; the constitutionality of targeted legislation; what it means for Congress to withdraw jurisdiction over a “class of cases;” and the relationship between sovereign immunity and the rule of decision principle. After exploring the dispute over each of these issues, I suggest how the courts, including the Supreme Court, should approach them in a future case. Although there are no easy answers to the questions raised in *Patchak*, following the suggestions set out below will allow courts to preserve the core judicial role without encroaching on Congress’s legislative function.

A. *The Changed Law Rule*

Patchak’s plurality and dissent squarely join issue on the breadth of the Changed Law Rule. In Thomas’s view, any statute changes the law sufficient to defeat an application of *Klein*, even a statute that makes an exception to the generally applicable law for a single piece of property.¹⁸¹ As Thomas crisply reasoned, by withdrawing jurisdiction over claims relating the Bradley Property, the Gun Lake Act “changes the law Before the Gun Lake Act, federal courts had jurisdiction to hear these actions. Now they do not.”¹⁸² Roberts, by contrast, reads a limitation into the Changed Law Rule, suggesting that not every statute “changes the law” in a way that defeats *Klein*.¹⁸³ In a sense, this dispute is the most important one in *Patchak*. If Thomas is correct, then no statute ever can be invalid under the *Klein* rule of decision principle because the Changed Law Rule is coextensive with it.¹⁸⁴

1. *The Overbreadth of Thomas’s Approach*

Thomas’s rendering of the Changed Law Rule is too broad to comport either with *Klein* or with Thomas’s own stated justification for the Changed Law Rule. First, Thomas’s Changed Law Rule is at odds with *Klein* itself. The ap-

¹⁸⁰ Lower courts disagree about how to apply the rule in *Marks v. United States*, 430 U.S. 188, 193 (1977), which provides that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’” Under one approach to this test, a position is the narrowest ground when its reasoning implicitly has been approved by a majority who support the result. See *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (*en banc*). Under a second approach, a position is the narrowest ground for the result when it would change the law the least, or be most specific to the case being decided. See *Bormuth v. Cnty. of Jackson*, 849 F.3d 266, 279 (6th Cir. 2017).

¹⁸¹ *Patchak*, 138 S. Ct. at 905.

¹⁸² *Id.* (internal citation omitted).

¹⁸³ *Id.* at 920 (Roberts, C.J., dissenting) (“[T]he concept of ‘changing the law’ must imply some measure of generality or preservation of an adjudicative role for the courts.”).

¹⁸⁴ See *supra* Section I.B.

appropriations proviso held unconstitutional in *Klein* changed the law within Thomas's definition of that concept. Recall that *Klein*'s appropriations proviso required the court to dismiss claims that were predicated on evidence that the claimant took an oath of loyalty.¹⁸⁵ Under Thomas's definition of the Changed Law Rule, the appropriations proviso changed the law: before the proviso, federal courts had jurisdiction to hear actions predicated on evidence of a loyalty oath. After the appropriations proviso, they did not.¹⁸⁶ On Thomas's own reading, therefore, there is no space for a *Klein* principle to operate consistent with the Changed Law Rule.

Second, the vitality of *Klein* aside, Thomas's reading of the Changed Law Rule is too broad because it conflicts with his own description of what the principle of separation of powers requires. Thomas opined in *Patchak* that the principle of separation of powers prevents Congress from "usurp[ing] a court's power to interpret and apply the law to the [circumstances] before it."¹⁸⁷ But, the Changed Law Rule as Thomas envisions it validates statutes that do just that. In *Robertson*, the Court (in an opinion by Thomas himself) upheld the Northwest Timber Compromise, which directed the federal courts to interpret a statute in a particular way for three pending cases.¹⁸⁸ The Court held that this statute changed the law.¹⁸⁹ If a statute that directs courts to interpret a statute in a particular way for a pending case changes the law in a way that defeats the application of *Klein*, then there would seem to be no statute that could encroach on the judicial power.¹⁹⁰ The breadth of Thomas's approach to the Changed Law Rule warrants a search for a different approach to this principle.

2. Three Narrower Approaches

Justice Thomas's Changed Law Rule is inconsistent both with *Klein* and with even an extremely modest view of judicial independence. A narrower definition of what it means to change the law, by contrast, not only makes it possible to reconcile the Changed Law Rule and the *Klein* rule of decision principle but it also preserves the core of judicial independence.

¹⁸⁵ *United States v. Klein*, 80 U.S. (13 Wall.) 128, 143 (1871) (describing operation of proviso).

¹⁸⁶ *Cf. Patchak*, 138 S. Ct. at 905, 909 ("Before the Gun Lake Act, federal courts had jurisdiction to hear these actions. Now they do not." (internal citation omitted)).

¹⁸⁷ *Id.* at 905 (alterations in original) (internal citation omitted).

¹⁸⁸ *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 429–30 (1992) (describing effect of Compromise).

¹⁸⁹ *Id.* at 438 ("We conclude that subsection (b)(6)(A) compelled changes in law . . .").

¹⁹⁰ Thomas's opinion in *Patchak* itself confirms this point. *See Patchak*, 138 S. Ct. at 908. *Patchak* reaffirmed *Bank Markazi*, which interpreted the law for one particular set of cases. *Id.* If the *Bank Markazi* statute changed the law within the meaning of the Changed Law Rule, then there is no constitutional line between law-making and law-application.

First, the Changed Law Rule and the *Klein* rule of decision principle can coexist if changing the law in a way that defeats the application of *Klein* means setting policy. As I have argued elsewhere,¹⁹¹ although most statutes, no matter how modest, indisputably set policy, a statute that does little or nothing other than to decide pending cases does not set policy and should not be considered to change the law in a way that defeats the application of *Klein*.

Reading the Changed Law Rule to distinguish between setting policy and deciding pending cases fits neatly with constitutional law doctrine outside of the *Klein* context. In *United States v. Winstar*,¹⁹² the government encouraged healthy banks to take over insolvent savings and loans by promising the banks favorable accounting treatment.¹⁹³ These promises were made through “express arrangements between the regulators and the acquiring institutions.”¹⁹⁴ Soon after banks merged with the insolvent institutions, Congress prohibited the government from keeping its regulatory promises, rendering many of the merged institutions instantly insolvent.¹⁹⁵ Justice Souter, for a plurality, opined that deference to Congress’s decision to invalidate the government’s promises was not warranted because the statute shifted the costs of the government’s breach of promise to particular parties.¹⁹⁶ Souter noted that deference to Congress’s decision to alter its obligations is appropriate only if this decision is “merely incidental to the accomplishment of a *broader governmental objective*.”¹⁹⁷ By contrast, if the statute appears to be doing little other than shifting the costs of governmental decisions to particular parties, the Court will not defer to the statute because it does not set policy.¹⁹⁸ Importantly, Souter was keenly aware that the government’s cost-shifting maneuver was in the public interest.¹⁹⁹ Nevertheless, a purpose to promote the general welfare did not insulate the government from its decision to shift the costs of the government’s decision to particular parties.²⁰⁰

The *Winstar* approach can be adapted easily to the Changed Law Rule. Most statutes, even quite narrow ones, set policy because they achieve a governmental objective broader than merely shifting the costs of governmental de-

¹⁹¹ Zoldan, *Klein*, *supra* note 20, at 2206–07 (arguing that the Changed Law Rule should be read to distinguish between statutes that set policy and statutes that do not set policy); Evan C. Zoldan, *Is the Federal Judiciary Independent of Congress?*, 70 STAN. L. REV. ONLINE 135, 139–40 (2018) [hereinafter Zoldan, *Federal Judiciary*] (same).

¹⁹² *United States v. Winstar Corp.*, 518 U.S. 839, 839 (1996) (plurality opinion).

¹⁹³ *Id.* at 848–51 (describing goodwill program).

¹⁹⁴ *Id.* at 853–54.

¹⁹⁵ *Id.* at 845–48.

¹⁹⁶ *Id.* at 900–03.

¹⁹⁷ *Id.* at 897–98 (emphasis added).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 903.

²⁰⁰ *Id.* (noting that the public interest-serving aspect of the statute does not necessarily make it a public and general law).

cisions to particular private parties. For example, a statute prohibiting or penalizing a class of conduct (say, discharging pollutants)²⁰¹ would set policy within the meaning of *Winstar*. Although such a statute raises costs for potential polluters, it does not raise costs for particular, identifiable parties. Rather, the category of potential polluters is an indeterminate class because others might become polluters in the future and current polluters might cease polluting. As a result, this kind of statute achieves a government objective (penalizing pollution) rather than merely shifting costs to particular, identifiable polluters. By contrast, a statute that breaches a particular set of agreements (as in *Winstar*), or a statute that directs the result only in a particular, pending case, merely shifts costs to identifiable parties and therefore does not achieve a governmental objective other than to penalize identifiable members of a class.

Admittedly, and as Professor Araiza has noted, the *Winstar* approach requires some line-drawing to determine whether a very narrow statute sets policy or merely shifts costs.²⁰² In rare cases, perhaps in a case like *Patchak* itself, this will be a difficult task. Because *Patchak*'s lawsuit was prompted by a single lawsuit about a specific governmental decision and a particular piece of land,²⁰³ the Gun Lake Act can be seen as a cost-shifting measure to relieve the government of the responsibility of answering for its actions in court. Whether the Gun Lake Act did anything *other* than merely shift costs turns on the interpretation of the Gun Lake Act. On one hand, as Roberts suggested,²⁰⁴ the purpose of the statute was to require the dismissal of *Patchak*'s claim.²⁰⁵ On this interpretation, the Gun Lake Act merely shifted costs for a pending case and did not set policy.²⁰⁶ On the other hand, in Thomas's view, the plain language of the Gun Lake Act applies to all cases, even possible future cases, relating to the Bradley Property.²⁰⁷ On this reading, the Gun Lake Act did set policy—the

²⁰¹ *E.g.*, 33 U.S.C. § 1311(a) (“[T]he discharge of any pollutant by any person shall be unlawful.”).

²⁰² Araiza has argued that a *Winstar*-inspired approach to *Klein* is difficult or impossible to apply as a theoretical matter. William Araiza, *The Once and (Maybe) Future Klein Principle*, 74 WASH. & LEE L. REV. ONLINE 383, 394–95 (2018). While Araiza is surely correct that this test does not provide a bright-line rule to distinguish close cases, a bright-line rule may not be realistic for a complex separation of powers issue like *Klein*'s rule of decision principle. The *Winstar* principle articulated here is coherent because there are cases that easily violate the principle and cases that easily survive the principle. There are cases on the line, but courts make decisions all the time that call on them to distinguish close cases.

²⁰³ *Patchak v. Zinke*, 138 S. Ct. 897, 897 (2018).

²⁰⁴ *Id.* at 917 (Roberts, C.J., dissenting) (opining that the Gun Lake Act dictates “a particular outcome” to “a particular party”).

²⁰⁵ Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, § 2(b), 128 Stat. 1913 (2014) (narrowly reaching a single pending case).

²⁰⁶ For more on the *Winstar* approach to *Patchak*, see Zoldan, *Federal Judiciary*, *supra* note 191 at 138–40.

²⁰⁷ *Patchak*, 138 S. Ct. at 910 (“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

policy to end litigation over the Bradley Property. This interpretive dispute demonstrates that difficult issues of statutory interpretation can give rise to close cases, even under the formulation I suggest. However, because it is often easy to determine whether a statute applies to a closed class of cases or an open class, most cases will be resolved with little difficulty, making the policy / cost-shifting dichotomy a meaningful if not perfect distinction.

Second, and related to the policy / cost-shifting distinction drawn above, the Changed Law Rule could be read to require a court to apply a statutory change only if it changes the generally applicable law. Chief Justice Roberts made this suggestion in his *Patchak* dissent.²⁰⁸ To Roberts, a statutory change that applies to a single pending case is not a change of law that can defeat the application of *Klein*. The Chief Justice's suggestion hints at the possibility that targeted legislation is constitutionally suspect simply because it is targeted. There is merit to the Chief's suggestion; indeed, a constitutional principle disfavoring targeted legislation is even more robust and more complex than he suggests. The constitutional sources of a principle prohibiting targeted legislation, and questions about the scope of this principle, are discussed more fully in Section III.B., below.

Third, the ostensible conflict between the rule of decision principle and the Changed Law Rule turns out to be illusory if the original relationship between these doctrines is restored. As noted above, the evisceration of the *Klein* rule of decision principle was made possible by the inversion of the relationship between it and the Changed Law Rule.²⁰⁹ When *Klein* was decided, the Changed Law Rule provided that a court, even on appeal, must apply the law in force at the time it decides a case.²¹⁰ *Klein*, which post-dated the Changed Law Rule, can be considered an exception to it, preventing the application of the Changed Law Rule when the new statute "prescribe[s] rules of decision to the Judicial Department of the government in cases pending before it."²¹¹ Although the meaning of the this language is far from certain, it can easily be read more narrowly than the Changed Law Rule, allowing the two doctrines to coexist. For example, the *Klein* rule of decision principle might be read to prevent the application of new law when it purports to apply to pending cases *only*. This version of *Klein* can coexist with the Changed Law Rule because the two do not completely overlap; that is, this version of *Klein* will block some, but not all, appli-

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'").

²⁰⁸ *Id.* at 920 (Roberts, C.J., dissenting) (opining that changing the law implies changing some generally applicable law).

²⁰⁹ See *supra* Section I.B.

²¹⁰ *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801) ("[When] 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").

²¹¹ *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871).

cations of the Changed Law Rule.²¹² There are other ways to narrow the rule of decision principle to make it compatible with the Changed Law Rule.²¹³ But, at least, as this approach shows, the two need not conflict. As a result, it is possible to give meaning to the rule of decision principle and the Changed Law Rule by reading both to preserve an adjudicatory role for the courts.

B. *The Constitutionality of Targeted Legislation*

Klein's rule of decision principle has long been considered mysterious because its result seems both intuitively correct and inconsistent with basic principles of law.²¹⁴ Chief Justice Roberts's dissent offers a possible solution to this dilemma by suggesting that *Klein* can be justified as an implementation of a constitutional value that prohibits legislation targeted to reach a single case.²¹⁵ Roberts's suggestion is promising but requires some further elaboration.

1. *A Constitutional Value of Legislative Generality*

As Roberts correctly notes, a principle that disfavors legislation targeting an identifiable individual (often called special legislation)²¹⁶ comports with other areas of constitutional law. A value disfavoring special legislation makes sense in light of *Fletcher v. Peck*'s distinction between the legislature's law-making authority and the judiciary's law-application function.²¹⁷ After all, if applying the law is reserved to the executive and judicial branches, then it makes sense that the legislature would be prohibited from writing a statute so specific that it can only apply to a specific individual; such a targeted statute would appear to infringe on the law-application function of the other branches. But, a value disfavoring targeted legislation is more nuanced, more robust, and even more deeply ingrained in the American constitutional fabric than Roberts suggests. As I have argued in previous work, a principle disfavoring targeted legislation—which may be called a value of legislative generality—is support-

²¹² I will defend this reading of the Changed Law Rule below. *Infra* Section III.C. Importantly, Roberts's reading of the Changed Law Rule and the rule of decision principle is different than his claim that the rule of decision principle prevents Congress from intervening in a single pending case. This latter claim rests on the particularity of the statute, an issue discussed more fully below.

²¹³ For example, some scholars have suggested that it applies only to constitutional claims. *E.g.*, Monaghan, *supra* note 52, at 67 (contrasting statutory claims and constitutional claims in the context of *Klein*).

²¹⁴ Zoldan, *Klein*, *supra* note 20, at 2149 (*Klein*'s rule of decision principle seems at once "intuitively correct and too broad to be literally true").

²¹⁵ Patchak v. Zinke, 138 S. Ct. 897, 915–16 (2018) (Roberts, C.J., dissenting).

²¹⁶ Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625, 632 (2014) [hereinafter Zoldan, *Reviving Legislative Generality*] (defining special legislation).

²¹⁷ See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) (distinguishing between law-making and law-application).

ed by the Constitution's history and text, and also by persuasive normative considerations.²¹⁸

First, during the Confederation period, newly independent state legislatures enacted countless targeted statutes that imposed punishment on named individuals, transferred title to land, granted individuals exemptions from the standing laws, and confiscated property from named individuals.²¹⁹ By the mid-1780s, after a long decade of suffering from the repercussions of targeted legislation, the framing generation wholeheartedly repudiated their legislatures' power to enact targeted laws.²²⁰ In their writings, speeches, and debates, members of the framing generation denounced their legislatures for "extending their deliberations to the cases of individuals" and granting them unearned privileges and imposing unearned burdens on them.²²¹ The experience of these legislative abuses served as a key impetus for a new national constitution.²²²

Second, and based on these experiences, the constitutional text drafted by the framers reflects a value of legislative generality. In addition to the Bill of Attainder Clauses (which most directly prohibit targeted legislative punishment), the Ex Post Facto, Contract, Equal Protection, Due Process, Takings, and General Welfare clauses also support a value of legislative generality because each can fairly be read to prohibit a certain type of particularized legislation.²²³ For example, although the Equal Protection Clause is primarily concerned with government classifications of individuals,²²⁴ the Supreme Court has also emphasized that the clause prohibits legislative specification by limiting the government's power to single out an individual as a "class of one."²²⁵ Simi-

²¹⁸ Zoldan, *Reviving Legislative Generality*, *supra* note 216, at 650–60 (describing a constitutional principle of legislative generality); Evan C. Zoldan, *The Equal Protection Component of Legislative Generality*, 51 U. RICH. L. REV. 489, 489 (2017) [hereinafter Zoldan, *The Equal Protection Component*] (distinguishing generality from equal protection); Zoldan, *Klein*, *supra* note 20, at 2152–53 (comparing generality with the *Klein* rule of decision principle).

²¹⁹ Zoldan, *Reviving Legislative Generality*, *supra* note 216, at 662–65 (recounting the special legislation-related abuses of the Confederation period).

²²⁰ *Id.* at 669–79 (describing the rejection of special legislation during the framing period).

²²¹ COUNCIL OF CENSORS, A REPORT OF THE COMMITTEE, *in* THE CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA 35, 38 (1784) (describing Confederation-era legislative abuses).

²²² Zoldan, *Reviving Legislative Generality*, *supra* note 216, at 652. ("By the close of the confederation period, both special privileges and special detriments were considered 'repugnant to the spirit of the American republics.' It was with these experiences, and in large part driven by them, that the framers of the Constitution arrived in Philadelphia in 1787." (internal citations omitted)).

²²³ *Id.* at 653 (describing textual support for a value of legislative generality).

²²⁴ *See* Engquist v. Or. Dep't of Agric., 553 U.S. 591, 601 (2008) (limiting the class-of-one doctrine).

²²⁵ Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (describing the class-of-one doctrine). For an explanation of the class of one doctrine, see Zoldan, *The Equal Protection Component*, *supra* note 218, at 525–31.

larly, although the Due Process Clause has been applied to a wide array of government actions, one of its oldest applications prohibits the legislature from “taking the property of A and giving it to B.”²²⁶ In this same way, each of the clauses identified above contains a component that reinforces legislative generality, either because of the effect given to it by the Court or the historical experiences that gave rise to its inclusion in the Constitution. Reading these clauses together suggests that a value of legislative generality pervades the Constitution and should inform its interpretation.²²⁷

Third, jurists, philosophers of law, and other commentators have long argued either that targeted legislation is outside the legislative power altogether or that it is bad law. Locke wrote that the legislature may not “rule by extemporary arbitrary decrees”²²⁸ and its laws may not be varied “in particular cases.”²²⁹ The United States Supreme Court invoked this tradition in *Hurtado v. California* when it noted that “not every act, legislative in form” can be considered “law.”²³⁰ Specifically, “a special rule for a particular person or a particular case,” including “acts of confiscation, acts reversing judgments, and acts directly transferring one man’s estate to another,” are simply excluded from its definition.²³¹ As a normative matter, special legislation is often associated with corruption, animus, favoritism, and unjustified inequalities,²³² leading commentators to conclude that it is “unjust,”²³³ “unfair,”²³⁴ and iniquitous.²³⁵

2. Applying a Value of Legislative Generality

A *Klein* principle that prohibits Congress from directing the result in pending cases is consistent with the constitutional value of legislative generality described above. Indeed, such a principle resonates strongly with the historical underpinnings of the Constitution: Confederation-era legislative interference

²²⁶ JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* 52–53 (2003); *see also* *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (noting that impropriety of “a law that takes property from A. and gives it to B”).

²²⁷ Zoldan, *Reviving Legislative Generality*, *supra* note 216, at 653 (describing the Constitution’s generality clauses).

²²⁸ JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 136 (C.B. Macpherson ed., 1980) (1690).

²²⁹ *Id.* § 142.

²³⁰ *Hurtado v. California*, 110 U.S. 516, 535 (1884).

²³¹ *Id.* at 535–36.

²³² Evan C. Zoldan, *Legislative Design and the Controllable Costs of Special Legislation*, 78 MD. L. REV. 415, 415 (2019) [hereinafter Zoldan, *Legislative Design*] (describing costs of special legislation).

²³³ MARCUS TULLIUS CICERO, *ON THE COMMONWEALTH AND ON THE LAWS* 173 (James E. G. Zerzel ed., Cambridge Univ. Press 1999).

²³⁴ LON L. FULLER, *THE MORALITY OF LAW* 47 (12th prt. 1980).

²³⁵ JAMES H. DOUGLAS, *RECORDS OF THE COUNCIL OF CENSORS OF THE STATE OF VERMONT* 67–68 (Paul S. Gillies & D. Gregory Sanford eds. 1991).

with court judgments was a key factor precipitating the Philadelphia Convention.²³⁶ A *Klein* principle prohibiting Congress from directing the result in a pending case is also consistent with, if not directly compelled by, the Constitution's prohibition on certain types of special laws. And a *Klein* principle also resonates with the normative justifications for a value of legislative generality because legislation that targets a pending case is apt to be based on animus or favoritism.²³⁷

There are difficult questions, to be sure, that must be answered before the Court could apply a value of legislative generality in the context of *Klein*. Many of these questions are raised, either explicitly or implicitly, in the exchange between Justice Thomas and the Chief Justice in *Patchak*. As Justice Thomas noted, at least as a formal matter, the Gun Lake Act did not apply to a single case alone.²³⁸ It was written in general language, applying to "an action pending in a Federal court" rather than to Patchak's case specifically.²³⁹ Moreover, the Gun Lake Act required the dismissal of any claim relating to the Bradley Property.²⁴⁰ As a result, on its face it applies to future actions relating to the Bradley Property, even if these future actions are unrelated to the suit already dismissed.²⁴¹ The Chief Justice responded to these arguments by noting that the "practical operation" of the statute "unequivocally confirms that it concerns solely Patchak's suit."²⁴²

As this exchange suggests, there are a number of difficult issues that will arise if a court seeks to apply a value of legislative generality in the *Klein* context. These include the following: whether a targeted statute is impermissible even if it does not name the individual case targeted; whether it is impermissible to target, not only an individual case, but also a small group of cases; and whether a statute is impermissibly targeted if some, but not all, of the targeted cases are determined at the time it is enacted.

Fortunately, the Supreme Court would not be writing on a blank slate when answering these and many other questions about the precise contours of a value of legislative generality. In previous work, I have set out the core commitments

²³⁶ *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1330 (2016) (Roberts, C.J., dissenting) (noting that the early state legislative abuses included interference "in cases still pending before courts, [and] granting continuances, stays of judgments," and new trials).

²³⁷ The statute upheld in *Bank Markazi*, for example, transferred property from an unsympathetic party (the Central Bank of Iran) to sympathetic parties (victims of state-sponsored terrorism). Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772.

²³⁸ *Patchak v. Zinke*, 138 S. Ct. 897, 910 (2018) (noting the general applicability of the Act).

²³⁹ Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, § 2(b), 128 Stat. 1913 (2014).

²⁴⁰ *Id.*

²⁴¹ *Patchak*, 138 S. Ct. at 910. Whether Thomas is correct, or whether the Chief Justice is correct that all other claims related to the Bradley Property are barred by statutes of limitations, is a matter of statutory interpretation.

²⁴² *Id.* at 918 (Roberts, C.J., dissenting).

of a value of legislative generality and general principles to guide courts in peripheral cases. Succinctly stated, the value of “legislative generality disfavors legislation that singles out a person or small, identifiable group for special treatment to which the general population is not subject.”²⁴³ Its core commitments, most relevant here, include prohibiting the legislature from: “interfering with both civil and criminal judicial processes for named claimants or defendants; declaring the proper interpretation of a standing law in a particular case; . . . and transferring property from one person to another.”²⁴⁴

Outside of these core commitments, my previous work suggests that the value of legislative generality should be less restrictive when it comes to “special laws that prefigure generally applicable laws” or “that eliminate, rather than create, disparities between people.”²⁴⁵

In addition to this theoretical work, state courts have extensive practical experience resolving these very issues under state constitutional prohibitions on special legislation.²⁴⁶ To give a sense of the answers they have reached, state courts tend to hold that a statute can be prohibited as special legislation even if it does not name the individual it targets.²⁴⁷ Similarly, state courts sometimes invalidate a statute as impermissibly special even if it applies to a small, known group rather than a single individual.²⁴⁸ Finally, state courts tend to evaluate a facially general statute based on whether it applies to an “open class” or a “closed class.”²⁴⁹ A class is closed if it is impossible, or extremely unlikely, that another person or entity will fall within the statutory classification in the future.

²⁴³ Zoldan, *Reviving Legislative Generality*, *supra* note 216, at 688.

²⁴⁴ *Id.* at 688–89.

²⁴⁵ *Id.* at 689.

²⁴⁶ DANIEL R. MANDELKER, JUDITH WELCH WEGNER, JANICE C. GRIFFITH, EVAN C. ZOLDAN & CYNTHIA BAKER, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 670 (9th ed. 2020) (noting that courts often invalidate statutes as special even though they do “not name a particular entity”); *id.* at 671 (“Courts often invalidate . . . narrowly drawn statutes as special laws.”); *id.* at 669 (“[C]ourts often hold that a challenged law is special when it creates a ‘closed class.’”).

²⁴⁷ *Cities Serv. Co. v. Governor of Maryland*, 431 A.2d 663, 673 (Md. 1981) (“[S]tatutory provisions which did not name particular individuals or entities have been held to be prohibited special laws, whereas enactments naming specific entities have been held not to be special laws.” (citations omitted)); *City of Topeka v. Gillett*, 4 P. 800, 804 (Kan. 1884) (“[A]n act . . . may be special where it simply describes the particular persons or things so that they may be known, as well as where it gives their particular names or distinctive appellations.”).

²⁴⁸ *People v. Canister*, 110 P.3d 380, 385 (Colo. 2005) (statute creating class of two co-conspirators violated prohibition on special legislation); *Opyt’s Amoco, Inc. v. Vill. of S. Holland*, 568 N.E.2d 260, 269 (Ill. 1991) (“Special legislation confers a special benefit or exclusive privilege on a person or a group of persons to the exclusion of others similarly situated.”).

²⁴⁹ *Canister*, 110 P.3d at 384 (“By contrast, a class that is drawn so that it will never have any members other than those targeted by the legislation is illusory, and the legislation creating such a class is unconstitutional special legislation.”); *Sierra Club v. Dep’t. of Transp.*, 202 P.3d 1226, 1276 (Haw. 2009) (invalidating a statute as a special law when, although framed as a general law, in reality it applied only to a closed class of one).

Courts tend to find that a generally written statute that creates a closed class is prohibited as special legislation.²⁵⁰ By contrast, courts tend to uphold classifications when a statute creates an “open” class, that is, a class into which other people or entities could fall in the future.²⁵¹

The Supreme Court is not, of course, required to follow the path that state courts have taken. But, the Court may find the states’ doctrinal solutions useful because, for many questions about special legislation, the states have articulated relatively manageable standards. At the very least, reviewing the states’ approaches will give the Court a sense of the types of issues that it will need to resolve in order to apply *Klein*’s rule of decision principle in light of a value of legislative generality.

C. A “Class of Cases”

Closely related to the issue of legislative generality is the issue of what constitutes a “class of cases.” As Justice Thomas noted in *Patchak*, the *Klein* Court specifically reaffirmed that Congress has the power to withdraw jurisdiction over a “class of cases.”²⁵² Because the Gun Lake Act applied to cases relating to the Bradley Property, Thomas opined that it withdrew jurisdiction over a class of cases within the meaning of *Klein*.²⁵³ Chief Justice Roberts did not deny this reading of *Klein*, instead arguing that, as a practical matter, the Gun Lake Act withdrew jurisdiction over just one case, Patchak’s suit against the United States.²⁵⁴ He concluded that the Gun Lake Act did not, therefore, withdraw jurisdiction over a “class of cases.”²⁵⁵ Although Roberts implies that a single case is not a class of cases, and Thomas implies that any number of cases greater than one is a class, both Roberts and Thomas carefully avoided defining what constitutes a class. As described below, a more nuanced approach than the ones suggested by Thomas or Roberts better explains what *Klein*’s “class of cases” should mean.

1. A Class of Cases v. a Single Case

The simplest way to define a class of cases is to follow the line of reasoning suggested by Justice Thomas. Noting that the Gun Lake Act required the dismissal of more than one case, Thomas neatly concluded that it withdrew ju-

²⁵⁰ MANDELKER ET AL., *supra* note 246, at 669–70 (“[C]ourts often hold that a challenged law is special when it creates a ‘closed class.’ A class is closed rather than open if it is impossible, or extremely unlikely, that another person or entity will fall within the statutory classification in the future.”).

²⁵¹ *Id.* at 670 (“Conversely, courts tend to uphold classifications that are narrowly drawn if the class is ‘open,’ that is, if other people or entities may fall into the class in the future.”).

²⁵² *Patchak v. Zinke*, 138 S. Ct. 897, 906–07 (2018).

²⁵³ *Id.* at 909.

²⁵⁴ *Id.* at 916–17 (Roberts, C.J., dissenting).

²⁵⁵ *Id.* at 918.

risdiction over a “class of cases.”²⁵⁶ Although he did not say so explicitly, Thomas’s conclusion can be taken as implicitly assuming that any number of cases greater than one is a class within the meaning of *Klein*.

The major advantage of this suggested rule is that it is relatively easy to administer: whether a statute applies to a single case or to more than one case normally can be discerned from the text of a statute and its legislative context. Consider the statute that created a special exemption allowing the appointment of James Mattis as Secretary of Defense.²⁵⁷ As the language of the statute made clear, it was a “limited exception,” applying “only to the first person appointed as Secretary of Defense” and to “no other person.”²⁵⁸ To erase all doubt about the bill’s reach, its proponents introduced the bill as “a one-time exemption on behalf of an individual” that would not “permanently change the law.”²⁵⁹ Just as the text and legislative context made clear that the Mattis waiver statute applied to one person, similarly, it will be easy to determine, for many statutes, whether they apply to a single case or more than one case.

However, even clear statutory language can give rise to grey areas. The legislation upheld in *Bank Markazi*, for example, deemed the assets of Bank Markazi to be the assets of Iran, but only for one particular, consolidated action involving nineteen judgments and more than a thousand victims.²⁶⁰ On one hand, the statute affected only a single pending case. But, on the other hand, because the single case was a consolidated action of nineteen judgments, it can also be viewed as more than one case. As this ambiguity reveals, a rule that distinguishes between a single case and more than one case does not neatly resolve all situations.

Another advantage of Thomas’s bright-line rule is that it is consistent with the constitutional value of legislative generality. As noted, a value of legislative generality prevents the legislature from targeting an individual for special treatment, which is often associated with corruption, animus, favoritism, or other costs.²⁶¹ A rule that prevents the application of a change in law to a single case advances the value of legislative generality by preventing the legislature from targeting an individual case and imposing these kinds of costs. A rule that distinguishes between a single case and any number of cases greater than one, however, is not a perfect fit with a value of legislative generality. Legislation that targets a group of identifiable individuals creates many of the same costs as

²⁵⁶ *Id.* at 910 (plurality opinion).

²⁵⁷ Act of Jan. 20, 2017, Pub. L. No. 115-2, 131 Stat. 6 (creating a special exception for James Mattis).

²⁵⁸ *Id.*

²⁵⁹ 163 CONG. REC. H9,480 (daily ed. Jan. 13, 2017) (statement of Rep. Dan Newhouse).

²⁶⁰ *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1326–27 (2016). This ambiguity was raised in the *Bank Markazi* Supreme Court oral argument. Transcript of Oral Argument at 5, *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016) (No. 14-770).

²⁶¹ Zoldan, *Legislative Design*, *supra* note 232, at 418–19, 426–42 (enumerating the costs associated with special legislation).

legislation that targets a single individual.²⁶² Because the legislature knows who will benefit or suffer from the targeted legislation,²⁶³ legislation targeting both an individual and a group of known individuals can be prompted by corruption, animus, favoritism, or other illegitimate motives. As a result, a rule that distinguishes between a single case and any number of cases greater than one will not prevent legislation creating many of the harms that a more nuanced value of legislative generality could address.

Weighed against these imperfect advantages, there are also significant drawbacks to a rule that turns on a precise number of cases. Defining a class of cases for the purposes of *Klein* in this way will often lead to an arbitrary distinction between statutes that are similar in a relevant way.

For example, consider again *Robertson*'s Northwest Timber Compromise, which instructed the federal courts to interpret the environmental and land management statutes underlying three named lawsuits in favor of the suits' defendants.²⁶⁴ By requiring the court to interpret statutory terms in a particular way, Congress arguably encroached on the independence of the courts, usurping the judicial function. But, whatever the severity of the encroachment on the courts, it had little to do with the precise number of cases that were affected. Had the statute directed the court to interpret the generally applicable law for one particular lawsuit rather than three, the incursion into the judicial role would have been fundamentally the same. A *Klein* principle that prevents Congress from directing the result in a single case, but is powerless if Congress directs the result in two or three related suits, would be easily evaded and lead to arbitrary distinctions between similar situations.²⁶⁵

Finally, a *Klein* rule that distinguishes between a single case and any number of cases greater than one is contrary to the holding in *Klein* itself. The appropriations proviso invalidated in *Klein* did not merely require dismissal of *Klein*'s case.²⁶⁶ Rather, it required the dismissal of a group of cases that fit a particular description: that is, cases in which a plaintiff had prevailed in the Court of Claims, relying on evidence of an oath of loyalty, against the United

²⁶² *People v. Canister*, 110 P.3d 380, 381 (Colo. 2005) (invalidating as special statute applying to two people).

²⁶³ Zoldan, *Reviving Legislative Generality*, *supra* note 216, at 654 (noting that one cost of special legislation is legislative targeting).

²⁶⁴ *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 437–38 (1992) (describing impact of Compromise on pending cases).

²⁶⁵ Conversely, there may be situations where a statute applies to one individual but appears justified in some way. In *Nixon v. Administrator of General Services*, 433 U.S. 425, 472, 477 (1977), the Court upheld a law confiscating the papers of former President Nixon because he was a "legitimate class of one."

²⁶⁶ Act of July 12, 1870, ch. 251, 16 Stat. 230, 235; *see also* Tyler, *supra* note 109, at 94–95 (noting that the appropriations proviso was intended to apply to multiple cases brought by former rebels).

States.²⁶⁷ As a result, when the *Klein* Court distinguished the group of cases affected by the appropriations proviso from a “class of cases,” it must have used “class of cases” to mean something other than any number of cases greater than one. Contrary to Thomas’s argument, therefore, *Patchak* cannot be distinguished from *Klein* on the basis of the number of suits affected. If *Klein* is still good law, as Thomas suggested, then a “class of cases” must mean something other than any number of cases greater than one.

2. *A Class of Cases v. Pending Cases Only*

Klein itself suggests an approach to defining a “class of cases” that is superior to the distinction between a single case and any number of cases greater than one. When the *Klein* Court approved Congress’s authority to withdraw jurisdiction from the federal courts in “a particular class of cases,”²⁶⁸ it contrasted this power with the appropriations proviso, which unconstitutionally prescribed a rule of decision to a court “in cases pending before it.”²⁶⁹ This statement can be read as expressing a concern not with the application of new law to pending cases (which is generally permitted under the Changed Law Rule),²⁷⁰ but rather as a concern with the application of new law to pending cases *only*. Under this reading of a “class of cases,” the problem with the appropriations proviso was that there were no cases other than pending cases to which it could have applied.²⁷¹

The modern Supreme Court has not followed this reading of *Klein*. As described above, the statute upheld in *Bank Markazi* explicitly applied to a pending case alone.²⁷² Nevertheless, when the Supreme Court again addresses the rule of decision principle, it should consider adopting an approach that distinguishes between statutes that reach pending cases alone and statutes that reach both pending and future cases. Unlike the rule suggested by Thomas, this approach is easy for courts to administer in a principled way. This approach also coheres with the constitutional value of legislative generality; but, unlike a rule that places conclusive weight on the number of cases affected, it does so in a way that better accounts for the value of legislative generality’s underlying

²⁶⁷ Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.

²⁶⁸ *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145 (1871).

²⁶⁹ *Id.* at 146.

²⁷⁰ *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801) (upholding statute that changed the law in a case on appeal).

²⁷¹ Act of July 12, 1870, ch. 251, 16 Stat. 230, 235 (applying retrospectively to pardons already offered and accepted); *see also* Tyler, *supra* note 109 at 94–95 (noting that the congressional proponent of the proviso estimated the government’s liability to former rebels under the Abandoned and Captured Property Act at more than ten million dollars).

²⁷² *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318–19 (2016) (noting that statute at issue applied to a single consolidated case).

concerns. And, unlike a rule that turns on whether a single case or more than one case is affected, this approach is consistent with *Klein* itself.²⁷³

First, a *Klein* rule that permits statutes to apply to pending cases so long as it also applies to future, unknown cases is easy to administer. The statutory language itself will often determine conclusively whether a statute applies to pending cases only. In *Bank Markazi*, for example, the legislation deemed the assets of Bank Markazi to be the assets of Iran, but only for ongoing litigation.²⁷⁴ In that case it is easy to tell that the legislation applied to a pending case (or pending cases) and could not apply to future, unknown cases. Because this approach does not turn on the precise number of pending cases, it also eliminates grey areas created by an approach that focuses exclusively on the number of cases affected.

Second, as noted above, a rule that turns on whether one case or more than one case is affected aligns it with the value of legislative generality.²⁷⁵ However, for many of the reasons that legislation targeting a single individual has been called unjust, legislation that targets a group of identifiable individuals also can be considered unjust. For example, because the legislature knows who will benefit or suffer from the targeted legislation, legislation targeting both an individual and a small group of known individuals can be prompted by corruption, animus, favoritism, or other illegitimate motives.²⁷⁶ As a result, a rule that prevents the application of new law to a fixed universe of cases that are known because they are already pending will be more closely aligned with a value of legislative generality than a rule that is powerless when a statute targets two or more pending cases.

An approach that turns on whether a change in law applies to pending cases only rather than on the absolute number of individuals targeted by the legislation also comports with the approach taken by state courts enforcing restrictions on targeted legislation under state constitutional law. When a statute creates a closed class, one that cannot be augmented in the future, state courts

²⁷³ There are other plausible definitions of the term “class of cases.” One alternative is that *Klein* used the term in the sense of “class legislation,” a constitutional doctrine important until the early 20th century. Class legislation is “legislation that singles out a class for special treatment without a concomitant public purpose.” Zoldan, *The Equal Protection Component*, *supra* note 218, at 505. Impermissible class legislation is distinguished from permissible legislation that legislates for a natural or real class. *People v. Canister*, 110 P.3d 380, 383 (Colo. 2005). On this view, *Klein* may have held that the proviso was impermissible class legislation because it singled out a group of cases that was a subpart of a real or natural class. The class legislation theory is no longer enforced as a stand-alone principle under the federal Constitution. Zoldan, *The Equal Protection Component*, *supra* note 218, at 524–25.

²⁷⁴ *Bank Markazi*, 136 S. Ct. at 1319.

²⁷⁵ See *supra* Section III.B.

²⁷⁶ Zoldan, *The Equal Protection Component*, *supra* note 218, at 496 (“After all, a statute that singles out a small, determinable group raises many of the same concerns—like favoritism, animus, or encroachment on the judicial function—that attend individualized legislation.”).

often invalidate the legislation as impermissibly special.²⁷⁷ When legislation creates a class that includes known individuals, but which also could apply to others in the future, courts tend to uphold it because it creates an open class.²⁷⁸ Legislation that affects pending cases maps on to this open-class / closed-class dichotomy. When legislation affects pending cases alone, it creates a closed class, whose members have been selected by the legislature for special treatment, perhaps with an impermissible motive. By contrast, when legislation applies to pending *and* future cases, the legislature acts, in part, from behind a veil of ignorance, unaware of the full spectrum of cases that will be affected by the change in law.²⁷⁹ The fact that the legislature cannot know everyone who will be affected by a change makes it less likely that the legislature will use this instrument to target known individuals because they cannot do so without risking unintended applications.

Third, unlike a rule that distinguishes between a single case and any number greater than one, an approach that distinguishes between pending cases only and pending and future cases is consistent with *Klein* itself. As noted, the *Klein* Court distinguished between “a particular class of cases,” over which Congress has complete control, and a statute that unlawfully prescribes a rule of decision to the courts “in cases pending before it.”²⁸⁰ This distinction demonstrates that the *Klein* Court considered it possible that withdrawing jurisdiction may be unlawful even if more than one case is affected by the change in law.

Finally, this approach also makes sense of a somewhat cryptic passage in *Klein*, in which the Court distinguished the appropriations proviso from the statute it previously upheld in *Wheeling Bridge*.²⁸¹ *Wheeling Bridge* arose from the Court’s previous injunction against the operation of a bridge, which the Court enjoined after finding that the bridge was a nuisance.²⁸² After the operation of the bridge was enjoined, however, Congress enacted a statute that declared the bridge was *not* a nuisance.²⁸³ In *Wheeling Bridge*, the Court upheld

²⁷⁷ *Canister*, 110 P.3d at 384 (“By contrast, a class that is drawn so that it will never have any members other than those targeted by the legislation is illusory, and the legislation creating such a class is unconstitutional special legislation.”); *Sierra Club v. Dep’t. of Transp.*, 202 P.3d 1226, 1276 (Haw. 2009) (invalidating a statute as a special law when, although framed as a general law, in reality applied only to a closed class of one).

²⁷⁸ MANDELKER ET AL., *supra* note 246, at 669–71 (discussing open class/closed class distinction).

²⁷⁹ Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 399 (2001) (arguing that the Constitution contains veil of ignorance rules that subject “decisionmakers to uncertainty about the distribution of benefits and burdens that will result from a decision”).

²⁸⁰ *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145–46 (1871).

²⁸¹ *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 440 (1855).

²⁸² *Id.* at 447.

²⁸³ *Id.* at 422.

the application of the new law to the pending case, which resulted in the dissolution of the injunction.²⁸⁴

In *Klein*, the Court reaffirmed its previous holding in *Wheeling Bridge*; the Court distinguished this previous case on the ground that, after the new law declared the bridge not to be a nuisance, the Court “was left to apply its ordinary rules to the new circumstances created” by the change in law.²⁸⁵ As a result, no “arbitrary rule of decision was prescribed in that case.”²⁸⁶ By contrast, the appropriations proviso was defective because it did not create new circumstances; instead, it required the Court to apply the law to particular pending cases. In making this distinction, *Klein* can be read to distinguish between a law that applies to pending cases alone and, on the other hand, a change in law that applies to pending cases *and* future cases. On this reading, the *Wheeling Bridge* statute was lawful because it declared that the bridge was not a nuisance—not only for the injunction that was then in force—but also for any future lawsuits claiming that the bridge was a nuisance. By contrast, the *Wheeling Bridge* statute would have been defective had it declared the bridge lawful only for the purposes of the injunction that was then in force.

In sum, when the Supreme Court again addresses the definition of “class of cases” in the context of *Klein*, it should revive the distinction between statutes that apply to pending cases only and, on the other hand, statutes that apply both to pending and future cases. A definition that carries this distinction will be easy for courts to administer because statutory language and legislative context normally make clear whether a statute affects pending cases alone. This approach, moreover, is consistent with a value of legislative generality because it is analogous to the open-class / closed-class distinction often used to define impermissible special legislation. And finally, this approach not only is consistent with *Klein*, but it also makes sense of *Klein*’s puzzling passage distinguishing *Wheeling Bridge*.

D. *The Government’s Sovereign Immunity*

In their concurrences, Justices Ginsburg and Sotomayor took an approach to *Patchak* that avoided all of the thorny issues discussed above. Instead, they opined that the Gun Lake Act had the functional effect of asserting or restoring the government’s sovereign immunity because it required the federal courts to dismiss suits relating to the Bradley Property.²⁸⁷ Because some suits relating to the Bradley Property would lie against the United States, and because the United States can always assert its immunity from suit, the Gun Lake Act was valid

²⁸⁴ *Id.* at 431–32.

²⁸⁵ *Klein*, 80 U.S. at 146–47.

²⁸⁶ *Id.* at 146.

²⁸⁷ *Patchak v. Zinke*, 138 S. Ct. 897, 912–14 (2018) (Ginsburg, J., concurring & Sotomayor, J., concurring).

even though it directed a federal court to dismiss a particular, pending suit.²⁸⁸ The plurality did not address this argument; moreover, the Chief Justice failed to counter the ultimate constitutional point asserted in these concurrences. Instead, he retreated to a statutory interpretation argument, opining that the Gun Lake Act did not, in fact, assert the government's sovereign immunity.²⁸⁹

1. *The Limits of Sovereign Immunity*

It is true that the Court has described Congress's power to assert the government's sovereign immunity in absolute terms. In a typical statement of this principle, the Court has held that the United States subjects itself to suit only as "an act of grace."²⁹⁰ As a result, it may be inferred, Congress's subsequent decision to withdraw jurisdiction from the federal courts over a suit against the United States always will be honored by the courts.²⁹¹

But, despite strong rhetorical statements about the government's consent to be sued, there is reason to doubt that the government's sovereign immunity extends as far as Ginsburg and Sotomayor suggest. Most obviously, the scope of immunity they describe is at odds with *Klein* itself. The statute invalidated in *Klein* required federal courts to dismiss suits that only could be asserted against the United States.²⁹² Nevertheless, the *Klein* Court invalidated the proviso. If *Klein* is good law, therefore, sovereign immunity, whatever its scope, does not insulate a statute simply because it requires dismissal of suits against the United States. The *Klein* Court made this point explicitly when it rejected the government's argument that "the right to sue the government . . . is a matter of favor."²⁹³ The Court emphasized, instead, that "it is as much the duty of the government as of individuals to fulfil its obligations."²⁹⁴

Doctrine aside, Ginsburg and Sotomayor's concurrences are still too broad: it cannot be true that any statute terminating pending suits is saved from constitutional infirmity so long as it has the effect of dismissing claims against the United States. Imagine a statute that requires the federal courts to dismiss all claims asserted by a particular religious group against the United States. Be-

²⁸⁸ *Id.* at 912–913 (Ginsburg, J., concurring).

²⁸⁹ *Id.* at 921–22 (Roberts, C.J., dissenting).

²⁹⁰ *District of Columbia v. Eslin*, 183 U.S. 62, 65 (1901).

²⁹¹ *Patchak*, 138 S. Ct. at 912 (Ginsburg, J., concurring) (citing *Eslin*, 183 U.S. at 65–66).

²⁹² Act of July 12, 1870, ch. 251, 16 Stat. 230, 235 (providing for the dismissal of suits against the United States).

²⁹³ *United States v. Klein*, 80 U.S. (13 Wall.) 128, 144 (1871).

²⁹⁴ *Id.* Here, the Supreme Court paraphrased a line from President Lincoln's First Annual Message: "It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals." Abraham Lincoln, President of the U.S., Annual Message to Congress (Dec. 3, 1861), in *CONG. GLOBE*, 37th Cong., 2d Sess. 1, 2 (1861). An excerpt from this speech adorns the side of the Washington, D.C. building that houses both the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit.

cause this statute requires the dismissal of suits against the United States, it would “restore[] the Federal Government’s sovereign immunity”²⁹⁵ as much as did the Gun Lake Act. But, of course, this statute also would violate other constitutional provisions.²⁹⁶ As this example demonstrates, simply because a statute effectively asserts or “restores” the government’s sovereign immunity does not determine whether it also generates other constitutional problems. As a result, the fact that the Gun Lake Act required the dismissal of suits against the government does not determine whether it also violates the Constitution by directing a federal court to enter judgment in a pending case. If the Constitution prohibits Congress from directing the result in a pending case, then a statute that does so is not redeemed by the fact that it also terminates suits against the government.²⁹⁷

2. A Principle Against Self-Dealing

The expansive vision of sovereign immunity proffered by Justices Ginsburg and Sotomayor turns out to be implausibly broad. It is possible, however, to imagine a more modest version of sovereign immunity. In a diverse set of constitutional contexts,²⁹⁸ the Supreme Court has declined to uphold statutes that reflect governmental *self-dealing*—that is—legislation that repudiates an obligation of the government in a pending dispute.²⁹⁹ A principle that disfavors legislative self-dealing is more modest than Justices Ginsburg and Sotomayor’s version of sovereign immunity because it protects the prerogatives of legislative power while also creating space for the independent operation of the feder-

²⁹⁵ *Patchak*, 138 S. Ct. at 912 (Sotomayor, J., concurring).

²⁹⁶ This statute would likely violate the Constitution’s First Amendment, among other provisions. For an Article III example, consider the possibility of Congress creating a second Supreme Court authorized to hear appeals from judgments in which claims were asserted against the United States, but which is required to dismiss all cases in which the United States prevailed in the lower court. This provision would result in the dismissal of claims against the United States, but it would also arguably violate Article III by creating a court of last resort other than the “one Supreme Court” provided for in the Constitution. U.S. CONST. art. III, § 1.

²⁹⁷ For a similar reason, Justice Breyer’s concurring opinion that Congress may always lawfully “confirm” administrative action that is itself constitutional is unpersuasive. For example, while an agency head may lawfully appoint inferior officers, it is unconstitutional for Congress itself to appoint inferior officers. U.S. CONST. art. II, § 2. As a result, whether a statute “confirms” administrative action does not determine whether it is otherwise unconstitutional.

²⁹⁸ *E.g.*, *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 1 (1977) (refusing to defer to states’ decision to breach bond obligations); *Perry v. United States*, 294 U.S. 330, 350 (1935) (holding that the United States “is [not] free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient”); *Carmell v. Texas*, 529 U.S. 513, 514 (2000) (retrospective rules that inure only to the benefit of the state implicate *ex post facto* concerns).

²⁹⁹ For an argument that the *Klein* rule of decision principle reflects a constitutional principle against self-dealing, see Zoldan, *Klein*, *supra* note 20, at 2190–94.

al courts. Examining some of the Court's self-dealing cases suggests a principled way for courts to determine whether to uphold a statutory change in law that has the effect of terminating suits against the United States.

In *Winstar*, the government was liable for breaching an agreement with private parties because Congress's repudiation of the government's agreement reflected self-dealing.³⁰⁰ The government was engaged in self-dealing because the statute that repudiated its contract appeared to be an act of an interested party rather than the act of a regulating sovereign.³⁰¹ The plurality suggested a sliding scale to determine whether the government may break its promise in the course of regulating.³⁰² A statute that impairs the government's obligations, but which does so only incidental to "the accomplishment of a broader governmental objective," will be permitted as a disinterested, sovereign act.³⁰³ However, the "greater the Government's *self-interest* . . . the more suspect becomes the claim that its private contracting partners ought to bear the financial burden."³⁰⁴ And if "a substantial part of the impact of the Government's action rendering performance impossible falls on its own contractual obligations," the government must honor its agreement.³⁰⁵

Similarly, in *Perry v. United States*,³⁰⁶ the Court rebuffed Congress's attempt to claim immunity from suit for renegeing on an obligation.³⁰⁷ The Court held that the United States is not free to "alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient."³⁰⁸ Indeed, while Congress has a relatively free hand to regulate contractual obligations generally, this freedom does not extend to the government's power "to alter or repudiate the substance of *its own* engagements."³⁰⁹ The Court specifically rejected the government's argument that, as a sovereign, Congress could not be bound to its contractual obligations.³¹⁰ The power to enter into binding contracts is itself a sovereign power, the Court reasoned; therefore, disclaiming a previous contractual obligation is as much a repudiation of sovereignty as abiding by it.³¹¹

³⁰⁰ *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996) (describing that statutes are sometimes "tainted by a governmental object of self-relief").

³⁰¹ *Id.* at 902–03 (distinguishing between public and general acts and, on the other hand self-interested acts).

³⁰² *Id.* at 896.

³⁰³ *Id.* at 898.

³⁰⁴ *Id.* (emphasis added).

³⁰⁵ *Id.*

³⁰⁶ *Perry v. United States*, 294 U.S. 330 (1935).

³⁰⁷ *Id.* at 350.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 350–51 (emphasis added).

³¹⁰ *Id.* at 353.

³¹¹ *Id.* at 354 ("The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts.").

In these cases, as well as in other contexts,³¹² the Court has refused to apply a change in law that would have had the effect of benefitting the government in pending cases when the new law reflected the government's self-interest. In these cases, the Court took pains to emphasize that it will respect, and defer to, laws that apply even-handedly to the government and other parties. Whether a statute reflects disinterested regulation rather than self-interest depends on the extent to which the statute accomplishes some goal other than simply relieving the government of an obligation.³¹³

A principle against governmental self-dealing, as suggested by *Winstar*, *Perry*, and similar cases, can guide courts considering whether to apply a new law purporting to terminate, because of the government's sovereign immunity, a suit pending against the United States. Consider how a principle against self-dealing could be used to evaluate *Patchak*. The surest effect of the Gun Lake Act was to save the government from the burden of defending itself in the pending suit brought by Patchak.³¹⁴ Like the statutes invalidated in *Winstar* and *Perry*, therefore, the Gun Lake Act repudiated the government's obligation under existing law. On the other hand, Interior's decision to take the Bradley Property into trust did more than alter the government's obligation; because it arguably reached all suits relating to the Bradley Property, the burden of the Gun Lake Act did not fall exclusively on Patchak.³¹⁵ Moreover, even if, as a practical matter, the statute affected Patchak's lawsuit alone, unlike the *Winstar* and *Perry* statutes, the Gun Lake Act created only a modest benefit for the United States. Other than the cost of defending against Patchak's suit, it did not benefit the government financially. Instead, the stated and likely reason for the government's action was to benefit the Match-E-Be-Nash-She-Wish.³¹⁶ On this view of the government's action, the Gun Lake Act can be seen as part of the government's effort to assist the tribe rather than to self-deal.

The *Winstar-Perry* analysis will not always provide an easy answer to difficult questions about the purposes and effects of the government's actions. Nevertheless, evaluating a claim of sovereign immunity in light of a principle against self-dealing should be attractive to courts resolving similar future cases. An approach based on a principle against governmental self-dealing resonates

³¹² *E.g.*, *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 1 (1977) (refusing to defer to states' decision to breach bond obligations); *Perry*, 294 U.S. at 350 (holding that the United States is not "free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient"); *Carmell v. Texas*, 529 U.S. 513, 514 (2000) (retrospective rules that inure to the benefit of the government only implicate Ex Post Facto Clause concerns).

³¹³ *United States v. Winstar Corp.*, 518 U.S. 839, 900 (invalidating statute that benefitted the government at the expense of private parties); *Perry*, 294 U.S. at 354 (same).

³¹⁴ *Patchak v. Zinke*, 138 S. Ct. 897, 909–10 (2018) (describing the effect of the Gun Lake Act).

³¹⁵ *Id.* (describing the possible broader reach of the Gun Lake Act).

³¹⁶ *Id.* (describing the purpose of Interior's decision to take the property into trust).

with other areas of constitutional law. It preserves both the prerogative of Congress to determine its exposure to liability and the power of courts to decide pending cases. And perhaps most importantly, this approach rejects an implausibly broad vision of sovereign immunity while still allowing the government to assert immunity when it regulates disinterestedly.

CONCLUSION

The core of judicial independence is the power of the courts to resolve cases pending before them without legislative interference. But, when Congress directs the courts to reach particular results in pending cases, it blurs the line between the judicial and legislative powers. The Supreme Court has not defended the core of judicial independence, instead upholding increasingly intrusive statutes that direct the courts to enter judgment for particular parties. Although the line between the judicial power and legislative power is surely fuzzy, the Court can, and should, refine its approach to ensure that the core of judicial independence is not lost altogether. The Court should not apply a change in law to pending cases when the law fails to set policy, when it singles out an individual for special treatment, when it withdraws jurisdiction solely for the purpose of terminating pending cases, or when it reflects governmental self-dealing. Observing these limitations on Congress's power to direct the result in pending cases allows Congress ample room to fulfill its lawmaking function. But, unlike the Court's current approach, it also preserves the courts' role to actually decide cases rather than just enter judgment at the direction of Congress.