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ESSAY

Is the Federal Judiciary Independent of Congress?

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Abstract. Can Congress command a federal court to rule in favor of a particular party in a pending case? The answer to this seemingly simple question is unsettled. The Constitution permits Congress to enact rules of law that courts must follow; and it permits the courts to decide cases pending before them. Constitutional conflict arises when Congress writes a rule of law so specific that it guarantees the outcome in a particular, pending case. The Supreme Court is currently considering this fundamental separation of powers question in *Patchak v. Zinke*. This Essay describes the complex issues presented in *Patchak* and offers an approach to resolving them that preserves both Congress's role in lawmaking and the judiciary's independence.

Introduction

Pending before the Supreme Court is the case of *Patchak v. Zinke*,[1] which considers whether Congress may direct a federal court to dismiss a particular, pending lawsuit. *Patchak* is a singularly difficult case because it brings into conflict the core powers of Congress and the courts.[2] On one hand, Congress has the power to make laws for the courts to apply.[3] This broad authority suggests that it is within Congress's power to eliminate a federal claim for any reason, including a claim underlying a particular federal lawsuit. On the other hand, the courts have the authority to decide cases pending before them. Constitutional conflict arises when Congress requires a court to dismiss a claim that is pending before it, guaranteeing a particular outcome in a case that a federal court is in the process of deciding. A statute eliminating a federal claim in a pending case appears to be doing more than merely making law; instead, it

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1. No. 16-498 (U.S. argued Nov. 7, 2017).
2. *See generally* Morrison v. Olson, 487 U.S. 654, 694 (1988) (noting that separation of powers requires "separateness but interdependence, autonomy but reciprocity" (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring))).
3. *See* JAMES E. PFANDER, PRINCIPLES OF FEDERAL JURISDICTION § 10.4.5, at 405 (3d ed. 2017).

appears to be deciding a federal case. By asserting the authority to direct a federal court to decide a particular, pending case for one party, Congress walks perilously close to the line separating the judicial power from the legislative power.[4] Whether Congress has erased the line altogether is the subject of *Patchak*.

I. The *Patchak* Case

Patchak arises from the decision of the United States Department of the Interior ("Interior") to take into trust a tract of land known as the Bradley Property.[5] At the request of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, Interior took the Bradley Property into trust to allow the tribe to build a casino on the land.[6] The Department of the Interior's action prompted a suit by David Patchak, who lives near the Bradley Property and objected to the tribe's proposed use of the land as the site for a casino.[7] Patchak challenged the legality of Interior's action under the Administrative Procedure Act, claiming that Interior's decision was not in accordance with the Indian Reorganization Act.[8] While Patchak's lawsuit was pending, Congress enacted the Gun Lake Trust Land Reaffirmation Act ("Gun Lake Act").[9] The Gun Lake Act identified the Department of the Interior's decision to take the property into trust and declared it lawful.[10] Making clear Congress's intention to pick the suit's winner, the Gun Lake Act also required the federal courts to "promptly dismiss[]" all pending and future cases related to the Bradley Property.[11] Applying the Gun Lake Act, the United States District Court for the District of Columbia found that it had no jurisdiction to hear Patchak's suit and dismissed it.[12] The Court of Appeals for the D.C. Circuit affirmed and the Supreme Court granted certiorari.[13] The case is currently pending before the Supreme Court, where argument was heard on November 7, 2017.

4. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1336 (2016) (Roberts, C.J., dissenting) ("[T]he entire constitutional enterprise depends on there *being* . . . a line" between the powers of the legislative and judicial branches. (emphasis in original)).
5. Patchak v. Jewell, 828 F.3d 995, 999 (D.C. Cir. 2016), *cert. granted sub nom.*, Patchak v. Zinke, 137 S. Ct. 2091 (2017) (No. 16-498).
6. *Id.*
7. *Id.* at 1000.
8. *Id.* at 999-1000.
9. Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (2014).
10. *Id.* § 2(a).
11. *Id.* § 2(b).
12. *Patchak*, 828 F.3d at 999.
13. *Id.*; Patchak v. Zinke, 137 S. Ct. 2091 (2017) (No. 16-498).

II. Three Approaches to *Patchak*

Oral argument before the Supreme Court touched on a number of interrelated and fundamental concepts about the respective powers of Congress and the federal courts. The discussion reveals three difficult issues that the Court should address in order to decide *Patchak*: (1) whether there is a line between withdrawing jurisdiction and changing the law; (2) whether sovereign immunity gives the government license to withdraw jurisdiction over claims against it for any reason; and (3) whether legislation can ever be impermissibly specific. This Essay describes these three disputed questions and suggests an approach to each that both provides leeway for Congress to legislate and also preserves an important part of the independence of the judiciary.

A. The Line Between Withdrawing Jurisdiction and Changing Law

1. The Changed Law Rule

Much of *Patchak*'s oral argument focused on Congress's power to withdraw federal court jurisdiction. The Constitution provides Congress with the authority to create lower federal courts and determine their jurisdiction.[14] This broad authority suggests that it is also within Congress's control to withdraw jurisdiction from the federal courts, as it did through the Gun Lake Act, for whatever reason.[15] And indeed, the Supreme Court has held that it will not second-guess Congress's decision to withhold jurisdiction from any lower federal court.[16] If Congress's power to withdraw jurisdiction from the federal courts is absolute, then the Gun Lake Act is constitutional despite the fact that it directed the result in a particular pending case.

Congress's power to withdraw jurisdiction from the federal courts is in tension with the principle that federal courts must have some irreducible authority to actually decide cases pending before them.[17] As alluded to by Patchak's counsel,[18] the canonical case of *United States v. Klein*[19] has long stood for the proposition that Congress may not make an exception to federal court jurisdiction when the withdrawal "is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress."[20] *Klein* grew out of a

14. *See* U.S. CONST. art. III, § 1 (providing Congress the power to create lower federal courts); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers.").
15. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513-14 (1868) (holding that the Supreme Court will not look into motivations behind Congress's withdrawal of jurisdiction).
16. *Id.*; *see also* Sheldon, 49 U.S (8 How.) at 449.
17. 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).
18. Transcript of Oral Argument at 9, Patchak v. Zinke, No. 16-498 (U.S. Nov. 7, 2017).
19. 80 U.S. (13 Wall.) 128 (1871).
20. *Id.* at 146.

statute granting the Court of Claims jurisdiction over claims against the United States for the value of property seized by Union troops during the Civil War.[21] When former rebels obtained judgments from the United States by relying on oaths of loyalty, Congress withdrew the Court of Claims's jurisdiction over suits predicated on oaths of loyalty.[22] The Supreme Court rebuffed Congress's attempt, holding that Congress may not withdraw jurisdiction only "as a means to an end."[23]

When pressed for a test to determine whether a statute that withdraws jurisdiction is invalid under a principle rooted in *Klein*, counsel distinguished between a statute that effectively decides a case and one that changes the law and leaves it to the courts to apply the new law.[24] The distinction between changing the law and deciding a case under existing law (often called the Changed Law Rule[25]) provides that any restriction rooted in *Klein* does not take hold when Congress amends the law.[26] As Justice Kagan pointed out, however, it is difficult to discern a difference between changing the law and altering jurisdiction to terminate a case.[27] Even when it only is "changing jurisdiction," Justice Kagan reasoned, "Congress is changing the law."[28] Justice Kagan's skepticism that there is a difference between changing the law and withdrawing jurisdiction is matched by that of a number of scholars who have suggested that an exception to *Klein* contingent on whether Congress "changes the law" swallows *Klein* altogether.[29] If, as Justice Kagan and scholars suggest, Congress "changes the law" within the meaning of *Klein* whenever it passes a statute, then *Klein* provides no restriction at all on Congress's power to withdraw jurisdiction to decide a case.[30]

2. A Meaningful Changed Law Rule

Klein's restriction on Congress's power to withdraw jurisdiction can be reconciled with the Changed Law Rule only if "changing the law" within the meaning of *Klein* is narrower than Justice Kagan and scholars suggest. In order

21. *Id.* at 130-32.
22. *Id.* at 143-44.
23. *Id.* at 145.
24. Transcript of Oral Argument, *supra* note 18, at 10.
25. *E.g.* 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 (1994).
26. *See* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 436 (1992).
27. Transcript of Oral Argument, *supra* note 18, at 11.
28. *Id.*
29. *See, e.g.*, 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, 1079 (1999).
30. Chief Justice Roberts made the same point in *Bank Markazi* when he noted that "[c]hanging the law is simply how Congress acts." 136 S. Ct. 1310, 1335 (2016) (Roberts, C.J., dissenting).

to resolve the tension between a principle rooted in *Klein* and the power of Congress to withdraw jurisdiction, the Court should treat Congress as having changed the law within the meaning of *Klein* only when Congress sets some kind of policy for the courts to follow.[31] Although most statutes, no matter how modest, certainly set policy, the Court should hold that a statute that does little or nothing other than to decide a pending case in favor of a litigating party does not set policy and, therefore, does not change the law within the meaning of *Klein*. In other contexts, the Court has drawn a distinction between a statute that sets policy and one that merely decides a pending case. In *United States v. Winstar Corp.*,[32] for example, the government encouraged healthy banks to take over insolvent savings and loans by promising the banks favorable accounting treatment.[33] Soon after banks merged with the insolvent institutions, Congress prohibited the government from keeping its regulatory promise, rendering many of the merged institutions instantly insolvent.[34] The Court invalidated the statute, holding that it would not defer to Congress's decision to shift costs to the banks after agreeing to accord them favorable accounting treatment.[35] The Court held that it will defer to the government's decision to alter its regulatory obligations only if the alteration of its obligations is "merely incidental to the accomplishment of a *broader governmental objective*."[36] By contrast, if the statute appears to be doing little other than shifting costs in a particular case, the Court will not defer to the government because the statute is not setting policy.[37]

The Court should take the same approach in *Patchak*. The Court can determine whether the Gun Lake Act changes the law within the meaning of *Klein* by asking whether the Gun Lake Act accomplishes a governmental objective other than merely deciding Patchak's suit. There is good reason to conclude that *Patchak* is the rare case, like *Winstar*, in which a federal statute fails to set policy because the Gun Lake Act fails to accomplish a governmental objective other than to terminate a particular suit. Like the statute in *Winstar*, the Gun Lake Act appears to shift the costs of a government decision to a particular party. The government's decision to take the Bradley Property into trust gave rise to Patchak's claim; the Gun Lake Act shifted the cost of the government's decision to Patchak by ensuring that the government no longer has to defend its decision in a suit by Patchak. The Gun Lake Act did not otherwise change the standards for how the government takes land into trust under the Indian Reorganization Act; and it did not affect claims concerning

31. *See* Evan C. Zoldan, *The* Klein *Rule of Decision Puzzle and the Self-Dealing Solution*, 74 WASH. & LEE L. REV. 2133, 2206-07 (2017).
32. 518 U.S. 839 (1996) (plurality opinion).
33. *Id.* at 848-51.
34. *Id.* at 845-58.
35. *Id.* at 900-903.
36. *Id.* at 897-98 (emphasis added).
37. *See id.*

other tracts of land. Seen in this light, the Gun Lake Act does not appear to be changing the law because it does not set policy; rather, it seems only to be shifting the cost of Interior's decision onto Patchak without accomplishing much else.

On the other hand, the Gun Lake Act applies not only to Patchak's claim, but to all potential claims arising out of the government's decision to take the Bradley Property into trust. As a result, if another claimant challenges the decision to take the Bradley Property intro trust, the Gun Lake Act would require the dismissal of that claim as well. Viewed in this light, the Gun Lake Act can be seen as setting policy—albeit modestly—to insulate the government's decision to take the Bradley Property into trust. From this perspective, the Gun Lake Act does appear to be changing the law.

Whether the Gun Lake Act changes the law within the meaning of *Klein* is a close case under the approach outlined above and I do not take a position on how the Court should rule. Nevertheless, this approach can meaningfully distinguish between "changing the law" and withdrawing jurisdiction in a way that preserves both the prerogative of Congress to make law and the independence of the judiciary.

B. The Government's Sovereign Immunity

1. Suits Against the Government as Acts of Grace

At argument, Justice Sotomayor suggested that the presence of the United States as a party in Patchak's suit rendered the Gun Lake Act less problematic than a statute intervening in a purely private lawsuit.[38] She noted that a statute directing the result in a suit between private parties raises the "quintessential separation of powers question."[39] The matter is different, she suggested, when the government is the defendant in a pending suit.[40] In this latter case, a statute directing an outcome in favor of the government is tantamount to an assertion of sovereign immunity.[41] Noting that "any suit against the government is a matter only of largesse and the government's voluntary choice," Justice Sotomayor suggested that Congress does not create significant separation of powers concerns when it asserts sovereign immunity.[42] Indeed, it is true that the Court has often described Congress's ability to assert the government's sovereign immunity in absolute terms. In a typical statement of this principle, the Court has held that any promise on the part of Congress that the United

38. Transcript of Oral Argument, *supra* note 18, at 18-19.
39. *Id.*
40. *Id.*
41. *Id.*
42. *See id.*

States will entertain suits against it is "an act of grace."[43] As a result, Congress's subsequent decision to withdraw jurisdiction from the federal courts over these suits always will be honored by the courts.[44]

Chief Justice Roberts appeared troubled by the prospect that the government would claim authority to withdraw jurisdiction when the government itself is a party to a dispute.[45] When the federal government asserts sovereign immunity, Chief Justice Roberts said, it is "sort of going nuclear."[46] He expressed concern about the "real political accountability problem" created when the government asserts sovereign immunity arbitrarily, acting like a "king" who can "do no wrong."[47] As with Justice Sotomayor's characterization of sovereign immunity, it is possible also to find support for Chief Justice Roberts's more skeptical view of Congress's power to withdraw its grace to be sued without limit. Indeed, in the pivotal *Klein* case, the government made the argument that the United States subjects itself to suit "*ex gratia*"—that is, as a matter of grace—and therefore has the right to terminate suits against it for any reason.[48] But, the *Klein* Court specifically rejected this argument, holding that "[i]t is as much the duty of the government as of individuals to fulfill its obligations."[49] A strong reading of *Klein* is in tension with Justice Sotomayor's argument that Congress can always assert sovereign immunity for any reason.

2. Governmental Self-Dealing

The Court should resolve the tension between the views of Justice Sotomayor and the Chief Justice by holding that sovereign immunity does not extend to withdrawals of jurisdiction that reflect governmental self-dealing.[50] In other areas of constitutional law,[51] the Court has held that it will not defer to statutes that purport to negate the government's obligations if the statutes largely reflect the government's self-interest. In *Winstar*, the Court held that the "greater the Government's self-interest, . . . the more suspect becomes the claim that its private contracting partners ought to bear the financial burden" of a statute impairing the government's obligations.[52] Similarly, in *Perry v.*

43. District of Columbia v. Eslin, 183 U.S. 62, 65 (1901).
44. *See id.*
45. *See* Transcript of Oral Argument, *supra* note 18, at 50.
46. *Id.*
47. *Id.*
48. United States v. Klein, 80 U.S. (13 Wall.) 128, 135 (1871).
49. *Id.* at 144.
50. *See* Zoldan, *supra* note 31, at 2192-94 (describing a constitutional value against governmental self-dealing).
51. A principle against self-dealing is found in constitutional doctrine under the Contract Clause, U.S. CONST. art. I, § 10; the Due Process Clause, U.S. CONST. amend. V; and the Ex Post Facto Clauses, U.S. CONST. art. I, §§ 9-10. See Zoldan, *supra* note 31, at 2183-88.
52. United States v. Winstar Corp., 518 U.S. 839, 898 (1996) (plurality opinion).

United States,[53] the Court held that Congress does not have the unlimited power "to alter or repudiate the substance of *its own* engagements" as opposed to interfering with obligations that one citizen owes another.[54] And in *United States Trust Co. of New York v. New Jersey*,[55] the Court held that it will not defer to a state's decision to impair its own financial obligations because, in that circumstance, its "self-interest is at stake."[56]

The Court can resolve the issue of the government's sovereign immunity in *Patchak* by determining whether the Gun Lake Act is an example of governmental self-dealing. Whether the Gun Lake Act reflects governmental self-dealing is a close case. On one hand, the main import of the Gun Lake Act was to repudiate the government's obligation under existing law. That is, by enacting the Gun Lake Act, Congress disclaimed the legal obligation that the government owed to Patchak to resolve his claim under the Indian Reorganization Act. The Gun Lake Act appears to repudiate the government's existing obligations and do little else; as a result, the Court should be skeptical of Congress's assertion of sovereign immunity to terminate Patchak's suit challenging Interior's decision. On the other hand, Interior's decision to take the Bradley property into trust was decidedly not for the financial benefit of the government, as were the statutes in *Winstar*, *Perry*, and *United States Trust*. Indeed, the government took the property into trust for the benefit, and at the request, of the Match-E-Be-Nash-She-Wish. 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.

Again, I do not take a position on how the Court should decide the self-dealing question in *Patchak*. However, an approach that limits the assertion of sovereign immunity when the government's actions reflect self-dealing has a number of benefits that should persuade the Court to adopt this approach: it takes seriously both sovereign immunity and government accountability, comports with doctrine in other areas of constitutional law, and preserves both the prerogative of Congress to determine its exposure to liability and the power of courts to decide pending cases.

C. The Particularity of the Gun Lake Act

1. The Gun Lake Act Is Targeted Legislation

During argument, the Court and parties returned several times to the most intuitively distressing part of the Gun Lake Act: by withdrawing suit over a particular, pending case, Congress knew precisely which party would benefit

53. 294 U.S. 330 (1935).
54. *Id.* at 350-51 (emphasis added).
55. 431 U.S. 1 (1977).
56. *Id.* at 25-26.

and which would suffer as a result of the statute. It is the specificity of the statute that makes it most like a judicial determination and, as a result, most in tension with the principle of judicial independence.[57] Justice Kagan challenged counsel to explain whether there is anything unconstitutional about a statute that names a particular entity and insulates it, by name, from suit.[58] As counsel noted in response, the Court's recent *Bank Markazi* opinion seems to answer this question definitively. In that case, victims of Iranian-sponsored terrorism brought suit to recover damages from the country of Iran.[59] Because Iran had no assets in the United States that could satisfy these judgments, Congress directed the federal courts to treat the assets of Bank Markazi, the Central Bank of Iran, as the assets of the country of Iran, but only for the purposes of the pending lawsuit.[60] The effect of the statute was to direct the court to find in favor of the claimants.[61] The Court wrestled with the fact that the statute singled out a particular party for special treatment in a particular case but ultimately upheld it.[62] The Court noted that although "legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action."[63] As a result, "singling out" an individual is not enough to render a statute invalid.[64]

2. A Value of Legislative Generality

Bank Markazi was too quick to reject the argument that "legislation must be generally applicable."[65] Contrary to the Court's assertion, American constitutional law reflects a long tradition of favoring legislative generality and disfavoring targeted legislation. In the first years after independence, the states enacted a host of targeted statutes—often called special legislation—including statutes that attainted known individuals,[66] granted them exemptions from the standing laws,[67] and confiscated their property.[68] The economic and social

57. *See* Transcript of Oral Argument, *supra* note 18, at 40-42.
58. *See id.* at 66-67.
59. *See* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1319 (2016).
60. *See* 22 U.S.C. § 8772(b) (2015) (defining assets subject to execution to include assets specifically named in particular lawsuit).
61. *See Bank Markazi*, 136 S. Ct. at 1320-22.
62. *Id.* at 1326-27.
63. *Id.* at 1327 (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 n.9 (1995)).
64. *Id.* (quoting *Plaut*, 514 U.S. at 239 n.9). However, singling out an individual for punishment can violate the Constitution's bill of attainder provisions. *See* U.S. CONST. art. I, §§ 9-10.
65. *Bank Markazi*, 136 S. Ct. at 1327.
66. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 279 (1969).
67. *Address of the Council of Censors*, *in* RECORDS OF THE COUNCIL OF CENSORS OF THE STATE OF VERMONT 58, 60-70 (Paul S. Gillies & D. Gregory Sanford eds., 1991).
68. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 302 (1967).

upheaval brought about by this targeted legislation convinced the generation that framed the Constitution to renounce the power to enact it.[69] By the close of the confederation period, the revolutionary generation harshly criticized their legislatures for enacting statutes that privileged or punished particular individuals.[70]

The text of the Constitution reflects the aversion to targeted legislation developed during the revolutionary period. Although they do not concern legislative generality exclusively, a number of clauses of the Constitution disfavor or prohibit legislation that benefits or burdens particular individuals. These clauses include the Bill of Attainder,[71] Title of Nobility,[72] Ex Post Facto,[73] Contract,[74] Due Process,[75] Takings,[76] and General Welfare[77] Clauses.

Finally, legal philosophers and jurists have long argued that targeted legislation cannot properly be considered "law." Locke argued that the legislature was not permitted to vary the standing laws "in particular cases."[78] Similarly, in his influential *Commentaries on the Laws of England*, Blackstone described an order "concerning a particular person" as "a sentence [rather] than a law."[79] In accordance with these jurisprudential considerations, the Supreme Court once embraced the fundamental principle that the legislature makes rules of general application that are applied by the other branches.[80] In *Hurtado v. California*, the Court explained that "a special rule for a particular person or a particular case" cannot properly be considered "[l]aw."[81] As a result, the Court continued, all types of targeted legislation are invalid, including "acts of

69. Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQUETTE L. REV. 625, 651-52 (2014).
70. *Id.* at 652.
71. U.S. CONST. art. I, §§ 9-10.
72. *Id.*
73. *Id.*
74. *Id.* § 10.
75. U.S. CONST. amends. V, XIV. The Fifth Amendment's Due Process Clause long has been interpreted to prohibit special transfers of wealth by preventing the legislature from "taking from A and giving to B." John V. Orth, *Taking from A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 CONST. COMMENT. 337, 339 (1997).
76. U.S. CONST. amend. V.
77. *Id.* art. I, § 8.
78. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 142 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).
79. 1 WILLIAM BLACKSTONE, COMMENTARIES *44; *see also* LON L. FULLER, THE MORALITY OF LAW 46 (1964) (arguing that the "first desideratum" of a legal system is a "requirement of generality").
80. *See* Hurtado v. California, 110 U.S. 516, 535-36 (1884).
81. *Id.* at 535.

confiscation, acts reversing judgments, and acts directly transferring one man's estate to another."[82]

In light of the commitment to a value of legislative generality reflected in constitutional text, history, and the works of legal philosophers and jurists, the *Bank Markazi* Court was wrong to conclude that targeted legislation raises no constitutional difficulties. Fortunately, *Patchak* gives the Court the opportunity to correct this misstep. In its *Patchak* opinion, the Court should reestablish legislative generality as a value of constitutional importance. Viewing the Gun Lake Act through the lens of a value of legislative generality suggests that the statute is defective because it singled out one particular government decision about one particular piece of land for special treatment not applied to anything else. By taking Patchak's case outside of the protection of the generally applicable laws, the Gun Lake Act ignores the lessons of the framing period, pays insufficient heed to the Constitution's text, and stands in tension with hundreds of years of well-considered doctrine delineating the boundaries of legislating.

Conclusion

Patchak is a difficult case because it brings the core lawmaking power of Congress into conflict with the core adjudicatory power of the federal courts. And *Patchak* is made even more difficult because, by deciding this case, the Supreme Court will necessarily be increasing the power of one branch at the expense of another. There is no easy answer to *Patchak*; but, by relying on the approaches set out above, the Court can reaffirm Congress's primacy in lawmaking and, at the same time, preserve some level of independence for the judiciary. If the Court finds that the Gun Lake Act fails to change the law within the meaning of *Klein*, reflects governmental self-dealing, or is impermissibly targeted, it should reverse the court of appeals.

82. *Id.* at 536; *see also* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810) ("It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.").