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JUDICIAL DISCRETION ON OUTCOME-DETERMINATIVE LEGISLATION AFTER BANK MARKAZI V. PETERSON

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I. INTRODUCTION

In the dissent of a recent Supreme Court case, *Bank Markazi v. Peterson*,[1] Chief Justice Roberts presented a compelling hypothetical:

> Imagine your neighbor sues you, claiming that your fence is on his property. His evidence is a letter from the previous owner of your home, accepting your neighbor's version of the facts. Your defense is an official county map, which under state law establishes the boundaries of your land. The map shows the fence on your side of the property line. You also argue that your neighbor's claim is six months outside the statute of limitations.
>
> Now imagine that while the lawsuit is pending, your neighbor persuades the legislature to enact a new statute. The new statute provides that for your case, and your case alone, a letter from one neighbor to another is conclusive of property boundaries, and the statute of limitations is one year longer. Your neighbor wins. Who would you say decided your case: the legislature, which targeted your specific case and eliminated your specific defenses so as to

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

> ensure your neighbor's victory, or the court, which presided over the *fait accompli*?[2]

Of course, the logical conclusion to the hypothetical is that the legislature ultimately directed the outcome.[3] However, the hypothetical depicts a more complex issue engrained in the intricate separation of powers doctrine.[4]

The Framers of the Constitution, inspired by the intellectual expositions of Montesquieu,[5] designed a tripartite government granting each branch separate powers.[6] The Constitution's structure of three coequal branches is evidence of the Framers' intent to establish a system of government built around the separation-of-powers doctrine.[7] Naturally, each branch is equipped with the requisite power to carry out its responsibilities in accordance with the constitutional scheme.[8] But the separation of powers doctrine protects each branch from incursion; as the Court has noted, the doctrine exists to preclude the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives."[9] But the Constitution also affords each branch a degree of flexibility, and the Court has placed great emphasis on James Madison's conclusion that separation of powers does not necessarily entail the complete separation of each branch from the affairs of another.[10] Consequently, there is no simple means for resolving separation of powers disputes, especially when legislative action encroaches upon that power allocated to the judiciary by Article III of the Constitution.[11]

2. *Id.* at 1329 (Roberts, C.J., dissenting).

3. *Id.* at 1330 (The Chief Justice contends that a statute tailored in such a way as the hypothetical assures one party wins as a result of the legislature deciding the case).

4. *Id.* at 1336 (Chief Justice Roberts discusses that cases involving separation of powers between Congress and the judiciary often involve the difficult task of drawing lines between the two powers).

5. *Id.* at 1330.

6. Mistretta v. United States, 488 U.S. 361, 380 (1989).

7. *Id.* (discussing James Madison's role in developing the theory of separation of powers in American political theory).

8. *See* INS v. Chadha, 462 U.S. 919, 951 (1983).

9. *Id.*

10. *Mistretta*, 488 U.S. at 380–81.

11. *See* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1336 (2016) (Roberts, C.J., dissenting).

For example, Congress enacted the Iran Threat Reduction and Syria Human Rights Act (§ 8772), which determines the outcome of litigation in *Bank Markazi*.[12] Victims of Iran-sponsored terror attacks brought a civil action against Iran and sought postjudgment execution against $1.75 billion in bonds held by Bank Markazi, the Central Bank of Iran.[13] After litigation had commenced, Congress enacted § 8772, which retroactively negated any state, federal, and international law defense that the petitioner Bank Markazi might have used.[14] The petitioner argued that Congress violated the separation of powers doctrine by enacting § 8772.[15] Specifically, the petitioner urged that § 8772 effectively mandated the Court to reach a specific result in a pending case and therefore was unconstitutional under precedent from a Reconstruction Era case, *United States v. Klein*.[16] In *Klein*, the Court first enforced Article III against legislation that directed the Court to reach only one result in a pending case.[17] Nonetheless, the majority in *Bank Markazi* concluded that Congress acted within its constitutional power because it established new substantive law rather than directed the Court to reach a conclusion under existing law.[18]

Under this theory, Congress may enact retroactive legislation that is outcome determinative of a pending case.[19] The Court established this rule in *Robertson v. Seattle Audubon Society*.[20] But, as Chief Justice Roberts argued in the dissent of *Bank Markazi*, *Klein* and Article III serve an important purpose in the separation of powers doctrine.[21] Further, the key issues between the majority and dissenting opinions in *Bank Markazi* involving Article III and *Klein* provide important insight into how the Court may gauge the constitutionality of outcome-determinative legislation in the future.

This Note is divided into three sections. First, I discuss the

12. *Id.* at 1316 (majority opinion) (citing one of the provisions of the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772 (2012)).
13. *Id.* at 1319–20.
14. *See id.* at 1320–21.
15. *Id.* at 1323.
16. *Id.* (citing United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871)).
17. *Id.* at 1333–34 (Roberts, C.J., dissenting) (citing *Klein*, 80 U.S. (13 Wall.) at 146–48).
18. *Id.* at 1323, 1326 (majority opinion).
19. *Id.* at 1324–25.
20. 503 U.S. 429 (1992).
21. *Bank Markazi*, 136 S. Ct. at 1334 & n.2 (Roberts, C.J., dissenting).

development of the separation of powers doctrine in American political theory. That section begins with an account of early intellectual theory, which influenced the Framers' adoption of separation of powers within the constitutional framework. The section ends with a discussion of constitutional safeguards that shield the judicial branch from legislative encroachment, including a detailed overview of *Klein* and Article III. Second, I explore the Court's recent decision in *Bank Markazi*, where the Court refused to apply *Klein* in the context of foreign-policy legislation.[22] Taking the key arguments between the majority and dissenting opinions, I urge that recent case law has eroded *Klein* and Article III.[23] Specifically, I suggest a reading of *Klein* and other precedent—primarily *Bank Markazi*—as providing a gauge of the constitutionality of outcome-determinative legislation. Finally, I discuss the idea of congressional deference with respect to certain issues, especially foreign policy.

II. SEPARATION OF POWERS IN AMERICAN POLITICAL THEORY

A. Article III and Early Intellectual Theory

"Article III, § 1 of the Constitution vests the 'judicial Power of the United States' in the Federal Judiciary."[24] The federal judiciary is comprised of the Supreme Court and inferior courts established by Congress.[25] In *Marbury v. Madison*,[26] Chief Justice Marshall posited perhaps one of the most well-known depictions of judicial power: "It is emphatically the province and duty of the judicial department to say what the law is," and "[t]hose who apply the [law] to particular cases, must of necessity expound and interpret that [law]."[27] The Framers, concerned with "legislative interference with private judgments of the courts," established that the judiciary's domain should be free from intrusion.[28] This fundamental principle is engrained in the separation of powers doctrine.

22. *See id.* at 1323, 1328–29.
23. *Id.* at 1334–35 (Roberts, C.J., dissenting) (discussing how both *Klein* and Article III limits "Congress's authority to legislate with respect to a pending case.").
24. *Id.* at 1330 (quoting U.S. CONST. art. III, § 1).
25. U.S. CONST. art. III, § 1.
26. 5 U.S. (1 Cranch) 137 (1803).
27. *Id.* at 177.
28. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 220–22 (1995).

Separation of powers principles originated long before the Constitution was ratified in 1788.[29] John Locke, possibly the most renowned English philosopher of the Enlightenment Era, advocated that separation of powers was a paramount component of a "well-framed government[]."[30] According to Locke, the legislative and executive branches' distinct responsibilities to society necessitated separation.[31] For example, the legislature's duty to create lasting and effective laws for the benefit of society was contingent upon the executive's assurance of "perpetual execution" of those laws.[32] Locke emphasized equilibrium among the branches of government, in part to combat the uncertainty of living in a state of nature, where people's "property" (i.e., their "lives, liberties and estates") were constantly subject to incursion.[33] Thus, a government comprised of separate branches, each with distinct roles, was necessary to protect individuals from invasion of their indispensable rights.[34]

However, Baron de Montesquieu's theory on separation of powers was more commensurate with the Constitution's establishment of a tripartite government.[35] James Madison opined that Montesquieu was "[t]he oracle who [was] always consulted and cited on "separation of powers."[36] Montesquieu conceptualized his theory of separation of powers based on the idea of "political liberty."[37] That is, government must be structured in a way that sustains liberty and society's confidence in its general welfare.[38] According to Montesquieu, political liberty required a repudiation of the threat that government would impose tyrannical law.[39] One of Montesquieu's primary concerns was that tyrannical law would ensue if the government's power was too concentrated: "There would be

29. *See, e.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 159, at 83–84 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

30. *Id.*

31. *Id.* §§ 143–48, at 75–77.

32. *Id.* §§ 143–44, at 75–76 (emphasis omitted).

33. *Id.* § 123, at 65–66 (emphasis omitted).

34. *See id.* § 127, at 66–67.

35. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1994–96 (2011).

36. THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961).

37. M. DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 163 (J.V. Prichard ed., Thomas Nugent trans., G. Bell & Sons 1914) (1748).

38. *See id.*

39. *Id.*

an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."[40]

Indeed, there are clear parallels between Montesquieu's theory on separation of powers and the Constitution's structural demarcation of the three branches of government.[41] However, as legal scholars have emphasized, Montesquieu's reliance on the framework of the English governmental structure resulted in the absence of a "reliable baseline"[42] as well as the failure of modern scholars to affix a cohesive meaning to the doctrine. Nevertheless, Montesquieu's separation of powers theory had an important effect on the Framers of the Constitution.[43] For example, Montesquieu advocated, and the Constitution ultimately adopted, a system of checks and balances, which is vital to maintaining strict enforcement of separation of powers.[44] One need not look further than the basic structure of the Constitution for evidence of Montesquieu's legacy in American political theory: "The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility."[45]

B. The Framers and Early Republic

The Framers witnessed the consequences of concentrated powers in state governments prior to the ratification of the Constitution.[46] Colonial legislatures were virtually omnipotent, and legislatures commonly performed executive and judicial functions.[47] Colonial governments consisted of "intermingled legislative and judicial powers" which ultimately led to "factional strife and partisan oppression."[48] The most

40. *Id.*
41. Manning, *supra* note 35, at 1994–96, 1994 n.281.
42. *Id.* at 1995.
43. *See* Mistretta v. United States, 488 U.S. 361, 394 (1989); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 241 (1995) (Breyer, J., concurring in judgment).
44. Bowsher v. Synar, 478 U.S. 714, 722 (1986).
45. INS v. Chadha, 462 U.S. 919, 951 (1983).
46. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1216 (2015) (Thomas, J., concurring in judgment).
47. *Id.*
48. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995).

flagrant examples of concentrated power in colonial governments stemmed from legislative interference with court judgments.[49] For example, colonial legislatures manipulated—and ultimately usurped—judicial functions by acting "as courts of equity of last resort, hearing original actions or providing appellate review of judicial judgments."[50]

Unsurprisingly, the ardent supporters of a new Constitution chronicled such ostensible expansions of power within colonial legislatures.[51] Take, for example, James Madison's reference to a report by Pennsylvania's Council of Censors in 1783 and 1784: "The constitutional trial by jury had been violated; and powers assumed, which had not been delegated by the Constitution. . . . [C]ases belonging to the judiciary department[] frequently [had been] drawn within legislative cognizance and determination."[52] In Vermont, a 1786 report "denounced the legislature's 'assumption of the judicial power,' which the legislature had exercised by staying and vacating judgments, suspending lawsuits, resolving property disputes, and 'legislating for individuals, and for particular cases.'"[53] Thomas Jefferson expressed similar concerns, claiming that Virginia's government did not exemplify the separation of powers principles, which existed to protect the citizens from despotic rule.[54] Rather, the executive and judicial departments yielded to the supremacy of the legislature, and the legislature often resolved disputes that were better suited for resolution by the judiciary.[55]

When the Constitutional Convention convened in 1787, the framers sought to enliven the theory of separation of powers, especially in the

49. *Id.* at 220–23.

50. *Id.* at 219; *see* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 154–55 (1969).

51. THE FEDERALIST NO. 48, at 333 (James Madison) (Jacob E. Cooke ed., 1961) ("The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex."); THE FEDERALIST NO. 71, at 483 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The tendency of the legislative authority to absorb every other, has been fully displayed and illustrated by examples, in some preceding numbers. In governments purely republican, this tendency is almost irresistible." (footnote omitted)).

52. INS v. Chadha, 462 U.S. 919, 961-62 (1983) (alteration in original) (citations omitted) (quoting *original citation*). THE FEDERALIST NO. 48, at 336–37 (James Madison) (Jacob E. Cooke ed., 1961).

53. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1331 (2016) (Roberts, C.J., dissenting) (quoting VERMONT STATE PAPERS 537–42 (William Slade ed., 1823)).

54. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (William Peden ed., Univ. of N.C. Press 1982) (1787).

55. *Id.* at 120; *see also Bank Markazi*, 136 S. Ct. at 1331 (Roberts, C.J., dissenting).

context of the all-too-familiar legislative supremacy.[56] "[T]he critical decision to establish a judicial department independent of the Legislative Branch" is clear evidence of the framers' intent to rectify the abuses of power that were prevalent in state governments prior to ratification.[57] Moreover, the framers' decision to structure a government into three separate branches evinces the fundamental goal of the separation of powers doctrine: "the preservation of liberty."[58] The Constitution's division of the legislative, executive, and judicial domains serve as the structural safeguards of the separation of powers doctrine.[59] But "[t]he department of government which benefited [the] most from this new, enlarged definition of separation of powers was the judiciary."[60]

The separation of powers doctrine serves as a "prophylactic device" to preclude the incursion by one branch into the affairs of another.[61] As for the judiciary, the Court has noted two essential dangers with respect to separation of powers.[62] First, the judiciary may assume responsibilities that are better suited for resolution by Congress or the executive.[63] Second, a "provision of law" may "impermissibly threaten[] the institutional integrity of the Judicial Branch."[64] Thus, Article III serves to prevent legislative power from undermining, and at times usurping, the integral and exclusive role of the judiciary in resolving cases or controversies.[65]

Article III also operates as a safeguard to the citizens seeking to vindicate their rights through the judicial system.[66] Article III, which states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,"[67] protects the judiciary from encroachment

56. Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 375 (1976).
57. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 221 (1995).
58. Mistretta v. United States, 488 U.S. 361, 380 (1989).
59. INS v. Chadha, 462 U.S. 919, 946 (1983).
60. WOOD, *supra* note 50, at 453–54 (1969).
61. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995).
62. *Mistretta*, 488 U.S. 361, 383 (1989).
63. *Id.* (citing Morrison v. Olson, 487 U.S. 654, 680–81 (1988)).
64. *Id.* (quoting Commodity Futures Trading Comm'n v. Schor 478 U.S. 833, 851 (1986)).
65. *Id.*
66. *Commodity Futures Trading Comm'n*, 478 U.S. at 848.
67. U.S. CONST. art. III, § 1.

by the other branches.[68] Additionally, Article III protects adversaries in the courts by ensuring that federal judges are both impartial and independent of influence by the political branches.[69] In its totality, Article III seeks to preserve the fundamental concept of liberty, and "[i]t define[s] not only what the Judiciary can do, but also what Congress cannot."[70]

But the Constitution manifests a flexible approach to separation of powers.[71] Madison's view that each branch should be protected against encroachment by the others did not result in a "hermetic division among the Branches, but [rather] in a carefully crafted system of checked and balanced power within each Branch."[72] In his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,[73] Justice Jackson presented a summary on the flexibility of the doctrine:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power [to] better . . . secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.[74]

However, flexibility necessarily requires a certain degree of restraint, and the Court faces a difficult line-drawing task to ensure its role is not supplanted by the legislative branch.[75]

68. *Commodity Futures Trading Comm'n*, 478 U.S. at 848 ("Article III, § 1, serves . . . to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government.'" (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 582–83 (1985)).

69. Additionally, "Article III, § 1 . . . safeguard[s] litigants' 'right to have claims decided before judges who are free from potential domination by other branches.'" *Id.* (alteration in original) (quoting United States v. Will, 449 U.S. 200, 218 (1980)).

70. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1335 (2016) (Roberts, C.J., dissenting).

71. Mistretta v. United States, 488 U.S. 361, 380–81 (1989).

72. *Id.* at 381.

73. 343 U.S. 579 (1952).

74. *Id.* at 635 (Jackson, J., concurring).

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

C. Early Constraints on Congressional Power: United States v. Klein

In *United States v. Klein*, the Court enforced Article III safeguards against legislation that mandated the Court to reach a certain result.[76] The Court emphasized that Congress could not effectively "prescribe rules of decision to the Judicial Department of the government in cases pending before it."[77] Consequently, courts, as well as scholars, have struggled to find a precise scope for *Klein*'s holding,[78] and the opinion has even been criticized as "a deeply puzzling decision."[79] However, even if *Klein* failed to delineate a precise standard that limited Congress's power to pass outcome-determinative legislation, Article III still imports such a standard.[80] And there is still practical significance imbedded in the *Klein* opinion where the Court first enforced Article III's "bedrock rule" that the judiciary is the sole entity for engaging in the judicial function.[81]

The dispute in *Klein* emanated from a series of piecemeal federal statutes and pardons promulgated throughout the Civil War and early Reconstruction Era.[82] Under the Abandoned and Captured Property Act of 1863, the Secretary of Treasury had the power to seize private property belonging to abettors of the Confederacy and distribute the proceeds into the national treasury.[83] Specifically, the Act delegated the United States as a "trustee" of the seized property.[84] The Act was subject to a presidential proclamation that extended a pardon to those who professed an oath of allegiance to the federal government.[85] In the prior case of *United States*

76. United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

77. *Id.* at 146.

78. *See, e.g.*, Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992) (refusing to consider whether the Ninth Circuit's reading of *Klein* was correct).

79. Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2538 (1998).

80. *Bank Markazi*, 136 S. Ct. at 1333 (Roberts, C.J., dissenting).

81. *Id.*

82. *Klein*, 80 U.S. (13 Wall.) at 137–41.

83. *Id.* at 137–38.

84. *Id.* at 138–39 ("The government constituted itself the trustee for those who were by that act declared entitled to the proceeds of captured and abandoned property, and for those whom it should thereafter recognize as entitled."); *see also* United States v. Padelford, 76 U.S. 531, 543 (1869) (describing the federal government's role as a trustee of the abettors' property).

85. *Klein*, 80 U.S. (13 Wall.) at 139–40 (citing Proclamation No. 11, 13 Stat. 737 (Dec. 8, 1863)).

v. Padelford,[86] the Court pronounced the practical effect of the pardon as two-fold. First, the federal government was required, upon proper proof of loyalty, to remit the proceeds back to the petitioner through the Court of Claims.[87] Second, "proof of pardon [was] a complete substitute for proof that [the petitioner] gave no aid or comfort to the rebellion."[88]

During the war, V.F. Wilson acted as a surety on certain bonds of confederate officers, and the federal government, acting under the authority of the Abandoned and Captured Property Act, seized a substantial portion of his cotton.[89] Unsurprisingly, Wilson exclaimed his allegiance to the federal government by giving his oath in accordance with the Proclamation.[90] Upon Wilson's passing, the executor of his estate, Klein, petitioned the Court of Claims to recover $125,300 worth of cotton, which the federal government had previously deposited into the national treasury.[91] *Padelford*'s precedent reassured that a decree from the Court of Claims would not only return the proceeds held by the treasury back to the petitioner, but also immunize pardoned citizens despite their prior support of the Confederacy.[92]

Although the Court of Claims decreed the proceeds back to Klein (acting on behalf of Wilson's estate),[93] the success was short-lived. In 1869, while the case was pending before the Supreme Court on appeal by the United States, the Republican Congress enacted a statute that made a pardon inadmissible and stripped both the Court of Claims and Supreme Court of appellate jurisdiction over such matters.[94] For the first time, the Court faced the difficult task of having to demarcate the boundary between legislative and judicial power in accordance with Article III's safeguards.[95] Congress was, no doubt, acting with circumspect ambition, as the stakes for rebuilding the war-torn nation had peaked during the Reconstruction

86. 76 U.S. (9 Wall.) 531.
87. *Id.* at 543.
88. *Id.*
89. *See* Wilson v. United States, 4 Ct. Cl. 559, 566–67 (1868), *aff'd sub nom.* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).
90. *Klein*, 80 U.S. (13 Wall.) at 142–43 (1871).
91. *Wilson*, 4 Ct. Cl. at 567–68.
92. *Padelford*, 76 U.S. (9 Wall.) at 543.
93. *Wilson*, 4 Ct. Cl. at 567–68.
94. *Klein*, 80 U.S. (13 Wall.) at 143–44.; Act of July 12, 1870, ch. 251, 16 Stat. 235 (1870).
95. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1333–34 (2016) (Roberts, C.J., dissenting).

Era; furthermore, Congress's purpose was to limit the compensation to loyal southerners.[96] Nevertheless, the Court determined that Congress's statute was a conspicuous encroachment into the judiciary's domain:

> It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.
>
> The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? . . . .
>
> Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor?[97]

Klein's holding and restriction on legislative power appears to be of substantial importance, but scholars have noted that "[i]t is a case whose importance to the shaping of American political theory has never been fully grasped or articulated by scholars, and whose meaning has been comprehended by the federal judiciary—including the Supreme Court itself—virtually not at all."[98] One possibility is that *Klein* is undervalued, not due to a disregard for separation of powers, but rather, because the Court views Congress's power to change the substantive law as congruent with a certain interpretation of *Klein*.[99] This theory rests on the premise that *Klein*'s constraint on legislative action is only applicable when

96. *Id.* at 1334 ("[T]he Radical Republican Congress wished to prevent pardoned rebels from obtaining . . . compensation" for property seized by the United States.).

97. *Klein*, 80 U.S. (13 Wall.) at 146–47.

98. Martin H. Redish &and 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, 437–438 (2006) (footnote omitted).

99. *See Bank Markazi*, 136 S. Ct. at 1324 ("[T]he statute in *Klein* infringed the judicial power, not because it left too little for courts to do, but because it attempted to direct the result without altering the legal standards governing the effect of a pardon. . . ."); Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992) (showing *Klein* is inapplicable when Congress changes the law).

Congress attempts to determine the winner in pending litigation without actually "altering the legal standards."[100] But, as Chief Justice Roberts suggests, if *Klein* is contextualized with broader Article III standards, then Congress may nonetheless infringe on judicial power by changing the substantive law.[101] The issue is framed as tension between legislative and judicial power: What should the Court do when Congress straddles the line between altering the substantive law and encroaching into the judiciary's domain by effectively deciding a case?[102]

III. MODERN APPLICATION OF *KLEIN* AND ARTICLE III WITH RESPECT TO OUTCOME-DETERMINATIVE LEGISLATION

In *Bank Markazi*, the Court refused to apply the *Klein* holding to a contested federal statute,[103] despite the petitioner's argument that Congress "prescribe[d] rules of decision" in violation of Article III's separation of powers.[104] Respondents, over 1,000 victims (including surviving family members and estate representatives) of Iran-coordinated terror attacks, sought redress under the exception to the Foreign Sovereign Immunity Act (FSIA).[105] Under a jurisdiction exception to the FSIA, an American citizen may bring an action in the United States for money damages against a foreign state for carrying out acts of terror.[106] To succeed under the FSIA exception,"the claimant [must] establish[] his claim or right to relief by evidence satisfactory to the court."[107] In 2003, the District Court for the District of Columbia concluded that Iran was

100. *Bank Markazi*, 136 S. Ct. at 1324; *see also Robertson*, 503 U.S. at 441 ("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.").

101. *Bank Markazi*, 136 S. Ct. at 1335 (Roberts, C.J., dissenting) (rejecting the majority's contention that a law directing a winner in a case does not change the substantive law).

102. *See id.* at 1336 (discussing the issue of evaluating the line separating Congress and the judiciary).

103. *Id.* at 1317 (majority opinion).

104. Reply Brief for Petitioner at 14, *Bank Markazi*, 136 S. Ct. 1310 (No. 14-770), 2016 WL 74944, at *14 (quoting United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871)).

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

106. 28 U.S.C. § 1605A(a) (2012).

107. 28 U.S.C. § 1608(e).

liable for compensatory and punitive damages.[108] In a factually similar case, the District Court for the Southern District of New York ordered the turnover of $1.75 billion in bond assets held by Bank Markazi, the Central Bank of Iran.[109] Notwithstanding the district courts' rulings, the respondents faced logistical and legal difficulties in obtaining their billions of dollars' worth of judgments against Iran.[110] The FSIA contains various provisions protecting foreign state property from judgments, including a provision providing immunity to "property . . . of a foreign central bank or monetary authority held for its own account."[111]

Congress responded to these difficulties by enacting the Iran Threat Reduction and Syria Human Rights Act of 2012, which made available the assets sought by respondents for postjudgment execution.[112] The Act states in pertinent part:

> (1) In general
> Subject to paragraph (2), notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law, a financial asset that is—
> (A) held in the United States for a foreign securities intermediary doing business in the United States;
> (B) a blocked asset (whether or not subsequently unblocked) that is property described in subsection (b); and
> (C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government, that such foreign securities intermediary or a related intermediary holds abroad,
> shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage-taking, or the provision of material support

108. Peterson v. Islamic Republic of Iran, 264 F. Supp. 2d 46, 61 (D.D.C. 2003).
109. *Bank Markazi*, 136 S. Ct. at 1320–21.
110. *Id.* at 1317–18.
111. 28 U.S.C. § 1611(b)(1).
112. *Bank Markazi*, 136 S. Ct. at 1317 (citing a provision of the Iran Threat Reduction and Syrian Human Rights Act of 2012, 22 U.S.C. § 8772 (2012)).

> or resources for such an act.[113]

Section 8772 applied solely to the consolidated civil suits brought against Iran[114] and specifically referenced the applicable docket number in the text of the statute.[115] Nonetheless, after the enactment of section 8772—which eradicated essentially all foreign, national, and state law defenses[116]—the petitioner argued that the statute violated the separation of powers doctrine by allowing Congress to effectively decide the case under the facade of law-making authority.[117] Specifically, petitioner argued that *Klein* was dispositive;[118] that is, § 8772 "direct[ed] the judiciary" to reach a certain conclusion and left little room (or none at all) for the Court to perform its judicial functions.[119] The Court ultimately found these arguments unpersuasive, instead relying on a string of cases that substantially reduced *Klein*'s applicability.[120]

Justice Ginsberg, writing for the majority, urged that *Klein* is not pertinent when Congress simply "amend[s] applicable law."[121] Citing *Robertson v. Seattle Audubon Society*,[122] Justice Ginsberg focused on what appeared to be a rudimentary understanding of congressional power: If Congress supplies a "new legal standard to undisputed facts," then it can hardly be questioned that Congress is somehow usurping the judiciary's power to decide cases and controversies.[123] And Congress's power to alter the pertinent law is not limited to prospective matters, as the Supreme Court recognizes Congress's constitutional authority to enact law that retroactively affects pending litigation.[124] Furthermore, there is little

113. 22 U.S.C. § 8772(a)(1).
114. *Bank Markazi*, 136 S. Ct. at 1317.
115. 22 U.S.C. § 8772(b).
116. *See Bank Markazi*, 136 S. Ct. at 1332 (Roberts, C.J., dissenting).
117. Reply Brief for Petitioner, *supra* note 104, at 2–3.
118. *Id.* at 14; *Bank Markazi*, 136 S. Ct. at 1323.
119. Reply Brief for Petitioner, *supra* note 104, at 2.
120. *Bank Markazi*, 136 S. Ct. at 1324–26. The Court made quick work of petitioner's argument that § 8772 violated *Klein*. Particularly, the Court contended that Congress has the power to enact outcome-determinative law that may be applied to pending cases. *Id.* at 1325 (first citing Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 226–27 (1995); and then citing Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992)).
121. *Id.* at 1323 (alteration in original) (quoting *Robertson*, 503 U.S. at 441).
122. 503 U.S. 429.
123. *Bank Markazi*, 136 S. Ct. at 1323, 1325.
124. *Id.* at 1324 (citing United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801)).

restraint on Congress's authority to enact narrow, outcome-determinative legislation with respect to isolated legal disputes.[125]

Robertson is a powerful illustration of the Court's recognition that narrow, outcome-determinative legislation may have a retroactive effect in pending litigation.[126] In *Robertson*, several environmental groups sought to enjoin the federal government from certain timber-harvesting operations in Washington and Oregon.[127] The environmental groups contended that the timber harvesting violated several federal environmental statutes and posed a threat to the northern spotted owl.[128] As the cases were pending, Congress enacted the Northwest Timber Compromise which "established a comprehensive set of rules to govern harvesting within a geographically and temporally limited domain."[129] The essential features of the statute read as follows:

> [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.[130]

The Ninth Circuit, applying *Klein*, construed the language of the statute as mandating the court to reach a specific result.[131] According to

125. *Id.* at 1325.
126. *Robertson*, 503 U.S. at 441; *Bank Markazi*, 136 S. Ct. at 1325.
127. *Robertson*, 503 U.S. at 432.
128. *See id.*
129. *Id.* at 433 ("In response to [the] ongoing litigation, Congress enacted § 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, 103 Stat. 745, popularly known as the Northwest Timber Compromise.").
130. Northwest Timber Compromise, Pub. L. No. 101-121, § 318, 103 Stat. 701, 747 (1989).
131. Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1314 (9th Cir. 1990) ("By section 318, Congress for the first time endeavors to instruct federal courts to reach a

the Ninth Circuit, the statute clearly violated the separation of powers doctrine because "Congress cannot 'prescribe a rule for [a] decision of a cause in a [particular] way' where 'no new circumstances have been created by legislation.'"[132] Thus, "[s]ection 318 [did] not, by its plain language, repeal or amend the environmental laws"; rather, "the clear effect of subsection (b)(6)(A) [was] to direct that, if the government follow[ed] the plan incorporated in subsections (b)(3) and (b)(5), then the government [would] have done what [was] required under the environmental statutes involved in [the] case[]."[133]

However, the Supreme Court reversed, stating that *Klein* was not dispositive.[134] Rather, the Court concluded that Congress's power to change the pertinent law for application to a pending case did not violate separation of powers.[135] The Court interpreted the statute differently, arguing instead that *Klein* was inapplicable because Congress merely amended the applicable law.[136]

Whether *Robertson* implicitly overruled *Klein* is a legitimate question.[137] If Congress may simply effectuate the outcome of a case under its power to implement new legislation, then whether *Klein* is still precedent is questionable.[138] The Court's refusal to apply *Klein* in *Bank*

particular result in pending cases identified by caption and file number.").

132. *Id.* at 1315 (alteration in original) (quoting United States v. Klein, 80 U.S. (13 Wall.) 128, 146–47 (1871)).

133. *Id.* at 1316.

134. *Robertson*, 503 U.S. at 441.

135. *Id.*

136. *Id.* The Supreme Court reiterated this rule in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995).

137. *See* 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, 1054, 1070 (1993).

> The Supreme Court's decision in *Robertson* either overrules or substantially erodes *Klein*. Although purporting to distinguish the Compromise from the Act in *Klein* on the basis that the Compromise amended the law, the Court approved legislation, which was practically the 1870 Act's doppelganger. In affecting the outcome of pending matters, the Compromise, like the 1870 Act, was precisely tailored to address the issues in the cases. The Compromise was also designed to favor the government as a litigant and arguably infiltrated the sacred domain by "direct[ing] the court to . . . make certain factual findings."

(alteration in original) (quoting *Seattle Audubon Soc'y*, 914 F.2d at 1316).

138. *See id.* at 1070.

Markazi only bolsters the theory that *Klein*'s value is drastically deteriorating in the wake of expanding legislative power.[139] In *Bank Markazi*, the majority employed three primary reasons for declaring the statute as a constitutional means of congressional power. First, precedent recognizes Congress's power to enact outcome-determinative legislation retroactively to pending cases.[140] Second, Congress may pass extremely narrow or particularized legislation affecting the rights of a single litigant in a case, even through identification of the issues by docket number in the statute.[141] The Court concluded by adding an interesting wrinkle to the analysis: The Court generally grants the political branches substantial deference in the realm of foreign policy, and Congress's power with respect to claims against foreign entities is well-established in the separation of powers context.[142] The Court's arguments are highly persuasive, but the ultimate effect is the continued devaluation of Article III separation of powers principles, and relatedly, the demise of *Klein*.[143]

IV. POTENTIAL INQUIRIES IN GAUGING THE CONSTITUTIONALITY OF OUTCOME-DETERMINATIVE LEGISLATION

A. Leaving Room for Judicial Interpretation of the Law

Despite legal scholars' dismissal of *Klein* as a baffling opinion, as well as the Court's refusal to "take [the] language from *Klein* 'at face value,'"[144] the underlying principle from *Klein* is really an expansion of Article III's mandate that the judiciary is the sole arbiter of judicial power.[145] "It is emphatically the province and duty of the judicial department to say what the law is," and "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule."[146] *Klein* reiterates these basic

139. *See* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1335 (2016) (Roberts, C.J., dissenting).
140. *See id.* at 1325 (majority opinion).
141. *Id.* at 1326–28.
142. *Id.* at 1328.
143. *Id.* at 1333 (Roberts, C.J., dissenting) (discussing § 8772's violation of *Klein*).
144. *Id.* at 1324 (majority opinion) (quoting RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 324 (7th ed. 2015)).
145. This theory conforms to a reading of the *Klein* holding "as broadly banning Congressional attempts to prescribe rules of decision to the judiciary in pending cases." *See* Ronner, *supra* note 137, at 1046–47.
146. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

principles with respect to congressional action: If Congress ultimately directs the outcome of a case or controversy, then the Court's power to apply and interpret the law is effectively diminished.[147] Necessarily, the Court faces a difficult task when evaluating legislation that is outcome-determinative because it requires drawing a line between legislative and judicial power.[148] But while *Klein* may be susceptible to differing interpretations, one possible interpretation is that *Klein*'s holding does not apply when there is still room to reasonably interpret the new substantive law that Congress supplies.[149]

For example, in *Bank Markazi* the majority and dissent fundamentally disagreed on the scope of *Klein* and whether the statute precluded the courts from engaging in some degree of judicial discretion.[150] According to the majority, the *Klein* Court struck down Congress's law repealing the presidential pardon "not because it left too little for courts to do, but because it attempted to direct the result without altering the legal standards."[151] Nevertheless, the Court concluded that § 8772 left plenty for judicial interpretation—specifically, whether Iran actually owned the assets sought for postjudgment execution.[152] Additionally, the Court urged that *Klein*'s "contemporary significance" rests on the notion that "Congress 'may not exercise [its authority, including its power to regulate federal jurisdiction,] in a way that requires a federal court to act unconstitutionally.'"[153] But, as the dissent argued, *Klein*'s significance need not be as limited as the majority suggests.[154]

Although Congress is restrained from enacting legislation that actually

147. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 146–47 (1871). Ultimately, the Act of Congress in *Klein* took away the Court's power to recognize the evidentiary effect of a pardon, which precluded the Court from exercising its judicial powers in the pending case. *Id.*

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

149. *See* Shawnee Tribe v. United States, 423 F.3d 1204, 1218 (10th Cir. 2005).

150. *Bank Markazi*, 136 S. Ct. at 1335 (Roberts C.J., dissenting) (challenging the majority's statement that § 8772 left enough "factual determinations for the court" to determine).

151. *Id.* at 1324 (majority opinion).

152. *See id.* at 1325.

153. *Id.* at 1324 n.19 (second alteration in original) (quoting Meltzer, *supra* note 79, at 2549).

154. *See id.* at 1333–35 (Roberts, C.J., dissenting) (arguing that *Klein* stands for the broader principle that Congress may not usurp the role of the judiciary).

requires courts to act unconstitutionally,[155] *Klein* proscribes legislative action that usurps the role of the judiciary, not only legislation that mandates the court to take unconstitutional action.[156] What seems to be an ideal approach is to read *Klein* as recognizing a limit in Article III that prohibits Congress from commandeering courts to reach a particular result.[157] For if Congress were allowed to engage in such action, then Congress would effectively supplant the courts' provincial duty to decide cases.[158]

However, the majority's decision not to apply *Klein* in *Bank Markazi* only furthers the idea that modern precedent has "implicit[ly] overrul[ed] . . . *Klein*."[159] But Congress's power to amend the applicable law,[160] even with retroactive effect to pending litigation,[161] does not "mean[] that there is and can no longer be a point at which legislation impermissibly impinges upon the exercise of judicial power."[162] Nevertheless, the majority in *Bank Markazi* ignored the fundamental aphorism of *Klein* and dismissed its viability on similar grounds as the *Robertson* Court. If *Klein* stands for the idea that Congress cannot adjudicate the rights of parties in pending litigation by directing particular results, then what really is at the core of *Klein* is the basic limitation in Article III giving federal courts the sole adjudicatory function.[163] In essence, there must be a line drawn that separates the legislative power from that of the judiciary, "[a]nd just because *Klein* did not set forth clear rules defining the limits on Congress's authority to legislate with respect to a pending case does not mean . . . that

155. *See id.* at 1324 n.19 (majority opinion).

156. United States v. Klein, 80 U.S. (13 Wall.) 128, 146–47 (1871). There is support for the argument that *Klein* focuses primarily on Congress directing the court to decide a case. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1373 (1953). Article III serves as a limitation that protects the court from congressional overreach. *Bank Markazi*, 136 S. Ct. at 1332 (Roberts, C.J., dissenting).

157. Hart, *supra* note 156, at 1373; *Bank Markazi*, 136 S. Ct. at 1332 (Roberts, C.J., dissenting).

158. *See Klein*, 80 U.S. (13 Wall.) at 147 ("We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.").

159. *See* Ronner, *supra* note 137, at 1041.

160. Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992).

161. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801).

162. *See* Ronner, *supra* note 137, at 1041.

163. *See* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1333 (2016) (Roberts, C.J., dissenting).

Article III itself imposes no such limits."[164] Necessarily, drawing that line is complex, but *Klein*—under the standard advocated above—is a helpful tool for evaluating whether Congress has impermissibly encroached into the role of the judiciary.

Under the broad reading of the *Klein* opinion, the courts, when evaluating outcome-determinative legislation, must ascertain whether Congress has encroached into the judicial domain by directing the Court to reach a particular result.[165] And, as Chief Justice Roberts has stated, making this determination relies on fundamental Article III separation of powers principles,[166] which I believe is at the core of *Klein.* Under this proposed theory, the Court is then charged with engaging in judicial discretion to ascertain whether there is still room to reasonably "expound and interpret"[167] the substantive law enacted by Congress.[168] And the primary points of disagreement between the majority and dissent in *Bank Markazi* provide guidance for determining whether Congress has in fact usurped the judicial function.

The first substantial difference between the majority and dissent in *Bank Markazi* is whether *Klein* can be reconciled with precedent giving Congress the power to enact narrow legislation retroactively to pending cases. As mentioned above, modern precedent has severely limited *Klein*'s holding by permitting Congress to change the substantive law in a way that applies retroactively to pending litigation.[169]

The majority's focus on retroactivity stems primarily from an 1801 case, *United States v. Schooner Peggy*,[170] in which the "Court applied a newly ratified treaty that, by requiring the return of captured property, effectively permitted only one possible outcome."[171] Additionally, the

164. *Id.* at 1335.

165. In *Bank Markazi*, Chief Justice Roberts in his dissent questions whether § 8772 effectively dictated the outcome. *Id.* at 1333–34.

166. *See id.* at 1336.

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

168. *See, e.g.*, Shawnee Tribe v. United States, 423 F.3d 1204, 1218 (10th Cir. 2005) (citing Anixster v. Home-Stake Prod. Co., 977 F.2d 1533, 1545 (10th Cir. 1992)) ("Congress can change existing law or create new law as long as the courts are left to their adjudicative function of interpreting and applying the meaning and effect of the new governing law.").

169. *Bank Markazi*, 136 S. Ct. at 1324 (citing United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801)).

170. 5 U.S. (1 Cranch) 103.

171. *Bank Markazi*, 136 S. Ct. at 1326 (discussing the outcome-determinative effect of

Court has held that retroactive legislation must generally be applied unless the Constitution expressly forbids such application.[172] However, the dissenting Chief Justice Roberts makes an important point on the scope of *Klein* and *Schooner Peggy*:

> It is true that *Klein* can be read too broadly, in a way that would swallow the rule that courts generally must apply a retroactively applicable statute to pending cases. But *Schooner Peggy* can be read too broadly, too. Applying a retroactive law that says "Smith wins" to the pending case of *Smith v. Jones* implicates profound issues of separation of powers, issues not adequately answered by a citation to *Schooner Peggy*.[173]

What Chief Justice Roberts seems to suggest is that *Schooner Peggy* is the general rule which allows Congress to enact outcome-determinative legislation retroactively to pending litigation, and that *Klein*, in conjunction with the history and text of Article III, is the exception which precludes Congress from mandating that "Smith wins."[174]

The majority concedes that it would hold unconstitutional a statute expressly directing a particular winner because such a statute "would create no new substantive law."[175] *Klein*—according to the majority—is strictly limited to instances in which Congress "direct[s a] result without altering the legal standards."[176] But by changing the substantive law, Congress can prospectively assume the judiciary's role vis-à-vis directing the outcome of a pending a case.[177]

Moreover, the majority's insistence on reading *Klein* as applying only when Congress fails to proscribe new legal standards is possibly consistent with *Pennsylvania v. Wheeling & Belmont Bridge Co*.[178] In *Wheeling Bridge*, the Court issued a decree requiring the abatement or alteration of

the treaty in *Schooner Peggy*).

172. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 267–69 (1994).

173. *Bank Markazi*, 136 S. Ct. at 1334–35 (Roberts, C.J., dissenting) (citation omitted).

174. *See id.* at 1334.

175. *Id.* at 1323 n.17 (majority opinion).

176. *Id.* at 1324.

177. *Id.* at 1335 (Roberts, C.J., dissenting).

178. 59 U.S. (18 How.) 421 (1855); *see* Ronner, *supra* note 137, at 1047 (discussing the view courts have taken based on *Klein* and *Wheeling Bridge*).

a bridge that obstructed navigation on the Ohio River.[179] Subsequently, Congress enacted a law stating "[t]hat the bridges across the Ohio River . . . are hereby declared to be lawful structures in their present positions and elevations."[180] In response to the plaintiff's separation of powers argument that Congress had negated a valid judicial determination, the Court held that Congress had competent authority to enact legislation with respect to the public right of navigation.[181]

In *Klein*, Justice Chase asserted that the "legislature may [not] prescribe rules of decision to the Judicial Department,"[182] distinguishing the statute from that in *Wheeling Bridge*:

> No arbitrary rule of decision was prescribed in that case, but the court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.[183]

Justice Chase's distinction became known as the "underlying law exception,"[184] under which "it is unconstitutional to prescribe a rule of decision to the judiciary in [a] pending case[] without changing the underlying procedural or substantive law."[185]

The theory that *Klein* applies only when Congress fails to supply new legal standards ignores Chief Justice Roberts's logical assertion that "[c]hanging the law is simply" a label describing congressional action.[186] Chief Justice Roberts proposes a hypothetical where Congress enacts a law

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

180. *Id*. at 429 (quoting Act of Aug. 31, 1852, ch. 111, § 6, 10 Stat. 112 (1852)).

181. *See id.* at 441.

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

183. *Id.* at 146–47.

184. *See* J. Richard Doidge, Note, *Is Purely Retroactive Legislation Limited by the Separation of Powers?: Rethinking* United States v. Klein, 79 CORNELL L. REV. 910, 912, 918 (1994) (suggesting that the "underlying law" approach defies practical workability, and that courts "should assess the purposes and consequences of the retroactive legislation").

185. *Id.* at 959–60.

186. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1335 (2016) (Roberts, C.J., dissenting).

declaring "Smith wins."[187] Congress, by directing the winner, would nonetheless change the substantive law to ensure that a particular litigant wins.[188] Under this analysis, the key question is whether Congress, by enacting or amending the substantive law, effectively usurped the role of the judiciary by ensuring that only one particular outcome could be reached.[189] Maybe *Klein* does not articulate that precise standard for gauging legislative encroachment, but the majority's conception that *Klein* does not apply when Congress changes the law ignores a broader rationale underlying *Klein*, as well as fundamental separation of powers principles in Article III.[190] It is especially relevant that "the Judiciary must take 'all possible care . . . to defend itself against [the] attacks' of the other branches."[191] And this necessarily entails logical skepticism of legislation that indirectly picks the winner in pending litigation.

I believe the *Klein–Wheeling Bridge* distinction offers another important piece to the analysis. In *Wheeling Bridge*, Justice Chase recognized that the statute was constitutional because it did not impose an "arbitrary rule" and the Court was still able to "apply its ordinary rules."[192] Contrary to the statute in *Wheeling Bridge*, the statute in *Klein* precluded the Court from applying its rules to examine the evidentiary effect of the pardon, thus directing the Court to decide a certain way.[193] Thus, the question is not only whether Congress changed the law, but whether the law interferes with the Court's role as an adjudicator.[194]

This question was raised in *United States v. Sioux Nation of Indians*.[195] In this case, the Sioux argued that an 1877 Act violated the 5th Amendment as an unconstitutional taking of their land without just compensation.[196] In 1942, the Court of Claims held that the Sioux were without a remedy under the Just Compensation Clause.[197] Subsequently, Congress passed the Indian Claims Commission Act, which gave the

187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* (alteration in original) (quoting THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).
192. United States v. Klein, 80 U.S. (13 Wall.) 128, 146–47 (1871).
193. *Id.* at 146.
194. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 392 (1980).
195. 448 U.S. 371.
196. *Id.* at 384.
197. *Id.*

Sioux the opportunity to petition the Indian Claims Commission for relief.[198] Ultimately, the Commission found that the 1877 Act constituted a taking and required just compensation, but the Government argued to the Court of Claims that the Sioux's claims were barred by the doctrine of res judicata from the 1942 decision.[199] The Court of Claims agreed and held that the claim was barred.[200] Following the Court of Claim's decision, Congress passed a statute allowing the Court of Claims to evaluate new evidence on the Sioux's original claim, notwithstanding res judicata.[201]

The Supreme Court, in response to the 1978 amended statute, granted certiorari to determine in part whether Congress "prescribe[d] a rule for decision that left the court no adjudicatory function to perform" in violation of *Klein*.[202] The statute stated in pertinent part:

> Notwithstanding any other provision of law . . . the Court of Claims shall review on the merits, without regard to the defense of res judicata or collateral estoppel, that portion of the determination of the Indian Claims Commission entered February 15, 1974, adjudging that the Act of February 28, 1877 (19 Stat. 254), effected a taking of the Black Hills portion of the Great Sioux Reservation in violation of the fifth amendment, and shall enter judgement accordingly.[203]

The Court disagreed with the contention that the statute effectively prescribed a rule of decision; instead, the Court refused to apply *Klein* because the statute did not command the Court of Claims to reach any particular decision.[204] Rather, the Court of Claims now had the ability to adjudicate the dispute with new evidence.[205]

Although the *Bank Markazi* Court refused to apply *Klein* because § 8772 supplied new legal standards, the majority and dissent strongly diverged on the issue of whether § 8772 left the judiciary with any

198. *Id.* at 384–85.
199. *Id.* at 386–87.
200. *Id.* at 387.
201. *Id.* at 389.
202. *Id.* at 392.
203. *Id.* at 391 (quoting Act of Mar. 13, 1978, Pub. L. No. 95-243, 92 Stat. 153 (1978)).
204. *Id.* at 392.
205. *Id.* at 389, 392.

adjudicatory function.[206] Specifically, the majority accepted the district court's contention that § 8772 left for the court the issue of whether Iran in fact owned the blocked assets.[207] This argument relies on the specific language in the statute stating that "the court shall determine whether Iran holds equitable title to, or the beneficial interest in, the assets . . . [and] that no other person possesses a constitutionally protected interest in the assets."[208] The dissent rejected this contention on the basis that these two determinations had been made prior to § 8772's enactment: An executive order already blocked assets belonging to Iran, and the respondent conceded to being the sole owner of the bond assets.[209]

Examining whether there is still room left to make judicial determinations is potentially consistent with the dichotomy between *Klein* and *Wheeling Bridge*. As Justice Chase stated, one of the primary distinctions from *Klein* was that the Court in *Wheeling Bridge* could still engage in judicial inquiry.[210] Nevertheless, there are several different interpretations of *Klein*, and the Court's modern precedent narrows it significantly.[211] The Court will look past *Klein* when Congress puts forth new substantive law for the judiciary to apply.[212] But there should, at the minimum, be some skepticism in order to protect the "institutional integrity of the Judicial Branch."[213] If the separation of powers doctrine acts a "prophylactic device,"[214] then the courts should arguably inquire into whether—after new law is supplied to pending litigation—it can still make a determination based on the new legal standards. To the contrary, if, as Chief Justice Roberts suggests, Congress ultimately directed the outcome, then the statute at issue should be met with tougher skepticism in order to preserve the structural constitutional safeguards.[215]

206. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1324–25, 1325 n.20 (2016); *id.* at 1335 (Roberts, C.J., dissenting).
207. *Id.* at 1325 (majority opinion).
208. 22 U.S.C. § 8772(a)(2) (2012).
209. *Bank Markazi*, 136 S. Ct. at 1335 (Roberts, C.J., dissenting) (citing Exec. Order No. 13599, 77 Fed. Reg. 6659 (Feb. 5, 2012)).
210. United States v. Klein, 80 U.S. (13 Wall.) 128, 146–47 (1871).
211. Shawnee Tribe v. United States, 423 F.3d 1204, 1217–18 (10th Cir. 2005).
212. *Bank Markazi*, 136 S. Ct. at 1325.
213. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986).
214. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995).
215. *Bank Markazi*, 136 S. Ct. at 1335 (Roberts, C.J., dissenting) (discussing how § 8772 implicates Article III).

B. Particularized Legislation

The Court—when evaluating "tailored" legislation[216]—should approach such legislation with intense skepticism to determine whether the law's vitality ends with the resolution of a specific case.[217] In *Robertson*, a question was raised as to whether a law was unconstitutional if it "swept no more broadly . . . than the range of applications at issue in the pending cases," but the Court did not provide a direct answer.[218] Approaching a statute from this angle will enable the Court to ascertain whether Congress's decision to enact a law retroactively to a particular case intrudes into the judiciary's role.[219]

In *Bank Markazi*, § 8772 restricted the assets for postjudgment execution to only those assets identified by the statute's reference to the docket number: "The financial assets described in this section are the financial assets that are identified in and the subject of proceedings in . . . Peterson et al., v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG) . . . ."[220] The statute clearly restricted the execution of assets for judgments in only the above-mentioned proceedings.[221] Congress's intent to render the Iranian assets available for judgment is clearly found in the statute, which says that its effect does not extend to "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)."[222]

In response to the petitioner's argument that § 8772 was too narrow in scope, the majority cited *Plaut v. Spendthrift Farm, Inc.*,[223] which recognized the validity of legislation affecting a small number of

216. *Id.* at 1335 (Roberts, C.J., dissenting). According to Chief Justice Roberts, both the law in the "Smith wins" hypothetical was "tailored to one case in the same way as § 8772 and [had] the same effect," and "[a]ll that both statutes 'effectuat[e],' in substance, is lawmakers' 'policy judgment' that one side in one case ought to prevail." *Id.* (second alteration in original) (quoting *id.* at 1326 (majority opinion)).

217. *See id.* at 1336 (Roberts, C.J., dissenting) (contrasting § 8772's reference to the particular case as distinct from the statute at issue in *Robertson*, which was not limited to only those cases referenced).

218. Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992).

219. *See* Doidge, *supra* note 184, at 964–65 (discussing the "pending case rule" and its potential limitations).

220. 22 U.S.C. § 8772(b) (2012).

221. *Id.* at § 8772(c)(1)–(2).

222. *Id.* at § 8772(c)(1).

223. 514 U.S. 211 (1995).

individuals.[224] Additionally, the majority argued that "nothing in § 8772 prevented additional judgment creditors from joining the consolidated proceeding after the statute's enactment."[225] The majority also emphasized the breadth of the statute's effect; that is, the statute ultimately expanded to sixteen suits with over 1,000 victims seeking judgments against Iran in consolidated claims.[226] Procedurally, claims that are consolidated for the purpose of collecting judgments do not erode each claim's distinct identity.[227]

The dissent conceded that precedent exists giving Congress the power to enact highly-specific legislation;[228] however, the dissent's distinction between § 8772 and the statute in *Robertson* provides guidance on approaching legislation of such specificity.[229] In *Robertson*, the respondents questioned the validity of the Northwest Timber Compromise, which referenced the two pending cases in the statutory language.[230] Despite the reference to the cases, the statute—unlike § 8772 at issue in *Bank Markazi*—had no language restricting its application to those cases alone.[231] In fact, the language of the statute emphasized the references to the two docket numbers "served only to identify the five 'statutory requirements that are the basis for' those cases—namely, pertinent provisions" of other environmental statutes.[232] On the contrary, Chief Justice Roberts argued that § 8772 stands alone, as there has never been "another statute that changed the law for a pending case in an outcome-determinative way and explicitly limited its effect to particular judicial proceedings."[233]

In another example of legislative specificity, in *Nixon v. Administrator of General Services*,[234] the Court evaluated in part whether the Presidential

224. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1327 (2016) (citing Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 n.9 (1995)).
225. *Id.* at 1327 n.24.
226. *Id.* at 1326–27.
227. *Id.* at 1327 (describing claims brought pursuant to Federal Rule of Civil Procedure 69).
228. *See id.* at 1336 (Roberts, C.J., dissenting).
229. *See id.*
230. Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 440 (1992).
231. *Bank Markazi*, 136 S. Ct. at 1336 (Roberts, C.J., dissenting).
232. *Robertson*, 503 U.S. at 440 (quoting Pub. L. No. 101-121, § 318(b)(6)(A), 103 Stat. 745, 747 (1989)).
233. *Bank Markazi*, 136 S. Ct. at 1333 (Roberts, C.J., dissenting).
234. 433 U.S. 425 (1977).

Recordings and Materials Preservation Act violated the separation of powers doctrine and the Constitution's prohibition of bills of attainder.[235] A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial."[236] The Constitution's express prohibition on bills of attainder signifies the Framers' fear that omnipotent legislatures would usurp the judiciary's power through a "trial by legislature."[237]

The Act at issue in *Nixon* authorized an executive official to seize documents belonging to the appellant, former President Nixon, in the wake of the Watergate scandal.[238] Prior to the Act, the appellant signed an agreement with the Administrator of General Services (the "Nixon–Sampson agreement"), which confirmed that all the rights to documents and materials from his presidency belonged to him.[239] Title I of the Act referenced appellant specifically by name and directed that, notwithstanding the Nixon–Sampson agreement, the Administrator of General Services would retain possession of all materials from appellant's presidency.[240] Additionally, the Act specified that the materials could be used in judicial proceedings and gave the Watergate special prosecutor priority for access to the materials.[241] Title II of the Act "establish[ed] a special commission to study and recommend appropriate legislation regarding the preservation of the records of future Presidents and all other federal officials."[242]

The Court held that the Act, despite its specificity in referencing the appellant in Title I, did not violate Article I's prohibition on bills of attainder.[243] Although the Court's focus on legislative specificity was brief, the Court nonetheless emphasized the continuing effect of the Act with respect to other federal officials; only the appellant's materials "demanded immediate attention" at the time Congress passed the Act, but

235. *Id.* at 429.
236. *Id.* at 468.
237. United States v. Brown, 381 U.S. 437, 442 (1965).
238. *Nixon*, 433 U.S. at 431–33.
239. *Id.* at 431–32.
240. Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, § 102, 88 Stat. 1695, 1696 (1974).
241. *Id.*
242. *Nixon*, 433 U.S. at 472 (discussing Public Documents Act, Pub. L. No. 93-526, § 3317, 88 Stat. 1698, 1699 (1974)).
243. *Id.*

the Act left open the prospect of future preservation of records belonging to federal officials.[244] And the Court further acknowledged that the Act's current effect made the appellant a "legitimate class of one," but Congress also "order[ed] the further consideration of generalized standards to govern his successors."[245]

The Court's emphasis on the statute's continuing validity lends support to the idea that legislation with a certain degree of specificity can be evaluated by examining whether Congress intended to impact future cases.[246] In essence, a statute may retroactively apply to a single pending case but provide future guidance to other disputes brought before the courts. Unlike the Act in *Nixon*, § 8772 in *Bank Markazi* retroactively applied to the pending cases enumerated in the statute only.[247] The language of the statute effectively limits its scope to those proceedings only.[248] If the statute is limited to only a particular case, then there is at least an argument that Congress is attempting to adjudicate disputes.[249] On the other hand, if Congress references a specific case, but the law can be applied in the future, then there is merit that Congress is operating primarily in the legislative domain.[250]

This proposition is not absolute, and particularized legislation is not in itself unconstitutional.[251] For example, Congress passed the Gun Lake Act in response to a legal dispute between a landowner and the federal government.[252] In *Patchak v. Jewell*,[253] a rural landowner in Michigan contested the federal government's decision to place certain land in trust for a band of Pottawatomi Indians (the Gun Lake Tribe).[254] The landowner's central argument was that the Gun Lake Tribe was not a formally recognized Indian Tribe under the Indian Reorganization Act of

244. *Id.*; *see also* Presidential Recordings and Materials Preservation Act § 101(a); Public Documents Act § 3315(1).
245. *Nixon*, 433 U.S. at 472.
246. *See id.*
247. 22 U.S.C. § 8772(b) (2012).
248. *Id.*
249. *See* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1335 (Roberts, C.J., dissenting).
250. *See Nixon*, 433 U.S. at 471–72.
251. *See Bank Markazi*, 136 S. Ct. at 1327–28.
252. Patchak v. Jewell, 828 F.3d 995, 999–1000 (D.C. Cir. 2016), *cert. granted in part*, Patchak v. Zinke, 137 S. Ct. 2091 (2017) (citing Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, § 2(a)–(b), 128 Stat. 1913 (2014)).
253. 828 F.3d 995.
254. *See id.* at 999–1000.

1934.[255] Thus, according to the landowner, the federal government lacked the requisite statutory authority to place the land in trust.[256]

In 2014, while the parties were arguing the merits of their case in a federal district court, the federal government enacted the Gun Lake Act.[257] The Act states:

> (a) In General.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians . . . is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.
>
> (b) No Claims.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.[258]

Similar to the statute at issue in *Klein*, the Gun Lake Act stripped federal courts of the jurisdiction to hear and render a decision on the merits of the case.[259]

The appellant–landowner argued that the Gun Lake Act was unconstitutional under *Klein* because Congress impermissibly intruded into the realm of the judiciary by "direct[ing] courts to make a particular decision in a pending matter" without actually amending the substantive law.[260] Citing *Plaut v. Spendthrift Farm, Inc.*, the appellant conceded that "[w]hile the legislature may amend [the] substantive laws, even when doing so will affect pending litigation, there is an important and notable difference between an amendment which will cause a change in the underlying law and an amendment which will compel a particular finding or result."[261] Rejecting this argument, the District of Columbia Court of

255. *Id.* at 1000.
256. *Id.*
257. *Id.* at 999.
258. Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913, § 2(a)–(b) (2014).
259. *Patchak*, 828 F.3d at 1001.
260. Opening Brief for Appellant at 23–25, *Patchak*, 828 F.3d 995 (No. 15-5200), 2016 WL 1213008, at *23–25.
261. *Id.* at 24 (citing Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 217–19 (1995)).

Appeals held that the Gun Lake Act passed muster under *Robertson* and *Klein*, notwithstanding the law's narrow ambit, because it established new legal standards for courts to apply.[262]

Although the Gun Lake Act impacted only the parties in the specific lawsuit, the Court of Appeals reiterated the Supreme Court's prior holdings respecting Congress's authority to enact particularized legislation.[263] Under these holdings, it is clear that congressional action will not be invalidated simply because it impacts only one party.[264] But looking into whether the legislation impacts future rights remains an important inquiry into gauging the constitutionality of legislation. This idea comports with the argument that a courts' assessment of legislative intent can play a crucial role in a *Klein* analysis.[265]

C. Deference to Legislative Policy

The majority's final rationale in *Bank Markazi* for holding that § 8772 did not violate the separation of powers doctrine is congressional and executive proficiency in handling foreign policy issues, specifically decision-making involving foreign sovereign immunity and claims against foreign assets.[266] In his dissent, Chief Justice Roberts admonished the majority's foreign policy rationale as an overbroad reading of *Dames & Moore v. Regan*.[267] In the dissent's opinion, to hold that § 8772 falls within the purview of Congress's power in the realm of foreign policy casts aside fundamental separation of powers principles.[268] Moreover, the majority's "decision will indeed become a 'blueprint for extensive expansion of the legislative power' at the Judiciary's expense."[269]

262. *See Patchak*, 828 F.3d at 1002–03 ("Congress is not limited to enacting generally applicable legislation.").

263. *Id.* at 1003.

264. *See* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1327–28 (2016); *Plaut*, 514 U.S. at 239 n.9.

265. *See* Doidge, *supra* note 184, at 969 (arguing that one factor in gauging retroactive legislation is "examining the legislature's motive" to determine whether "Congress is attempting to usurp the judicial function").

266. *Bank Markazi*, 136 S. Ct. at 1328 (citing Dames & Moore v. Regan, 453 U.S. 654, 673–74, 679–81 (1981)).

267. 453 U.S. 654; *Bank Markazi*, 136 S. Ct. at 1336–37 (Roberts, C.J., dissenting).

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

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

But the analysis in *Bank Markazi* involves balancing of two competing principles: How will the Court respect precedent, recognizing the political branches' autonomy in settling foreign policy issues, and also adhere to the Article III separation of powers concerns that the judiciary be "free from potential domination by the other branches"?[270] The answer is far from clear, but one potential guiding factor rests on the distinction of formalism and functionalism in foreign policy matters.[271] On one hand, the Court's longstanding functional approach to foreign policy issues gives significant deference to the political branches on the basis that they are more equipped to handle matters involving discretion and flexibility.[272] On the other hand, the Court cannot undermine the structural design of the Constitution which offers to safeguard the judiciary's independence.[273] And if the Court continues to permit such broad legislative expansion, then the Court should be weary of that expansion into domestic issues.[274]

The argument that the political branches should be accorded substantial deference in handling matters of foreign policy is meritorious. In *United States v. Curtiss-Wright Export Corp*.,[275] the Court distinguished foreign and domestic issues and determined the federal government's deference with respect to each one:

> It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.[276]

The Court opined that Congress's delegation of law-making authority to the President did not violate the nondelegation doctrine because of the

270. United States. v. Scott, 688 F.Supp. 1483, 1488 (1988).
271. *See* Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 386 (2015).
272. *See id.*
273. N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982).
274. *See, e.g.*, Patchak v. Jewell, 828 F.3d 995, 1000–04 (D.C. Cir. 2016), *cert. granted in part*, Patchak v. Zinke, 137 S. Ct. 2091 (2017).
275. 299 U.S. 304 (1936).
276. *Id.* at 318.

federal government's plenary power in matters of foreign policy.[277]

In *Bank Markazi*, the Court referenced *Dames & Moore*, in which the Court noted the long-standing authority of the political branches to settle claims with foreign nations.[278] The majority in *Bank Markazi* fervently argued that "[i]n pursuit of foreign policy objectives, the political branches have regulated specific foreign-state assets by, *inter alia*, blocking them or governing their availability for attachment."[279] And further, these "measures have never been rejected as invasions upon the Article III judicial power."[280] In conclusion, the majority stated that § 8772 fell within the realm of the political branches' strong authority to dispose of foreign state property and recognize foreign sovereign immunity.[281]

The dissent recognizes that the political branches have historically settled claims against foreign countries.[282] However, the majority's reliance on *Dames & Moore* might be overly broad, as *Dames & Moore* involved congressional acquiescence to the executive's practice of claim settlement.[283] But the executive action in *Dames & Moore* did not settle the claims; rather, it delegated the claims to a separate tribunal for resolution, which is not in itself a judicial act.[284] Chief Justice Roberts reasoned that *Bank Markazi* could hardly be reconciled with *Dames & Moore* because § 8772 mandated a specific outcome in violation of *Klein*.[285] Thus, in *Dames & Moore*, the Court approved of long-standing practices associated with the roles of the political branches.[286] But, according to the dissent, the political branches' involvement in the disposition of claims is distinct from § 8772, which directed the Court to reach a certain outcome regarding claims against a foreign nation and effectively dismantled any of Bank Markazi's arguments on state, federal, or international law.[287]

Under *Bank Markazi*, Congress's power to enact outcome-

277. *Id.* at 318–22.
278. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1328 (2016) (citing Dames & Moore v. Regan, 453 U.S. 654, 673–74, 679–81 (1981)).
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.* at 1337 (Roberts, C.J., dissenting).
283. *See id.*
284. *Id.*
285. *See id.* at 1337–38.
286. *Id.* (citing Dames & Moore v. Regan, 453 U.S. 654, 679–-681 (1981)).
287. *See id.* at 1336.

determinative legislation is bolstered when the underlying issue involves matters of foreign policy.[288] The question remains how much deference will Congress receive when enacting legislation in this realm. Should the Court always defer to Congress's foreign policy decisions? And, should this deference extend to other areas, for example, legislation involving Indian tribes? In *Patchak v. Jewell*, the District of Columbia Court of Appeals stated:

> In passing the Gun Lake Act, Congress exercised its "broad general powers to legislate in respect to Indian tribes . . . ." Accordingly, we ought to defer to the policy judgment reflected therein. Such is our role. Indeed, "[a]pplying laws implementing Congress' policy judgments, with fidelity to those judgments, is commonplace for the Judiciary."[289]

This leaves open the question of how the courts should evaluate legislation reflecting "Congress' policy judgments"[290] when such legislation comes into tension with *Klein* and Article III.

IV. CONCLUSION

United States v. Klein is a confusing opinion, and the Court's modern precedent establishes a rule that grants Congress substantial deference to enact narrow, outcome-determinative legislation without violating *Klein* or Article III.[291] Historical separation of powers principles, various interpretations of *Klein*, and modern precedent can be used to gauge the constitutionality of such legislation. First, focusing on whether a law precludes judicial interpretation is instructive as to the law's constitutionality under *Klein* and Article III.[292] Relatedly, determining whether a law applies only to a particular legal dispute is important when

288. *Id.* at 1317 (majority opinion).

289. Patchak v. Jewell, 828 F.3d 995, 1003 (D.C. Cir. 2016) (alteration in original) (citation omitted) (first quoting United States v. Lara, 541 U.S. 193, 200 (2004); and then quoting *Bank Markazi*, 136 S. Ct. at 1326), *cert. granted in part*, Patchak v. Zinke, 137 S. Ct. 2091 (2017).

290. *Id.* (quoting *Bank Markazi*, 136 S. Ct. at 1326).

291. *See Bank Markazi*, 136 S. Ct. at 1325.

292. This seems to be an important issue in *Bank Markazi* between the majority and dissent. *See generally id.*

assessing whether Congress intruded into the judiciary's role of deciding cases.[293] Finally, the courts can assess how much deference Congress should receive when enacting law by looking to its skill and proficiency in a given area, particularly foreign policy.[294] These inquiries help courts assess *Klein* in light of the necessary safeguards Article III provides to protect the judiciary from intrusion.

293. *See* Doidge, *supra* note 184, at 966–67, 966 n.249 (discussing the "pending case rule").

294. *See Bank Markazi*, 136 S. Ct. at 1328.