AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Judicial Power/Constitutional Litigation

**Bank Markazi v. Peterson, 578 U.S. \_\_\_** (2016)

*The Foreign Sovereign Immunities Act of 1976 includes an exception that allows American citizens to file suit against state sponsors of terrorism in American courts for monetary damages they might have suffered from a terrorist incident. Only some assets of foreign governments held in the United States were legally accessible to judicial processes for recovering such damage awards. The Terrorism Risk Insurance Act of 2002 allowed judgments to be executed against the “blocked assets” of such countries, which consisted of assets seized by the executive branch under other national security statutes. In 2012, President Barack Obama imposed such a block on property of Iranian financial institutions in the United States, and aspects of that executive order were challenged in federal court. In section 8772 of the Iran Threat Reduction and Syria Human Rights Act of 2012, Congress specified that assets that met specified conditions could be used to satisfy judgments under the Foreign Sovereign Immunities Act.*

*A group of victims of Iran-sponsored terrorist activities won a judgment under the terrorism exception to the Foreign Sovereign Immunities Act. They sought to execute the judgment against assets held in the New York account of Bank Markazi, the state-owned central bank of Iran. This effort was tied up in litigation when §8772 was passed. The victims moved for an immediate judgement under the new statute, and the bank countered that §8772 unconstitutionally infringed on the judicial power by attempting to direct how a case should be decided. The district court rejected the bank’s argument, and a circuit court affirmed that ruling. The U.S. Supreme Court affirmed the lower courts and upheld the statutory provision in a 6-2 decision. The majority held that §8772 merely provided new law that courts must take into account in pending litigation but did not direct the outcome of any particular case.*

JUSTICE GINSBURG delivered the opinion of the Court.

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Article III of the Constitution establishes an independent Judiciary, a Third Branch of Government with the "province and duty ... to say what the law is" in particular cases and controversies. *Marbury v. Madison* (1803). Necessarily, that endowment of authority blocks Congress from "requir[ing] federal courts to exercise the judicial power in a manner that Article III forbids." *Plaut v. Spendthrift Farm, Inc*. (1995). Congress, no doubt, "may not usurp a court's power to interpret and apply the law to the [circumstances] before it," for "[t]hose who apply [a] rule to particular cases, must of necessity expound and interpret that rule." And our decisions place off limits to Congress "vest[ing] review of the decisions of Article III courts in officials of the Executive Branch." Congress, we have also held, may not "retroactively comman[d] the federal courts to reopen final judgments."

Citing *United States v. Klein* (1872), Bank Markazi urges a further limitation. Congress treads impermissibly on judicial turf, the Bank maintains, when it "prescribe[s] rules of decision to the Judicial Department . . . in [pending] cases." . . . More recent decisions, however, have made it clear that *Klein* does not inhibit Congress from "amend[ing] applicable law." *Robertson v. Seattle Audubon Society* (1992). Section 8772, we hold, did just that.

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. . . . As we explained in *Landgraf v. USI Film Products* (1994), the restrictions that the Constitution places on retroactive legislation “are of limited scope”:

"The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation. Article I, § 10, cl. 1, prohibits States from passing ... laws `impairing the Obligation of Contracts.' The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a `public use' and upon payment of `just compensation.' The prohibitions on `Bills of Attainder' in Art. I, §§ 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause `may not suffice' to warrant its retroactive application."

"Absent a violation of one of those specific provisions," when a new law makes clear that it is retroactive, the arguable "unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give [that law] its intended scope." So yes, we have affirmed, Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases. . . .

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[A] statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts. "When a plaintiff brings suit to enforce a legal obligation it is not any less a case or controversy upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff's claim is uncontested or incontestable." . . .

. . . . § 8772 provides a new standard clarifying that, if Iran owns certain assets, the victims of Iran-sponsored terrorist attacks will be permitted to execute against those assets. Applying laws implementing Congress' policy judgments, with fidelity to those judgments, is commonplace for the Judiciary.

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This Court and lower courts have upheld as a valid exercise of Congress' legislative power diverse laws that governed one or a very small number of specific subjects. *Regional Rail Reorganization Act Cases* (1974). . . .

We stress, finally, that § 8772 is an exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper. In furtherance of their authority over the Nation's foreign relations, Congress and the President have, time and again, as exigencies arose, exercised control over claims against foreign states and the disposition of foreign-state property in the United States. *Dames & Moore v. Regan* (1981). . . .

*Affirmed*.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SOTOMAYOR joins, dissenting.

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

That question lies at the root of the case the Court confronts today. Article III of the Constitution commits the power to decide cases to the Judiciary alone. *Stern v. Marshall* (2011). Yet, in this case, Congress arrogated that power to itself. Since 2008, respondents have sought $1.75 billion in assets owned by Bank Markazi, Iran's central bank, in order to satisfy judgments against Iran for acts of terrorism. 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. Then, having gotten Congress to resolve all outstanding issues in their favor, respondents returned to court . . . and won.

Contrary to the majority, I would hold that § 8772 violates the separation of powers. No less than if it had passed a law saying "respondents win," Congress has decided this case by enacting a bespoke statute tailored to this case that resolves the parties' specific legal disputes to guarantee respondents victory.

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The Revolution-era "crescendo of legislative interference with private judgments of the courts," however, soon prompted a "sense of a sharp necessity to separate the legislative from the judicial power." . . .

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The States' experiences ultimately shaped the Federal Constitution, figuring prominently in the Framers' decision to devise a system for securing liberty through the division of power:

"Before and during the debates on ratification, Madison, Jefferson, and Hamilton each wrote of the factional disorders and disarray that the system of legislative equity had produced in the years before the framing; and each thought that the separation of the legislative from the judicial power in the new Constitution would cure them." *Plaut v. Spendthrift Farm, Inc.* (1995).

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Experience had confirmed Montesquieu's theory. The Framers saw that if the "power of judging . . . were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary." They accordingly resolved to take the unprecedented step of establishing a "truly distinct" judiciary. To help ensure the "complete independence of the courts of justice," they provided life tenure for judges and protection against diminution of their compensation. But such safeguards against indirect interference would have been meaningless if Congress could simply exercise the judicial power directly. The central pillar of judicial independence was Article III itself, which vested "[t]he judicial Power of the United States" in "one supreme Court" and such "inferior Courts" as might be established. The judicial power was to be the Judiciary's alone.

Mindful of this history, our decisions have recognized three kinds of "unconstitutional restriction[s] upon the exercise of judicial power." Two concern the effect of judgments once they have been rendered. . . .

This case is about the third type of unconstitutional interference with the judicial function, whereby Congress assumes the role of judge and decides a particular pending case in the first instance. Section 8772 does precisely that, changing the law — for these proceedings alone — simply to guarantee that respondents win. The law serves no other purpose — a point, indeed, that is hardly in dispute. As the majority acknowledges, the statute "`sweeps away ... any ... federal or state law impediments that might otherwise exist'" to bar respondents from obtaining Bank Markazi's assets. . . .

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There has never been anything like § 8772 before. Neither the majority nor respondents have identified another statute that changed the law for a pending case in an outcome-determinative way and explicitly limited its effect to particular judicial proceedings. That fact alone is "[p]erhaps the most telling indication of the severe constitutional problem" with the law. . . .

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"Smith wins" is a new law, tailored to one case in the same way as § 8772 and having the same effect. All that both statutes "effectuat[e]," in substance, is lawmakers' "policy judgment" that one side in one case ought to prevail. The cause for concern is that though the statutes are indistinguishable, it is plain that the majority recognizes no limit under the separation of powers beyond the prohibition on statutes as brazen as "Smith wins." Hamilton warned that the Judiciary must take "all possible care ... to defend itself against [the] attacks" of the other branches. In the Court's view, however, Article III is but a constitutional Maginot Line, easily circumvented by the simplest maneuver of taking away every defense against Smith's victory, without saying "Smith wins."

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