BANK OF MARKAZI V. PETERSON: THE EROSION OF SEPARATION OF POWERS

INTRODUCTION

The separation of powers doctrine results from the three-branch system created by the Constitution.[1] The Constitution bestows upon each branch its own sphere of power and creates a system of "checks and balances" between branches.[2] This doctrine is also derived from historical analysis and the intent of the Framers; the colonies experiences with legislatures performing what is now traditionally recognized as judicial roles "figur[ed] prominently in the Framer's decision to devise a system [which] secur[es] liberty through the division of power."[3] Furthermore, in *Marbury v. Madison*,[4] Justice Marshall declared Article III of the Constitution establishes an independent judiciary whose "province and duty is . . . to say what the law is."[5]

This article focuses on the much–adjudicated relationship between Congress and the Judiciary.[6] Throughout the history of the United States, the Court has attempted to articulate the division of power between the Legislature and the courts.[7]

In *United States v. Klein*,[8] the foundational decision regarding the boundary between Congress and the courts in pending litigation, the Court stated that the Legislature violated the principles of separation of power when Congress "prescribe[ed] rules of decision to the Judicial

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1. *See* Bank Markazi v. Peterson, 139 S. Ct. 1310, 1330 (2016) (Roberts, C.J., dissenting); *see also* Plaut v. Spendthrift Farm Inc., 514 U.S. 211, 219 (1995).

2. Amy D. Ronner, *Judicial Self-Demise: The Test of When Congress Impermissibly Intrudes on Judicial Power After* Robertson v. Seattle Audubon Society *and the Federal Appellate Courts' Rejection of the Separation of Powers Challenges to The New Section of the Securities Exchange Act of 1934*, 35 ARIZ. L. REV. 1037, 1038 (1993) (discussing the historical foundation of separation of powers).

3. *Bank Markazi*, 139 S. Ct. at 1331 (Roberts, C.J., dissenting).

4. 5 U.S. (1 Cranch) 137 (1803).

5. *Id.* at 177.

6. This topic is divisive regarding issues outside the scope of this article, such as separation of powers in prison litigation reform. For additional information 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 (2009); Theodore K. Cheng*, Invading an Article III Court's Inherent Equitable Powers: Separation of Powers and the Immediate Termination Provisions of the Prison Litigation Reform Act*, 56 WASH. & LEE L. REV. 969 (1999); Ira Bloom, *Prisons, Prisoners, and Pine Forests: Congress Breaches the Wall Separating Legislative from Judicial Power*, 40 ARIZ. L. REV. 389 (1998); Heidi J. Goldstein, *When the Supreme Court Shuts Its Doors, May Congress Re-Open Them?: Separation of Powers Challenges to § 27a of the Securities Exchange Act*, 34 B.C. L. REV. 853 (1993).

7. *See* Howard M. Wasserman, *The Irrepressible Myth of Klein*, 79 U. CIN. L. REV. 53, 54 (2010).

8. 80 U.S. (13 Wall.) 128 (1871).

Department of the government . . . . in [pending] cases."[9] However, *Klein* has troubled both the courts and legal theorists alike. Justice Ginsberg remarked, "*Klein* has been called a deeply puzzling decision."[10] In *Robertson v. Seattle Audubon Soc.*,[11] the Court appeared to dilute the holding in *Klein*, which limits the ability of Congress to "force the judiciary's hand."[12] In *Plaut v. Spendthrift Farms Inc.*,[13] the Court reiterated separation of powers principles and declared Congress cannot command courts to reopen settled cases.[14] While *Plaut* does not deal with laws deciding pending cases, the case expounds upon the meaning of separation of powers and illuminates the dangers of weakening the barrier between Congress and the courts.[15]

The Court's most recent decision on the division of power between Congress and the judiciary is *Bank Markazi v. Peterson*.[16] In that case, Congress had passed legislation that expressly targeted pending litigation and allowed citizens to sue a foreign bank otherwise protected under sovereign immunity.[17] While the Court upheld the law as constitutional, this article argues the Court was incorrect in its decision. First, this article will present background information on *Klein* and the formative cases interpreting the *Klein* decision. Next, this article will summarize the majority opinion and dissenting opinion in *Bank Markazi*. Finally, this article will argue that, in conjunction with *Robertson*, *Bank Markazi* further dilutes the separation of power between the Legislature and the Judiciary, and this weakening of the division of power has dangerous consequences.

I. BACKGROUND

This section discusses the history of the Court's interpretation of the separation of power between the Legislature and the Judiciary leading up to its decision in *Bank Markazi*. The Court first articulated the division of power between the Judiciary and the Legislature in *Klein*. The Court then diluted the *Klein* holding in, and then revisited the separation of powers doctrine in *Plaut*.

The formative decision articulating the separation of power between Congress and the courts is *Klein*.[18] *Klein* is a Reconstruction Era case

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9. *Id.* at 146.
10. *Bank Markazi*, 139 S. Ct. at 1332 (quoting Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2538 (1998).
11. 503 U.S. 429 (1992).
12. Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2525 (1998).
13. 514 U.S. 211 (1995).
14. *Id.* at 219.
15. *See generally Bank Markazi*, 139 S. Ct. at 1330 ((Roberts, C.J., dissenting) (explaining the separation of powers).
16. Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016).
17. *Id.* at 1317-18.
18. *See* Ronner, *supra* note 2, at 1041.

involving Civil War legislation that allowed a person whose property had been seized and sold during the war to recover the proceeds of the sale upon proof he did not aid the rebellion.[19] In 1863, President Lincoln issued a presidential pardon that pardoned all rebels who swore an oath of loyalty, and the Court in *United States v. Pedelford*[20] held that a presidential pardon established proof the recipient of the pardon did not aid in the rebellion.[21] Klein, the administrator of an estate whose property had been seized and sold, was able to collect.[22] However, Congress wished to block these claims for political reasons.[23] While Klein's case was pending, Congress passed an additional piece of legislation stating acceptance of pardon without disclaiming participation was proof of disloyalty, and thus blocked Klein's claims.[24] The Court declared Congress had "infringed on judicial power because [the new law] attempted to direct the result without altering the legal standards governing the effect of a pardon and attempt[ed] to decide the case by prescribe[ing] the rules of decision to the Judicial Department of the government in cases pending before it."[25]

Since *Klein*, the most significant case approaching this separation of power boundary is *Robertson*.[26] *Robertson* involved appropriations for the Department of Interior, where Congress passed new requirements for the U.S. Forrest Service's management of certain forests to protect a species of owl.[27] When the Seattle Audubon Society sued and challenged the Department of Interior's decision, Congress passed legislation during pending litigation which was intended as a political compromise between the two groups.[28] Problematic with the legislation, however, was that the statute explicitly mentioned the case name of the pending litigation and stated preexisting conduct satisfied the law.[29]

Although it appeared that the statute violated the separation of powers principles articulated in *Klein*, the Court held that the statute was constitutional.[30] The subsections of the statute "compelled changes in the law, not findings or results under old law,"[31] and therefore Congress did

19. *Bank Markazi*, 139 S. Ct. at 1323 (citing United States v. Klein, 80 U.S. (13 Wall.) 128, 139 (1871)).
20. 76 U.S. (9 Wall.) 531, 542 (1869).
21. *Bank Markazi*, 139 S. Ct. at 1323 (citing *Klein*, 80 U.S. at 132).
22. *Id.* at 1324.
23. *See Id.* at 1334 (Roberts, C.J., dissenting).
24. *Id*. at 1324.
25. *Id.* at 1334 (Roberts, C.J., dissenting) (quoting *Klein*, 80 U.S. at 145–46).
26. Wasserman, *supra* note 7, at 67.
27. 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, 1057 (1999).
28. *Id.* at 1058.
29. *Id.*; *See also* Robertson v. Seattle Audubon Soc., 503 U.S. 429, 434–35 (1992).
30. *Robertson*, 503 U.S. at 437 (upholding the constitutionality of the statute in question).
31. *Id.* at 438.

not infringe upon the Judiciary's role of deciding cases.[32] Additionally, the Court was untroubled by the specifics in the law and stated that naming the pending cases was shorthand for the purpose of clarifying the previous regulations that the statute sought to amend.[33]

However, in *Plaut*, the Court held that Congress "exceeded its authority by requiring the federal courts to exercise '[t]he judicial power of the United States'"[34] by passing a statute prolonging the Statute of Limitations for cases already decided. Writing for the majority, Justice Scalia relied on the decisions in both *Klein* and *Robertson* and determined, even though Congress's statute did amend the law, it is unconstitutional for Congress to retroactively command the courts to reopen final judgments.[35] Justice Scalia further articulated the history of separation of powers, the importance of the doctrine, and stated that permitting Congress to decide cases for the Judiciary is "repugnant" to the Constitution.[36] While the holding in *Plaut* does not strictly apply to the facts of *Bank Markazi*, Justice Roberts' dissent in *Bank Markazi* relied heavily on the principles set for in *Plaut*.[37]

II. *BANK MARKAZI V. PETERSON*

A. Facts

The respondents were victims of Iranian–sponsored terrorism who sued Iran in 2003 in the District Court for the District of Columbia for injuries to themselves and to their family members.[38] Many of the injuries were in connection to the 1983 terrorist bombing of a U.S. Marine barracks in Lebanon sponsored by Iran.[39] In 2003, respondents were granted summary judgment by default against the Islamic Republic of Iran and obtained billions of dollars of judgments against Iran, much of which went unpaid.[40] In order to enforce their judgments, respondents filed writs of execution in the United States District Court for the Southern District of New York for a turnover of $1.75 billion in assets from a New York bank owned by Bank of Markazi—the central bank of Iran.[41] Bank Markazi invoked sovereign immunity under the Foreign Sovereign Immunities Act of 1976 (FSIA).[42] During the judgment–enforcement

32. *Id.* at 441 (stating generally no Article III jurisprudence was violated).
33. Araiza, *supra* note 27, at 1070; *See also Robertson*, 503 U.S. at 439–40.
34. Plaut v. Spendthrift Farm Inc., 514 U.S. 211, 218 (1995) (quoting U.S. CONST. art. III, § 1).
35. *Id.* at 219.
36. *Id.* at 218.
37. *See* Bank Markazi v. Peterson, 139 S. Ct. 1310, 1330 (2016) (Roberts, C.J., dissenting).
38. *Id.* at 1319; *See*, *e.g.*, *Peterson v. Islamic Republic of Iran*, 264 F.Supp.2d 46, 49 (2003).
39. *Bank Markazi*, 139 S. Ct. at 1319.
40. *Id.* at 1320.
41. *Id.*
42. *Id.* at 1318-19; *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605.

proceedings, Congress passed 22 U.S.C. § 8772 (§ 8772), allowing respondents to execute funds from Bank Markazi.[43]

B. Procedural History

In accordance with § 8772, the District Court for the Southern District of New York ordered Bank Markazi to turn over its assets.[44] Bank of Markazi appealed, stating § 8772 violated the separation of powers doctrine by dictating factual findings and determining the decision of the court.[45] On appeal, the Second Circuit affirmed, and held § 8772 is constitutional because the statute retroactively changed a law.[46]

C. Opinion of the Court

Justice Ginsberg delivered the opinion of the Court.[47] Justices Kennedy, Breyer, Alito, and Kagan joined her in all parts, and Justice Thomas joined in Part II-C.[48] The Court began by stating the issue on appeal: "Does § 8772 violate the separation of powers by purporting to change the law for, and directing a particular result in, a single pending case?"[49] The Court affirmed the Second Circuits ruling that § 8772 does not violate the separation of powers and stated that Congress can amend the law and make changes to pending cases "even when the amendment is outcome determinative."[50]

The Court next reviewed statutes relevant to the case.[51] First, the Court reviewed the FSIA, which contained a "terrorist exception" granting American citizens the right to sue state sponsors of terrorism in U.S. courts.[52] The Court noted, however, FSIA protected execution of property of a "foreign central bank" and thus many successful plaintiffs faced difficulties collecting judgments.[53] The Court then explained that to overcome these difficulties President Obama issued an executive order allowing citizens to execute property from any Iranian financial institution in the United States.[54]

When this executive order was challenged, Congress passed 22 U.S.C. § 8772, which stated if a court makes specified findings, "a financial asset . . . shall be subject to execution . . . in order to satisfy any judgment to the extent of any compensatory damages awarded against

43. Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772 (2012).
44. *Bank Markazi*, 139 S. Ct. at 1321.
45. *Id.* at 1322.
46. *Id.*
47. *Id.* at 1316.
48. *Id.*
49. *Id.* at 1317.
50. *Id.*
51. *Id.*
52. *Id.* (citing to 28 U.S.C. §1606(a)(1)).
53. *Id.* at 1318 (quoting 28 U.S.C. § 1611(b)(1)).
54. *Id.*

Iran for damages for personal injury [by acts of terrorism enumerated in FSIA]."[55] Furthermore, the statute defines "financial assets" as "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)."[56] Finally, the Court noted that in order for a court to order execution of an asset under § 8772, a court must determine the asset is:

> (A) held in the United States for a foreign securities intermediary doing business in the United States;
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> (B) a blocked asset . . . and
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> (C) equal in value to a financial asset of Iran, including an asset of the central bank . . . of the Government of Iran . . . .[57]

The Court acknowledged § 8772 is "unusual" because it designates assets, deems assets available, and further specifies this statute identifies a case named by the docket number.[58]

After addressing the relevant statutes and the language of § 8772, the Court discussed the jurisprudential history of the separation of powers doctrine to determine § 8772 does not violate separation of powers. The Court began by citing *Marbury v. Madison*, stating Article III of the Constitution establishes an independent Judiciary with the power of judicial review.[59] The Court also cited the holdings in *Plaut*: Congress cannot require the federal courts to act in a manner repugnant to the Constitution and that Congress may not "retroactively comman[d] the federal courts to reopen final judgments."[60]

The Court next addressed Bank of Markazi's primary argument.[61] Bank of Markazi argued based on the ruling in *Klein*, Congress violated separation of powers and stepped onto judicial turf when § 8772 "prescribe[d] rules of decisions to the Judicial department . . . in pending cases."[62] The Court analyzed *Klein* regarding Bank's Markazi's claim first by reviewing the facts of *Klein*, and concluded that the Congress in *Klein* violated the separation of powers because Congress "attempted to direct the result altering the legal standards governing the effect of the pardon ."[63] The Court additionally specified that "[m]ore recent decisions

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55. *Id.* at 1318-19 (quoting 22 U.S.C. § 8772 (a)).
56. *Id.* at 1319 (quoting 22 U.S.C. § 8772 (b)).
57. *Id.* at 1319 (citing 22 U.S.C. § 8772 (a)(1)).
58. *Id.* at 1317.
59. *Id.* at 1322 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
60. *Id.* at 1322-23 (quoting Plaut v. Spendthrift Farm Inc., 514 U.S. 211, 218-19 (1995)).
61. *Id.* at 1323.
62. *Id.* (quoting United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871)).
63. *Id.* at 1324.

[such as *Robertson*], however, have made it clear that *Klein* does not inhibit Congress from amending the applicable law."[64]

Furthermore, the Court determined that the language of *Klein* cannot be taken at "face value" because Congress often has the power to make retroactive statutes, and constitutional restrictions regarding retroactive legislation are of "limited scope."[65] The Court listed the sections of the Constitution that expressly inhibit retroactive legislation.[66] The Court qualified, absent one of these specific violations, "Congress may indeed direct courts to apply newly enacted, outcome–altering legislation in pending civil cases."[67]

Moreover, a statute does not impose upon judicial autonomy when it changes the substantive law.[68] While Bank Markazi argued § 8772 "effectively" directed fact finding, the Court contended that § 8772 provided a new standard that if Iran holds assets, victims of terrorism can execute those assets.[69] Section 8772 amended the substantive law and is therefore constitutional.[70] The Court additionally responded to the dissent's arguments and stated a law that says "Smith wins" is of course unconstitutional, but for reasons other than the separation of powers principles.[71] The Court maintained this type of hypothetical law is irrational and would not amend substantive law, unlike § 8772.[72]

The Court rejected Bank Markazi's additional argument that because § 8772 is not general, the statute is suspect.[73] The Court cited to several cases where statutes that govern a small number of cases were valid and affirmed that lack of generality of a statute does not imply the statute is unconstitutional.[74]

Finally, in Section II-C the Court concluded § 8772 is a "congressional exercise regarding foreign affairs" and stressed its deference to Congress and the Executive in that domain.[75] The Court reflected that throughout history Congress and the President have regulated foreign assets to further foreign policy objectives, and "[s]uch measures have never been rejected as an invasion upon the Article III judicial power."[76] The Court further remarked that when Congress altered the law regarding property belonging to Iran in the United States, "Congress acted com-

64. *Id.* at 1323 (quoting Robertson v. Seattle Audubon Soc., 503 U.S. 429, 441 (1992).
65. *Id.* at 1324.
66. *Id.*
67. *Id.* at 1325.
68. *See Id.* at 1326.
69. *Id.* at 1325.
70. *Id.* at 1326.
71. *Id.*
72. *Id.*
73. *Id.* at 1327.
74. *Id.* at 1328.
75. *Id.*
76. *Id.*

fortably within the political branches' authority over foreign sovereign immunity and foreign-state assets."[77] The Court concluded by affirming the lower court's decision holding § 8772 does not infringe upon separation of powers principles.[78]

D. Dissenting Opinion

Chief Justice Roberts delivered the dissenting opinion, joined by Justice Sotomayor.[79] The dissent stated it would hold § 8772 violates the separation of powers because Congress enacted legislation that directed the court's ruling.[80] Section 8772 was "tailored to this case . . . [and] resolves the parties' specific legal disputes to guarantee respondent's victory" and is therefore unconstitutional.[81]

The dissent began with a story asking the reader to imagine that his neighbor sues him over a property line dispute.[82] The neighbor presents a letter from the previous homeowner accepting the neighbor's version of facts as evidence, and the reader presents a defense of an old county map.[83] The dissent then asked the reader to imagine that while the suit is pending, the neighbor persuades the Legislature to pass a law stating that for the "readers case alone" a letter is conclusive evidence and the neighbor wins.[84] The dissent then questioned the reader about who decided the case: "the Legislature which targeted your specific case . . . so as to ensure your neighbor's victory, or the court?"[85] The dissent likened § 8772 to this scenario, illustrating the violation of separation of powers.[86]

The dissent next discussed the foundation of separation of powers.[87] The dissent stated separation of powers is foundational to the United States and "safeguards individual freedom."[88] Citing Justice Scalia's historical analysis in *Plaut*, the dissent remarked the foundation of the separation of powers was the Framers experience with colonial legislatures performing typically judicial roles.[89] The Framer's experience was fundamental to their decision to devise "a system of securing liberty" through a tripartite system of government comprised of checks and bal-

77. *Id.* at 1329
78. *Id.*
79. *Id.* (Roberts, C.J., dissenting).
80. *Id.* at 1330.
81. *Id.*
82. *Id.* at 1329.
83. *Id.*
84. *Id.*
85. *Id.*
86. *See Id*.
87. *Id.* at 1330.
88. *Id.*
89. *Id.* at 1331.

ances.[90] The dissent expressed the importance that "judicial power [is] . . . the judiciary's alone."[91]

The dissent then reviewed the language of § 8772 and determined Congress's statute unconstitutionally "assumes the role of a judge" and determines the outcome of the case.[92] The dissent stated "there has never been anything like § 8772 before" and deemed the outcome-determinative nature and the specifics of the statute concerning.[93] Not only does § 8772 cite pending litigation, but § 8772 also states that the statute shall not affect "a judgment in any other action against a terrorist party in any other proceeding."[94] The dissent distinguished § 8772 from the majority's analysis of *Robertson*, stating the statute in *Robertson* is not comparable to this case because the specificity in that situation was intended merely as shorthand for an otherwise valid exercise of Congressional power.[95]

Based on the principles set forth in *Klein*, the dissent deemed § 8772 violates separation of powers.[96] The dissent criticized the majority's view of *Klein* and specified, although *Klein* may not have set forth clear rules defining the division of power between Congress and the courts, "it does not mean—as the majority seems to think—that Article III itself imposes no such limits."[97] The dissent also commented on the majority's characterization of the meaning of a change in substantive law and asserted that almost any law passed by Congress changes the law.[98] This is because "changing the law is simply how Congress acts."[99] Furthermore, the dissent stressed the importance of a true division of power between Congress and the Judiciary and criticized the majority for not recognizing a separation of power between the two branches, short of a statute stating "Smith Wins." [100]

Finally, the dissent remarked on the majority's deference to Congress in the sphere of foreign policy.[101] The dissent emphasized that Congress has "extensive powers of [its] own" in the arena of foreign affairs and could have resolved the issue differently.[102] Rather, through

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90. *Id.* at 1332; *See also* Plaut v. Spendthrift Farm Inc., 514 U.S. 211, 221 (1995).
91. *Bank Markazi*, 139 S. Ct. at 1332 (Roberts, C.J., dissenting) (remarking the language of Article III establishes an independent judiciary).
92. *Id.*
93. *Id.* at 1333.
94. *Id.* (quoting 22 U.S.C. § 8772(c) (2012)).
95. *Id.* at 1336 (citing Robertson v. Seattle Audubon Soc., 503 U.S. 429, 433-35 (1992).
96. *Id.* at 1334. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871).
97. *Bank Markazi*, 139 S. Ct. at 1335 (Roberts, C.J., dissenting).
98. *Id.*
99. *Id.*
100. *Id.*
101. *See Id.* at 1336.
102. *Id.* at 1337

§ 8772, Congress "seized" the authority of the Court and "commandeered the courts to make a political judgment."[103]

III. ANALYSIS

The Court incorrectly decided *Bank Markazi*. In its decision, the Court abrogated separation of powers principles for pending litigation that were established in *Klein*. This decision is dangerous because it threatens the individual liberty that the Framers sought to protect through division of power. Additionally, *Bank Markazi* perilously strengthens Congress and weakens the Judiciary by allowing Congress to decide cases rather than an independent Judiciary.

A. Bank Markazi *Extends Beyond* Robertson *and Abates* Klein.

Bank Markazi abrogates *Klein*. As stated previously, *Klein* is the seminal and foundational case regarding the separation of power between Congress and the Judiciary in pending litigation.[104] While *Klein* states an important separation of powers principle, that Congress may not decide cases for the courts, legal scholars have noted the confusion surrounding *Klein* and the Court's wariness to apply its principles.[105] After the Court's decision in *Bank Markazi*, the Court appears to have abrogated *Klein* and eroded the division of power between Congress and the Judiciary in pending cases.[106]

The Court refers to *Klein* as a "puzzling" decision.[107] While the decision in *Klein* is unclear, many legal scholars have assessed *Klein* to mean: (1) Congress can prescribe rules of decisions in pending litigation only by amending the substantive law and (2) Congress cannot tell courts how to decide an issue of fact or determine an evidentiary matter.[108] Some have even referenced Klein as a myth.[109] Regardless of the exact meaning of *Klein*, most importantly the Court has not deemed any act of Congress created during pending legislation to be unconstitutional under the principles set forth in *Klein*, leaving the boundary between Congress

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103. *Id.*
104. Ronner, *supra* note 2, at 1039.
105. Sager, *supra* note 12.
106. Ronner, *supra* note 2, at 1048.
107. *Bank Markazi*, 139 S. Ct. at 1323.
108. *Id.* at 1046; Wasserman, *supra* note 7, at 54–9; Araiza, *supra* note 27, at 1074; Sager, *supra* note 12, at 2529.
109. Wasserman, *supra* note 7, at 53; Araiza, *supra* note 27, at 1074; Barry Friedman, The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court, 91 Geo. L.J. 1, 34 (2002) ("Klein is sufficiently impenetrable that calling it opaque is a compliment"); Daniel J. Meltzer, Congress, Courts, and Constitutional Remedies, 86 Geo. L.J. 2537, 2549 (1998) ("Much that it said in the opinion is exaggerated if not dead wrong...."); Sager, *supra* note 12, at 2525 (arguing that, while not exactly Fermat's Last Theorem, Klein is "deeply puzzling"); Gordon G. Young, *Congressional Regulations of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1189, 1193, 1195 (describing opinion as "confusing" and criticizing "excessively broad and ambiguous statements" in majority opinion).

and the courts unclear.[110] However, first in its decision in *Robertson*[111] and then in its decision in *Bank Markazi*, the Court dilutes any such principles set forth in *Klein*. Both cases involve statutes that appear to be clear examples of what *Klein* forbids, yet both are upheld.

The statute in *Robertson* seemed "to be a clear example of what [*Klein*] decries,"[112] and many infer *Robertson* to implicitly overrule *Klein*.[113] By allowing Congress to specifically tailor legislation to a few pending cases, *Robertson* allowed Congress to direct the decision of the case.[114] Although the Court distinguished *Robertson* from *Klein* in that the statute in *Robertson* amended the law, *Robertson* essentially declares separation of powers cannot be violated so long as Congress can be said to have amended the law.[115] Thus, "the distillation of *Robertson* is the inane proposition that as long as legislation is legislation, then it is properly legislation."[116]

Should the state of *Klein* be unclear after *Robertson*, the decision in *Bank Markazi* extends beyond *Robertson* to disregard the separation of powers principles stated in *Klein*. The Court not only affirmed *Robertson* by stating that the separation of powers is not offended so long as Congress amends the law,[117] but surpassed *Robertson* by allowing Congress to target a single pending case with legislation that expressly states the statute solely applies to the pending case and nothing else.[118] Whereas *Robertson* applied to a small group of cases and stated case names as shorthand for regulations, the Court took one step further and upheld the constitutionality of a statute so specifically targeted at pending legislation.[119] The ability of Congress to target a single case weakens the division of power between Congress and the Judiciary because Congress is deciding the case rather than the courts.[120]

The Court defended its decision and stated that Congress exercised constitutional power because § 8772 amends the law and still allows the court to determine fact.[121] Undoubtedly, through legislation, Congress prescribes rules of decision when the law establishes conduct for courts to determine and imposes legal liability.[122] However, there is a difference

110. *Id.* at 66.
111. Ronner, *supra* note 2.
112. Sager, *supra* note 12, at 2527.
113. Ronner, *supra* note 2, at 1054.
114. *Id.*
115. *Id.*
116. *Id.* at 1070.
117. Bank Markazi v. Peterson, 139 S. Ct. 1310, 1326 (2016).
118. *Id.* at 1333 (Roberts, C.J., dissenting); *See* 22 U.S.C. § 8772(c) (2012).
119. *See Bank Markazi*, 139 S. Ct. at 1336 (Roberts, C.J., dissenting).
120. *Id.* at 1338 (Roberts, C.J., dissenting).
121. *Id.* at 1326.
122. Wasserman, *supra* note 7, at 66, 71.

between Congress "hoping" for an outcome in a case based on the law and deciding a case by targeting that pending case through legislation.[123]

The Court's argument that § 8772 changes the substantive law and leaves courts the ability to determine facts is suspect. Congress did not write legislation hoping for an outcome. Instead, § 8772 tells the Court how to decide based on facts that are already determined.[124] While § 8772 technically allows a Court to determine if an asset is "(a) held in the United States for foreign securities . . . (b) a blocked asset . . . and (c) equal in value to a financial asset of Iran, including an asset of the central bank . . . of the Government of Iran,"[125] these facts which implicate Bank Markazi were already "well established" at the time the statute was written.[126] When facts of a case are already decided and implicated in the statute, the courts cannot determine facts in any meaningful way.[127]

Therefore, when the Court determines a statute that applies solely to pending litigation and already has the facts, the principles set forth in *Klein* are implicitly overruled. While pieces of *Klein*, such as the holding that Congress cannot change evidentiary procedures or write a law stating "Smith Wins,"[128] the meaningful boundary of power between Congress and the courts is dissolved. The Court weakened the separation of powers in *Robertson*,[129] and now upholds a statute deciding a pending case.[130] Therefore, *Bank of Markazi* makes the meaning of *Klein* clear: *Klein* is a relic of the past.

B. The Dilution of Separation of Powers Threatens Individual Liberty.

Bank Markazi is a dangerous precedent because the decision reduces the separation of power between Congress and the courts, and in turn this endangers individual liberty. The Constitution creates an independent Judiciary with the power to decide cases.[131] *Bank Markazi* blurs that division of power.

Separation of powers protects individual liberty.[132] This doctrine is instilled in the American conscious and is an extension of the Framers' beliefs.[133] Congress is traditionally viewed as "the most dangerous branch" and the judiciary is viewed as the protector of individual

123. *Id.* at 72
124. *See Bank Markazi*, 139 S. Ct. at 1335 (Roberts, C.J., dissenting).
125. 22 U.S.C. § 8772 (a)(1).
126. *Bank Markazi*, 139 S. Ct. at 1335 (Roberts, C.J., dissenting).
127. *See Id.*
128. *Id.* at 1326.
129. Ronner, *supra* note 2.
130. *Bank Markazi*, 139 S. Ct. at 1338 (Roberts, C.J., dissenting).
131. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
132. *Bank Markazi*, 139 S. Ct. at 1335 (Roberts, C.J., dissenting).
133. Wasserman, *supra* note 7, at 57.

rights.[134] As a guardian of individual liberty, the partition between legislative and judicial power is critical.[135]

When Congress can single out a case, having already determined the facts, Congress dictates to the Judiciary how to rule.[136] In this situation, Congress has no check on its power, and the political check is likely unavailable.[137] The likelihood is small that a small group whose case has been decided by legislation will have an immensely difficult time garnering the necessary political power and support to vote-out members of Congress. Additionally, when a law has a narrow range, legislation may not receive full consideration by congressmen before there is a vote.[138] Thus, when Congress dictates decisions to the courts, as was done in *Bank Markazi*, it is repugnant to the separation of powers and is a threat to individual freedom and liberty.

Moreover, the Court did not present a meaningful line to separate power to ensure an independent judiciary. As the dissent stated, a law as blatant as "Smith Wins" is contrary to the separation of powers.[139] However, even this arbitrary line holds little weight because the Court accepted § 8772, tailored in the same way as "Smith Wins," as constitutional.[140] Where is the line dividing power and maintaining an independent Judiciary? Again, while the Court argued changes in the substantive law do not violate separation of powers,[141] this is a tautological argument. Almost any law created by Congress (maybe short of the statute passed in *Klein*) can be seen as a substantive change in the law.[142] Not only did the Court abate *Klein*, but the Court failed to distinguish any true separation of power to stop Congress from expanding its power and infringing upon the Judiciary. This failure fundamentally violates the separation of powers and is a threat to individual liberty by permitting the "most dangerous branch"[143] to impede upon an independent Judiciary.

Although the Court criticized the argument that non-general statutes are suspect,[144] Congress's "singling out" pending litigation for particular individuals is an encroachment of individual liberty.[145] In his concurring opinion in *Plaut*, Justice Breyer noted an additional reason Congress's law violated separation of powers is that specificity of legislation to a

134. Ronner, *supra* note 2, at 1040.
135. *Id.*
136. *See Bank Markazi*, 139 S. Ct. at 1335 (Roberts, C.J., dissenting).
137. *See* Araiza, *supra* note 27, at 1097.
138. *Id.* at 1098.
139. *Bank Markazi*, 139 S. Ct. at 1335 (Roberts, C.J., dissenting).
140. *Id.* (Roberts, C.J., dissenting).
141. *Id.* at 1326.
142. *Id.* at 1335 (Roberts, C.J., dissenting).
143. Ronner, *supra* note 2, at 1040
144. *Bank Markazi*, 139 S. Ct. at 1327.
145. *See* Araiza, *supra* note 27, at 1092; *See also* Plaut v. Spendthrift Farm Inc., 514 U.S. 211, 244 (1995) (Breyer, J., concurring).

small, closed group singles out individuals.[146] The phenomenon of singling out is when Congress singles out individuals and applies the law to them on a case by case basis.[147] Justice Breyer contended that legislation in most circumstances has general applicability, and laws that single out small groups or individuals "lack the liberty-protecting assurances" that laws with general applicability maintain.[148] Thus, statutes that specifically single out small groups or individuals contradict the separation of powers principles.[149]

Section 8772 does what Justice Breyer deemed to violate the separation of powers. Not only does § 8772 single out a pending case by name, but the statute expressly states § 8772 is not to be applied to any other proceedings other than the named pending case.[150] Justice Breyer viewed the statute in *Plaut*, which applied to a small, but not closed group, to violate separation of powers.[151] Using this same line of reasoning, § 8772 certainly singles out Bank Markazi.

C. Bank Markazi *Expands Congress's Power and Weakens the Courts' Power.*

Furthermore, *Bank Markazi* expands the power and purview of Congress, and in turn, limits the power of the Court. In its decision, the Court deferred to Congress and the President in the sphere of foreign policy.[152] The dissent pointed out the consequences for Bank Markazi go beyond simply removing sovereign immunity from the bank and stripping bank of any protection from federal law, state law, or international law.[153] In addition to the consequences to the bank, *Bank Markazi* expands Congress's power in the realm of foreign policy, granting Congress deference to decide a pending case simply because "foreign affairs [is] a domain in which the controlling role of the political branches is both necessary and proper."[154] The Court's deference to Congress and the President in all things foreign policy is a dangerous precedent. While Bank Markazi is a foreign bank, what is to stop Congress from deciding an American citizen's pending suit in the name of foreign policy?

The opportunities for abuse of power, the very abuse the Framers sought to curtail via the separation of powers, are worrisome. Even though Congress has enumerated foreign policy powers in the Constitution, the Court is supposed to operate as a check to Congress's power.[155]

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146. *See Plaut*, 514 U.S. at 246 (Breyer, J., concurring).
147. *See* Araiza, *supra* note 27, at 1093.
148. *Plaut*, 514 U.S. at 244 (Breyer, J., concurring).
149. *See Id.* at 242.
150. *See* 22 U.S.C. § 8772(c) (2012).
151. *See Plaut*, 514 U.S. at 246 (Breyer, J., concurring).
152. Bank Markazi v. Peterson, 139 S. Ct. 1310, 1328 (2016).
153. *Id.* at 1336 (Roberts, C.J., dissenting).
154. *Id.* at 1328.
155. *See id*. at 1336 (Roberts, C.J., dissenting).

By simply deferring to Congress and allowing Congress to "unabashedly pick winners and losers in particular pending cases," the Court decreases its power of judicial review and increases the power of Congress in foreign policy.[156]

IV. CONCLUSION

In *Bank Markazi*, the Court eroded the division of power between Congress and the Judiciary. Through this decision, the Court abates any such separation of powers principles for pending legislation set forth in *Klein*, by permitting Congress to decide pending cases. This dilution of separations of powers has dangerous consequences beyond *Bank Markazi.* Without a meaningful division of power supporting an independent judiciary, Congress is free to trample on individual liberties that separation of powers seeks to protect. Furthermore, the deterioration of separation of powers expands the power of Congress and weakens the power of the Court.

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156. *Id.* at 1337 (Roberts, C.J., dissenting).

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