

## AGAINST CONGRESSIONAL CASE SNATCHING

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### ABSTRACT

*Congress has developed a deeply problematic habit of aggrandizing itself by snatching cases from the Article III courts. One form of contemporary case snatching involves directly legislating the outcome of pending litigation by statute. These laws do not involve generic amendments to existing statutes but rather dictate specific rulings by the Article III courts in particular cases. Another form of congressional case snatching involves rendering ongoing judicial proceedings essentially advisory by unilaterally permitting a disgruntled litigant to transfer a pending case from an Article III court to an executive agency for resolution. Both practices involve Congress reallocating the business of the Article III courts, and both should be deemed to violate the separation of powers doctrine. Unfortunately, however, the Supreme Court's institutional response to this troubling new trend of congressional reassignment of core judicial business has been (at best) halting, tepid, and weak. In a trio of recent decisions, the Justices have given Congress a green light to direct merits results in pending litigation before the Article III courts (Patchak v. Zinke*

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*and Bank Markazi v. Peterson) and also blessed giving disgruntled litigants the unfettered right to remove pending judicial business from an Article III court to an Article II agency (Oil States Energy Services v. Greene's Energy Group).*

*These three decisions reflect a regrettable return to functionalist analysis in separation of powers disputes involving threats to the structural integrity and independence of the Article III courts. Simply put, vesting the "judicial power" in the federal courts means that judges, not members of Congress, must decide how to interpret and apply the law. This is, after all, the central holding of Marbury v. Madison. Under well-settled separation of powers principles, Congress should not be permitted to aggrandize itself by usurping the decisional authority of the Article III courts. Nor should Congress be empowered to render ongoing federal court proceedings entirely advisory by vesting a litigant who fears an adverse decision with the unilateral power to force a remand of a pending lawsuit to a potentially more sympathetic federal administrative agency. Alexander Hamilton, writing in The Federalist Papers, presciently observed that the judiciary constitutes the least dangerous branch of the federal government. If this is so, it also means that the judiciary is the weakest of the three branches. Separation of powers doctrine and practice must take account of this important structural reality. Vindicating the Madisonian system of checks and balances requires that congressional case snatching, in all of its forms and manifestations, must be categorically resisted and rejected.*

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## INTRODUCTION

Alexander Hamilton, in *The Federalist Papers*, famously observed that the federal courts constitute “the least dangerous” branch of the federal government because they have “no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever.”<sup>1</sup> He added that the judiciary “may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”<sup>2</sup> By way of contrast, the President “dispenses the honors” and also “holds the sword of the community,” and Congress “not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated.”<sup>3</sup>

If we take seriously Hamilton’s observations about the relative institutional strength of the three branches of the federal government, what implications should they have for theorizing and applying the separation of powers doctrine to novel schemes that attempt either to strip cases from the Article III courts or to constrain, if not control, their disposition?

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1. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.”).

2. *Id.*

3. *Id.* For a general discussion of the institutional and structural limits of the federal courts, with particular attention to the “countermajoritarian difficulty,” see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1962). John Hart Ely has also addressed the problem of the relative weakness of the federal courts vis-à-vis Congress and the President. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 101-03 (1980). Ely posits that the federal courts should attempt to conserve their institutional capital and use it to advance a general project of reinforcing the process of democratic self-government. See *id.* at 101-02, 178-81. He argues “that unlike an approach geared to the judicial imposition of ‘fundamental values,’ the representation-reinforcing orientation ... is not inconsistent with, but on the contrary is entirely supportive of, the American system of representative democracy.” *Id.* at 101-02. In Ely’s view, having federal judges address structural failures in the democratic process, such as malapportioned electoral districts, “assigns judges a role they are conspicuously well-situated to fill.” *Id.* at 102-03.

This Article argues that in order to forestall bad endings, the federal courts in general, and the Supreme Court in particular, should more zealously guard their institutional authority by more strictly enforcing the separation of powers doctrine when Congress attempts to usurp or transfer away pieces of the judicial power of the United States from the Article III courts (including even relatively small ones). It proceeds in three Parts.

Part I considers the relevance of Hamilton's least dangerous branch thesis to congressional attempts to dictate how federal courts should rule in pending cases or to reassign pending judicial business entirely outside the Article III courts (phenomena that we denominate "congressional case snatching"). This Part argues that Hamilton's well-stated concerns about the inherent weakness of the least dangerous branch require the federal courts to resolutely turn back any and all efforts by Congress or the President to usurp or reassign the judicial power of Article III courts. Moreover, this Part highlights the waxing and waning of formalism in separation of powers analysis in the contemporary Supreme Court. What's more, it provides an overview of the formalism/functionalist dichotomy.

Part II traces the meandering path that the Supreme Court has charted, zigging and zagging between strict formalist enforcement of the separation of powers in the context of congressional case snatching (*Stern v. Marshall* and *Executive Benefits Insurance Agency v. Arkinson*) and more relaxed functionalist analysis (*Patchak v. Zinke*, *Oil States Energy Services v. Greene's Energy Group*, and *Commodity Futures Trading Commission v. Schor*). In this Part, we show how a strong and stable majority of the contemporary Supreme Court has come to embrace a distinctly functionalist approach that precludes the invalidation of congressional efforts to reassign judicial business from the Article III courts. We believe that the Supreme Court has overstated the benefits of these congressional incursions into the constitutional territory of the Article III courts and, concurrently, seriously underestimated the potential risks that congressional case snatching schemes present.

Part III explains why this functionalist turn constitutes a mistake (and a big one) and should be rejected in favor of a more formalist approach. Drawing on the Hamiltonian least dangerous branch thesis, we argue that the inherent structural weakness of

the federal courts requires judicial vigilance against congressional case snatching. Finally, we offer a brief overview and conclusion of our main themes, arguments, and proofs.

Iconic federal courts scholar James Pfander has observed woefully that “[s]cholars have searched, with mixed success, for an organizing and limiting principle in the somewhat muddled jurisprudence ... govern[ing]” the reassignment of adjudicative responsibilities from the Article III courts.<sup>4</sup> What is true of legal scholars would also seem to hold true of the federal courts.<sup>5</sup> Yet, this lack of agreement on the rules of the road does not seriously undermine, much less refute, the structural concerns that arise quite organically from Hamilton’s least dangerous branch thesis. Simply put, the least dangerous branch is also the most vulnerable branch. The federal courts should take greater care to incorporate this fact of constitutional life into separation of powers doctrine.

#### I. JUDICIAL INDEPENDENCE IN HAMILTON’S TIME AND OURS: THE CONTINUING SALIENCE OF THE SEPARATION OF POWERS DOCTRINE

“Basic to the constitutional structure established by the Framers was their recognition that ‘[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.’”<sup>6</sup> As a result, the Framers devised a national government that reflected Montesquieu’s conception of the separation of powers;<sup>7</sup> the federal government would comprise three distinct branches, with each branch to exercise inherently distinct governmental powers

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4. James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 647 (2004). Pfander also observes that “[s]cholars have expressed little enthusiasm for either the Court’s categorical approach or its balancing approach.” *Id.* at 665.

5. Compare *infra* notes 62-66 and accompanying text (describing the Supreme Court’s functionalist approach in a trio of recent cases), with *infra* note 70 and accompanying text (outlining the Chief Justice’s formalist dissents).

6. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1978) (plurality opinion) (quoting THE FEDERALIST NO. 47, at 300 (James Madison) (H. Lodge ed., 1888)).

7. See CHARLES LOUIS DE SECONDAT, 1 THE COMPLETE WORKS OF M. DE MONTESQUIEU 198-200 (London, T. Evans (Strand) & W. Davis (Piccadilly), 1777).

and to do so largely independently of the other two branches. Notably, our Constitution ensures that the judicial power of the United States “must be reposed in an independent Judiciary.”<sup>8</sup> Thus, the “independence of the Judiciary [must] be jealously guarded.”<sup>9</sup>

Part I reviews the implications of Alexander Hamilton’s least dangerous branch thesis. It posits that, if one credits this idea seriously, it necessarily follows that the federal courts must zealously oppose and systematically fend off attempted raids by Congress or the President to commandeer the constitutional authority of the Article III courts (namely, the “judicial Power” of the United States). In addition, Part I discusses how the Supreme Court has systematically failed to aggressively, or even reliably, enforce the separation of powers doctrine in instances in which the institutional rights and prerogatives of the federal courts are squarely at issue. More specifically, Part I provides several salient examples of recent minor attacks on the authority of the Article III courts that could lead to more, and perhaps even more ambitious, instances of congressional case snatching. Lastly, this Part provides an overview of the waxing and waning of formalism in separation of powers analysis in the contemporary Supreme Court.

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8. *N. Pipeline Constr. Co.*, 458 U.S. at 60.

9. *Id.*; THE FEDERALIST NO. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961) (“The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. ‘When the legislative and executive powers are united in the same person or body,’ says he, ‘there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.’ Again: ‘Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.’ Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.”). James Madison describes Montesquieu as “the oracle” of the separation of powers. *See id.* at 301. (“The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind.”).



A. *The Least Dangerous Branch Thesis and the Growing Problem of Congressional Encroachments on the Constitutional Authority of the Article III Courts*

In advancing his least dangerous branch thesis, Hamilton's core claim—namely that the judicial branch is particularly weak and highly vulnerable to incursions from the political branches—would provide a strong theoretical and empirical basis for the federal courts to strictly enforce the separation of powers in instances that involve invasions of the constitutional authority of the federal courts.<sup>10</sup> Because, as Justice William J. Brennan, Jr., has explained, “[t]he Federal Judiciary was ... designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial,”<sup>11</sup> the Hamiltonian inherent structural weakness thesis could easily justify a more cautious approach towards efforts to tinker with the constitutional authority of the Article III courts.<sup>12</sup> From this vantage point, as Justice Brennan argues, “Art[icle] III both defines the power and protects the independence of the Judicial Branch.”<sup>13</sup>

Under this approach, the federal courts should resolutely turn back any and all efforts by Congress or the President either to usurp or to reassign “[t]he judicial Power of the United States.”<sup>14</sup> The inherent structural weakness of the federal courts, relative to the political branches, requires judicial vigilance rather than complacency and accommodation.<sup>15</sup> Because Congress and the President have more and better tools to fend off attempted raids on each other's constitutional turf, the federal courts could adopt a more

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10. See *N. Pipeline Constr. Co.*, 458 U.S. at 58-60 (plurality opinion).

11. *Id.* at 58.

12. See *id.* at 58-60.

13. *Id.* at 58.

14. See U.S. CONST. art. III, §§ 1-2 (vesting the judicial power in the federal courts and defining the scope of “[t]he judicial Power of the United States”).

15. See, e.g., *N. Pipeline Constr. Co.*, 458 U.S. at 60 (plurality opinion) (opining that “our Constitution unambiguously enunciates a fundamental principle—that the ‘judicial Power of the United States’ must be reposed in an independent Judiciary” and interpreting this constitutional text as a “command[] that the independence of the Judiciary be jealously guarded”).

laissez-faire, or functionalist, approach to defining and enforcing the separation of powers in cases involving novel governmental structures or relationships involving these branches without doing undue damage to the Madisonian system of checks and balances.<sup>16</sup>

The Madisonian system of carefully calibrated and separated powers, in which ambition will check ambition,<sup>17</sup> requires a federal judiciary up to the task of enforcing constitutional strictures when Congress or the President seek to disregard them.<sup>18</sup> Despite the critical importance of the federal judiciary in enforcing constitutional limitations, many contemporary public law scholars argue that the Madisonian system of separated powers is either failing or already has failed.<sup>19</sup> As Professor Sanford Levinson has lamented, “James Madison has truly, and irrevocably, left the building.”<sup>20</sup> If this is so, and many very thoughtful and talented legal scholars

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16. *But cf.* *Clinton v. City of New York*, 524 U.S. 417, 445-47 (1998) (invalidating the Line Item Veto Act because it gave “the President the unilateral power to change the text of duly enacted statutes”); *Bowsher v. Synar*, 478 U.S. 714, 730-32 (1986) (invalidating the Balanced Budget and Emergency Deficit Control Act on formalist grounds because the majority could “see no escape from the conclusion that, because Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers”); *INS v. Chadha*, 462 U.S. 919, 944, 958-59 (1983) (invalidating the use of legislative veto provisions despite them constituting “a convenient shortcut” and explaining that “[t]here is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided”).

17. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (“Ambition must be made to counteract ambition.”). Madison also argues that those serving in each branch of the federal government must have principal loyalties to their own institution in order for the system of checks and balances to function properly and reliably. *See id.* (“The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government.”).

18. *See, e.g., N. Pipeline Constr. Co.*, 458 U.S. at 58-60 (plurality opinion).

19. *See* Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1112 (2013) (“Congress by itself often seems either unable or unwilling to provide adequate checks on executive power.”); Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 884 (2007) (arguing that “[w]hether or not this picture [of Madison’s ambition checking ambition] was ever realistic, it is no longer so today”). For an excellent discussion and critique of the problems vexing our national governing institutions these days, see generally SANFORD LEVINSON & JACK M. BALKIN, *DEMOCRACY AND DYSFUNCTION* (2019).

20. LEVINSON & BALKIN, *supra* note 19, at 50.

clearly believe it to be so,<sup>21</sup> then the need for the judiciary to hold its constitutional ground is more important than ever.<sup>22</sup>

The argument for more rigorous enforcement of the separation of powers to protect the Article III courts also has some textual basis in the Constitution itself.<sup>23</sup> After all, Article III requires “[t]he judicial Power of the United States” to be vested exclusively in the Supreme Court and lower federal courts.<sup>24</sup> On the other hand, however, the Constitution also features identical Vesting Clauses that place all legislative powers in the hands of Congress<sup>25</sup> and all

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21. See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 2-12 (2010) (arguing that the traditional Madisonian system of separate, distinct executive, legislative, and judicial powers has been eroding, at an accelerating pace over time, in favor of an all-powerful “runaway presidency”); ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 14-15 (2010) (arguing “that executive-centered government in the administrative state is inevitable” and that courts applying the separation of powers doctrine “cannot hope to constrain the modern executive”). Professor Ackerman warns specifically about the dangers of undue judicial deference to the Executive Branch. See ACKERMAN, *supra*, at 142.

22. See, e.g., *N. Pipeline Constr. Co.*, 458 U.S. at 58 (plurality opinion).

23. See *id.* at 58-60.

24. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”). Some public law scholars, for example Dean John Manning, argue that general separation of powers principles should be left to the political branches to police. See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944-48, 2005, 2021-22, 2040 (2011). Manning specifically questions whether more general provisions of the Constitution that allocate powers, such as the Vesting Clauses of Articles I, II, and III, should be judicially enforced to invalidate novel administrative structures. See *id.* at 2014-21. Manning argues that formalist separation of powers analysis, which does involve judicially enforced limits flowing from the Vesting Clauses, “risk[s] attributing excessive determinacy to the Vesting Clauses in certain types of cases.” *Id.* at 2021. He posits that “[b]y invalidating schemes on the ground that they offend a freestanding norm of strict separation, formalists undervalue the *indeterminacy* of the Vesting Clauses relative to Congress’s authority to shape government under the Necessary and Proper Clause.” *Id.* at 1945. This may well be so. However, the indeterminacy argument does not really address Hamilton’s core concerns about the relative weakness of the federal judiciary vis-à-vis the political branches. See THE FEDERALIST NO. 78, *supra* note 1, at 465-66. This intrinsic structural weakness could provide a basis for greater judicial willingness to imply structural limits from Article III’s Vesting Clause—and thereby to distinguish it from the Vesting Clauses of Articles I and II, because good reasons exist to believe that the federal courts are not constitutionally well-positioned to defend their institutional turf. See LEVINSON & BALKIN, *supra* note 19, at 153-55, 158-59, 170-73 (describing the failures of the separation of powers doctrine).

25. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

executive powers with the President.<sup>26</sup> Should these clauses have the same structural implications for defining and applying the separation of powers doctrine?<sup>27</sup> At least arguably, they should not. The role of the federal courts as a de facto referee of last resort between Congress and the President<sup>28</sup> should require that they assiduously fend off attempted raids on the judiciary's constitutional authority (whether by Congress or the President). One could deem such raids quite literally to constitute "roughing up the referee," something never permitted in competitive sports featuring referees or umpires.<sup>29</sup>

To be sure, some legal academics, such as Dean John Manning, are skeptical about formalist enforcement of the Vesting Clauses.<sup>30</sup> Indeed, Manning expresses serious doubts about the relevance of *any* of the Vesting Clauses to interpreting and applying the separation of powers doctrine.<sup>31</sup> Yet, he also cautions that "[b]ecause the structural provisions come in many shapes and sizes, no one-size-fits-all theory can do them justice."<sup>32</sup>

26. *Id.* art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.")

27. See Manning, *supra* note 24, at 1945 ("Most prominently, the Vesting Clauses speak in general terms about the legislative, executive, and judicial powers, and say nothing about how these clauses intersect with Congress's broad coordinate power to compose the government under the Necessary and Proper Clause."). Dean Manning argues that "[l]ike most bargained-for texts, the Constitution's structural provisions thus leave many important questions unaddressed." *Id.*

28. See *Goldwater v. Carter*, 444 U.S. 996, 996 (1979) (Powell, J., concurring) (arguing that "[t]he Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse" but implying that when such an impasse has been reached, the federal courts have a duty to decide the merits).

29. See ALAN S. GOLDBERGER, *SPORTS OFFICIATING: A LEGAL GUIDE* 213-24 (2d ed. 2007) (discussing the phenomenon of players, parents, and fans assaulting referees and umpires and legal remedies available to officiating officials). See generally Ronald J. Krotoszynski, Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*, 77 WASH. U. L.Q. 993, 995 (2000) ("Each sport, whether football or figure skating, requires rules and judges to enforce those rules.")

30. See Manning, *supra* note 24, at 1944-48, 2017-23.

31. *Id.*

32. *Id.* at 1945. Like Manning, Professors Posner and Vermeule are highly skeptical about the ability of the judiciary to comprehensively police the boundaries that separate legislative, executive, and judicial powers. See POSNER & VERMEULE, *supra* note 21, at 13-17 (arguing that the Madisonian system of carefully calibrated and separated powers has atrophied in the face of ever-broader unilateral presidential authority and suggesting that in the contemporary United States "law does little to constrain the modern executive" but that "politics and public

If one takes seriously this admonition about “one size” not fitting all cases, it would seem to support judicial efforts aimed at differentiating how the federal courts interpret and enforce the Vesting Clauses of Articles I, II, and III in the context of applying the separation of powers doctrine. Precisely because the three branches of the federal government are differently structured, the structural implications of the Vesting Clauses can and should differ too. Accordingly, even if as a general matter good arguments exist for permitting Congress and the President to adopt novel power-sharing arrangements that permit Congress to play a role in executing the laws<sup>33</sup> or the President to have a role in shaping them,<sup>34</sup> the inherent structural weakness of the Article III courts would justify more vigilant enforcement of generalized separation of powers concerns to disallow structural innovations involving the federal courts.

Of course, one of Hamilton’s main objectives in *Federalist No. 78* was to reassure the body politic that the federal courts would not constitute a serious threat to the rights and liberties of the people.<sup>35</sup>

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opinion do constrain the modern executive”).

33. See *INS v. Chadha*, 462 U.S. 919, 967-68 (1983) (White, J., dissenting) (“The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies.”). Justice Byron White, defending the so-called legislative veto against a separation of powers objection, observed that

[w]ithout the legislative veto, Congress is faced with a Hobson’s choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the Executive Branch and independent agencies.

*Id.* at 968.

34. See *Touby v. United States*, 500 U.S. 160, 164-65 (1991) (observing that “[t]he Constitution provides that ‘[a]ll legislative Powers herein granted shall be vested in a Congress of the United States’” and explaining that “[f]rom this language the Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government” but that “the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches”). *But cf.* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 473 (2001) (“The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority.”).

35. See *THE FEDERALIST NO. 78*, *supra* note 1, at 465-66 (observing “that the judiciary is

The other, without doubt, was to make clear that the federal courts would enjoy the power of judicial review, a power that he deemed indispensable to ensuring the efficacy of a written, or “limited,” constitution.<sup>36</sup> Well before Chief Justice John Marshall’s iconic opinion in *Marbury v. Madison*,<sup>37</sup> Hamilton had made clear beyond peradventure that the federal courts would enjoy a power of judicial review over federal and state laws.<sup>38</sup>

In this sense, then, Hamilton’s argument presumes that the institutional weakness of the federal courts, relative to Congress and the President, would constitute a virtue rather than a design defect.<sup>39</sup> But is Hamilton’s assumption correct? After all, a set of juridical entities either unable or unwilling to protect their constitutional authority probably will not be able to enforce a valid judicial order against an unwilling or intransigent President or Congress.<sup>40</sup>

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beyond comparison the weakest of the three departments of power” and “that it can never attack with success either of the other two”). Indeed, Hamilton cautions “that all possible care is requisite to enable it to defend itself against their attacks.” *Id.* at 466.

36. *Id.* (“The complete independence of the courts of justice is peculiarly essential in a limited Constitution.”). *But cf.* Manning, *supra* note 24, at 1980-82 (arguing that life tenure and salary protections afford sufficient institutional protection for the federal courts to obviate the need for strict enforcement of Article III’s Vesting Clause).

37. 5 U.S. (1 Cranch) 137 (1803). For a detailed and thoughtful overview of *Marbury*, see generally William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1.

38. THE FEDERALIST NO. 78, *supra* note 1, at 468 (explaining “that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former”). What is more, “the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.” *Id.* Given the emphatic endorsement of judicial review by one of the principal proponents of ratification of the Constitution, the question could reasonably be deemed an open and shut one. *See, e.g.,* *Barron v. Baltimore*, 32 (7 Pet.) U.S. 243, 247 (1833) (“The question thus presented is, we think, of great importance, but not of much difficulty.”).

39. *See* THE FEDERALIST NO. 78, *supra* note 1, at 468.

40. For example, the Trump administration’s Department of Justice, under the leadership of Attorney General William Barr, ordered immigration judges to ignore a panel decision of the Seventh Circuit. *Baez-Sanchez v. Barr*, 947 F.3d 1033, 1035-36 (7th Cir. 2020) (observing that, following issuance of the court’s mandate, “[w]hat happened next beggars belief,” discussing the Department of Justice’s open defiance of the Seventh Circuit’s order in the case, and warning that “[w]e have never before encountered defiance of a remand order, and we hope never to see it again”); *see also* Kimberly Wehle, *A Conservative Judge Draws a Line in the Sand with the Trump Administration*, POLITICO (Feb. 12, 2020, 11:40 AM), <https://perma.cc/QC6G-RDJC> (“In defying the 7th Circuit, therefore, Attorney General Barr challenged the validity of *Marbury v. Madison* itself—and thus the federal judiciary’s authority

And if enforcing the strictures of a “limited Constitution” is essential in order for them to be meaningful, then too much institutional weakness definitely constitutes a design defect (and a rather serious one).<sup>41</sup>

Hamilton was quite correct to posit that the federal courts are, relative to the political branches, institutionally weak and thus poorly situated to defend their institutional interests and authority.<sup>42</sup> And, precisely because of this structural reality, it becomes even more important for the federal judiciary to defend its institutional powers and prerogatives against efforts by either Congress or the President to snatch them away.<sup>43</sup> If Congress may usurp or redirect judicial authority, the cumulative effect of such encroachments on the Article III courts could render them incapable of playing their crucial checking function on the political branches.<sup>44</sup>

Implicit in Dean John Manning’s argument is the existence of a federal judiciary up to the task of enforcing specific constitutional strictures.<sup>45</sup> Permitting the political branches to aggrandize themselves by usurping judicial authority or to encroach on the judiciary by rendering it more difficult, perhaps even impossible, for the federal courts to exercise “[t]he judicial Power of the United States”<sup>46</sup> risks rendering completely nugatory the Constitution’s

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to say what the law is and have it stick.”). Despite Judge Frank Easterbrook’s umbrage, what precisely could a federal court do if the Attorney General ordered a detained person deported in the face of a federal court order that prohibits this action? Viable options for judicial self-help would appear to be very limited and of doubtful efficacy.

41. THE FEDERALIST NO. 78, *supra* note 1, at 466.

42. *See id.* at 465-66.

43. *See* F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 718-19 (2018) (arguing that “Article III assigns the judicial power to the federal courts, and nothing in the Constitution allows the parties to reallocate that power” and defending strong rules against encroachments on the authority of the Article III courts because doing so will protect and advance “society’s broader interests in living under a government that adjudicates based on the rule of law instead of political considerations, maintaining a system of adjudication that provides adequate remedies for violations of rights, and preventing imprudent government actions by requiring various government institutions with different interests to evaluate those actions”).

44. *See* Manning, *supra* note 24, at 2004.

45. *See id.* at 2005-17.

46. U.S. CONST. art. III, § 1. Although Congress enjoys broad constitutional authority to create—or not create—lower federal courts and to fix their jurisdiction as it wishes, as well as to tinker with the appellate jurisdiction of the Supreme Court of the United States, *see id.* art. III, § 2, Congress does not have discretion to vest the federal judicial power entirely outside the Article III courts. The language of Article III, section 1 is mandatory, not

specific rules on how Congress and the Executive Branch should exercise their respective governing authority.<sup>47</sup> In this respect, Manning's support for judicial enforcement of specific textual limits on the structure and function of the three branches presupposes a federal judiciary able and willing to make its judgments stick.<sup>48</sup>

Unfortunately, however, the Supreme Court has generally been less aggressive in strictly enforcing the separation of powers doctrine in instances when the institutional rights and prerogatives of the federal courts are squarely at issue.<sup>49</sup> In a number of landmark separation of powers cases, such as *Commodity Futures Trading Commission v. Schor*, the Supreme Court has deployed an open-ended balancing test that takes into consideration

the extent to which the “essential attributes of judicial power” are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the

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discretionary; “[t]he judicial Power of the United States *shall* be vested” with either the lower federal courts or the Supreme Court. *Id.* art. III, § 1 (emphasis added).

47. *Cf.* Manning, *supra* note 24, at 1945-48 (arguing that the federal courts should not attempt to impose organizational limits based on general clauses, such as the Vesting Clauses, but should respect the “specificity” of other constitutional provisions that create particular rules limiting how Congress or the President must exercise their constitutional powers). Dean Manning explains that “[w]here the Constitution is specific, the Court should read it the way it reads all specific texts” and enforce such limits strictly. *Id.* at 1947. On the other hand, however, “[i]f legislation regulating the powers of the coordinate branches neither contradicts an identifiable background understanding of one of the Vesting Clauses nor effectively reallocates power from its specified branch, interpreters should not invalidate such legislation by reading abstract notions of the separation of powers into those otherwise open-ended clauses.” *Id.* at 1948.

48. *See id.* at 2040 (positing that “interpreters should determine the allocation of power by asking how it is effectuated by particular clauses” and that “[w]hen the Constitution conditions the exercise of power on compliance with a specified procedure, interpreters should enforce that specific framework strictly”). Presumably the “interpreters” that Manning has in mind to secure “compliance” with specific constitutional strictures are judges serving on the Article III courts. *See id.*

49. *See, e.g., Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986) (observing that the Supreme Court “has declined to adopt formalistic and unbending rules” in cases raising separation of powers questions involving the Article III courts in favor of “weigh[ing] a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary”).



concerns that drove Congress to depart from the requirements of Article III.<sup>50</sup>

In 2011, however, in *Stern v. Marshall*, the Roberts Court seemed to signal that it would embrace a more formalist approach and critically review efforts by Congress to transfer matters at the core of the judicial power of the United States to non-Article III tribunals.<sup>51</sup>

Writing for the *Stern* majority, Chief Justice John G. Roberts, Jr., sounded a decidedly different note from Justice Sandra Day O'Connor's majority opinion in *Schor*.<sup>52</sup> Rather than considering the efficiencies that might be associated with permitting bankruptcy courts to adjudicate common law counterclaims (despite an unwilling litigant) and then balancing the benefits against the degree of encroachment that the scheme involved, the Chief Justice declared in categorical terms that the judicial power of the United States may not be transferred outside the Article III courts.<sup>53</sup> He explained that "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decision-making if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III."<sup>54</sup>

Given this strong language, endorsed by a clean majority of the Supreme Court, one might reasonably have believed that *Stern* constituted a kind of judicial turning point. In other words, it

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50. *Id.*; see Pfander, *supra* note 4, at 646-47 (observing, quite correctly, that the Supreme Court "has seemingly retreated to a multifaceted balancing test that includes judicial independence as one factor and often results in the validation of Article I tribunals").

51. 564 U.S. 462, 487 (2011) (analyzing whether bankruptcy courts, which are non-Article III tribunals, have authority to hear certain common law counterclaims and deciding they do not); Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1619 (2012) ("The [Stern] majority's analysis was unabashedly formalist in tone and approach."); see *id.* at 1605 ("The Roberts Court's separation-of-powers decisions reflect a pronounced trend toward formalism."); *id.* at 1621 ("If one reads *Stern* in tandem with *Free Enterprise Fund*, it becomes reasonably clear that a majority of the Roberts Court has embraced formalism and has done so with gusto.")

52. See *Schor*, 478 U.S. at 851-52.

53. See *Stern*, 564 U.S. at 483-85.

54. *Id.* at 484.

seemed likely that the Roberts Court's "strong, pronounced ... turn toward formalism"<sup>55</sup> would have some staying power. On its face, the *Stern* majority opinion reflects a renewed and vigorous judicial commitment to fending off congressional efforts to transfer its constitutional duties to non-Article III fora (whether those fora are executive branch agencies or so-called "Article I tribunals" that are not staffed by presidentially appointed, Senate-confirmed, life-tenured judges).<sup>56</sup> But, for better or worse, this is not how these matters have come to rest.

To be sure, the Supreme Court initially stood by its guns and imposed a saving construction on the Bankruptcy Act that made facts found by bankruptcy court judges (related to common law claims) merely advisory—with the district courts fully empowered to adopt, revise, or wholly reject them.<sup>57</sup> Writing for a unanimous bench in *Executive Benefits Insurance Agency v. Arkison*, Justice Clarence Thomas explained "that when, under *Stern's* reasoning, the Constitution does not permit a bankruptcy court to enter final judgment on a bankruptcy-related claim, the relevant statute nevertheless permits a bankruptcy court to issue proposed findings of fact and conclusions of law to be reviewed *de novo* by the district court."<sup>58</sup> But the center did not hold; in the Court's most recent decisions, the Justices have returned to a more functionalist analysis of congressional attempts to reassign the business of the federal courts to non-Article III tribunals.<sup>59</sup>

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55. Krotoszynski, *supra* note 51, at 1602.

56. For a detailed and quite thoughtful discussion of the constitutionally complex relationship between Article I tribunals and Article III courts, see generally Pfander, *supra* note 4. In discussing the scholarly effort to find a "limiting principle" for this relationship, Professor Pfander posits that the Supreme Court must remain atop a hierarchy of "inferior" federal and state courts and suggests that considerations rooted in "unity, supremacy, and inferiority provide a textual predicate for a variety of structural features of the Article III judicial department." *Id.* at 648-49. Under this approach, "the Constitution does not permit Congress to place such inferior federal courts beyond the supervision and control of the Supreme Court—their judicial superior." *Id.* at 650.

57. See *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 38 (2014) (holding that when it comes to *Stern* claims governed under § 157(c)(1), the Bankruptcy Court would be permitted to submit its findings of fact and law to the District Court for *de novo* review).

58. *Id.* at 28.

59. See *infra* notes 62-66 and accompanying text.

Since 2014, functionalist reasoning has made a significant comeback in the pages of the *U.S. Reports*.<sup>60</sup> A reliable majority of the Supreme Court has embraced functionalism and done so with brio.<sup>61</sup> In cases such as *Bank Markazi v. Peterson*,<sup>62</sup> *Patchak v. Zinke*,<sup>63</sup> and *Oil States Energy Services v. Greene's Energy Group*,<sup>64</sup> the Supreme Court issued opinions that emphasize balancing and the potential efficiency of novel administrative structures involving judicial functions over the strict enforcement of the separation of powers in general and Article III's Vesting Clause in particular.<sup>65</sup> Thus, the Justices have abandoned the strict formalism of *Stern* and *Executive Benefits Insurance Agency* in favor of giving Congress broad discretion to enact laws that do not merely transfer disputes to non-Article III tribunals but actually mandate particular outcomes in specific cases currently pending before the Article III courts at the time Congress acts.<sup>66</sup> In theory, a constitutional rule,

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60. See *infra* notes 62-66 and accompanying text.

61. For a thoughtful and comprehensive discussions of "formalism" and "functionalism" in approaching separation of powers questions, 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, 854-55, 860-62, 870-78 (2009). Briefly, formalism "emphasizes the necessity of maintaining three distinct branches of government based on functions: one to legislate, one to execute, and one to adjudicate." *Id.* at 860. Contrast this with functionalism, which "posits that overlap beyond the [three] core functions is practically necessary and even desirable." *Id.* at 861.

62. See *generally* 136 S. Ct. 1310 (2016) (affirming that Congress may direct courts to apply newly enacted, outcome-altering legislation in pending civil cases).

63. See *generally* 138 S. Ct. 897 (2018) (plurality opinion) (holding that Congress's targeted statutes comported with Article III so long as they did not cross the line from legislative to judicial power).

64. See 138 S. Ct. 1365, 1378 (2018) (holding that "matters governed by the public-rights doctrine, from their nature can be resolved in multiple ways: Congress can reserve to itself the power to decide, delegate that power to executive officers, or commit it to judicial tribunals" (internal quotation marks omitted)).

65. See Gary Lawson, *Territorial Government and the Limits of Formalism*, 78 CALIF. L. REV. 853, 857-58 (1990) (explaining that under a formalist approach to the enforcement of the separation of powers, a reviewing court should assess which branch possesses constitutional authority over a particular government power, that is, whether it is fundamentally legislative, executive, or judicial in character, and then require that the branch to which a power belongs, and no other, exercise that power).

66. In *Bank Markazi*, Peterson and a group of other plaintiffs sought to execute monetary judgments for injuries and deaths caused by terrorist acts allegedly sponsored by the Iranian government. *Id.* at 1318-21. While the cases were pending, Congress passed the Iran Threat Reduction and Syria Human Rights Act of 2012. *Bank Markazi*, 136 S. Ct. at 1316, 1320. Section 8772 of this statute provides that "the financial assets that are identified in and the

dating back to 1872 and *United States v. Klein*, and arguably earlier to *United States v. Schooner Peggy*,<sup>67</sup> prohibits Congress from dictating the outcomes of cases in the Article III courts.<sup>68</sup> Yet, as one commentator wryly observes, the Supreme Court has observed this rule-of-decision limitation more often in the breach than in the observance.<sup>69</sup>

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subject of proceedings in the [S.D.N.Y.] in *Peterson et al. v. Islamic Republic of Iran et al.*,” 28 U.S.C. § 8772(b), “shall be subject to execution ... in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by an act of [terrorism].” *Id.* § 8772(a)(1). Peterson and the other plaintiffs then moved for summary judgment based on the newly passed congressional statute. *Bank Markazi*, 136 S. Ct. at 1320-21. Bank Markazi argued that the congressional statute violated the separation of powers doctrine because the law was precisely directed at establishing a rule of decision in this specific litigation. *Id.* at 1321-22. The district court granted summary judgment for the plaintiffs and the U.S. Court of Appeals for the Second Circuit affirmed. *Id.* at 1321-22. In the end, the Supreme Court affirmed the decision by holding that the congressional statute merely changed the applicable governing law. *See id.* at 1325, 1329 (upholding a statute that effectively directed the outcome in a pending case and observing that “we have affirmed [that] Congress may indeed direct courts to newly enacted, outcome-altering legislation in pending civil cases”). *But cf.* *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147-48 (1872) (striking down a statute that stripped jurisdiction from the Court of Claims and Supreme Court over certain claims based on presidential pardons because it imposed a rule of decision in pending judicial cases and, accordingly, usurped the authority of the Article III courts).

67. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (announcing, for the first time, what is now known as the Changed Law Rule); *see also* J. Richard Doidge, *Is Purely Retroactive Legislation Limited by the Separation of Powers?: Rethinking United States v. Klein*, 79 CORNELL L. REV. 910, 953-64 (1994) (explaining how *Klein*, along with *Schooner Peggy* and *Pennsylvania v. Wheeling & Belmont Bridge Co.*, stands for the Changed Law Rule); Evan C. Zoldan, *The Vanishing Core of Judicial Independence*, 21 NEV. L.J. (forthcoming 2021) (manuscript at 24-27) (explaining the relationship between *Schooner Peggy* and *Klein* as they relate to the Changed Law Rule).

68. *See Klein*, 80 U.S. (13 Wall.) at 146. Chief Justice Salmon P. Chase observed that the statute at issue in *Klein*, which made the federal courts’ jurisdiction turn on their proposed merits ruling, “is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress” and such a law “is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.” *Id.* Because the statute made a federal court’s jurisdiction turn on the merits ruling, permitting jurisdiction only if the merits ruling would favor the government, the majority concluded that “Congress has inadvertently passed the limit which separates the legislative from the judicial power,” and invalidated the statute as unconstitutional. *Id.* at 147-48.

69. *The Supreme Court, 2017 Term—Leading Cases*, 132 HARV. L. REV. 297, 302-03 (2018) (analyzing the holding of *Patchak v. Zinke* and observing that “[t]he Court hasn’t identified a rule-of-decision violation since *Klein*; it seems increasingly likely that it never will”); *see* Evan C. Zoldan, *The Klein Rule of Decision Puzzle and the Self-Dealing Solution*, 74 WASH. & LEE L. REV. 2133, 2136-37 (2017) (arguing that the Supreme Court’s commitment to meaningfully enforcing the rule against Congress dictating outcomes in cases sub judice is

Thus, despite Chief Justice Roberts's strenuous objections,<sup>70</sup> a majority of the Justices seems largely unconcerned about the prospect of Congress usurping small pieces of the Article III courts' constitutional duties.<sup>71</sup> More troubling, these functionalist decisions do not carefully articulate and apply any limiting principle to Congress's use of these devices.<sup>72</sup> Admitting the principle that, consistent with the separation of powers, Congress may dictate outcomes in specific cases and also permit pending judicial business to be transferred to non-Article III tribunals opens a Pandora's box that might best be left tightly shut.<sup>73</sup>

As the Greek playwright Euripides aptly observed, bad beginnings make for bad endings.<sup>74</sup> Although the laws at issue in *Bank Markazi*, *Patchak*, and *Oil States Energy* all involved relatively minor attacks on the authority of the Article III courts,<sup>75</sup> by approving these devices as consistent with the separation of powers doctrine, the Justices have left the door open to Congress using these devices more regularly and aggressively.<sup>76</sup> The cumulative

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open to serious doubt based on its failure to apply the rule to invalidate legislation that seems to usurp judicial decisional authority in specific pending cases).

70. See, e.g., *Patchak v. Zinke*, 138 S. Ct. 897, 918-21 (2018) (Roberts, C.J., dissenting) (objecting to the plurality's failure to fully and fairly apply the *Klein* principle and arguing that the plurality failed to establish "any limitations on Congress's power to determine judicial results" and vested Congress with the power "to pick winners and losers in pending litigation as it pleases"); *Bank Markazi*, 136 S. Ct. at 1330 (Roberts, C.J., dissenting) (arguing that the statute making Iranian bank assets available to satisfy judgments in a single case was nothing more than a statute directing that a particular litigant should win and objecting that "[n]o less than if it had passed a law saying 'respondents win,' Congress has decided this case by enacting a bespoke statute tailored to this case that resolves the parties' specific legal disputes to guarantee respondents victory").

71. See, e.g., *Patchak*, 138 S. Ct. at 905 (plurality opinion) (stating that the "kind of legal change" seen in *Patchak* "is well within Congress's authority and does not violate Article III"); *Bank Markazi*, 136 S. Ct. at 1317 (holding that Congress's actions constituted "no violation of separation-of-powers principles, and no threat to the independence of the Judiciary").

72. See Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 454 (1991) (highlighting the danger "that once a reviewing court begins down those roads [of 'functional' or 'balancing' analysis] in the enforcement of separation of powers, no meaningful limitations on inter-branch usurpation of power remain").

73. See *id.*

74. EURIPIDES, *Aeolus*, fragment 32, in FRAGMENTS: AEGEUS-MELEAGER 12, 29 (Christopher Collard & Martin Cropp eds. & trans., Harvard Univ. Press 2008) ("A bad end comes from a bad beginning.").

75. See *infra* notes 424-60 and accompanying text.

76. See *infra* notes 446-52 and accompanying text.

effects of more instances of congressional case snatching would be deeply problematic because the sum total effects can and would greatly exceed the sum of the parts.<sup>77</sup>

*B. The Waxing and Waning of Formalism in Separation of Powers Analysis in the Contemporary Supreme Court*

The Supreme Court's most recent return to functionalism in separation of powers analysis simply reflects the latest twist and turn in a long history of judicial vacillation and analytical inconsistency.<sup>78</sup> As Professor Martin Redish and his coauthor, Elizabeth Cisar, have observed, "[t]he Court has gone from one extreme to the other, with the assertion of what are at best tenuous distinctions" to justify the use of one analytical methodology or the other.<sup>79</sup>

In cases involving novel administrative structures that redistributed executive and legislative responsibilities, the Burger Court frequently adopted a highly formalist stance and invalidated efforts to innovate new relationships between Congress and the President.<sup>80</sup> Most of these efforts involved Congress attempting to give itself a larger role in the implementation of statutes.<sup>81</sup> By the late 1980s, under the Rehnquist Court, the pendulum swung back toward a more consistently functionalist approach; the Supreme Court sustained the independent counsel provisions of the Ethics in Government Act<sup>82</sup> and the Federal Sentencing Commission<sup>83</sup> in decisions with a decidedly functionalist cast.<sup>84</sup>

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77. See *infra* notes 443-60 and accompanying text.

78. See Redish & Cisar, *supra* note 72, at 450 ("In the separation of powers area, however, the modern Court has evinced something of a split personality, seemingly wavering from resort to judicial enforcement with a formalistic vengeance to use of a so-called 'functional' approach that appears to be designed to do little more than rationalize incursions by one branch of the federal government into the domain of another.")

79. *Id.*

80. To be sure, some Burger Court decisions, such as *Commodity Futures Trading Commission v. Schor*, involved efforts to encroach on the authority of the federal courts and these decisions featured functionalist, rather than formalist, reasoning and outcomes. See *Bowsher v. Synar*, 478 U.S. 714, 736 (1986); *INS v. Chadha*, 462 U.S. 919, 957-59 (1983).

81. See *Bowsher*, 478 U.S. at 736; *Chadha*, 462 U.S. at 957-59.

82. *Morrison v. Olson*, 487 U.S. 654, 696-97 (1988).

83. *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

84. See Redish & Cisar, *supra* note 72, at 450-53, 476-78.

Beginning in 2010, however, the Supreme Court struck out on a decidedly more formalist path and invalidated a two-layer system of “good-cause protection” within an independent federal agency,<sup>85</sup> as well as the involuntary litigation of common law claims before bankruptcy courts.<sup>86</sup> However, as with earlier majorities embracing formalist reasoning in separation of powers disputes, the Supreme Court once again has drifted back toward functionalism—most notably in *Patchak*<sup>87</sup> and *Bank Markazi*.<sup>88</sup> A brief discussion of formalism and functionalism will help to establish precisely why *Patchak*, *Bank Markazi*, and *Oil States Energy* all constitute functionalist rulings.

Since the New Deal, formalism and functionalism have served as the two principal approaches to enforcement of the separation of powers of doctrine.<sup>89</sup> Formalism is a categorical approach that considers the nature of a particular government power, asks to which branch the Constitution assigns the power, and then ascertains if that branch, rather than another branch, is actually exercising that power.<sup>90</sup> For formalists, the intentions of the Framers—to the extent one can ascertain those intentions—should be controlling and Congress lacks constitutional authority to

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85. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484, 496 (2010) (holding that Congress’s imposition of dual good-cause removal provisions was “contrary to Article II’s vesting of the executive power in the President” and explaining “[w]ithout the ability to oversee the Board, or to attribute the Board’s failings to those whom he *can* oversee, the President is no longer the judge of the Board’s conduct”). The *Free Enterprise Fund* majority explained that “[i]ndeed, if allowed to stand, this dispersion of responsibility could be multiplied. If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third?” *Id.* at 497. What is true of insulating executive officers from presidential oversight also holds true of imposing rules of decision in particular cases pending before the Article III courts. *See, e.g.*, *Patchak v. Zinke*, 138 S. Ct. 897, 919 (2018) (Roberts, C.J., dissenting) (explaining that, by allowing Congress to impose a rule of decision and thereby disperse judicial authority, “the plurality disavows any limitations on Congress’s power to determine judicial results, conferring on the Legislature a colonial-era authority to pick winners and losers in pending litigation as it pleases”).

86. *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (“Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government’s ‘judicial Power’ on entities outside Article III.”).

87. *See Patchak*, 138 S. Ct. at 906-08 (plurality opinion).

88. *See Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323-29 (2016).

89. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 495-96 (1987).

90. Redish & Cisar, *supra* note 72, at 454, 455 n.24.

reallocate or rearrange the assignment of specific powers to particular branches of the federal government.<sup>91</sup> As Professor Cass Sunstein explains, “Formalist decisions are premised on the beliefs that the text of the Constitution and the intent of its drafters are controlling and sometimes dispositive, that changed circumstances are irrelevant to constitutional outcomes, and that broader ‘policy’ concerns should not play a role in legal decisions.”<sup>92</sup>

Functionalism, as its name implies, constitutes a more flexible approach to enforcing the separation of powers doctrine that emphasizes balancing and considers carefully the benefits and efficiencies that novel administrative structures might provide.<sup>93</sup> So long as a novel administrative structure does not cut too deeply into the core or central powers of one of the three branches, the federal courts should tolerate some play in the joints if the benefits of doing so are sufficiently weighty.<sup>94</sup>

To be sure, several thoughtful and well-informed legal scholars have questioned the utility of the formalism/functionalism dichotomy. For example, Provost Elizabeth Magill argues that “[t]he debate over formalism and functionalism is a distraction, masking a robust consensus to which nearly all participants in the debate subscribe.”<sup>95</sup> Instead of the traditional dichotomy, she proposes an approach that “match[es] the exercise of certain types of government authority with specific types of government decisionmakers”<sup>96</sup> as part of “a reconstructed separation of powers doctrine.”<sup>97</sup> Magill concludes that the dichotomy constitutes “an unhelpful way to evaluate whether an institutional arrangement is constitutional.”<sup>98</sup>

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91. *Id.* at 449-56. *But cf.* Sunstein, *supra* note 89, at 493 (observing that a formalist approach to enforcing the separation of powers doctrine “rests on weak foundations” and “is vulnerable to a wide range of objections relating to the appropriate characterization of the framers’ intent, the problem of interpretive intent, and the question how intent should be treated in unforeseen circumstances”).

92. Sunstein, *supra* note 89, at 493.

93. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492-96 (1987).

94. *See* Jellum, *supra* note 61, at 870-73.

95. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1129 (2000).

96. M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 650 (2001).

97. *Id.* at 660.

98. *Id.*



Other legal scholars offer very similar critiques of the formalism/functionalism dichotomy. For example, Professor Linda Jellum posits that “[r]igidly dividing separation of powers analysis into these two categories, formalism and functionalism, is imperfect.”<sup>99</sup> Dean John Manning makes a similar point, positing that “[n]ew thinking about the legitimacy of strongly purposive reasoning reveals difficulties with the approach that underlies both strands of modern separation of powers doctrine.”<sup>100</sup> Professor Ed Rubin strongly argues that the entire conceptual framework used to define and enforce the separation of powers doctrine badly needs an update,<sup>101</sup> and Professor Bruce Ackerman urges the United States not to attempt to export its system of separation of powers to other polities.<sup>102</sup>

Despite these critiques, and the frequency with which administrative law scholars restate them, the formalism/functionalism dichotomy remains quite resilient and provides a generally accepted and effective means of categorizing major separation of powers doctrine precedents.<sup>103</sup> Accordingly, “the distinction retains significant explanatory force.”<sup>104</sup> It is easy to understand why this is so. The dichotomy reflects a relatively basic distinction between a categorical approach to enforcing the separation of powers and a balancing test.<sup>105</sup>

As Lee Liberman explains, formalism “uses a syllogistic, definitional approach to determining whether a particular exercise of power is legislative, executive, or judicial.”<sup>106</sup> No balancing is required—instead, as Magill posits, “[w]hen confronting an institutional arrangement, a formalist, following a rule-like approach,

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99. Jellum, *supra* note 61, at 878.

100. Manning, *supra* note 24, at 1972.

101. EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* 12 (2005).

102. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 640 (2000).

103. See Lawson, *supra* note 65, at 857 (“Whatever ‘formalism’ and ‘functionalism’ might mean in the abstract, they have become terms of art in discourse concerning separation of powers.”).

104. Krotoszynski, *supra* note 51, at 1611.

105. Cf. RONALD J. KROTOSZYNSKI, JR., *THE DISAPPEARING FIRST AMENDMENT* 16-17, 35-39, 217, 224 (2019) (discussing the relative salience of categorical tests and balancing tests in First Amendment jurisprudence).

106. Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 343 (1989).

identifies the type of power exercised and asks whether it is exercised by the appropriate department in the appropriate way.”<sup>107</sup> Accordingly, as Professor Redish and his coauthor observe, “the Court’s role in separation of powers cases should be limited to determining whether the challenged branch action falls within the definition of that branch’s constitutionally derived powers—executive, legislative, or judicial” and “[n]o other questions are to be asked; no other countervailing factors are to be considered.”<sup>108</sup>

Functionalism, in turn, steadfastly rejects hard and fast rules (that is, categorical rules) that delimit Congress’s authority to mix and match legislative, executive, and judicial functions; the functionalist approach to the separation of powers doctrine features overt forms of cost/benefit balancing.<sup>109</sup> Professor Thomas Merrill explains that a functionalist views separation of powers questions “not in terms of fixed rules but rather in light of an evolving standard designed to advance the ultimate purposes of a system of separation of powers.”<sup>110</sup>

Making a different, but related point, Manning observes that “functionalists view the Constitution as emphasizing the balance, and not the separation, of powers,”<sup>111</sup> and do so, at least in part, because “the Constitution’s structural clauses ultimately supply few useful details of meaning.”<sup>112</sup> In sum, and as Jellum posits, “[t]he functionalist approach emphasizes the need to maintain pragmatic flexibility to respond to modern government.”<sup>113</sup> When the Supreme Court frames a separation of powers question in terms of whether Congress has “gone too far”—as it did in both *Patchak* and *Bank Markazi*—the decision rests on functionalist grounds and reasoning.<sup>114</sup>

107. Magill, *supra* note 96, at 608-09.

108. Redish & Cisar, *supra* note 72, at 454-55.

109. See Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 231.

110. *Id.*

111. Manning, *supra* note 24, at 1952.

112. *Id.* at 1950.

113. Jellum, *supra* note 61, at 854-55; see also Magill, *supra* note 96, at 609 (arguing that from a functionalist perspective “[t]he key question is whether an institutional arrangement upsets the overall balance” between and among the three branches of the federal government “by permitting one of them to compromise the ‘core’ function of another”).

114. See *Patchak v. Zinke*, 138 S. Ct. 897, 905-08 (2018) (plurality opinion); *Bank Markazi*

For the record, we do not assert that functionalism is never an acceptable methodological choice; our claim is considerably more limited. Because of the inherent structural weakness of the federal judiciary,<sup>115</sup> the federal courts should exercise extreme caution in deploying functionalist analysis when deciding whether novel administrative structures involving the Article III courts are consistent with the separation of powers doctrine. Because, as Hamilton explained, the federal judiciary is the least dangerous and hence the weakest of the three branches of the federal government,<sup>116</sup> the federal courts “should articulate and apply consistently a stricter standard of review to interbranch power-sharing arrangements that either expand or contract the duties of Article III courts.”<sup>117</sup> Thus, “[f]ormalism, or some form of neo-[f]ormalism, is necessary to protect the judiciary” from efforts to poach its constitutional responsibilities.<sup>118</sup> A kind of “pragmatic formalism”<sup>119</sup> is requisite—but currently sorely lacking—in separation of powers theory and practice. Pragmatic formalism<sup>120</sup> requires the federal courts to avoid engaging in highly permissive functionalist analysis when Congress attempts to snatch judicial business from the federal courts.

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v. Peterson, 136 S. Ct. 1310, 1323 (2016).

115. See THE FEDERALIST NO. 78, *supra* note 1, at 465-66.

116. See *id.*

117. Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 WM. & MARY L. REV. 417, 481 (1997).

118. *Id.* at 481-82.

119. See Redish & Cisar, *supra* note 72, at 454-56 (discussing and explaining the concept of “pragmatic formalism”).

120. See *id.* (“Pragmatic formalism’ ... is a ‘street smart’ mode of interpretation, growing out of a recognition of the dangers to which a more ‘functional’ or ‘balancing’ analysis in the separation of powers context may create. It recognizes that once a reviewing court begins down those roads in the enforcement of separation of powers, no meaningful limitations on interbranch usurpation of power remain. More importantly, [pragmatic formalism] recognizes that even if functionalism and balancing could be employed with principled limitation, any such interpretational approach inherently eviscerates the prophylactic nature of the separation of powers protections, so essential a part of that system.”).

## II. CONGRESSIONAL CASE SNATCHING IS A REAL AND GROWING PROBLEM THAT ENDANGERS THE ABILITY OF THE FEDERAL COURTS TO SECURE AND ADVANCE RULE OF LAW VALUES

In recent years, Congress has enacted at least two statutes that seem to direct outcomes in specific cases. The Iran Threat Reduction and Syria Human Rights Act of 2012<sup>121</sup> made assets of Iran's central bank available for execution of judgment in a single pending case; the text of the statute helpfully referenced a specific docket number.<sup>122</sup> This law, which was at issue in *Bank Markazi v. Peterson*, did not establish a generally applicable rule governing execution of judgments against national central bank assets. Instead, it made specific assets held by Bank Markazi available only to particular plaintiffs seeking to execute judgments.<sup>123</sup>

An identical problem arose in *Patchak v. Zinke*, which considered a challenge to a federal law that provided a rule of decision in a specific case involving land owned by a Native American tribe operating a casino.<sup>124</sup> As explained below, in both instances, the Supreme Court sustained Congress's case snatching behavior by characterizing the constitutionally questionable statutes as "changing the law" rather than as imposing a rule of decision on the federal courts (and thereby usurping a quintessential judicial function).<sup>125</sup>

Finally, in *Oil States Energy Services v. Greene's Energy Group*, the Supreme Court also sustained a federal law that permits a

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121. 22 U.S.C. § 8772.

122. *Id.* § 8772(b) (making available Iranian central bank assets "identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG), that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings").

123. See 136 S. Ct. 1310, 1330 (2016) (Roberts, C.J., dissenting) ("No less than if it had passed a law saying 'respondents win,' Congress has decided this case by enacting a bespoke statute tailored to this case that resolves the parties' specific legal disputes to guarantee respondents victory.").

124. Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, § 2(b), 128 Stat. 1913, 1915 (2014) (providing that a lawsuit "shall not be filed or maintained in a Federal court and shall be promptly dismissed"); see *Patchak v. Zinke*, 138 S. Ct. 897, 904 (2018) (plurality opinion) (discussing the Gun Lake Act).

125. See *infra* Part II.A.

nervous litigant to remove a pending case involving a patent infringement claim from an Article III court—potentially at any point in the judicial process, including litigation pending before the Court of Appeals or even the Supreme Court—back to the United States Patent and Trademark Office (USPTO).<sup>126</sup> Strictly speaking, Oil States Energy, the party objecting to the transfer of the case to the USPTO for inter partes review, did not raise a separation of powers claim objecting to the procedure, though this procedure essentially rendered all of the federal court proceedings prior to the transfer of the dispute to the USPTO nugatory (and arguably advisory).<sup>127</sup> This is a different form of case snatching that involves Congress only conditionally vesting the adjudication of a legal dispute with the Article III courts, rather than attempting to decide the case itself.<sup>128</sup> Even so, it is no less objectionable because it has the effect of making federal court proceedings, and final judgments, binding on the parties only if Congress allows.<sup>129</sup>

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126. 138 S. Ct. 1365, 1370-73, 1379 (2018).

127. *See id.* at 1372, 1376 (describing Oil States' arguments). *But cf.* *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410-11 (1792) (reporting on several lower court cases that invalidated an administrative scheme under which final federal court decisions involving veterans' benefits would be reviewed, and potentially reversed, by the Secretary of War). For a thorough discussion of *Hayburn's Case*, including its somewhat complicated procedural background and substantive import, see Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 438-41 (1996).

128. *See Oil States Energy Servs.*, 138 S. Ct. at 1373.

129. *See Hayburn's Case*, 2 U.S. (2 Dall.) at 410-11 (disallowing review of final judgments of Article III courts by the Secretary of War); *see also* Pushaw, *supra* note 127, at 441 ("Riding circuit, every Justice agreed that the Constitution's scheme of separated powers requires judicial review and bars political branch revision of judicial orders."). *See generally* William W. Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229, 266-67 (1973) (observing that despite Congress's undoubted power to control the appellate jurisdiction of the Supreme Court, this constitutional authority does not extend to "an unpermitted corruption of the judicial power to decide the case" and emphasizing that "neither may [Congress] seek to direct the outcome of constitutional adjudication by legislating a rule of decision"). Even with respect to a public right, such as a veteran's benefit, Congress may not vest only conditional authority to decide a public rights question in the Article III courts. *Cf.* *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67-68 (1982) (plurality opinion) (describing the public rights doctrine as "draw[ing] upon the principle of separation of powers" and applying only to those matters under historically "exclusive" control of political branches). In other words, the "greater" power to exclude such disputes entirely from being heard and decided in the Article III courts *does not* imply an ostensibly "lesser" power to vest adjudicatory responsibility in the federal courts on an incomplete or contingent basis. *Patchak*, 138 S. Ct. at 919 (Roberts, C.J., dissenting). In sum, Congress may not incompletely or only contingently vest the adjudication of public rights questions in the Article

Despite some fits and starts, perhaps best exemplified by *Stern v. Marshall's* formalist holding,<sup>130</sup> the Supreme Court's overall approach to congressional reassignments of judicial duties to non-Article III entities has been unduly permissive and highly functionalist. The Justices seem confident in their abilities to monitor and police separation of powers problems in their own backyard—and therefore are generally receptive to congressional efforts to usurp or reassign judicial duties.<sup>131</sup>

Detailed and careful consideration of *Patchak* and *Oil States Energy* will show that the problem of congressional case snatching is both real and growing. Simply put, the results in these cases cannot be reconciled with a serious commitment to protecting the institutional authority and independence of the Article III courts.<sup>132</sup> Finally, we will not provide independent extended treatment of *Bank Markazi* because *Patchak* presents an even more obvious—and egregious—attempt by Congress to impose a rule of decision in a pending case.<sup>133</sup>

#### A. *Patchak v. Zinke: Congress Merely Changing the Law or Prescribing a Rule of Decision?*

*Patchak v. Zinke* involved a relatively minor dispute over the trust status of a parcel of land used for a casino run by a Native American tribe in Michigan.<sup>134</sup> Like other important cases featuring comparatively mundane facts,<sup>135</sup> however, it raised an important

III courts. *See id.*

130. *See* 564 U.S. 462, 469 (2011).

131. *See, e.g.,* *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851-52 (1986). Ironically, the Supreme Court has been much more vigilant in strictly enforcing the separation of powers in cases involving novel power sharing arrangements between Congress and the President. *See, e.g.,* *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010). Because Congress and the President have effective tools to check each other, and the federal courts do not, the judiciary's active superintendence of the separation of powers is less critical in this context than it is when Congress attempts to usurp or reassign judicial duties. *See* THE FEDERALIST NO. 78, *supra* note 1, at 465-66.

132. *See infra* Parts II.A-B.

133. *See infra* Part II.A.

134. 138 S. Ct. at 903 (plurality opinion).

135. *See, e.g.,* *Cohen v. California*, 403 U.S. 15, 15-17 (1971); *see also* Ronald J. Krotoszynski, Jr., *Cohen v. California: "Inconsequential" Cases and Larger Principles*, 74 TEX. L. REV. 1251, 1255 (1996) (observing that "[j]udges must be able to look beyond the

constitutional question: May Congress enact a statute that tells the federal courts the legal effect of another statutory provision?<sup>136</sup> The answer to this question should have been obvious and easy given the critical importance of maintaining the structural independence and decisional autonomy of the federal courts.<sup>137</sup> Yet, for six members of the Supreme Court, Congress's ability to reach into the Article III courts to "say what the law is" did not violate the separation of powers.<sup>138</sup>

### 1. *The Klein Rule*

In *United States v. Klein*, the Supreme Court held that Congress may not prescribe a rule of decision in a pending case.<sup>139</sup> *Klein* involved a challenge to a statute that gave the Court of Claims jurisdiction over claims related to calculating just compensation of pardoned Confederate Army members' property taken by Union troops during the Civil War.<sup>140</sup> As former Confederate Army members obtained favorable judgments from the U.S. Court of Claims by providing presidential pardons coupled with oaths of loyalty to the Union, Congress passed a law that retroactively abolished the Court of Claim's jurisdiction over suits in which the merits rested on presidential pardons.<sup>141</sup>

The Supreme Court held that Congress could not withdraw jurisdiction depending on whether a federal court was going to rule for the plaintiff or the government because such an approach "passed the limit which separates the legislative from the judicial power."<sup>142</sup> *Klein* established that Congress cannot strip Article III

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importance of the particular case before them to the broader implications of their ruling" and positing that "*Cohen* provides an excellent example of this phenomenon").

136. *Patchak*, 138 S. Ct. at 910 (plurality opinion).

137. See The FEDERALIST NO. 78, *supra* note 1, at 466; see also Zoldan, *supra* note 69, at 2136-37 (providing an overview of the holding in *United States v. Klein* regarding a rule of decision and explaining how Article III courts have grappled with separation of powers problems associated with legislative intrusions into judicial functions).

138. See *Patchak*, 138 S. Ct. at 902 (plurality opinion); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

139. 80 U.S. (13 Wall.) 128, 146 (1871).

140. *Id.* at 131-32.

141. See *id.* at 143-44.

142. *Id.* at 147.

courts of jurisdiction based “solely on the application of a rule of decision, in causes pending, prescribed by Congress.”<sup>143</sup> Moreover, the precedent stands for the proposition that Congress cannot retroactively strip jurisdiction from Article III courts “as a means to an end.”<sup>144</sup>

*Klein*’s holding is attributed with standing for the Changed Law Rule,<sup>145</sup> which provides that federal courts will apply a revised law to pending cases, but that this rule applies “only when Congress sets some kind of policy for the courts to follow.”<sup>146</sup> As the Chief Justice has argued, “changing the law’ must imply some measure of generality or preservation of an adjudicative role for the courts.”<sup>147</sup> By way of contrast, when Congress attempts to change the law for a single litigant in a single case, he posits that Congress “has pronounced the equivalent of ‘Smith wins’” and violates the separation of powers doctrine.<sup>148</sup>

The practical difference between “changing the law” and prescribing a rule of decision can be ephemeral.<sup>149</sup> Some legal scholars suggest that Congress actually changes the law, even in the *Klein* context, if it simply passes a statute prescribing a rule of decision without instructing the federal courts on how to apply it.<sup>150</sup> We believe that the difference lies in tinkering with the power to render

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143. *Id.* at 146.

144. *Id.* at 145.

145. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (announcing what is now known as the Changed Law Rule); *see also* Doidge, *supra* note 67, at 953-64; Zoldan, *supra* note 67 (manuscript at 24-27).

146. Evan C. Zoldan, *Is the Federal Judiciary Independent of Congress?*, 70 STAN. L. REV. ONLINE 135, 139 (2018); *see* Zoldan, *supra* note 69, at 2206-07 (discussing the distinction between changing the law and prescribing a rule of decision for a pending case and the importance of a law’s generality to enforcing this distinction).

147. *Patchak v. Zinke*, 138 S. Ct. 897, 920 (2018) (Roberts, C.J., dissenting); *see* Doidge, *supra* note 67, at 959-63 (discussing and explaining the Changed Law Rule and its explication in *United States v. Klein*).

148. *Patchak*, 138 S. Ct. at 918 (Roberts, C.J., dissenting).

149. Transcript of Oral Argument at 11-12, *Patchak*, 138 S. Ct. 897 (No. 16-498) (featuring Justice Elena Kagan pressing counsel to articulate the elusive difference between section 2(b) and a constitutional jurisdiction-stripping statute).

150. *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).



a decision (allowed) and directly ordering a disposition in a pending case (prohibited).<sup>151</sup>

*United States v. Winstar Corporation* demonstrates the potential elusiveness of the distinction.<sup>152</sup> In *Winstar*, the Federal Home Loan Bank Board encouraged banks in good standing to take over failing thrifts through mergers; in return, the healthy banks were promised supervisory goodwill and capital credits that counted toward capital reserve requirements imposed by federal regulations.<sup>153</sup> Congress subsequently enacted a statute that retroactively prohibited the healthy banks from counting the goodwill capital credits in computing the required reserves, which forced many of the merged institutions into insolvency.<sup>154</sup> A few of the healthy banks that had since run into financial troubles after the merger and passage of the statute challenged it on separation of powers grounds.<sup>155</sup>

The Supreme Court invalidated the law because Congress had retroactively directed the merits outcome by shifting costs in this particular case to three banks after promising to provide them with goodwill toward their calculations of capital reserve requirements.<sup>156</sup> Thus, the Court found that the statute in *Winstar* did nothing more than force costs onto particular parties in a specific case; on these facts, the statute lacked the requisite generality to constitute a change in the law rather than a rule of decision.<sup>157</sup>

In both *Klein* and *Winstar*, the Court found that Congress was violating the separation of powers; Congress snatched cases from the Article III courts by enacting statutes that did nothing more than decide a pending case in favor of one party.<sup>158</sup> This reasoning should have applied in *Patchak* (and *Bank Markazi* as well)—but it did not.<sup>159</sup> Because *Patchak*'s Gun Lake Act failed to “change the law” within the meaning of *Klein*, it constitutes a usurpation of

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151. See *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 436 (1992).

152. 518 U.S. 839 (1996).

153. *Id.* at 845-49.

154. *Id.* at 856-58.

155. *Id.* at 858.

156. *Id.* at 901-03.

157. *Id.* at 900, 902-03.

158. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871); *Winstar*, 518 U.S. at 900.

159. See *Patchak v. Zinke*, 138 S. Ct. 897, 908 (2018) (plurality opinion).

judicial power rather than an appropriate exercise of legislative power.<sup>160</sup>

## 2. *Patchak v. Zinke*

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, also known as the Gun Lake Tribe, is a Native American tribe that resides in southwestern Michigan.<sup>161</sup> The Gun Lake Tribe has lived in the United States for hundreds of years.<sup>162</sup> However, the U.S. Secretary of Interior did not formally recognize the tribe until 1999.<sup>163</sup> After the U.S. federal government officially recognized the Gun Lake Tribe, the tribe petitioned the Secretary to place a tract of land, called the Bradley Property, into trust; it planned to build and operate a casino on the parcel.<sup>164</sup> In May 2005, the Secretary of Interior “agreed and posted a notice informing the public that the Bradley Property would be taken into trust for the Band.”<sup>165</sup> Eventually, in February 2011, the Gun Lake Tribe opened its casino.<sup>166</sup>

However, shortly before the Secretary placed the Bradley Property in trust, a neighboring landowner, David Patchak, filed an action challenging the Secretary’s decision as a violation of the

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160. *Id.* at 908 n.5.

161. *Id.* at 903.

162. *Id.* There is evidence of a relationship between the Gun Lake Tribe and the United States that dates back as early as 1795 when the two parties began negotiating treaties. *Id.* The Gun Lake Tribe maintains an official website that provides a detailed history of their tribe. See *Gun Lake Tribe History*, MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS, <https://gunlaketribe-nsn.gov/about/our-heritage/> [<https://perma.cc/X4HG-KXNW>].

163. Indian Entities Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs, 65 Fed. Reg. 13,298 (2000); Final Determination to Acknowledge the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan, 63 Fed. Reg. 56,936 (Oct. 14, 1998).

164. 25 U.S.C. § 2703(4)(B) (providing that recognized Indian tribes may operate casinos on “Indian lands,” which include lands “held in trust by the United States for the benefit of any Indian tribe”). The Gun Lake Tribe “identified a 147-acre parcel of land in Wayland, known as the Bradley Property, where it wanted to build a casino. The [tribe] asked the Secretary to invoke the Indian Reorganization Act, § 5, 48 Stat. 985, 25 U.S.C. § 5108, and take the Bradley Property into trust.” *Patchak*, 138 S. Ct. at 903 (plurality opinion).

165. *Patchak*, 138 S. Ct. at 903 (plurality opinion); Notice of Determination, 70 Fed. Reg. 25,596 (May 2, 2005).

166. *Patchak*, 138 S. Ct. at 903 (plurality opinion).

Indian Reorganization Act.<sup>167</sup> The Secretary argued that Patchak's suit was "barred by sovereign immunity and that Patchak lacked prudential standing to bring it."<sup>168</sup> The district court ruled in favor of the Department of the Interior,<sup>169</sup> but the U.S. Court of Appeals reversed this ruling.<sup>170</sup> The Supreme Court granted review and affirmed the U.S. Court of Appeals for the District of Columbia Circuit.<sup>171</sup>

In *Patchak I*, the Supreme Court held both that Patchak had prudential standing and that the Secretary waived sovereign immunity, allowing Patchak's suit to go forward.<sup>172</sup> The Justices remanded the case for further proceedings.<sup>173</sup> However, the tribe decided that the litigation presented an existential threat to its newly opened casino; accordingly, it decided to seek the aid of Congress in fending off Patchak's suit.<sup>174</sup> The tribe's efforts proved to be wildly successful—they obtained enactment of a statute aimed at ending, once and for all, Patchak's lawsuit.<sup>175</sup>

In 2014, while Patchak's suit was still pending in the District Court, Congress enacted the Gun Lake Act.<sup>176</sup> Pursuant to section 2(a), the Bradley Property was "reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust

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167. *Id.* Patchak argued that under the Administrative Procedure Act, 5 U.S.C. §§ 702, 706(2), "the Secretary lacked statutory authority to take the Bradley Property into trust for the Band. [Furthermore,] the Indian Reorganization Act [IRA] does not allow the Secretary to take land into trust for tribes that were not under federal jurisdiction when the statute was enacted in 1934." *Id.* (citing *Carcieri v. Salazar*, 555 U.S. 379, 382-83 (2009)). Therefore, because the federal government did not recognize the Gun Lake Tribe until 1999, it was arguably too late for the Bradley Property to be put into trust for the band under the terms of the IRA. *Id.*

168. *Id.*

169. *Patchak v. Salazar*, 646 F. Supp. 2d 72, 76 (D.D.C. 2009), *rev'd*, 632 F.3d 702 (D.C. Cir. 2011).

170. *Patchak v. Salazar*, 632 F.3d 702, 704-07 (D.C. Cir. 2011), *aff'd*, 567 U.S. 209 (2012).

171. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak (Patchak I)*, 567 U.S. 209, 211 (2012).

172. *Id.* at 212.

173. *Id.* at 228.

174. Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, § 2, 128 Stat. 1913, 1913-14 (2014).

175. *Id.*

176. *Id.*

are ratified and confirmed.”<sup>177</sup> Section 2(b) in turn seeks to tell the federal courts what to do with section 2(a):

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.<sup>178</sup>

As a result of the enactment of section 2(b) of the Gun Lake Act, the district court did what Congress ordered it to do—it dismissed the suit for lack of jurisdiction.<sup>179</sup> The D.C. Circuit affirmed.<sup>180</sup>

The Supreme Court again granted review on a single issue: whether section 2(b) violates separation of powers principles associated with Article III of the Constitution.<sup>181</sup> Section 2(b) of the statute arguably violates the *Klein* rule that prohibits Congress from prescribing a rule of decision to a federal court in a pending case.<sup>182</sup> Congress may write the laws, but the federal courts, not the Congress, get to interpret them.<sup>183</sup>

This important separation of powers question badly divided the Justices. Four Justices held that section 2(b) was constitutional because Congress had simply altered the substantive law—which *Ex parte McCordle*<sup>184</sup> permits Congress to do.<sup>185</sup> Justice Ruth Bader Ginsburg, by way of contrast, found that section 2(b) merely reversed the Administrative Procedure Act’s (APA) waiver of sovereign immunity.<sup>186</sup> Justice Stephen Breyer also voted to sustain the statute, finding that section 2(b) constituted a jurisdiction-stripping

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177. *Id.*

178. *Id.*

179. *Patchak v. Jewell*, 109 F. Supp. 3d 152, 156 (D.D.C. 2015).

180. *Patchak v. Jewell*, 828 F.3d 995, 999 (D.C. Cir. 2016).

181. *Patchak v. Zinke*, 138 S. Ct. 897, 904 (2018) (plurality opinion).

182. 80 U.S. (13 Wall.) 128, 146 (1871).

183. *See id.*; *see also* Doidge, *supra* note 67, at 942-45 (outlining the separation of powers doctrine and using the *Klein* case as a prism for the analysis).

184. 74 U.S. (7 Wall.) 506, 514 (1868) (holding that repealing a statute during the pendency of the cause of action deprived the court of jurisdiction because Congress has the power to alter the law).

185. *Patchak*, 138 S. Ct. at 907 (plurality opinion).

186. *Id.* at 912 (Ginsburg, J., concurring).

device—rendering it largely redundant with section 2(a).<sup>187</sup> Six Justices, divided 3-1-2, voted to sustain the statute over Patchak’s separation of powers objection.<sup>188</sup>

Writing for the four Justice plurality, Justice Clarence Thomas began by highlighting that the federal government has three distinct branches and that each branch holds and exercises a different power.<sup>189</sup> Moreover, Justice Thomas emphasized the principle of separation of powers, which “among other things, prevents Congress from exercising the judicial power.”<sup>190</sup> Furthermore, the plurality looked to past precedent “[t]o distinguish between permissible exercises of the legislative power and impermissible infringements of the judicial power.”<sup>191</sup>

Justice Thomas explained that “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.’”<sup>192</sup> He added that “[o]ne 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.’”<sup>193</sup> A clear example of Congress crossing the line would be “a statute that says, ‘In *Smith v. Jones*, *Smith* wins.’”<sup>194</sup>

The plurality concluded that section 2(b) of the Gun Lake Act “changes the law” and was therefore consistent with the separation of powers doctrine.<sup>195</sup> To support this conclusion, Justice Thomas interpreted section 2(b) as a “jurisdiction-stripping” provision by

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187. *Id.* at 911-12 (Breyer, J., concurring).

188. *Id.* at 902 (plurality opinion).

189. *Id.* at 904.

190. *Id.* at 905 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)).

191. *Id.* (citing *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 438 (1992)).

192. *Id.* (alterations in original) (first citing *Seattle Audubon Soc’y*, 503 U.S. at 438; and then citing *Plaut*, 514 U.S. at 218).

193. *Id.* (second and third alterations in original) (citing *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 (2016)). In *Bank Markazi*, the Supreme Court held that the Iran Threat Reduction and Syria Human Rights Act of 2012, which effectively determined the outcome of pending litigation, “d[id] not offend ‘separation of powers principles.’” *Bank Markazi*, 136 S. Ct. at 1329 (quoting *Miller v. French*, 530 U.S. 327, 350 (2000)).

194. *Patchak*, 138 S. Ct. at 905 (citing *Bank Markazi*, 136 S. Ct. at 1323 n.17) (plurality opinion).

195. *Id.*

finding that “[t]he statute uses jurisdictional language.”<sup>196</sup> He explained that statutory language that declares:

an “action” relating to the Bradley Property “shall not be filed or maintained in a Federal court” ... imposes jurisdictional consequences: Actions relating to the Bradley Property “shall be promptly dismissed.” Section 2(b) has no exceptions. And it applies “[n]otwithstanding any other provision of law,” including the general grant of federal-question jurisdiction, 28 U.S.C. § 1331.<sup>197</sup>

It is important to note that section 2(b) does not use the word “jurisdiction,” and Justice Thomas acknowledges this fact.<sup>198</sup> Yet, the plurality still concluded that section 2(b) should be read as nothing more than a run-of-the-mill “jurisdiction-stripping statute” because the statute does not identify any specific elements of Patchak’s claim for relief.<sup>199</sup>

The characterization of section 2(b) as a “jurisdiction-stripping statute” was essential because past precedents have treated similar jurisdiction-stripping statutes as “chang[ing] the law’ for the purpose of Article III.”<sup>200</sup> In *Ex parte McCardle*, Congress repealed an 1867 statute that provided jurisdiction for the Supreme Court to hear appeals in cases denying writs of habeas corpus.<sup>201</sup> Military authorities imprisoned William McCardle, an anti-Reconstruction newspaper editor from Mississippi; McCardle sought a writ of habeas corpus ordering his release from military custody.<sup>202</sup> After losing before the Circuit Court of the District of Mississippi, McCardle appealed the adverse decision to the Supreme Court—but while the case was pending, Congress repealed the statute

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196. *Id.* at 905-06.

197. *Id.* at 905 (citations omitted).

198. *Id.*

199. *Id.* at 906; see *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) (“[W]hen [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”). *But cf.* *United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1871) (holding a statute unconstitutional because Congress exceeded its constitutional authority when it made the federal courts’ jurisdiction contingent on the outcome on the merits of a pending case).

200. *Patchak*, 138 S. Ct. at 906 (plurality opinion).

201. 74 U.S. (7 Wall.) at 514.

202. See Van Alstyne, *supra* note 129, at 236.

McCardle had used to seek review of the lower court's denial of his petition.<sup>203</sup> The Supreme Court sustained Congress's power to repeal its appellate jurisdiction over McCardle's case, because jurisdiction-stripping statutes do not involve "the exercise of judicial power" or "legislative interference with courts in the exercising of continuing jurisdiction."<sup>204</sup>

Applying *McCardle*, the *Patchak* Court found that section 2(b) altered the law, rather than dictated a rule of decision in a pending case, and did not unconstitutionally usurp or interfere with the ability of the Article III courts to exercise the judicial power of the United States.<sup>205</sup> Justice Thomas also cited *Bank Markazi v. Peterson* in support of this outcome.<sup>206</sup> He explained that "[t]he *Bank Markazi* Court rejected a separation of powers challenge to a statute similar to the Gun Lake Act, insofar as"<sup>207</sup> Congress "may amend the law and make the change applicable to specific pending cases, even when the amendment is outcome determinative."<sup>208</sup>

Section 2(b), however, is significantly less general than the Iran Threat Reduction and Syria Human Rights Act of 2012 at issue in *Bank Markazi*.<sup>209</sup> Given that the *Patchak* majority found the Gun Lake Act possessed the requisite level of generality to constitute a change in the governing law, rather than a congressional attempt to prescribe a rule of decision for a single case and litigant, it necessarily follows that the Iran Threat Reduction and Syria Human Rights Act of 2012, which affected the legal rights of a group of litigants holding judgments from several lawsuits, also possessed the necessary level of generality to fall under *McCardle* rather than *Klein*.

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203. *Id.* at 237-39.

204. *McCardle*, 74 U.S. (7 Wall) at 514; *see also* Van Alstyne, *supra* note 129, at 230, 238-40 (analyzing how Congress has sought either to control the merits of pending litigation within the federal courts or to limit, if not preclude, the Article III courts from exercising the power of judicial review).

205. *See Patchak*, 138 S. Ct. at 905, 910-11 (plurality opinion).

206. *Id.* at 905 (citing *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 (2016)).

207. Joseph S. Diedrich, *Article III, Judicial Restraint, and This Supreme Court*, 72 SMU L. REV. 235, 241 (2019).

208. *Bank Markazi*, 136 S. Ct. at 1317.

209. *See id.* at 1320. In the end, the Supreme Court held that the congressional statute merely changed the applicable governing law. *See id.* at 1329.

Justice Breyer, who joined the plurality opinion, also filed a separate concurrence.<sup>210</sup> He reasoned that reading section 2(a) and section 2(b) together support the conclusion that the separation of powers had not been violated.<sup>211</sup> In his view, section 2(a) simply “gave the Secretary the authority to take the Bradley Property into trust” and section 2(b) stated that “federal courts shall not hear cases challenging the land’s trust status.”<sup>212</sup> This reasoning is puzzling because Justice Breyer seems to blithely admit that section 2(b) imposes a rule of decision on the federal courts in a pending case—however, in his analysis, this fact possesses little, if any, legal relevance.

Justice Ginsburg, with whom Justice Sotomayor joined, concurred in the judgment.<sup>213</sup> She reasoned that section 2(b) repealed the waiver of the “[g]overnment’s sovereign immunity from suit” under the APA.<sup>214</sup> Patchak sought relief from the Secretary of Interior under the APA, which has a “waiver of the Federal Government’s immunity from suit.”<sup>215</sup> Justice Ginsburg explained that the “consent of the United States to suit may be withdrawn ‘at any time,’” including during the pendency of litigation within the Article III courts.<sup>216</sup> She concluded that section 2(b) withdrew the APA’s waiver of sovereign immunity as it applies to the Bradley Property.<sup>217</sup> This reasoning and conclusion allowed Justice Ginsburg to avoid deciding the separation of powers issue.

Chief Justice Roberts dissented and was joined by Justices Anthony M. Kennedy and Neil Gorsuch.<sup>218</sup> Roberts objected that the plurality’s approach gave Congress unlimited power to dictate the outcome of a single pending case.<sup>219</sup> In his view, section 2(b) of the Gun Lake Act violated Article III of the Constitution and the

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210. *Patchak*, 138 S. Ct. at 911-12 (Breyer, J., concurring).

211. *Id.* at 911.

212. *Id.*

213. *Id.* at 912 (Ginsburg, J., concurring).

214. *Id.*; see Administrative Procedure Act, 5 U.S.C. § 702.

215. *Patchak*, 138 S. Ct. at 912 (Ginsburg, J., concurring).

216. *Id.* (quoting *Lynch v. United States*, 292 U.S. 571, 581 (1934)).

217. *Id.* at 913 (opining that “Congress acted effectively to displace the APA’s waiver of immunity for suits against the United States with a contrary command applicable to the Bradley Property”).

218. *Id.* at 914 (Roberts, C.J., dissenting).

219. *Id.*



principle of separation of powers.<sup>220</sup> This was because Patchak's suit was the only pending litigation relating to the Bradley Property when Congress enacted the Gun Lake Act in 2014; no other challenges could be brought due to the expiration of the APA's six-year statute of limitations.<sup>221</sup> Accordingly, the Gun Lake Act was plainly targeted legislation that directed the outcome of Patchak's case—and Patchak's case alone.

Moreover, Chief Justice Roberts correctly observed that section 2(b) of the Gun Lake Act lacked any jurisdiction-stripping language.<sup>222</sup> In prior cases, the Supreme Court had ruled that Congress must provide a plain statement when it enacts a statute that establishes new jurisdictional limits.<sup>223</sup> Without such a plain statement, the Supreme Court will treat the statute as nonjurisdictional.<sup>224</sup> In light of these principles, Roberts found that section 2(b) was *not* a jurisdiction-stripping statute.<sup>225</sup> Instead, Congress was attempting to use its legislative powers to direct the outcome of Patchak's pending suit—a constitutionally impermissible usurpation of the judicial power under *Klein*.<sup>226</sup>

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220. *Id.*

221. *Id.* at 916-17.

222. *Id.* at 918-19.

223. *See id.* (observing that the Court had previously held that “nearly identical statutory language ‘says nothing about whether a federal court has subject-matter jurisdiction’” (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 164 (2010))). Moreover, comparing the statute in *Reed Elsevier*, which provided that “no civil action ... shall be instituted,” with section 2(b) of the Gun Lake Act highlights the similarities between them. *See Reed Elsevier*, 559 U.S. at 164; Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, § 2, 128 Stat. 1913 (2014).

224. *See Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) (“To ward off profligate use of the term ‘jurisdiction,’ we have adopted a ‘readily administrable bright line’ for determining whether to classify a statutory limitation as jurisdictional. We inquire whether Congress has ‘clearly state[d]’ that the rule is jurisdictional; absent such a clear statement, we have cautioned, ‘courts should treat the restriction as nonjurisdictional in character.’” (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006))). It is also important to note the unique circumstances and history associated with this case as it deals with American Indian tribal sovereignty and Congress's plenary power over the affairs with and of the Indian tribes. *See generally* Kendall McCoy, Note, “*Perhaps Congress Would, Perhaps Congress Should*”—*Why Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak and Carcieri v. Salazar Must Be Legislatively Overridden to Protect IRA Trust Acquisition Authority*, 43 AM. INDIAN L. REV. 459 (2018-2019) (discussing the rights of tribes as distinct nations due to their legal status as separate governments that preexist the Constitution).

225. *Patchak*, 138 S. Ct. at 918-19 (Roberts, C.J., dissenting).

226. *Id.* at 919-20.

Finally, Chief Justice Roberts addressed the alternative reading of section 2(b) set forth by Justice Ginsburg. He argued that because Congress made no “unambiguous intention to withdraw” section 702’s waiver of sovereign immunity, nor used any specific language, like “immunity” or “United States,” it was implausible to read the statute as withdrawing the APA’s waiver of sovereign immunity.<sup>227</sup> He acknowledged that Congress may, by express language, repeal a waiver of sovereign immunity, but he concluded that Congress had not actually taken this step.<sup>228</sup>

In our view, the Chief Justice’s dissent possesses the greatest persuasive force among the four opinions in *Patchak* because it best vindicates the Hamiltonian concerns about the inherent structural weakness of the Article III federal courts. His dissent, far more than either the plurality opinion or the concurring opinions, articulates precisely why section 2(b) unconstitutionally intrudes into the authority of the federal judiciary and ably applies and defends the separation of powers doctrine in the context of attempted congressional case snatching. After all, under *Marbury*, the federal judiciary—not Congress—possesses the constitutional authority to “say what the law is.”<sup>229</sup>

Article III of the Constitution confers power on the federal judiciary to decide cases and controversies,<sup>230</sup> which is an essential aspect of the constitutional system’s checks and balances.<sup>231</sup> The Article III courts, not Congress, have the power to interpret and apply law, which “can no more be shared’ with another branch than ‘the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.’”<sup>232</sup> Essentially, Article III “sets out not only what the Judiciary can do, but also what Congress cannot.”<sup>233</sup>

227. *Id.* at 921-22.

228. *Id.*

229. 5 U.S. (1 Cranch) 137, 177 (1803); *see also* *Baker v. Carr*, 369 U.S. 186, 211 (1962) (“Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed ... is a responsibility of this Court as ultimate interpreter of the Constitution.”).

230. U.S. CONST. art. III, § 2.

231. *Stern v. Marshall*, 564 U.S. 462, 483 (2011).

232. *Id.* (quoting *United States v. Nixon*, 418 U.S. 683, 704 (1974)).

233. *Patchak*, 138 S. Ct. at 915 (Roberts, C.J., dissenting).

In 2014, when Congress passed the Gun Lake Act, it plainly sought to determine the result for one individual's lawsuit.<sup>234</sup> Congress's enactment of the Gun Lake Act effectively told the Article III courts how to interpret section 2(a) in a pending case; it set forth a rule of decision that marked a clear violation of the separation of powers.<sup>235</sup> Simply put, Congress lacks the constitutional authority to enact a law that orders the federal judiciary to interpret and apply statutory language in a specific way.<sup>236</sup> Yet, section 2(b) has precisely this purpose and effect.

To be sure, Article III provides Congress with the power to create lower federal courts and to determine their jurisdiction.<sup>237</sup> Congress, not the Article III courts, enjoys the power to control the jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court.<sup>238</sup> Consistent with these principles, Congress possessed constitutional authority to withdraw the jurisdiction of the federal courts to hear any lawsuit involving the Bradley Property.<sup>239</sup> Justice Thomas's plurality opinion invokes *Ex parte McCordle* in support of this outcome.<sup>240</sup> What is more, the federal courts will not look into the specific reasons that motivated Congress to withdraw jurisdiction if this is actually what Congress has done.<sup>241</sup> In sum, even if Congress could validly withdraw the

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234. *See id.* at 904 (plurality opinion) (discussing Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (2014)).

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

236. *Id.*; Bank Markazi v. Peterson, 136 S. Ct. 1310, 1323 n.17 (2016) (opining that Congress lacks constitutional authority to enact a statute that directs the outcome of a hypothetical pending case that provides that in “Smith v. Jones,” “Smith wins”); *see also* RICHARD FALLON, JOHN MANNING, DANIEL MELTZER & DAVID SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 324 (7th ed. 2015) (“Whatever else the Court may have had in mind, it is surely right, isn't it, 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?”).

237. U.S. CONST. art. III, § 1 (conferring on Congress the power to create, or not create, the lower federal courts); *see* Sheldon v. Sill, 49 U.S. (7 How.) 441, 449 (1850) (“Courts created by statute can have no jurisdiction but such as the statute confers.”).

238. *See* U.S. CONST. art. III, §§ 1-2; *see also* Jellum, *supra* note 61, at 882-92 (discussing when statutory directives disrupt the balance between Article III courts and Congress, thereby crossing the constitutional line, and accordingly violate the separation of powers doctrine).

239. *Patchak*, 138 S. Ct. at 903-05 (plurality opinion).

240. *Id.* at 905.

241. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1868) (holding that the Supreme Court will not question Congress's decision to withdraw jurisdiction from Article III courts); *see*

jurisdiction of the Article III courts, it could not dictate to them how to interpret and apply the Gun Lake Act.<sup>242</sup>

Of course, Justice Thomas would claim, counterfactually, that the Gun Lake Act does not apply only to Patchak's claim but also "creates new law for suits relating to the Bradley Property."<sup>243</sup> From this vantage point, the Gun Lake Act decides not just Patchak's claim but also any and all future claims that might arise relating to the government taking the Bradley Property into trust. Thus, the Gun Lake Act could be characterized as setting a government policy and ultimately changing the law, not in violation of *Klein* but in agreement with the holding in *Ex parte McCardle*.<sup>244</sup>

With that said, however, it is a stretch (and a big one) to claim with a straight face that the Gun Lake Act sets a general policy when the statute's *only* possible legal effect is to retroactively protect a single government action. Additionally, the statute neither amended the Indian Reorganization Act nor changed the standards for how the government takes lands into trust.<sup>245</sup> Furthermore, the Gun Lake Act did not impact any other tracts of land—only the Bradley Property.<sup>246</sup> Most importantly, when Congress enacted the Gun Lake Act in 2014, the only pending lawsuit was Patchak's action relating to the Bradley Property; no other challenges could ever be filed because the APA's six-year statute of limitations had expired.<sup>247</sup> Thus, it is quite obvious that the Gun Lake Act constituted targeted legislation enacted with the purpose and effect of directing the outcome in Patchak's case.

Congress effectively snatched the Article III courts' power to interpret and apply the law—here the Gun Lake Act—by enacting

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Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1593-1605 (1986) (discussing *McCardle* and the political circumstances that framed the Supreme Court's decision); Jellum, *supra* note 61, at 845 ("Federal statutes that provide a rule of decision violate federal separation of powers.").

242. *But see Patchak*, 138 S. Ct. at 905-06 (plurality opinion).

243. *Id.* at 908.

244. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1874). *But see Ex parte McCardle*, 74 U.S. (7 Wall.) at 514-15.

245. *See Gun Lake Trust Land Reaffirmation Act*, Pub. L. No. 113-179, § 1603, 128 Stat. 1913 (2014).

246. *Id.*

247. *Patchak*, 138 S. Ct. at 916-17 (Roberts, C.J., dissenting).

a statute that simply tells the federal courts how to rule in Patchak's case.<sup>248</sup> The plurality's reasoning and outcome set a dangerous precedent that chips away at the viability of *Klein*.<sup>249</sup> If the Supreme Court continues to endorse congressional case snatching of this sort, Congress will surely resort to this device with greater frequency to dispense political favors to litigants with the ability to seek and hold Congress's attention.<sup>250</sup>

### 3. *Bills of Attainder and the Presumption Against Implied Repeal*

Other constitutional considerations augur in favor of invalidating section 2(b) of the Gun Lake Act. Chief Justice Roberts emphasized in his *Patchak* dissent that American constitutional jurisprudence favors legislative generality and disfavors targeted legislation.<sup>251</sup> This is supported by the text of the Constitution, which disavows legislation with limited generality.<sup>252</sup> Salient examples include the clauses prohibiting Bills of Attainder,<sup>253</sup> Titles of Nobility,<sup>254</sup> Ex Post Facto laws,<sup>255</sup> laws impairing the obligation of contracts,<sup>256</sup> and the Takings Clause.<sup>257</sup> The clause with the most potential relevance to *Patchak* is plainly the Bill of Attainder Clause.<sup>258</sup>

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248. Zoldan, *supra* note 67 (manuscript at 7, 19-24) (arguing that the core of judicial independence is the power of the courts to resolve cases pending before them without legislative interference).

249. *See Klein*, 80 U.S. (13 Wall.) at 146.

250. It is important to note a key distinction. Congress may change the substantive laws, and the federal courts will give effect to such changes; Congress may also modify the jurisdiction of the lower federal courts and even the appellate jurisdiction of the Supreme Court. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512-14 (1868) (holding that Congress could eliminate the Court's appellate jurisdiction in a pending case without violating the Constitution). However, Congress cannot change the law for a single litigant in a single case, such as pronouncing the equivalent of "Smith wins" because it violates the separation of powers doctrine. *See Patchak*, 138 S. Ct. at 914-15 (Roberts, C.J., dissenting).

251. *See Patchak*, 138 S. Ct. at 915 (Roberts, C.J., dissenting).

252. *See* U.S. CONST. art. I, §§ 9-10.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* art. I, § 10.

257. *Id.* amend. V.

258. *Id.* art. I, § 9. *See generally* Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625 (2014) (discussing the Bill of Attainder, Titles of Nobility, Ex Post Facto, Contracts, and Taking Clauses, and their historical connection with a value of legislative

Under Article I, Section 9, Clause 3 of the Constitution, “[n]o Bill of Attainder ... shall be passed.”<sup>259</sup> Essentially, a bill of attainder is targeted legislation that affects only specific individuals and imposes punishment without judicial process.<sup>260</sup> Thus, the Constitution prohibits the federal government from enacting laws that impose legislative punishment.<sup>261</sup> James Madison explained that “[b]ills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation.”<sup>262</sup>

The Supreme Court has held that “the Bill of Attainder Clause [i]s not to be given a narrow historical reading (which would exclude bills of pains and penalties),” but should be construed to prohibit “legislative punishment, of any form or severity, of specifically designated persons or groups.”<sup>263</sup> This approach is necessary to effectuate the separation of powers rule that prohibits Congress from “exercis[ing] the powers and office of judge.”<sup>264</sup>

The Supreme Court has established a three-part test for determining when legislation violates the Bill of Attainder Clause.<sup>265</sup> To violate this clause, legislation must (1) target specific individuals or groups; (2) include punishment; and (3) fail to provide judicial process (that is, a trial).<sup>266</sup> The Court has a narrow definition of

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generality).

259. U.S. CONST. art. I, § 9.

260. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (“A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.”); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 641-56 (2d ed. 1988) (providing an overview of bills of attainder). See generally Anthony Dick, *The Substance of Punishment Under the Bill of Attainder Clause*, 63 STAN. L. REV. 1177 (2011) (providing discussions of cases in which the Supreme Court found violations of the Bill of Attainder Clause).

261. See *Blawis v. Bolin*, 358 F. Supp. 349, 353-54 (D. Ariz. 1973) (holding that the Communist Control Act of 1954, 50 U.S.C. § 842, which disenfranchised the Communist Party and its affiliates and had as its stated purpose the proscription of the party from the political process, inflicted legislative “punishment” for purposes of applying the Bill of Attainder Clause); *In re Yung Sing Hee*, 36 F. 437, 439 (C.C.D. Or. 1888) (holding unconstitutional a law that inflicted punishment, in the form of banishment or exile, on a U.S. citizen on bill of attainder grounds).

262. THE FEDERALIST No. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961).

263. *United States v. Brown*, 381 U.S. 437, 447 (1965) (citing *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 286 (1827)).

264. *Cummings v. Missouri*, 71 U.S. (6 Wall.) 277, 323 (1866).

265. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 143-44 (1951) (Black, J., concurring) (articulating the elements of an unlawful bill of attainder).

266. *Id.*

punishment, and therefore, legislation is rarely invalidated under the Bill of Attainder Clause.<sup>267</sup>

In *Bank Markazi v. Peterson*, victims of terrorism as well as the personal representatives of the victims' estates brought an action against Iran for the injuries and deaths associated with terrorist attacks allegedly supported by the government of Iran.<sup>268</sup> However, their judgments against Iran could not be fulfilled by assets in the United States, so they brought claims against Bank Markazi, Iran's central bank.<sup>269</sup> The Foreign Sovereign Immunities Act did not permit a central bank's assets to be reached to satisfy judgments against the bank's home country.<sup>270</sup> This led Congress to enact the Iran Threat Reduction and Syria Human Rights Act, which permitted claims against Iran to be satisfied with Bank Markazi's assets in the United States.<sup>271</sup>

More specifically, Congress provided that the "financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Peterson et al. v. Islamic Republic of Iran et al.*, Case No. 10 Civ. 4518 (BSJ) (GWG)" would be available "to satisfy any judgment ... awarded against Iran for damages for personal injury or death caused by" acts of terrorism.<sup>272</sup> Thus, the Iran Threat Reduction and Syria Human Rights Act clearly applied only to a single action to enforce outstanding judgments against Bank Markazi that had been brought by these particular plaintiffs.<sup>273</sup> Nevertheless, the Supreme

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267. See *Selective Serv. Sys. v. Minn. Pub. Int. Rsch. Group*, 468 U.S. 841, 852 (1984) (holding that denial of noncontractual government benefits, such as financial aid, did not constitute legislative punishment); see also *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 470-72 (1977) (holding that requiring former President Richard M. Nixon to turn over his Oval Office recordings and papers to the General Services Administration did not constitute legislative punishment and accordingly did not violate the Bill of Attainder Clause). However, the Supreme Court has held that categorical exclusion from current or future government employment constitutes a form of legislative punishment. See *United States v. Brown*, 381 U.S. 437, 449-50 (1965).

268. 136 S. Ct. 1310, 1319-20 (2016).

269. *Id.*

270. *Id.* at 1318.

271. *Id.* at 1318-19.

272. 22 U.S.C. § 8772(a)(1), (b)(2); see Evan C. Zoldan, *Legislative Design and the Controllable Costs of Special Legislation*, 78 MD. L. REV. 415, 440-42 (2019) (arguing that Congress's enactment of special legislation or targeted legislation, as in *Bank Markazi*, presents serious constitutional issues and should probably be deemed unconstitutional).

273. Zoldan, *supra* note 272, at 440-42.

Court did not invalidate the Iran Threat Reduction statute as a violation of the Bill of Attainder Clause (or on more general *Klein* separation of powers grounds).<sup>274</sup>

However, the Court could have avoided the Bill of Attainder Clause by simply enforcing the holding of *Klein* in *Bank Markazi* and *Patchak*.<sup>275</sup> In our view, as in *Klein*, the Iran Threat Reduction and Syria Human Rights Act and the Gun Lake Act were statutes that directed a rule of decision.<sup>276</sup> Both statutes applied only to specific litigants named in the language of the respective statutes.<sup>277</sup> In *Patchak*, it is difficult to see how the legislative effect of section 2(b) does anything other than serve to prescribe a rule of decision.<sup>278</sup> Similarly, in *Bank Markazi*, the legislative effect of the statute imposed a rule of decision by allowing select, specifically identified judgments to be executed against assets held by Iran's central bank, Bank Markazi.<sup>279</sup>

So much for Justice Thomas's argument that the Gun Lake Act changed the law.<sup>280</sup> What about Justice Ginsburg's argument that the statute repealed the APA's waiver of sovereign immunity?<sup>281</sup> In our view, Justice Ginsburg states a valid legal rule—but a rule that simply does not apply to the facts at bar in *Patchak*.

In finding that the Gun Lake Act restored the federal government's sovereign immunity, Justice Ginsburg posits that “[w]hat Congress grants, it may retract.”<sup>282</sup> This is certainly true. Nevertheless, it begs the question of what Congress must do in order to effectively revise a general waiver of sovereign immunity. In the APA, and more specifically section 702,<sup>283</sup> Congress gave its consent to Patchak's suit seeking judicial review of the Department of the Interior's decision to take the Bradley Property into trust.<sup>284</sup> Justice

274. *Bank Markazi*, 136 S. Ct. at 1317.

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

276. *Id.* at 145-46.

277. 22 U.S.C. § 8772(a)(1)(C), (b)(2); Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (2014).

278. *See Patchak v. Zinke*, 138 S. Ct. 897, 921 (2018) (Roberts, C.J., dissenting).

279. *Bank Markazi*, 136 S. Ct. at 1330 (Roberts, C.J., dissenting).

280. *Patchak*, 138 S. Ct. at 908 (plurality opinion).

281. *Id.* at 912-13 (Ginsburg, J., concurring).

282. *Id.* at 912.

283. 5 U.S.C. § 702.

284. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S.



Ginsburg's concurrence rests on a finding of an implied repeal of section 702's waiver of sovereign immunity.<sup>285</sup>

Congress is free to take away jurisdiction given or to reinstate sovereign immunity after waiving it.<sup>286</sup> Thus, if the Gun Lake Act actually reinstated sovereign immunity, it would preclude the federal courts from hearing and deciding Patchak's suit on the merits.<sup>287</sup> However, nothing in section 2(b) suggests *any* intention to repeal section 702's waiver of sovereign immunity. Simply put, Congress failed to express an unambiguous intention to withdraw the waiver of sovereign immunity. Nor did the Gun Lake Act use any language, such as "sovereign immunity" or "consent to be sued," that even remotely suggested a congressional intent to reinstate sovereign immunity.<sup>288</sup>

A strong presumption against implied repeal constitutes a bedrock principle of statutory interpretation.<sup>289</sup> As Justice Antonin Scalia and his coauthor, Bryan Garner, explain, "[r]epeals by implication are disfavored—'very much disfavored.'"<sup>290</sup> At the same time, however, they caution that "a provision that flatly contradicts an earlier-enacted provision repeals it."<sup>291</sup> As a general rule of

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209, 211-12 (2012).

285. *Patchak*, 138 S. Ct. at 913 (Ginsburg, J., concurring); Diedrich, *supra* note 207, at 241 (describing, discussing, and critiquing Justice Ginsburg's concurring opinion in *Patchak*, and noting that her conclusion that section 2(b) revoked section 702's waiver of sovereign immunity "decided the case for Ginsburg" and allowed her to elide larger separation of powers issues that the Gun Lake Act otherwise implicated (quoting *Patchak*, 138 S. Ct. at 912-14 (Ginsburg, J., concurring))).

286. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 513 (1868); *see also* Van Alstyne, *supra* note 129, at 267-68 (positing that "Congress may not overrule or reverse a decision of [the Supreme] Court on any matter involving an interpretation of the Constitution[:]; neither may it seek to direct the outcome of constitutional adjudication by legislating a rule of decision which, if applied, would produce a judgment that the Constitution forbids" and also arguing that Congress may not "accomplish that result by legislating the selective removal of constitutional questions while otherwise providing that an affirmative decision shall issue on the merits of the case").

287. *Patchak*, 138 S. Ct. at 913 (Ginsburg, J., concurring).

288. *Id.* at 921-22 (Roberts, C.J., dissenting).

289. ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 327 (2012).

290. *Id.* (citing JAMES KENT, *COMMENTARIES ON AMERICAN LAW* \*467 n.1 (Charles M. Barnes ed., 13th ed. 1884)).

291. *Id.* (citing JAMES KENT, *COMMENTARIES ON AMERICAN LAW* \*467 n.1 (Charles M. Barnes ed., 13th ed. 1884)); *see* *United States v. Noce*, 268 U.S. 613, 619 (1925) ("Implied repeals are not favored.").

thumb, “if statutes are to be repealed, they should be repealed with some specificity.”<sup>292</sup>

David Patchak initially brought a claim under the APA, which waived the federal government’s sovereign immunity.<sup>293</sup> Section 702 of the APA provides that a suit “shall not be dismissed ... *on the ground that it is against the United States*.”<sup>294</sup> Section 2(b) provided that “[n]otwithstanding 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.”<sup>295</sup> Applying the presumption against implied repeal to section 2(b), it is clear that the Gun Lake Act did not repeal the APA waiver of sovereign immunity, as Justice Ginsburg argues.<sup>296</sup>

In sum, *Patchak v. Zinke* highlights one recent example of congressional case snatching. Specifically, the Supreme Court sustained a federal law that provided a rule of decision in a specific case involving land owned by a Native American tribe operating a casino—a clear violation of the separation of powers doctrine.

*B. Oil States Energy Services v. Greene’s Energy Group:  
“Now You See It, Now You Don’t”—Vesting Merely Contingent  
Adjudicatory Authority to Hear and Decide Cases in the  
Article III Courts*

Another recent example of congressional case snatching upheld by the Supreme Court occurred in *Oil States Energy*, which is discussed in greater detail in this Subsection.

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292. SCALIA & GARNER, *supra* note 289, at 327. In THE FEDERALIST NO. 78, Alexander Hamilton compared a conflict with an earlier statute with a conflict of the Constitution when he said:

The rule which has obtained in the courts for determining [conflicting statutes] relative validity is that the last in order of time shall be preferred to the first.

But this is a mere rule of construction, not derived from any positive law but from the nature and reason of the thing.

THE FEDERALIST NO. 78, *supra* note 1, at 468.

293. See 5 U.S.C. § 702; *Patchak v. Zinke*, 138 S. Ct. 897, 903 (2018) (plurality opinion).

294. § 702 (emphasis added).

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

296. *Patchak*, 138 S. Ct. at 912-13 (Ginsburg, J., concurring).

### 1. OSE and the Problem of Advisory Opinions

The Leahy-Smith America Invents Act establishes a process called “inter partes review” of already-issued patents.<sup>297</sup> Under inter partes review, the United States Patent and Trademark Office (USPTO), a non-Article III tribunal, has the authority to review a patent decision made by a federal court.<sup>298</sup> Essentially, inter partes review allows the USPTO to reconsider and to cancel an issued patent claim in limited circumstances.<sup>299</sup> Oil States Energy (OSE) litigated the case by arguing that patent validity claims must be determined by the federal courts, not the USPTO.<sup>300</sup> The precise question presented was whether patent validity questions present legal claims that are at the core of the “judicial Power of the United States”<sup>301</sup> or, instead, constitute “public rights” that Congress may vest in non-Article III tribunals.<sup>302</sup> However, a more problematic separation of powers issue embedded in inter partes review, but an issue not litigated or decided in *Oil States Energy*, was whether the USPTO’s inter partes review violates Article III of the Constitution by effectively rendering Article III courts’ proceedings and judgments advisory in nature.

The patent statutes vest the USPTO with responsibility “for the granting and issuing of patents.”<sup>303</sup> An inventor will normally seek a patent from the USPTO, which the agency either approves or rejects.<sup>304</sup> Both an approved patent and a rejected patent application are subject to judicial review by an Article III court.<sup>305</sup> However, the Article III court’s decision is not final, because “a person who is not the owner of a patent may file with the Office a petition to institute an inter partes review.”<sup>306</sup> After certain procedural requirements

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297. Leahy-Smith America Invents Act, 35 U.S.C. § 311.

298. *Id.*

299. *Id.* §§ 311-319.

300. *See Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1372 (2018).

301. U.S. CONST. art. III, § 1.

302. *See Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 853 (1986); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67-70 (1982) (plurality opinion).

303. 35 U.S.C. § 2(a)(1).

304. *Id.* §§ 112-131.

305. *Oil States Energy Servs.*, 138 S. Ct. at 1372.

306. 35 U.S.C. § 311(a).

have been met,<sup>307</sup> the Patent Trial and Appeal Board (Board), an adjudicatory body within the USPTO, reexamines the validity of the patent incident to the inter partes review.<sup>308</sup>

The Board sits in “three-member panels of administrative patent judges.”<sup>309</sup> After the proceedings conclude, the Board will issue a final written decision that determines the patent’s validity.<sup>310</sup> If any party is dissatisfied with the Board’s decision regarding the patent’s validity, then the party can seek judicial review of the Board’s decision with the United States Court of Appeals for the Federal Circuit.<sup>311</sup> It bears noting that the statute permits a party to seek this second look at any time.<sup>312</sup>

OSE, an oilfield services company, “obtained a patent relating to an apparatus and method for protecting wellhead equipment used in hydraulic fracturing” in 2001.<sup>313</sup> OSE subsequently initiated an action against Greene’s Energy Group (GEG) for infringing on that patent in 2012.<sup>314</sup> This led GEG to challenge the validity of OSE’s patent in federal district court.<sup>315</sup> Toward the end of the discovery process, GEG sought inter partes review by the Board regarding the OSE patent’s validity.<sup>316</sup>

Both the action in the federal district court and the inter partes review by the Board proceeded in parallel.<sup>317</sup> First, the district court issued a claim-construction order in June 2014, which interpreted the claim in a way so as to prevent GEG from raising claims regarding the prior art.<sup>318</sup> Shortly after, the Board issued its

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307. *Id.* § 314(a) (“The Director may not authorize an inter partes review to be instituted unless the Director determines that the information presented in the petition filed under section 311 and any response filed under section 313 shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.”).

308. *Id.* § 6; *see id.* § 316(c).

309. *Oil States Energy Servs.*, 138 S. Ct. at 1371.

310. *See* 35 U.S.C. § 318(a); *see also* 37 C.F.R. § 42.108 (2015).

311. *See* 35 U.S.C. § 319.

312. *See generally* Stephen Yelderman, *Prior Art in Inter Partes Review*, 104 IOWA L. REV. 2705, 2707-10, 2714-15, 2720-21, 2730-34 (2019) (providing an in-depth analysis, overview, and explanation of the costs and benefits of the inter partes review process).

313. *Oil States Energy Servs.*, 138 S. Ct. at 1372.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

decision, where it “acknowledged the District Court’s contrary decision, but nonetheless concluded that the claims were anticipated by the prior art.”<sup>319</sup>

Ultimately, the district court and the Board reached conflicting legal conclusions: the Board found that OSE’s original claims were unpatentable and the district court reached the opposite conclusion.<sup>320</sup> As a result, OSE sought review in the United States Court of Appeals for the Federal Circuit.<sup>321</sup> OSE’s position was that the Board’s inter partes review violates Article III because patent revocation must be tried before an Article III court rather than before an administrative agency.<sup>322</sup> The United States Court of Appeals for the Federal Circuit affirmed the Board’s decision.<sup>323</sup> The U.S. Supreme Court granted review in order to resolve whether the inter partes review process violated Article III.<sup>324</sup>

Writing for the majority, Justice Thomas held that “[i]nter partes review falls squarely within the public-rights doctrine” and therefore claims of this sort could be litigated before the USPTO without violating the separation of powers doctrine.<sup>325</sup> He explained that “the decision to *grant* a patent is a matter involving public

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319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* Here, in *Oil States Energy*, as in *Patchak*, Justice Clarence Thomas authored the lead opinion, but this time a majority of the Justices joined his opinion. *Id.* at 1369 (Justices Kennedy, Ginsburg, Breyer, Alito, Sotomayor, and Kagan joined Justice Thomas’s opinion for the Court). Justice Stephen Breyer filed a concurring opinion joined by Justices Ginsburg and Sotomayor. *Id.* at 1379 (Breyer, J., concurring). Justice Neil Gorsuch authored a dissenting opinion joined by Chief Justice Roberts. *Id.* at 1380 (Gorsuch, J., dissenting). The majority squarely rejected OSE’s claim that Congress could not constitutionally vest the USPTO with final authority to determine patent validity claims. *See id.* at 1372-73.

325. *Id.* at 1373. Justice Thomas’s majority opinion analyzed the inter partes review issue under the “public-rights doctrine.” *Id.* Essentially, the public rights doctrine stands for the proposition that private rights must be adjudicated by Article III courts, whereas adjudication of matters “arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.” *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929). Thus, the public rights doctrine “give[s] Congress significant latitude to assign adjudication of public rights to entities other than Article III courts.” *Oil States Energy Servs.*, 138 S. Ct. at 1373; *see Stern v. Marshall*, 564 U.S. 462, 488-92 (2011) (discussing the public rights doctrine exception to the Article III requirement that the judicial power to hear and decide cases be vested exclusively in the federal courts rather than in non-Article III tribunals).

rights—specifically, the grant of a public franchise.”<sup>326</sup> Justice Thomas reasoned from this starting point that “[i]nter partes review is simply a reconsideration of that grant, and Congress has permissibly reserved the [US]PTO’s authority to conduct that reconsideration.”<sup>327</sup> In sum, inter partes review in the USPTO does not unconstitutionally infringe on the authority of Article III courts to decide patent validity claims.<sup>328</sup>

Justice Neil Gorsuch authored the principal dissent, joined by Chief Justice Roberts.<sup>329</sup> Gorsuch took issue with the majority’s view that inter partes review involves public rights rather than claims arising at law<sup>330</sup>—a point that implicates the separation of powers and raises case-snatching concerns associated with the conflict between the reasoning and outcome in *Stern* and *Schor*.<sup>331</sup> However, Justice Gorsuch’s dissent did not address how allowing inter partes review after judicial proceedings have commenced renders those judicial proceedings essentially advisory in nature.

Indeed, none of the opinions in *Oil States Energy* engage arguably the most serious problem with the inter partes review scheme: namely, making the decisions of Article III courts, and all the proceedings used to generate such decisions, merely advisory. Typically to be justiciable, the court must not be offering an advisory opinion. One of the earliest confrontations with justiciability was in *Hayburn’s Case*.<sup>332</sup> The Invalid Pensions Act of 1792 tasked federal circuit courts with initially determining the eligibility of applicants for veteran’s benefits.<sup>333</sup> After calculating an applicant’s benefits, the Secretary of War would review and either accept or reject the ruling of the Article III court on the applicant’s claim.<sup>334</sup>

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326. *Oil States Energy Servs.*, 138 S. Ct. at 1373 (observing that “[t]his Court has not ‘definitively explained’ the distinction between public and private rights” and positing that the Court’s “precedents applying the public-rights doctrine have ‘not been entirely consistent’” (first quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982); and then quoting *Stern*, 564 U.S. at 488)).

327. *Id.*

328. *Id.*

329. *Id.* at 1380 (Gorsuch, J., dissenting).

330. *See id.* at 1381.

331. *See Stern*, 564 U.S. at 483-85; *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851-52, 856-57 (1986).

332. *See* 2 U.S. (2 Dall.) 409, 409-11 (1792).

333. *See* Act of Mar. 23, 1792, ch. 11, 1 Stat. 243 (1792).

334. *Id.*

Although the Supreme Court never issued a merits ruling on the validity of this administrative structure, a majority of the Justices, riding circuit, did consider the question and held that permitting an executive branch official to review a final judgment of an Article III court violated the separation of powers doctrine.<sup>335</sup>

A year later, in 1793, the Washington Administration sought the Supreme Court's views on the meaning of a treaty between the United States and Great Britain.<sup>336</sup> Chief Justice John Jay referred a letter from Secretary of State Thomas Jefferson to the full court for its consideration.<sup>337</sup> Speaking for the full Court, Chief Justice Jay explained that "[t]he lines of separation drawn by the Constitution between the three departments of the government" precluded the Supreme Court from offering merely advisory opinions.<sup>338</sup> Similar to *Hayburn's Case*, the *Correspondence of the Justices* constitutes a landmark precedent against the Supreme Court issuing advisory opinions.<sup>339</sup> The USPTO's ability to assert jurisdiction over the validity of a patent, even while litigation over that question is pending in the Article III courts, arguably creates a very similar, if not quite identical, separation of powers problem because it has the

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335. *Hayburn's Case*, 2 U.S. (2 Dall.) at 410. The Circuit Court for the District of Pennsylvania (consisting of Wilson and Blair, Justices, and Peters, district judge) made the following representation regarding the constitutionality of the Invalid Pensions Act: "[T]his act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States." *Id.* at 411; see also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (opining that *Hayburn's Case* limits the Article III courts to hearing and deciding "cases and controversies" and precludes the federal courts from issuing advisory opinions).

336. See Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 144-58 (discussing the request by President Washington for "advice" from the Supreme Court on foreign policy questions as well as the reasons the Justices provided for declining to provide the requested legal advice); see also William R. Casto, *The Early Supreme Court Justices' Most Significant Opinion*, 29 OHIO N.U. L. REV. 173, 181 (2002) (explaining that President Washington's cabinet disagreed over the answers to the foreign policy questions and that Washington turned to the Supreme Court seeking an authoritative interpretation of the treaty).

337. FALLON ET AL., *supra* note 236, at 52.

338. *Id.* (reprinting August 8, 1793, letter from Chief Justice Jay to President Washington).

339. See, e.g., *United States v. Sharpe*, 470 U.S. 675, 726 n.17 (1985) (Stevens, J., dissenting) (discussing the rule against federal courts issuing advisory opinions); see also Joseph W. Mead, *Interagency Litigation and Article III*, 47 GA. L. REV. 1217, 1231-39 (2013) (providing an analysis of litigation between two departments of the United States government and discussing the judiciary's earliest confrontations with justiciability and advisory opinions).

effect of rendering advisory both federal court proceedings and even final judgments on patentability.

2. *Proposed Solutions to OSE's Advisory Opinion*  
*Problem—Primary Jurisdiction and Certification*

Critical for separation of powers purposes, renormalizing the inter partes review process to more closely resemble the process used when invoking either the primary jurisdiction doctrine or the certification process would ensure that if a case leaves the federal courts for an administrative agency (such as the USPTO), the change of venue occurs because an Article III court, not a nervous litigant, orders it. The problem of rendering federal court proceedings advisory—because of the potential transfer back to the USPTO for inter partes review—could best be addressed under the rubric of the primary jurisdiction doctrine. The doctrine of primary jurisdiction “is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.”<sup>340</sup> It applies when “a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.”<sup>341</sup> The Supreme Court has held that “[n]o fixed formula exists for applying the doctrine of primary jurisdiction.”<sup>342</sup>

Professor Kent Barnett explains that “[p]rimary jurisdiction, in its most usual form, is a discretionary doctrine similar to abstention, where courts can stay litigation to permit an agency to choose to decide an issue first.”<sup>343</sup> He observes that although no fixed rules exist governing the doctrine’s use, “courts typically consider the relevance of agency expertise and the need for uniformity” when deciding whether or not to invoke it.<sup>344</sup> The doctrine, in his view, can

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340. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303 (1976) (quoting *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63 (1956)).

341. *W. Pac. R.R. Co.*, 352 U.S. at 64.

342. *Id.*

343. Kent Barnett, *Towards Optimal Enforcement*, 72 VAND. L. REV. EN BANC 127, 131 (2019).

344. *Id.* (footnote omitted). For a comprehensive and careful overview of when the Supreme



“promote judicial efficiency and provide a mechanism for limiting the number of private suits.”<sup>345</sup> On the other hand, however, Professor Diana Winters offers a more cautionary note, emphasizing that the doctrine, outside the context of rate-making and labor cases, “results in delay” and also “has the potential to interfere with agency decisionmaking.”<sup>346</sup>

The development of the doctrine stems from a 1907 case, *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*<sup>347</sup> *Texas & Pacific* presented the question whether an Article III court could review an oil company’s claim that it was charged an unreasonable rate because the Interstate Commerce Commission (ICC) had the sole responsibility for reviewing whether shipping rates were reasonable.<sup>348</sup> The Supreme Court held that allowing Article III courts and the ICC to hear complaints on the exact same subject could lead to conflicting, and irreconcilable, results.<sup>349</sup> To avoid this conundrum, the Supreme Court emphasized “the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions.”<sup>350</sup> However, later cases identified

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Court and lower federal courts will apply the doctrine, and the specific legal tests that govern its use in the lower federal appellate courts, see Diana R. H. Winters, *Restoring the Primary Jurisdiction Doctrine*, 78 OHIO STATE L.J. 541, 549-51, 569-71 (2017).

345. Barnett, *supra* note 343, at 132.

346. Winters, *supra* note 344, at 591-92 (explaining that, on a best case basis, referral of a question to an administrative agency will significantly delay resolution and warns that “[l]engthy delays are inevitable as litigants approach the relevant agency, request a determination, and then reapproach the court in the event of a decision or the failure of the agency to consider the question”); see also Richard J. Pierce, Jr., *Primary Jurisdiction: Another Victim of Reality*, 69 ADMIN. L. REV. 431, 436 (2017) (“Invocation of the primary jurisdiction doctrine has one major disadvantage: it has the potential to delay resolution of the dispute before the court.”). Winters identifies a second concern as well: “the potential for the interference with agency resource allocation and decisionmaking” because referral of a legal question to a federal agency “asks the agency to prioritize that specific issue at that time.” Winters, *supra* note 344, at 593-94. Professor Pierce reports that the federal courts “have become reluctant to invoke primary jurisdiction” because of the risk of delay, as well as from concerns related to “decreases in agency resources” and “judicial recognition that courts cannot force agencies to reallocate their scarce resources” to answer the referring court’s query on a timely basis. See Pierce, *supra*, at 436-37.

347. See 204 U.S. 426 (1907); see also Louis L. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1042 (1964).

348. *Tex. & Pac. Ry. Co.*, 204 U.S. at 448.

349. *Id.* at 440-41.

350. *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956) (citing *Tex. & Pac. Ry. Co.*, 204 U.S. 426).

specialization, expertise, and the knowledge that federal administrative agencies possess as additional, important rationales for the primary jurisdiction doctrine.<sup>351</sup>

The doctrine gives the federal courts the discretion to refer a legal question to an administrative agency so that the expert agency may first decide the legal question at issue.<sup>352</sup> This approach conserves scarce judicial resources and also precludes the possibility of proceedings in Article III courts being rendered essentially advisory in nature. Thus, if an expert agency can best resolve a legal question, the primary jurisdiction doctrine permits a federal court to allow it to decide the issue.<sup>353</sup> Moreover, the application of the doctrine rests entirely with the Article III courts; a federal court always has discretion to refer, or refrain from referring, a question as it thinks best.<sup>354</sup>

The federal courts decide whether to apply the doctrine of primary jurisdiction on a case-by-case basis when “the reasons for the existence of the doctrine are present and ... the purposes it serves will be aided by its application in the particular litigation.”<sup>355</sup> When Article III courts find that an initial determination by an agency would secure “[u]niformity and consistency in the regulation

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351. *Id.*; see also *Reiter v. Cooper*, 507 U.S. 258, 268 (1993) (highlighting that the doctrine of primary jurisdiction is “specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency”).

352. *W. Pac. R.R. Co.*, 352 U.S. at 64.

353. *Winters*, *supra* note 344, at 542-45, 552-73 (discussing how the primary jurisdiction doctrine has become a tool that permits courts to stay or dismiss a case while seeking agency advice on a particular issue within the agency’s purview, while still retaining jurisdiction over the case and analyzing the doctrine’s application in the Supreme Court and lower federal courts).

354. See *id.* at 547-48.

355. *W. Pac. R.R. Co.*, 352 U.S. at 64 (“[N]ow firmly established [is the principle], that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.” (quoting *Far E. Conf. v. United States*, 342 U.S. 570, 574-75 (1952))). Moreover,

[u]niformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

*Id.* at 64-65 (quoting *Far E. Conf.*, 342 U.S. at 574-75).

of business entrusted to a particular agency,”<sup>356</sup> the doctrine should apply. A second reason the Article III court will invoke the doctrine is “the expert and specialized knowledge of the agencies involved” would be instrumental in resolving the question correctly.<sup>357</sup>

From a procedural standpoint, the application of the primary jurisdiction doctrine is clear and simple. First, a court must “enable a ‘referral’ to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling.”<sup>358</sup> This means that referral of a particular issue to an agency “does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice.”<sup>359</sup> Thus, the federal court, not the agency, remains in control of the litigation.

The federal courts have not yet applied the primary jurisdiction doctrine to the USPTO’s inter partes review process.<sup>360</sup> Because there is no “fixed formula” for when the doctrine applies, the doctrine *could* apply when patent validity claims are eligible for inter partes review. This flexibility should prompt Article III courts to apply the doctrine by referring patent validity issues to the USPTO—which would have the salutary effect of avoiding a problematic form of congressional case snatching. *Oil States Energy* did not reach these questions.<sup>361</sup> In consequence, conflicting judgments between Article III courts and the USPTO will potentially arise regarding issues of patent validity. Currently, litigants can pursue patent validity claims both in the Article III courts and before the USPTO through the inter partes review process—a circumstance that raises a serious separation of powers problem and makes little (if any) sense as a matter of policy or efficiency.<sup>362</sup>

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356. *Far E. Conf.*, 342 U.S. at 574.

357. *See W. Pac. R.R. Co.*, 352 U.S. at 64.

358. *Reiter v. Cooper*, 507 U.S. 258, 268 (1993) (first citing *W. Pac. R.R. Co.*, 352 U.S. at 63-64; then citing *Ricci v. Chi. Mercantile Exch.*, 409 U.S. 289, 291, 302 (1973); and then citing *Port of Bos. Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 65, 68 (1970)).

359. *Id.* at 268-69.

360. *See* Melissa F. Wasserman, *The Changing Guard of Patent Law: Chevron Deference for the PTO*, 54 WM. & MARY L. REV. 1959, 1971 (2013).

361. *See Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018).

362. *See id.* at 1372.

More troubling is that if a disgruntled litigant, such as GEG, does not like its chances in the Article III forum where a patent validity claim defense is pending, that litigant can press the “ejector button” to escape federal court.<sup>363</sup> The disgruntled litigant can instead pursue its claim in the alternative USPTO administrative forum and hope for a better outcome.<sup>364</sup> This precise strategy worked, and worked quite well, for GEG.<sup>365</sup> GEG pursued challenges to the OSE patent’s validity in the federal district court and somewhat later concurrently through inter partes review within the USPTO.<sup>366</sup> Ultimately, the Article III courts and the USPTO reached different legal conclusions.<sup>367</sup> Of course, the Supreme Court ultimately ruled in favor of GEG.<sup>368</sup> The inter partes review process nevertheless wasted scarce judicial resources and rendered the proceedings in the district court essentially advisory in nature.<sup>369</sup>

Had the federal court applied the doctrine of primary jurisdiction to inter partes review, referral to the USPTO would constitute a procedurally straightforward way to prevent this wasted judicial effort.<sup>370</sup> First, the doctrine would enable Article III courts to “refer” patent validity cases, like OSE’s, to the USPTO. Practical reasons that exist for referring patent validity issues to the USPTO include the desirability for uniform and consistent judgments and the specialized or expert knowledge of the USPTO.<sup>371</sup> These reasons strongly support application of the primary jurisdiction doctrine.<sup>372</sup>

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363. *See id.*

364. *See id.*

365. *See id.*

366. *Id.*

367. *Id.*

368. *Id.* at 1379.

369. *Cf. Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 413-14 n.4 (1792) (noting lower court decisions, rendered by members of the Supreme Court riding circuit, holding that Congress may not make final judgments of the Article III courts subject to review by the Secretary of War because such a procedure renders the judicial decision subject to such review within the Executive Branch advisory in nature); FALLON ET AL., *supra* note 236, at 52 (reporting the refusal of the Supreme Court to render an advisory opinion to the George Washington administration regarding the correct interpretation of a treaty because federal courts may hear and decide only actual “cases and controversies”).

370. *See Oil States Energy Servs.*, 138 S. Ct. at 1372.

371. *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64-65 (1956) (quoting *Far E. Conf. v. United States*, 342 U.S. 570, 574-75 (1952)).

372. *Id.*; *see Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303-04 (1976); *Far E. Conf.*, 342 U.S. at 574-75.

Taking this approach also would advance larger, and quite important, constitutional values associated with the separation of powers doctrine.

Notably, application of primary jurisdiction to the inter partes review process would ensure that the Article III courts' proceedings and decisions would not be rendered advisory. As noted previously, the Article III courts cannot render advisory opinions—and this rule dates back to 1792 and *Hayburn's Case*.<sup>373</sup> In *Hayburn's Case*, three circuit courts, headed by Justices Wilson,<sup>374</sup> Jay,<sup>375</sup> and Iredell,<sup>376</sup> advised President George Washington in separate opinion letters that the Invalid Pensions Act of 1792<sup>377</sup> violated the separation of powers by making final judgments of the Article III courts reviewable by an executive branch official (the Secretary of War), thus rendering these judgments advisory in character.<sup>378</sup> Similarly, the Supreme Court declined to offer the Washington Administration advice on how to interpret and apply a treaty.<sup>379</sup> Chief Justice Jay, on behalf of the entire Supreme Court, told Secretary of State

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373. See *Hayburn's Case*, 2 U.S. (2 Dall.) at 413-14.

374. *Id.* at 411-12 (reprinting the opinion letter of Justice Wilson, Justice Blair, and District Judge Peters regarding the validity of the statute). See generally 1 THE WORKS OF JAMES WILSON 2 (Robert Green McCloskey ed., 1967) (discussing Wilson's contributions to the concepts of separation of powers, the authority of the judiciary to review acts of the other branches, and the development of principles of representative government).

375. *Hayburn's Case*, 2 U.S. (2 Dall.) at 410 (reprinting the opinion letter of Chief Justice Jay, Justice Cushing, and District Judge Duane). See generally 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 5-7 (Maeva Marcus & James R. Perry eds., 1985) (discussing Chief Justice Jay's contributions during the early days of the Supreme Court to the meaning of the separation of powers when the Court considered questions central to creating a workable national government).

376. *Hayburn's Case*, 2 U.S. (2 Dall.) at 412-13 (reprinting the opinion letter of Justice Iredell and District Judge Sitgreaves). See generally 1 DOCUMENTARY HISTORY, *supra* note 375, at 62-63 (discussing the contributions of Justice Iredell during the early days of the Supreme Court to the meaning of the separation of powers).

377. Act of Mar. 23, 1792, ch. 11, 1 Stat. 243 (1792).

378. *Hayburn's Case*, 2 U.S. (2 Dall.) at 409; see also Pushaw, *supra* note 127, at 438-44 (discussing the early precedents of *Hayburn's Case* and the *Correspondence of the Justices* regarding judicial review, the finality of the judgments of Article III courts, and the proscription against offering advisory opinions).

379. See Wheeler, *supra* note 336, at 144-58 (discussing the request by President Washington for "advice" from the Supreme Court on foreign policy questions as well as the reasons provided by the Justices for declining to provide advice).

Thomas Jefferson that offering such advice would constitute an impermissible advisory opinion.<sup>380</sup>

However, when a federal court chooses to stay proceedings and refer a legal question to an administrative agency, no separation of powers problem arises.<sup>381</sup> Consistent with this approach, when a question of patent validity arises, a federal district court could entertain a motion to transfer the case to the USPTO for inter partes review.<sup>382</sup> Absent the Article III court's consent, however, transfer would not take place; the court, not the litigants, would control the transfer process. When a district court transfers a case, the action would be stayed while the USPTO considers the matter and renders its judgment on reconsideration.<sup>383</sup> If the USPTO concludes that the patent is valid, then that ruling would be binding on the parties as well as the court.<sup>384</sup> The key is that the decision to transfer the case back to the USPTO must rest with the Article III court and not with the litigants.<sup>385</sup> Additionally, the application of the doctrine of primary jurisdiction would "provid[e] patentees a higher degree of certainty that at least on the basis of already raised prior art, the patent is safe from being invalidated."<sup>386</sup> Of course, if both parties prefer an Article III forum, presumably they could agree to waive inter partes review and the district court would proceed to determine the patent validity question.

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380. Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488-89 (Henry P. Johnston ed., New York, G.P. Putnam's Sons, 1890).

381. Christopher Ilardi, Note, *The Broken System of Parallel Patent Proceedings: How to Create a Unified, One-Judgment System*, 36 CARDOZO L. REV. 2213, 2238 (2015).

382. *Id.* at 2241-45.

383. *Id.* at 2238.

384. *See id.* at 2243. Presumably GEG or OSE could raise procedural objections to the USPTO's reconsideration of the patent in the federal court proceeding. So too could a constitutional claim related to the USPTO's proceedings be heard and decided by the federal courts. *See Webster v. Doe*, 486 U.S. 592, 603-05 (1988) (holding that the federal courts presumptively may hear and decide constitutional claims related to agency action and stating grave doubts about whether Congress could constitutionally prohibit the federal courts from hearing and deciding such constitutional claims on the merits).

385. Ilardi, *supra* note 381, at 2242-43 (describing how cases would be transferred to the USPTO if the doctrine of primary jurisdiction applied); *cf.* Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 892 (2001) (describing the harms that come from allowing patent litigants to pick and choose between forums).

386. Ilardi, *supra* note 381, at 2243.

The certification procedure in pure diversity cases is quite analogous to the application of the doctrine of primary jurisdiction—and accordingly provides a second example of a constitutionally permissible means of transferring (at least in part) pending litigation from the Article III courts to a non-Article III forum (in this instance to state supreme courts). Certification involves the federal courts (either district courts or circuit courts) referring undecided, but controlling, questions of state law to a state supreme court to answer.<sup>387</sup> Professor Jonathan Nash explains that when “certification is an available option, one or more of the parties to the federal case may request that the federal court invoke certification, or the federal court may choose that option *sua sponte*.”<sup>388</sup> The local federal district or circuit court rules must authorize the practice; however, most local rules provide for certification if a state supreme

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387. This is assuming that certification is an option. See Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1690 n.74 (2003) (“As a threshold matter, certification of a question of state law will be an available option to a federal court only if the state whose law is at issue offers a certification procedure for the federal court to exercise. A federal court will not ask a state high court to respond to any questions of state law if there is no procedure under state law that authorizes certification.”). Nash observes that “[a] more difficult question is whether federal courts might have the *power* to certify questions in the absence of a state certification procedure.” *Id.* at 1690-91 n.74; see Peter Jeremy Smith, *The Anticommandeering Principle and Congress’s Power to Direct State Judicial Action: Congress’s Power to Compel State Courts to Answer Certified Questions of State Law*, 31 CONN. L. REV. 649, 649 (1999) (discussing whether Congress has the power to allow federal courts to order state courts to answer undecided questions of state law even if they would prefer not to do so).

388. Nash, *supra* note 387, at 1690-92 (footnote omitted) (discussing local federal appellate rules that authorize parties to move for certification and federal courts to certify questions of state law to the appropriate state supreme court); see, e.g., 7th Cir. R. 52 (permitting the U.S. Court of Appeals for the Seventh Circuit to certify undecided questions of state law to a state supreme court on motion of a party); see also *In re Badger Lines, Inc.*, 140 F.3d 691, 698-99 (7th Cir. 1998) (certifying an undecided question of state law on a party’s motion to a state supreme court). See generally James A. Parker, Daniel A. McKinnon & Ted Occhialino, *Certification and Removal: Practices and Procedures*, 31 N.M. L. REV. 161, 170 (2001) (noting that, from 1990 to 1994, “[o]nly thirty percent of the requests by counsel to certify a question to a state court have been honored by the Tenth Circuit Court of Appeals; seventy percent of the time they turn down the request to certify” and observing that this represents “the highest rate of refusals by a circuit court in the United States”). On the other hand, however, data exist that suggest other federal appellate courts might be less reticent to approve motions for certification than the Tenth Circuit. See *id.* (“Some refuse only about fifteen percent of the time.”).

court has agreed to receive and decide certified questions of state law from the federal courts.<sup>389</sup>

For present purposes, the key point is that although a party to a pending federal court diversity case may move for certification of a controlling, but undecided, legal question to a state supreme court, the decision to seek the state supreme court's input—effectively to transfer the case in part from the federal court to the state supreme court for purposes of resolving a central legal issue—remains entirely vested with the Article III court (not the parties).<sup>390</sup> This is a crucial difference between certification and inter partes review before the USPTO, which involves the parties, not the federal court hearing a patent dispute, controlling whether to transfer the case back to the administrative agency.<sup>391</sup> With the certification process in a diversity case, the federal court has the final say as to whether or not to invoke certification.<sup>392</sup>

Of course, asking a state supreme court to answer an undecided question of state law does not necessarily mean that the state supreme court will agree to cooperate. As Professor Nash explains, “A state high court has discretion to accept or reject the certifying court's questions.”<sup>393</sup> After a state high court accepts the certification from the federal court, it will proceed to resolve the certified questions of undecided state law.<sup>394</sup> A state supreme court's

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389. See, e.g., 7th Cir. R. 52 (permitting the court to certify questions of state law to a state high court sua sponte); see also *Elkins v. Moreno*, 435 U.S. 647, 662 (1978) (featuring the Supreme Court certifying sua sponte, and on its own motion, an undecided but controlling question of state law).

390. The federal court transmits the certificate, which is directed to the judges of the state supreme court. See *Wilson v. Bryan (In re Wilson)*, 162 F.3d 378, 378 (5th Cir. 1998) (addressing a certification request to the Justices of the Supreme Court of Louisiana).

391. See *supra* notes 313-40 and accompanying text.

392. See, e.g., *Barnes v. Atl. & Pac. Life Ins. Co. of Am.*, 514 F.2d 704, 705 n.4 (5th Cir. 1975).

393. Nash, *supra* note 387, at 1693; see also *Schlieter v. Carlos*, 775 P.2d 709, 710 (N.M. 1989) (“[W]e may undertake at our discretion to answer [certified] questions when the answers are ‘determinative’ of the cause before the federal court.”); *Tunick v. Safir*, 731 N.E.2d 597, 598-99 (N.Y. 2000) (declining to answer questions certified by the Second Circuit).

394. Nash, *supra* note 387, at 1693-94 (“State courts considering certified questions do not engage in fact finding. Certification applies only to questions of law; thus, state courts have treated the collection by the certifying federal court of all necessary ancillary factual findings as a prerequisite to proper certification.”); see *Sangamo Weston, Inc. v. Nat’l Sur. Corp.*, 414 S.E.2d 127, 130 (S.C. 1992) (holding that the court would not accept and answer a certified question of South Carolina state law because the factual record was not developed sufficiently



involvement will end after it has provided the answers to the federal court's certified questions.<sup>395</sup>

The federal courts were initially uncertain if a state high court's answers to the certified questions were binding on the certified court. However, "modern federal courts generally agree that they are bound to follow state court responses to certified questions."<sup>396</sup> This approach, at least potentially, avoids the problem of an opinion from a state supreme court being merely advisory in nature. Although some state supreme courts enjoy express constitutional authority to issue advisory opinions,<sup>397</sup> state constitutions typically restrict who may seek one—the provisions often authorize the governor, the state legislature, or the state attorney general to request an advisory opinion.<sup>398</sup> Because answers to certified questions are binding on the federal court seeking those answers, and because the federal courts cannot hear and decide disputes

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and the court would "not issue advisory opinions and cannot alter precedent based on questions presented in the abstract").

395. See John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 419 (1988) ("When a certified question is answered and returned to the certifying court, ... the state high court's influence over the case is effectively ended.").

396. Nash, *supra* note 387, at 1695; see also *Purifoy v. Mercantile-Safe Deposit & Tr. Co.*, 567 F.2d 268, 269 (4th Cir. 1977) (holding that the Maryland state high court's answer to a certified question of Maryland law was "definitive" and binding on the federal courts); *Coastal Petroleum Co. v. Sec'y of Army of U.S.*, 489 F.2d 777, 779 (5th Cir. 1973) (holding that the Florida Supreme Court's answer to a certified question of Florida law constitutes "the last word" on the law of that state and has a binding effect on the federal courts in a diversity case); *Sunshine Mining Co. v. Allendale Mut. Ins. Co.*, 666 P.2d 1144, 1148 (Idaho 1983) (observing that when it answers certified questions from a federal court, the Idaho Supreme Court expects its answers to those certified questions will be determinative of the law of Idaho in any and all subsequent proceedings).

397. Lucas Moench, Note, *State Court Advisory Opinions: Implications for Legislative Power and Prerogatives*, 97 B.U. L. REV. 2243, 2246 (2017) ("[S]tatutory or constitutional provisions in Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, Michigan, New Hampshire, Oklahoma, Rhode Island, and South Dakota allow their highest courts to issue advisory opinions in some circumstances."); see, e.g., MASS. CONST. pt. 2, ch. 3, art. II ("Each branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.").

398. See, e.g., R.I. CONST. art. X, § 3 ("The judges of the supreme court shall give their written opinion upon any question of law whenever requested by the governor or by either house of the general assembly."); FLA. CONST. art. IV, § 10 ("The attorney general shall, as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI."); see also Moench, *supra* note 397, at 2255.

absent a concrete case or controversy,<sup>399</sup> no issues generally arise from a state supreme court that either cannot issue advisory opinions at all or can issue advisory opinions only in response to queries from specific state government officials or institutions.<sup>400</sup>

*Lehman Brothers v. Schein* provides a useful example of how the certification process works.<sup>401</sup> In this litigation, the plaintiff class brought a shareholders' derivative action in the United States District Court for the Southern District of New York based upon a theory of misappropriation of information by a corporate insider.<sup>402</sup> The New York state courts had previously endorsed a theory of liability based on the misappropriation of information by someone in a corporation's management.<sup>403</sup> However, the Florida courts, whose laws governed the dispute under the applicable choice-of-law clauses, had not yet ruled on whether a misappropriation theory of liability was viable under Florida state corporations law.<sup>404</sup>

The district court and the U.S. Court of Appeals for the Second Circuit reached opposite conclusions as to the correct result under Florida law.<sup>405</sup> In order to resolve this conflict between the trial and appellate courts on this outcome-determinative question, the U.S. Supreme Court granted certiorari solely to consider whether "the Court of Appeals for the Second Circuit err[ed] in not certifying the question of Florida law to the Florida Supreme Court pursuant to Florida's certification procedure."<sup>406</sup> The Supreme Court observed that certification was "particularly appropriate in view of the

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399. See U.S. CONST. art. III, § 2, cl. 1.

400. See *Grover ex rel. Grover v. Eli Lilly & Co.*, 33 F.3d 716, 718-19 (6th Cir. 1994) (chiding the district court for having "ignored the binding effect of the Ohio Supreme Court's majority opinion" and explaining that "[a] federal court that certifies a question of state law should not be free to treat the answer as merely advisory unless the state court specifically contemplates that result").

401. See 416 U.S. 386 (1974). The U.S. Supreme Court gave its express approval to the invocation of certification in pure diversity cases because "[i]t does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." *Id.* at 391.

402. *Id.* at 387-88.

403. See *Diamond v. Oreamuno*, 248 N.E.2d 910, 912, 914-16 (N.Y. 1969).

404. See *Lehman Bros.*, 416 U.S. at 388.

405. The Southern District of New York ruled that Florida law did not support a misappropriation theory. See *Gildenhorn v. Lum's Inc.*, 335 F. Supp. 329, 333-34 (S.D.N.Y. 1971), *rev'd sub nom. Schein v. Chasen*, 478 F.2d 817 (2d Cir. 1973), *vacated sub nom. Lehman Bros.*, 416 U.S. 386. The U.S. Court of Appeals for the Second Circuit concluded that Florida law *did* support a misappropriation theory of liability. See *Schein*, 478 F.2d at 821-23.

406. *Lehman Bros. v. Schein*, 414 U.S. 1062, 1062 (1973).

novelty of the question and the great unsettlement of Florida law” and then remanded the case, admonishing the Second Circuit to consider carefully whether it should certify the controlling state law question to the Florida Supreme Court.<sup>407</sup> What is more, on remand, this is precisely what the Second Circuit proceeded to do.<sup>408</sup>

*Lehman Brothers* thus provides a highly salient example of the potential benefits of the certification procedure to a well-functioning judicial system.<sup>409</sup> First, it allows “a state government to establish and define its own state law” and “gives the state judiciary the opportunity to rule on important issues of state law in cases in which it might not otherwise have had the chance.”<sup>410</sup> Second, certification allows a state high court to rule on undecided questions of state law, which spares federal courts the difficult task of determining state law.<sup>411</sup> These reasons are largely the same as for the invocation of the primary jurisdiction doctrine because state high courts should have interpretative primacy over questions of state law.<sup>412</sup>

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407. *Lehman Bros.*, 416 U.S. at 391-92.

408. *Schein v. Chasen*, 519 F.2d 453, 453-54 (2d Cir. 1975); *Schein v. Chasen*, 313 So.2d 739, 747 (Fla. 1975) (answering the questions certified). Ultimately, the Second Circuit affirmed the judgment below because the Florida Supreme Court’s answer to the questions certified disposed of the controversy originally before it. *Schein*, 519 F.2d at 454.

409. *See also* Nat’l Educ. Ass’n v. Lee Cnty. Bd. of Pub. Instruction, 467 F.2d 447, 449 (5th Cir. 1972) (“[Certification] ... minimiz[es] or eliminat[es] entirely the confusion, uncertainty and juridical friction inherent in a system of Federalism that frequently forces Federal Judges to assume—often with extreme reluctance—a decisional role that properly belongs to their brethren on the State bench.”).

410. *Nash*, *supra* note 387, at 1697; *see* *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 798 n.9 (Tex. 1992).

411. *See* *McCarthy v. Olin Corp.*, 119 F.3d 148, 158-59, 158 n.3 (2d Cir. 1997) (Calabresi, J., dissenting) (discussing the U.S. Court of Appeals for the Second Circuit’s difficulty in interpreting state law); *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291, 302-03, 303 n.11 (3d Cir. 1995) (Becker, J., dissenting) (discussing the U.S. Court of Appeals for the Third Circuit’s difficulty in interpreting state law); *United States v. Buras*, 475 F.2d 1370, 1375 (5th Cir. 1972) (Brown, C.J., dissenting from denial of rehearing en banc) (“Our wide experience with certification to the Florida Supreme Court has ... proved its utility in sparing this Court—and more importantly, the litigants—the risk of a wrong decision.”); *United Servs. Life Ins. Co. v. Delaney*, 328 F.2d 483, 486-87 (5th Cir. 1964) (Brown, J., concurring) (describing occasions when the U.S. Court of Appeals for the Fifth Circuit has attempted to interpret state law, but nevertheless failed to resolve controlling questions of state law correctly).

412. *Cf. Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (“Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court’s refusal to decide cases where there is an adequate and

The certification procedure, like primary jurisdiction, permits a federal court to seek an authoritative answer from the entity with the most relevant expertise to answer the question; in theory, this approach should lead to better law.<sup>413</sup> As with agencies and primary jurisdiction,<sup>414</sup> it is better for federal courts to seek and obtain the authoritative answer than to guess at it, especially when the state high courts are free to disregard the answer rendered independently by a federal court.<sup>415</sup> Thus, certification guarantees federal court litigants final resolution of their case based upon definite state law as determined by the state's high court.<sup>416</sup>

Ultimately, renormalizing the inter partes review process to more closely resemble the process used when invoking either the primary jurisdiction doctrine or the certification process would ensure that if a case leaves the federal courts for an administrative agency (like

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independent state ground.”).

413. See *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 76 (1997) (finding that certification “increas[es] the assurance of gaining an authoritative response”).

414. See *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956). As with certification, the doctrine of primary jurisdiction involves suspending the federal court proceedings and awaiting an answer to the controlling question from the expert administrative agency. See *id.* (holding that when a court has invoked the doctrine of primary jurisdiction “the judicial process is suspended pending referral of such issues to the administrative body for its views” (citing *Gen. Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940))); Pierce, *supra* note 346, at 436 (positing that the primary jurisdiction doctrine advances several important values, including “allow[ing] an issue to be resolved by an institution with superior subject matter expertise,” securing “uniformity with respect to federal law,” and ensuring the “coherent and efficient” implementation of federal regulatory programs).

415. See Wade H. McCree, *Foreword*, 23 WAYNE L. REV. 255, 262-63 (1977).

416. See Bruce M. Selya, *Certified Madness: Ask a Silly Question...*, 29 SUFFOLK U. L. REV. 677, 690 (1995). The same also holds true with respect to federal administrative agencies, like the USPTO, under the *Chevron* doctrine. See *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-85, 1002-03 (2005) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). An administrative agency is free to revise or reject prior interpretations of ambiguous statutory texts—even after a federal court has reviewed the prior interpretation and approved it. See *id.* at 982 (“A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”). Because an agency may lawfully adopt any reasonable construction of an ambiguous statutory text, it would be far more efficient to permit an agency to interpret, or even to reinterpret, an ambiguous statutory text in the first instance than for a court to impose its own reading of the text on the agency (which would not be bound by it). See *id.* at 982-86 (explaining that an agency is not bound by a federal court decision accepting an earlier interpretation of an ambiguous statutory provision and remains free to choose any reasonable interpretation of the text going forward).

the USPTO), the change of venue occurs because an Article III court, not a disgruntled litigant, orders it, which is critical for separation of powers purposes. Finally, it bears noting that this approach would also make the inter partes review process more closely resemble the rules and procedures governing the transfer of cases to the Article I bankruptcy courts in bankruptcy proceedings. As with the invocation of the primary jurisdiction doctrine and the certification process, a non-Article III bankruptcy court may hear a bankruptcy case only if a federal district court voluntarily transfers the matter to the non-Article III tribunal.<sup>417</sup>

The 1984 Bankruptcy Act vests the district courts with jurisdiction over bankruptcy cases, but permits them to delegate resolution of these cases to Article I bankruptcy courts.<sup>418</sup> In fact, after *Northern Pipeline*, Congress used this device to avoid a serious separation of powers problem.<sup>419</sup> Under the revised procedures, a district court may choose not to transfer a case or, if it elects to send a case to the bankruptcy courts for resolution, to reassert jurisdiction at any time after doing so.<sup>420</sup> Thus, bankruptcy courts only hear cases when a district court has authorized them to do so.<sup>421</sup> Through

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417. See *Wellness Int'l Network v. Sharif*, 135 S. Ct. 1932, 1939 (2015).

418. See 28 U.S.C. § 157(a)-(b)(1). For a discussion of the limits of bankruptcy court authority, see *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58, 62, 84 (1982) (plurality opinion) (invalidating the adjudicative authority of a non-Article III tribunal by holding that Article I bankruptcy courts could not constitutionally hear a state law breach of contract claim because vesting authority over such claims violated the separation of powers doctrine). Additionally, in *Stern*, the Court reaffirmed its holding in *Northern Pipeline* that Congress may not assign non-congressionally created claims to non-Article III tribunals for final judgment. See *Stern v. Marshall*, 564 U.S. 462, 503 (2011) (holding that “Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article” and concluding that “[t]he Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim”).

419. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 862-65 (1986) (Brennan, J., dissenting) (arguing that, under *Northern Pipeline*, Congress could not grant the Commodity Futures Trading Commission authority to hear common law claims incident to the agency's disposition of public rights claims arising under the agency's enabling statute).

420. See *Wellness Int'l Network*, 135 S. Ct. at 1939.

421. See *id.*; see also Andrea Olson, *Defining the Article III Judicial Power: Comparing Congressional Power to Strip Jurisdiction with Congressional Power to Reassign Adjudications*, 53 CREIGHTON L. REV. 111, 123-25 (2019) (discussing the application of the separation of powers doctrine to congressional schemes that transfer the adjudication of cases to non-Article III tribunals).

the vesting of transfer and supervisory authority, the district courts retain control over the adjudication of bankruptcy cases.<sup>422</sup>

If Article III courts apply the primary jurisdiction doctrine to the USPTO's inter partes review process, the decision to transfer a case to the USPTO would rest entirely in the discretion of the Article III court rather than with the litigants. The Article III courts would also retain ongoing supervisory authority and jurisdiction over any and all transferred cases. In consequence, the separation of powers problem that arises from parallel proceedings regarding the validity of a patent would be avoided; the proceedings of the Article III courts would no longer be merely advisory in nature because the authority of the Article III courts to hear and decide patent validity cases would not be merely contingent.<sup>423</sup> However, as it stands, *Oil States Energy* highlights another example of congressional case snatching the Supreme Court sustained in upholding a federal law that permits a nervous litigant to remove a pending case involving a patent infringement claim from an Article III court—potentially at any point in the judicial processing, including litigation pending before the Court of Appeals or even the Supreme Court—back to the USPTO.

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422. See *Wellness Int'l Network*, 135 S. Ct. at 1944-46; *Stern*, 564 U.S. 462.

423. It bears noting that, as a general matter, the federal courts have been invoking the primary jurisdiction doctrine with less frequency over time; Professor Richard Pierce observes that “[j]udicial invocations of primary jurisdiction have become rare.” Pierce, *supra* note 346, at 437; see also Barnett, *supra* note 343, at 133 (noting the federal “courts’ increasing reluctance to use the doctrine”). Instead, “[c]ourts routinely ask agencies to submit amicus briefs in which the agencies apprise courts of their interpretations of agency-administered statutes, rules, and tariffs” and “[a]gencies typically respond promptly and affirmatively to those requests.” Pierce, *supra* note 346, at 437. Pierce believes that “both the Supreme Court and lower [federal] courts seem to accord agency interpretations adopted in amicus briefs the same degree of deference they accord to interpretations adopted in adjudications and rules.” *Id.* at 438. Nevertheless, the primary jurisdiction doctrine remains good law and the Supreme Court has invoked the doctrine with some regularity over the past half-century. See Winters, *supra* note 344, at 552-67 (collecting and analyzing Supreme Court decisions from 1956 to 2015 that addressed the potential application of the primary jurisdiction doctrine). Professor Diana Winters found that, from 1956 to 2015, “there were about seventy-three Supreme Court cases that considered whether the application of primary jurisdiction was warranted.” *Id.* at 552. Accordingly, we believe it would be entirely plausible to avoid the separation of powers problem that the USPTO's review otherwise presents by applying the primary jurisdiction doctrine to vest control of the transfer decision with the federal court hearing the dispute.

### III. CONGRESSIONAL CASE SNATCHING CONSTITUTES A CLEAR AND PRESENT DANGER TO THE INSTITUTIONAL AUTONOMY AND INDEPENDENCE OF THE ARTICLE III COURTS

The great American poet Robert Frost once wrote that “[g]ood fences make good neighbors.”<sup>424</sup> The federal courts need to apply this principle in a careful and consistent way when Congress attempts to control the disposition of judicial business—or attempts to vest the federal courts with only contingent authority to hear and decide particular legal disputes. Even if “the modern administrative state requires the abandonment of formalism in separation of powers analyses, at least insofar as executive/legislative power-sharing arrangements are concerned,” a fundamental difference exists “between novel power-sharing arrangements between the two political branches and attempts to include Article III judges in such arrangements.”<sup>425</sup> This is so because “[u]nlike the federal courts, both the President and Congress have ample tools at their disposal to prevent encroachments on their institutional prerogatives.”<sup>426</sup>

#### *A. Enforcing the Separation of Powers Doctrine to Protect Judicial Authority Would Not Prevent or Impede Legitimate Congressional Policy Making*

Embracing pragmatic formalism in separation of powers cases involving the institutional independence of the Article III courts would at most require relatively modest changes to the statutes at

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424. Robert Frost, *Mending Wall* (1914), reprinted in *THE TREASURY OF AMERICAN POETRY* 342 (Nancy Sullivan ed., 1978). The full verse bears repeating:

My apple trees will never get across  
And eat the cones under his pines, I tell him.

He only says, “Good fences make good neighbors.”

*Id.* In point of fact, the Supreme Court has invoked Frost when, engaging in a formalist analysis, it held that Congress lacked the constitutional authority to reopen final judgments of the Article III courts. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995) (“Separation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors.”).

425. Krotoszynski, *supra* note 117, at 476.

426. *Id.* at 479; see *THE FEDERALIST* NO. 78, *supra* note 1, at 465-66 (describing the federal judiciary as “the weakest of the three departments of power” and observing that the judiciary “can never attack with success” the legislative or executive branches).

issue in *Patchak*, *Bank Markazi*, and *Oil States Energy*. Indeed, the statutes at issue in all three cases could be brought into compliance with a more strictly formalist conception of the separation of powers very easily.

In *Patchak*, had the Supreme Court found that section 2(b) of the Gun Lake Act violated the *Klein* rule against Congress imposing a rule of decision on a federal court currently adjudicating a legal dispute and consequentially invalidated it, section 2(a) would likely have led the district court to dismiss Patchak's challenge to the government's decision to take the Bradley Property into trust.<sup>427</sup> The only difference—at most a nominal one—would be that the federal courts, not Congress, would have parsed the meaning of section 2(a) in order to reach that result.

We believe that in close cases, a prudent commitment to protecting judicial authority and enforcing the separation of powers doctrine should require the federal courts to resolve any lingering doubts about whether a new statute possesses the requisite level of generality *against* Congress; yet, to date, it would appear that a working majority of the Justices has taken the exact opposite approach (and resolved ambiguities in *favor* of sustaining congressional enactments that appear to constitute case snatching). So too, as we observed earlier, if the inter partes review process at issue in *Oil States Energy* could be commenced only with the affirmative approval of a federal district court (when that court is in the process of deciding a patent infringement suit) the statutory procedure would effectively be renormalized as little more than a routine application of the primary jurisdiction doctrine.<sup>428</sup>

The key to resolving the separation of powers difficulty is to make the transfer of the question of a patent's validity one for the Article III court, rather than for a nervous litigant.<sup>429</sup> The practical difference in the availability of inter partes review would be de minimis.<sup>430</sup> Nevertheless, vesting the transfer decision in the Article III court would mean that these legal questions would be fully,

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427. See *Patchak v. Zinke*, 138 S. Ct. 897, 911 (2018) (Breyer, J., concurring); *supra* notes 176-80 and accompanying text.

428. See *supra* notes 340-86 and accompanying text.

429. See *supra* notes 360-86 and accompanying text.

430. See *supra* notes 360-87 and accompanying text.



rather than only contingently, entrusted to the Article III courts.<sup>431</sup> The proceedings would no longer be effectively advisory in nature (in violation of the rules announced in *The Correspondence of the Justices* and *Hayburn's Case*).<sup>432</sup>

Moreover, what harm would it have done to note, perhaps in a footnote, that permitting a disgruntled litigant to force a transfer of a legal question pending before an Article III court to an administrative agency raises serious separation of powers problems? The Supreme Court routinely flags constitutional problems that parties have failed to raise.<sup>433</sup> It could—and should—have used this technique in *Oil States Energy*.

The statute at issue in *Bank Markazi* admittedly presents a harder question.<sup>434</sup> The Iran Threat Reduction and Syria Human Rights Act of 2012 made Iranian state central bank assets available to a particular group of plaintiffs in a single judicial proceeding.<sup>435</sup> At first blush, it is difficult to see how the federal courts could render a saving construction of the statute.<sup>436</sup> To generalize the law, so as to make judgments capable of execution against any and all state-operated central banks, would radically and unreasonably expand the scope of the enactment.

A more modest judicial surgery on the Iran Threat Reduction and Syria Human Rights Act would be to interpret the law as making assets of the Bank Markazi available to satisfy any and all valid legal judgments issued by a federal or state court. Of course, taking this step would increase, quite substantially, the generality of the

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431. See *supra* note 423 and accompanying text.

432. See *supra* notes 332-39, 373-80 and accompanying text.

433. See, e.g., *White v. Mass. Council of Constr. Emps., Inc.*, 460 U.S. 204, 214-15 n.12 (1983) (noting a potentially valid legal objection to a city jobs set-aside program for local residents but declining to decide this question because “[t]his question has not been, to any great extent, briefed or argued in this Court” and, accordingly, the Supreme Court remanded the case “without passing on its merits” (citing *Gen. Talking Pictures Corp. v. W. Elec. Co.*, 304 U.S. 175, 177-78 (1938))).

434. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1316 (2016).

435. 22 U.S.C. § 8772; see *supra* notes 268-72 and accompanying text.

436. See Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1946-49 (1997) (discussing the theory and practice of federal courts rewriting statutes via “saving constructions” to avoid invalidating the statute); see also Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2115-19 (2015) (discussing the same).

statute.<sup>437</sup> Even so, Congress could decide to accept a judicially modified statute with a broader scope of application—to avoid a *Klein* problem—or to repeal the statute in toto.<sup>438</sup> Accordingly, although a judicial fix to avoid a separation of powers problem would require a bit more creativity in *Bank Markazi*, one could envision a judicial gloss on the statute that would render the statute a genuine “new law” rather than a command to decide a particular set of cases in the fashion that Congress would prefer.<sup>439</sup>

Thus, in most, if not all, instances of attempted congressional case snatching, no more than modest amendments of the constitutionally problematic statutes would be necessary to avoid the separation of powers problem. A pragmatic formalist application<sup>440</sup> of the separation of powers doctrine to protect the weakest branch from congressional predation would not require Congress to significantly modify its habits and practices.<sup>441</sup> This legal fact constitutes one of the central paradoxes of pragmatic formalism: in virtually all instances, very small changes to Congress’s administrative innovations would bring them within the metes and bounds of the Madisonian system of the separation of powers.<sup>442</sup>

Accordingly, dire warnings from functionalist jurists, such as Justice Stephen Breyer,<sup>443</sup> do not really hold up to close scrutiny. Simply put, pragmatic formalism in separation of powers analysis will not cause serious or undue disruption to the administrative state.<sup>444</sup> Because the practical difficulty and cost of securing the decisional authority and autonomy of the Article III courts can, in most cases, be easily mitigated, arguments against embracing pragmatic formalism are particularly weak and unconvincing.<sup>445</sup>

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437. See *supra* notes 121-22 and accompanying text.

438. See Katyal & Schmidt, *supra* note 436, at 2120-21.

439. *Id.* at 2119.

440. See *supra* note 120.

441. See *supra* notes 427-28 and accompanying text.

442. See *supra* notes 427-39 and accompanying text.

443. *Stern v. Marshall*, 564 U.S. 462, 520-21 (2010) (Breyer, J., dissenting) (arguing that “these types of disputes arise in bankruptcy court with some frequency” and warning that “a constitutionally required game of jurisdictional ping-pong between courts would lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy”).

444. See *supra* notes 427-28 and accompanying text.

445. See Redish & Cisar, *supra* note 72, at 477-78 (dismissing several arguments against formalism).

*B. Congressional Case Snatching Endangers Both the Independence and the Authority of the Article III Courts*

One could reasonably ask, “Why should we care if Congress intervenes in a case and prescribes a rule of decision that dictates a particular outcome in a pending case?” Does permitting Congress to intervene legislatively to make specific assets available to satisfy a judgment,<sup>446</sup> to prevent challenges to an administrative agency’s decision to hold land in trust for the benefit of a Native American tribe who wished to operate a casino on the parcel,<sup>447</sup> or to permit a nervous litigant to remove a case from the Article III courts to an administrative agency<sup>448</sup> really present an existential threat to the independence of the Article III courts? At the risk of sounding unduly alarmist, we believe that the answer to this question is clearly yes.

Considered individually and in isolation, the incursions that have occurred to date on the institutional power and authority of the federal courts might seem to be harmless—utterly picayune.

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446. *See, e.g.*, Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772; *see also* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1325-28 (2016) (upholding a statute making assets of Iran’s national bank available to satisfy judgments for plaintiffs involved in a single judicial proceeding because “a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts” and “[t]his Court and lower courts have upheld as a valid exercise of Congress’ legislative power diverse laws that governed one or a very small number of specific subjects”).

447. Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, § 2, 128 Stat. 1913 (2014); *see also* Patchak v. Zinke, 138 S. Ct. 897, 905-08 (2018) (upholding a rule-of-decision statute that ordered the federal courts to interpret a statute in a particular way because it “change[d] the law” by “strip[ping] federal courts of jurisdiction over actions” that pertained to a particular parcel of land in Michigan). *But cf.* Jellum, *supra* note 61, at 869-70 (observing that “[t]he line between dictating results and altering underlying policy can be difficult to draw” but nevertheless concluding “[w]hen either the executive or legislature attempts to decide cases, reopen final cases, or interfere with the decisionmaking process, separation of powers is violated”).

448. *See* American Inventors Protection Act, 35 U.S.C. §§ 311(a), 312(a), 314(a); *see also* Oil States Energy Servs. LLC v. Greene’s Energy Grp. LLC, 138 S. Ct. 1365, 1379 (2018) (holding that “inter partes review does not violate Article III or the Seventh Amendment” and rejecting OSE’s constitutional objections to involuntary de facto remands of patent infringement cases to the USPTO). One should take care to note that OSE failed to argue in the lower federal courts that permitting parties to effectively force a remand of a pending judicial question to a federal administrative agency violates the separation of powers doctrine. *See id.* At least arguably, this claim might have provided a stronger constitutional objection to this novel adjudicatory structure that vested only contingent jurisdiction over patent infringement claims with the Article III courts. *See supra* notes 332-93 and accompanying text.

Nevertheless, permitting Congress to usurp the constitutional authority of the federal courts in *any* fashion effectively opens the door to larger scale incursions on the independence and autonomy of the Article III courts.

Judge Irving Kaufman, of the U.S. Court of Appeals for the Second Circuit, has observed that “[t]he essence of judicial independence [consists of] the preservation of a separate institution of government that can adjudicate cases or controversies with impartiality.”<sup>449</sup> He argued, with some force, that maintaining the independence of the federal courts requires that the federal courts resist “all significant intrusions upon the exercise of the judicial power.”<sup>450</sup> Kaufman insisted that “the ultimate power of decision, the judicial power of the United States, remain in the third branch.”<sup>451</sup>

These considerations, if applied to statutes that impose a rule of decision in a case sub judice in an Article III court, should require that such a law be held unconstitutional on separation of powers grounds.<sup>452</sup> So too, a law that authorizes a disgruntled litigant to short circuit pending judicial proceedings by effectively transferring an outcome-determinative legal question pending before an Article III court to a federal administrative agency, removes the “ultimate power of decision” from the federal judiciary.<sup>453</sup> In both instances, the ultimate power of decision no longer rests with the federal courts—it instead rests with Congress (in circumstances such as those in *Patchak* and *Bank Markazi*) or with a federal administrative agency (in circumstances such as those in *Oil States Energy*).

But precisely how far may Congress go without exceeding constitutional limits on directing the federal courts? In *City of Arlington v. Federal Communications Commission*, Justice Antonin Scalia happily conceded that “Congress has the power (within limits) to tell the courts what classes of cases they may decide.”<sup>454</sup> However, this power to grant or withhold jurisdiction does not

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449. Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 688 (1980).

450. *Id.*

451. *Id.* at 693.

452. See *Patchak*, 138 S. Ct. at 919-22 (Roberts, C.J., dissenting).

453. See Kaufman, *supra* note 449, at 693.

454. 569 U.S. 290, 297 (2013).

encompass the power “to prescribe or superintend how they decide those cases.”<sup>455</sup> Moreover, “[a] court’s power to decide a case is independent of whether its decision is correct, which is why even an erroneous judgment is entitled to *res judicata* effect”—which means that “a jurisdictionally proper but substantively incorrect judicial decision is not *ultra vires*.”<sup>456</sup>

Congress can and does possess broad discretion to regulate the jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court.<sup>457</sup> We should not be understood to suggest that *Klein* effectively overrules *McCardle* or that *Klein* should have done so. Questions of degree, which *Klein* presented, necessarily will entail hard cases with close facts. The core legal principle, however, is easy to state (if not always easy to apply): Congress may not usurp the power of a federal court to decide a pending case, even if it has the legal authority to prevent future courts from hearing similar cases going forward.

In sum, the point is a relatively straightforward one. Congress may change the laws that the federal courts must apply to cases *sub judice*, but Congress may not actually dictate how a federal court must apply a rule in a pending case. Laws with broad general effect will almost never constitute rule of decision violations, but laws that apply to a single docket or litigant, by way of contrast, will almost always violate the proscription against congressional case snatching.<sup>458</sup> As the generality of a statute wanes, the separation of powers problem waxes. If Congress wishes to avoid the potential for judicial invalidation of its legislative handiwork, it should paint with a relatively broad brush.<sup>459</sup>

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455. *Id.*

456. *Id.*

457. *Id.*

458. *See, e.g.,* Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772(b).

459. It would not be inappropriate for the Supreme Court to direct Congress to write more general laws if it wishes to avoid the risk of judicial invalidation of laws on *Klein* grounds. The Justices have not been shy, for example, in requiring Congress to indicate that a general Commerce Clause statute is to apply to state governments as such. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). So too, the Justices instructed state supreme courts to include a plain statement indicating that a decision rests exclusively on state law grounds if it wishes to insulate that decision from Supreme Court review. *See Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983). If it is permissible to require Congress and state supreme courts to adopt plain statements in order to insulate their work from review and potential invalidation, it is

Congress certainly possesses all of the legislative powers vested in the federal government.<sup>460</sup> However, Congress does not possess *any* of the judicial power of the United States;<sup>461</sup> the power to decide cases and controversies that fall within the judicial power of the United States *must* be vested in the Article III courts—and not usurped by Congress or transferred to the Executive Branch. *Patchak*, *Oil States Energy*, and *Bank Markazi* constitute unjustified, and quite lamentable, failures to observe this basic separation of powers rule. Precisely because of the inherent structural weakness of the federal courts, Hamilton’s “least dangerous” branch,<sup>462</sup> the application and enforcement of separation of powers values must be demanding rather than forgiving when Congress attempts to reallocate the business of the Article III courts.

Moreover, if the level of generality seems questionable—such that a reasonable interpreter might understand the statutory language not to alter governing law, but to prescribe a rule of decision in a pending case—the federal court should construe the ambiguity *against* Congress. Good fences make for good neighbors—and fences are most effective when they are kept in good repair. If Congress wishes to change the governing law, it can always reenact a statute that fell on the wrong side of the boundary and modify it to adopt a less specific, more general policy. This also demonstrates that adopting pragmatic formalism in enforcing the separation of judicial and legislative authority would not unduly burden or constrain Congress. If Congress genuinely wishes to establish a new law, and a new regulatory policy, it can always win by simply legislating at a reasonable level of generality. When a statute references a single parcel of land, or a single civil case docket number, it beggars belief and strains credulity to claim that Congress is really changing the

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no less plausible to imagine a rule that instructs Congress to write laws that meet a minimum level of generality to avoid invalidation on *Klein* grounds.

460. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

461. *Id.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

462. THE FEDERALIST NO. 78, *supra* note 1, at 465.

governing law rather than trying to directly usurp judicial authority to hear and decide a pending case or controversy.

In this regard, Euripides's admonition bears repeating: the best way to avoid a bad ending is to avoid a bad beginning.<sup>463</sup> To date, unfortunately, the Supreme Court has not adopted this approach. Even so, nothing would prevent the Justices from making a course correction and more reliably protecting the institutional integrity and decisional autonomy of the Article III courts.

CONCLUSION: SEPARATION OF POWERS THEORY AND DOCTRINE  
MUST TAKE ACCOUNT OF THE STRUCTURAL FACT THAT THE LEAST  
DANGEROUS BRANCH IS ALSO THE WEAKEST BRANCH

Alexander Hamilton was correct to posit that the federal judiciary is the weakest of the three branches of the federal government.<sup>464</sup> Unfortunately, however, the contemporary Supreme Court has failed to take this important structural fact adequately into account when developing and applying the separation of powers doctrine in instances when Congress attempts to snatch or reassign judicial power from the Article III courts. If the Justices do not defend their turf with greater alacrity going forward, they may well be surprised to find how little of it they have retained.

The inherent structural weakness of the judiciary vis-à-vis the legislative and executive branches of the federal government makes it necessary to more strictly enforce separation of powers principles to safeguard the judiciary's capacity to "say what the law is."<sup>465</sup> Accordingly, the Supreme Court's recent functionalist decisions are deeply misguided and should be overruled. Pragmatic formalist enforcement of the separation of powers doctrine in cases involving congressional case snatching need not unduly constrain Congress's power to exercise its legislative authority in ways that seriously affect pending litigation.<sup>466</sup> Given that this is so, the contemporary

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463. EURIPIDES, *supra* note 74 ("A bad end comes from a bad beginning.").

464. See THE FEDERALIST NO. 78, *supra* note 1, at 465-66.

465. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

466. See *supra* notes 427-48 and accompanying text.

Supreme Court's reticence to protect the institutional authority and constitutional powers of the Article III courts is quite puzzling.

The Supreme Court failed to vindicate the Madisonian system of separated powers in both *Patchak* and *Bank Markazi*. It also failed to flag a serious structural problem, from a separation of powers perspective, with the USPTO's inter partes review process.<sup>467</sup> The federal courts must do better going forward if the Madisonian system of checks and balances is to function as the Framers intended for it to work—and thereby safeguard individual liberty.<sup>468</sup>

If the Supreme Court fails to defend the federal courts from congressional efforts to reassign, or snatch, duties that the Constitution vests with the judiciary, the federal courts are very likely to see more examples of such congressional power grabs—and these enactments will undoubtedly affect an ever-growing swath of judicial business. The surest and most reliable way to safeguard the institutional independence, autonomy, and dignity of the Article III courts would be to categorically and resolutely reject any and all forms of congressional case snatching.

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467. See *Oil States Energy Servs. LLC v. Greene's Energy Grp. LLC*, 138 S. Ct. 1365 (2018).

468. See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1515-17 (1991).