Article III — Judicial Power — Congressional Limits — Patchak v. Zinke

The suggestion that "'the judicial Power of the United States . . . can no more be shared' with another branch than 'the Chief Executive, for example, can share with the Judiciary the veto power'" has an axiomatic ring to it.[1] Yet in practice the federal courts are substantially creatures of Congress. Congress has broad authority to steer some disputes into non–Article III tribunals; may tailor federal jurisdiction with few express constraints;[2] may withdraw without obvious limit the federal government's consent to suit; and may, of course, make the law federal courts apply. Against this backdrop, the Supreme Court has continued to recite a nominal limit: if nothing else, Congress "usurp[s] a court's power to interpret and apply the law"[3] when it writes a statute that reads "in '*Smith v. Jones*,' 'Smith wins.'"[4] Last Term, in *Patchak v. Zinke*,[5] a fractured Court made clear that that principle limits very little. Though no line of reasoning won a majority, six Justices voted to uphold a statute difficult to distinguish from "Patchak loses." The decision is a defeat for the proposition, typically traced to the Court's 1871 decision in *United States v. Klein*,[6] that Article III meaningfully constrains congressional power to direct results in pending cases.[7] And if the defeat turns out to be final, little harm little foul. Inquiries into the inviolate scope of the judicial power are almost hopelessly indeterminate,[8] and *Klein*'s limit did little to no work in broader constitutional context.

David Patchak's suit centered on a dispute over a parcel of land, the Bradley Property, in southwest Michigan.[9] In 2005, the Secretary of the

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[1] Stern v. Marshall, 564 U.S. 462, 483 (2011) (omission in original) (quoting United States v. Nixon, 418 U.S. 683, 704 (1974)).

[2] *But see, e.g.*, Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953); Transcript of Oral Argument at 16, Patchak v. Zinke, 138 S. Ct. 897 (2018) (No. 16-498), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-498_2103.pdf [https://perma.cc/VMN5-QQ9D] (statement of Roberts, C.J.) (observing that "we've been replicating . . . a famous dialogue between Professors Wechsler and Hart").

[3] Bank Markazi v. Peterson, 136 S. Ct. 1310, 1323 (2016) (quoting Brief for Former Senior Officials of the Office of Legal Counsel as Amici Curiae, *Bank Markazi* (No. 14-770), at 3).

[4] *Id.* at 1323 n.17.

[5] 138 S. Ct. 897.

[6] 80 U.S. (13 Wall.) 128 (1871).

[7] *Compare Patchak*, 138 S. Ct. at 915 (Roberts, C.J., dissenting) (citing *Klein* for the rule that "Congress violates [Article III] when it arrogates the judicial power to itself and decides a particular case"), *with* Evan C. Zoldan, *The* Klein *Rule of Decision Puzzle and the Self-Dealing Solution*, 74 WASH. & LEE L. REV. 2133, 2149 (2017) (noting *Klein* may "state[] no principle about the line separating the legislative and judicial functions that can be enforced consistent with doctrine").

[8] *See* John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 56–57 (2014); *cf. infra* pp. 307–16; pp. 317–26.

[9] *Patchak*, 138 S. Ct. at 903 (plurality opinion).

Interior announced her intent to take the Property into trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, which hoped to build a casino there.[10] In 2008, Patchak, an unhappy neighbor, sued under the Administrative Procedure Act (APA) to enjoin the action, arguing that the authority invoked — the Indian Reorganization Act[11] (IRA) — permitted Interior to take land into trust only on behalf of tribes that were under federal jurisdiction when the statute passed in 1934.[12] It soon became clear Patchak's argument was a winner. By 2009, the Court had embraced this interpretation of the IRA in another party's suit.[13]

Notwithstanding that good turn, Patchak still faced jurisdictional obstacles that would take years to litigate. In his first trip to the Court, he overcame objections that he lacked prudential standing and that federal sovereign immunity barred his suit.[14] It now seemed obvious Patchak would win on remand — but in the interim, the Band had built its casino.[15] While there was no appetite in Congress to overturn wholesale the Justices' interpretation of the IRA,[16] lawmakers took note of the reliance interests now at stake and passed by overwhelming margins the Gun Lake Trust Land Reaffirmation Act,[17] a short statute providing:

> SEC. 2. REAFFIRMATION OF INDIAN TRUST LAND
>
> (a) IN GENERAL. — [The Bradley Property] is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.
>
> (b) 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 land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.[18]

As Patchak would object on remand, the Act seemed designed to resolve his case and his case alone, without changing otherwise applicable law.[19] No other challenges to the land's trust status were pending;

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[10] *Id.*

[11] 25 U.S.C. §§ 5101–5144 (2012 & Supp. IV 2017).

[12] Patchak v. Salazar, 646 F. Supp. 2d 72, 75 (D.D.C. 2009).

[13] Carcieri v. Salazar, 555 U.S. 379, 381–83 (2009).

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

[15] *See* H.R. REP. NO. 113-590, at 1–2 (2014).

[16] *See id.* at 2 ("[T]here is no consensus in Congress on how to address Carcieri.").

[17] Pub. L. No. 113-179, 128 Stat. 1913 (2014).

[18] *Id.* Section 1 is just the Act's title, and Section 2(c), because irrelevant here, is omitted.

[19] *See* H.R. REP. NO. 113-590, at 5 (2014) ("[T]his bill would make no changes in existing law."); S. REP. NO. 113-194, at 4 (2014) ("S. 1603 will not make any changes in existing law.").

no others could be brought because the APA's statute of limitations had run.[20] All the same, pointing to § 2(b), the district court with custody of Patchak's suit dismissed it.[21] This over his objections that the statute violated the separation of powers; that it violated the Petition Clause; that it extinguished his property interest in his suit without due process of law; and that it amounted to a Bill of Attainder.[22] The D.C. Circuit affirmed on each question.[23] The Supreme Court granted certiorari on the first and, splintered across five opinions, affirmed.[24]

Writing for a plurality, Justice Thomas[25] found no threat to Article III. Patchak had invoked the ghost of *Klein*, the confused[26] opinion in which the Court announced that Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it."[27] On its face, *Klein*'s rule-of-decision principle can't be quite right. The Court has long made clear that, where a judgment isn't yet final, "a law [that] intervenes and positively changes the rule which governs . . . must be obeyed."[28] Later cases have read *Klein* more narrowly, Justice Thomas noted, for the proposition that "Congress violates Article III when it 'compel[s] . . . findings or results under old law'"[29] but may freely "change[] the law,"[30] even if the change's application to pending suits "effectively ensures that one side wins."[31] Here, he reasoned, the Act was best read as an exercise of Congress's jurisdictional authority, and "[s]tatutes that strip jurisdiction 'chang[e] the law' for the purpose of Article III, just as much as other exercises of Congress' legislative authority."[32] To the retort that this change applied to just one case — the dread "Smith wins" hypothetical — Justice Thomas answered that "[n]othing on the face of § 2(b) is limited to Patchak's case."[33]

That isn't to say the plurality ignored the context in which the statute arose. "[W]e recognize," the opinion acknowledged, "that the Gun

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[20] *See Patchak*, 138 S. Ct. at 916–17 (Roberts, C.J., dissenting).

[21] Patchak v. Jewell, 109 F. Supp. 3d 152, 158–59 (D.D.C. 2015).

[22] *See id.* at 161–65.

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

[24] *Patchak*, 138 S. Ct. at 898.

[25] Justice Thomas was joined by Justices Breyer, Alito, and Kagan.

[26] Reference to *Klein*'s opacity is a federal courts ritual. *See, e.g.*, Howard M. Wasserman, *The Irrepressible Myth of* Klein, 79 U. CIN. L. REV. 53, 55 n.14 (2010) (collecting examples).

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

[28] United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801); *see also* Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States v. Klein *Revisited*, 1981 WIS. L. REV. 1189, 1240 & n.238 (noting that the rule of *Schooner Peggy* was "well established" by 1871, *id.* at 1240, and that the Court applied the principle just a year after *Klein*).

[29] *Patchak*, 138 S. Ct. at 905 (plurality opinion) (alteration and omission in original) (quoting Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 438 (1992)).

[30] *Id.* (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995)).

[31] *Id.* (citing Bank Markazi v. Peterson, 136 S. Ct. 1310, 1324–27 (2016)).

[32] *Id.* at 906 (alteration in original) (citation omitted) (quoting *Plaut*, 514 U.S. at 218).

[33] *Id.* at 910.

Lake Act was a response to this Court's decision in *Patchak I*."[34] Nor did Justice Thomas seriously dispute that Congress's intervention was "unfair,"[35] emphasizing that "the question in this case is '[n]ot favoritism, nor even corruption, but *power*.'"[36] After all, the Court largely disposed of *Klein* challenges predicated on the complaint that "there is something wrong with particularized legislative action"[37] two years ago in *Bank Markazi v. Peterson*.[38] In that case, the Court upheld a statute designed to ease the enforcement of a judgment in a single proceeding, which Congress had helpfully identified by its docket number.[39] No degree of targeting here, then, was likely to undermine the formal conviction that "when Congress strips federal courts of jurisdiction, it exercises a valid legislative power no less than when it lays taxes, coins money, declares war, or invokes any other power that the Constitution grants it."[40]

Of course, *Klein* itself involved a jurisdiction-stripping statute, applicable in cases where penitent Confederates — seeking to recover property — submitted presidential pardons as proof of loyalty.[41] Why a different result for Klein than for Patchak, then? Per the plurality, the core Article III objection in *Klein* was that Congress had bent jurisdiction in an attempt to "alter[] the legal standards governing the effect of a pardon" — that is, to give pardons an effect other than the one the Constitution assigns — "standards Congress was powerless to prescribe."[42] This was the understanding centered in *Bank Markazi*, even as that Court defended the "Smith wins" principle. This is also a very thin reading of *Klein*; the notion that Congress can't by ordinary legislation amend the Constitution has been secure since *Marbury*.

Justice Breyer, who joined the plurality in full, wrote separately to assert the relevance of § 2(a).[43] No one, he noted, had attacked that provision before the Court,[44] and its import was that no suit challenging the Secretary's action could succeed. That sufficed to distinguish *Klein*,

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[34] *Id.*

[35] *Id.*

[36] *Id.* (alteration in original) (quoting *Plaut*, 514 U.S. at 228).

[37] *Plaut*, 514 U.S. at 239 n.9.

[38] 136 S. Ct. 1310 (2016).

[39] *Id.* at 1317–19.

[40] *Patchak*, 138 S. Ct. at 906 (plurality opinion).

[41] *Id.* at 908–09.

[42] *Id.* at 909 (quoting *Bank Markazi*, 136 S. Ct. at 1324).

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

[44] *Id.* While Patchak challenged § 2(a) in the district court, objecting that it reinterpreted the statute without amending it, Patchak v. Jewell, 109 F. Supp. 3d 152, 160 (D.D.C. 2015), he later abandoned that argument. For more on this genre of concern, see Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 879–97 (2009).

"a congressional effort to use its jurisdictional authority to reach a result . . . that it could not constitutionally reach directly."[45]

Justice Ginsburg, joined by Justice Sotomayor, concurred only in the judgment.[46] Without entering *Klein*'s thicket, Justice Ginsburg read the statute as a withdrawal of consent to suit, a one-to-one response to *Patchak I*'s holding.[47] To this Justice Sotomayor added a standalone concurrence disputing the plurality's approach to *Klein*. Concisely, she "agree[d] with the dissent that Congress may not achieve through jurisdiction stripping what it cannot permissibly achieve outright, namely, directing entry of judgment for a particular party."[48]

Finally, in an opinion joined by Justices Kennedy and Gorsuch, Chief Justice Roberts dissented.[49] The plurality's defense of formal power over jurisdiction, he objected, was both "undoubtedly correct" and "undoubtedly irrelevant."[50] This because *Klein*'s functional heart was its insight that "not every congressional attempt to influence the outcome of cases, even if phrased in jurisdictional language, can be justified as a valid exercise of a power over jurisdiction."[51] To hold otherwise — to

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[45] *Patchak*, 138 S. Ct. at 912 (Breyer, J., concurring); *see also id.* at 911–12. Justice Breyer's opinion evokes — but does not cite — the *Battaglia* principle, the suggestion that "when Congress can validly extinguish a substantive right, it can also strip courts of jurisdiction to enforce the right that it has abolished." Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1104 (2010). A separate question, with gratitude to Professor Richard Fallon for the point, is whether the separation of powers might *require* that Congress expressly abolish the right when it withdraws jurisdiction to enforce it. On this read, Article III would require not just that Congress avoid crossing the boundary of legislative power but also that it not appear to get chalk on its cleats. Such a principle might explain *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), which invalidated an act instructing courts to reinstate time-barred securities claims, *id.* at 214–25. If Congress had power to "give the plaintiffs in those cases a new cause of action, based on the same facts . . . but subject to a different limitations period," then requiring that it do so rather than accomplish the same end by purporting to reopen judgments amounts to a separation-of-powers drafting rule. John Harrison, *Legislative Power and Judicial Power*, 31 CONST. COMMENT. 295, 308 (2016). Then again, perhaps *Plaut* should be taken to mean that Congress lacked substantive power to accomplish the end at issue, *see id.* at 309, in which case reference to *Klein* and Article III would be unnecessary to explain the result. If Justice Breyer's opinion is best read to track the first of these positions — that § 2(a)'s inclusion was *essential* to § 2(b)'s constitutionality — then it may be the narrowest ground for *Patchak*'s judgment.

[46] *Patchak*, 138 S. Ct. at 912 (Ginsburg, J., concurring in the judgment).

[47] *Id.* at 912–13.

[48] *Id.* at 913 (Sotomayor, J., concurring in the judgment). It isn't entirely clear why immunity restoration wouldn't be susceptible to the same objection. In *Klein* itself, "[i]t was urged in argument that the right to sue the government in the Court of Claims is a matter of favor; but this seems not entirely accurate." 80 U.S. (13 Wall.) 128, 144 (1871). For the argument that *Klein* implicitly recognizes a limit on discriminatory assertion of immunity, see Young, *supra* note 28, at 1230–33.

[49] *Patchak*, 138 S. Ct. at 914 (Roberts, C.J., dissenting).

[50] *Id.* at 919. The dissent also disputed whether the Act spoke as clearly as jurisdictional rules must. *Id.* at 918–19 (citing Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013)).

[51] *Id.* at 919 (quoting RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 324 (7th ed. 2015) [hereinafter HART AND WECHSLER]).

hold that stripping jurisdiction in a single case works enough of a change to satisfy *Klein* — would "'provide[] no limiting principle' on Congress's ability to assume the role of judge and decide the outcome of pending cases."[52] Continuing to defend ground largely lost in *Bank Markazi*, the Chief Justice maintained that "the concept of 'changing the law' must imply some measure of generality or preservation of an adjudicative role for the courts."[53] And here, while the "relating to" standard "could theoretically suggest a broader application,"[54] in practice, he warned, the plurality "disavow[ed] any limitations on Congress's power to determine judicial results, conferring on the Legislature a colonial-era authority to pick winners and losers in pending litigation as it pleases."[55]

Though only briefly, the dissent also took issue with the suggestion that the Act broke no new jurisdiction-stripping ground. Justice Thomas had invoked *Ex parte McCardle*[56] for the proposition that "Congress generally does not violate Article III when it strips federal jurisdiction over a class of cases."[57] Chief Justice Roberts replied that *McCardle* addressed only a withdrawal of the Court's appellate jurisdiction, not a denial of *any* forum for the litigant's federal claim.[58] Patchak "ha[d] no alternative means of review anywhere else."[59]

It's difficult to say anything wholly new about *Klein*,[60] and in a sense *Patchak* says nothing new about *Klein*. Four Justices saw no Article III trouble, four Justices sounded some alarm, and one expressed no opinion.[61] But it would be difficult to encourage a client to bring a *Klein* challenge after *Patchak*, unless the law read on its face "Smith wins." The Court hasn't identified a rule-of-decision violation since *Klein*;[62] it

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[52] *Id.* at 920 (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 73 (1982) (plurality opinion)).

[53] *Id.*

[54] *Id.* at 918.

[55] *Id.* at 921.

[56] 74 U.S. (7 Wall.) 506 (1868).

[57] *Patchak*, 138 S. Ct. at 906 (plurality opinion).

[58] *Id.* at 921 (Roberts, C.J., dissenting).

[59] *Id.* For this he cited a statute limiting state jurisdiction over trust land. *Id.* (citing 25 U.S.C. § 1322(a) (2012)). What's more, state courts may lack power to enjoin a federal officer. *See* HART AND WECHSLER, *supra* note 51, at 436; *cf.* Tarble's Case, 80 U.S. (13 Wall.) 397, 409–12 (1871).

[60] *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 (1999); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537 (1998); 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 (2006); Lawrence G. Sager, Klein*'s First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998); Wasserman, *supra* note 26; Gordon G. Young, United States v. Klein*, Then and Now*, 44 LOY. U. CHI. L.J. 265 (2012); Zoldan, *supra* note 7.

[61] Though it bears noting that Justice Ginsburg authored the Court's opinion in *Bank Markazi*. 136 S. Ct. 1310, 1316 (2016).

[62] Zoldan, *supra* note 7, at 2136.

seems increasingly likely that it never will. The question, in *Patchak*'s wake, is whether the principle is better praised or buried. And the better but the boring argument, probably, is that "Smith wins" is unconstitutional when unconstitutional for an articulable reason — but not always, no thanks to *Klein*, and not on inchoate separation of powers grounds. In that sense, the outcome in *Patchak* is a victory for the suggestion that "the purposes of the separation of powers are too general and diverse to offer much concrete guidance" where no particular constitutional guarantee is at stake.[63] The dissent may be right that a sharp division of powers "secure[s] individual freedom,"[64] but the energy expended over more than a century clarifying *Klein* is a cautionary tale about "treat[ing] a broad purpose of the separation of powers — safeguarding liberty — as if it were a judicially manageable constitutional standard."[65]

The waste is best measured relative to the stakes, and if the fall of the rule-of-decision principle sounds troubling, it bears emphasizing how little work is left for *Klein* to do once other prohibitions on "Patchak loses" are accounted for. Consider a few ways of articulating what was wrong with the Act. Was it that it singled Patchak out for differential treatment? The Equal Protection Clause, that great guarantee of legislative generality,[66] only requires that lawmakers draw lines rationally, and choosing the Band's economic certainty over Patchak's quiet enjoyment was at least minimally rational. Beyond this, as aired more fully in *Bank Markazi*, there is no absolute or freestanding generality requirement, "or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause . . . [or] a case [holding] that Congress may legislate 'a legitimate class of one.'"[67] Rationality is a deeper rule-of-law value than generality in any event,[68] and a judgment that an otherwise applicable rule would be a bad fit for

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[63] Manning, *supra* note 8, at 56–57.

[64] *Patchak*, 138 S. Ct. at 915 (Roberts, C.J., dissenting).

[65] PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 105 (D.C. Cir. 2018) (en banc).

[66] *Cf.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 300–01 (1990) (Scalia, J., concurring). Of course, Congress is bound by the equal protection component of the Due Process Clause rather than the Equal Protection Clause. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[67] Bank Markazi v. Peterson, 136 S. Ct. 1310, 1327 (2016) (alterations in original) (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 n.9 (1995)). Professors Nathan Chapman and Michael McConnell have argued that the original meaning of the Due Process Clause requires some degree of legislative generality, but acknowledge — with a nod to Dean John Manning, *see* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1988 (2011) — that this guarantee would not invalidate every statute that "violate[s] the *norms* of separation of powers." Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1734 (2012) (emphasis added); *see also id.* at 1734 n.278 (giving the (prescient) example of ratification of a land transfer beneficial to both parties).

[68] *Cf. Bank Markazi*, 136 S. Ct. at 1326 (noting that "a law directing judgment for Smith . . . if the court finds that the sun rises in the east" would embody no "reasonable policy judgment").

certain facts makes for a valid subrule.[69] "Smith wins *on our say-so*" is likely unconstitutional; "Smith wins *for good reason*" is lawmaking.[70]

Alternatively, was the problem with "Patchak loses" that it made the legal and factual judgments of a non–Article III body — Congress — conclusive on Article III courts, leaving them "[no] role . . . beyond that of stenographer"?[71] As to questions of law, the objection evokes anxieties about deference to administrative agencies[72] and, in the habeas context, state courts,[73] settings in which federal courts are asked to give effect to something other than their own view of the law. The concern recalls, too, Henry Hart's remark that "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."[74] An extended discussion of those considerations is (wildly) beyond the scope of this comment.[75] But it bears interrogating whether the Article III question is often, or for that matter ever, squarely presented. *Chevron* deference can just as well be articulated as a rule about the scope of substantive agency authority,[76] while limits on post-conviction relief can be defended as constraints on the remedial — rather than interpretive — power of the federal courts.[77] And Patchak, it's worth remembering, did not press before the Court the argument that § 2(a) "unlawfully impose[d] 'Congress's own interpretation of the IRA' on the federal courts"[78] — probably because, per Justice Breyer, Congress didn't so impose. Given how difficult it is to find a statute flatly requiring that

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[69] A loose analogy could be drawn to agency latitude to announce new principles in adjudication. *Cf.* SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) ("Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations.").

[70] Of course, the point is complicated by the fact that Congress need not give its own reasons. *See* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (deeming "constitutionally irrelevant" whether the rationale courts impute "in fact underlay the legislative decision" (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960))). For a discussion of the extent to which the requirement that reasons be *discoverable* duplicates protection attributed to *Klein*, see Araiza, *supra* note 60.

[71] *Patchak*, 138 S. Ct. at 918 (Roberts, C.J., dissenting).

[72] *See* Caprice Roberts, Chevron *as Remedy*, JOTWELL (May 23, 2018), https://lex.jotwell.com/chevron-as-remedy/ [https://perma.cc/7M8F-4X9S] ("[I]f Article III requires independent judicial interpretation, *Chevron* deference conflicts with the Constitution.").

[73] *See* Young, *supra* note 60, at 319–23.

[74] Hart, *supra* note 2, at 1373.

[75] For a very detailed effort to suss out Article III's requirements, see James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking that Article III and the Supremacy Clause Demand of the Federal Courts*, 98 COLUM. L. REV. 696 (1998).

[76] Or even, perhaps, the federal courts' remedial authority. *See generally* F. Andrew Hessick, *Remedial* Chevron, 96 N.C. L. REV. (forthcoming 2018) (reframing *Chevron* as a "limit [on] the circumstances under which courts could vacate agency actions as inconsistent with statutes" (manuscript at 1)), available at https://ssrn.com/abstract=3131018 [https://perma.cc/494C-6SLV].

[77] *See* Young, *supra* note 60, at 320–21.

[78] Patchak v. Jewell, 109 F. Supp. 3d 152, 160 (D.D.C. 2015) (quoting Plaintiff's Consolidated Reply to Defendants' & Intervenor-Defendant's Opposition to Plaintiff's Motion for Summary Judgment at 31, *Patchak*, 109 F. Supp. 3d 152 (No. 1:08-cv-01331), 2014 WL 12657292).

courts apply something other than law, perhaps *Klein* forbids such laws in the sense in which Saint Patrick drove the snakes out of Ireland.

With respect to questions of fact, it bears emphasizing that the Court has never suggested federal courts must be absolutely free to do all their own factfinding (the history of agency adjudication is very much to the contrary[79]), and where it *has* struck down arrangements that abridge the courts' factual judgment, the ground has usually been due process rather than *Klein*[80] — the objection that an individual has been deprived of a constitutionally protected interest without an opportunity to raise relevant constitutional arguments.[81] This concern tends to flow into the last intuitive critique of the Act: Namely, is the problem with "Patchak loses" that Patchak's merits argument was a clear winner, and that in kicking him out of court, Congress denied him a remedy to which he was constitutionally entitled? If anything is surprising about *Patchak*, it's the dearth of discussion — especially measured relative to the concern's prominence at argument[82] — about this longstanding jurisdiction-stripping anxiety.[83] And certainly the plurality account includes few express safeguards.[84] But *Patchak* needn't cast doubt on the notion that, "when substantive constitutional rights exist, the Constitution

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[79] Crowell v. Benson, 285 U.S. 22 (1932); Hart, *supra* note 2, at 1375 ("[T]he solid or apparently solid thing about *Crowell* is the holding that administrative findings of non-constitutional and non-jurisdictional facts may be made conclusive upon the courts, if not infected with any error of law, as a basis for judicial enforcement of a money liability of one private person to another."); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 82 n.34 (1982) (plurality opinion) (noting that even *Crowell*'s nonconstitutional, nonjurisdictional limit "has been undermined by later cases").

[80] *See* United States v. Mendoza-Lopez, 481 U.S. 828, 837 (1987) (invalidating a statute that prohibited review of certain deportation orders, where violating the order was an element of a crime); Wasserman, *supra* note 26, at 70 n.120 (noting that, in *Mendoza-Lopez*, "functionally the statute forced courts to accept a non-judicial factual determination . . . [y]et the Court never mentioned *Klein*"). Of course, perhaps the prospect of Congress arrogating a factfinding role to itself is more concerning than its delegating the power. But if the worry is that Congress will use factual "findings" to constructively amend the Constitution, then again this would be straightforwardly unconstitutional under *Marbury*. Young, *supra* note 60, at 305–06; *see also id.* at 306 n.185 ("If Congress can regulate the growing of lemons and plums in certain ways, it can do so by means of a statute that defines lemons as including plums and then just regulate lemons.").

[81] This proposition probably authorizes more than it forbids. *Cf.* Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 435–36 (1982) (requiring abstention where state administrative proceedings provided "'adequate opportunity' for [plaintiff] to raise his constitutional claims," *id.* at 432 (quoting Moore v. Sims, 442 U.S. 415, 430 (1979))); Allen v. McCurry, 449 U.S. 90, 104 (1980) (section 1983 plaintiff estopped by state trial that offered "a full and fair opportunity to litigate federal claims").

[82] *See* Transcript of Oral Argument, *supra* note 2, at 28 (statement of Roberts, C.J.) (drawing an analogy to efforts to withdraw jurisdiction over busing controversies during the Civil Rights Era).

[83] You could call this a *Klein* argument, though it invokes a "strand" of the opinion other than the rule-of-decision principle around which the litigants chose to frame *Patchak*. *See* Fallon, *supra* note 45, at 1079 & n.167 (distinguishing these facets of *Klein*). On semantics, see *infra* note 89.

[84] *But see Patchak*, 138 S. Ct. at 906 n.3 (plurality opinion).

requires that some court have jurisdiction to provide sufficient remedies to prevent those rights from becoming practical nullities."[85]

Recall that underneath the procedural wrangling, Patchak was seeking an injunction to redress a violation of *statutory* law. Whatever the list of constitutionally necessary remedies,[86] it probably doesn't include that one: Congress's power to preclude review of bare statutory violations is fairly well established.[87] And Congress didn't succeed, contra Chief Justice Roberts's concern,[88] in insulating any separation of powers violation from review. A majority of the Court *saw* no substantive separation of powers problem with § 2(b), and any failure to review § 2(a) on the merits is better attributed to Patchak's litigation decisions than to Congress or the Court. In that respect *Patchak*'s bottom line is readily defended against the charge that it represents a new "highwater mark of legislative encroachment on Article III."[89] Neither in *Patchak* nor in broader constitutional context does Congress's latitude to authorize constitutional violations rise and fall with *Klein*.[90]

In each of these respects, *Patchak* was typical of cases that appeal to *Klein*: something feels wrong in general, but nothing, on close examination, is convincingly wrong in particular. The same objection could be levied in a range of contexts that, under precedents old and new, require freeform separation of powers inquiries, largely unmoored from text or history.[91] Here, the Court refused to be drawn into the morass, all but announcing it would never again be tempted by this facet of *Klein*. Perhaps the rule-of-decision principle is worth keeping on the nominal books in case some future suit brings the Article III objection into sharper relief. But if *Patchak* marks the last impassioned invocation of the rule, little of constitutional significance will have been lost.

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[85] Fallon, *supra* note 45, at 1050.

[86] For discussion of this set and plausible elements, see *id.* at 1104–15.

[87] *Cf.* Webster v. Doe, 486 U.S. 592 (1988). This point surfaces in none of the opinions, but Justice Alito broached it at argument. *See* Transcript of Oral Argument, *supra* note 2, at 27.

[88] *See* Transcript of Oral Argument, *supra* note 2, at 28 (statement of Roberts, C.J.).

[89] *Patchak*, 138 S. Ct. at 921 (Roberts, C.J., dissenting). Indeed, the plurality's discussion of *McCardle* seems to grant that jurisdiction to award some remedies is constitutionally required. *See id.* at 907 n.4 (plurality opinion). In light of *Boumediene v. Bush*, 553 U.S. 723 (2007), it would have been hard to maintain otherwise. The plurality does seem to deny that this requirement arises from Article III rather than the substantive provision under which a plaintiff claims a remedy. *Patchak*, 138 S. Ct. at 907 n.4 (plurality opinion). It's debatable whether the dispute has content, *see id.* at 921 n.3 (Roberts, C.J., dissenting), but insofar as the plurality shifts focus from abstract separation of powers to concrete rights, the rhetorical turn is all to the good.

[90] For a post-*Patchak* example of the extent to which review of a jurisdictional provision permits review of the underlying claim, see *Ragbir v. Homan*, No. 18-CV-1159, 2018 WL 2338792, at *7 (S.D.N.Y. May 23, 2018).

[91] *Cf.* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373 (2018) (non–Article III adjudication); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 518–23 (2010) (Breyer, J., dissenting) (agency design).