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# The Once and (Maybe) Future Klein Principle

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# The Once and (Maybe) Future *Klein* Principle

William D. Araiza\*

## *Abstract*

*This Response considers Evan Zoldan's argument, set forth in his recently-published Article, that one can find a coherent principle underlying the vexing case of United States v. Klein in the idea that government is prohibited from what Zoldan calls "self-dealing." The promise is a seductive one: Klein, and in particular its language prohibiting Congress from dictating "rules of decision" to courts, has puzzled scholars for generations. As Zoldan explains, other understandings of Klein all encounter significant obstacles in the form of precedent that rebut other explanations of what that case really means.*

*Unfortunately, Zoldan's valiant and careful effort encounters serious difficulties of its own. His self-dealing prohibition arguably conflicts with an early post-Klein case, Eslin v. District of Columbia, and conflicts even more seriously with the Court's most recent case to consider Klein, Patchak v. Zinke, which was decided after Zoldan published his article. There is also reason to question the practical workability and conceptual coherence of the self-dealing prohibition Zoldan offers.*

*But Patchak also offers hope for those, like Zoldan, who see worth in the possible normative values implicit in Klein. Patchak featured a not-insignificant line-up of justices who expressed sympathy with a meaningful reading of Klein as a limit on Congress's power to legislate in hyper-specific ways and ways that leave no role for judicial analysis. Ironically, then, while Patchak calls into serious question Zoldan's solution to the Klein puzzle, it also offers hope that the Court might eventually embrace a more meaningful Klein principle.*

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*Table of Contents*

I. The Puzzle of <i>Klein</i> .....	385
II. The Self-Dealing Theory .....	387
A. Self-Dealing as Applied to <i>Klein</i> .....	388
B. Self-Dealing In Post- <i>Klein</i> Cases .....	391
1. The Easy Cases .....	391
2. The Harder Cases .....	392
III. <i>Patchak</i> and the Possibility of Another Reading of <i>Klein</i> .....	396

Evan Zoldan has written important work on the constitutional principle of legislative generality and on constitutional limits on the form legislation takes.<sup>1</sup> In the work this Response addresses,<sup>2</sup> he has (again)<sup>3</sup> engaged the Great While Whale of federal courts scholarship—the vexing case of *United States v. Klein*<sup>4</sup>—through a similar lens. He has argued that the principle of legislative generality, and in particular its opposition not just to singling out, but to singling out that favors the government, provides the best way to understand *Klein*. He describes this as a principle prohibiting government “self-dealing.” There is a great deal to admire in this effort. Zoldan is right that legislative generality is—or at least, should be—“a principle of constitutional dimension.”<sup>5</sup> In addition, Zoldan has done very careful analysis of *Klein* in his attempt to craft a doctrinal rule that is both workable and still consistent with at least most of extant precedent.<sup>6</sup>

But the attempt falters. As this Response suggests, the self-dealing principle that Zoldan offers is likely a very difficult

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1. See generally Evan C. Zoldan, *The Equal Protection Component of Legislative Generality*, 51 RICH. L. REV. 489 (2017); Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625 (2014).

2. Evan Zoldan, *The Klein Rule of Decision Puzzle and the Self-Dealing Solution*, 74 WASH. & LEE L. REV. 2133 (2017) [hereinafter Zoldan, *The Klein Rule*].

3. See generally Evan C. Zoldan, *Bank Markazi and the Undervaluation of Legislative Generality*, 35 YALE L. & POL’Y REV. INTER ALIA 1 (2016).

4. 80 U.S. 129 (1871).

5. Zoldan, *The Klein Rule*, *supra* note 2, at 2152.

6. Zoldan recognizes that his proffered reading of *Klein* stands in at least some tension with one important post-*Klein* precedent. See *infra* note 60 and accompanying text.

one to apply in any principled way—not just as a matter of courts being able to discern when self-dealing lurks in a given government action, but also as a more conceptual matter of understanding self-dealing emanating from a sovereign. Moreover, the Court’s most recent engagement with *Klein*—its February 2018 decision in *Patchak v. Zinke*<sup>7</sup>—raises questions about the viability of Zoldan’s self-dealing reading of *Klein*. There is good reason to be disheartened by the result in *Patchak*. But it also provides reason for hope, given that the prevailing side was fractured, that one of the six votes on that side remains sympathetic to a stronger reading of *Klein*,<sup>8</sup> and that the newest Justice, Justice Gorsuch, voted with the dissent.<sup>9</sup> These developments suggest that the struggle to craft a meaningful understanding of *Klein* is not over. But, paradoxically, they also suggest that that understanding may ultimately come to rest on considerations different from those offered by Zoldan in his excellent and careful analysis. After Part I sets forth the challenge *Klein* poses, Part II examines Zoldan’s self-dealing principle and its difficulties. Part III concludes by briefly discussing *Patchak* and the potential it carries for a meaningful understanding of *Klein*.

### I. The Puzzle of Klein

*Klein* is a deeply puzzling case. To summarize the facts,<sup>10</sup> after the Civil War, Klein, the executor of the estate of a former confederate named Wilson, sued the federal government to recover the proceeds of the sale of Wilson’s cotton that Union forces confiscated during the war. Wilson, who had taken an oath of loyalty to the Union, had been pardoned by the President, and thus was considered a loyal citizen based on a Supreme Court decision that had interpreted presidential pardons as cleansing any taint of treason from those accepting them.<sup>11</sup> Klein thus sued

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7. 138 S. Ct. 897 (2018).

8. See *infra* note 73 and accompanying text.

9. *Patchak*, 138 S. Ct. at 914.

10. For a fuller statement of *Klein*’s facts, see Zoldan, *The Klein Rule*, *supra* note 2, at 2144–46.

11. See *generally* *United States v. Padelford*, 76 U.S. 531 (1870) (construing

under a Civil War-era law that both authorized seizure of enemy property but also guaranteed the property rights of loyal citizens, a group that included Wilson, based on the effect of the pardon as understood by the Court.<sup>12</sup>

While Klein's suit was pending in the federal courts, Congress enacted a law that denied recovery for persons in Wilson's position.<sup>13</sup> That law required courts to interpret a person's receipt of a presidential pardon as evidence of *disloyalty*, unless the person's acceptance of the pardon was accompanied by a denial of the underlying charge.<sup>14</sup> It further specified that when a plaintiff relied on such a pardon as support for his compensation claim, the court should dismiss the cause "for want of jurisdiction."<sup>15</sup>

In *Klein*, the Court struck that law down.<sup>16</sup> After providing an extended discussion of the history of presidential pardon offers extended during and immediately after the Civil War,<sup>17</sup> and explaining the constitutional status of the Court of Claims (where Klein originally brought the suit),<sup>18</sup> the Court moved directly into its famous language prohibiting Congress from "prescrib[ing] a rule for the decision of a cause in a particular case."<sup>19</sup> After a two page discussion of that issue,<sup>20</sup> the Court then observed, almost as an afterthought, that "[t]he rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive."<sup>21</sup> Thus, the Court very strongly suggested that its discussion of the "rule of decision" issue, while surely connected to the constitutional status of a pardon, pointed to a problem with the statute separate and

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the effect of a presidential pardon).

12. United States v. Klein, 80 U.S. 129, 148 (1871).

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

14. *Id.*

15. *Id.*

16. See *Klein*, 80 U.S. at 147 ("We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.").

17. *Id.* at 139–42.

18. *Id.* at 144–45.

19. *Id.* at 146.

20. *Id.* at 146–47.

21. *Id.* at 147.

distinct from its attack on the executive branch—that is, the Court suggested that the statute also had the effect of unconstitutionally interfering with the judicial power.<sup>22</sup>

It is the statute's latter, Article III-based infirmity that has puzzled scholars ever since. On its face, the idea that Congress acts unconstitutionally when it "prescribe[s] rules of decision"<sup>23</sup> seems to collide with the reality that any legislation effectively does exactly that.<sup>24</sup> Scholars have attempted to square this reality with *Klein*'s statements by focusing on several aspects of legislation that might render it problematic: most notably, a law's retroactivity, hyper-narrowness, reference to particular cases whose results the law intends to affect, or positive impact on the government's litigating position in a case involving the government. As Zoldan carefully explains, all of these explanations for *Klein*, as well as others that he offers, come up short, either as a matter of logic or precedent.<sup>25</sup>

## II. The Self-Dealing Theory

Zoldan offers another explanation for *Klein*. He argues that *Klein* and cases that have engaged it can be understood as reflecting a rule against government "self-dealing."<sup>26</sup> As Zoldan explains it, under this principle "when a statute is drawn narrowly to benefit the government in a particular set of cases, or

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22. Justice Miller's dissent also described its holding in terms of Congress's asserted attempt to prescribe to the judiciary the effect of a presidential pardon. *Id.* at 148 (Miller, J., dissenting).

23. *Id.* at 146.

24. See generally, 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).

25. See generally Zoldan, *The Klein Rule*, *supra* note 2 at 2148–73. That precedent includes *Bank Markazi v. Peterson*, 136 S.Ct. 1310 (2016). In *Bank Markazi*, the Court upheld a statute that made available the assets of the Iranian state bank to satisfy judgments finding the Iranian Government responsible for acts of terrorism. *Id.* at 1317. A seven-justice majority cast doubt on the bank's argument that hyper-specific legislation is inherently problematic, and rejected the argument that the statute left nothing for courts to decide and thus dictated a result. *Id.* Chief Justice Roberts, joined by Justice Sotomayor, dissented. *Id.* at 1329.

26. See, e.g., Zoldan, *The Klein Rule*, *supra* note 2, at 2193 (referring to what Zoldan calls "the *Klein* Self-Dealing Principle").

necessarily will run to the advantage of the government in all situations, a statute self-deals within the meaning of this principle.”<sup>27</sup> He cautions, however, that the kind of self-dealing he views as condemned by *Klein* does not include such laws that benefit the government when that benefit is designed to “accomplish . . . a broader governmental objective.”<sup>28</sup> Zoldan argues that this principle explains both *Klein*<sup>29</sup> and “most rule of decision cases.”<sup>30</sup>

Zoldan’s self-dealing principle is an attractive one. As he notes, it reflects a broader jurisprudential commitment to government neutrality—in this case, a prohibition on government skewing the scales of justice by using its lawmaking power to force a decision in its favor in a case that implicates the government not as a policy-maker but simply as an interested litigator, no more deserving than any other litigator to fix the rules by which its liability is determined.<sup>31</sup> It also reflects, if indirectly, Zoldan’s focus on legislative generality—that is, the disfavor with which constitutional law looks, or should look, on government action that precisely targets one winner and one loser. Indeed, his self-dealing principle targets the most egregious form of such singling out—singling out that benefits the government itself, for no public purpose. Nevertheless, that principle, like all principles that have been offered to explain *Klein*, encounters difficulties.

#### A. Self-Dealing as Applied to *Klein*

First, consider *Klein* itself. Zoldan concludes that the statute in *Klein* violates the self-dealing principle because it always benefits the government, and only the government. Importantly, he writes that that law “did not establish a broader governmental policy within the meaning of [the] self-dealing principle.”<sup>32</sup> But it’s not clear what Zoldan means by that statement. At the end of

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27. *Id.* at 2190.

28. *Id.* at 2193–94.

29. *Id.* at 2194–96.

30. *Id.* at 2197; *see also id.* at 2197–2216.

31. *Id.* at 2174–79.

32. *Id.* at 2196.

the Article, he offers a series of examples of laws that implicate that principle, all dealing with an environmental protection law to which Congress legislates a set of different exemptions relating to the operation of power plants. He identifies one such exemption—exempting from the law a particular plant constructed and operated by the federal government and identified in the law<sup>33</sup>—as most likely to violate *Klein*. According to Zoldan, this is because that exemption reflects no general policy addressing power generation; rather, it simply decrees that the environmental impairment the original law seeks to prevent is not implicated by the particular facility identified in the statute.<sup>34</sup>

But it's not clear why laws such as his hypothetical power plant exemption should be thought of as not "establish[ing] a broader governmental policy," unless, by definition, governmental policy cannot be "establish[ed]" in a targeted way. For example, it would presumably be perfectly coherent for government to conclude that a particular power station is a crucial part of the national or local power infrastructure, such that ensuring its continued existence reflects perfectly sound policy—and, more relevantly for our purposes, "policy" of any sort.<sup>35</sup> To be sure, at other points in his analysis Zoldan seems to suggest that legislation that otherwise appears to be self-dealing is not so if the benefits it confers only on the government inure to the public more generally.<sup>36</sup> Nevertheless, Zoldan's suggestion that this

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33. The hypothetical law in question accomplishes this exception in a manner calling to mind the statute in *Robertson*, that is, by referring to the structure identified in the lawsuit the statute seeks to end.

34. See Zoldan, *The Klein Rule*, *supra* note 2, at 2223–25; see also *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992) (upholding a law that "determined and directed" that new obligations imposed on the federal government satisfied the obligations imposed by the statutes identified in two particular federal court cases identified by names and case numbers).

35. Cf. *United States v. Klein*, 80 U.S. 129, 146–47 (1871) (distinguishing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), which upheld a law identifying a particular bridge as a post road and nullified its previous status as a nuisance, on the ground that the law simply created a new state of affairs that would be applied to any relevant future case).

36. See Zoldan, *The Klein Rule*, *supra* note 2, at 2192–93 ("[I]f the change in law abrogates an obligation of the government only incidental to the accomplishment of a broader governmental objective, or benefits someone other than the government, then it amends applicable law and must be applied by the



targeted exemption would likely fail his self-dealing principle presumably means that that exemption does not establish policy, as Zoldan uses that term. This result would suggest that a great deal of government decision-making would become subject to judicial invalidation. But even the self-dealing inquiry itself, so understood, would raise concerns, to the extent it would require courts to determine whether such a particularized exemption does in fact establish broader public policy. One would think that courts performing such an inquiry would need to exhibit some measure of deference to the government's argument that the challenged law, despite its narrowness, did in fact legitimately establish policy for the public benefit. Of course, such deference, if applied liberally, might effectively validate self-dealing.<sup>37</sup>

Zoldan's application of this principle to *Klein* itself raises this issue. To be sure, the law in *Klein* was not the sort of narrowly-targeted law that he hypothesizes toward the end of the Article. After all, the statute in *Klein* applied to everyone in Wilson's position. But for Zoldan, the *Klein* law nevertheless failed the self-dealing test, because "whatever the motivations of Congress for doing so, the effect of the proviso [at issue in *Klein*] was only to relieve the government of its obligations under the [law allowing loyal southerners to recover their property], not to set public policy."<sup>38</sup> But this is just an assertion. It is just as reasonable to assert that the effect of that proviso was to prevent overly-generous pardoning action by the President, and overly-generous judicial interpretations of such pardons, from inappropriately lightening the burdens to be borne by people who were factually disloyal to the Union during the war. Of course, such a policy might be beyond Congress's power to enact, since that policy might interfere with either the President's pardoning power and/or the courts' power to construe the effects of pardons. But that is a different rationale for striking the proviso down. Indeed, it's the rationale that all scholars of *Klein* take as relatively unexceptional. The rationale that Zoldan cares about—

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court.”).

37. Cf. *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (employing highly deferential review to uphold against equal protection and due process challenges a law that might well have been motivated by private party rent-seeking).

38. Zoldan, *The Klein Rule*, *supra* note 2, at 2196.

the prohibition on legislative prescriptions of “rules of decision”—is explained by Zoldan’s self-dealing rationale only if one is willing to take a narrow view of what counts as legitimate public policy, and, by extension, only if one is willing to take a very broad view of courts’ power to second-guess the assertion that such laws do indeed promote some public good.

### *B. Self-Dealing In Post-Klein Cases*

#### *1. The Easy Cases*

Zoldan divides the most important cases engaging *Klein* into several categories.<sup>39</sup> The first category, which he discusses only briefly,<sup>40</sup> involves cases where the government has legislated to favor one private party over another private party, rather than the government as litigator over its litigation adversary. Zoldan considers these easy cases for his self-dealing principle. And they are, for the obvious reason the government can be presumed not to gain a direct benefit from a ruling in favor of one private party as opposed to the other.<sup>41</sup>

The second category of cases involves the government as a party, but features legislation that favors the private party in the case. He includes in this category the venerable case *The Schooner Peggy*,<sup>42</sup> in which the Supreme Court enforced the terms of a treaty that required the return of a vessel previously claimed as a prize, even though the treaty was concluded after the lower court had ruled in favor of the vessel’s status as a prize (a status that inured partially to the benefit of the United States). Nearly two centuries later, in *United States v. Sioux Nation*,<sup>43</sup> the Court upheld a law that waived the federal government’s defense of *res judicata* in litigation involving the government as a defendant. In

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39. This Response does not address each case Zoldan discusses, but does discuss each category. See generally Zoldan, *The Klein Rule*, *supra* note 2, at 2197–2216. One of the important cases Zoldan discusses, *District of Columbia v. Eslin*, 183 U.S. 62 (1901), is discussed later in this Response. *Infra* Part II.B.2.

40. Zoldan, *The Klein Rule*, *supra* note 2, at 2197–98.

41. *Id.* at 2198.

42. 5 U.S. (1 Cranch) 103 (1801).

43. 448 U.S. 371 (1980).

so doing, the Court distinguished *Klein* on the ground that the statute in *Sioux Nation* operated to disadvantage the government.<sup>44</sup> These cases also are self-explanatory as illustrations of Zoldan's self-dealing principle.

## 2. The Harder Cases

But then harder cases arise. Zoldan begins with *Robertson v. Seattle Audubon Society*,<sup>45</sup> a 1992 case in which the Court unanimously rejected a *Klein*-based challenge to the "Northwest Timber Compromise," (Compromise) a federal law that sought to resolve a dispute between logging and environmental interests in the Pacific Northwest. The dispute took the form of two lawsuits, brought by, respectively, the Portland and Seattle chapters of the National Audubon Society.<sup>46</sup> Those lawsuits alleged that federal management of old-growth forests in the Northwest violated several federal laws, including the Migratory Bird Treaty Act and the National Environmental Policy Act. While those suits were pending, Congress brokered a compromise. That compromise imposed new requirements on federal management of those forests, but also "determine[d] and direct[ed]" that satisfaction of those new requirements

is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al., v. F. Dale Robertson*, Civil No. 89-160 and *Washington Contract Loggers Assoc. et al., v. F. Dale Robertson*, Civil No. 89-99 (order granting preliminary injunction) and the case *Portland Audubon Society et al., v. Manuel Lujan, Jr.*, Civil No. 87-1160-FR.<sup>47</sup>

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44. *Id.* at 405; see also Zoldan, *The Klein Rule*, *supra* note 2, at 2200.

45. 503 U.S. 429 (1992).

46. See *id.* at 434 (quoting the federal statute that in turn identified the lawsuits brought by both organizations).

47. Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, § 318(b)(6)(A), 103 Stat. 745 (1989).

A unanimous panel of the Ninth Circuit held that this provision prescribed a rule of decision, and thus violated *Klein*.<sup>48</sup> As noted above, a unanimous Supreme Court disagreed.<sup>49</sup>

As Zoldan acknowledges,<sup>50</sup> *Robertson* presents a difficult challenge for scholars seeking to explain *Klein*. On the one hand, “determin[ing] and direct[ing]” that satisfaction of the Compromise’s new requirements for federal land management is “adequate consideration for the purpose of meeting the statutory requirements” the plaintiffs cited in their lawsuits appears on its face to force courts to reach certain results, a seemingly clear violation of *Klein*’s rule of decision prohibition. On the other hand, a moment’s reflection should lead one to the conclusion ultimately reached by the Supreme Court, namely, that this provision simply amended those underlying laws, to make them inapplicable in the context of the lawsuits the provision identified. Surely, this is not the most transparent way of making law. But, according to the Supreme Court, it remains lawmaking. But if that is true, then what remains of *Klein*’s rule of decision prohibition?

Zoldan argues that the self-dealing principle explains *Robertson*, in two ways.<sup>51</sup> First, he observes that the Compromise imposes real obligations on the government, and leaves open the prospect of future litigation against the government if it defaults on those obligations.<sup>52</sup> Thus, this is not a situation like *Klein* itself where, without having to do anything substantive, the government necessarily wins as a result of the statute. Second, he argues that the Compromise achieved a public purpose beyond simply lifting a burden on the government.<sup>53</sup> Rather, the

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48. *Seattle Audubon Soc’y v. Robertson*, 914 F.2d 1311 (9th Cir. 1990).

49. *See Robertson*, 503 U.S. at 437.

50. *See Zoldan, The Klein Rule*, *supra* note 2, at 2201 (“The difficult *Robertson* decision has long been considered a significant challenge to the articulation of a viable *Klein* principle.”).

51. *Id.* at 2201–07.

52. *Id.* at 2204–05.

53. Zoldan does concede that the Compromise likely lifted burdens on the government, since the new requirements the Compromise imposed on the government were less onerous than those in the laws that the Compromise effectively partially repealed. *See id.* at 2205

Certainly, some part of the impact of the Compromise relieved the government of an obligation; at the least, it was relieved of its

Compromise successfully mediated the conflicting demands of logging and environmental interests, and as such, established effective government policy.

Zoldan's analysis of *Robertson* is lawyerly and careful. Nevertheless, it leaves unanswered important questions about workability of his self-dealing principle. First, once one gets past a statute that necessarily results in a complete victory for the government, it becomes difficult to draw a coherent line separating laws that unconstitutionally self-deal and those for which the self-dealing aspect is only a part of the law's effect. *Robertson* illustrates this problem. Zoldan's self-dealing principle requires that a "substantial" part of the challenged law's impact consist not simply in lifting a burden from the government.<sup>54</sup> Consider the difficulty this standard imposes on courts. For example, what if, instead of imposing the requirements the Compromise actually placed on the government, it instead imposed a very rudimentary requirement—say, a requirement that government simply keep records of the number of trees harvested? One could argue that such a requirement, trivial as it is, remains substantive: for example, one could suggest that such record-keeping could spur future legislative efforts to protect the forests, once the extent of the logging became clear. Would that count as substantial enough an obligation to defeat the self-dealing claim? How would a court decide?

Zoldan's second explanation for the Compromise's constitutionality is even more susceptible to a critique based on the difficulty of line-drawing, and, ultimately, on judicial competence. Zoldan notes that the Compromise established public policy rather than simply benefitting the government as a litigant. But the assumption underlying this rule—that courts are able to tell the difference between government policy-making and government actions taken simply to benefit itself as a litigator—may be difficult to vindicate. Consider a governmental decision to cut off all lawsuits against it by asserting sovereign

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obligation to litigate the cases referenced in the Compromise. Further, to the extent that the obligations of (b)(3) and (b)(5) were less onerous than the statutory obligations provided by generally applicable environmental statutes, the government was relieved of those burdens as well.

54. Zoldan, *The Klein Rule*, *supra* note 2, at 2193.

immunity, or even simply sovereign immunity to suits seeking damages or other retrospective relief. The Court has acknowledged, most notably in its state sovereign immunity jurisprudence, that government immunity from lawsuits or at least from certain types of relief provide important public benefits.<sup>55</sup> If such assertions of sovereign immunity can be defended on public policy grounds then, again, how can courts competently draw a line separating laws whose predominant effect is simply to benefit the government as a litigator, and those that feature a greater proportion of public policy benefits relative to those self-dealing benefits? This latter critique repeats this Response's questions about how the self-dealing principle would apply to *Klein* itself.<sup>56</sup> That same critique applies here—as, indeed, it would to any application of the policy-making exception to the self-dealing prohibition.

Finally, Zoldan considers *District of Columbia v. Eslin*.<sup>57</sup> In *Eslin* the Court upheld a statute that vacated creditors' judgments against the District of Columbia government. That statute repealed an earlier federal law that had both made the federal government liable for the District's debts and allowed creditors of the District's public works board to renew lawsuits that had previously been dismissed. An important part of this convoluted story is that, at the time, the D.C. government was not a federal entity.<sup>58</sup> This oddity allows Zoldan to read to its fullest extent *Eslin*'s language that the federal government's initial shouldering of the District's debt liabilities constituted an act of grace, which Congress was thus free to abandon without constitutional consequence.<sup>59</sup>

Zoldan acknowledges that this reading of *Eslin* "is not free of difficulty."<sup>60</sup> As he explains, one could argue that the federal

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55. See, e.g., *Alden v. Maine*, 527 U.S. 706, 751–52 (1999) (noting the accountability benefits state governments enjoy when they are able to avoid lawsuits seeking retrospective relief).

56. *Supra* note 38 and accompanying text.

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

58. See Zoldan, *The Klein Rule*, *supra* note 2, at 2213 ("When the District became indebted for the work that was the subject of *Eslin*'s claims, the District was, for relevant purposes, not the United States government.").

59. *Id.* at 2213–15.

60. *Id.* at 2214.

government in *Eslin* had shouldered the same obligation to pay the District's debts as it had shouldered in *Klein* after the Supreme Court decided that a pardon did in fact erase the label "disloyal" that previously would have disqualified Wilson's estate from seeking reimbursement for his seized cotton.<sup>61</sup> Nevertheless, he concludes that this reading is the best way to harmonize *Klein* and *Eslin*,<sup>62</sup> the latter case, as he notes, not even bothering to cite *Klein*.<sup>63</sup>

The space limitations of this Response preclude a deep engagement with Zoldan's reading of *Eslin*, which, at any rate, is tangential to the underlying question of the self-dealing principle's viability. For that narrower purpose, Zoldan's reading of *Eslin* is important because it forces us to consider the distinction between government obligation and government grace, and whether that distinction provides a stable foundation for a general principle prohibiting self-dealing. The next Part takes up this work, albeit briefly.

### III. Patchak and the Possibility of Another Reading of Klein

In *Patchak v. Zinke*,<sup>64</sup> decided after the publication of Zoldan's Article, the Court returned, for the second time in as many years,<sup>65</sup> to the question of *Klein*'s meaning. In *Patchak*, a sharply divided Court upheld a federal law governing legal claims relating to a parcel of land that the Secretary of the Interior took into trust for the benefit of a Native tribe that desired the land for a casino.<sup>66</sup> After a neighboring landowner's lawsuit challenging the Secretary's decision enjoyed preliminary success,<sup>67</sup> Congress enacted the law in question. Section 2(a) of

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61. *Id.*

62. *Id.*

63. *Id.* at 2172.

64. 138 S. Ct. 897 (2018).

65. *Bank Markazi v. Peterson*, 136 S.Ct. 1310 (2016). Zoldan mentions *Bank Markazi* at several points in his analysis, most importantly to note how that case makes doubtful a straightforward reading of *Klein* as barring hyper-specific legislation. See generally Zoldan, *The Klein Rule*, *supra* note 2, at 2173.

66. *Patchak*, 138 S. Ct. at 901.

67. See generally *Match-E-Be-Nash-She-Wish Band of Pottawatomi*

that law—unchallenged in *Patchak*—“ratified and confirmed” the Secretary’s decision to take the land into trust. Section 2(b)—the provision at issue in *Patchak*—reads as follows:

NO CLAIMS.— Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.<sup>68</sup>

A six-justice majority upheld this law. Writing for four of those justices, Justice Thomas concluded that Section 2(b) constituted a stripping of federal court jurisdiction over claims such as *Patchak*’s, and that such jurisdiction stripping was a valid use of Congress’s power to set the jurisdiction of federal courts. He acknowledged that the Constitution prevents Congress from “compel[ling] . . . findings or results under old law,”<sup>69</sup> but he concluded that Section 2(b)’s jurisdiction stripping changed the law, and did so for “an open-ended class of disputes.”<sup>70</sup>

Justice Breyer concurred, concluding that Section 2(b) was simply a housekeeping measure that ensured the effectiveness of Section 2(a)’s confirmation of the parcel’s status as trust land.<sup>71</sup> Justice Ginsburg, joined by Justice Sotomayor, concurred only in the judgment. She concluded that Section 2(b) should be construed as the government’s reassertion of the sovereign immunity it had waived when it enacted the Administrative Procedure Act, the statute under which *Patchak* sued.<sup>72</sup> Importantly, Justice Sotomayor wrote her own concurrence in the judgment, to reiterate her agreement with Justice Ginsburg’s sovereign immunity conclusion, but also to stress her agreement with much of the dissent’s analysis.<sup>73</sup>

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Indians v. *Patchak*, 567 U.S. 209 (2012) (holding that the federal government had waived its sovereign immunity to the lawsuit and that the plaintiff had standing to sue).

68. 28 U.S.C. § 1331 (2012).

69. *Patchak*, 138 S. Ct. at 901 (internal quotation omitted).

70. *Id.* at 910 (internal quotation omitted).

71. *Id.* at 911 (Breyer, J., concurring).

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

73. *Id.* at 913 (Sotomayor, J., concurring).



Chief Justice Roberts, joined by Justices Kennedy and Gorsuch, dissented.<sup>74</sup> Disputing the characterizations of Section 2(b) as either a jurisdiction-stripping statute<sup>75</sup> or an assertion of sovereign immunity,<sup>76</sup> he insisted that that provision left nothing for courts to decide and thus did not establish a new legal rule. He also insisted that Section 2(b) compelled a result in a single case, given the expiration of the limitations period on any possible future challenges to the trust status of the property. Indeed, even assuming that Section 2(b) was properly understood as a jurisdiction-stripping provision, he still argued that it violated the Constitution by compelling a result in one and only one case, thus violating his belief that “the concept of ‘changing the law’ must imply some measure of generality or preservation of an adjudicative role for the courts.”<sup>77</sup>

The Court’s decision in *Patchak* illustrates both the limits of *Klein* today but also the potential for a meaningful *Klein* rule in the future. First, *Patchak* is difficult to square with any self-dealing limitation on congressional power. The hard fact of the matter is that in *Patchak* a majority allowed Congress to ensure that the federal government would prevail in any challenge to its decision taking into trust the property in question. Indeed, regardless of its characterization as a jurisdiction stripping provision or a reassertion of federal sovereign immunity, Section 2(b) ensured that any such challenge could not even be heard on the merits. This result conflicts with Zoldan’s self-dealing principle, unless that principle allows for such avoidance on the theory that the federal sovereign’s amenability to suit is purely a matter of grace. In that latter case, the self-dealing principle leaves open a major loophole, given that either such characterization of a law would constitute a highly attractive vehicle for government to accomplish exactly what Zoldan urges it should be prohibited from accomplishing.

Nevertheless, and perhaps ironically, the voting in *Patchak* raises hope that the justices may yet possess some appetite for a meaningful understanding of *Klein*. First, Chief Justice Roberts’

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74. *Id.* at 913 (Roberts, C.J., dissenting).

75. *Id.* at 919–22 (Roberts, C.J., dissenting).

76. *Id.* at 922 (Roberts, C.J., dissenting).

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

dissent garnered two new adherents that he did not have in his *Bank Markazi* dissent. To be sure, he lost his only supporter from *Bank Markazi*—Justice Sotomayor—but the fact that in *Patchak* she agreed with much of his reasoning suggests that her vote is eminently gettable. Just as heartening is the fact that Chief Justice Roberts' *Patchak* dissent was a full-throated insistence on legislative generality and a realistically meaningful judicial role in applying statutes. The fact that that insistence gained the votes of two other justices, and the sympathy of a third, suggests that the Court is in fact closely split on the possibility of resurrecting a meaningful *Klein* principle, just as the last remaining plausible Article III-based reading of *Klein*—Zoldan's—appears less and less viable as a matter of existing precedent.