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Constitutional Law for a Changing America

Institutional Powers and Constraints

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CONSTRAINTS ON JUDICIAL POWER: ARTICLE III

Article III—or the Court's interpretation of it—places three major constraints on the ability of federal tribunals to hear and decide cases: (1) courts must have authority to hear a case (jurisdiction), (2) the case must be appropriate for judicial resolution (justiciability), and (3) the appropriate party must bring the case (standing to sue). In what follows, we review doctrine surrounding these constraints. As you read this discussion, consider not only the Court's interpretation of its own limits but also the justifications it offers. Note, in particular, how fluid these can be: sometimes the Supreme Court has favored loose constructions of the rules; at other times it has interpreted them more strictly. What factors might explain these different tendencies? Or, to think about it another way, to what extent do these constraints limit the Court's authority?

Jurisdiction

According to Chief Justice Salmon P. Chase, "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[50] In other words, a court cannot hear a case unless it has the authority—the jurisdiction—to do so.

Article III, Section 2, defines the jurisdiction of U.S. federal courts. Lower courts have the authority to hear disputes involving particular parties and subject matter. The U.S. Supreme Court's jurisdiction is divided into original and appellate: the former are classes of cases that originate in the Court; the latter are those it hears after a lower court.

To what extent does jurisdiction actually constrain the federal courts? *Marbury v. Madison* provides some answers, although contradictory, to this question. Chief Justice Marshall informed Congress that it could not alter the original jurisdiction of the Court. Having reached this conclusion, perhaps Marshall should have merely dismissed the case on the ground that the Court lacked authority to hear it, but that is not what he did.

Marbury remains an authoritative ruling on original jurisdiction. The issue of appellate jurisdiction may be a bit more complex. Article III explicitly states that for those cases over which the Court does not have original jurisdiction, it "shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make." In other words, the exceptions clause seems to give Congress authority to alter the Court's appellate jurisdiction—including to subtract from it.

Would the justices agree? In *Ex parte McCardle* the Court addressed this question, examining whether Congress can use its power under the exceptions clause to *remove* the Court's appellate jurisdiction over a particular category of cases.

[50] *Ex parte McCardle* (1869).

BOX 2-3

Judicial Review in Global Perspective

JUDICIAL AUTHORITY to invalidate acts of coordinate branches of government is not unique to the United States, although it is fair to say that the prestige of the U.S. Supreme Court has provided a model and incentive for other countries. By the middle of the nineteenth century, the Judicial Committee of the British Privy Council was functioning as a kind of constitutional arbiter for colonial governments within the British Empire—but not for the United Kingdom itself. Then in the late nineteenth century Canada, and in the first years of the twentieth Australia, created their own systems of constitutional review.

In the nineteenth century Argentina also modeled its Corte Suprema on that of the United States and even instructed its judges to pay special attention to precedents of the American tribunal. In the twentieth century Austria, India, Ireland, and the Philippines adopted judicial review, and variations of this power can be found in Norway, Switzerland, much of Latin America, and some countries in Africa.

After World War II the three defeated Axis powers—Italy, Japan, and (West) Germany—institutionalized judicial review in their new constitutions. This development was due in part to revulsion regarding their recent experiences with unchecked political power and in part to the influence of American occupying authorities. Japan, where the constitutional document was largely drafted by Americans, follows the decentralized model of the United States: the power of constitutional review is diffused throughout the entire judicial system.[1] Any court of general jurisdiction can declare a legislative or executive act invalid.

Germany and Italy, and later Belgium, Portugal, and Spain, followed a centralized model first adopted in the Austrian constitution of 1920. Each country has a single constitutional court (although some sit in divisions or senates) that has a judicial monopoly on reviewing acts of government for their compatibility with the constitution. The most a lower court judge can do when a constitutional issue is raised is to refer the problem to the specialized constitutional court. *(See Box 1-1.)*

After the Berlin Wall was torn down in 1989 and the Soviet Union disintegrated soon after, many Eastern European republics looked to judges' interpreting constitutional texts with bills of rights to protect their newfound liberties. Most opted for centralized systems of constitutional review, establishing ordinary tribunals and a separate constitutional court. They made this choice despite familiarity with John Marshall's argument for a decentralized court system in *Marbury;* namely, all judges may face the problem of a conflict between a statute or executive order on one hand and the terms of a constitutional document on the other. If judges cannot give preference to the constitutional provision over ordinary legislation or an executive act, they violate their oath to support the constitution.

The experiences of these tribunals have varied. The German Constitutional Court is largely regarded as a success story. In its first thirty-eight years, that tribunal invalidated 292 Bund (national) and 130 Land (state) laws, provoking frequent complaints that it "judicializes" politics.[2] The Court, however, has survived these attacks and has gone on to create a new and politically significant jurisprudence in the fields of federalism and civil liberties. The Russian Constitutional Court stood (or teetered) in stark contrast. It too began to make extensive use of judicial review to strike down government acts, but it quickly paid a steep price: in 1993 President Boris Yeltsin suspended the court's operations, and it did not resume its activities until nearly two years later.

Source: Adapted from C. Herman Pritchett, Walter F. Murphy, Lee Epstein, and Jack Knight, *Courts, Judges, and Politics* (New York: McGraw-Hill, 2005), chap. 6.

1. Walter F. Murphy and Joseph Tanenhaus, eds., *Comparative Constitutional Law* (New York: St. Martin's Press, 1977), chaps. 1–6; C. Neal Tate and Torbjörn Vallinder, eds., *The Global Expansion of Judicial Power: The Judicialization of Politics* (New York: New York University Press, 1995).

2. Donald P. Kommens, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed. (Durham, NC: Duke University Press, 1997), 52.

Ex parte McCardle

74 U.S. (7 Wall.) 506 (1869)
http://caselaw.findlaw.com/us-supreme-court/74/506.html
Vote: 8 (Chase, Clifford, Davis, Field, Grier, Miller, Nelson, Swayne)
0

OPINION OF THE COURT: *Chase*

FACTS:

After the Civil War, the Radical Republican Congress imposed a series of restrictions on the South.[51] Known as the Reconstruction laws, they in effect placed the region under military rule. Journalist William McCardle opposed these measures and wrote editorials urging resistance to them. As a result, he was arrested for publishing allegedly "incendiary and libelous articles" and held for a trial before a military tribunal established under Reconstruction.

Because he was a civilian, not a member of any militia, McCardle claimed that he was being illegally held. He petitioned for a writ of habeas corpus under an 1867 act stipulating that federal courts had the power to grant writs of habeas corpus in all cases where prisoners—state and federal—were deprived of their liberty in violation of the Constitution, laws, or treaties of the United States. When this effort failed, McCardle appealed to the U.S. Supreme Court. Under the Judiciary Act of 1789, the Supreme Court already had appellate jurisdiction over federal habeas cases; the 1867 law extended appellate jurisdiction to case involving state prisoners. Even though McCardle was held by federal authorities, he brought his case to the Court under the 1867 law.

In early March 1868, *McCardle* "was very thoroughly and ably [presented] upon the merits" to the U.S. Supreme Court. It was clear to most observers that "no Justice was still making up his mind": the Court's sympathies, as was widely known, lay with McCardle.[52] But before the justices issued their decision, Congress, on March 27, 1868, enacted a law repealing the provision of the 1867 Habeas Corpus Act that gave the Supreme Court authority to hear appeals arising from it; that is, Congress removed the Court's jurisdiction to hear appeals in cases like McCardle's. This move was meant either to punish the Court or to send it a strong message. Two years before *McCardle*, in 1866, the Court had invalidated President Abraham Lincoln's use of military tribunals in certain areas, and Congress did not want to see the Court take similar action in this dispute.[53] The legislature felt so strongly on this issue that after President Andrew Johnson vetoed the 1868 repealer act, Congress overrode the veto.

The Court responded by redocketing the case for oral arguments in March 1869. During the arguments and in its briefs, the government contended that the Court no longer had authority to hear the case and should dismiss it.

ARGUMENTS:

For the appellant, William McCardle:

- According to the Constitution, the judicial power extends to "the laws of the United States." The Constitution also vests that judicial power in one Supreme Court. The jurisdiction of the Supreme Court, then, comes directly from the Constitution, not from Congress.
- Suppose that Congress never made any exceptions or any regulations regarding the Court's appellate jurisdiction. Under the argument that Congress must define when, where, and how the Supreme Court shall exercise its jurisdiction, what becomes of the "judicial power of the United States," given to the Supreme Court? It would cease to exist. But the Court is coexistent and co-ordinate with Congress, and must be able to exercise judicial power even if Congress passed no act on the subject.
- By interfering in a case that has already been argued and is under consideration by the Court, Congress is unconstitutionally exercising judicial power.

For the Appellee, United States:

- The Constitution gives Congress the power to "except" any or all of the cases mentioned in the jurisdiction clause of Article III from the appellate jurisdiction of the Supreme Court. It was clearly Congress's intention, in the repealer act, to exercise its power to except.

[51]See Lee Epstein and Thomas G. Walker, "The Role of the Supreme Court in American Society: Playing the Reconstruction Game," in *Contemplating Courts*, ed. Lee Epstein (Washington, DC: CQ Press, 1995), 315–346.

[52]Charles Fairman, *History of the Supreme Court of the United States, vol. 7, Reconstruction and Reunion* (New York: Macmillan, 1971), 456.

[53]That action came in *Ex parte Milligan* (1866), discussed in Chapter 5.

- The Court has no authority to pronounce any opinion or render any judgment in this cause because the act conferring the jurisdiction has been repealed, and so jurisdiction ceases.
- No court can act in any case without jurisdiction, and it does not matter at what period in the progress of the case the jurisdiction ceases. After it has ceased, no judicial act can be performed.

THE CHIEF JUSTICE DELIVERED THE OPINION OF THE COURT.

The first question necessarily is that of jurisdiction, for if the act of March, 1868, takes away the jurisdiction defined by the act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.

It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make."

It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. From among the earliest Acts of the first Congress, at its first session, was the Act of September 24th, 1789, to establish the judicial courts of the United States. That Act provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction. . . .

The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the Act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus, is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the Legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing Act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle. . . .

It is quite clear, therefore, that this . . . court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

The appeal of the petitioner in this case must be dismissed for want of jurisdiction.

DISMISSED FOR WANT OF JURISDICTION

As we can see, the Court acceded and declined to hear the case. *McCardle* suggests that Congress has the authority to remove the Court's appellate jurisdiction as it deems necessary. As Justice Felix Frankfurter put it in 1949, "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice* [before a judge]."[54] Former justice Owen J. Roberts, who apparently agreed with Frankfurter's assertion, proposed an amendment to the Constitution that would have deprived Congress of the ability to remove the Court's appellate jurisdiction.[55] To Frankfurter, Roberts, and others in their camp, the *McCardle* precedent, not to mention the text of the exceptions clause, makes it quite clear that Congress can remove

[54]*National Mutual Insurance Co. v. Tidewater Transfer Co.* (1949).

[55]See Owen J. Roberts, "Now Is the Time: Fortifying the Supreme Court's Independence," *American Bar Association Journal* 35 (1949): 1. The Senate approved the amendment in 1953, but the House tabled it. Cited in Gerald Gunther, *Constitutional Law*, 12th ed. (Westbury, NY: Foundation Press, 1991), 45.

the Court's appellate jurisdiction.[56] In 1962, however, Justice William O. Douglas remarked, "There is a serious question whether the *McCardle* case could command a majority view today."[57] And even Chief Justice Chase himself suggested limits on congressional power in this area. After *McCardle* was decided, he noted that use of the exceptions clause was "unusual and hardly to be justified except upon some imperious public exigency."[58]

Why the disagreement over the precedential value of *McCardle* when the Court's holding—not to mention the text of the Constitution—seems so clear? One argument against *McCardle*'s viability is that it was something of an odd case, that the Court had no choice but to acquiesce to Congress if it wanted to retain its legitimacy in post–Civil War America. The pressures of the day, rather than the Constitution or the beliefs of the justices, may have led to the decision. Some commentators also suggest that *McCardle* does not square with American traditions: before *McCardle*, Congress had never stripped the Court's jurisdiction, and after *McCardle*, Congress did not take this step even in response to some of the Court's most controversial constitutional decisions such as ***Roe v. Wade*** and *Brown v. Board of Education*, as Table 2-2 indicates.[59]

Then there is the related claim that, taken to its extreme, jurisdiction stripping could render the Court virtually powerless. Would the framers have vested judicial power in "one Supreme Court . . ." only to allow Congress to destroy it? Many scholars say no.

A final set of arguments against *McCardle* focus on its precedential value. One set points to the last paragraph of Chief Justice Chase's opinion: "Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error." Chase is correct. Although Congress eliminated the route that McCardle took—the 1867 law—it did not end another: the Judiciary Act of 1789, which, as we noted, gave the Court jurisdiction over habeas petitions filed by federal prisoners, which McCardle was. And, in fact, shortly after *McCardle*, the Court heard the case of *Ex parte Yerger* (1869), which also involved a military trial for a private citizen. But this case reached the Court through its jurisdiction under the 1789 Act, not the 1867 law, and led to a different outcome. In an opinion written by Chief Justice Chase, the author of *McCardle*, the Court affirmed its power to issue the writ of habeas corpus in such cases.

The *Yerger* decision, combined with *McCardle*'s last paragraph, has led some experts to conclude that the Court would have been less likely to cave to Congress in *McCardle* had Congress "foreclosed all avenues for judicial review of McCardle's complaint."[60]

Another precedent that may cast some doubt on *McCardle* comes from *United States v. Klein* (1871). *Klein* is a complicated dispute that still generates debate among law scholars and justices,[61] but the upshot is this. In 1863, during the Civil War, Congress passed a law that allowed people living in rebel states to obtain money from the sale of property seized by the government if they could prove that they had not "given any aid and comfort" to the rebels. In 1870, in *United States v. Padelford*, the Supreme Court held that a presidential pardon would provide conclusive evidence of loyalty for purposes of the 1863 law.

Congress, concerned that President Andrew Johnson would pardon too many confederate supporters, passed a law to respond to *Padelford*. The law barred rebels from using a pardon as evidence of loyalty. It also said that if a confederate supporter had received a presidential pardon, "the jurisdiction of the court in the case shall cease, and the court shall

[56]We deal only with the question directly flowing from *McCardle*—of whether Congress can remove the Supreme Court's appellate jurisdiction—not the related questions of whether it can strip jurisdiction from the lower federal courts or strip all federal jurisdiction. For interesting commentary on these questions, see Richard H. Fallon et al., *Hart & Wechsler's The Federal Courts and the Federal System*, 5th ed. (New York: Foundation Press, 2003); Gerald Gunther, "Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate," *Stanford Law Review* 36 (1984): 895–922.

[57]*Glidden Co. v. Zdanok* (1962).

[58]*Ex parte Yerger* (1869).

[59]Grove argues that this tradition follows the requirements of enacting legislation (primarily bicameralism and presentment) outlined in Article I. These "structural safeguards," she argues, "give competing political factions (even political minorities) considerable power to 'veto' legislation." And such factions are especially "likely to use their structural veto to block jurisdiction-stripping legislation favored by their opponents." Grove, "The Structural Safeguards of Federal Jurisdiction," 869.

[60]Chief Justice John Roberts dissenting in *Patchak v. Zinke* (2018), excerpted in this chapter.

[61]See *Patchak v. Zinke* (2018) and the cites contained in the amicus curiae brief filed by Federal Courts Scholars in *Zinke*. We adopt some of the preceding discussion from this brief.

Table 2-2 A Sample of Congressional Proposals Aimed at Limiting or Eliminating the U.S. Supreme Court's Appellate Jurisdiction in the Wake of Controversial Constitutional Decisions

Issue	Court Decision Provoking Proposal	Proposal
Criminal confessions	*Miranda v. Arizona* (1966), in which the Court required police to read those under arrest a series of rights.	A 1968 proposal sought to remove the Court's jurisdiction to hear state cases involving the admissibility of confessions.
Abortion	*Roe v. Wade* (1973), in which the Supreme Court struck down state laws criminalizing abortion. *Roe* legalized abortion during the first two trimesters of pregnancy.	In the 1970s and 1980s several proposals sought to remove the Court's authority to hear abortion cases.
Pledge of Allegiance	*Newdow v. U.S. Congress* (2003), in which the U.S. Court of Appeals for the Ninth Circuit struck down the mandatory saying of the Pledge of Allegiance in public schools because the pledge has the phrase "under God."	A proposal in 2004 sought to remove the jurisdiction of the lower courts and the Supreme Court to hear any case on the constitutionality of the Pledge of Allegiance.
Gay rights	*Lawrence v. Texas* (2003), which struck down same-sex sodomy laws; *Obergefell v. Hodges* (2015), which invalidated state bans on same-sex marriage.	In 1996 Congress passed the Defense of Marriage Act (DOMA), which defines marriage as between one man and one woman. Either anticipating constitutional challenges to DOMA or in response to *Lawrence* (or both), a proposal in 2004 sought to remove the Court's appellate jurisdiction to decide on the constitutionality of DOMA. After the Court invalidated DOMA, in *United States v. Windsor* (2013) but before *Obergefell*, a bill was introduced in the House to "prevent the federal courts from hearing marriage cases."

Source: Adapted from Kathleen M. Sullivan and Gerald Gunther, *Constitutional Law*, 15th ed. (New York: Foundation Press, 2004), 83–85; Tara Leigh Grove, "The Structural Safeguards of Federal Jurisdiction," *Harvard Law Review* 124 (2011): 869–940.

forthwith dismiss the suit of such claimant." Finally, if a lower court already had found in favor of the pardoned claimant and the government had appealed, the law instructed the Supreme Court to dismiss the suit for lack of jurisdiction.

In *Klein*, the Court struck down the 1870 law. Although Chief Justice Chase, writing yet again for the majority, acknowledged that the exceptions clause gave Congress the right to remove the Court's appellate jurisdiction, he held that Congress may not "prescribe rules of decision to the Judicial Department . . . in cases pending before it." The law forbade the Court to "give the effect to evidence [here, a presidential pardon] which, in its own judgment [in *Padelford*], such evidence should have, and is directed to give it an effect precisely the opposite." By so forbidding, "Congress has inadvertently passed the limit which separates the legislative from the judicial power." The Court also held that the law infringed on "the constitutional power of the executive" by curtailing the effect of a presidential pardon.

Still, *Klein* did not settle the issue. Nearly 150 years later, in *Patchak v. Zinke* (2018), the Court revisited both *Klein* and *McCardle*. Almost all the justices agreed that Congress had stripped the Court's jurisdiction to hear cases involving a particular piece of land. But they disagreed over whether Congress had acted constitutionally. Which side has the better case?

Patchak v. Zinke

583 U.S. ___ (2018)
https://caselaw.findlaw.com/us-supreme-court/16-498.html
Oral arguments available at https://www.oyez.org/cases/2017/16-498.
Vote: 6 (Alito, Breyer, Ginsburg, Kagan, Sotomayor, Thomas)
3 (Gorsuch, Kennedy, Roberts)

JUDGMENT OF THE COURT: *Thomas*
OPINIONS CONCURRING IN THE JUDGMENT: *Ginsburg, Sotomayor*
DISSENTING OPINION: *Roberts*

FACTS:

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("Band") reside in Michigan near the township of Wayland. In the early 2000s, the Band identified a 147-acre parcel of land in Wayland, known as the Bradley Property, where it wanted to build a casino. The Band asked the secretary of the interior to invoke the Indian Reorganization Act to take the Bradley Property into trust. The secretary agreed, but before it formally took the land into trust, a nearby landowner, David Patchak, filed a lawsuit in federal district court challenging the secretary's decision on various grounds. Patchak's case eventually reached the Supreme Court under the name *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* (Patchak I). The Court did not reach a decision on the merits of the dispute but instead held on procedural grounds that "Patchak's suit may proceed." The case then went back to the district court.

While the case was in the district court, Congress passed the Gun Lake Act of 2014, which reaffirmed the Bradley Property as "trust land" and ratified the actions of the secretary of the interior in taking the land into trust. The Act, in Section 2(b) when on to provide:

> 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.

Based on Section 2(b) the district court dismissed Patchak's suit for lack of jurisdiction, and the court of appeals affirmed. The Supreme Court granted certiorari to determine whether Section 2(b) violates Article III of the Constitution.

ARGUMENTS

For the petitioner, David Patchak:

- Section 2(b) of the Gun Lake Act violates the separation of powers system because Congress has intruded upon the judicial power.
- Any legislative interference in the adjudication of the merits of a particular case carries the risk that political power will supplant evenhanded justice.
- Section 2(b) is similar to the statute at issue in *United States v. Klein* (1871), where the Court held that Congress had "passed the limit which separates the legislative from the judicial power," when it "directed" that courts "shall forthwith dismiss" pending cases.

For the respondent, Ryan Zinke, Secretary of the Interior:

- Just as Congress is empowered to confer jurisdiction, Congress may take away jurisdiction in whole or in part; and if jurisdiction is withdrawn, all pending cases though cognizable when commenced must fall. See *Ex parte McCardle* (1868).
- Section 2(b) does not transgress any separation of powers limitation. It does not instruct courts to interpret existing law (or apply it to the facts) in a particular way or vest review of judicial decisions in another branch of government.
- Section 2(b) is not similar to the extreme law at issue in *United States v. Klein* (1871). That law both impinged on the president's pardon power and directed courts to dismiss cases only if they first made dispositive findings adverse to the government.

JUSTICE THOMAS ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED AN OPINION, IN WHICH JUSTICE BREYER, JUSTICE ALITO, AND JUSTICE KAGAN JOIN.

The Constitution creates three branches of Government and vests each branch with a different type of power. . . .

The separation of powers, among other things, prevents Congress from exercising the judicial power. One way that Congress can cross the line from legislative power to judicial power is by "usurp[ing] a court's power to interpret and apply the law to the [circumstances] before it." The simplest example would be a statute that says, "In *Smith* v. *Jones*, Smith wins." At the same time, the legislative power

is the power to make law, and Congress can make laws that apply retroactively to pending lawsuits, even when it effectively ensures that one side wins.

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

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

Statutes that strip jurisdiction "chang[e] the law" for the purpose of Article III,, just as much as other exercises of Congress' legislative authority. . . . Thus, when Congress strips federal courts of jurisdiction, it exercises a valid legislative power no less than when it lays taxes, coins money, declares war, or invokes any other power that the Constitution grants it.

Indeed, this Court has held that Congress generally does not violate Article III when it strips federal jurisdiction over a class of cases. . . . Jurisdiction-stripping statutes, the Court explained [in *Ex parte McCardle*], do not involve "the exercise of judicial power" or "legislative interference with courts in the exercising of continuing jurisdiction." . . . [That is,] Congress generally does not infringe the judicial power when it strips jurisdiction because, with limited exceptions, a congressional grant of jurisdiction is a *prerequisite* to the exercise of judicial power. . . .

Patchak does not dispute Congress' power to withdraw jurisdiction from the federal courts. He instead [argues] that §2(b) violates Article III, even if it strips jurisdiction. [R]elying on *United States* v. *Klein* 128 (1872), Patchak argues . . . that the last four words of §2(b)—"shall be promptly dismissed"—direct courts to reach a particular outcome. But a statute does not violate Article III merely because it uses mandatory language. Instead of directing outcomes, the mandatory language in §2(b) "simply imposes the consequences" of a court's determination that it lacks jurisdiction because a suit relates to the Bradley Property. [S]ee *McCardle.*

Patchak compares §2(b) to the statute this Court held unconstitutional in *Klein*. . . . *Klein* held that [the 1870] statute infringed the executive power by attempting to "change the effect of . . . a pardon." *Klein* also held that the statute infringed the judicial power, although its reasons for this latter holding were not entirely clear.

[T]he statute in *Klein* "infringed the judicial power, not because it left too little for courts to do, but because it attempted to direct the result without altering the legal standards governing the effect of a pardon—standards Congress was powerless to prescribe." Congress had no authority to declare that pardons are not evidence of loyalty, so it could not achieve the same result by stripping jurisdiction whenever claimants cited pardons as evidence of loyalty. Nor could Congress confer jurisdiction to a federal court but then strip jurisdiction from that same court once the court concluded that a pardoned claimant should prevail under the statute.

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

We conclude that §2(b) of the Gun Lake Act does not violate Article III of the Constitution. The judgment of the Court of Appeals is, therefore, affirmed.

CHIEF JUSTICE ROBERTS, with whom JUSTICE KENNEDY and JUSTICE GORSUCH Join, Dissenting.

Chief Justice Marshall wrote that the Constitution created a straightforward distribution of authority: The Legislature wields the power "to prescribe general rules for the government of society," but "the application of those rules to individuals in society" is the "duty" of the Judiciary. *Fletcher* v. *Peck* (1810). Article III, in other words, sets out not only what the Judiciary can do, but also what Congress cannot.

Congress violates this arrangement when it arrogates the judicial power to itself and decides a particular case. We first enforced that rule in *United States* v. *Klein* (1872). . . . This Court [held that] Congress, in addition to impairing the President's pardon power, had "prescribe[d] rules of decision to the Judicial Department . . . in cases pending before it." . . .

[T]he facts of this case are stark. . . . When Congress passed the [Gun Lake Act] in 2014, no other suits relating to the Bradley Property were pending, and the [statute of limitations on challenges to the Secretary's action] . . . had expired. . . .

Recognizing that the "clear intent" of Congress was "to moot this litigation," the District Court dismissed Patchak's case against the Secretary. The D. C. Circuit affirmed, also based on the "plain" directive of §2(b) [that is, Section 2(b)].

Congress has previously approached the boundary between legislative and judicial power, but it has never gone so far as to target a single party for adverse treatment and direct the precise disposition of his pending case. Section 2(b)—remarkably—does just that. . . .

I would hold that Congress exercises the judicial power when it manipulates jurisdictional rules to decide the outcome of a particular pending case. Because the Legislature has no authority to direct entry of judgment for a party, it cannot achieve the same result by stripping jurisdiction over a particular proceeding. . . .

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

In my view, the concept of "changing the law" must imply some measure of generality or preservation of an adjudicative role for the courts. . . . The Court, to date, has never sustained a law that withdraws jurisdiction over a particular lawsuit.

The closest analogue is of course *Ex parte McCardle* (1869), which the plurality nonchalantly cites as one of its leading authorities [even though] *McCardle* has been alternatively described as "caving to the political dominance" of the Radical Republicans or "acceding to Congress's effort to silence the Court." Read for all it is worth, the decision is also inconsistent with the approach the Court took just three years later in *Klein*, where Chief Justice Chase (a dominant character in this drama) stressed that "[i]t is of vital importance" that the legislative and judicial powers "be kept distinct."

The facts of *McCardle*, however, can support a more limited understanding of Congress's power to divest the courts of jurisdiction. For starters, the repealer provision covered more than a single pending dispute; it applied to a class of cases, barring anyone from invoking the Supreme Court's appellate jurisdiction in habeas cases for the next two decades. In addition, the Court's decision did not foreclose all avenues for judicial review of McCardle's complaint. As Chase made clear—and confirmed later that year in his opinion for the Court in *Ex parte Yerger* (1869)—the statute did not deny "the whole appellate power of the Court." McCardle, by taking a different procedural route and filing an original habeas action, could have had his case heard on the merits.

Section 2(b), on the other hand, has neither saving grace. It ends Patchak's suit for good. His federal case is dismissed, and he has no alternative means of review anywhere else. . . . Section 2(b) thus reaches further than the typical jurisdictional repeal. . . . Because [it] singles out Patchak's suit, specifies how it must be resolved, and deprives him of any judicial forum for his claim, the decision to uphold that provision surpasses even *McCardle* as the highwater mark of legislative encroachment on Article III.

Indeed, although the stakes of this particular dispute may seem insignificant, the principle that the plurality would enshrine is of historic consequence. In no uncertain terms, the plurality disavows any limitations on Congress's power to determine judicial results, conferring on the Legislature . . . authority to pick winners and losers in pending litigation as it pleases. . . .

I respectfully dissent.

In *Patchak*, Justice Thomas's plurality opinion emphasized *McCardle* and distinguished *Klein*. Chief Justice Roberts's did the reverse: minimized—perhaps even questioned—*McCardle* and elevated *Klein*. Thomas's view prevailed but for how long? Put another way, do you think *Patchak* brings closure to the debate over Congress's power to strip the Court's jurisdiction—a debate that has been ongoing almost from the day the Court issued *McCardle*?