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Bank Markazi v. Peterson: Threatening the Separation of Powers Doctrine

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BANK MARKAZI V. PETERSON: THREATENING THE SEPARATION OF POWERS DOCTRINE

ABSTRACT

The Framers of the United States Constitution created three distinct bodies of government. The Legislature makes laws, the Executive enforces laws, and the Judiciary interprets the laws. The Framers designed this three-part government to ensure no one branch became too powerful. Accordingly, when Congress enacts legislation that tells courts how to decide a pending lawsuit, it threatens the doctrine of separation of powers that defines the American government.

In *Bank Markazi v. Peterson*, the Supreme Court upheld federal legislation that swept away the foreign sovereignty of Iran’s central bank for the *Bank Markazi* plaintiffs only. Previous Supreme Court precedent allowed Congress to enact laws that identified cases by name or docket number but only if the new law amended or repealed the underlying law at issue in the case. The underlying statute at issue in *Bank Markazi* was the Foreign Sovereign Immunities Act (FSIA). Despite the FSIA’s “terrorism exception,” which allows Americans to file suit against state sponsors of terrorism in the courts of the United States, the FSIA still shields from execution a foreign central bank. Instead of amending the relevant portion of the FSIA that protects foreign central banks, Congress drafted 22 U.S.C. § 8772, which removed the central bank barrier for the *Bank Markazi* plaintiffs only.

This Case Comment argues that in enacting § 8772, Congress impermissibly commandeered the Judiciary’s authority by picking the winner of a pending lawsuit. In allowing Congress to do so, the Court greatly expanded the power of Congress at the Judiciary’s expense. Now Congress can pick the winners and losers in pending litigation without amending the underlying law. This Comment also argues that Congress cannot single out specific parties when enacting legislation, even if the new law amends or repeals the underlying statute. Finally, this Comment proposes a three-factor test for courts to analyze separation of powers issues when Congress passes a law that affects pending litigation.

TABLE OF CONTENTS

INTRODUCTION	418
I. BACKGROUND.....	419
II. <i>BANK MARKAZI V. PETERSON</i>	425
<i>A. Facts</i>	425
<i>B. Procedural History</i>	426
<i>C. Opinion of the Court</i>	426

<i>D. Dissenting Opinion</i>	428
III. ANALYSIS	429
<i>A. Congress Has the Authority to Prescribe Rules That Alter the Outcome of Specific Litigation Subject to Limited Exceptions</i> ...	430
<i>B. Congress Cannot Single Out Specific Parties</i>	433
<i>C. Proposed Three-Factor Test for Separation of Powers Issues</i> ...	436
1. Factor One—Examining the Statute to Determine If It Amends or Repeals the Underlying Law	438
2. Factor Two—The Prohibition on Singling Out One Party	440
3. Factor Three—Government-Favoring Legislation	441
4. Weight of the Factors	442
CONCLUSION	443

INTRODUCTION

The Supreme Court recently ruled in *Bank Markazi v. Peterson*¹ that a provision of the Iran Threat Reduction and Syria Human Rights Act of 2012, codified as 22 U.S.C. § 8772, does not offend the separation of powers doctrine.² This decision is significant because it departed from a 150-year-old Civil War-era precedent that prevented Congress from picking the winner in a pending lawsuit and, in doing so, greatly expanded the powers of the Legislature at the Judiciary's expense.³ What was once a very defined line between the Legislature and the Judiciary is now a gray line drawn heavily in Congress's favor.

The “judicial Power of the United States” is vested in the Federal Judiciary.⁴ The Supreme Court has held that this provision “safeguards the role of the Judicial Branch in our tripartite system.”⁵ In *Pennsylvania v. Wheeling & Belmont Bridge Co.*,⁶ the Court decided that so long as Congress amends or repeals a statute underlying pending litigation, the law is valid regardless of whether it alters the outcome of the lawsuit.⁷

Sixteen years later, the Court decided what is arguably the quintessential separation of powers case. In *United States v. Klein*,⁸ the Court established three core principles: (1) Congress cannot direct courts to reach a certain outcome in specific litigation or command courts how to resolve a particular case; (2) Congress cannot force courts to interpret

1. 136 S. Ct. 1310 (2016).

2. *Id.* at 1329.

3. See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855).

4. *Bank Markazi*, 136 S. Ct. at 1330 (Roberts, C.J., dissenting) (quoting U.S. CONST. art. III, § 1).

5. *Id.* (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 883, 850 (1986)).

6. 59 U.S. (18 How.) 421 (1855).

7. *Id.* at 431.

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

and apply the Constitution in a certain way; and (3) Congress cannot enact laws that violate an individual's constitutional rights.⁹

Well over one hundred years after *Klein*, the Court faced similar issues in *Robertson v. Seattle Audubon Society*.¹⁰ However, the Court declined to address a *Klein* argument but reaffirmed the *Wheeling Bridge* “amend or repeal” rule, holding that the newly enacted statute “compelled changes in law, not findings or results under old law.”¹¹ Section 8772 implicates *Wheeling Bridge*, *Klein*, and *Robertson* because it directs a court to resolve the case in a particular way and fails to amend or repeal the underlying law, namely the Foreign Sovereign Immunities Act of 1976 (FSIA).¹²

This Case Comment will argue that *Bank Markazi* was wrongly decided. Part I of this Comment will first review the Court's history of cases analyzing the separation of powers doctrine. Part II provides a brief summary of the facts of *Bank Markazi* as well as the majority and dissenting opinions. Part III explains Congress's limits when it passes legislation that directly impacts pending litigation. This Comment will then provide a three-factor test that courts could apply to ensure Congress can carry out its legislative duties without offending the separation of powers doctrine.

I. BACKGROUND

Separation of powers between the three branches of government is derived from the “tripartite structure of the Constitution.”¹³ The Judiciary's primary function is “to say what the law is.”¹⁴ When Congress attempts to commandeer the Judiciary, the Supreme Court will strike down the legislative act as a violation of the separation of powers doctrine.¹⁵ In 1855, Congress overturned a judicial order that declared a bridge a nuisance by reclassifying the bridge as a post road for the United States mail

9. See *id.* at 148; see also Stephen I. Vladeck, *Why Klein (Still) Matters: Congressional Deception and the War on Terrorism*, 5 J. NAT'L SECURITY L. & POL'Y 251, 252 (2011); Howard M. Wasserman, *The Irrepressible Myth of Klein*, 79 U. CIN. L. REV. 53, 56 (2010).

10. See *Robertson v. Seattle Audubon Soc'y (Robertson II)*, 503 U.S. 429, 440 (1992) (discussing how Congress's passing of a new law constitutes a modification of prior law).

11. *Id.* at 438, 441; see also 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, 1069 (1999).

12. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1316 (2016) (“The question raised by petitioner *Bank Markazi*: Does § 8772 violate the separation of powers by purporting to change the law for, and directing a particular result in, a single pending case?”).

13. 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, 1037 (1993).

14. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

15. See Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2525–26 (1998).

service.¹⁶ Congress essentially amended the underlying law by legalizing the structure.¹⁷ The Supreme Court upheld the legislation in *Wheeling Bridge* because the bridge was no longer a nuisance in the eyes of the law following the enactment of the new statute.¹⁸ Congress simply created new legal circumstances, which the courts then applied to the ordinary rules concerning nuisances.¹⁹

Sixteen years later, in 1871, the Court decided its most important separation of powers case: *United States v. Klein*.²⁰ In *Klein*, the Court declared a congressional statute unconstitutional because it prescribed a “rule of decision” in a pending case.²¹ In the wake of the Civil War, Congress enacted the Abandoned and Captured Property Act of 1863 (1863 Act), which granted the proceeds the government collected from the sale of seized property to the original owners of that property provided they had not supported Confederate soldiers or the rebellion.²² Later, President Lincoln offered full pardons to persons engaged in the rebellion if they swore an oath of allegiance to the United States.²³ One of the pardoned rebellion supporters was a man named Wilson, whose cotton was seized and sold during the Civil War.²⁴ Klein, the administrator of Wilson’s estate, brought suit to recover the proceeds from the cotton because Klein received a presidential pardon in 1862.²⁵

While *Klein* was on appeal, the Supreme Court decided *United States v. Padelford*.²⁶ *Padelford* contained similar facts as those in *Klein*. The *Padelford* Court affirmed a Court of Claims decision that determined that the beneficiaries of President Lincoln’s pardon were cleansed of their offense of giving aid and comfort to the enemy.²⁷ Therefore, because the pardon recipients were legally cleansed of any consequences of disloyalty, the property owners were entitled to the proceeds under the 1863 Act.²⁸

16. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 429 (1855).

17. *Id.* (explaining that Congress’s newly enacted legislation, which declared that all bridges across the Ohio River at Wheeling to be lawful structures for the postal service, amended the current nuisance laws).

18. *See id.* at 436.

19. *See Wasserman*, *supra* note 9, at 66.

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

21. *Id.* at 146–47; *see also* Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 Nw. U. L. REV. 437, 447 (2006); Sager, *supra* note 15, at 2525–26.

22. *Klein*, 80 U.S. (13 Wall.) at 128–29; Sager, *supra* note 15, at 2525.

23. Sager, *supra* note 15, at 2525.

24. *Klein*, 80 U.S. (13 Wall.) at 130–32.

25. *See id.* at 132.

26. 76 U.S. (9 Wall.) 531 (1869), *superseded by statute*, Act of July 12, 1870, ch. 251, 16 Stat. 235, *as recognized in Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016).

27. *Id.* at 543.

28. *See id.*

In response to the *Padelford* decision, a disgruntled Congress enacted the Abandoned and Captured Property Act in 1870 (1870 Act).²⁹ Congress passed the 1870 Act specifically to prevent certain individuals, including Klein, from prevailing in their lawsuit to recovery property.³⁰ The 1870 Act declared that if a person such as Klein accepted a presidential pardon, courts should consider the pardon as conclusive evidence that the individual provided aid and comfort to the enemy and was therefore not entitled to recovery.³¹ The 1870 Act went further and stated that if a claimant prevailed in the Court of Claims by proving his loyalty through a presidential pardon, the Supreme Court must remand the case to the Court of Claims and order dismissal for lack of jurisdiction.³²

The Court declared the Act unconstitutional.³³ In rejecting the 1870 Act, the *Klein* Court determined Congress inappropriately meddled with Supreme Court jurisdiction and stated that Congress was “prescrib[ing] a rule for the decision of a cause in a particular way.”³⁴ The Court distinguished *Wheeling Bridge* on the ground that the *Klein* Court believed Congress prescribed an “arbitrary rule of decision.”³⁵ The statute forbade the Court from giving a presidential pardon the evidentiary effect that the Court believed it should receive and directed the Court to determine a pending legal dispute according to Congress’s judgment—both unconstitutional acts.³⁶ In contrast, the Court in *Wheeling Bridge* was “left to apply its ordinary rules to the new circumstances created by the act.”³⁷ There were no major cases analyzing *Klein* until the Court faced a similar separation of powers issue in *Robertson*.³⁸

In 1990, the Ninth Circuit addressed the constitutionality of the Northwest Timber Compromise (Compromise), which was enacted in response to ongoing litigation.³⁹ Two parties representing opposite interests sued over the United States Forest Service’s adoption of certain timber management guidelines.⁴⁰ The Seattle Audubon Society argued that the Forest Service’s guidelines failed to properly protect northern spotted owls, while the Washington Loggers Association claimed the guidelines

29. Wasserman, *supra* note 9, at 61–62.

30. *Id.*

31. Sager, *supra* note 15, at 2525.

32. Ronner, *supra* note 13, at 1044.

33. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 129 (1871); Sager, *supra* note 15, at 2525–26.

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

35. *Id.*; see also Wasserman, *supra* note 9, at 64.

36. Wasserman, *supra* note 9, at 63–64.

37. *Klein*, 80 U.S. (13 Wall.) at 147; see also Sager, *supra* note 15, at 2526.

38. See generally *Robertson II*, 503 U.S. 429 (1992).

39. *Seattle Audubon Soc’y v. Robertson (Robertson I)*, 914 F.2d 1311, 1313 (9th Cir. 1990), *rev’d*, 503 U.S. 429 (1992); Araiza, *supra* note 11, at 1065–66; Ronner, *supra* note 13, at 1048–49 (explaining that Congress stepped in after the district court granted Seattle Audubon’s preliminary injunction).

40. See Araiza, *supra* note 11, at 1065; Ronner, *supra* note 13, at 1048.

unfairly restricted timber harvesting.⁴¹ The litigation involved the classic "jobs versus the environment" argument, and Congress felt the need to intervene.⁴² After the district court granted a preliminary injunction in favor of the Seattle Audubon Society, Congress responded with the Compromise, which provided some relief for owls and some relief for loggers.⁴³

The Compromise simultaneously expanded and restricted harvesting in thirteen national forests that contained northern spotted owls.⁴⁴ Subsection (b)(6)(A) of the Compromise stated that "compliance with the spotted-owl protective provisions of subsections (b)(3) and (b)(5) was to be considered 'adequate consideration for the purpose of meeting' the statutory requirements alleged to have been violated in the pending Seattle Audubon . . . litigation."⁴⁵

The Ninth Circuit ruled the Compromise was unconstitutional because instead of repealing or amending the laws at issue in the lawsuit, Congress created entirely new obligations through the Compromise.⁴⁶ Thus, Congress violated the separation of powers doctrine because it directed courts that if the government satisfied the requirements of subsections (b)(3) and (b)(5) of the Compromise, then the government met the underlying environmental statutes at issue in the pending litigation.⁴⁷ The Ninth Circuit determined the statute impermissibly "direct[ed] the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court."⁴⁸ Additionally, the unanimous three-judge panel found the Compromise's format troubling because it was drafted with a specific result in mind.⁴⁹

41. See *supra* note 39 and accompanying text.

42. Araiza, *supra* note 11, at 1065.

43. See *supra* note 39 and accompanying text.

44. Act of Oct. 23, 1989, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-50 ("[T]he Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls 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. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States."); see also Ronner, *supra* note 13, at 1048-49.

45. Araiza, *supra* note 11, at 1066 (quoting § 318(b)(6)(A), 103 Stat. at 745-50).

46. *Robertson I*, 914 F.2d 1311, 1317 (9th Cir. 1990) ("Congress did not amend or repeal laws, as it unquestionably could do, but rather prescribed a rule for the decision of a cause in a particular way, without changing the underlying laws, as it unquestionably cannot do."), *rev'd*, 503 U.S. 429 (1992); Araiza, *supra* note 11, at 1068; Ronner, *supra* note 13, at 1050.

47. Ronner, *supra* note 13, at 1050.

48. *Robertson I*, 914 F.2d at 1316.

49. See Araiza, *supra* note 11, at 1066. Note that there were no dissenting opinions among the three-judge panel. See *Robertson I*, 914 F.2d at 1312, 1317.

A unanimous Supreme Court reversed.⁵⁰ Justice Thomas authored the opinion and concluded that the Compromise “replaced the legal standards underlying the two original challenges . . . without directing particular applications under either the old or new standards,” and, therefore, the underlying law was not left intact.⁵¹ Further, Justice Thomas brushed aside the Ninth Circuit’s issue with the statute’s format, finding that Congress merely referenced the pending cases as a legislative shortcut to identify the five environmental statutes at issue in the case.⁵²

Although the Court ultimately determined Congress did amend the underlying law, Justice Thomas made reference to a less stringent standard. He stated the following:

Congress might have modified [the Migratory Bird Treaty Act (MBTA)] directly, for example, in order to impose a new obligation of complying either with the current § 2 or with subsections (b)(3) and (b)(5). Instead, Congress enacted an entirely separate statute deeming compliance with subsections (b)(3) and (b)(5) to constitute compliance with § 2-a “modification” of the MBTA⁵³

The Court, therefore, focused on the statute Congress could have written whereas the Ninth Circuit focused on the statute Congress actually enacted.⁵⁴

One final important aspect of the *Robertson* decision occurred in dicta in the opinion’s final paragraph. The Court acknowledged an especially insightful amicus brief argument that, despite amending a law, a statute is not automatically constitutional under the *Wheeling Bridge* “amend or repeal” rule.⁵⁵ According to the brief, “even a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases.”⁵⁶ The Court declined to address this argument because it was “neither raised below nor squarely considered by the Court of Appeal, nor was it advanced by respondents in this Court.”⁵⁷

Three years later in *Plaut v. Spendthrift Farm, Inc.*,⁵⁸ Justice Breyer, in his concurring opinion, addressed a similar argument as that of the *Robertson* amicus brief.⁵⁹ In *Plaut*, the Court deemed a federal statute

50. *Robertson II*, 503 U.S. 429, 437–38 (1992) (“We conclude that subsection (b)(6)(A) compelled changes in law, not findings or results under old law.”); Ronner, *supra* note 13, at 1052.

51. *Robertson II*, 503 U.S. at 437; see also Ronner, *supra* note 13, at 1052.

52. *Robertson II*, 503 U.S. at 430 (“[T]he subsection’s explicit reference to the two pending cases served only to identify the five statutory requirements that were the basis for those cases.”); see also Ronner, *supra* note 13, at 1053.

53. *Robertson II*, 503 U.S. at 439–40.

54. Araiza, *supra* note 11, at 1070; Ronner, *supra* note 13, at 1053.

55. *Robertson II*, 503 U.S. at 441.

56. *Id.*

57. *Id.*

58. 514 U.S. 211 (1995).

59. *Id.* at 213.

unconstitutional that required federal courts to reopen judgments that were previously final in securities fraud claims.⁶⁰ The new law stated that claims previously dismissed for failing to satisfy the former statute of limitations should be reopened if the claim meets the timeline under the new statute.⁶¹

The majority focused on the “integrity of final judgments” when striking down the law.⁶² However, the Court rejected a *Klein* challenge and found that Congress acted permissibly with respect to *Klein* because the law did not direct courts to decide a claim in a particular way.⁶³ Instead, the new statute only directed courts to apply the new statute of limitations and explained the legal consequences of meeting the new time period.⁶⁴ Unlike the majority, Justice Breyer focused on separation of powers in his concurrence.⁶⁵ He was convinced that Congress had singled out particular parties for unfavorable treatment under the law.⁶⁶ In Justice Breyer’s view, when Congress applies a law to individuals, as it did in *Plaut*, Congress impermissibly acts as a court rather than a legislature.⁶⁷

Finally, in *National Coalition to Save Our Mall v. Norton*,⁶⁸ the Court of Appeals for the District of Columbia Circuit upheld a congressional act that was passed in direct response to a pending lawsuit.⁶⁹ Plaintiffs brought suit to enjoin construction of a memorial, alleging that multiple federal statutes were violated in approving and constructing the memorial on the National Mall.⁷⁰ The court rejected the idea that specifically targeting a pending lawsuit rather than an anticipated lawsuit was fatal, mainly because the statute did amend the underlying law.⁷¹ In fact, the plaintiff conceded that the new statute would have been a valid amendment to the underlying law had it been enacted before the plaintiffs filed the lawsuit.⁷² The Supreme Court denied certiorari to hear this case.⁷³

60. *Id.*; see also Araiza, *supra* note 11, at 1093 (summarizing the facts and holding of *Plaut*, 514 U.S. at 218–19).

61. Wasserman, *supra* note 9, at 71.

62. Araiza, *supra* note 11, at 1093.

63. See *Plaut*, 514 U.S. at 230 (“We considered and rejected separation-of-powers objections to the statute based upon . . . *United States v. Klein*.”); Wasserman, *supra* note 9, at 71.

64. Wasserman, *supra* note 9, at 71.

65. See *Plaut*, 514 U.S. at 243–44 (Breyer, J., concurring).

66. *Id.*

67. *Id.* at 242.

68. 269 F.3d 1092 (D.C. Cir. 2001).

69. *Id.* at 1097; see also Wasserman, *supra* note 9, at 68–69.

70. Wasserman, *supra* note 9, at 68–69.

71. *Save Our Mall*, 269 F.3d at 1097.

72. *Id.*

73. *Id.* at 1092.

II. *BANK MARKAZI V. PETERSON*A. *Facts*

The *Bank Markazi* respondents were victims and family members of Iran-sponsored terrorism over the past four decades.⁷⁴ There were over one thousand respondents separated into sixteen discrete groups, each of whom obtained judgment against Iran pursuant to the “terrorism exception”⁷⁵ of the FSIA in the United States District Court for the District of Columbia.⁷⁶ The terrorism exception of the FSIA allows Americans to sue state sponsors of terrorism in the courts of the United States.⁷⁷ The validity of the judgments obtained in district court was not in dispute in *Bank Markazi* because Iran’s liability to each plaintiff had already been decided by convincing evidence.⁷⁸

Despite obtaining judgment against Iran, respondents faced difficulties trying to enforce the terrorism exception.⁷⁹ The primary reason for the difficulties was that, despite the terrorism exception, the FSIA shields from execution the property “of a foreign central bank or monetary authority held for its own account.”⁸⁰ To address these enforcement difficulties, Congress enacted the Terrorism Risk Insurance Act of 2002 (TRIA),⁸¹ which permits execution of judgments obtained under the terrorism exception against a terrorist party’s blocked assets.⁸² In February 2012, President Obama issued Executive Order No. 13599, which blocked all “property and interests . . . of any Iranian financial institution, including the Central Bank of Iran, that are in the United States.”⁸³ To ensure there was no dispute about the availability of the assets called into question in the Executive Order, Congress passed § 8772 of the Iran Threat Reduction and Syria Human Rights Act of 2012,⁸⁴ not as an amendment to the TRIA or the FSIA, but as a freestanding law.⁸⁵ Section 8772, the relevant provision in *Bank Markazi*, provided an additional basis for executing judgments on Iran’s bank assets and swept away the

74. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1319 (2016).

75. Foreign Sovereign Immunities Act of 1976 § 1605, 28 U.S.C. § 1605A(a)(1) (2012).

76. *Bank Markazi*, 136 S. Ct. at 1319.

77. 28 U.S.C. § 1605A(a)(1).

78. *Bank Markazi*, 136 S. Ct. at 1319–20.

79. *Id.* at 1317–18.

80. *Id.* at 1318 (quoting 28 U.S.C. § 1611(b)(1) (2012), *recognized as repealed by implication* in *Weininger v. Castro*, 462 F. Supp. 2d 457 (S.D.N.Y. 2006)).

81. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 101, 116 Stat. 2322, 2322–23 (2002).

82. *Id.* § 201, 116 Stat. at 2337–40; *see also Bank Markazi*, 136 S. Ct. at 1318.

83. *Bank Markazi*, 136 S. Ct. at 1319 (quoting Exec. Order No. 13,599, *Blocking Property of the Government of Iran and Iranian Financial Institutions*, 77 Fed. Reg. 6659 (Feb. 5, 2012)).

84. Iran Threat Reduction and Syria Human Rights Act of 2012 § 501, 22 U.S.C. § 8772 (2012).

85. *Bank Markazi*, 136 S. Ct. at 1318.

FSIA provision that set forth immunity for Iran's central bank for this case only.⁸⁶

B. Procedural History

To seek a court order to enforce their judgments, the sixteen groups filed suit in the United States District Court for the Southern District of New York in 2008.⁸⁷ The district court reviewed the financial history of Bank Markazi's (the Bank) assets and determined that the Bank owned the assets.⁸⁸ Following the issuance of President Obama's Executive Order and the enactment of § 8772, the judgment holders updated their motions in 2012.⁸⁹ All of Bank Markazi's defenses became irrelevant after § 8772's enactment, so the Bank changed its defenses.⁹⁰ It conceded that Iran held equitable title to the bonds in New York, but argued that § 8772 violated the separation of powers doctrine.⁹¹ The district court disagreed and ordered the requested turnover of nearly two billion dollars in bond assets held in a New York bank account owned by Bank Markazi.⁹² The Court of Appeals for the Second Circuit unanimously affirmed the decision.⁹³ The Second Circuit stated that § 8772 did not violate the separation of powers doctrine because it did not force or compel judicial findings under the old law but simply changed the applicable law relevant to this case.⁹⁴ The United States Supreme Court granted certiorari to consider the separation of powers question.⁹⁵

C. Opinion of the Court

Justice Ginsburg authored the opinion of the Court.⁹⁶ Justices Kennedy, Breyer, Alito, and Kagan joined, and Justice Thomas joined in all but Section II.C.⁹⁷ The Court affirmed the Second Circuit's ruling, concluding that § 8772 did not violate the separation of powers doctrine.⁹⁸

86. *Id.* at 1321 ("Several of [Bank Markazi's] objections to execution became irrelevant following enactment of § 8772, which, the District Court noted, 'sweeps away . . . any . . . federal or state law impediments that might otherwise exist, so long as the appropriate judicial determination is made.'"); *id.* at 1329 (Roberts, C.J., dissenting) ("The Bank has vigorously opposed those efforts, asserting numerous legal defenses. So, in 2012, four years into the litigation, respondents persuaded Congress to enact a statute, 22 U.S.C. § 8772, that for this case alone eliminates each of the defenses standing in respondents' way."); *see also* Peterson v. Islamic Republic of Iran, No. 10 Civ. 4518(KBF), 2013 WL 1155576, at *9–10 (S.D.N.Y. Mar. 13, 2013) (discussing 22 U.S.C. § 8772(a)(1)).

87. *Bank Markazi*, 136 S. Ct. at 1320.

88. *Id.* at 1321.

89. *Id.* at 1320.

90. *Id.* at 1321.

91. *Id.*

92. *Id.*

93. *Id.* at 1322.

94. *Id.*

95. *Id.*

96. *Id.* at 1316.

97. *Id.*

98. *Id.* at 1317.

Justice Ginsburg began by discussing *Klein, Robertson, and Plaut*.⁹⁹ Her review of the relevant cases solidified her belief that “Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases.”¹⁰⁰ With the passage of the new law, Justice Ginsburg found that “§ 8772 changed the law by establishing new substantive standards” that the district court could apply to the facts of the case.¹⁰¹

Justice Ginsburg then rejected Bank Markazi’s two main arguments.¹⁰² First, she rejected the claim that § 8772 dictated certain fact-finders and directed the outcome of the case under the newly enacted law.¹⁰³ Justice Ginsburg stated that a statute does not invade judicial power when it requires courts to apply the new legal standard outlined in the statute to undisputed facts.¹⁰⁴ She reiterated that Iran’s liability in the case, and its obligation to pay damages, was established four years before Congress enacted § 8772.¹⁰⁵ However, the ownership of the blocked assets was at issue.¹⁰⁶ Justice Ginsburg believed that the large volume of filings suggested that “[t]here [was] . . . plenty . . . to [litigate].”¹⁰⁷

Next, Justice Ginsburg dismissed Bank Markazi’s argument that § 8772 was “unprecedented” because it “prescribe[d] a rule for a single pending case—identified by caption and docket number.”¹⁰⁸ The Court explained that the statute in question in *Robertson* identified two cases by docket number.¹⁰⁹ Additionally, the Court emphasized that § 8772 was not accurately portrayed as a one-case-only statute.¹¹⁰ Instead, § 8772 covered a host of post-judgment execution claims filed by several plaintiffs, all of whom secured evidence-based judgments against Iran in multiple civil actions.¹¹¹ Justice Ginsburg argued that individual cases do not lose their identity simply because courts consolidate their claims.¹¹² To further quash the Bank’s second argument, Justice Ginsburg noted the Supreme Court and lower courts have upheld legislation that “govern[s] one or a very small number of specific subjects,” such as in *Wheeling Bridge* and *Save Our Mall*.¹¹³

99. *Id.* at 1323.

100. *Id.* at 1325.

101. *Id.* at 1326.

102. *Id.* at 1325–26.

103. *Id.* at 1325.

104. *Id.*

105. *Id.* at 1322.

106. *Id.*

107. *Id.* (alterations in original) (quoting *Peterson v. Islamic Republic of Iran*, No. 10 Civ. 4518(KBF), 2013 WL 1155576, at *31 (S.D.N.Y. Mar. 13, 2013)).

108. *Id.* at 1326–27 (footnote omitted) (citation omitted).

109. *Id.* at 1326.

110. *Id.* at 1317.

111. *Id.*

112. *Id.* at 1327.

113. *Id.* at 1328.

Finally, the Court highlighted that § 8772 was an exercise of legislative power regarding foreign affairs.¹¹⁴ Justice Ginsburg said it remains Congress's prerogative to alter a foreign state's immunity even when it is the subject of pending litigation.¹¹⁵ Therefore, the Court ruled that when Congress "alter[ed] the law governing the attachment of particular property belonging to Iran, Congress acted comfortably within its authority over foreign sovereign immunity and foreign-state assets."¹¹⁶

D. Dissenting Opinion

Chief Justice Roberts authored the dissenting opinion and was joined by an unusual ally, Justice Sotomayor.¹¹⁷ The Chief Justice began by fiercely arguing that the Framers warned that legislative involvement in judicial matters threatened democracy.¹¹⁸ He then addressed § 8772, arguing that it was an unconstitutional interference with the Judiciary because Congress ultimately decided the outcome of this particular case.¹¹⁹ He declared that by changing the law—for these proceedings only—simply to guarantee that the respondents win was a violation of separation of powers.¹²⁰ The Chief Justice quoted the majority, which stated that § 8772 "sweeps away . . . any . . . federal or state law impediments that might otherwise exist" to bar respondents from obtaining Bank Markazi's assets.¹²¹ The dissent had no doubt that "Congress's sole concern [in passing § 8772] was deciding this particular case, rather than establishing any generally applicable rules."¹²² Indeed, the Chief Justice noted that § 8772 stated that "nothing in the statute 'shall be construed . . . to satisfy a judgment in any other action against a terrorist party in any proceedings other than' [this case]."¹²³

Chief Justice Roberts then addressed the majority's position that § 8772 left "plenty" of factual determinations for the district court to adjudicate.¹²⁴ In actuality, the dissent noted that § 8772 only required two factual determinations—that Bank Markazi had an equitable interest in the assets and that no other party did.¹²⁵ Both factual determinations were simply legislative deception. President Obama already decided the assets were the "property of the Government of Iran" when he froze the money as part of his Executive Order.¹²⁶ Next, on numerous occasions the Bank

114. *Id.*

115. *Id.* at 1329.

116. *Id.*

117. *Id.* (Roberts, C.J., dissenting).

118. *Id.* at 1331–32.

119. *Id.* at 1332.

120. *Id.*

121. *Id.* (quoting *Bank Markazi*, 136 S. Ct. at 1317 (majority opinion)).

122. *Id.* at 1333.

123. *Id.* (footnote omitted) (quoting 22 U.S.C. § 8772(c)(1) (2012)).

124. *Id.* at 1335.

125. *Id.*

126. *Id.* (quoting Exec. Order No. 13,599, Blocking Property of the Government of Iran and Iranian Financial Institutions, 77 Fed. Reg. 6659 (Feb. 5, 2012)).

insisted it was the sole owner of the blocked assets.¹²⁷ Since both of these determinations were undisputed and well established by the time Congress enacted § 8772, Congress simply picked the winner.¹²⁸

The dissent also challenged the majority's position that the Court has previously allowed Congress to pass legislation that targeted specific cases by docket number.¹²⁹ Chief Justice Roberts noted that in *Robertson*, the relevant statute merely referenced particular cases as a shortcut for describing the environmental statutes at issue, not to limit the law's effect to those cases alone.¹³⁰ Referring to statutes through case names is permissible as long as the statute does not single out the defendant for adverse treatment, and the statute amends the underlying law.¹³¹

Finally, Chief Justice Roberts argued that the majority mischaracterized the Executive's and Legislature's historical authority to recognize a foreign state's sovereign immunity.¹³² He did not dispute that Congress, with the approval of the President, may withdraw Iran's foreign sovereign immunity.¹³³ However, Chief Justice Roberts noted that by eliminating any protections that New York State law or international law might have offered Bank Markazi, § 8772 did "considerably more than withdraw sovereign immunity."¹³⁴

The Chief Justice ended his argument by returning to his original point, discussing the long-term policy effects of the Legislature's intrusion into the Judiciary's arena.¹³⁵ Chief Justice Roberts stressed that Congress can now "unabashedly pick the winners and losers in particular pending cases" and professed that the Court laid the groundwork for extensive expansion of legislative authority at the Judiciary's expense.¹³⁶

III. ANALYSIS

The *Bank Markazi* decision greatly expanded the powers of Congress in such a way that Congress can now draft legislation that invades the Judiciary's authority.¹³⁷ In actuality, the Court veered off-course in *Robertson*, and both *Robertson* and *Bank Markazi* were wrongly decided because neither relevant statute amended or repealed the underlying laws in their respective cases. The following analysis proceeds in three main sections. Section A will first argue that it is inherently within the Legislature's authority to prescribe rules to a court that alters the outcome of a

127. *Id.*

128. *Id.*

129. *Id.* at 1336.

130. *Id.*

131. *Id.* (summarizing the holding in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995)).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 1337–38.

136. *Id.* at 1338.

137. *See supra* Section II.C.

pending case so long as Congress amends or repeals the underlying law—with limited exceptions. Section B will address the major limitation, namely, that even if the legislation does amend or repeal the statute in question, it must not target a specific party. Finally, Section C proposes a three-factor test that courts should apply each time Congress passes a law specifically aimed at pending litigation.

A. Congress Has the Authority to Prescribe Rules That Alter the Outcome of Specific Litigation Subject to Limited Exceptions

In the opinion for the Court, Justice Ginsburg makes clear in her introduction that under Supreme Court precedent, “Congress . . . may amend the law and make changes applicable to pending cases, even when the amendment is outcome determinative.”¹³⁸ More often than not, the amendment is constitutional and results in positive change. Consider, for example, the Civil Rights Act of 1964, which superseded any law that allowed employers to discriminate against an employee on the basis of membership in a protected class.¹³⁹ Congress prescribed rules of decision that required courts to find in favor of plaintiffs if they could establish evidence that they were fired because of their “race, color, religion, sex, or national origin.”¹⁴⁰ This new statute applied to prospective and pending cases and is an example of Congress permissibly affecting pending litigation by altering the preexisting general substantive law.

However, the first limit¹⁴¹ to Congress’s power to prescribe rules that alter the outcome of specific litigation is that Congress must actually amend the underlying law. When Congress truly amends the underlying substantive law, it can normally do so without referencing specific pending cases.¹⁴²

Congress cannot deceive the electorate by passing a law that commandeers the Judiciary in an attempt to achieve its political goals without the responsibility of passing legislation.¹⁴³ If Congress attempts to eliminate an applicable defense, such as central bank immunity, it must “eliminate[] [the] applicable defense in all cases.”¹⁴⁴ Congress would deceive the public if it left the defense in place in the underlying statute but compelled a court to reject the defense in other cases.¹⁴⁵

138. *Bank Markazi*, 136 S. Ct. at 1317 (majority opinion).

139. 42 U.S.C. § 2000e-2(a)(1) (2012).

140. *Id.*

141. The second limitation is outlined below in Section III.B. As a preview, the second limitation is that Congress cannot single out a specific party for adverse treatment even if it amends the underlying law.

142. Redish & Pudelski, *supra* note 21, at 457.

143. *See, e.g.*, Wasserman, *supra* note 9, at 75.

144. *Id.*

145. *Id.*

Legislative deception may occur “through either ‘micro’ or ‘macro’ deception.”¹⁴⁶ Micro deception occurs when the Legislature “leaves the generalized substantive law intact, but legislatively directs that a particular litigation (or group of litigations) arising under that law be resolved in a manner inconsistent with the dictates of that pre-existing generalized law.”¹⁴⁷ Congress employed this exact tactic in passing § 8772, and the Supreme Court mistakenly approved it.

The similarities are striking between § 8772 and the Abandoned and Captured Property Act of 1870, the statute at issue in *Klein*. The 1870 Act attempted to accomplish three feats, all of which threatened the separation of powers. First, the 1870 Act did not amend the 1863 Act, which was the underlying statute in question in *Klein* and *Padelford*.¹⁴⁸ Rather, the 1870 Act simply barred claimants who received a presidential pardon from recovering monetary proceeds under the 1863 Act.¹⁴⁹ The 1870 Act manipulated the 1863 Act “without actually amending it.”¹⁵⁰ Second, Congress enacted the 1870 Act immediately following *Padelford* in an attempt to prevent *Klein* and similar claimants from prevailing on their claims.¹⁵¹ It was precisely tailored to *Klein*’s pending litigation. Congress’s goal in passing the 1870 Act was to circumvent the *Padelford* rule so lawsuits such as *Klein*’s would not succeed.¹⁵² Finally, the 1870 Act clearly favored the government. The Court of Claims awarded *Klein* \$125,300 for compensation.¹⁵³ Thus, Congress would clearly have benefited from withholding *Klein*’s payment.

The first similarity between the 1870 Act and § 8772 is that neither law amended the underlying statute at issue in the case. The majority acknowledged that Congress “[e]nacted [§ 8772] as a freestanding measure, not as an amendment to the FSIA or the TRIA.”¹⁵⁴ Yet later in her opinion, Justice Ginsburg stated: “By altering the law governing the attachment of particular property belonging to Iran, Congress acted comfortably within the political branches’ authority over foreign sovereign immunity and foreign-state assets.”¹⁵⁵ These two assertions are irreconcilable. Subsection 8772(c) makes clear that the FSIA or the TRIA remain intact.¹⁵⁶ In order to satisfy the *Wheeling Bridge* “amend or repeal”

146. Vladeck, *supra* note 9, at 253 (summarizing Martin H. Redish and Christopher R. Pudelski’s article, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437, 439 (2006)).

147. Redish & Pudelski, *supra* note 21, at 439.

148. Ronner, *supra* note 13, at 1044.

149. *Id.*

150. Vladeck, *supra* note 9, at 254.

151. Ronner, *supra* note 13, at 1044.

152. *Id.* at 1044, 1069.

153. *Id.* at 1043.

154. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318 (2016).

155. *Id.* at 1329.

156. See 22 U.S.C. § 8772(c)(1) (2012) (“Nothing in this section shall be construed—(1) to affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than proceedings referred to in subsection (b) . . .”).

standard, Congress needed to either amend the FSIA or the TRIA, or remove the expiration date of § 8772. But Congress failed to do so and tried to do exactly what it attempted to do in *Klein*—manipulate the underlying law, namely the FSIA, without actually amending it.

Next, Congress passed § 8772, like the 1870 Act, in direct response to pending litigation. Congress had a noble goal—assist the victims in enforcing the judgment against Iran.¹⁵⁷ Therefore, Congress simply circumvented its own statute, the FSIA, which shields from execution the property of a foreign central bank, and drafted legislation precisely tailored to Bank Markazi's case.¹⁵⁸ Finally, Congress controls the purse of the United States government. With America's growing debt, using Iran's two billion dollars instead of taxpayer dollars to compensate terrorist victims favors the government.

Despite Justice Ginsburg's claim that *Klein* "has been called 'a deeply puzzling decision,'" *Klein* continues to stand as the standard for maintaining separation of powers.¹⁵⁹ *Klein* provided a separation of powers framework that ensures the unelected Judiciary polices the legislative process to eliminate legislative deception.¹⁶⁰

Scholars have argued that there is no plausible situation in which Congress could permissibly alter the result in a pending lawsuit without simultaneously amending the existing law at issue in the litigation.¹⁶¹ Yet that is exactly what Congress did in passing § 8772. There are two key differences between the Civil Rights Act of 1964 and § 8772. First, the anti-discrimination law applied to pending litigation and future instances of discrimination. Here, Congress made clear that § 8772 has no effect on future litigation.¹⁶² Second, despite amending the Civil Rights Act during presumably multiple pending court cases, courts were required to apply new outcome-determinative law to the facts of each individual case. In *Bank Markazi*, there was no fact-finding required. The two fac-

157. See *id.* § 8772(a)(1)(C).

158. 28 U.S.C. § 1611(b)(1) (2012) ("Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver . . ."), recognized as repealed by implication in *Weininger v. Castro*, 462 F. Supp. 2d 457 (S.D.N.Y. 2006).

159. *Bank Markazi*, 136 S. Ct. at 1323 (quoting Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2538 (1998)); see *id.* at 1334 (Roberts, C.J., dissenting) ("The majority characterizes *Klein* as a delphic, puzzling decision whose central holding—that Congress may not prescribe the result in pending cases—cannot be taken at face value.").

160. Redish & Pudelski, *supra* note 21, at 440; Vladeck, *supra* note 9, at 262.

161. See Redish & Pudelski, *supra* note 21, at 457.

162. See 22 U.S.C. § 8772(c)(1).

tual determinations were established prior to the enactment of § 8772, leaving “nothing” for the district court to decide.¹⁶³

B. Congress Cannot Single Out Specific Parties

The second major limitation to the rule discussed in the preceding section is the prohibition on singling out specific parties. The Court mentioned the “targeting one party” question in *Robertson* but did not resolve the issue.¹⁶⁴ The amicus brief referenced in the final paragraph of the *Robertson* opinion challenged the long-standing position that a newly enacted law is always valid under *Wheeling Bridge* as long as it amends or repeals the law.¹⁶⁵ Justice Thomas went out of his way to mention the argument, but declined to answer the question it posed since neither party raised the issue in their briefs or in the lower courts.¹⁶⁶

Three years after the *Robertson* decision, in *Plaut*, Justice Breyer expressed concern that Congress applied the statute only to a discrete, closed class of cases.¹⁶⁷ He believed Congress had singled out specific individuals for unfavorable legal treatment.¹⁶⁸ When Congress targeted specific parties, Justice Breyer believed Congress was applying the law (as opposed to making law), which is the job of the Judiciary.¹⁶⁹ This is the primary reason that courts should be extremely critical of statutes that are not of general applicability.

Laws that lack general character should always be suspect and presumed unconstitutional.¹⁷⁰ Non-general laws are typically “odd-looking,

163. *Bank Markazi*, 136 S. Ct. at 1335 (Roberts, C.J., dissenting).

164. *Robertson II*, 503 U.S. 429, 441 (1992) (“We have no occasion to address any broad question of Article III jurisprudence. The Court of Appeals held that subsection (b)(6)(A) was unconstitutional under *Klein* because it directed decisions in pending cases without amending any law. Because we conclude that subsection (b)(6)(A) *did* amend applicable law, we need not consider whether this reading of *Klein* is correct. The Court of Appeals stated additionally that a statute would be constitutional under *Wheeling Bridge* if it did amend law. Respondents’ amicus Public Citizen challenges this proposition. It contends that even a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases. This alternative theory was neither raised below nor squarely considered by the Court of Appeals, nor was it advanced by respondents in this Court. Accordingly, we decline to address it here.”).

165. *Id.* (summarizing an amicus brief position); Ronner, *supra* note 13, at 1047 (“Congress can prescribe rules of decision in pending cases as long as it does so by amending or changing the law.”); *id.* at 1055 (“The amicus had challenged the proposition that a statute is constitutional under *Wheeling Bridge* if it amends the law.”).

166. *Robertson II*, 503 U.S. at 441.

167. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 243 (1995) (Breyer, J., concurring) (“It lacks generality, for it applies only to a few individual instances.”).

168. *Id.* at 243–44; *see also Araiza, supra* note 11, at 1094.

169. *Plaut*, 514 U.S. at 243–44; *see also Araiza, supra* note 11, at 1093–94 (“For Justice Breyer, the problem with section 27A was that it applied to a discrete, closed class of cases, indeed, a class of cases, the particulars of which Congress seemed to be familiar. These characteristics convinced him that there was simply too great a danger that Congress had singled out particular individuals for unfavorable treatment—the resurrection of lawsuits against them. In other words, by legislating so as to affect only a closed, limited, and apparently identified class of individuals, Congress applied law to individuals, thereby acting like a court rather than making law.”).

170. *See Araiza, supra* note 11, at 1090; Redish & Pudelski, *supra* note 21, at 445.

[J]udiciary-intruding”¹⁷¹ laws and should only satisfy the separation of powers doctrine when they concern truly unique subjects. For example, the cases cited by Justice Ginsburg in the majority opinion primarily deal with unique subjects. She argued that the Supreme Court and lower courts have upheld statutes that “governed one or a very small number of specific subjects.”¹⁷² One such case was *Save Our Mall*.¹⁷³ That case concerned a single memorial that was “legitimately confined to ‘a unique public amenity.’”¹⁷⁴ Additionally, she cited *Wheeling Bridge*, which also dealt with unique government property—a postal road.¹⁷⁵ Both of these cases, like the majority of her other cited cases, concerned federal property.

Beyond federal property, Congress should not enact legislation directed at a single class of cases. Essentially, Congress conducted its own hearing and held a “trial by [L]egislature” in enacting § 8772.¹⁷⁶ The Framers specifically protected against legislative trials when they created the tripartite government, and for good reason. Justice Powell correctly noted in *Immigration & Naturalization Service v. Chadha* that “trial by a [L]egislature lacks the safeguards necessary to prevent the abuse of power.”¹⁷⁷ He elaborated on his thesis and stated:

Unlike the [J]udiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights. The only effective constraint on Congress’ power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to “the tyranny of a shifting majority.”¹⁷⁸

As Chief Justice Roberts stated in his dissent, Congress’s sole aim in passing § 8772 was “deciding this particular case, rather than establishing any generally applicable rules.”¹⁷⁹

171. Wasserman, *supra* note 9, at 90.

172. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1328 (2016) (citations omitted).

173. *Id.* (referring to *Nat’l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001), along with a number of other cases).

174. Brief of Federal Courts Scholars as Amici Curiae in Support of Petitioner at 23–24, *Bank Markazi*, 136 S. Ct. 1310 (No. 14-770), 2015 WL 7450417, at *23–24 [hereinafter Brief of Federal Courts Scholars] (quoting *Save Our Mall*, 259 F.3d at 1097).

175. *Bank Markazi*, 136 S. Ct. at 1328 (citing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 430 (1855)).

176. Brief of Federal Courts Scholars, *supra* note 174, at 20 (quoting *United States v. Brown*, 381 U.S. 437, 442 (1965)).

177. *Id.* at 21 (quoting *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 962 (1983) (Powell, J., concurring)).

178. *Chadha*, 462 U.S. at 966 (Powell, J., concurring).

179. *Bank Markazi*, 136 S. Ct. at 1333 (Roberts, C.J., dissenting) (referring to 22 U.S.C. § 8772(c)(1) (2012)); *see also* Brief of Federal Courts Scholars, *supra* note 174, at 23 (“No law is

In the present case, Justice Ginsburg dismissed the singling out argument by claiming this statute is “not fairly portrayed as a one-case-only regime.”¹⁸⁰ Instead, she argued that § 8772 “covers a category of postjudgment execution claims filed by numerous plaintiffs who, in multiple civil actions, obtained evidence-based judgments against Iran together amounting to billions of dollars.”¹⁸¹ She quoted language from § 8772 that subjects the Bank’s assets to execution “to satisfy *any* judgment” against Iran for acts of terrorism.¹⁸² Despite the language quoted by Justice Ginsburg, the statute makes clear in the following section that it only applies to this specific case, identified by docket number, declaring that “[n]othing in this section shall be construed . . . to affect the availability, or lack thereof, of a right to satisfy a judgment in *any other action* against a terrorist party.”¹⁸³

It is possible that Justice Ginsburg misinterpreted the *Robertson* decision when she used it to argue that the Court has upheld statutes that identify cases by docket number.¹⁸⁴ In *Robertson*, the Court dismissed the singling out argument because it determined that Congress used the two pending cases as a shortcut to identify the five statutory requirements at issue.¹⁸⁵ The *Robertson* Court stated that the statute named “two pending cases in order to identify five statutory provisions.”¹⁸⁶ Chief Justice Roberts highlighted this discrepancy in his dissent. He said the two cases mentioned by name in *Robertson* were only used as a reference to describe the five underlying environmental statutes at issue; Congress did not intend to “limit the statute’s effect to only those cases alone.”¹⁸⁷

Bank Markazi was wrongly decided because Congress explicitly targeted the Bank when it enacted § 8772, violating the separation of powers doctrine. The sequence of events in the case highlights the constitutional violation. First, Bank Markazi invoked its sovereign immunity under the FSIA in the district court, but § 8772 eliminated the Bank’s sovereign immunity.¹⁸⁸ Next, the Bank raised the defense that its status as a distinct juridical entity under international law and federal common

general if Congress may pick and choose when litigation under it will succeed and when it will fail.”).

180. *Bank Markazi*, 136 S. Ct. at 1317 (internal quotation marks omitted).

181. *Id.*

182. *Id.* (quoting 22 U.S.C. § 8772(a)(1) (emphasis added)).

183. 22 U.S.C. § 8772(c)(1) (emphasis added).

184. *Bank Markazi*, 136 S. Ct. at 1326–27 (“The amended law in *Robertson*, however, also applied to cases identified by caption and docket number, and was nonetheless upheld. Moreover, § 8772 . . . facilitates execution of judgments in 16 suits, together encompassing more than 1,000 victims of Iran-sponsored terrorist attacks. Although consolidated for administrative purposes at the execution stage, the judgment-execution claims . . . were not independent of the original actions for damages and each retained its separate character.”).

185. *Robertson II*, 503 U.S. 429, 440 (1992).

186. *Id.*

187. *Bank Markazi*, 136 S. Ct. at 1336 (Roberts, C.J., dissenting).

188. *Id.* at 1332.

law released it from liability for Iran's debt.¹⁸⁹ Section 8772 then removed that defense to ensure the Bank was liable.¹⁹⁰ Finally, the Bank raised a defense under New York law, claiming that the state law did not allow plaintiffs to execute their judgments against the Bank's assets.¹⁹¹ Again, § 8772 made the Bank's assets subject to execution.¹⁹² The sole purpose of § 8772 was to remove all legal defenses against the Bank so that the plaintiffs would prevail. It is in this country's best interest to maintain three separate branches of government. The *Bank Markazi* decision threatens this separation and the American governmental framework the Framers carefully crafted.

C. Proposed Three-Factor Test for Separation of Powers Issues

The Court should adopt a three-factor test for evaluating whether Congress violates the separation of powers doctrine when it passes a statute in response to pending litigation.¹⁹³ The first factor would require a court to closely examine the congressional legislation and consider whether the statute actually amends or repeals the underlying law.¹⁹⁴ The second factor would require a court to decide if the statute is so closely tailored to the pending litigation that it can be "said to fit glove-like around the live case or controversy."¹⁹⁵ The third factor would ask whether the statute favors the government, especially if the government is a party to the litigation.¹⁹⁶ A court should weigh these three factors each time Congress enacts legislation aimed at impacting pending litigation.

The first factor is the most important factor. Each time a court rules on the constitutionality of a statute, it must closely examine the law at issue. A court should ask the following question: Does the law actually amend or repeal the underlying law at issue in the pending litigation without telling a court how to decide a particular case? Supreme Court precedent is clear that Congress may amend or repeal a law with the intent of producing certain outcomes for certain facts.¹⁹⁷ However, *Klein* established the principle that Congress cannot direct a court how to decide a particular claim.¹⁹⁸

189. *Id.* at 1332-33.

190. *Id.* at 1333.

191. *Id.*

192. *Id.*

193. *See* Ronner, *supra* note 13, at 1047-48.

194. *See id.*

195. *Id.* at 1048.

196. *Id.*

197. *See Bank Markazi*, 136 S. Ct. at 1317 ("Congress, our decisions make clear, may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative."); *Robertson II*, 503 U.S. 429, 440-41 (1992); *see also* Wasserman, *supra* note 9, at 71-72.

198. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1871).

The second factor would require a court to decide if the statute is too closely tied to a live case or controversy. Statutes aimed at one specific case should always be considered suspect, especially if the law benefits one party. A court should ask the following question: Does the statute single out one party to the benefit of the other party? However, as stated above in Section III.B, there are situations where Congress must address a “unique public amenity,” such as a national memorial or bridge.¹⁹⁹ In these rare situations, it is permissible for Congress to enact laws that are precisely tied to pending litigation. But barring litigation concerning unique public structures or amenities, any closely tailored statute should be presumed unconstitutional.

Finally, a court should strictly scrutinize the statute when it favors the government in pending litigation.²⁰⁰ As a matter of fairness, Congress should not be its own judge in a case ruling on the constitutionality of congressional action.²⁰¹ The *Klein* Court rationalized its holding by stating the following:

In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the [L]egislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it? We think not²⁰²

Klein is the quintessential case in which Congress tried to resolve pending litigation through legislative trial. If Congress can control either the method or conclusion of the judicial decision making process, the formal protections of independent branches of government would prove to be of little value.²⁰³

This Comment will now apply the proposed test to the facts of *Bank Markazi*. When the factors are applied to the *Bank Markazi* facts, all three factors weigh against the constitutionality of § 8772.

199. Brief of Federal Courts Scholars, *supra* note 174, at 23; see *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 429–30 (1855); *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1094, 1097 (D.C. Cir. 2001) (“This seems particularly sound where Congress is addressing a unique public amenity (or disamenity, depending on one’s viewpoint), such as the Memorial or the bridge at issue in *Wheeling Bridge*.”).

200. See Ronner, *supra* note 13, at 1048 (explaining that the *Klein* Court struck down the 1870 Act in part because it favored the government); see also Redish & Pudelski, *supra* note 21, at 444–45 (explaining that Congress lacks constitutional authority to decide the outcome of lawsuits in its favor).

201. Ronner, *supra* note 13, at 1071.

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

203. Redish & Pudelski, *supra* note 21, at 450.

1. Factor One—Examining the Statute to Determine If It Amends or Repeals the Underlying Law

Close examination of § 8772 reveals that the statute does not actually amend or repeal the underlying law—namely the FSIA. Justice Ginsburg performs a precise analysis of § 8772(a) and § 8772(b) but fails to mention § 8772(c) in her opinion.²⁰⁴ She dedicates all of Section I.A as a review of the “statutory provisions relevant to this case,” but through omission, the majority opinion did not consider § 8772(c) relevant in this case.²⁰⁵ Section 8772(c) states that “[n]othing in this statute shall be construed—(1) to affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than proceedings referred to in subsection (b)”²⁰⁶

Congress carefully drafted § 8772 to achieve its desired outcome in “*Peterson et al. v. Islamic Republic of Iran et al.*, Case No. 10 Civ. 4518 (BSJ) (GWG),”²⁰⁷ while not amending the FSIA. Congress convinced the *Bank Markazi* majority because a reading of only § 8772(a) would make a judge believe the statute amended the underlying law.²⁰⁸ Section 8772(a) states generally that a blocked asset held in the United States, including an asset of the central bank of Iran, shall be subject to execution or attachment in order to satisfy any judgment for compensatory damages.²⁰⁹ But as noted in the preceding paragraph, a closer reading of the entire statute reveals Congress’s true intention in passing § 8772—to pick the winner of this case.²¹⁰ For unbeknownst reasons, Congress did not want to amend or repeal the section of the “FSIA [that] shields from execution property ‘of a foreign central bank or monetary authority held for its own account.’”²¹¹

The Court’s misguided precedent concerning factor one originated in *Robertson*. The *Robertson* Court significantly lowered the bar for the “amend or repeal” standard established by the *Wheeling Bridge* Court in 1855.²¹² The *Robertson* Court concluded “subsection (b)(6)(A) compelled changes in law, not findings or results under old law.”²¹³ However, careful analysis of the statute suggests otherwise.²¹⁴

Subsection (b)(6)(A) states the following:

204. See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318–19 (2016).

205. *Id.* at 1317.

206. 22 U.S.C. § 8772(c)(1) (2012).

207. *Id.* § 8772(b).

208. *Id.* § 8772(a)(1) (explaining that the statute subjects the designated financial assets to execution “to satisfy any judgment” against the Government of Iran).

209. *Id.*

210. *Id.* § 8772(c)(1).

211. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318 (2016) (quoting 28 U.S.C. § 1611(b)(1) (2012)).

212. See *Ronner*, *supra* note 13, at 1047, 1055.

213. *Robertson II*, 503 U.S. 429, 438 (1992).

214. See Act of Oct. 23, 1989 Pub. L. No. 101-121, § 318, 103 Stat. 701, 745.

Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests . . . known to contain northern spotted owls 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. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States.²¹⁵

Congress essentially declared that if § (b)(3) and § (b)(5) are satisfied, a court is directed to find that the five statutes²¹⁶ at issue in the two pending cases are necessarily satisfied as well.²¹⁷ Congress’s directive told the courts how to interpret the underlying statutes without actually amending the statutes.²¹⁸ Instead of applying the facts of the case to the five valid environmental statutes at issue and allowing a court to interpret the statute, a typical Judiciary function, Congress directed the courts to interpret the statutes according to Congress’s interpretation.²¹⁹

For the Ninth Circuit, the “critical distinction” was between amending the law underlying the pending case, which is constitutional, and the actual prescription of a rule of decision, which violates the constitutional doctrine of separation of powers.²²⁰ This is why the circuit panel unanimously ruled that “§ 318(b)(6)(A) ‘does not, by its plain language, repeal or amend the environmental laws underlying this litigation,’ but rather ‘directs the court to reach a specific result and make certain factual findings under existing law in connection with two [pending] cases.’”²²¹

In passing § 8772, Congress did not repeal the FSIA or the TRIA.²²² It simply created a new statute that applied to this case and this case on-

215. *Id.*

216. Migratory Bird Treaty Act (MBTA) § 143(b), 16 U.S.C. § 703 (2012); National Forest Management Act of 1976 (NFMA), 16 U.S.C. § 1600 (2012); National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 (2012); Federal Land Policy and Management Act of 1976 § 102, 43 U.S.C. § 1701; (2012); Oregon and California Railroad and Coos Bay Wagon Road Grant, 43 U.S.C. § 1181 (2012).

217. § 318(b)(6)(A), 103 Stat. at 745.

218. *Id.*

219. *See id.*; Araiza, *supra* note 11, at 1066–68.

220. *See Robertson I*, 914 F.2d 1311, 1315 (9th Cir. 1990) (“More recent Supreme Court authority also strongly suggests that the critical distinction, for purposes of deciding the limits to Congress’ authority to affect pending litigation through statute, is between the actual repeal or amendment of the law underlying the litigation, which is permissible, and the actual direction of a particular decision in a case, without repealing or amending the law underlying the litigation, which is not permissible.”), *rev’d*, 503 U.S. 429 (1992); Araiza, *supra* note 11, at 1066–68.

221. *Robertson II*, 503 U.S. 429, 436 (1992) (quoting *Robertson I*, 914 F.2d at 1316).

222. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318–19 (2016) (“Enacted as a freestanding measure, not as an amendment to the FSIA or the TRIA, § 8772 provides that, if a court makes specified findings, ‘a financial asset . . . shall be subject to execution . . . in order to satisfy any

ly.²²³ Admittedly, Justice Ginsburg stated that § 8772 was not enacted as an “amendment to the FSIA or the TRIA.”²²⁴ The statute did not repeal either of the laws because the statute made clear it only applies to the “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).”²²⁵ However, Congress could have simply amended the FSIA to remove the central bank immunity, and the victims could likely recover through that method.

The first factor weighs against the constitutionality of § 8772. The Court strayed from its long-standing precedent in requiring actual amendment of the underlying statute. Section 8772 decided this case only, and it does not affect any other case dealing with Iran-sponsored terrorism. Future terrorist victims may be left without legislative coverage because a central bank’s assets, even if frozen by the President, will be protected.

2. Factor Two—The Prohibition on Singling Out One Party

For Chief Justice Roberts, passing a statute that is expressly intended to affect only one case and then expire after the litigation is complete is a major constitutional issue. The Chief Justice argued that § 8772 targeted the Bank.²²⁶ He asserted that because the statute was so closely tailored to this case, Congress might as well have said, “respondents win.”²²⁷ This aspect of the statute is distinguishable from the Northwest Timber Compromise. The dissent had less issue with the Compromise because, as the name suggests, Congress drafted the legislation as a middle ground between both parties.²²⁸ The Compromise did not favor one party at the benefit of the other.²²⁹ This distinction is significant because the majority heavily relied on *Robertson* in upholding § 8772.

When a court considers factor two, it ensures the statute can outlive the pending litigation, and it prevents Congress from picking winners and losers in pending litigation. When a law is tailored to one specific party or case, except in situations as detailed in Section III.B such as unique public amenities, Congress typically intends for the legislation to

judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by’ the acts of terrorism enumerated in the FSIA’s terrorism exception. Section 8772(b) defines as available for execution by holders of terrorism judgments against Iran ‘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), that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings.’” (footnote omitted) (citations omitted)).

223. *Id.*

224. *Id.*

225. 22 U.S.C. § 8772(b)–(c) (2012).

226. *Bank Markazi*, 136 S. Ct. at 1332–33 (Roberts, C.J., dissenting).

227. *Id.* at 1330.

228. *Robertson II*, 503 U.S. 429, 433 (1992).

229. *Id.*

expire after the pending case is resolved. This type of legislation, which picks the winner in a pending lawsuit, invades the judicial power of the United States government.

Here, the statute states that it does not apply beyond the life of case number 4518.²³⁰ Section 8772 lacks any evidence of general application, and removes all legal defenses for Bank Markazi in this one particular case only. Section 8772 would not even apply to the respondents if the district court were to dismiss the case without prejudice due to some evidentiary technicality (this is further proof § 8772 did not amend the underlying law, thus, violating factor one).²³¹ Section 8772 is so specific that if the respondents were to re-file their case and receive a new case number, § 8772 would no longer apply.²³²

By brushing aside the singling out argument in *Bank Markazi*, the Court set the standard that “Congress can unabashedly pick the winners and losers in particular pending cases.”²³³ Contrary to the Court’s decision, legislating against one specific party violates the separation of powers doctrine. The second factor weighs heavily in favor of the Bank in this case.

3. Factor Three—Government-Favoring Legislation

Congress passed § 8772 to favor itself. Congress enacted § 8772 in 2012 at the height of Iran’s nuclear expansion.²³⁴ Potentially to maintain diplomatic relations, Congress made the Court execute the assets against Iran. Chief Justice Roberts alluded to this when he stated that Congress “commandeer[ed] the courts to make a political judgment look like a judicial one.”²³⁵ He further stated that Congress has sufficient authority to give relief to the plaintiffs through confiscating and disposing of Iran’s property without needing to “seize” the Judiciary’s authority.²³⁶

230. See 22 U.S.C. § 8772(c).

231. Brief of Federal Courts Scholars, *supra* note 174, at 17.

232. See 22 U.S.C. § 8772(b)(1) (“The financial assets described in this section are 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), that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings, as modified by court order dated June 27, 2008, and extended by court orders dated June 23, 2009, May 10, 2010, and June 11, 2010, so long as such assets remain restrained by court order.”).

233. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1338 (Roberts, C.J., dissenting).

234. Shreeya Sinha & Susan Campbell Beachy, *Timeline on Iran’s Nuclear Program*, N.Y. TIMES, <http://www.nytimes.com/interactive/2014/11/20/world/middleeast/iran-nuclear-timeline.html> (last updated Apr. 2, 2015) (explaining Iran’s pursuit of nuclear weapons and the state of relations between the United States and Iran in 2012).

235. *Bank Markazi*, 136 S. Ct. at 1337 (Roberts, C.J., dissenting) (“[N]o comparable history sustains Congress’s action here, which seeks to provide relief to respondents not by transferring their claims in a manner only the political branches could do, but by commandeering the courts to make a political judgment look like a judicial one.”).

236. *Id.*

Congress was not a party in this case, but the federal government certainly had an interest in the outcome. Many of the plaintiffs were family members of terrorism victims. For example, the lead plaintiff, Deborah Peterson, lost her brother in the 1983 Marine Corps Barracks truck bombing in Beirut, Lebanon.²³⁷ Through § 8772, Congress legislatively supported their cause—compensating the victims of those killed on official duty—by using seized money from the Government of Iran instead of taxpayer dollars.²³⁸ When Congress compensated the victims from the 9/11 terrorist attacks, it paid out \$15.8 billion from government programs to support the victims.²³⁹ In *Bank Markazi*, Congress attained its desired outcome by usurping the Judiciary’s authority and deciding the case in favor of the government.

Congress and the President should have simply confiscated the two billion dollars in Iranian assets and “used, administered, liquidated, sold, or otherwise dealt with” the money to benefit the victims and families.²⁴⁰ The political branches have plenty of authority to confiscate and dispose of Iran’s sovereign property without seizing the Judiciary’s jurisdiction.²⁴¹

The third factor, much like the first two factors, weighs against the constitutionality of § 8772. Congress passed this statute with one clear winner in mind, which strongly favored the plaintiffs and Congress. Congress compensated the terrorist victims by using seized funds from the Government of Iran. The only cost is the threat to democracy, as the Court allowed Congress to further invade the realm of judicial authority.

4. Weight of the Factors

When evaluating a newly enacted statute passed in response to pending litigation, courts should ask three questions to determine wheth-

237. See Matt Ford, *What the Supreme Court’s Ruling on Iranian Assets Means*, ATLANTIC (Apr. 20, 2016), <http://www.theatlantic.com/politics/archive/2016/04/bank-markazi/479190/>; Greg Stohr, *Iran Terror Victims Win at U.S. Supreme Court, Can Collect \$2 Billion*, BLOOMBERG POL. (Apr. 20, 2016, 8:08 AM), <http://www.bloomberg.com/politics/articles/2016-04-20/iran-terror-victims-win-at-u-s-high-court-can-collect-2-bln>.

238. Ford, *supra* note 237; Stohr, *supra* note 237.

239. LLOYD DIXON & RACHAEL K. STERN, COMPENSATING THE VICTIMS OF 9/11, RAND CORP. (2004), http://www.rand.org/content/dam/rand/pubs/research_briefs/2005/RAND_RB9087.pdf; Aaron Smith, *The 9/11 Fund: Putting a Price on Life*, CNN MONEY (Sept. 7, 2011, 9:38 AM), http://money.cnn.com/2011/09/06/news/economy/911_compensation_fund/.

240. See *Bank Markazi*, 136 S. Ct. at 1337 (Roberts, C.J., dissenting); see also 50 U.S.C. § 1702(a)(1)(C) (2012) (“The President may . . . confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes.”).

241. *Bank Markazi*, 136 S. Ct. at 1337 (Roberts, C.J., dissenting).

er Congress violated the separation of powers doctrine: (1) Does the law actually amend or repeal the underlying law at issue in the pending litigation without directing the courts to decide the case a particular way?; (2) Does the statute single out one party to the benefit of the other party?; and (3) Does that law favor the government? When applying these factors to *Bank Markazi*, all three factors weigh in favor of the Bank.

If courts fail to adopt and apply this test or a similar test, the implications of the Court's decision in *Bank Markazi* is the advent of a newly empowered and unchecked Legislature. Both the *Robertson* statute and § 8772 threaten the separation of powers doctrine because they impermissibly invade the Judiciary's arena.²⁴² The Court gave Congress a blank check to "alter[] the legal and political impact of the controlling generalized substantive law in specific contexts without also altering that substantive law itself."²⁴³ It can now undermine the separation of powers by passing laws that enlist the Judiciary in an elaborate attempt to deceive the public.²⁴⁴ Indeed, the dissent finds it troubling that the majority opinion recognized no limit to its holding beyond the prohibition against statutes that say "Smith wins."²⁴⁵ Because the Court failed to draw a firm line, Congress will use the Court's decision as "a 'blueprint for extensive expansion of the legislative power' at the Judiciary's expense,"²⁴⁶ feeding Congress's tendency to 'extend[] the sphere of its activity and draw[] all power into its impetuous vortex.'²⁴⁷

CONCLUSION

The separation of powers doctrine is the bedrock of the American government. The Framers were paranoid of concentrating too much power in one branch of government.²⁴⁸ When Congress attempts to expand its power and usurp the Judiciary's authority, it is the Judiciary's job to police the action.²⁴⁹ If the Court continues to allow Congress to whittle down the Judiciary's authority, like it did in *Robertson* and *Bank Markazi*, it may be too late to avoid the danger of tyranny. Many legal scholars have warned against congressional expansion, arguing that the usurpation typically takes form when Congress attempts to achieve poli-

242. Araiza, *supra* note 11, at 1136 (arguing that "statutes such as section 318 threaten the fundamental constitutional balance and, ultimately, the individual rights that that balance seeks to protect").

243. Redish & Pudelski, *supra* note 21, at 450.

244. *Id.* at 451.

245. *Bank Markazi*, 136 S. Ct. at 1335 (Roberts, C.J., dissenting) (quoting *Bank Markazi*, 136 S. Ct. at 1326 (majority opinion)).

246. *Id.* at 1338 (quoting *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991)).

247. *Id.* (quoting THE FEDERALIST NO. 48, at 309 (James Madison)).

248. 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, 451 (1991).

249. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); THE FEDERALIST NO. 78 (Alexander Hamilton).

cy results not through direct enactments but through manipulation of the courts.²⁵⁰ This is exactly what Congress accomplished with § 8772.

The *Bank Markazi* decision sends a message to Congress that the Legislature can usurp the Judiciary's power with only the slightest restriction—it cannot say “Party A wins.” Besides declaring a winner outright, Congress can now pass legislation so closely tailored to a pending lawsuit that it might as well say “Party A wins.” The Court erred in *Robertson*, where it reversed a unanimous Ninth Circuit decision, because Congress exceeded its authority and decided the outcome of pending litigation. That same Court acknowledged but failed to answer the harder question of whether legislation violates separation of powers when it is tailored to one specific case only. The Court concluded that the statute at issue created “no occasion to address any broad question of Article III jurisprudence.”²⁵¹

Using the dangerous precedent set in *Robertson*,²⁵² the majority in *Bank Markazi* further expanded Congressional power by upholding § 8772 without any restrictions other than the prohibition against explicitly telling a court who wins. But the underlying constitutional principle of separation of powers is too important to avoid in cases such as *Bank Markazi* or *Robertson*. It is the Supreme Court's duty to take “all possible care . . . to defend itself against [the] attacks” of the other governmental branches.²⁵³ While it may be difficult to draw the line between judicial and legislative authority, “the entire constitutional enterprise depends on there *being* such a line.”²⁵⁴

Cory J. Wroblewski

250. See Redish & Pudelski, *supra* note 21, at 438–39; Vladeck, *supra* note 9, at 255.

251. *Robertson II*, 503 U.S. 429, 441 (1992).

252. See *id.* at 440–41; see also Redish & Pudelski, *supra* note 21, at 440–41 (“On occasion, the Court has described the Klein holding in what are largely obscure and misleading terms. On other occasions, it may have disingenuously ignored blatant violations by Congress of the democratically imposed limits on its authority to manipulate the judicial process, without either acknowledging or seemingly comprehending the serious stakes involved for purposes of the success of American democracy.”).

253. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1335 (2016) (Roberts, C.J., dissenting) (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

254. *Id.* at 1336 (emphasis added).

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