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## YALE LAW & POLICY REVIEW INTER ALIA

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### *Bank Markazi* and the Undervaluation of Legislative Generality

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#### INTRODUCTION

In its recent *Bank Markazi v. Peterson*<sup>1</sup> decision, the Supreme Court of the United States resolved terrorism-related claims that spanned three decades and totaled billions of dollars. Although it brought relief to hundreds of victims of terrorism, the decision is controversial because of its impact on the relationship between Congress and the federal courts. By permitting Congress to change the law that applies to an ongoing dispute, the Court allowed Congress to pick the winner in a particular pending lawsuit. By doing so, the Court made clear that it does not recognize a constitutional principle of legislative generality—that is, a principle that disfavors legislation targeting an identifiable person for special treatment. Part II of this Essay demonstrates how *Bank Markazi* fails to value legislative generality as a constitutional principle. Part III explains why the Court’s rejection of a principle of legislative generality is inconsistent with constitutional history, text, and widely held jurisprudential commitments.

#### I. *BANK MARKAZI* REJECTS THE VALUE OF LEGISLATIVE GENERALITY

##### A. *The Background of Bank Markazi*

The story behind the *Bank Markazi* dispute reads like an epic political thriller, spanning decades, continents, and political regimes. During the Lebanese Civil War, Iranian-sponsored terrorists bombed United States Marine barracks in Beirut, Lebanon, killing hundreds of American and French servicemen and wounding dozens more. Surviving victims and family members of those killed filed suit against Iran under an exception to the Foreign Sovereign Im-

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

munities Act (FSIA) that permits suits against state sponsors of terrorism.<sup>2</sup> In subsequent lawsuits conducted over the course of thirty years, hundreds of other victims of terrorism, as well as family members and estate representatives of those victims, demonstrated that Iran was responsible for injuries and deaths caused by other terrorist acts. The claimants in these cases were awarded judgments amounting to billions of dollars, the vast majority of which could not be satisfied by assets located in the United States.<sup>3</sup>

In an effort to satisfy their outstanding judgments, the claimants in these separate suits brought a consolidated action against Bank Markazi, the Central Bank of Iran, which owned assets held in New York. Under the FSIA, however, the assets of Bank Markazi, a “foreign central bank,” were immune from suit.<sup>4</sup> As a result, Bank Markazi’s assets would not be available to satisfy the judgments unless “blocked” by action of the President.<sup>5</sup> In 2012, President Obama did block Bank Markazi’s assets, but doubts still remained about whether its assets could be used to satisfy the outstanding judgments.<sup>6</sup>

In order to resolve these doubts in favor of the claimants, Congress enacted the Iran Threat Reduction and Syria Human Rights Act of 2012, which permitted claims against Iran to be satisfied by the assets identified in the claimants’ complaint against Bank Markazi.<sup>7</sup> Specifically, Congress provided that “the financial assets that are identified”<sup>8</sup> in the claimant’s case against Bank Markazi would be available “to satisfy any judgment . . . awarded against Iran for damages for personal injury or death caused by” acts of terrorism.<sup>9</sup> As directed by the new statute, the district court found in favor of the claimants, making Bank Markazi’s assets available to satisfy the claimants’ judgments against Iran. The United States Court of Appeals for the Second Circuit affirmed and the Supreme Court granted certiorari to consider the constitutional implications of the Iran Threat Reduction statute.<sup>10</sup>

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2. *Id.* at 1319 (discussing the lawsuits filed against Iran by those suffering injuries from the 1983 bombing); 28 U.S.C. § 1605A (2012).

3. 136 S. Ct. at 1319-20, 1319 n.5 (discussing sixteen court judgments, amounting to billions of dollars, against Iran).

4. 28 U.S.C. § 1611(b)(1) (2012).

5. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201(a), 116 Stat. 2322, 2337 (“[I]n every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism . . . , the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment . . .”).

6. 136 S. Ct. at 1318.

7. 22 U.S.C. § 8772 (2012).

8. *Id.* § 8772(b).

9. *Id.* § 8772(a)(1)(C).

10. 136 S. Ct. at 1322.

*B. The Bank Markazi Decision*

The main issue briefed to the Supreme Court was whether Congress violated the principle of separation of powers by directing federal courts to treat the assets of Bank Markazi as available to satisfy outstanding judgments against Iran in a pending lawsuit. The basis for this challenge was the Reconstruction-era case of *United States v. Klein*, which held, to the confusion of generations of scholars, that Congress may not withdraw jurisdiction from the federal courts based solely on the application of a rule of decision in cases pending before them.<sup>11</sup>

A discussion of the *Klein* separation of powers issue is outside the scope of this Essay. Instead, this Essay explores another aspect of the *Bank Markazi* opinion—an aspect no less momentous, but perhaps less readily apparent, than the *Klein* issue. The Bank argued that the Iran Threat Reduction statute was constitutionally defective because it applied only to a single, pending case identified specifically in the statute itself. The statute’s effect, therefore, was the legislative resolution of a particular dispute among identified parties.

The Bank’s argument, that under the Constitution a statute may not resolve a particular dispute, resonates with a number of foundational constitutional values. The Bill of Attainder Clauses, for example, prohibit the legislature from singling out a particular person for certain types of special burdens.<sup>12</sup> The Due Process Clause has long been interpreted to mean that the legislature cannot “take the property of A and give it to B.”<sup>13</sup> And the Equal Protection Clause, although primarily concerned with suspect classifications, has been interpreted to permit claims alleging that a plaintiff has been singled out as a “class of one” by government action.<sup>14</sup>

Despite this support for the Bank’s position, the Court made short work of the argument that there is something wrong with particularized legislative action. The Court held that “the assumption that legislation must be generally applicable” is “flawed.”<sup>15</sup> The Court reasoned that “[w]hile legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action.”<sup>16</sup> Citing cases upholding particularized laws, the Court held

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11. *United States v. Klein*, 80 U.S. 128 (1871). Discerning *Klein*’s meaning is a veritable cottage industry among federal courts scholars. *See, e.g.*, Evan Caminker, Schiavo *and Klein*, 22 CONST. COMMENT. 529 (2005); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT’L L. REV. 521 (2003); Howard M. Wasserman, *The Irrepressible Myth of Klein*, 79 U. CIN. L. REV. 53 (2010); Gordon G. Young, *United States v. Klein, Then and Now*, 44 LOY. U. CHI. L.J. 265 (2012).
  12. U.S. CONST. art. I, § 9-10; *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 473 (1977).
  13. JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* 6 (2003); *see also Calder v. Bull*, 3 U.S. 386, 388 (1798).
  14. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000).
  15. 136 S. Ct. at 1327.
  16. *Id.* (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995)).

that singling out an individual is not enough to render a statute invalid.<sup>17</sup> Ultimately, the Court upheld the Iran Threat Reduction statute, permitting the claimants to satisfy their judgments against Iran with the assets of Bank Markazi.<sup>18</sup> In dissent, Chief Justice Roberts expressed discomfort with legislation targeting a particular pending case. He criticized the statute for invading the judicial sphere<sup>19</sup> and expressed concern that *Bank Markazi* permits Congress to “unabashedly pick the winners and losers in particular pending cases.”<sup>20</sup> Nevertheless, Chief Justice Roberts did not view the problem as one of legislative specificity. Instead, he was concerned about the legislature’s encroachment on the judicial function. The Chief Justice did not go so far as to opine that particularized legislation was constitutionally problematic outside of the context of separation of powers.

*Bank Markazi*’s affirmative rejection of a principle disfavoring particularized legislation is a departure from the Court’s past cases. It is true that the Court has not rigorously enforced a value that disfavors particularized legislation in recent decades.<sup>21</sup> Nevertheless, until *Bank Markazi*, the Court may best be characterized as undecided or tentative about this view. In *Robertson v. Seattle Audubon Society*, the Court left open the possibility that a change in law would be “unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue” in specifically named cases.<sup>22</sup> When faced with the question again in *Plaut v. Spendthrift Farm, Inc.*, the Court similarly avoided addressing the question directly, stating only that it was “questionable” whether there was “something wrong with particularized legislative action.”<sup>23</sup> *Bank Markazi*’s affirmative rejection of a value of legislative generality, therefore, breaks new doctrinal ground and clears the way for serious legislative intrusions on individual rights. After *Bank Markazi*, it is unclear whether there are any significant limits on Congress’s power to grant special benefits to, or levy special burdens on, named individuals.

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17. *Id.* at 1328.

18. *Id.* at 1329.

19. *Id.* at 1333 (Roberts, C.J., dissenting). Justice Sotomayor joined the dissent.

20. *Id.* at 1338.

21. During the early days of the United States, the Court robustly enforced a value disfavoring legislative specification. *E.g.*, *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 558 (1819). In recent decades, however, the Court has expressed skepticism that targeted legislation is constitutionally suspect. *E.g.*, *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 471-72 (1977).

22. 503 U.S. 429, 441 (1992).

23. 514 U.S. 211, 239 n.9 (1995). Moreover, *Plaut* invalidated rather than upheld the statute at issue in that case. *Id.* at 240.

## II. THE UNDERVALUED ASSETS OF LEGISLATIVE GENERALITY

The Court dismissed the value of legislative generality too lightly. Contrary to the Court's holding, there is strong support for the proposition that the Constitution does not permit the legislature to target an identifiable individual for special treatment. This historical, textual, and jurisprudential support is summarized briefly below.<sup>24</sup>

### A. *Historical Support for the Value of Legislative Generality*

Although he would have found the Iran Threat Reduction statute unconstitutional, Chief Justice Roberts did not directly address the majority's rejection of a value of legislative generality. Instead, he focused on the issue of separation of powers. As the Chief Justice described in his *Bank Markazi* dissent, the colonial and early state legislatures exercised powers now considered judicial, including intervening "in cases still pending before courts, granting continuances, stays of judgments," and new trials.<sup>25</sup> He noted that the revolutionary generation came to view these legislative activities as abusive, prompting them to adopt a new federal constitution that rejected the broad powers assumed by their state legislatures.<sup>26</sup> Chief Justice Roberts concluded that, by rejecting these types of legislative abuses, the revolutionary generation affirmatively committed to separating the legislative from judicial functions in a way that would prohibit statutes like the Iran Threat Reduction statute.<sup>27</sup>

The historical record from which Chief Justice Roberts drew, while perhaps accurate as far as it goes, is incomplete. As a result, his conclusions are too narrow. A more thorough historical analysis reveals that revolutionary-era legislative interferences with the judiciary were part of a broader pattern of particularized legislation designed to benefit or burden known individuals. In the decade after the American colonies declared independence, the newly independent state legislatures enacted all types of particularized statutes. These included, as the Chief Justice described, statutes that invaded the judicial sphere.<sup>28</sup> However, in addition to these judiciary-specific incursions, state legislatures also enacted myriad other targeted statutes, including statutes transferring title to land,<sup>29</sup>

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24. For a robust articulation of the value of legislative generality, see Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625, 650-60 (2014).

25. 136 S. Ct. at 1330 (Roberts, C.J., dissenting).

26. *Id.* at 1331-32.

27. *Id.* at 1332.

28. See, e.g., ADDRESS OF THE COUNCIL OF CENSORS (Feb. 14, 1786), in RECORDS OF THE COUNCIL OF CENSORS OF THE STATE OF VERMONT 58, 60-70 (Paul S. Gillies & D. Gregory Sanford eds., 1991) [hereinafter VERMONT REPORT] (describing and criticizing statutes subordinating the judiciary to the legislature).

29. See, e.g., *Council of Censors, A Report*, in THE CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA, AS ESTABLISHED BY THE GENERAL

granting divorces and exemptions from the standing laws,<sup>30</sup> confiscating property from named individuals,<sup>31</sup> and punishing political undesirables with bills of attainder.<sup>32</sup>

After a decade of suffering from the social and economic dislocations caused by targeted legislation, the revolutionary generation wholeheartedly repudiated their legislatures' power to enact it. By the mid-1780s, in their writings, speeches, and debates, the revolutionary generation denounced their legislatures in no uncertain terms for "extending their deliberations to the cases of individuals."<sup>33</sup> By categorically rejecting all types of targeted legislation, the revolutionary generation did more than assert the belief that the legislative and judicial powers should be separated, as Chief Justice Roberts concluded. Rather, on the eve of the drafting of the Constitution, ordinary and prominent members of the revolutionary generation alike made clear that *any* legislative imposition of privileges or burdens on identifiable individuals was inconsistent with American republicanism.<sup>34</sup>

### B. Textual Support for the Value of Legislative Generality

The aversion to targeted legislation nurtured during the confederation period is reflected in a number of clauses of the Constitution. Most explicitly, the Bill of Attainder Clauses restrain the once-common legislative practice of singling out individuals for special burdens. Reflecting the goal of protecting unpopular political minorities from the prejudices of the majority, the Bill of Attainder Clauses prohibit the legislatures from targeting particular individuals for punishment.<sup>35</sup> The Title of Nobility Clauses are the mirror image of the Bill of Attainder Clauses, supporting the value of legislative generality by prohibiting the legislature from singling out individuals for certain special *benefits*. At the least, the Title of Nobility Clauses prohibit the legislature from granting literal titles of nobility. Moreover, a natural reading of these clauses includes restraints on the legal and economic privileges traditionally associated with the

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CONVENTION, CAREFULLY COMPARED WITH THE ORIGINAL 35, 40 (Philadelphia, Francis Bailey 1784) [hereinafter PENNSYLVANIA REPORT].

30. See, e.g., VERMONT REPORT, *supra* note 28, at 60, 70.
31. See, e.g., BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 302 (1967).
32. See, e.g., GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 279 (1969).
33. PENNSYLVANIA REPORT, *supra* note 29, at 38; see *id.* at 35; see also Zoldan, *supra* note 24, at 669-79.
34. WOOD, *supra* note 32, at 401. For an extended historical argument about the revolutionary generation's rejection of targeted legislation, see Zoldan, *supra* note 24, at 669-79.
35. U.S. CONST. art. I, §§ 9-10; United States v. Brown, 381 U.S. 437, 441-42 (1965).

English nobility, including superordinate political representation and advantageous treatment in both civil and criminal proceedings.<sup>36</sup>

The Ex Post Facto Clauses<sup>37</sup> support legislative generality by preventing the legislature from doing indirectly what it cannot do directly through the Bill of Attainder and Title of Nobility Clauses. When a legislature enacts retroactive legislation, it acts with the knowledge of conduct that already has occurred. As a result, the ability to enact retroactive legislation permits the legislature to punish or benefit an individual who is identifiable but not specifically named.<sup>38</sup> Indeed, it has been a common practice for legislatures to use retrospective laws to target known individuals under a thin guise of generality.<sup>39</sup> Accordingly, during the republic's early years, the Ex Post Facto Clauses were viewed as the primary constitutional source for the prevention of targeted legislation.<sup>40</sup>

The Constitution contains a number of other clauses that further imply a norm of generality in legislation, including the Contract,<sup>41</sup> Appointments,<sup>42</sup> Due Process,<sup>43</sup> Takings,<sup>44</sup> and General Welfare<sup>45</sup> clauses. For example, the Appointments Clause denies Congress the right to appoint executive officers, a power that state legislatures abused during the confederation period.<sup>46</sup> The Fifth Amendment's Due Process Clause has been interpreted to mean that the legislature cannot "take the property of A and give it to B."<sup>47</sup> Even the Equal Protection Clause, primarily concerned with suspect classifications, has been interpreted to encompass a claim that a plaintiff has been singled out as a "class of one" by government action.<sup>48</sup>

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36. U.S. CONST. art. I, §§ 9-10; 1 WILLIAM BLACKSTONE, COMMENTARIES \*389-90.

37. U.S. CONST. art. I, §§ 9-10.

38. Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693 (1960).

39. See, e.g., *Bridges v. Wixon*, 326 U.S. 135, 158-59 (1945) (Murphy, J., concurring) (noting that a retrospective law, although stated in general terms, was enacted in order to allow the government to reach a specific individual).

40. EDWARD SAMUEL CORWIN, JOHN MARSHALL AND THE CONSTITUTION: A CHRONICLE OF THE SUPREME COURT 149-50 (1920).

41. U.S. CONST. art. I, § 10.

42. *Id.* art. II, § 2.

43. *Id.* amends. V, XIV.

44. *Id.* amend. V.

45. *Id.* art. I, § 8.

46. *Id.* art. II, § 2, cl. 2; WOOD, *supra* note 32, at 145.

47. ORTH, *supra* note 13, at 6; see also *Calder v. Bull*, 3 U.S. 386, 388 (1798).

48. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000). Some lower courts more broadly interpret the "class of one" theory of equal protection than does the Supreme Court. E.g., *Geinosky v. City of Chicago*, 675 F.3d 743, 749 (7th Cir. 2012).

Although none of these clauses are exclusively about generality in legislation, each suggests the impropriety of targeted legislation in certain circumstances. Read together, they suggest that generality in legislation is a value of constitutional weight.

*C. Jurisprudential Support for the Value of Legislative Generality*

Jurists and philosophers of law have long excluded targeted legislation from the definition of “law.” John Locke argued that the legislature was not permitted to vary the standing laws “in particular cases.”<sup>49</sup> Similarly, in his influential *Commentaries on the Laws of England*, William Blackstone described an order concerning “a particular person” as “a sentence [rather] than a law.”<sup>50</sup> *Bank Markazi*’s dismissive attitude toward legislative generality notwithstanding, a long strain of Supreme Court doctrine fits squarely with Locke and Blackstone, defining law to exclude orders directed at individuals. In *Fletcher v. Peck*, the Court considered whether an act nullifying the transfer of a particular parcel of land is a legislative act permitted by the Constitution.<sup>51</sup> Chief Justice Marshall answered in the negative, asserting that “[i]t is the peculiar province of the legislature to prescribe *general* rules for the government of society; the *application* of those rules to individuals in society would seem to be the duty of other departments.”<sup>52</sup> This fundamental principle was restated in *Trustees of Dartmouth College v. Woodward*, in which the Court agreed that acts of the legislature, which affect only particular persons and their particular privileges, are “not the exercise of a power properly legislative.”<sup>53</sup>

Moreover, theorists assessing the normative implications of targeted legislation stress the harm and injustice it causes. Cicero emphasized that “laws to be carried against private men” are unjust because “the essence of law” is a “decision or order applying to all.”<sup>54</sup> More modern scholars, like Lon Fuller and H. L. A. Hart, have also emphasized the centrality of legislative generality to a legal system.<sup>55</sup> Ultimately, the consistency with which targeted legislation has been denounced is no doubt closely linked to the harms that it causes. The power to enact targeted statutes is closely linked with corruption,<sup>56</sup> the unequal treatment

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49. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 142 (C. B. Macpherson ed., Hackett Publ’g Co. 1980) (1690).

50. BLACKSTONE, *supra* note 36, at \*44.

51. 10 U.S. (6 Cranch) 87, 120 (1810).

52. *Id.* at 136 (emphasis added).

53. 17 U.S. (4 Wheat.) 518, 558 (1819).

54. MARCUS TULLIUS CICERO, *On the Laws*, in ON THE COMMONWEALTH AND ON THE LAWS 173 (James E. G. Zetzel ed., Cambridge Univ. Press 1999).

55. LON L. FULLER, THE MORALITY OF LAW 46-48 (1964); H. L. A. HART, THE CONCEPT OF LAW 20-21 (1961).

56. MARGARET MIKYUNG LEE, CONG. RESEARCH SERV., RL33024, PRIVATE IMMIGRATION LEGISLATION 9 (2005) (discussing the link between private legislation and



of similar cases,<sup>57</sup> the persecution of political minorities,<sup>58</sup> and a host of other harms.

#### CONCLUSION

By permitting Congress to direct judgment in favor of victims of terrorism, the *Bank Markazi* Court helped compensate hundreds of people who suffered great tragedies. But, perhaps inadvertently, the Court also conferred on Congress the expansive, and dangerous, power to target an individual for special treatment that is not applied to the population in general. The serious consequences of *Bank Markazi* may live long after the details of its facts have faded from memory. There is no doubt that articulating a coherent, meaningful value of legislative generality is a difficult task. Nevertheless, historical, textual, and jurisprudential arguments strongly suggest that legislative generality should be enforced as a constitutional principle. The Court would do well to reconsider *Bank Markazi* and to explore how to give the value of legislative generality the constitutional force that it deserves.

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corruption); CHARLES CHAUNCEY BINNEY, RESTRICTIONS UPON LOCAL AND SPECIAL LEGISLATION IN STATE CONSTITUTIONS 6-9 (1894).

57. William D. Araiza, *The Trouble with Robertson: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 *Cath. U. L. Rev.* 1055, 1080 (1999) (arguing that legislative targeting of individuals raises equal protection concerns); see, e.g., *Terri's Law*, Pub. L. No. 109-3, 119 Stat. 15 (2005). Both proponents and detractors of Terri's Law noted that there were thousands of people in Schiavo's situation who would not be helped by the special bill. 151 *Cong. Rec.* H1700, H1710-11, H1721-22 (daily ed. Mar. 20, 2005) (statements of Rep. Holt & Rep. McHenry).
58. See, e.g., *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 474-75 (1977) (noting that targeted legislation has been used to persecute political minorities for their beliefs).