2020 Cumulative Supplement

U.S. Foreign Relations Law

Cases, Materials, and Practice

Exercises

Fifth Edition

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American Casebook Series®
This supplement provides both principal and secondary reading suggestions based on developments since publication of the print edition. For principal suggestions, we provide an edited text or link. For secondary suggestions, we provide a summary of the development, with links to relevant documents as appropriate, either for distribution or background.


Principal assigned reading suggestion

  [Sec. 3 (Individual Liberty and Foreign Relations), page 84, bottom of Note 7]
  ➢ Irrespective of the other issues in Trump v. Hawaii, note that while Korematsu v. United States was for many years not formally disavowed by the Supreme Court (see page 75, Note 3), the Court in Trump v. Hawaii took “the opportunity to make express what is already obvious: Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—‘has no place in law under the Constitution.’” Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (citations omitted).

Chapter 2. Customary International Law

Principal assigned reading suggestion

Secondary suggestions

- **International Law Commission Conclusions on Identification of Customary International Law**
  
  [Sec. 1 (Introduction to Customary International Law), page 86, following second full paragraph]
  
  The U.N. International Law Commission completed a project in 2018 called “Identification of Customary International Law,” in which it sets out a series of conclusions designed to assist states and others in recognizing a rule of customary international law (http://legal.un.org/docs/?path=./ilc/texts/instruments/english/draft_articles/1_13_2018.pdf&lang=EF). There also exists commentary to the conclusions that may be particularly helpful to students less familiar with public international law (http://legal.un.org/docs/?path=./ilc/texts/instruments/english/commentaries/1_13_2018.pdf&lang=EF).

- **Hernandez v. Mesa**, 140 S. Ct. 735 (2020)
  
  [Sec. 3 (Limitations on Incorporation, page 123, following the end of Note 3; alternatively, Sec. 6 (Human Rights), page 193, following end of Note 1; alternatively, page 184, following Sosa v. Alvarez-Machain.]
  
  The question of cross-border violation of human rights has been addressed in a number of guises, including according to treaty in United States v. Alvarez-Machain, 504 U.S. 655 (1992) (noted on pages 119-120) and according to customary international law and the Federal Tort Claims Act in Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (excerpted beginning on page 168). In Hernandez v. Mesa, 140 S. Ct. 735 (2020), the Supreme Court held that the Fourth Amendment claim for damages implied in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), does not extend to claims based on a cross-border shooting. The Court emphasized, among other things, the foreign relations context, which posed the risk of disrupting the functions of the political branches, particularly the role of the executive branch in mediating the resulting disagreement with Mexico. Another factor was congressional refusal to authorize damages against federal officials for injury inflicted outside U.S. borders: the Court noted territorial limits in 42 U.S.C. § 1983 and the Federal Tort Claims Act, as well as the fact that the Torture Victim Protection Act did not address suits by an alien against a United States officer.

- **WesternGeco v. Ion Geophysical Corp.**, 138 S. Ct. 2129 (2018)
  
  [Sec. 5 (Scope of U.S. Extraterritorial Jurisdiction), page 154, following
In another decision on the presumption against extraterritoriality, *WesternGeco v. Ion Geophysical Corp.*, 138 S. Ct. 2129 (2018), the Supreme Court upheld the award of lost profits under the Patent Act in a case where overseas events gave rise to the damages. The Court exercised its discretion to begin with “step two” of the framework it detailed in *RJR Nabisco, Inc. v. European Community*, meaning that it assumed that the presumption had not been rebutted—noting concerns that the presumption did not apply at all to statutory provisions that provide a general damages remedy for otherwise-proscribed conduct—and addressed instead whether conduct relevant to the statute’s focus occurred in the United States. It concluded that the relevant conduct, the infringement, was the export of components, which had occurred within the United States.

- **Nestle USA, Inc. v. Doe I**, 2020 WL 3578678 (Mem.) (July 2, 2020) & **Cargill, Inc. v. Doe I**, 2020 WL 3578679 (Mem.) (July 2, 2020)  
  *Sec. 6 (Human Rights), page 195, end of Note 3*

Near the close of its October 2019 term, the Supreme Court granted certiorari and consolidated two Alien Tort Statute (ATS) cases arising out of the Ninth Circuit. In brief, the court of appeals had held that alleged child labor abuses involving the cocoa industry in Côte d’Ivoire were not extraterritorial for ATS purposes, based on activities by U.S. corporations within the United States. *Doe v. Nestle, S.A.*, 929 F.3d 623 (9th Cir. 2019). The Supreme Court will entertain two questions: one, involving whether the presumption against extraterritorial application of the Alien Tort Statute is displaced based on particular allegations regarding domestic conduct by the two companies; and second, whether a domestic corporation (not, that is, foreign corporations as at issue in *Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018)) is subject to liability under the Alien Tort Statute.

**Chapter 3. Treaties and Other International Agreements**

Secondary suggestions

- **United States Withdrawal from the Joint Comprehensive Plan of Action**, May 8, 2018  
  *Sec. 8 (Choice of Instruments), Note 6, page 401, following first full paragraph; equally relevant to Sec. 10 (Treaty Termination), page 431, continuation of Note 5*
  
  On May 8, 2018, President Trump announced that the United States would withdraw from the Joint Comprehensive Plan of Action, with corollary effects on U.N. and U.S. sanctions
Treaty Interpretation Decisions, October 2019 Term
[Sec. 9 (Treaty Interpretation), continuation of Note 1, page 409]

Two decisions in 2020 illustrated the Supreme Court’s approach to treaty interpretation. In *Monasky v. Taglieri*, 140 S. Ct. 719 (2020), the Court held that under the Hague Convention on Civil Aspects of International Child Abduction, a child’s “habitual residence” depended on the totality of the circumstances, rather than any actual agreement between the parents on where to raise their child or any other categorical requirement. The majority opinion began with the Convention’s text (including the context within which the words were used), citing *Air France v. Saks*, 470 U.S. 392, 397 (1985), a Warsaw Convention case. It also drew on an explanatory report, the treaty’s negotiation and drafting history, and the practice of other states parties. Justice Thomas, concurring, would have decided “principally on the plain meaning of the treaty’s text,” and found reliance on the practice of states parties particularly objectionable because it coalesced only within the last decade, approximately 30 years after the Convention was concluded. 140 S. Ct. at 732-33.

In *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020), the Court held that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards does not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories. Justice Thomas, this time writing for the majority, emphasized that the New York Convention’s text was silent about nonsignatory enforcement, which was “dispositive” as to the application of domestic equitable estoppel doctrines, such as those permitted under the Federal Arbitration Act. 140 S. Ct. at 1645. That interpretation was “aid[ed]” by the negotiation and drafting history, as well as practice by other states parties, at least so far as it was confirmatory. Id. at 1645-46.

Executive Branch Treaty Interpretation, October 2019 Term
[Sec. 9 (Treaty Interpretation), Note on Treaty Interpretation by the Executive Branch, page 411, preceding ABM Treaty discussion]

In *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020), a decision involving the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Justice Thomas’ majority opinion had a neutral but
conspicuous reaction to a dispute between the parties as to the weight to be afforded executive branch interpretation. He wrote: “We have never provided a full explanation of the basis for our practice of giving weight to the Executive’s interpretation of a treaty. Nor have we delineated the limitations of this practice, if any. But we need not resolve these issues today. Our textual analysis aligns with the Executive’s interpretation so there is no need to determine whether the Executive’s understanding is entitled to ‘weight’ or ‘deference.’” 140 S. Ct. at 1647 (citations omitted).

- Congressional Restriction of Unilateral Presidential Withdrawal from NATO?
  [Sec. 10 (Treaty Termination), page 429, continuation of Note 2]
  - Restatement (Fourth) § 113, reporters’ note 2 (Tentative Draft No. 2), stressed the distinction between a unilateral presidential power to terminate treaties and an exclusive presidential power, noting that the latter would be in tension with previous attempts by Congress to authorize or direct withdrawal—and noting too that if termination was concurrent and non-exclusive, Congress might be able to limit it. Reacting to anti-NATO rhetoric, members of Congress indicated support for a bill that would restrict the president’s ability to terminate U.S. participation in NATO (https://www.washingtonpost.com/powerpost/bipartisan-bill-would-prevent-trump-from-exiting-nato-without-senate-consent/2018/07/26/4ca1b206-9106-11e8-bcd5-9d911c784c38_story.html?utm_term=.09bb7daf9920). What obstacles would such legislation face?

- United States Withdrawal from Additional Article II Treaties
  [Sec. Sec. 10 (Treaty Termination), page 429, Note 3, following examples of the World Tourism Organization and the U.N. Industrial Development Organization]
  - On October 12, 2017, the United States withdrew from its membership in the U.N. Educational, Scientific and Cultural Organization (UNESCO) (https://www.state.gov/the-united-states-withdraws-from-unesco/)—having previously withdrawn, and rejoined, in accordance with the terms of the organization. Such formal measures, even if not establishing a permanent policy, are distinct from other forms of disengagement. For example, on June 19, 2018, the United States separated itself from the Human Rights Council by relinquishing the seat to which it had been elected, which it characterized as “officially withdrawing” from that body (https://www.state.gov/remarks-on-the-un-human-rights-council/).
Withdrawal from UNESCO reflected ongoing U.S. objections to certain aspects of the organization, but it took advantage of a provision that allowed member states to withdraw without cause. More formal causes may also be invoked. On February 2, 2019, the United States, citing a December 4, 2018, announcement that Russia was in material breach of its obligations under the Intermediate-Range Nuclear Forces (INF) Treaty (and Russia’s failure to return to compliance in the ensuing 60 days), announced that it would (a) immediately suspend its own obligations under the treaty, in accordance with customary international law; and (b) withdraw from the treaty in six months, consistent with Article XV of the treaty (https://www.state.gov/u-s-intent-to-withdraw-from-the-inf-treaty-february-2-2019/). On August 2, 2019, the Secretary of Defense issued a statement confirming that the United States had officially withdrawn (https://www.defense.gov/Newsroom/Releases/Release/Article/1924386/statement-from-secretary-of-defense-mark-t-esper-on-the-inf-treaty/). The United States also cited objections to Russian compliance in formally notifying its intention to withdraw from the Open Skies Treaty, which will take effect six months after the May 22, 2020 notice (https://www.defense.gov/Newsroom/Releases/Release/Article/2195239/dod-statement-on-open-skies-treaty-withdrawal/).

- **United States Withdrawal from Non-Article II Agreements: the Paris Agreement and the World Health Organization**
  
  [Sec. 10 (Treaty Termination), page 431, continuation of Note 5]
  
  The United States has recently notified its withdrawal (or intent to withdraw) from several non-treaty agreements. One of the most significant was the Paris Agreement, which calls for carbon-based emissions reductions by all states with the aim of keeping the global temperature rise this century below two degrees Celsius above pre-industrial levels. Rather than legally-binding targets and timetables, the Paris Agreement requires all states parties to put forward their best efforts through “nationally determined contributions,” and to report regularly on their emissions and on their implementation efforts. The agreement entered into force in 2016 and, as of 2018, has 177 states parties, including the United States—which joined through an executive agreement. The Trump Administration, however, announced that the United States would cease all participation in the agreement, as well as the intention of the United States to withdraw from the agreement. It formally notified its intention to withdraw in August 2017.
and the Secretary of State subsequently confirmed that the United States had submitted formal notification on November 4, 2019, with the expectation that the withdrawal would take effect one year hence. As noted previously, the United States also notified its decision to withdraw from the Joint Comprehensive Plan of Action involving Iran, which the United States regarded as a nonbinding international agreement.

Terminating agreements that have had pronounced congressional involvement may pose different issues than sole executive agreements or, potentially, even Article II treaties. One of the most widely noted recent developments in U.S. foreign relations law concerned the U.S. position in the World Health Organization (WHO). After several months of escalating statements, on July 7, 2020, the United States formally notified the Secretary General of the United Nations, as well as the U.S. Congress, of its intention to withdraw from the organization. In addition to the intrinsic significance of this announcement, given the global pandemic, it raised distinct issues in light of the fact that Congress—in providing its consent, in the form of a joint resolution, to the U.S. joining—had stated in part that “In adopting this joint resolution the Congress does so with the understanding that, in the absence of any provision in the World Health Organization Constitution for withdrawal from the organization, the United States reserves its right to withdraw from the organization on a one-year notice, provided, however, that the financial obligations of the United States to the organization shall be met in full for the organization's current fiscal year.” Pub. L. No. 80-643, 80th Cong., 62 Stat. 441 (1948) (S.J. Res. 98). This condition was accepted by the WHO. As intimated by Secretary of State Pompeo’s recent comments, the United States is resolved to satisfy its financial obligations as a condition precedent to withdrawal; whether the condition supports any particular assignment of responsibility for withdrawal within the U.S. constitutional scheme is a more difficult question.

Potential controversies still on the horizon—given, for example, President Trump’s objections to the World Trade Organization (WTO)—may involve whether the president’s authority to withdraw from an international agreement is different with respect to congressional-executive agreements involving trade, at least to the extent that the authorizing statutes license or restrict withdrawal;

Chapter 4. War Powers

Principal assigned reading suggestion


  [Sec. 5(C) (Recent Major Incidents—Airstrikes in Libya, 2011), page 519, continuing Note 2, or in as a supplement to pages 506-14; also relates to Sec. 5(E) (Syria: The “Red Line” and 2017 Airstrikes), page 527, continuing Note 1]

  In June 2019, the United States released an Office of Legal Counsel (OLC) opinion provided in support of President Trump’s April 13, 2018 airstrikes in Syria (https://www.justsecurity.org/wp-content/uploads/2018/06/2018-05-31-syrian-airstrikes_1-office-of-legal-counsel.pdf). That opinion was largely consistent with OLC’s 2011 opinion on Libya, excerpted in Section 5(C); in concluding that
the president has very broad authority to conduct such strikes without congressional authorization, it asked (1) whether unilateral presidential force serve important national interests, and (2) if so, whether the “anticipated nature, scope and duration” of the conflict rose to the level of a war in the constitutional sense, in which case congressional approval may nonetheless be necessary. The memorandum cited three national interests that President Trump had invoked and that OLC considered as reasonable bases for unilateral action: “the promotion of regional stability, the prevention of a worsening of the region’s humanitarian catastrophe, and the deterrence of the use and proliferation of chemical weapons,” the latter two being distinct from those previously cited by OLC. Nonetheless, U.S. airstrikes elicited critical reactions in terms of U.S. foreign relations law (e.g., https://www.lawfareblog.com/downsides-bombing-syria), as well as varied appraisals by other states regarding their compatibility with international law (https://www.justsecurity.org/55790/update-mapping-states-reactions-syria-strikes-april-2018/).

Secondary suggestions

- **U.S. Airstrike, in Iraq, Against Iranian Military Leader**
  
  [Sec. 5 (Recent Major Incidents), Subsection D, following Note 4, page 525), or Sec. 6 (The Commander-in-Chief Power), following Note 1, page 531]
  
  On January 2, 2020, the U.S. military conducted an air strike in Iraq that successfully targeted Major General Qassem Soleimani, head of the Islamic Revolutionary Guard Corps of Iran, along with commander of an expeditionary Revolutionary Guards unit; others were also killed in the strike. The factual and legal bases for the air strike appeared to evolve over time. Initially, U.S. officials alluded to Soleimani’s plotting of imminent attacks on U.S. forces, embassies, or interests; later reports emphasized future (possibly non-imminent) attacks, then found justification in a series of attacks preceding the air strike. In terms of legal authority, U.S. officials claimed self-defense consistent with the U.N. Charter and customary international law—and domestic authority stemming from the Commander-in-Chief Clause (with object of protecting U.S. personnel and property in Iraq and U.S. interests in the Middle East) and the 2002 Authorization for Use of Military Force (AUMF), which authorized the United States to “defend the national security of the United States against the continuing threat posed by Iraq”. For sample articulations of these views, see the 1264 Report, provided pursuant to the National Defense Authorization Act (https://www.justsecurity.org/wp-
content/uploads/2020/02/1264-Report-Soleimani.pdf), and a speech by Hon. Paul C. Ney, General Counsel, U.S. Department of Defense (https://assets.documentcloud.org/documents/6808252/DOD-GC-Speech-BYU-QS.pdf). The air strike attracted considerable attention because of the stress it put on imminent or even non-imminent dangers warranting the use of force by the United States and unilateral measures by the president, the use of force in Iraq without Iraqi consent (but against Iran), and the broad interpretation of the 2002 AUMF. There is extensive commentary on the Just Security and Lawfare blogs. A congressional attempt to react by limiting the use of use of force against Iran unless specifically authorized was vetoed as politically motivated and “insulting” (https://www.whitehouse.gov/briefings-statements/statement-president-regarding-veto-s-j-res-68/), and Congress was not successful in overriding it (https://www.congress.gov/bill/116th-congress/senate-joint-resolution/68).

- **Iran’s Shootdown of a U.S. Drone**
  [Sec. 5 (Recent Major Incidents), following Subsection E, page 527), or Sec. 6 (The Commander-in-Chief Power), page 531, continuing Note 1]

- **Congressional Attempts to Restrict U.S. Involvement in Yemen**
  [Sec. 6 (The Commander-in-Chief Power), page 531, continuing Note 1]
  - Congress has repeatedly attempted to restrain U.S. participation in Yemen’s civil war. In April 2019, it adopted a joint resolution (https://www.congress.gov/bill/116th-congress/senate-joint-resolution/...
that would, among other things, have compelled the president to remove U.S. armed forces from hostilities there; President Trump vetoed the legislation (https://www.whitehouse.gov/presidential-actions/presidential-veto-message-senate-accompany-s-j-res-7/), which Congress failed to override (see, e.g., https://www.lawfareblog.com/where-trumps-veto-leaves-yemen-resolution; https://www.justsecurity.org/63855/getting-past-the-veto-on-ending-yemen-war-how-congress-next-move-can-succeed/). Congress subsequently failed to override the president’s vetoes of arms-sales resolutions that were designed largely to impede Saudi participation in the Yemen war (https://www.washingtonpost.com/national-security/senate-fails-to-override-trumps-veto-on-saudi-measures-as-chances-of-sanctions-dim/2019/07/29/ce008c22-b235-11e9-8f6c-7828e68cb15f_story.html?utm_term=.0322ac426ad0). These attempts provide a contemporary framing of important issues regarding the capacity of Congress to restrict U.S. participation in such conflicts.

- **Executive Order on Protecting America Through Lawful Detention of Terrorists** (Jan. 30, 2018)
  [Sec. 7 (Detention and Prosecution of Enemy Combatants), page 554, continuing Note 2]
  ➢ The dwindling population at Guantánamo has not lost all political salience. In one of his first acts as president, then-President Obama ordered the closure of the detention facilities, Executive Order 13492 (Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities) (Jan. 22, 2009), but that effort encountered administrative and political difficulties and was never effectuated. Nonetheless, President Trump revoked that order in 2018 (https://www.whitehouse.gov/presidential-actions/presidential-executive-orderprotecting-america-lawful-detention-terrorists/).

**Chapter 5. The Power of the Purse**

Secondary suggestions

- **Office of Management and Budget—Withholding of Ukraine Security Assistance** (January 16, 2020)
  [Sec. 1 (The Appropriations Power in Foreign Affairs: Trump Card, Balancer, or Illusion?), page 570, preceding Kate Stith, Congress’ Power of the Purse; alternatively, Sec. 2 (Setting Foreign Policy by Restricting Funding for Embassies Abroad), page 581, following Note 3]
In the conventional dynamic, the president wants to spend money that Congress has not authorized. But what if the converse is the case? In the summer of 2019, the Office of Management and Budget (OMB) withheld from obligation approximately $214 million appropriated to DOD for security assistance to Ukraine according to the Department of Defense Appropriations Act of 2019, by issuing a series of apportionment schedules with footnotes that effectively paused use of the funds until an interagency process was completed in August. It later elaborated that withholding was necessary to ensure that the funds were not spent “in a manner that could conflict with the President’s foreign policy.” (There were other allegations, based in part on remarks by the president’s chief of staff, that the money was withheld either because of Ukrainian corruption, or perhaps as a means of applying pressure on it for national or partisan ends.) Examining OMB’s actions, the Government Accountability Office (GAO) observed that the Constitution not only vests Congress with the power of the purse, but also vests all legislative powers in Congress; the president lacks legal capacity to ignore or amend any such duly enacted law and must faithfully execute it. The GAO also emphasized that the Impoundment Control Act (ICA) gives the president authority to impound, or withhold, budget authority through rescission (cancellation) or deferral, but only under strictly circumscribed circumstances and procedures. According to the GAO, deferring use of authorized funds for policy reasons is impermissible, and in its view the withholding of funds violated the ICA. Office of Management and Budget—Withholding of Ukraine Security Assistance (B-331564), Jan. 16, 2020 (https://www.gao.gov/assets/710/703909.pdf).

• Litigation Concerning Funding Restrictions on Sanctuary Cities

[Sec. 1 (The Appropriations Power in Foreign Affairs: Trump Card, Balancer, or Illusion?), page 570, preceding Kate Stith, Congress’ Power of the Purse]

Most spending disputes have involved executive branch tests of congressional spending restrictions, but Congress’s plenary power may have other significance. Since 2017, a number of state and local jurisdictions have refused to one degree or another to cooperate with the enforcement of federal immigration law. One reaction by the Justice Department to this so-called “sanctuary” movement has been to impose conditions on Department-administered justice assistance grants. These have been challenged, in turn, in part on the ground that withholding federal
grants from “sanctuary” cities and counties violates the separation of powers and the Spending Clause, which vests exclusive power to Congress to impose conditions on federal grants. These challenges have enjoyed some success in the Ninth Circuit, albeit with some wrangling over the scope of injunctive relief. City and County of San Francisco v. Trump, 897 F.3d 1225 (9th Cir. 2018) (upholding summary judgment for plaintiffs, remanding for further consideration of whether a nationwide injunction was supported by specific findings); City and County of San Francisco v. Sessions, 372 F. Supp. 3d 928 (N.D. Cal. 2019) (granting, but staying, permanent nationwide injunction). In litigation concerning FY 2017 grants, the Ninth Circuit upheld injunctive relief for affected California state entities and political on the ground that Justice Department conditions exceed statutory authority, but noted (in footnote 3) a substantial circuit split, and it vacated a permanent nationwide injunction. City and County of San Francisco v. Barr, 2020 WL 3957184 (July 13, 2020).

• Memorandum on Suspension of Limitations Under the Jerusalem Embassy Act (June 4, 2018) [Sec. 2 (Setting Foreign Policy by Restricting Funding for Embassies Abroad), page 575, preceding Section 609 excerpt]
  - On December 7, 2018, President Trump again exercised the statutory waiver—despite the official move of the U.S. embassy from Tel Aviv to Jerusalem, and its opening in May—because other statutory requirements, reportedly including an official residence for the U.S. ambassador in Jerusalem, have not yet been fulfilled (https://www.govinfo.gov/content/pkg/FR-2018-12-27/pdf/2018-28364.pdf). On May 8, 2019, the Secretary of State declared to Congress the determination that because “the relevant elements of the Jerusalem Embassy Act of 1995 have been addressed . . . no further Presidential waiver of the funding restriction under the Act is necessary” (https://www.state.gov/determination-under-the-jerusalem-embassy-act/).

Chapter 6. Federalism

Secondary suggestions

• Further on Sanctuary Movements [Sec. 2 (Preemption of State Law by Federal Statute), Note 3, page 632, immediately preceding Note 4]
  - Another action initiated by the United States in response to the sanctuary movement claimed that three California laws were preempted due to conflicts with federal law: one that limited the
discretion of state and local officials to cooperate with federal immigration authorities (SB 54); another requiring the state attorney general to inspect facilities where immigrants were being detained by federal agents while awaiting court dates or deportation (AB 103); and a third prohibiting public and private employers from cooperating with federal enforcement (unless such cooperation is mandated by a court order or a specific federal law), and requiring employers to notify employees of federal scrutiny (AB 450). The district court denied in most regards the United States’ motion for a preliminary injunction. The court of appeals, in United States v. State of California, 921 F.3d 865 (9th Cir. 2019), held that the district court had not abused its discretion in concluding that AB 450, including its employee-notice provisions, were not preempted; that SB 54’s limitations on cooperation were consistent with the Tenth Amendment and the anti-commandeering doctrine; but that one component of AB 103 discriminated against and burdened the federal government in violation of the intergovernmental immunity doctrine. As had the district court, the court of appeals distinguished Arizona v. United States, 567 U.S. 387 (2012), insofar as the state law regulated state law enforcement activities, and employer-employee relationships, rather than varying the techniques for regulating employers that Congress had already extensively (and exclusively) regulated. The Supreme Court has denied certiorari, with Justice Thomas and Justice Alito indicating that they would have granted review. United States v. California, 2020 WL 3146844 (Mem.) (U.S. June 15, 2020).

In Kansas v. Garcia, 140 S. Ct. 791 (2020), however, the Supreme Court upheld convictions under Kansas identity-theft and false-information statutes, holding that they were neither expressly preempted by Immigration Reform and Control Act (IRCA) or other federal law, nor were they subject to conflict or field preemption. The Court distinguished Arizona v. United States throughout. As to field preemption, for example, the Court acknowledged that Arizona had preempted the field of alien registration, but concluded that, by contrast, federal law did not “create a comprehensive and unified system regarding the information that a State may require employees to provide.”

- **State and Local Climate-Change Initiatives**
  
  [Sec. 5 (Preemption of State Law Under the Dormant Foreign Affairs Power), page 662, following Note 4; those assigning Sec. 7 (Compact Clause) may prefer to consider this following Note 2 on page 672, and perhaps assigning the referenced district court opinion]
  
  ➢ California and a number of other states have undertaken climate-
related initiatives in reaction to diminishing interest by the federal government, including notice by the United States of its intention to withdraw from the Paris Agreement. These initiatives have involved domestic regulatory steps (e.g., [https://nyti.ms/2yrQgV4](https://nyti.ms/2yrQgV4)) and more internationally-oriented measures (e.g., [https://nyti.ms/2suoYdl](https://nyti.ms/2suoYdl) and [https://nyti.ms/2qQ74V5](https://nyti.ms/2qQ74V5)). In part because these initiatives are supported or opposed along partisan lines, the potential for a clash with federal approaches is substantial ([https://www.nytimes.com/2019/06/21/climate/states-climate-change.html](https://www.nytimes.com/2019/06/21/climate/states-climate-change.html)). In late 2019, the United States sued California and a number of related individuals and entities, alleging that California’s cap-and-trade program with Quebec and Ontario violated the U.S. Constitution. The complaint invoked the Dormant Foreign Affairs Power and the Foreign Commerce Clause, but the United States initially moved for summary judgment on Treaty Clause and Compact Clause grounds alone. The district court denied the motion, holding that the program’s agreement did not constitute an an Article II treaty nor establish a compact within the meaning of Article I—lacking both the formal, classical indicia of a compact and the capacity to increase the power of the state so as to interfere with the just supremacy of the federal government. *United States v. California*, 2020 WL 1182663 (E.D. Cal. March 12, 2020).

Chapter 7. The Judiciary

**Principal/secondary assigned reading suggestion**

  
  *(This subject is presently addressed in Sec. 7 (Immunities), page 784, end of carryover paragraph. Instructors assigning the edited case may instead wish to assign it at the end of Sec. 7; there, students can be asked to reflect on how well the FSIA adapts to international organizations, whether the role of the executive branch is consistent with its role in relation to the immunity of foreign States, and whether a new approach is appropriate. Alternatively, instructors may discuss the case at the original juncture.)*

  - In February 2019, the Supreme Court issued its decision in *Jam v. International Finance Corp.*, 139 S. Ct. 759 (2019), in which it addressed whether the International Organizations Immunities Act (IOIA)’s grant of the “same immunity” from suit that foreign governments enjoy confers on such organizations the same immunity as foreign governments have today under the Foreign Sovereign Immunities Act (FSIA)—including the qualifications and
exceptions to such immunity. The court below had interpreted the IOIA as requiring the same immunity as existed for states when the IOIA was adopted in 1945, at a time when the immunity accorded to states was almost absolute, and long before the FSIA was adopted in 1976. Reversing, the Supreme Court agreed with petitioners that “the IFC was entitled under the IOIA only to the limited or ‘restrictive’ immunity that foreign governments currently enjoy.” It based that conclusion on principles of statutory construction, principally the “reference” canon, which indicates that a statute’s reference to a general subject—here, the immunity owed foreign governments—adopts the law “as it exists whenever a question under the statute arises”; it contrasted the statute to one in which Congress had referred directly to “absolute immunity” or incorporated the law of foreign sovereign immunity as it existed on a particular date. The Supreme Court rebuffed attempts to infer statutory purposes that ran counter to that textual analysis, but did suggest that concerns about interference with international organizations and foreign-relations consequences were exaggerated, noting that organizational charters could specify a different level of immunity, and identifying remaining hurdles before any claims could qualify under an FSIA exception. Justice Breyer dissented, expressing the view that textual indications were unclear and that the different functions of foreign governments and international organizations (and their immunities) made it unlikely that Congress would have desired the majority’s result.

Secondary suggestions

  [Sec. 1 (Political Question Doctrine Generally), page 705, continuation of Note 3)]
  - In a signal that the political question doctrine remains alive, a bare majority of the Supreme Court invoked that doctrine to dismiss partisan gerrymandering claims in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). It cited *Zivotofsky v. Clinton* only once, quoting it to the effect that “[a]ny judicial decision on what is ‘fair’ in this context would be an ‘unmoored determination’ of the sort characteristic of a political question beyond the competence of the federal courts.” 139 S. Ct. at 2500. The majority also held that none of the proposed tests for assessing such claims “meets the need for a limited and precise standard that is judicially discernible and manageable,” particularly given that judges would have to “take the extraordinary step of reallocating power and influence between political parties.” Id. at 2502. Justice Kagan, writing a vigorous
dissent for herself and three other justices, wrote that “[f]or the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.” Id. at 2509 (Kagan, J., dissenting). The dissent did not invoke Zivotofsky, instead focusing (as had the majority) on the voting rights context.

• **Al-Tamimi v. Adelson**, 916 F.3d 1 (D.C. Cir. 2019)  
  [Sec. 1 (Political Question Doctrine Generally), page 707, continuation of Note 4)]  
  ➢ A district court dismissed on political question grounds claims presented by Palestinians and Palestinian–Americans from East Jerusalem, the West Bank, and the Gaza Strip, as well as five Palestinian village councils, against a wide variety of individuals, businesses, non-governmental organizations, and the United States, alleging an expulsion conspiracy that involved war crimes, crimes against humanity, and genocide in violation of the Alien Tort Statute (ATS) and the Torture Victim Protection Act (TVPA), among other things. In *Al-Tamimi v. Adelson*, 916 F.3d 1 (D.C. Cir. 2019), the court of appeals distinguished among the claims, holding that while determining who had sovereignty over disputed territory was a non-justiciable political question, determining whether Israeli soldiers committed genocide was not, and the political question appeared (at least tentatively) be sufficiently “extricable” to permit further proceedings. 916 F.3d at 13.

• **Philipp v. Germany**, 894 F.3d 406 (D.C. Cir. 2018)  
  [Sec. 7 (Immunities), page 821, continuation of Note 3)]  
  ➢ In *Philipp v. Germany*, 894 F.3d 406 (D.C. Cir. 2018), the D.C. Circuit held the expropriation exception applicable and allowed a case to go forward against an agency of the German government, concluding that an alleged coerced sale of an art collection (Welfenschatz) was sufficiently connected to genocide to be a taking in violation of international law. (It granted the motion to dismiss against the Federal Republic of Germany, however, on the ground that there was an inadequate commercial nexus absent the art’s presence in the United States.) The court also rejected arguments that it should decline jurisdiction on international comity grounds unless the plaintiffs had exhausted domestic remedies, as well as arguments that the state-law causes of action should be dismissed on foreign policy grounds, following *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), and *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), because the existing international mechanism for addressing the dispute was not
evidently exclusive or otherwise in conflict. The Supreme Court has now granted certiorari, and will hear the petition in October Term 2020. *Germany v. Philipp*, 2020 WL 3578677 (July 2, 2020).

- **International Reaction to Terrorism Litigation Against Foreign States**
  
  ![Image](image)

  In a preliminary ruling, the International Court of Justice upheld a U.S. objection to jurisdiction, holding that Iran’s sovereign immunity claims fell outside the scope of the Treaty. *Certain Iranian Assets (Iran v. United States)*, Preliminary Objections, Judgment of Feb. 13, 2019, at ¶¶ 48-80.

- **Opati v. Republic of Sudan, 140 S. Ct. 1601 (2020)**

  ![Image](image)

  A long-running suit against Sudan brought by victims of an al Qaeda bombing outside the U.S. embassies in Kenya and Tanzania was affected by changes to the FSIA in 2008 that newly authorized a federal cause of action for terrorism-related actions, along with punitive damages. The same amendments made clear that they applied to existing lawsuits, and allowed new actions arising out of the same act or incident to be filed under the amended provisions. Nonetheless, the court of appeals held that approximately $4.3 billion in punitive damages had been awarded improperly, because the 2008 amendments did not expressly authorize punitive damages for preenactment conduct. The Supreme Court reversed, holding that “Congress was as clear as it could have been when it authorized plaintiffs to seek and win punitive damages for past conduct using [28 U.S.C.] § 1065A(c)'s new federal cause of action.” *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1608 (2020).


  ![Image](image)

  The Supreme Court upheld the relevant statutory provision, § 2(b) of the Gun Lake Act, in *Patchak v. Zinke*, 138 S. Ct. 897 (2018). A plurality opinion distinguished between congressional attempts to compel findings or results under old law and instances when Congress changes the law, and viewed the relevant provision as permissibly stripping federal courts of jurisdiction over actions relating to a particular property. By contrast, two concurring justices regarded Congress as having retracted consent to be sued (in effect, restoring sovereign immunity). Three dissenters would have held that Congress had violated Article III.

[Sec. 8 (Act of State Doctrine), page 852, continuation of Note 5]

The act of state doctrine is related to, but distinct from, other doctrines concerning deference to foreign states. In Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co., Inc., 138 S. Ct. 1865 (2018), the Supreme Court reversed a decision of the Second Circuit regarding a major class action by purchasers of Vitamin C alleging price-fixing by Chinese manufacturers and distributors. The Second Circuit had held that it was required to defer to a foreign government’s representations concerning the application of its laws and regulations so long as they were reasonable—in particular, a representation that the Chinese sellers were required by their government to engage in the price-fixing that violated U.S. law. The Supreme Court held that “respectful consideration” was all that was required, and that U.S. courts were not bound by a foreign government’s representations about its laws. 138 S. Ct. at 1869. It vacated and remanded for further consideration. The Second Circuit is now reconsidering arguments against the plaintiffs’ claims, which include not only the act of state doctrine, but also foreign sovereign compulsion and the basis for its prior decision—the argument that international comity required abstention due to the conflict between complying with U.S. antitrust law and Chinese law.
[Excerpt from the Supreme Court syllabus]: In September 2017, the President issued Proclamation No. 9645, seeking to improve vetting procedures for foreign nationals traveling to the United States by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present a security threat. The Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate. Foreign states were selected for inclusion based on a review undertaken pursuant to one of the President’s earlier Executive Orders. As part of that review, the Department of Homeland Security (DHS), in consultation with the State Department and intelligence agencies, developed an information and risk assessment “baseline.” DHS then collected and evaluated data for all foreign governments, identifying those having deficient information-sharing practices and presenting national security concerns, as well as other countries “at risk” of failing to meet the baseline. After a 50–day period during which the State Department made diplomatic efforts to encourage foreign governments to improve their practices, the Acting Secretary of Homeland Security concluded that eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—remained deficient. She recommended entry restrictions for certain nationals from all of those countries but Iraq, which had a close cooperative relationship with the U.S. She also recommended including Somalia, which met the information-sharing component of the baseline standards but had other special risk factors, such as a significant terrorist presence. After consulting with multiple Cabinet members, the President adopted the recommendations and issued the Proclamation. Invoking his authority under 8 U.S.C. §§ 1182(f) and 1185(a), he determined that certain restrictions were necessary to “prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information” and “elicit improved identity-management and information-sharing protocols and practices from foreign governments.” The Proclamation imposes a range of entry restrictions that vary based on the “distinct circumstances” in each of the eight countries. It exempts lawful permanent residents and provides case-by-case waivers under certain circumstances. It also directs DHS to assess on a continuing basis whether the restrictions should be modified or continued, and to report to the President every 180 days. At the completion of the first such review period, the
President determined that Chad had sufficiently improved its practices, and he accordingly lifted restrictions on its nationals.

Plaintiffs—the State of Hawaii, three individuals with foreign relatives affected by the entry suspension, and the Muslim Association of Hawaii—argue that the Proclamation violates the Immigration and Nationality Act (INA) and the Establishment Clause. The District Court granted a nationwide preliminary injunction barring enforcement of the restrictions. The Ninth Circuit affirmed, concluding that the Proclamation contravened two provisions of the INA: § 1182(f), which authorizes the President to “suspend the entry of all aliens or any class of aliens” whenever he “finds” that their entry “would be detrimental to the interests of the United States,” and § 1152(a)(1)(A), which provides that “no person shall ... be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.” The court did not reach the Establishment Clause claim.

ROBERTS, C.J., delivered the opinion of the Court, in which KENNEDY, THOMAS, ALITO, and GORSUCH, JJ., joined. KENNEDY, J., and THOMAS, J., filed concurring opinions. BREYER, J., filed a dissenting opinion, in which KAGAN, J., joined. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined.

Chief Justice ROBERTS delivered the opinion of the Court.

[In Part I, the majority discussed the factual and legal background; in Part II of the opinion, it assumed without deciding that the plaintiffs’ statutory claims were reviewable, notwithstanding the doctrine of consular nonreviewability; in Part III, it held that the president had lawfully exercised authority delegated under the INA, which in 8 U.S.C. § 1182(f) entrusts the president “suspend the entry of all aliens or any class of aliens” whenever he “finds” that their entry “would be detrimental to the interests of the United States.” It noted that “[b]y its terms, § 1182(f) exudes deference to the President in every clause.” It observed that federal agencies had been tasked with conducting a “comprehensive evaluation” culminating in the presidential proclamation’s “extensive findings,” which led to a more detailed review than any previous; it further noted the need to defer to the president in matters of international affairs and national security. Considering the statutory language in light of past applications, it cited examples of exclusion “not because the covered nationals themselves engaged in harmful acts but instead to retaliate for conduct by their governments that conflicted with U.S. foreign policy interests.” Finally, it rejected the argument that the INA generally prohibited nationality-based discrimination. It suggested that this would condemn a number of prior presidential determinations, and preclude the president from “suspend[ing] entry from particular foreign states in response to an epidemic confined to a single region, or a verified terrorist threat involving nationals of a specific foreign nation, or even if the United States were on the brink of war.”]
IV

A

We now turn to plaintiffs’ claim that the Proclamation was issued for the unconstitutional purpose of excluding Muslims. . . .

B

The First Amendment provides, in part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Our cases recognize that “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” Larson v. Valente, 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982). Plaintiffs believe that the Proclamation violates this prohibition by singling out Muslims for disfavored treatment. The entry suspension, they contend, operates as a “religious gerrymander,” in part because most of the countries covered by the Proclamation have Muslim-majority populations. And in their view, deviations from the information-sharing baseline criteria suggest that the results of the multi-agency review were “foreordained.” Relying on Establishment Clause precedents concerning laws and policies applied domestically, plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President’s stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims. Brief for Respondents 69–73.

At the heart of plaintiffs’ case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. For example, while a candidate on the campaign trail, the President published a “Statement on Preventing Muslim Immigration” that called for a “total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.” App. 158. That statement remained on his campaign website until May 2017. Id., at 130–131. Then-candidate Trump also stated that “Islam hates us” and asserted that the United States was “having problems with Muslims coming into the country.” Id., at 120–121, 159. Shortly after being elected, when asked whether violence in Europe had affected his plans to “ban Muslim immigration,” the President replied, “You know my plans. All along, I’ve been proven to be right.” Id., at 123.

One week after his inauguration, the President issued EO–1. In a television interview, one of the President’s campaign advisers explained that when the President “first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’ ” Id., at 125. The adviser said he assembled a group of Members of Congress and lawyers that “focused on, instead of religion, danger.... [The order] is based on places where there [is] substantial evidence that people are sending terrorists into our country.” Id., at 229.
Plaintiffs also note that after issuing EO–2 to replace EO–1, the President expressed regret that his prior order had been “watered down” and called for a “much tougher version” of his “Travel Ban.” Shortly before the release of the Proclamation, he stated that the “travel ban ... should be far larger, tougher, and more specific,” but “stupidly that would not be politically correct.” Id., at 132–133. More recently, on November 29, 2017, the President retweeted links to three anti-Muslim propaganda videos. In response to questions about those videos, the President’s deputy press secretary denied that the President thinks Muslims are a threat to the United States, explaining that “the President has been talking about these security issues for years now, from the campaign trail to the White House” and “has addressed these issues with the travel order that he issued earlier this year and the companion proclamation.”

The President of the United States possesses an extraordinary power to speak to his fellow citizens and on their behalf. Our Presidents have frequently used that power to espouse the principles of religious freedom and tolerance on which this Nation was founded. In 1790 George Washington reassured the Hebrew Congregation of Newport, Rhode Island that “happily the Government of the United States ... gives to bigotry no sanction, to persecution no assistance [and] requires only that they who live under its protection should demean themselves as good citizens.” 6 Papers of George Washington 285 (D. Twohig ed. 1996). President Eisenhower, at the opening of the Islamic Center of Washington, similarly pledged to a Muslim audience that “America would fight with her whole strength for your right to have here your own church,” declaring that “[t]his concept is indeed a part of America.” Public Papers of the Presidents, Dwight D. Eisenhower, June 28, 1957, p. 509 (1957). And just days after the attacks of September 11, 2001, President George W. Bush returned to the same Islamic Center to implore his fellow Americans—Muslims and non-Muslims alike—to remember during their time of grief that “[t]he face of terror is not the true faith of Islam,” and that America is “a great country because we share the same values of respect and dignity and human worth.” Public Papers of the Presidents, George W. Bush, Vol. 2, Sept. 17, 2001, p. 1121 (2001). Yet it cannot be denied that the Federal Government and the Presidents who have carried its laws into effect have—from the Nation’s earliest days—performed unevenly in living up to those inspiring words.

Plaintiffs argue that this President’s words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.
Unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive regulating the entry of aliens abroad. Their claim accordingly raises a number of delicate issues regarding the scope of the constitutional right and the manner of proof. The Proclamation, moreover, is facially neutral toward religion. Plaintiffs therefore ask the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office. These various aspects of plaintiffs’ challenge inform our standard of review.

C

For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a “fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” …

Nonetheless, although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen. In *Kleindienst v. Mandel*, the Attorney General denied admission to a Belgian journalist and self-described “revolutionary Marxist,” Ernest Mandel, who had been invited to speak at a conference at Stanford University. 408 U.S., at 756–757, 92 S.Ct. 2576. The professors who wished to hear Mandel speak challenged that decision under the First Amendment, and we acknowledged that their constitutional “right to receive information” was implicated. *Id.*, at 764–765, 92 S.Ct. 2576. But we limited our review to whether the Executive gave a “facially legitimate and bona fide” reason for its action. *Id.*, at 769, 92 S.Ct. 2576. Given the authority of the political branches over admission, we held that “when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification” against the asserted constitutional interests of U.S. citizens. *Id.*, at 770, 92 S.Ct. 2576. …

The upshot of our cases in this context is clear: “Any rule of constitutional law that would inhibit the flexibility” of the President “to respond to changing world conditions should be adopted only with the greatest caution,” and our inquiry into matters of entry and national security is highly constrained. *Mathews*, 426 U.S., at 81–82, 96 S.Ct. 1883. We need not define the precise contours of that inquiry in this case. A conventional application of *Mandel*, asking only whether the policy is facially legitimate and bona fide, would put an end to our review. But the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order. … For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the
Government’s stated objective to protect the country and improve vetting processes. ... As a result, we may consider plaintiffs’ extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.

D

Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a “bare ... desire to harm a politically unpopular group.” Department of Agriculture v. Moreno, 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). ...

The Proclamation does not fit this pattern. It cannot be said that it is impossible to “discern a relationship to legitimate state interests” or that the policy is “inexplicable by anything but animus.” Indeed, the dissent can only attempt to argue otherwise by refusing to apply anything resembling rational basis review. ...

The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world’s Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks. ...

The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review, pointing to deviations from the review’s baseline criteria resulting in the inclusion of Somalia and omission of Iraq. But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country. Although Somalia generally satisfies the information-sharing component of the baseline criteria, it “stands apart ... in the degree to which [it] lacks command and control of its territory.” Proclamation § 2(h)(i). As for Iraq, the Secretary of Homeland Security determined that entry restrictions were not warranted in light of the close cooperative relationship between the U.S. and Iraqi Governments and the country’s key role in combating terrorism in the region. § 1(g).

It is, in any event, difficult to see how exempting one of the largest predominantly Muslim countries in the region from coverage under the Proclamation can be cited as evidence of animus toward Muslims.
The dissent likewise doubts the thoroughness of the multi-agency review because a recent Freedom of Information Act request shows that the final DHS report “was a mere 17 pages.” Post, at 2443. Yet a simple page count offers little insight into the actual substance of the final report, much less predecisional materials underlying it. See 5 U.S.C. § 552(b)(5) (exempting deliberative materials from FOIA disclosure).

More fundamentally, plaintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little to serve national security interests. But we cannot substitute our own assessment for the Executive’s predictive judgments on such matters, all of which “are delicate, complex, and involve large elements of prophecy.” Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948); see also Regan v. Wald, 468 U.S. 222, 242–243, 104 S.Ct. 3026, 82 L.Ed.2d 171 (1984) (declining invitation to conduct an “independent foreign policy analysis”). While we of course “do not defer to the Government’s reading of the First Amendment,” the Executive’s evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving “sensitive and weighty interests of national security and foreign affairs.” Humanitarian Law Project, 561 U.S., at 33–34, 130 S.Ct. 2705.

Three additional features of the entry policy support the Government’s claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list of covered countries. ...

Second, for those countries that remain subject to entry restrictions, the Proclamation includes significant exceptions for various categories of foreign nationals. The policy permits nationals from nearly every covered country to travel to the United States on a variety of nonimmigrant visas. ... The Proclamation also exempts permanent residents and individuals who have been granted asylum. ...

Third, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. According to the Proclamation, consular officers are to consider in each admissibility determination whether the alien demonstrates that (1) denying entry would cause undue hardship; (2) entry would not pose a threat to public safety; and (3) entry would be in the interest of the United States. § 3(c)(i) ... On its face, this program is similar to the humanitarian exceptions set forth in President Carter’s order during the Iran hostage crisis. ...

Finally, the dissent invokes Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). Whatever rhetorical advantage the dissent may see in doing so, Korematsu has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful
and outside the scope of Presidential authority. But it is wholly inapt to liken that
morally repugnant order to a facially neutral policy denying certain foreign nationals
the privilege of admission. ...The entry suspension is an act that is well within
executive authority and could have been taken by any other President—the only
question is evaluating the actions of this particular President in promulgating an
otherwise valid Proclamation.

The dissent’s reference to Korematsu, however, affords this Court the opportunity to
make express what is already obvious: Korematsu was gravely wrong the day it was
decided, has been overruled in the court of history, and—to be clear—“has no place

***

Under these circumstances, the Government has set forth a sufficient national
security justification to survive rational basis review. We express no view on the
soundness of the policy. We simply hold today that plaintiffs have not demonstrated
a likelihood of success on the merits of their constitutional claim.

V

Because plaintiffs have not shown that they are likely to succeed on the merits of
their claims, we reverse the grant of the preliminary injunction as an abuse of
365, 172 L.Ed.2d 249 (2008). The case now returns to the lower courts for such further
proceedings as may be appropriate. Our disposition of the case makes it unnecessary
to consider the propriety of the nationwide scope of the injunction issued by the
District Court.

The judgment of the Court of Appeals is reversed, and the case is remanded for
further proceedings consistent with this opinion.

It is so ordered.

Justice KENNEDY, concurring.

I join the Court’s opinion in full. ...

There are numerous instances in which the statements and actions of Government
officials are not subject to judicial scrutiny or intervention. That does not mean those
officials are free to disregard the Constitution and the rights it proclaims and
protects. The oath that all officials take to adhere to the Constitution is not confined
to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.

... An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.

THOMAS, J., concurring.

[Justice Thomas emphasized the inherent authority of the president to exclude aliens; doubted the merits of the First Amendment claim, particularly as applied to aliens; and apart from the merits, criticized the breadth of the “universal” injunction granted by the district court.]

Justice BREYER, with whom Justice KAGAN joins, dissenting.

The question before us is whether Proclamation No. 9645 is lawful. If its promulgation or content was significantly affected by religious animus against Muslims, it would violate the relevant statute or the First Amendment itself. ... If, however, its sole ratio decidendi was one of national security, then it would be unlikely to violate either the statute or the Constitution. Which is it? Members of the Court principally disagree about the answer to this question, i.e., about whether or the extent to which religious animus played a significant role in the Proclamation’s promulgation or content.

In my view, the Proclamation’s elaborate system of exemptions and waivers can and should help us answer this question. That system provides for case-by-case consideration of persons who may qualify for visas despite the Proclamation’s general ban. Those persons include lawful permanent residents, asylum seekers, refugees, students, children, and numerous others. There are likely many such persons, perhaps in the thousands. And I believe it appropriate to take account of their Proclamation-granted status when considering the Proclamation’s lawfulness. The Solicitor General asked us to consider the Proclamation “as” it is “written” and “as” it is “applied,” waivers and exemptions included. Tr. of Oral Arg. 38. He warned us against considering the Proclamation’s lawfulness “on the hypothetical situation that [the Proclamation] is what it isn’t,” ibid., while telling us that its waiver and exemption provisions mean what they say: The Proclamation does not exclude individuals from the United States “if they meet the criteria” for a waiver or exemption. Id., at 33.

On the one hand, if the Government is applying the exemption and waiver provisions
as written, then its argument for the Proclamation’s lawfulness is strengthened. For one thing, the Proclamation then resembles more closely the two important Presidential precedents on point, President Carter’s Iran order and President Reagan’s Cuba proclamation, both of which contained similar categories of persons authorized to obtain case-by-case exemptions. . . . For another thing, the Proclamation then follows more closely the basic statutory scheme, which provides for strict case-by-case scrutiny of applications. It would deviate from that system, not across the board, but where circumstances may require that deviation.

Further, since the case-by-case exemptions and waivers apply without regard to the individual’s religion, application of that system would help make clear that the Proclamation does not deny visas to numerous Muslim individuals (from those countries) who do not pose a security threat. And that fact would help to rebut the First Amendment claim that the Proclamation rests upon anti-Muslim bias rather than security need. Finally, of course, the very fact that Muslims from those countries would enter the United States (under Proclamation-provided exemptions and waivers) would help to show the same thing.

On the other hand, if the Government is not applying the system of exemptions and waivers that the Proclamation contains, then its argument for the Proclamation’s lawfulness becomes significantly weaker. For one thing, the relevant precedents—those of Presidents Carter and Reagan—would bear far less resemblance to the present Proclamation. . . .

For another thing, the relevant statute requires that there be “find[ings]” that the grant of visas to excluded persons would be “detrimental to the interests of the United States.” § 1182(f). Yet there would be no such findings in respect to those for whom the Proclamation itself provides case-by-case examination (followed by the grant of a visa in appropriate cases).

And, perhaps most importantly, if the Government is not applying the Proclamation’s exemption and waiver system, the claim that the Proclamation is a “Muslim ban,” rather than a “security-based” ban, becomes much stronger. How could the Government successfully claim that the Proclamation rests on security needs if it is excluding Muslims who satisfy the Proclamation’s own terms? At the same time, denying visas to Muslims who meet the Proclamation’s own security terms would support the view that the Government excludes them for reasons based upon their religion.

Unfortunately there is evidence that supports the second possibility, i.e., that the Government is not applying the Proclamation as written. The Proclamation provides that the Secretary of State and the Secretary of Homeland Security “shall coordinate to adopt guidance” for consular officers to follow when deciding whether to grant a waiver. § 3(c)(ii). Yet, to my knowledge, no guidance has issued. The only potentially
relevant document I have found consists of a set of State Department answers to certain Frequently Asked Questions, but this document simply restates the Proclamation in plain language for visa applicants. It does not provide guidance for consular officers as to how they are to exercise their discretion. ...

An examination of publicly available statistics also provides cause for concern. The State Department reported that during the Proclamation’s first month, two waivers were approved out of 6,555 eligible applicants. Letter from M. Waters, Assistant Secretary Legislative Affairs, to Sen. Van Hollen (Feb. 22, 2018). In its reply brief, the Government claims that number increased from 2 to 430 during the first four months of implementation. Reply Brief 17. That number, 430, however, when compared with the number of pre-Proclamation visitors, accounts for a miniscule percentage of those likely eligible for visas, in such categories as persons requiring medical treatment, academic visitors, students, family members, and others belonging to groups that, when considered as a group (rather than case by case), would not seem to pose security threats. . . .

Anecdotal evidence further heightens these concerns. For example, one amicus identified a child with cerebral palsy in Yemen. The war had prevented her from receiving her medication, she could no longer move or speak, and her doctors said she would not survive in Yemen. Her visa application was denied. Her family received a form with a check mark in the box unambiguously confirming that “a waiver will not be granted in your case.” Letter from L. Blatt to S. Harris, Clerk of Court (May 1, 2018). But after the child’s case was highlighted in an amicus brief before this Court, the family received an update from the consular officer who had initially denied the waiver. It turns out, according to the officer, that she had all along determined that the waiver criteria were met. But, the officer explained, she could not relay that information at the time because the waiver required review from a supervisor, who had since approved it. The officer said that the family’s case was now in administrative processing and that she was attaching a “revised refusal letter indicating the approval of the waiver.” Ibid. The new form did not actually approve the waiver (in fact, the form contains no box saying “granted”). But a different box was now checked, reading: “The consular officer is reviewing your eligibility for a waiver under the Proclamation.... This can be a lengthy process, and until the consular officer can make an individualized determination of [the relevant] factors, your visa application will remain refused under Section 212(f) [of the Proclamation].” Ibid. One is left to wonder why this second box, indicating continuing review, had not been checked at the outset if in fact the child’s case had remained under consideration all along. Though this is but one incident and the child was admitted after considerable international attention in this case, it provides yet more reason to believe that waivers are not being processed in an ordinary way.

Finally, in a pending case in the Eastern District of New York, a consular official has filed a sworn affidavit asserting that he and other officials do not, in fact, have
discretion to grant waivers. According to the affidavit, consular officers “were not allowed to exercise that discretion” and “the waiver [process] is merely ‘window dressing.’” See Decl. of Christopher Richardson, Alharbi v. Miller, No. 1:18–cv–2435 (June 1, 2018), pp. 3–4. Another report similarly indicates that the U.S. Embassy in Djibouti, which processes visa applications for citizens of Yemen, received instructions to grant waivers “only in rare cases of imminent danger,” with one consular officer reportedly telling an applicant that “[e]ven for infants, we would need to see some evidence of a congenital heart defect or another medical issue of that degree of difficulty that ... would likely lead to the child’s developmental harm or death.” Center for Constitutional Rights and the Rule of Law Clinic, Yale Law School, Window Dressing the Muslim Ban: Reports of Waivers and Mass Denials from Yemeni–American Families Stuck in Limbo 18 (2018).

Declarations, anecdotal evidence, facts, and numbers taken from amicus briefs are not judicial factfindings. The Government has not had an opportunity to respond, and a court has not had an opportunity to decide. But, given the importance of the decision in this case, the need for assurance that the Proclamation does not rest upon a “Muslim ban,” and the assistance in deciding the issue that answers to the “exemption and waiver” questions may provide, I would send this case back to the District Court for further proceedings. And, I would leave the injunction in effect while the matter is litigated. Regardless, the Court’s decision today leaves the District Court free to explore these issues on remand.

If this Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the Proclamation, along with the other statements also set forth in Justice SOTOMAYOR’s opinion, a sufficient basis to set the Proclamation aside. And for these reasons, I respectfully dissent.

Justice SOTOMAYOR, with whom Justice GINSBURG joins, dissenting.

. . .

I

. . . Whatever the merits of plaintiffs’ complex statutory claims, the Proclamation must be enjoined for a more fundamental reason: It runs afoul of the Establishment Clause’s guarantee of religious neutrality.

A

The Establishment Clause forbids government policies “respecting an establishment
of religion.” U.S. Const., Amdt. 1. The “clearest command” of the Establishment Clause is that the Government cannot favor or disfavor one religion over another.

To determine whether plaintiffs have proved an Establishment Clause violation, the Court asks whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion. See McCreary County v. American Civil Liberties Union of Ky., 545 U.S. 844, 862, 866 (2005).

In answering that question, this Court has generally considered the text of the government policy, its operation, and any available evidence regarding “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by” the decisionmaker.

B

Although the majority briefly recounts a few of the statements and background events that form the basis of plaintiffs’ constitutional challenge, ante, at 2417 – 2418, that highly abridged account does not tell even half of the story. The full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.

During his Presidential campaign, then-candidate Donald Trump pledged that, if elected, he would ban Muslims from entering the United States. Specifically, on December 7, 2015, he issued a formal statement “calling for a total and complete shutdown of Muslims entering the United States.”

On December 8, 2015, Trump justified his proposal during a television interview by noting that President Franklin D. Roosevelt “did the same thing” with respect to the internment of Japanese Americans during World War II. Id., at 120. In January 2016, during a Republican primary debate, Trump was asked whether he wanted to “rethink [his] position” on “banning Muslims from entering the country.” Ibid. He answered, “No.” Ibid. A month later, at a rally in South Carolina, Trump told an apocryphal story about United States General John J. Pershing killing a large group of Muslim insurgents in the Philippines with bullets dipped in pigs’ blood in the early 1900’s. Id., at 163–164. In March 2016, he expressed his belief that “Islam hates us. ... [W]e can’t allow people coming into this country who have this hatred of the United States ... [a]nd of people that are not Muslim.” Id., at 120–121. That same month, Trump asserted that “[w]e’re having problems with the Muslims, and we’re having problems with Muslims coming into the country.” Id., at 121. He therefore called for surveillance of mosques in the United States, blaming terrorist attacks on Muslims’
lack of “assimilation” and their commitment to “sharia law.” *Ibid.; id.,* at 164. A day later, he opined that Muslims “do not respect us at all” and “don’t respect a lot of the things that are happening throughout not only our country, but they don’t respect other things.” *Ibid.*

As Trump’s presidential campaign progressed, he began to describe his policy proposal in slightly different terms. . . .

On January 27, 2017, one week after taking office, President Trump signed Executive Order No. 13769, 82 Fed. Reg. 8977 (2017) (EO–1), entitled “Protecting the Nation From Foreign Terrorist Entry Into the United States.” As he signed it, President Trump read the title, looked up, and said “We all know what that means.” *App. 124.* That same day, President Trump explained to the media that, under EO–1, Christians would be given priority for entry as refugees into the United States. In particular, he bemoaned the fact that in the past, “[i]f you were a Muslim [refugee from Syria] you could come in, but if you were a Christian, it was almost impossible.” *Id.,* at 125. Considering that past policy “very unfair,” President Trump explained that EO–1 was designed “to help” the Christians in Syria. *Ibid.* The following day, one of President Trump’s key advisers candidly drew the connection between EO–1 and the “Muslim ban” that the President had pledged to implement if elected. *Ibid.* According to that adviser, “[W]hen [Donald Trump] first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’” *Ibid.* . . .

On March 6, 2017, President Trump issued that new executive order, which, like its predecessor, imposed temporary entry and refugee bans. See Exec. Order No. 13,780, 82 Fed. Reg. 13209 (EO–2). One of the President’s senior advisers publicly explained that EO–2 would “have the same basic policy outcome” as EO–1, and that any changes would address “very technical issues that were brought up by the court.” *App. 127.* . . .

While litigation over EO–2 was ongoing, President Trump repeatedly made statements alluding to a desire to keep Muslims out of the country . . . The President went on to tweet: “People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!” *Id.,* at 132–133. He added: “That’s right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won’t help us protect our people!” *Id.,* at 133 . . .

... Taking all the relevant evidence together, a reasonable observer would conclude
that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government’s asserted national-security justifications. Even before being sworn into office, then-candidate Trump stated that “Islam hates us,” App. 399, warned that “[w]e’re having problems with the Muslims, and we’re having problems with Muslims coming into the country,” id., at 121, promised to enact a “total and complete shutdown of Muslims entering the United States,” id., at 119, and instructed one of his advisers to find a “lega[l]” way to enact a Muslim ban, id., at 125. The President continued to make similar statements well after his inauguration, as detailed above, see supra, at 2436 – 2438.

Moreover, despite several opportunities to do so, President Trump has never disavowed any of his prior statements about Islam. Instead, he has continued to make remarks that a reasonable observer would view as an unrelenting attack on the Muslim religion and its followers. Given President Trump’s failure to correct the reasonable perception of his apparent hostility toward the Islamic faith, it is unsurprising that the President’s lawyers have, at every step in the lower courts, failed in their attempts to launder the Proclamation of its discriminatory taint. . . . Notably, the Court recently found less pervasive official expressions of hostility and the failure to disavow them to be constitutionally significant. Cf. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n, 584 U.S. ––––, ––––, 138 S.Ct. 1719, 1732, ––– L.Ed.2d –––– (2018) (“The official expressions of hostility to religion in some of the commissioners’ comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to the affirmance of the order—were inconsistent with what the Free Exercise Clause requires”). It should find the same here.

Ultimately, what began as a policy explicitly “calling for a total and complete shutdown of Muslims entering the United States” has since morphed into a “Proclamation” putatively based on national-security concerns. But this new window dressing cannot conceal an unassailable fact: the words of the President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers.

II

Rather than defend the President’s problematic statements, the Government urges this Court to set them aside and defer to the President on issues related to immigration and national security. The majority accepts that invitation and incorrectly applies a watered-down legal standard in an effort to short circuit plaintiffs’ Establishment Clause claim.

The majority begins its constitutional analysis by noting that this Court, at times, “has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly
burdens the constitutional rights of a U.S. citizen.” Ante, at 2419 (citing Kleindienst v. Mandel, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972)). As the majority notes, Mandel held that when the Executive Branch provides “a facially legitimate and bona fide reason” for denying a visa, “courts will neither look behind the exercise of that discretion, nor test it by balancing its justification.” Id., at 770, 92 S.Ct. 2576. In his controlling concurrence in Kerry v. Din, 576 U.S. ——, 135 S.Ct. 2128, 192 L.Ed.2d 183 (2015), Justice KENNEDY applied Mandel’s holding and elaborated that courts can “‘look behind’ the Government’s exclusion of” a foreign national if there is “an affirmative showing of bad faith on the part of the consular officer who denied [the] visa.” Din, 576 U.S., at ——, 135 S.Ct., at 2141 (opinion concurring in judgment). The extent to which Mandel and Din apply at all to this case is unsettled, and there is good reason to think they do not. Indeed, even the Government agreed at oral argument that where the Court confronts a situation involving “all kinds of denigrating comments about” a particular religion and a subsequent policy that is designed with the purpose of disfavoring that religion but that “dot[s] all the i’s and ... cross[es] all the t’s,” Mandel would not “pu[t] an end to judicial review of that set of facts.” Tr. of Oral Arg. 16.

In light of the Government’s suggestion “that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order,” the majority rightly declines to apply Mandel’s “narrow standard of review” and “assume[s] that we may look behind the face of the Proclamation.” Ante, at 2420. In doing so, however, the Court, without explanation or precedential support, limits its review of the Proclamation to rational-basis scrutiny. Ibid. That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review. . . . 6 As explained above, the Proclamation is plainly unconstitutional under that

6 The majority chides as “problematic” the importation of Establishment Clause jurisprudence “in the national security and foreign affairs context.” Ante, at 2420, n. 5. As the majority sees it, this Court’s Establishment Clause precedents do not apply to cases involving “immigration policies, diplomatic sanctions, and military actions.” Ante, at 2420, n. 5. But just because the Court has not confronted the precise situation at hand does not render these cases (or the principles they announced) inapplicable. Moreover, the majority’s complaint regarding the lack of direct authority is a puzzling charge, given that the majority itself fails to cite any “authority for its proposition” that a more probing review is inappropriate in a case like this one, where United States citizens allege that the Executive has violated the Establishment Clause by issuing a sweeping executive order motivated by animus. Ante, at 2420 n. 5; see supra, at 2440, and n. 5. In any event, even if there is no prior case directly on point, it is clear from our precedent that “[w]hatever power the United States Constitution envisions for the Executive” in the context of national security and foreign affairs, “it most assuredly envisions a role for all three branches when individual liberties are at stake.” Hamdi v. Rumsfeld, 542 U.S. 507, 536, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion). This Court’s Establishment Clause precedents require that, if a reasonable observer would understand an executive action to be driven by discriminatory animus, the action be invalidated. See McCreary, 545 U.S., at 860, 125 S.Ct. 2722. That reasonable-observer inquiry includes consideration of the Government’s asserted justifications for its actions. The Government’s invocation of a national-security justification, however, does not mean that the Court should close its eyes to other relevant information. Deference is different from unquestioning acceptance. Thus, what is “far more
heightened standard. See supra, at 2438 – 2440.

But even under rational-basis review, the Proclamation must fall. . . . The President’s statements, which the majority utterly fails to address in its legal analysis, strongly support the conclusion that the Proclamation was issued to express hostility toward Muslims and exclude them from the country. Given the overwhelming record evidence of anti-Muslim animus, it simply cannot be said that the Proclamation has a legitimate basis. . . .

The majority insists that the Proclamation furthers two interrelated national-security interests: “preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices.” Ante, at 2421. But . . . even a cursory review of the Government’s asserted national-security rationale reveals that the Proclamation is nothing more than a “‘religious gerrymander.’” Lukumi, 508 U.S., at 535, 113 S.Ct. 2217.

The majority first emphasizes that the Proclamation “says nothing about religion.” Ante, at 2421. Even so, the Proclamation, just like its predecessors, overwhelmingly targets Muslim-majority nations. Given the record here, including all the President’s statements linking the Proclamation to his apparent hostility toward Muslims, it is of no moment that the Proclamation also includes minor restrictions on two non-Muslim majority countries, North Korea and Venezuela, or that the Government has removed a few Muslim-majority countries from the list of covered countries since EO–1 was issued. Consideration of the entire record supports the conclusion that the inclusion of North Korea and Venezuela, and the removal of other countries, simply reflect subtle efforts to start “talking territory instead of Muslim,” App. 123, precisely so the Executive Branch could evade criticism or legal consequences for the Proclamation’s otherwise clear targeting of Muslims. The Proclamation’s effect on North Korea and Venezuela, for example, is insubstantial, if not entirely symbolic. A prior sanctions order already restricts entry of North Korean nationals, see Exec. Order No. 13810, 82 Fed. Reg. 44705 (2017), and the Proclamation targets only a handful of Venezuelan government officials and their immediate family members, 82 Fed. Reg. 45166. As such, the President’s inclusion of North Korea and Venezuela does little to mitigate the anti-Muslim animus that permeates the Proclamation.

The majority next contends that the Proclamation “reflects the results of a worldwide review process undertaken by multiple Cabinet officials.” Ante, at 2421. At the outset, there is some evidence that at least one of the individuals involved in that process may have exhibited bias against Muslims. As noted by one group of amici, the Trump administration appointed Frank Wuco to help enforce the President’s travel bans and lead the multiagency review process. See Brief for Plaintiffs in International Refugee
Assistance Project v. Trump as Amici Curiae 13–14, and n. 10. According to amici, Wuco has purportedly made several suspect public statements about Islam: He has “publicly declared that it was a ‘great idea’ to ‘stop the visa application process into this country from Muslim nations in a blanket type of policy,’ ” “that Muslim populations ‘living under other-than-Muslim rule’ will ‘necessarily’ turn to violence, that Islam prescribes ‘violence and warfare against unbelievers,’ and that Muslims ‘by-and-large ... resist assimilation.’” Id., at 14.

But, even setting aside those comments, the worldwide review does little to break the clear connection between the Proclamation and the President’s anti-Muslim statements.

Ignoring all this, the majority empowers the President to hide behind an administrative review process that the Government refuses to disclose to the public. . . . Furthermore, evidence of which we can take judicial notice indicates that the multiagency review process could not have been very thorough. Ongoing litigation under the Freedom of Information Act shows that the September 2017 report the Government produced after its review process was a mere 17 pages. . . .

Beyond that, Congress has already addressed the national-security concerns supposedly undergirding the Proclamation through an “extensive and complex” framework governing “immigration and alien status.” Arizona v. United States, 567 U.S. 387, 395, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012). The Immigration and Nationality Act sets forth, in painstaking detail, a reticulated scheme regulating the admission of individuals to the United States. [The dissent described the statutory and regulatory restrictions, as well as restrictions on the Visa Waiver Program requiring the vetting of other countries’ systems.]

. . . As a result of a recent review, for example, the Executive decided in 2016 to remove from the program dual nationals of Iraq, Syria, Iran, and Sudan. . . .

Put simply, Congress has already erected a statutory scheme that fulfills the putative national-security interests the Government now puts forth to justify the Proclamation. Tellingly, the Government remains wholly unable to articulate any credible national-security interest that would go unaddressed by the current statutory scheme absent the Proclamation. The Government also offers no evidence that this current vetting scheme, which involves a highly searching consideration of individuals required to obtain visas for entry into the United States and a highly searching consideration of which countries are eligible for inclusion in the Visa Waiver Program, is inadequate to achieve the Proclamation’s proclaimed objectives of “preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their [vetting and information-sharing] practices.” Ante, at 2421.

For many of these reasons, several former national-security officials from both
political parties—including former Secretary of State Madeleine Albright, former State Department Legal Adviser John Bellinger III, former Central Intelligence Agency Director John Brennan, and former Director of National Intelligence James Clapper—have advised that the Proclamation and its predecessor orders “do not advance the national-security or foreign policy interests of the United States, and in fact do serious harm to those interests.” Brief for Former National Security Officials as Amici Curiae 15 (boldface deleted).

Moreover, the Proclamation purports to mitigate national-security risks by excluding nationals of countries that provide insufficient information to vet their nationals. 82 Fed. Reg. 45164. Yet, as plaintiffs explain, the Proclamation broadly denies immigrant visas to all nationals of those countries, including those whose admission would likely not implicate these information deficiencies (e.g., infants, or nationals of countries included in the Proclamation who are long-term residents of and traveling from a country not covered by the Proclamation). See Brief for Respondents 72. In addition, the Proclamation permits certain nationals from the countries named in the Proclamation to obtain nonimmigrant visas, which undermines the Government’s assertion that it does not already have the capacity and sufficient information to vet these individuals adequately. See 82 Fed. Reg. 45165–45169.

Equally unavailing is the majority’s reliance on the Proclamation’s waiver program. Ante, at 2423, and n. 7. As several amici thoroughly explain, there is reason to suspect that the Proclamation’s waiver program is nothing more than a sham . . . .

In sum, none of the features of the Proclamation highlighted by the majority supports the Government’s claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest. What the unrebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country.

III

As the foregoing analysis makes clear, plaintiffs are likely to succeed on the merits of their Establishment Clause claim. To obtain a preliminary injunction, however, plaintiffs must also show that they are “likely to suffer irreparable harm in the absence of preliminary relief,” that “the balance of equities tips in [their] favor,” and that “an injunction is in the public interest.” Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). Plaintiffs readily clear those remaining hurdles. . . .

IV

39
... Today’s holding is all the more troubling given the stark parallels between the reasoning of this case and that of Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). See Brief for Japanese American Citizens League as Amicus Curiae. In Korematsu, the Court gave “a pass [to] an odious, gravely injurious racial classification” authorized by an executive order. Adarand Constructors, Inc. v. Penã, 515 U.S. 200, 275, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (GINSBURG, J., dissenting). As here, the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion. See Brief for Japanese American Citizens League as Amicus Curiae 12–14. As here, the exclusion order was rooted in dangerous stereotypes about, inter alia, a particular group’s supposed inability to assimilate and desire to harm the United States. See Korematsu, 323 U.S., at 236–240, 65 S.Ct. 193 (Murphy, J., dissenting). As here, the Government was unwilling to reveal its own intelligence agencies’ views of the alleged security concerns to the very citizens it purported to protect. Compare Korematsu v. United States, 584 F.Supp. 1406, 1418–1419 (N.D.Cal.1984) (discussing information the Government knowingly omitted from report presented to the courts justifying the executive order); Brief for Japanese American Citizens League as Amicus Curiae 17–19, with IRAP II, 883 F.3d, at 268; Brief for Karen Korematsu et al. as Amici Curiae 35–36, and n. 5 (noting that the Government “has gone to great lengths to shield [the Secretary of Homeland Security’s] report from view”). And as here, there was strong evidence that impermissible hostility and animus motivated the Government’s policy. ... 

Today, the Court takes the important step of finally overruling Korematsu, denouncing it as “gravely wrong the day it was decided.” Ante, at 2423 (citing Korematsu, 323 U.S., at 248, 65 S.Ct. 193 (Jackson, J., dissenting)). This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority’s decision here acceptable or right. By blindly accepting the Government’s misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploy the same dangerous logic underlying Korematsu and merely replaces one “gravely wrong” decision with another. Ante, at 2423.

Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments. Because the Court’s decision today has failed in that respect, with profound regret, I dissent.
Supreme Court of the United States

Joseph JESNER, et al., Petitioners

v.

ARAB BANK, PLC.

138 S.Ct. 1386

Decided April 24, 2018.

Justice KENNEDY announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B–1, and II–C, and an opinion with respect to Parts II–A, II–B–2, II–B–3, and III, in which THE CHIEF JUSTICE and Justice THOMAS join.

Petitioners in this case, or the persons on whose behalf petitioners now assert claims, allegedly were injured or killed by terrorist acts committed abroad. Those terrorist acts, it is contended, were in part caused or facilitated by a foreign corporation. Petitioners now seek to impose liability on the foreign corporation for the conduct of its human agents, including its then-chairman and other high-ranking management officials. The suits were filed in a United States District Court under the Alien Tort Statute, commonly referred to as the ATS. See 28 U.S.C. § 1350.

The foreign corporation charged with liability in these ATS suits is Arab Bank, PLC; and it is respondent here. Some of Arab Bank’s officials, it is alleged, allowed the Bank to be used to transfer funds to terrorist groups in the Middle East, which in turn enabled or facilitated criminal acts of terrorism, causing the deaths or injuries for which petitioners now seek compensation. Petitioners seek to prove Arab Bank helped the terrorists receive the moneys in part by means of currency clearances and bank transactions passing through its New York City offices, all by means of electronic transfers.

It is assumed here that those individuals who inflicted death or injury by terrorism committed crimes in violation of well-settled, fundamental precepts of international law, precepts essential for basic human-rights protections. It is assumed as well that individuals who knowingly and purposefully facilitated banking transactions to aid, enable, or facilitate the terrorist acts would themselves be committing crimes under the same international-law prohibitions.

Petitioners contend that international and domestic laws impose responsibility and liability on a corporation if its human agents use the corporation to commit crimes in violation of international laws that protect human rights. The question here is whether the Judiciary has the authority, in an ATS action, to make that
determination and then to enforce that liability in ATS suits, all without any explicit authorization from Congress to do so.

The answer turns upon the proper interpretation and implementation of the ATS. The statute provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” § 1350. The Court must first ask whether the law of nations imposes liability on corporations for human-rights violations committed by its employees. The Court must also ask whether it has authority and discretion in an ATS suit to impose liability on a corporation without a specific direction from Congress to do so.

Petitioners are plaintiffs in five ATS lawsuits filed against Arab Bank in the United States District Court for the Eastern District of New York. The suits were filed between 2004 and 2010.

A significant majority of the plaintiffs in these lawsuits—about 6,000 of them—are foreign nationals whose claims arise under the ATS. These foreign nationals are petitioners here. They allege that they or their family members were injured by terrorist attacks in the Middle East over a 10–year period. Two of the five lawsuits also included claims brought by American nationals under the Anti–Terrorism Act, 18 U.S.C. § 2333(a), but those claims are not at issue.

Arab Bank is a major Jordanian financial institution with branches throughout the world, including in New York. According to the Kingdom of Jordan, Arab Bank “accounts for between one-fifth and one-third of the total market capitalization of the Amman Stock Exchange.” Brief for Hashemite Kingdom of Jordan as Amicus Curiae 2. Petitioners allege that Arab Bank helped finance attacks by Hamas and other terrorist groups. Among other claims, petitioners allege that Arab Bank maintained bank accounts for terrorists and their front groups and allowed the accounts to be used to pay the families of suicide bombers.

Most of petitioners’ allegations involve conduct that occurred in the Middle East. Yet petitioners allege as well that Arab Bank used its New York branch to clear dollar-denominated transactions through the Clearing House Interbank Payments System. That elaborate system is commonly referred to as CHIPS. It is alleged that some of these CHIPS transactions benefited terrorists. . . .

In addition to the dollar-clearing transactions, petitioners allege that Arab Bank’s New York branch was used to launder money for the Holy Land Foundation for Relief and Development (HLF), a Texas-based charity that petitioners say is affiliated with
Hamas. According to petitioners, Arab Bank used its New York branch to facilitate the transfer of funds from HLF to the bank accounts of terrorist-affiliated charities in the Middle East.

During the pendency of this litigation, there was an unrelated case that also implicated the issue whether the ATS is applicable to suits in this country against foreign corporations. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (C.A.2 2010). That suit worked its way through the trial court and the Court of Appeals for the Second Circuit. The *Kiobel* litigation did not involve banking transactions. Its allegations were that holding companies incorporated in the Netherlands and the United Kingdom had, through a Nigerian subsidiary, aided and abetted the Nigerian Government in human-rights abuses. *Id.*, at 123. In *Kiobel*, the Court of Appeals held that the ATS does not extend to suits against corporations. *Id.*, at 120. This Court granted certiorari in *Kiobel*. 565 U.S. 961, 132 S.Ct. 472, 181 L.Ed.2d 292 (2011).

After additional briefing and reargument in *Kiobel*, this Court held that, given all the circumstances, the suit could not be maintained under the ATS. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 114, 124–125, 133 S.Ct. 1659, 185 L.Ed.2d 671 (2013).

The rationale of the holding, however, was not that the ATS does not extend to suits against foreign corporations. That question was left unresolved. The Court ruled, instead, that “all the relevant conduct took place outside the United States.” *Id.*, at 124, 133 S.Ct. 1659. Dismissal of the action was required based on the presumption against extraterritorial application of statutes.

So while this Court in *Kiobel* affirmed the ruling that the action there could not be maintained, it did not address the broader holding of the Court of Appeals that dismissal was required because corporations may not be sued under the ATS. Still, the courts of the Second Circuit deemed that broader holding to be binding precedent. As a consequence, in the instant case the District Court dismissed petitioners’ ATS claims based on the earlier *Kiobel* holding in the Court of Appeals; and on review of the dismissal order the Court of Appeals, also adhering to its earlier holding, affirmed. *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F.3d 144 (2015).

This Court granted certiorari in the instant case. 581 U.S. —, 137 S.Ct. 1432, 197 L.Ed.2d 646 (2017). . . .

With these principles in mind, this Court now must decide whether common-law liability under the ATS extends to a foreign corporate defendant. It could be argued, under the Court’s holding in *Kiobel*, that even if, under accepted principles of international law and federal common law, corporations are subject to ATS liability for human-rights crimes committed by their human agents, in this case the activities of the defendant corporation and the alleged actions of its employees have insufficient connections to the United States to subject it to jurisdiction under the ATS. Various *amici* urge this as a rationale to affirm here, while the Government argues that the
Court should remand this case so the Court of Appeals can address the issue in the first instance. There are substantial arguments on both sides of that question; but it is not the question on which this Court granted certiorari, nor is it the question that has divided the Courts of Appeals.

The question whether foreign corporations are subject to liability under the ATS should be addressed; for, if there is no liability for Arab Bank, the lengthy and costly litigation concerning whether corporate contacts like those alleged here suffice to impose liability would be pointless. In addition, a remand to the Court of Appeals would require prolonging litigation that already has caused significant diplomatic tensions with Jordan for more than a decade. So it is proper for this Court to decide whether corporations, or at least foreign corporations, are subject to liability in an ATS suit filed in a United States district court.

Before recognizing a common-law action under the ATS, federal courts must apply the test announced in Sosa. An initial, threshold question is whether a plaintiff can demonstrate that the alleged violation is “of a norm that is specific, universal, and obligatory.” 542 U.S., at 732, 124 S.Ct. 2739 (internal quotation marks omitted). And even assuming that, under international law, there is a specific norm that can be controlling, it must be determined further whether allowing this case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed. See id., at 732–733, and nn. 20–21, 124 S.Ct. 2739. . . .

It must be said that some of the considerations that pertain to determining whether there is a specific, universal, and obligatory norm that is established under international law are applicable as well in determining whether deference must be given to the political branches. For instance, the fact that the charters of some international tribunals and the provisions of some congressional statutes addressing international human-rights violations are specifically limited to individual wrongdoers, and thus foreclose corporate liability, has significant bearing both on the content of the norm being asserted and the question whether courts should defer to Congress. The two inquiries inform each other and are, to that extent, not altogether discrete.

With that introduction, it is proper now to turn first to the question whether there is an international-law norm imposing liability on corporations for acts of their employees that contravene fundamental human rights.

A

Petitioners and Arab Bank disagree as to whether corporate liability is a question of international law or only a question of judicial authority and discretion under domestic law. The dispute centers on a footnote in Sosa. In the course of holding that international norms must be “sufficiently definite to support a cause of action,” the
Court in *Sosa* noted that a “related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.” *Id.*, at 732, and n. 20, 124 S.Ct. 2739.

In the Court of Appeals’ decision in *Kiobel*, the majority opinion by Judge Cabranes interpreted footnote 20 to mean that corporate defendants may be held liable under the ATS only if there is a specific, universal, and obligatory norm that corporations are liable for violations of international law. 621 F.3d, at 127. . . . There is considerable force and weight to the position articulated by Judge Cabranes. And, assuming the Court of Appeals was correct that under *Sosa* corporate liability is a question of international law, there is an equally strong argument that petitioners cannot satisfy the high bar of demonstrating a specific, universal, and obligatory norm of liability for corporations. Indeed, Judge Leval agreed with the conclusion that international law does “not provide for any form of liability of corporations.” *Kiobel*, 621 F.3d, at 186.

1 . . . “The singular achievement of international law since the Second World War has come in the area of human rights,” where international law now imposes duties on individuals as well as nation-states. *Kiobel*, 621 F.3d, at 118.

It does not follow, however, that current principles of international law extend liability—civil or criminal—for human-rights violations to corporations or other artificial entities. This is confirmed by the fact that the charters of respective international criminal tribunals often exclude corporations from their jurisdictional reach.

The Charter for the Nuremberg Tribunal, created by the Allies after World War II, provided that the Tribunal had jurisdiction over natural persons only. See Agreement for Prosecution and Punishment of Major War Criminals of the European Axis, Art. 6, Aug. 8, 1945, 59 Stat. 1547, E.A.S. 472. Later, a United States Military Tribunal prosecuted 24 executives of the German corporation IG Farben. 7 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, pp. 11–60 (1952) (*The Farben Case*). Among other crimes, Farben’s employees had operated a slave-labor camp at Auschwitz and “knowingly and intentionally manufactured and provided” the poison gas used in the Nazi death chambers. *Kiobel*, 621 F.3d, at 135. Although the Military Tribunal “used the term ‘Farben’ as descriptive of the instrumentality of cohesion in the name of which” the crimes were committed, the Tribunal noted that “corporations act through individuals.” 8 *The Farben Case*, at 1153. Farben itself was not held liable. See *ibid*.

The jurisdictional reach of more recent international tribunals also has been limited to “natural persons.” See Statute of the International Criminal Tribunal for the

The international community’s conscious decision to limit the authority of these international tribunals to natural persons counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law.

2

In light of the sources just discussed, the sources petitioners rely on to support their contention that liability for corporations is well established as a matter of international law lend weak support to their position.

Petitioners first point to the International Convention for the Suppression of the Financing of Terrorism. This Convention imposes an obligation on “Each State Party” “to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity,” violated the Convention. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. Treaty Doc. No. 106–49, 2178 U.N.T.S. 232. But by its terms the Convention imposes its obligations only on nation-states “to enable” corporations to be held liable in certain circumstances under domestic law. The United States and other nations, including Jordan, may fulfill their obligations under the Convention by adopting detailed regulatory regimes governing financial institutions. . . . The Convention neither requires nor authorizes courts, without congressional authorization, to displace those detailed regulatory regimes by allowing common-law actions under the ATS. And nothing in the Convention’s text requires signatories to hold corporations liable in common-law tort actions raising claims under international law.

In addition, petitioners and their amici cite a few cases from other nations and the Special Tribunal for Lebanon that, according to petitioners, are examples of corporations being held liable for violations of international law. E.g., Brief for Petitioners 50–51. Yet even assuming that these cases are relevant examples, at most they demonstrate that corporate liability might be permissible under international law in some circumstances. That falls far short of establishing a specific, universal, and obligatory norm of corporate liability. . . .
Petitioners also contend that international law leaves questions of remedies open for determination under domestic law. As they see it, corporate liability is a remedial consideration, not a substantive principle that must be supported by a universal and obligatory norm if it is to be implemented under the ATS. According to petitioners, footnote 20 in *Sosa* does no more than recognize the distinction in international law between state and private actors. But, as just explained, there is a similar distinction in international law between corporations and natural persons. And it is far from obvious why the question whether corporations may be held liable for the international crimes of their employees is a mere question of remedy.

In any event, the Court need not resolve the questions whether corporate liability is a question that is governed by international law, or, if so, whether international law imposes liability on corporations. There is at least sufficient doubt on the point to turn to *Sosa*’s second question—whether the Judiciary must defer to Congress, allowing it to determine in the first instance whether that universal norm has been recognized and, if so, whether it is prudent and necessary to direct its enforcement in suits under the ATS.

B

*Sosa* is consistent with this Court’s general reluctance to extend judicially created private rights of action. The Court’s recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law.

This caution extends to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations.

Neither the language of the ATS nor the precedents interpreting it support an exception to these general principles in this context. In fact, the separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS. See *infra*, at 1406–1407. The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns. See *Kiobel*, 569 U.S., at 116–117, 133 S.Ct. 1659. That the ATS implicates foreign relations “is itself a reason for a high bar to new private causes of action for violating international law.” *Sosa, supra*, at 727, 124 S.Ct. 2739.

In light of the foreign-policy and separation-of-powers concerns inherent in ATS litigation, there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS. But the Court need not resolve that question in this case. Either way, absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign
Even in areas less fraught with foreign-policy consequences, the Court looks to analogous statutes for guidance on the appropriate boundaries of judge-made causes of action.

Here, the logical place to look for a statutory analogy to an ATS common-law action is the TVPA—the only cause of action under the ATS created by Congress rather than the courts. The TVPA reflects Congress’ considered judgment of the proper structure for a right of action under the ATS. Absent a compelling justification, courts should not deviate from that model.

The key feature of the TVPA for this case is that it limits liability to “individuals,” which, the Court has held, unambiguously limits liability to natural persons. *Mohamad v. Palestinian Authority*, 566 U.S. 449, 453–456, 132 S.Ct. 1702, 182 L.Ed.2d 720 (2012). Congress’ decision to exclude liability for corporations in actions brought under the TVPA is all but dispositive of the present case.

According to petitioners, the TVPA is not a useful guidepost because Congress limited liability under that statute to “individuals” out of concern for the sovereign immunity of foreign governmental entities, not out of general hesitation about corporate liability under the ATS. The argument seems to run as follows: The TVPA provides a right of action to victims of torture and extrajudicial killing, and under international law those human-rights violations require state action. For a corporation’s employees to violate these norms therefore would require the corporation to be an instrumentality of a foreign state or other sovereign entity. That concern is absent, petitioners insist, for crimes that lack a state-action requirement—for example, genocide, slavery, or, in the present case, the financing of terrorists.

At least two flaws inhere in this argument. First, in *Mohamad* the Court unanimously rejected petitioners’ account of the TVPA’s legislative history. 566 U.S., at 453, 458–460, 132 S.Ct. 1702. The Court instead read that history to demonstrate that Congress acted to exclude all corporate entities, not just the sovereign ones. *Id.*, at 459–460, 132 S.Ct. 1702 (citing Hearing and Markup on H.R. 1417 before the House Committee on Foreign Affairs and Its Subcommittee on Human Rights and International Organizations, 100th Cong., 2d Sess., 87–88 (1988)); see also 566 U.S., at 461–462, 132 S.Ct. 1702 (BREYER, J., concurring). Second, even for international-law norms that do not require state action, plaintiffs can still use corporations as surrogate defendants to challenge the conduct of foreign governments. In *Kiobel*, for example, the plaintiffs sought to hold a corporate defendant liable for “aiding and abetting the Nigerian Government in committing,” among other things, “crimes against humanity.” 569 U.S., at 114, 133 S.Ct. 1659 . . .
Petitioners contend that, instead of the TVPA, the most analogous statute here is the Anti–Terrorism Act. That Act does permit suits against corporate entities. See 18 U.S.C. §§ 2331(3), 2333(d)(2). In fact, in these suits some of the foreign plaintiffs joined their claims to those of United States nationals suing Arab Bank under the Anti–Terrorism Act. But the Anti–Terrorism Act provides a cause of action only to “national[s] of the United States,” and their “estate, survivors, or heirs.” § 2333(a). In contrast, the ATS is available only for claims brought by “an alien.” 28 U.S.C. § 1350. A statute that excludes foreign nationals (with the possible exception of foreign survivors or heirs) is an inapt analogy for a common-law cause of action that provides a remedy for foreign nationals only.

To the extent, furthermore, that the Anti–Terrorism Act is relevant it suggests that there should be no common-law action under the ATS for allegations like petitioners’. Otherwise, foreign plaintiffs could bypass Congress’ express limitations on liability under the Anti–Terrorism Act simply by bringing an ATS lawsuit. . . .

In any event, even if the Anti–Terrorism Act were a suitable model for an ATS suit, Congress’ decision in the TVPA to limit liability to individuals still demonstrates that there are two reasonable choices. In this area, that is dispositive—Congress, not the Judiciary, must decide whether to expand the scope of liability under the ATS to include foreign corporations.

Other considerations relevant to the exercise of judicial discretion also counsel against allowing liability under the ATS for foreign corporations, absent instructions from Congress to do so. It has not been shown that corporate liability under the ATS is essential to serve the goals of the statute. As to the question of adequate remedies, the ATS will seldom be the only way for plaintiffs to hold the perpetrators liable. See, e.g., 18 U.S.C. § 1091 (criminal prohibition on genocide); § 1595 (civil remedy for victims of slavery). And plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS. If the Court were to hold that foreign corporations have liability for international-law violations, then plaintiffs may well ignore the human perpetrators and concentrate instead on multinational corporate entities. . .

If, moreover, the Court were to hold that foreign corporations may be held liable under the ATS, that precedent-setting principle “would imply that other nations, also applying the law of nations, could hale our [corporations] into their courts for alleged violations of the law of nations.” Kibbel, 569 U.S., at 124, 133 S.Ct. 1659. This judicially mandated doctrine, in turn, could subject American corporations to an immediate, constant risk of claims seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world, all as determined in foreign courts, thereby “hinder[ing] global investment in developing economies, where it is most needed.” Brief for United States as Amicus Curiae in American Isuzu
The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable. Brief for United States as Amicus Curiae 7. But here, and in similar cases, the opposite is occurring.

Petitioners are foreign nationals seeking hundreds of millions of dollars in damages from a major Jordanian financial institution for injuries suffered in attacks by foreign terrorists in the Middle East. The only alleged connections to the United States are the CHIPS transactions in Arab Bank’s New York branch and a brief allegation regarding a charity in Texas. The Court of Appeals did not address, and the Court need not now decide, whether these allegations are sufficient to “touch and concern” the United States under Kiobel. See 569 U.S., at 124–125, 133 S.Ct. 1659.

At a minimum, the relatively minor connection between the terrorist attacks at issue in this case and the alleged conduct in the United States well illustrates the perils of extending the scope of ATS liability to foreign multinational corporations like Arab Bank. For 13 years, this litigation has “caused significant diplomatic tensions” with Jordan, a critical ally in one of the world’s most sensitive regions. Brief for United States as Amicus Curiae 30. “Jordan is a key counterterrorism partner, especially in the global campaign to defeat the Islamic State in Iraq and Syria.” Id., at 31. The United States explains that Arab Bank itself is “a constructive partner with the United States in working to prevent terrorist financing.” Id., at 32 (internal quotation marks omitted). Jordan considers the instant litigation to be a “grave affront” to its sovereignty. . . .

This is not the first time, furthermore, that a foreign sovereign has appeared in this Court to note its objections to ATS litigation. Sosa, 542 U.S., at 733, n. 21, 124 S.Ct. 2739 (noting objections by the European Commission and South Africa); Brief for the Federal Republic of Germany as Amicus Curiae in Kiobel v. Royal Dutch Petroleum Co., O.T. 2012, No. 10–1491, p. 1; Brief for the Government of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in No. 10–1491, p. 3. These are the very foreign-relations tensions the First Congress sought to avoid. . . .

Accordingly, the Court holds that foreign corporations may not be defendants in suits brought under the ATS.

III

With the ATS, the First Congress provided a federal remedy for a narrow category of international-law violations committed by individuals. Whether, more than two
centuries on, a similar remedy should be available against foreign corporations is similarly a decision that Congress must make.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice THOMAS, concurring.

I join the Court’s opinion in full because it correctly applies our precedents. I also agree with the points raised by my concurring colleagues. Courts should not be in the business of creating new causes of action under the Alien Tort Statute, see post, at 1412 – 1414 (GORSUCH, J., concurring in part and concurring in judgment), especially when it risks international strife, see post, at 1408 (ALITO, J., concurring in part and concurring in judgment). And the Alien Tort Statute likely does not apply to suits between foreign plaintiffs and foreign defendants. See post, at 1414 – 1419 (opinion of GORSUCH, J.).

Justice ALITO, concurring in part and concurring in the judgment.

Creating causes of action under the Alien Tort Statute against foreign corporate defendants would precipitate exactly the sort of diplomatic strife that the law was enacted to prevent. As a result, I agree with the Court that we should not take that step, and I join Parts I, II–B–1, and II–C of the opinion of the Court. I write separately to elaborate on why that outcome is compelled not only by “judicial caution,” ante, at 1407 (majority opinion), but also by the separation of powers.

II

For the reasons articulated by Justice Scalia in Sosa and by Justice GORSUCH today, I am not certain that Sosa was correctly decided. . . But even taking that decision on its own terms, this Court should not create causes of action under the ATS against foreign corporate defendants. As part of Sosa’s second step, a court should decline to create a cause of action as a matter of federal common law where the result would be to further, not avoid, diplomatic strife. Properly applied, that rule easily resolves the question presented by this case.* . .

. . . Federal courts should decline to create federal common law causes of action under Sosa’s second step whenever doing so would not materially advance the ATS’s objective of avoiding diplomatic strife. And applying that principle here, it is clear that federal courts should not create causes of action under the ATS against foreign

* Because this case involves a foreign corporation, we have no need to reach the question whether an alien may sue a United States corporation under the ATS. And since such a suit may generally be brought in federal court based on diversity jurisdiction, 28 U.S.C. § 1332(a)(2), it is unclear why ATS jurisdiction would be needed in that situation.
corporate defendants. All parties agree that customary international law does not require corporate liability as a general matter. See Brief for Petitioners 30; Brief for Respondent 22; see also ante, at 1427 (plurality opinion); post, at 1420 – 1421 (SOTOMAYOR, J., dissenting). But if customary international law does not require corporate liability, then declining to create it under the ATS cannot give other nations just cause for complaint against the United States.

To the contrary, ATS suits against foreign corporations may provoke—and, indeed, frequently have provoked—exactly the sort of diplomatic strife inimical to the fundamental purpose of the ATS. Some foreign states appear to interpret international law as foreclosing civil corporate liability for violations of the law of nations. . . . Even when states do not object to this sort of corporate liability as a legal matter, they may be concerned about ATS suits against their corporations for political reasons. For example, Jordan considers this suit “a direct affront” to its sovereignty and one that “risks destabilizing Jordan’s economy and undercutting one of the most stable and productive alliances the United States has in the Middle East.” Brief for Hashemite Kingdom of Jordan as Amicus Curiae 4. Courting these sorts of problems—which seem endemic to ATS litigation—was the opposite of what the First Congress had in mind. . . .

Justice GORSUCH, concurring in part and concurring in the judgment.

I am pleased to join the Court’s judgment and Parts I, II–B–1, and II–C of its opinion. Respectfully, though, I believe there are two more fundamental reasons why this lawsuit must be dismissed. A group of foreign plaintiffs wants a federal court to invent a new cause of action so they can sue another foreigner for allegedly breaching international norms. In any other context, a federal judge faced with a request like that would know exactly what to do with it: dismiss it out of hand. Not because the defendant happens to be a corporation instead of a human being. But because the job of creating new causes of action and navigating foreign policy disputes belongs to the political branches. For reasons passing understanding, federal courts have sometimes treated the Alien Tort Statute as a license to overlook these foundational principles. I would end ATS exceptionalism. We should refuse invitations to create new forms of legal liability. And we should not meddle in disputes between foreign citizens over international norms. . . .

. . . [Plaintiffs] want the federal courts to recognize a new cause of action, one that did not exist at the time of the statute’s adoption, one that Congress has never authorized. While their request might appear inconsistent with Sosa’s explanation of the ATS’s modest origin, the plaintiffs say that a caveat later in the opinion saves them. They point to a passage where the Court went on to suggest that the ATS may also afford federal judges “discretion to[ ] consider[ ] creating new cause[s] of action” if they “rest on a norm of international character accepted by the civilized world and
defined with a specificity comparable to the features of the [three] 18th-century” torts the Court already described. 542 U.S., at 725, 124 S.Ct. 2739.

I harbor serious doubts about Sosa’s suggestion. In our democracy the people’s elected representatives make the laws that govern them. Judges do not. The Constitution’s provisions insulating judges from political accountability may promote our ability to render impartial judgments in disputes between the people, but they do nothing to recommend us as policymakers for a large nation. Recognizing just this, our cases have held that when confronted with a request to fashion a new cause of action, “separation-of-powers principles are or should be central to the analysis.” Ziglar v. Abbasi, 582 U.S. ——, ——, 137 S.Ct. 1843, 1857, 198 L.Ed.2d 290 (2017). The first and most important question in that analysis “is ‘who should decide’ ..., Congress or the courts?” and the right answer “most often will be Congress.” Ibid. Deciding that, henceforth, persons like A who engage in certain conduct will be liable to persons like B is, in every meaningful sense, just like enacting a new law. And in our constitutional order the job of writing new laws belongs to Congress, not the courts. Adopting new causes of action may have been a “proper function for common-law courts,” but it is not appropriate “for federal tribunals” mindful of the limits of their constitutional authority. Alexander v. Sandoval, 532 U.S. 275, 287, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) (internal quotation marks omitted).

Nor can I see any reason to make a special exception for the ATS. As Sosa initially acknowledged, the ATS was designed as “a jurisdictional statute creating no new causes of action.” 542 U.S., at 724, 124 S.Ct. 2739; accord, ante, at 1392 (majority opinion). And I would have thought that the end of the matter. A statute that creates no new causes of action ... creates no new causes of action. . . .

But even accepting Sosa’s framework does not end the matter. As the Court acknowledges, there is a strong argument that “a proper application of Sosa would preclude courts from ever recognizing any new causes of action under the ATS.” Ante, at 1403. I believe that argument is correct. For the reasons just described, separation of powers considerations ordinarily require us to defer to Congress in the creation of new forms of liability. This Court hasn’t yet used Sosa’s assertion of discretionary authority to recognize a new cause of action, and I cannot imagine a sound reason, hundreds of years after the statute’s passage, to start now. For a court inclined to claim the discretion to enter this field, it is a discretion best exercised by staying out of it.

The context in which any Sosa discretion would be exercised confirms the wisdom of restraint. Sosa acknowledged that any decision to create a new cause of action would “inevitably [involve] an element of judgment about the practical consequences” that might follow. Id., at 732–733, 124 S.Ct. 2739. But because the point of such a claim would be to vindicate “a norm of international character,” id., at 725, 124 S.Ct. 2739 those “practical consequences” would likely involve questions of foreign affairs and...
national security—matters that implicate neither judicial expertise nor authority. It is for Congress to “define and punish ... Offences against the Law of Nations” and to regulate foreign commerce. U.S. Const. Art. I., § 8. And it is for the President to resolve diplomatic disputes and command the armed forces. Art. II. §§ 2–3. Foreign policy and national security decisions are “delicate, complex, and involve large elements of prophecy” for which “the Judiciary has neither aptitude, facilities[,] nor responsibility.” Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948) (Jackson, J.). And I find it difficult to imagine a case in which a federal court might safely conclude otherwise. Take this very lawsuit by way of example. The Kingdom of Jordan considers it to be “a ‘grave affront’ to its sovereignty,” and the State Department worries about its foreign policy implications. Ante, at 1432. Whether American interests justify the “practical consequence” of offending another nation in this way (or in worse ways yet) is a question that should be addressed “only by those directly responsible to the people whose welfare” such decisions “advance or imperil.” Waterman S.S. Corp., supra, at 111, 68 S.Ct. 431. So while I have no quarrel with the dissent’s observation, post, at 1426 – 1427, that lower federal courts are not free to overrule Sosa’s framework or treat it as optional, I do know that the analysis Sosa requires should come out the same way in virtually every case. If Sosa is right—and I am sure it is—that federal courts must “inevitably” exercise “an element of judgment” about delicate questions of foreign affairs when deciding whether to create a new cause of action, then judges should exercise good judgment by declining the project before we create real trouble.

II

Another independent problem lurks here. This is a suit by foreigners against a foreigner over the meaning of international norms. Respectfully, I do not think the original understanding of the ATS or our precedent permits federal courts to hear cases like this. At a minimum, both those considerations and simple common sense about the limits of the judicial function should lead federal courts to require a domestic defendant before agreeing to exercise any Sosa-generated discretion to entertain an ATS suit.

Start with the statute. What we call the Alien Tort Statute began as just one clause among many in § 9 of the Judiciary Act of 1789, which specified the jurisdiction of the federal courts. 1 Stat. 76–78. The ATS clause gave the district courts “cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” Like today’s recodified version, 28 U.S.C. § 1350, the original text of the ATS did not expressly call for a U.S. defendant. But I think it likely would have been understood to contain such a requirement when adopted.

That is because the First Congress passed the Judiciary Act in the shadow of the Constitution. The Act created the federal courts and vested them with statutory authority to entertain claims consistent with the newly ratified terms of Article III.
Meanwhile, under Article III, Congress could not have extended to federal courts the power to hear just any suit between two aliens (unless, for example, one was a diplomat). Diversity of citizenship was required. So, because Article III’s diversity-of-citizenship clause calls for a U.S. party, and because the ATS clause requires an alien plaintiff, it follows that an American defendant was needed for an ATS suit to proceed. . . .

Together with other provisions of the Judiciary Act, the ATS served [a] purpose. The law of nations required countries to ensure foreign citizens could obtain redress for wrongs committed by domestic defendants, whether “through criminal punishment, extradition, or a civil remedy.” Bellia & Clark, 78 U. Chi. L. Rev., at 509. Yet in 1789 this country had no comprehensive criminal code and no extradition treaty with Great Britain. Id., at 509–510. Section 11 achieved a partial solution to the problem by permitting civil diversity suits in federal court between aliens and domestic parties, but that provision required at least $500 in controversy. 1 Stat. 78; cf. 28 U.S.C. § 1332(a) (today’s minimum is $75,000). But, as Professors Bellia and Clark have explained, “[h]ad Congress stopped there, it would have omitted an important category of law of nations violations that threatened the peace of the United States: personal injuries that U.S. citizens inflicted upon aliens resulting in less than $500 in damages.” 78 U. Chi. L. Rev., at 509. So the ATS neatly filled the remaining gap by allowing aliens to sue in federal court for a tort in violation of the law of nations regardless of the amount in controversy. . . .

Any consideration of Sosa ‘s discretion must also account for proper limits on the judicial function. As discussed above, federal courts generally lack the institutional expertise and constitutional authority to oversee foreign policy and national security, and should be wary of straying where they do not belong. See supra, at 1394 – 1396. Yet there are degrees of institutional incompetence and constitutional evil. It is one thing for courts to assume the task of creating new causes of action to ensure our citizens abide by the law of nations and avoid reprisals against this country. It is altogether another thing for courts to punish foreign parties for conduct that could not be attributed to the United States and thereby risk reprisals against this country. If a foreign state or citizen violates an “international norm” in a way that offends another foreign state or citizen, the Constitution arms the President and Congress with ample means to address it. Or, if they think best, the political branches may choose to look the other way. But in all events, the decision to impose sanctions in disputes between foreigners over international norms is not ours to make. It is a decision that belongs to those answerable to the people and assigned by the Constitution to defend this nation. If they wish our help, they are free to enlist it, but we should not ever be in the business of elbowing our way in.

Justice SOTOMAYOR, with whom Justice GINSBURG, Justice BREYER, and Justice KAGAN join, dissenting.
The Court today holds that the Alien Tort Statute (ATS), 28 U.S.C. § 1350, categorically forecloses foreign corporate liability. In so doing, it absolves corporations from responsibility under the ATS for conscience-shocking behavior. I disagree both with the Court’s conclusion and its analytic approach. The text, history, and purpose of the ATS, as well as the long and consistent history of corporate liability in tort, confirm that tort claims for law-of-nations violations may be brought against corporations under the ATS. Nothing about the corporate form in itself raises foreign-policy concerns that require the Court, as a matter of common-law discretion, to immunize all foreign corporations from liability under the ATS, regardless of the specific law-of-nations violations alleged. I respectfully dissent.

I

The plurality assumes without deciding that whether corporations can be permissible defendants under the ATS turns on the first step of the two-part inquiry set out in Sosa v. Alvarez–Machain, 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004). But by asking whether there is “a specific, universal, and obligatory norm of liability for corporations” in international law, ante, at 1400, the plurality fundamentally misconceives how international law works and so misapplies the first step of Sosa.

A

In Sosa, the Court considered whether a Mexican citizen could recover under the ATS for a claim of arbitrary detention by a Mexican national who had been hired by the Drug Enforcement Administration to seize and transport him to the United States. See 542 U.S., at 697–698, 124 S.Ct. 2739. The Court held that the ATS permits federal courts to “recognize private causes of action for certain torts in violation of the law of nations,” id., at 724, 124 S.Ct. 2739 without the need for any “further congressional action,” id., at 712, 124 S.Ct. 2739. The Court then articulated a two-step framework to guide that inquiry. First, a court must determine whether the particular international-law norm alleged to have been violated is “accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms,” i.e., “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” Id., at 724–725, 124 S.Ct. 2739. Only if the norm is “specific, universal, and obligatory” may federal courts recognize a cause of action for its violation. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 117, 133 S.Ct. 1659, 185 L.Ed.2d 671 (2013) (quoting Sosa, 542 U.S., at 732, 124 S.Ct. 2739). Second, if that threshold hurdle is satisfied, a court should consider whether allowing a particular case to proceed is an appropriate exercise of judicial discretion. Sosa, 542 U.S., at 727–728, 732–733, 738, 124 S.Ct. 2739. Applying that framework, Sosa held that the alleged arbitrary detention claim at issue failed at step one because “a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.” Id., at 738, 124 S.Ct. 2739.
Sosa’s norm-specific first step is inapposite to the categorical question whether corporations may be sued under the ATS as a general matter. International law imposes certain obligations that are intended to govern the behavior of states and private actors. See id., at 714–715, 124 S.Ct. 2739; 1 Restatement (Third) of Foreign Relations Law of the United States, pt. II, Introductory Note, pp. 70–71 (1987) (Restatement). Among those obligations are substantive prohibitions on certain conduct thought to violate human rights, such as genocide, slavery, extrajudicial killing, and torture. See 2 Restatement § 702. Substantive prohibitions like these are the norms at which Sosa’s step-one inquiry is aimed and for which Sosa requires that there be sufficient international consensus.

Sosa does not, however, demand that there be sufficient international consensus with regard to the mechanisms of enforcing these norms, for enforcement is not a question with which customary international law is concerned. Although international law determines what substantive conduct violates the law of nations, it leaves the specific rules of how to enforce international-law norms and remedy their violation to states, which may act to impose liability collectively through treaties or independently via their domestic legal systems. . . .

The text of the ATS also reflects this distinction between prohibiting conduct and determining enforcement. The statute provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. The phrase “of the law of nations” modifies “violation,” not “civil action.” The statutory text thus requires only that the alleged conduct be specifically and universally condemned under international law, not that the civil action be of a type that the international community specifically and universally practices or endorses.

The plurality nonetheless allies itself with the view that international law supplies the rule of decision in this case based on its reading of footnote 20 in Sosa. That footnote sets out “[a] related consideration” to “the determination whether a norm is sufficiently definite to support a cause of action.” 542 U.S., at 732, and n. 20, 124 S.Ct. 2739. In full, it states:

. . . [T]he Court of Appeals mistook the meaning of footnote 20, which simply draws attention to the fact that, under international law, “the distinction between conduct that does and conduct that does not violate the law of nations can turn on whether the conduct is done by or on behalf of a State or by a private actor independently of a State.” *Kiobel*, 621 F.3d, at 177 (Leval, J., concurring in judgment).

The international-law norm against genocide, for example, imposes obligations on all actors. Acts of genocide thus violate the norm irrespective of whether they are committed privately or in concert with the state. . . . In contrast, other norms, like the prohibition on torture, require state action. Conduct thus qualifies as torture and violates the norm only when done “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” . . .

Footnote 20 in *Sosa* flags this distinction and instructs courts to consider whether there is “sufficient consensus” that, with respect to the particular conduct prohibited under “a given norm,” the type of defendant being sued can be alleged to have violated that specific norm. 542 U.S., at 732, n. 20, 124 S.Ct. 2739. Because footnote 20 contemplates a norm-specific inquiry, not a categorical one, it is irrelevant to the categorical question presented here. Assuming the prohibition against financing of terrorism is sufficiently “specific, universal, and obligatory” to satisfy the first step of *Sosa*, a question on which I would remand to the Court of Appeals, nothing in international law suggests a corporation may not violate it.

2

The plurality briefly acknowledges this critique of its reading of footnote 20, but nonetheless assumes the correctness of its approach because of its view that there exists a “distinction in international law between corporations and natural persons.” *Ante*, at 1402. The plurality attempts to substantiate this proposition by pointing to the charters of certain international criminal tribunals and noting that none was given jurisdiction over corporate defendants. That argument, however, confuses the substance of international law with how it has been enforced in particular contexts. . . .

Ultimately, the evidence on which the plurality relies does not prove that international law distinguishes between corporations and natural persons as a categorical matter. To the contrary, it proves only that states’ collective efforts to enforce various international-law norms have, to date, often focused on natural rather than corporate defendants.

In fact, careful review of states’ collective and individual enforcement efforts makes clear that corporations are subject to certain obligations under international law. . . .
Instead of asking whether there exists a specific, universal, and obligatory norm of corporate liability under international law, the relevant inquiry in response to the question presented here is whether there is any reason—under either international law or our domestic law—to distinguish between a corporation and a natural person who is alleged to have violated the law of nations under the ATS. As explained above, international law provides no such reason. See Kiobel, 621 F.3d, at 175 (Leval, J., concurring in judgment) (“[T]he answer international law furnishes is that it takes no position on the question”). Nor does domestic law. The text, history, and purpose of the ATS plainly support the conclusion that corporations may be held liable.

The conclusion that corporations may be held liable under the ATS for violations of the law of nations is not of recent vintage. More than a century ago, the Attorney General acknowledged that corporations could be held liable under the ATS. See 26 Op. Atty. Gen. 250, 252 (1907) (stating that citizens of Mexico could bring a claim under the ATS against a corporation, the American Rio Grande Land and Irrigation Company, for violating provisions of a treaty between the United States and Mexico).

In his concurrence, Justice GORSUCH urges courts to exercise restraint in recognizing causes of action under the ATS. But whether the ATS provides a cause of action for violations of the norms against genocide, crimes against humanity, and financing of terrorism is not the question the parties have asked the Court to decide. I therefore see no reason why it is necessary to delve into the propriety of creating new causes of action.

II

At its second step, Sosa cautions that courts should consider whether permitting a case to proceed is an appropriate exercise of judicial discretion in light of potential foreign-policy implications. See 542 U.S., at 727–728, 732–733, 738, 124 S.Ct. 2739. The plurality only assumes without deciding that international law does not impose liability on corporations, so it necessarily proceeds to Sosa’s second step. Here, too, its analysis is flawed.

A

Nothing about the corporate form in itself justifies categorically foreclosing corporate liability in all ATS actions.

As the United States urged at oral argument, when international friction arises, a court should respond with the doctrine that speaks directly to the friction’s source. In addition to the presumption against extraterritoriality, federal courts have at their disposal a number of tools to address any foreign-relations concerns that an ATS case may raise. This Court has held that a federal court may exercise personal jurisdiction over a foreign corporate defendant only if the corporation is incorporated
in the United States, has its principal place of business or is otherwise at home here, or if the activities giving rise to the lawsuit occurred or had their impact here. See *Daimler AG v. Bauman*, 571 U.S. 117, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014). Courts also can dismiss ATS suits for a plaintiff’s failure to exhaust the remedies available in her domestic forum, on *forum non conveniens* grounds, for reasons of international comity, or when asked to do so by the State Department. See *Kiobel*, 569 U.S., at 133, 133 S.Ct. 1659 (BREYER, J., concurring in judgment); *Sosa*, 542 U.S., at 733, n. 21, 124 S.Ct. 2739.

Several of these doctrines might be implicated in this case, and I would remand for the Second Circuit to address them in the first instance. The majority, however, prefers to use a sledgehammer to crack a nut. I see no need for such an ill-fitting and disproportionate response. Foreclosing foreign corporate liability in all ATS actions, irrespective of circumstance or norm, is simply too broad a response to case-specific concerns that can be addressed via other means.

B

1

The Court urges that “[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.” *Ante*, at 1403. I agree that the political branches are well poised to assess the foreign-policy concerns attending ATS litigation, which is why I give significant weight to the fact that the Executive Branch, in briefs signed by the Solicitor General and State Department Legal Advisor, has twice urged the Court to reach exactly the opposite conclusion of the one embraced by the majority. . . . At oral argument in this case, the United States told the Court that it saw no “sound reason to categorically exclude corporate liability.” Tr. of Oral Arg. 29. It explained that another country would hold the United States accountable for not providing a remedy against a corporate defendant in a “classic” ATS case, such as one involving a “foreign officia[1] injured in the United States,” id., at 32–33, and suggested that foreclosing the ability to recover from a corporation actually would raise “the possibility of friction,” id., at 33. Notably, the Government’s position that categorically barring corporate liability under the ATS is wrong has been consistent across two administrations led by Presidents of different political parties.

Likewise, when Members of Congress have weighed in on the question whether corporations can be proper defendants in an ATS suit, it has been to advise the Court against the rule it now adopts. . . . Congress has also never seen it necessary to immunize corporations from ATS liability even though corporations have been named as defendants in ATS suits for years. . . .

Given the deference to the political branches that *Sosa* encourages, I find it puzzling that the Court so eagerly departs from the express assessment of the Executive Branch and Members of Congress that corporations can be defendants in ATS actions.
The plurality instead purports to defer to Congress by relying heavily on the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U.S.C. § 1350, to support its categorical bar. See ante, at 1429 – 1430. The TVPA makes available to all individuals, not just foreign citizens, a civil cause of action for torture and extrajudicial killing that may be brought against natural persons. See Mohamad v. Palestinian Authority, 566 U.S. 449, 451–452, 454, 132 S.Ct. 1702, 182 L.Ed.2d 720 (2012). The plurality extrapolates from Congress’ decision regarding the scope of liability under the TVPA a rule that it contends should govern all ATS suits. See ante, at 1429 – 1430. But there is no reason to think that because Congress saw fit to permit suits only against natural persons for two specific law-of-nations violations, Congress meant to foreclose corporate liability for all law-of-nations violations. The plurality’s contrary conclusion ignores the critical textual differences between the ATS and TVPA, as well as the TVPA’s legislative history, which emphasizes Congress’ intent to leave the ATS undisturbed.

On its face, the TVPA is different from the ATS in several significant ways: It is focused on only two law-of-nations violations, torture and extrajudicial killing; it makes a cause of action available to all individuals, not just foreign citizens; and it uses the word “individual” to delineate who may be liable. See 28 U.S.C. § 1350 note. The ATS, by contrast, is concerned with all law-of-nations violations generally, makes a cause of action available only to foreign citizens, and is silent as to who may be liable. Because of the textual differences between the two statutes, the Court unanimously concluded in Mohamad that the ATS “offers no comparative value” in ascertaining the scope of liability under the TVPA. 566 U.S., at 458, 132 S.Ct. 1702. It makes little sense, then, to conclude that the TVPA has dispositive comparative value in discerning the scope of liability under the ATS.

Furthermore, Congress repeatedly emphasized in the House and Senate Reports on the TVPA that the statute was meant to supplement the ATS, not replace or cabin it. . . .

Lacking any affirmative evidence that Congress’ decision to limit liability under the TVPA to natural persons indicates a legislative judgment about the proper scope of liability in all ATS suits, the plurality focuses its efforts on dismissing petitioners’ argument that Congress limited TVPA liability to natural persons to harmonize the statute with the Foreign Sovereign Immunities Act of 1976 (FSIA), which generally immunizes foreign states from suit. See ante, at 1430. Contrary to the plurality’s contention, however, this Court did not reject petitioners’ account of the TVPA’s legislative history in Mohamad. In fact, that decision agreed that the legislative history “clarif[es] that the Act does not encompass liability against foreign states.”
What Mohamad rejected was the argument that because the TVPA forecloses liability against foreign states, it necessarily permits liability against corporations. In concluding that the TVPA encompasses only natural persons, Mohamad took no position on why Congress excluded organizations from its reach.

To infer from the TVPA that no corporation may ever be held liable under the ATS for any violation of any international-law norm, moreover, ignores that Congress has elsewhere imposed liability on corporations for conduct prohibited by customary international law. For instance, the Antiterrorism Act of 1990 (ATA) created a civil cause of action for U.S. nationals injured by an act of international terrorism and expressly provides for corporate liability. 18 U.S.C. § 2333.

Finally, the plurality offers a set of “[o]ther considerations relevant to the exercise of judicial discretion” that it concludes “counsel against allowing liability under the ATS for foreign corporations.” Ante, at 1405. None is persuasive.

First, the plurality asserts that “[i]t has not been shown that corporate liability under the ATS is essential to serve the goals of the statute” because “the ATS will seldom be the only way for plaintiffs to hold the perpetrators liable,” and because “plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS.” Ibid. This Court has never previously required that, to maintain an ATS action, a plaintiff must show that the ATS is the exclusive means by which to hold the alleged perpetrator liable and that no relief can be had from other parties. Such requirements extend far beyond the inquiry Sosa contemplated and are without any basis in the statutory text.

Moreover, even if there are other grounds on which a suit alleging conduct constituting a law-of-nations violation can be brought, such as a state-law tort claim, the First Congress created the ATS because it wanted foreign plaintiffs to be able to bring their claims in federal court and sue for law-of-nations violations. A suit for state-law battery, even if based on the same alleged conduct, is not the equivalent of a federal suit for torture; the latter contributes to the uptake of international human rights norms, and the former does not. . .

Furthermore, holding corporations accountable for violating the human rights of foreign citizens when those violations touch and concern the United States may well be necessary to avoid the international tension with which the First Congress was concerned. Consider again the assault on the Secretary of the French Legation in Philadelphia by a French adventurer. See supra, at 1426; ante, at 1415 (majority opinion). Would the diplomatic strife that followed really have been any less charged if a corporation had sent its agent to accost the Secretary? Or, consider piracy. If a corporation owned a fleet of vessels and directed them to seize other ships in U.S.
waters, there no doubt would be calls to hold the corporation to account. See Kiobel, 621 F.3d, at 156, and n. 10 (observing that “Somali pirates essentially operate as limited partnerships”). Finally, take, for example, a corporation posing as a job-placement agency that actually traffics in persons, forcibly transporting foreign nationals to the United States for exploitation and profiting from their abuse. Not only are the individual employees of that business less likely to be able fully to compensate successful ATS plaintiffs, but holding only individual employees liable does not impose accountability for the institution-wide disregard for human rights. Absent a corporate sanction, that harm will persist unremedied. Immunizing the corporation from suit under the ATS merely because it is a corporation, even though the violations stemmed directly from corporate policy and practice, might cause serious diplomatic friction.

Second, the plurality expresses concern that if foreign corporations are subject to liability under the ATS, other nations could hale American corporations into court and subject them “to an immediate, constant risk of claims seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world,” a prospect that will deter American corporations from investing in developing economies. Ante, at 1405. The plurality offers no empirical evidence to support these alarmist conjectures, which is especially telling given that plaintiffs have been filing ATS suits against foreign corporations in United States courts for years. . . .

* * *

In sum, international law establishes what conduct violates the law of nations, and specifies whether, to constitute a law-of-nations violation, the alleged conduct must be undertaken by a particular type of actor. But it is federal common law that determines whether corporations may, as a general matter, be held liable in tort for law-of-nations violations. Applying that framework here, I would hold that the ATS does not categorically foreclose corporate liability. Tort actions against corporations have long been available under federal common law. Whatever the majority might think of the value of modern-day ATS litigation, it has identified nothing to support its conclusion that “foreign corporate defendants create unique problems” that necessitate a categorical rule barring all foreign corporate liability. Ante, at 1406.

Absent any reason to believe that the corporate form in itself raises serious foreign-policy concerns, and given the repeated urging from the Executive Branch and Members of Congress that the Court need not and should not foreclose corporate liability, I would reverse the decision of the Court of Appeals for the Second Circuit and remand for further proceedings, including whether the allegations here sufficiently touch and concern the United States, see Kiobel, 569 U.S., at 124–125, 133 S.Ct. 1659 and whether the international-law norms alleged to have been violated by Arab Bank—the prohibitions on genocide, crimes against humanity, and financing of terrorism—are of sufficiently definite content and universal acceptance
to give rise to a cause of action under the ATS.

III

In categorically barring all suits against foreign corporations under the ATS, the Court ensures that foreign corporations—entities capable of wrongdoing under our domestic law—remain immune from liability for human rights abuses, however egregious they may be.

Corporations can be and often are a force for innovation and growth. Many of their contributions to society should be celebrated. But the unique power that corporations wield can be used both for good and for bad. Just as corporations can increase the capacity for production, so, too, some can increase the capacity for suffering. Consider the genocide that took upwards of 800,000 lives in Rwanda in 1994, which was fueled by incendiary rhetoric delivered via a private radio station, the Radio Télévision Libre des Mille Collines (RTLM). Men spoke the hateful words, but the RTLM made their widespread influence possible.

There can be, and sometimes is, a profit motive for these types of abuses. Although the market does not price all externalities, the law does. We recognize as much when we permit a civil suit to proceed against a paint company that long knew its product contained lead yet continued to sell it to families, or against an oil company that failed to undertake the requisite safety checks on a pipeline that subsequently burst. There is no reason why a different approach should obtain in the human rights context.

Immunizing corporations that violate human rights from liability under the ATS undermines the system of accountability for law-of-nations violations that the First Congress endeavored to impose. It allows these entities to take advantage of the significant benefits of the corporate form and enjoy fundamental rights, see, e.g., Citizens United v. Federal Election Comm’n, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ——, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014), without having to shoulder attendant fundamental responsibilities.

I respectfully dissent.
On April 13, 2018, the Syrian regime used chemical weapons in the eastern Damascus suburb of Duma. United States Government Assessment of the Assad Regime’s Chemical Weapons Use (Apr. 13, 2018) ("USG Assessment"), https://www.whitehouse.gov/briefings-statements/united-states-government-assessment-assad-regimes-chemical-weapons-use/. At the time, the intelligence community had assessed that the regime carried out this attack with chlorine gas and perhaps with the nerve agent sarin as well. Briefing by Secretary Mattis on U.S. Strikes in Syria (Apr. 13, 2018) ("Mattis Briefing"), https://www.defense.gov/News/Transcripts/Transcript-View/Article/1493658/briefing-by-secretary-mattis-on-us-strikes-in-syria/. The attack, part of a weeks-long offensive by the regime, killed dozens of innocent men, women, and children, and injured hundreds. USG Assessment. In this use of chemical weapons, the regime sought to “terrorize and subdue” the civilian population, as well as opposition fighters. Id.

On April 7, 2018, the Syrian regime used chemical weapons in the eastern Damascus suburb of Duma. United States Government Assessment of the Assad Regime’s Chemical Weapons Use (Apr. 13, 2018) ("USG Assessment"), https://www.whitehouse.gov/briefings-statements/united-states-government-assessment-assad-regimes-chemical-weapons-use/. At the time, the intelligence community had assessed that the regime carried out this attack with chlorine gas and perhaps with the nerve agent sarin as well. Briefing by Secretary Mattis on U.S. Strikes in Syria (Apr. 13, 2018) ("Mattis Briefing"), https://www.defense.gov/News/Transcripts/Transcript-View/Article/1493658/briefing-by-secretary-mattis-on-us-strikes-in-syria/. The attack, part of a weeks-long offensive by the regime, killed dozens of innocent men, women, and children, and injured hundreds. USG Assessment. In this use of chemical weapons, the regime sought to “terrorize and subdue” the civilian population, as well as opposition fighters. Id.

The Syrian government’s latest use of chemical weapons followed a string of other chemical-weapons attacks. The regime used sarin in November 2017 in the suburbs of Damascus and in an April 2017 attack on Khan Shaykhun. Id. It also dropped chlorine bombs three times in just over a week last spring and launched at least four chlorine rockets in January in Duma. Id. The U.S. government has assessed that the regime used chemical weapons on many other occasions—it has identified more than fifteen chemical-weapons uses since June 2017 in the suburb of East Ghutah alone—and believes that the regime, unless deterred, will continue to make use of such
On April 13, 2018, in coordination with the United Kingdom and France, the United States attacked three facilities associated with Syria’s use of chemical weapons: the Barzeh Research and Development Center, the Him Shinshar chemical-weapons storage facility, and the Him Shinshar chemical-weapons bunker facility. In total, the United States launched 105 missiles from naval platforms in the Red Sea, the Northern Arabian Gulf, and the Eastern Mediterranean. DoD Briefing (statement of Lt. Gen. McKenzie). The missiles all hit their targets within a few minutes of each other, although the full operation lasted several hours. Id.

The United States deconflicted the airspace with Russia in advance and selected the sites to reduce the risk of hitting Russian forces. The strikes were timed to hit their targets around 4 a.m. local time to reduce casualties. The sites were chosen to minimize collateral damage, while inflicting damage on the chemical-weapons program.

The allied attacks followed a limited U.S. strike in April 2017, in the wake of Syria’s use of sarin against civilians in Khan Shaykhun. While the April 2017 strike targeted the airfield from which the Syrian regime delivered the weapons, the 2018 attacks were focused on the long-term degradation of Syria’s capability to research, develop, and use chemical and biological weapons.

III.

We now explain our analysis of the April 13, 2018 Syrian strikes in light of our precedents. In evaluating whether a proposed military action falls within the President’s authority under Article II of the Constitution, we have distilled our precedents into two inquiries. First, we consider whether the President could reasonably determine that the action serves important national interests. Second, we consider whether the “anticipated nature, scope and duration” of the conflict might rise to the level of a war under the Constitution. Prior to the Syrian strikes, we applied this framework to conclude that the proposed Syrian operation would fall within the President’s constitutional authority.

A.

This Office has recognized that a broad set of interests would justify use of the President’s Article II authority to direct military force. These interests understandably grant the President a great deal of discretion. The Commander in Chief bears great responsibility for the use of the armed forces and for putting U.S. forces in harm’s way. We would not expect that any President would use this power without a substantial basis for believing that a proposed operation is necessary to advance important interests of the Nation. The aim of this inquiry is not to evaluate
the worth of the interests at stake—a question more of policy than of law—but rather, to set forth the justifications for the President’s use of military force and to situate those interests within a framework of prior precedents.

In our past opinions, this Office has identified a number of different interests that have supported sending U.S. forces into harm’s way, including . . . the protection of U.S. persons and property . . .; assistance to allies . . .; support for the United Nations . . .; and promoting regional stability . . .

In recent years, we have also identified the U.S. interest in mitigating humanitarian disasters. See Memorandum Opinion for the Counsel to the President, from Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Re: Authority to Use Military Force in Iraq at 20-24 (Dec. 30, 2014) (“Iraq Deployment”). With respect to Syria, in April 2017, the President identified the U.S. interest in preventing the use and proliferation of chemical weapons, see Letter to Congressional Leaders on United States Military Operations in Syria, 2017 Daily Comp. Pres. Doc. 201700244, at 1 (Apr. 8, 2017) (“2017 Congressional Notification”). As explained below, these interests too are consistent with those that the President and his advisers have relied upon in the past.

The President identified three interests in support of the April 2018 Syria strikes: the promotion of regional stability, the prevention of a worsening of the region’s humanitarian catastrophe, and the deterrence of the use and proliferation of chemical weapons. See Letter to Congressional Leaders on United States Military Operations in Syria, 2018 Daily Comp. Pres. Doc. 201800243, at 1 (Apr. 15, 2018). Prior to the attack, we advised that the President could reasonably rely on these national interests to authorize air strikes against particular facilities associated with Syria’s chemical-weapons program without congressional authorization.

As discussed above, Presidents have deployed U.S. troops on multiple occasions in the interest of promoting regional stability and preventing the spread of an ongoing conflict. While the United States is not the world’s policeman, as its power has grown, the breadth of its regional interests has expanded and threats to national interests posed by foreign disorder have increased. ...

Here, the President could reasonably determine that Syria’s use of chemical weapons in the ongoing civil war threatens to undermine further peace and security of the Near East, a region that remains critically important to our national security. Syria’s possession and use of chemical weapons have increased the risk that others will gain access to them. See Daniel R. Coats, Director of National Intelligence, Statement for the Record: Worldwide Threat Assessment of the US Intelligence Community at 7 (Feb. 13, 2018), https://www.dni.gov/files/documents/Newsroom/Testimonies/2018-ATA—Unclassified-SSCI.pdf (“Worldwide Threat Assessment”) (“Biological and chemical materials and technologies—almost always dual-use—move easily in the
globalized economy, as do personnel with the scientific expertise to design and use them for legitimate and illegitimate purposes.”). The proliferation of such weapons to other countries with fragile governments or to terrorist groups could further spread conflict and disorder within the region. See Council on Foreign Relations, A Conversation with Nikki Haley (Mar. 29, 2017), https://www.cfr.org/event/conversation-nikki-haley (“Let’s really look at the fact that if we don’t have a stable Syria, we don’t have a stable region.”); Remarks to the United Nations General Assembly in New York City, 2017 Daily Comp. Pres. Doc. 201700658, at 5 (Sept. 19, 2017), (“No society can be safe if banned chemical weapons are allowed to spread.”); United States Mission to the United Nations, Ambassador Haley Delivers Remarks at a UN Security Council Meeting on Nonproliferation (Jan. 18, 2018), https://usun.state.gov/highlights/8276 (“The regimes that most threaten the world today with weapons of mass destruction are also the source of different kinds of security challenges. They deny human rights and fundamental freedoms to their people. They promote regional instability. They aid terrorists and militant groups. They promote conflict that eventually spills over its borders.”). The United States has a direct interest in ensuring that others in the region not look to Syria’s use of chemical weapons as a successful precedent for twenty-first-century conflicts.

Moreover, the regime’s use of chemical weapons is a particularly egregious part of a broader destabilizing conflict. The civil war in Syria directly empowered the growth of the Islamic State of Iraq and Syria (“ISIS”), a terrorist threat that has required the deployment of over 2,000 U.S. troops. See Jim Garmone, DoD News, Defense Media Activity, Pentagon Announces Troop Levels in Iraq, Syria (Dec. 6, 2017), https://www.defense.gov/News/Article/Article/1390079/pentagon-announces-troop-levels-in-iraq-syria/. The instability in Syria has had a direct and marked impact upon the national security of close American allies and partners, including Iraq, Israel, Jordan, Lebanon, and Turkey, all of which border Syria and have had to deal with unrest from the conflict. Rand Corporation, Research Brief, The Conflict in Syria: Understanding and Avoiding Regional Spillover Effects at 1 (2014), https://www.rand.org/content/dam/rand/pubs/research_briefs/RB9700/RB9785/RAND_RB9785.pdf; see also generally Leila Vignal, The Changing Borders and Borderlands of Syria in a Time of Conflict, 93 Int’l Affairs 809 (2017). In addition, the power vacuum in Syria has provided an opportunity for Russia and Iran to deepen their presence in the region and engage in activities that have had a directly adverse impact on the interests and security of the United States and its allies in the area. See President Donald J. Trump, National Security Strategy of the United States of America at 49 (Dec. 2017), https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf (“Rival states are filling vacuums created by state collapse and prolonged regional conflict.”).

The Syrian regime’s continued attacks on civilians have also contributed to the displacement of civilians and thus deepened the instability in the region. . . .
In directing the strikes, the President also relied on the national interest in mitigating a humanitarian crisis. In analyzing proposed military operations in Iraq designed to prevent genocidal acts against the Yazidis and otherwise to protect civilians at risk, we advised that humanitarian concerns could provide a basis for the President’s use of force under his constitutional authority. See Iraq Deployment at 20-24. Given the role of the United States in the international community and the humanitarian interests of its people, Presidents have on many occasions deployed troops to prevent or mitigate humanitarian disasters. See, e.g., Letter to Congressional Leaders on Deployment of United States Armed Forces to Haiti (Sept. 18, 1994), 2 Pub. Papers of Pres. William J. Clinton 1572, 1572 (1994) (“The deployment of U.S. Armed Forces into Haiti is justified by United States national security interests” including “stop[ping] the brutal atrocities that threaten tens of thousands of Haitians”); Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya (Mar. 21, 2011), 1 Pub. Papers of Pres. Barack Obama 280, 280 (2011) (notifying Congress of the commencement of operations “to prevent a humanitarian catastrophe”).

In some cases, humanitarian concerns have been a significant, or even the primary, interest served by U.S. military operations. In 1992, when President George H.W. Bush announced that he had ordered the deployment of “a substantial American force” to Somalia during a widespread famine, he described it as “a mission that can ease suffering and save lives.” Address to the Nation on the Situation in Somalia (Dec. 4, 1992), 2 Pub. Papers of Pres. George Bush 2174, 2174-75 (1992-93); see also id. at 2175 (“Let me be very clear: Our mission is humanitarian[.]”); Somalia Deployment, 16 Op. O.L.C. at 6 (“I am informed that the mission of those troops will be to restore the flow of humanitarian relief to those areas of Somalia most affected by famine and disease[.]”). Similarly, military intervention in Bosnia included the establishment of a no-fly zone, maintained for roughly two-and-a-half years, in support of a humanitarian air drop. . . . President Clinton also framed U.S. peacekeeping efforts in humanitarian terms. Clinton Address to the Nation at 1784 (“In fulfilling this mission, we will have the chance to help stop the killing of innocent civilians, especially children[.]”).

The Syrian regime’s use of chemical weapons has contributed to the ongoing humanitarian crisis in Syria. As discussed above, civilians fleeing from the strikes become refugees needing assistance. . . . But even where the attacks do not displace civilians, the nature of chemical weapons alone makes their use a humanitarian issue. See Remarks on Syria Operations at 1 (“The evil and the despicable attack left mothers and fathers, infants and children, thrashing in pain and gasping for air. These are not the actions of a man; they are crimes of a monster instead.”). As the President explained after the Syrian strike, “[c]hemical weapons are uniquely dangerous not only because they inflict gruesome suffering, but because even small amounts can unleash widespread devastation.” Id.
In carrying out these strikes, the President also relied on the national interest in deterring the use and proliferation of chemical weapons. The President previously relied upon this interest in ordering the April 2017 airstrike in response to the attack on Khan Shaykhun. See 2017 Congressional Notification (stating that the President directed a strike on the Shayrat military airfield to “degrade the Syrian military’s ability to conduct further chemical weapons attacks and to dissuade the Syrian regime from using or proliferating chemical weapons, thereby promoting the stability of the region and averting a worsening of the region’s current humanitarian catastrophe”). While we are unaware of prior Presidents justifying U.S. military actions based on this interest as a matter of domestic law, we believe that it is consistent with those that have justified previous uses of force. The United States has long and consistently objected to the use and proliferation of chemical weapons. See Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, adopted June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65; The Axis Is Warned Against the Use of Poison Gas (June 8, 1948), Pub. Papers of Pres. Franklin D. Roosevelt 242, 243 (1943) (“Use of [chemical] weapons has been outlawed by the general opinion of civilized mankind.”). For nearly thirty years, Presidents have repeatedly declared the proliferation of chemical weapons to be a national emergency. See Notice Regarding the Continuation of the National Emergency with Respect to the Proliferation of Weapons of Mass Destruction, 82 Fed. Reg. 51,971 (Nov. 6, 2017) (most recent order continuing in effect an emergency first declared in Executive Order 12735 of Nov. 16, 1990). In 1997, the United States ratified the Chemical Weapons Convention, which prohibits the use, development, production, and retention of chemical weapons. See Remarks on Senate Ratification of the Chemical Weapons Convention and an Exchange with Reporters (Apr. 24, 1997), 1 Pub. Papers of Pres. William J. Clinton 480, 480 (1997) (stating that ratification will permit the end of “a century that began with the horror of chemical weapons in World War I much closer to the elimination of those kinds of weapons”). And Congress cited Iraq’s development of chemical weapons as one of the reasons in support of authorizing the use of military force against Iraq in 2002. See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, 1498 (“Whereas the efforts of international weapons inspectors, United States intelligence agencies, and Iraqi defectors led to the discovery that Iraq had large stockpiles of chemical weapons”).

The United States has also repeatedly joined international condemnation of Syria’s use of chemical weapons. See, e.g., S.C. Res. 2319 (Nov. 17, 2016) (“Condemning again in the strongest terms any use of any toxic chemicals as a weapon in the Syrian Arab Republic and expressing alarm that civilians continue to be killed and injured by toxic chemicals as weapons in the Syrian Arab Republic”) . . .

Despite near-global condemnation, a small number of state and non-state actors persist in using chemical weapons, and Syria’s continued use of them “threatens to desensitize the world to their use and proliferation, weaken prohibitions against their
use, and increase the likelihood that additional states will acquire and use these weapons.” *USG Assessment*. Last year’s U.S. strike did not fully dissuade the Syrian regime from continuing to use chemical weapons. And Russia recently used a nerve agent in an attempted assassination in the United Kingdom, “showing an uncommonly brazen disregard for the taboo against chemical weapons.” . . . ISIS has also acquired and deployed chemical weapons. *See Worldwide Threat Assessment* at 8. The United States has a weighty interest in deterring the use of these weapons.

In sum, the President here was faced with a grave risk to regional stability, a serious and growing humanitarian disaster, and the use of weapons repeatedly condemned by the United States and other members of the international community. In such circumstances, the President could reasonably conclude that these interests provided a basis for airstrikes on facilities that support the regime’s use of chemical weapons. . . . We believe that these interests fall comfortably within those that our Office has previously relied upon in concluding that the President had appropriately exercised his authority under Article II, and we so advised prior to the Syrian strikes.

B.

We next considered whether the President could expect the Syrian operations to rise to the level of a war requiring congressional authorization. Such a determination “requires a fact-specific assessment of the ‘anticipated nature, scope, and duration’ of the planned military operations.” . . . As we have previously explained, military operations will likely rise to the level of a war only when characterized by “prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.” *Id.*

We have found that previous military deployments did not rise to the level of a war even where the deployment was substantial. For example, the United States spent two years enforcing a no-fly zone, protecting United Nations (“UN”) peacekeeping forces, and securing safe areas for civilians in Bosnia, all without congressional authorization. . . . Similarly, in 1994, we approved a plan to deploy as many as 20,000 troops to Haiti. . . . We also approved a U.S.-led air campaign in Libya in 2011 that lasted for over a week and involved the use of over 600 missiles and precision-guided munitions. . . . In none of these cases did we conclude that prior congressional authorization was necessary.

In reviewing these deployments, we considered whether U.S. forces were likely to encounter significant armed resistance and whether they were likely to “suffer or inflict substantial casualties as a result of the deployment.” *Haiti Deployment I*, 18 Op. O.L.C. at 179. In this regard, we have looked closely at whether an operation will require the introduction of U.S. forces directly into the hostilities, particularly with respect to the deployment of ground troops. The deployment of ground troops “is an essentially different, and more problematic, type of intervention,” given “the
difficulties of disengaging ground forces from situations of conflict, and the attendant risk that hostilities will escalate.” Bosnia Deployment, 19 Op. O.L.C. at 333. In such circumstances, “arguably there is a greater need for approval at the outset for the commitment of such troops to such situations.” Id.

. . . [E]ven in cases involving the deployment of ground troops, we have found that the expected hostilities would fall short of a war requiring congressional authorization.

With these precedents in mind, we concluded that the proposed Syrian operation, in its nature, scope, and duration, fell far short of the kinds of engagements approved by prior Presidents under Article II. First, in contrast with some prior deployments, the United States did not plan to employ any U.S. ground troops, and in fact, no U.S. airplanes crossed into Syrian airspace. Where, as here, the operation would proceed without the introduction of U.S. troops into harm’s way, we were unlikely to be “confronted with circumstances in which the exercise of [Congress’s] power to declare war is effectively foreclosed.” Bosnia Deployment, 19 Op. O.L.C. at 333.

Second, the mission was sharply circumscribed. This was not a case where the military operation served an open-ended goal. Rather, the President selected three military targets with the aim of degrading and destroying the Syrian regime’s ability to produce and use chemical weapons. . . . And the strikes were planned to minimize casualties, further demonstrating the limited nature of the operation. . . . Those aspects both underscored the “limited mission” and the fact that the operation was not “aim[ed] at the conquest or occupation of territory nor even, as did the planned Haitian intervention, at imposing through military means a change in the character of a political regime.” . . .

Third, the duration of the planned operation was expected to be very short. In fact, the entire operation lasted several hours, and the actual attack lasted only a few minutes. . . .

Standing on its own, the attack on three Syrian chemical-weapons facilities was not the kind of “prolonged and substantial military engagement” that would amount to a war. Libya Deployment at *8. We did not, however, measure the engagement based solely upon the contours of the first strike. Rather, in evaluating the expected scope of hostilities, we also considered the risk that an initial strike could escalate into a broader conflict against Syria or its allies, such as Russia and Iran. . . . But the fact that there is some risk to American personnel or some risk of escalation does not itself mean that the operation amounts to a war . . . We therefore considered the likelihood of escalation and the measures that the United States intended to take to minimize that risk.

We were advised that escalation was unlikely (and reviewed materials supporting
that judgment), and we took note of several measures that had been taken to reduce the risk of escalation by Syria or Russia. The targets were selected because of their particular connections to the chemical-weapons program, underscoring that the strikes sought to address the extraordinary threat posed by the use of chemical weapons and did not seek to precipitate a regime change. . . . The targets were chosen to minimize civilian casualties . . ., and the strikes took place at a time that further reduced the threat to civilians . . ., again reducing the likelihood that Syria would retaliate. The targets were also chosen to minimize risk to Russian soldiers, and deconfliction processes were used, two steps that reduced the possibility that Russia would respond militarily. . . . Given the absence of ground troops, the limited mission and time frame, and the efforts to avoid escalation, the anticipated nature, scope, and duration of these airstrikes did not rise to the level of a “war” for constitutional purposes.

IV.

For the foregoing reasons, we concluded that the President had the constitutional authority to carry out the proposed airstrikes on three Syrian chemical-weapons facilities. The President reasonably determined that this operation would further important national interests in promoting regional stability, preventing the worsening of the region’s humanitarian catastrophe, and deterring the use and proliferation of chemical weapons. Further, the anticipated nature, scope, and duration of the operations were sufficiently limited that they did not amount to war in the constitutional sense and therefore did not require prior congressional approval.

Steven A. Engel
Assistant Attorney General
Office of Legal Counsel
Supreme Court of the United States.

Budha Ismail JAM, et al., Petitioners

v.

INTERNATIONAL FINANCE CORPORATION

139 S. Ct. 759

Argued October 31, 2018

Decided February 27, 2019

Chief Justice ROBERTS delivered the opinion of the Court.

The International Organizations Immunities Act of 1945 grants international organizations such as the World Bank and the World Health Organization the “same immunity from suit ... as is enjoyed by foreign governments.” 22 U.S.C. § 288a(b). At the time the IOIA was enacted, foreign governments enjoyed virtually absolute immunity from suit. Today that immunity is more limited. Most significantly, foreign governments are not immune from actions based upon certain kinds of commercial activity in which they engage. This case requires us to determine whether the IOIA grants international organizations the virtually absolute immunity foreign governments enjoyed when the IOIA was enacted, or the more limited immunity they enjoy today. . . .

I

In the wake of World War II, the United States and many of its allies joined together to establish a host of new international organizations. Those organizations, which included the United Nations, the International Monetary Fund, and the World Bank, were designed to allow member countries to collectively pursue goals such as stabilizing the international economy, rebuilding war-torn nations, and maintaining international peace and security.

Anticipating that those and other international organizations would locate their headquarters in the United States, Congress passed the International Organizations Immunities Act of 1945, 59 Stat. 669. The Act grants international organizations a set of privileges and immunities, such as immunity from search and exemption from property taxes. 22 U.S.C. §§ 288a(c), 288c.

The IOIA defines certain privileges and immunities by reference to comparable privileges and immunities enjoyed by foreign governments. For example, with respect to customs duties and the treatment of official communications, the Act grants international
organizations the privileges and immunities that are “accorded under similar circumstances to foreign governments.” § 288a(d). The provision at issue in this case provides that international organizations “shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments.” § 288a(b).

The IOIA authorizes the President to withhold, withdraw, condition, or limit the privileges and immunities it grants in light of the functions performed by any given international organization. § 288. Those privileges and immunities can also be expanded or restricted by a particular organization’s founding charter. . . .

The International Finance Corporation is an international development bank headquartered in Washington, D. C. The IFC is designated as an international organization under the IOIA. Exec. Order No. 10680, 3 C.F.R. 86 (1957); see 22 U.S.C. §§ 282, 288. One hundred eighty-four countries, including the United States, are members of the IFC.

The IFC is charged with furthering economic development “by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas, thus supplementing the activities of” the World Bank. Articles of Agreement of the International Finance Corporation, Art. I, Dec. 5, 1955, 7 U.S.T. 2193, T. I. A. S. No. 3620. Whereas the World Bank primarily provides loans and grants to developing countries for public-sector projects, the IFC finances private-sector development projects that cannot otherwise attract capital on reasonable terms. See Art. I(i), ibid. In 2018, the IFC provided some $23 billion in such financing.

The IFC expects its loan recipients to adhere to a set of performance standards designed to “avoid, mitigate, and manage risks and impacts” associated with development projects. IFC Performance Standards on Environmental and Social Sustainability, Jan. 1, 2012, p. 2, ¶1. Those standards are usually more stringent than any established by local law. The IFC includes the standards in its loan agreements and enforces them through an internal review process. Brief for Respondent 10.

In 2008, the IFC loaned $450 million to Coastal Gujarat Power Limited, a company located in India. The loan helped finance the construction of a coal-fired power plant in the state of Gujarat. Under the terms of the loan agreement, Coastal Gujarat was required to comply with an environmental and social action plan designed to protect areas around the plant from damage. The agreement allowed the IFC to revoke financial support for the project if Coastal Gujarat failed to abide by the terms of the agreement.

The project did not go smoothly. According to the IFC’s internal audit, Coastal Gujarat did not comply with the environmental and social action plan in constructing and operating the plant. The audit report criticized the IFC for inadequately supervising the project.

In 2015, a group of farmers and fishermen who live near the plant, as well as a local village,
sued the IFC in the United States District Court for the District of Columbia. They claimed that pollution from the plant, such as coal dust, ash, and water from the plant’s cooling system, had destroyed or contaminated much of the surrounding air, land, and water. Relying on the audit report, they asserted several causes of action against the IFC, including negligence, nuisance, trespass, and breach of contract. The IFC maintained that it was immune from suit under the IOIA and moved to dismiss for lack of subject matter jurisdiction.

The District Court, applying D. C. Circuit precedent, concluded that the IFC was immune from suit because the IOIA grants international organizations the virtually absolute immunity that foreign governments enjoyed when the IOIA was enacted. . . . The D. C. Circuit affirmed in light of its precedent. 860 F.3d 703 (2017). Judge Pillard wrote separately to say that she would have decided the question differently were she writing on a clean slate. . . Judge Pillard also noted that the Third Circuit had expressly declined to follow the D. C. Circuit’s approach. See OSS Nokalva, Inc. v. European Space Agency, 617 F.3d 756 (CA3 2010). . . .

II

The IFC contends that the IOIA grants international organizations the “same immunity” from suit that foreign governments enjoyed in 1945. Petitioners argue that it instead grants international organizations the “same immunity” from suit that foreign governments enjoy today. We think petitioners have the better reading of the statute.

A

The language of the IOIA more naturally lends itself to petitioners’ reading. In granting international organizations the “same immunity” from suit “as is enjoyed by foreign governments,” the Act seems to continuously link the immunity of international organizations to that of foreign governments, so as to ensure ongoing parity between the two. The statute could otherwise have simply stated that international organizations “shall enjoy absolute immunity from suit,” or specified some other fixed level of immunity. Other provisions of the IOIA, such as the one making the property and assets of international organizations “immune from search,” use such noncomparative language to define immunities in a static way. 22 U.S.C. § 288a(c). Or the statute could have specified that it was incorporating the law of foreign sovereign immunity as it existed on a particular date. See, e.g., Energy Policy Act of 1992, 30 U.S.C. § 242(c)(1) (certain land patents “shall provide for surface use to the same extent as is provided under applicable law prior to October 24, 1992”). Because the IOIA does neither of those things, we think the “same as” formulation is best understood to make international organization immunity and foreign
sovereign immunity continuously equivalent.

The IFC objects that the IOIA is different because the purpose of international organization immunity is entirely distinct from the purpose of foreign sovereign immunity. Foreign sovereign immunity, the IFC argues, is grounded in the mutual respect of sovereigns and serves the ends of international comity and reciprocity. The purpose of international organization immunity, on the other hand, is to allow such organizations to freely pursue the collective goals of member countries without undue interference from the courts of any one member country. The IFC therefore urges that the IOIA should not be read to tether international organization immunity to changing foreign sovereign immunity.

But that gets the inquiry backward. We ordinarily assume, “absent a clearly expressed legislative intention to the contrary,” that “the legislative purpose is expressed by the ordinary meaning of the words used.” American Tobacco Co. v. Patterson, 456 U.S. 63, 68, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982) (alterations omitted). Whatever the ultimate purpose of international organization immunity may be—the IOIA does not address that question—the immediate purpose of the immunity provision is expressed in language that Congress typically uses to make one thing continuously equivalent to another.

B

The more natural reading of the IOIA is confirmed by a canon of statutory interpretation that was well established when the IOIA was drafted. According to the “reference” canon, when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises. . . . For example, a statute allowing a company to “collect the same tolls and enjoy the same privileges” as other companies incorporates the law governing tolls and privileges as it exists at any given moment. Snell v. Chicago, 133 Ill. 413, 437–439, 24 N.E. 532, 537 (1890). In contrast, a statute that refers to another statute by specific title or section number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted, without any subsequent amendments. See, e.g., Culver v. People ex rel. Kochersperger, 161 Ill. 89, 95–99, 43 N.E. 812, 814–815 (1896) (tax-assessment statute referring to specific article of another statute does not adopt subsequent amendments to that article). . . .

. . . The IOIA’s reference to the immunity enjoyed by foreign governments is a general rather than specific reference. The reference is to an external body of potentially evolving law—the law of foreign sovereign immunity—not to a specific provision of another statute. The IOIA should therefore be understood to link the law of international organization immunity to the law of foreign sovereign immunity, so that the one develops in tandem with the other.
The IFC contends that the IOIA’s reference to the immunity enjoyed by foreign governments is not a general reference to an external body of law, but is instead a specific reference to a common law concept that had a fixed meaning when the IOIA was enacted in 1945. . . .

But in 1945, the “immunity enjoyed by foreign governments” did not mean “virtually absolute immunity.” The phrase is not a term of art with substantive content, such as “fraud” or “forgery.” . . . It is rather a concept that can be given scope and content only by reference to the rules governing foreign sovereign immunity. It is true that under the rules applicable in 1945, the extent of immunity from suit was virtually absolute, while under the rules applicable today, it is more limited. But in 1945, as today, the IOIA’s instruction to grant international organizations the immunity “enjoyed by foreign governments” is an instruction to look up the applicable rules of foreign sovereign immunity, wherever those rules may be found—the common law, the law of nations, or a statute. In other words, it is a general reference to an external body of (potentially evolving) law.

C

In ruling for the IFC, the D. C. Circuit relied upon its prior decision in [Atkinson v. Inter-American Development Bank, 156 F.3d 1335 (CADC 1998).] . . . The Atkinson court focused on the provision of the IOIA that gives the President the authority to withhold, withdraw, condition, or limit the otherwise applicable privileges and immunities of an international organization, “in the light of the functions performed by any such international organization.” 22 U.S.C. § 288. The court understood that provision to “delegate to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances.” Atkinson, 156 F.3d at 1341. That delegation, the court reasoned, “undermine[d]” the view that Congress intended the IOIA to in effect update itself by incorporating changes in the law governing foreign sovereign immunity. Ibid.

We do not agree. The delegation provision is most naturally read to allow the President to modify, on a case-by-case basis, the immunity rules that would otherwise apply to a particular international organization. The statute authorizes the President to take action with respect to a single organization—“any such organization”—in light of the functions performed by “such organization.” 28 U.S.C. § 288. The text suggests retail rather than wholesale action, and that is in fact how authority under § 288 has been exercised in the past. . . . In any event, the fact that the President has power to modify otherwise applicable immunity rules is perfectly compatible with the notion that those rules might themselves change over time in light of developments in the law governing foreign sovereign immunity.
The D.C. Circuit in Atkinson also gave no consideration to the opinion of the State Department, whose views in this area ordinarily receive “special attention.” . . . Shortly after the FSIA was enacted, the State Department took the position that the immunity rules of the IOIA and the FSIA were now “linked.” Letter from Detlev F. Vagts, Office of the Legal Adviser, to Robert M. Carswell, Jr., Senior Legal Advisor, OAS, p. 2 (Mar. 24, 1977). The Department reaffirmed that view during subsequent administrations, and it has reaffirmed it again here. That longstanding view further bolsters our understanding of the IOIA’s immunity provision.

D

The IFC argues that interpreting the IOIA’s immunity provision to grant anything less than absolute immunity would lead to a number of undesirable results.

The IFC first contends that affording international organizations only restrictive immunity would defeat the purpose of granting them immunity in the first place. Allowing international organizations to be sued in one member country’s courts would in effect allow that member to second-guess the collective decisions of the others. It would also expose international organizations to money damages, which would in turn make it more difficult and expensive for them to fulfill their missions. The IFC argues that this problem is especially acute for international development banks. Because those banks use the tools of commerce to achieve their objectives, they may be subject to suit under the FSIA’s commercial activity exception for most or all of their core activities, unlike foreign sovereigns. According to the IFC, allowing such suits would bring a flood of foreign-plaintiff litigation into U.S. courts, raising many of the same foreign-relations concerns that we identified when considering similar litigation under the Alien Tort Statute. . . .

The IFC’s concerns are inflated. To begin, the privileges and immunities accorded by the IOIA are only default rules. If the work of a given international organization would be impaired by restrictive immunity, the organization’s charter can always specify a different level of immunity. The charters of many international organizations do just that. See, e.g., Convention on Privileges and Immunities of the United Nations, Art. II, § 2, Feb. 13, 1946, 21 U.S.T. 1422, T. I. A. S. No. 6900 (“The United Nations ... shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity”); Articles of Agreement of the International Monetary Fund, Art. IX, § 3, Dec. 27, 1945, 60 Stat. 1413, T. I. A. S. No. 1501 (IMF enjoys “immunity from every form of judicial process except to the extent that it expressly waives its immunity”). Notably, the IFC’s own charter does not state that the IFC is absolutely immune from suit.

Nor is there good reason to think that restrictive immunity would expose international development banks to excessive liability. As an initial matter, it is not clear that the lending
activity of all development banks qualifies as commercial activity within the meaning of the FSIA. To be considered “commercial,” an activity must be “the type” of activity “by which a private party engages in” trade or commerce. Republic of Argentina v. Wellover, Inc., 504 U.S. 607, 614, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992); see 28 U.S.C. § 1603(d).

As the Government suggested at oral argument, the lending activity of at least some development banks, such as those that make conditional loans to governments, may not qualify as “commercial” under the FSIA. See Tr. of Oral Arg. 27–30.

And even if an international development bank’s lending activity does qualify as commercial, that does not mean the organization is automatically subject to suit. The FSIA includes other requirements that must also be met. For one thing, the commercial activity must have a sufficient nexus to the United States. See 28 U.S.C. §§ 1603, 1605(a)(2). For another, a lawsuit must be “based upon” either the commercial activity itself or acts performed in connection with the commercial activity. See § 1605(a)(2). Thus, if the “gravamen” of a lawsuit is tortious activity abroad, the suit is not “based upon” commercial activity within the meaning of the FSIA’s commercial activity exception. See OBB Personenverkehr AG v. Sachs, 577 U.S. ———, ———– ———, 136 S.Ct. 390, 395–396, 193 L.Ed.2d 479 (2015); Saudi Arabia v. Nelson, 507 U.S. 349, 356–359, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). At oral argument in this case, the Government stated that it has “serious doubts” whether petitioners’ suit, which largely concerns allegedly tortious conduct in India, would satisfy the “based upon” requirement. Tr. of Oral Arg. 25–26. In short, restrictive immunity hardly means unlimited exposure to suit for international organizations.

* * *

The International Organizations Immunities Act grants international organizations the “same immunity” from suit “as is enjoyed by foreign governments” at any given time. Today, that means that the Foreign Sovereign Immunities Act governs the immunity of international organizations. The International Finance Corporation is therefore not absolutely immune from suit.

The judgment of the United States Court of Appeals for the D. C. Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KAVANAUGH took no part in the consideration or decision of this case.

Justice BREYER, dissenting.

The International Organizations Immunities Act of 1945 extends to international
organizations “the same immunity from suit and every form of judicial process as is enjoyed by foreign governments.” 22 U.S.C. § 288a(b). The majority, resting primarily upon the statute’s language and canons of interpretation, holds that the statute’s reference to “immunity” moves with the times. As a consequence, the statute no longer allows international organizations immunity from lawsuits arising from their commercial activities. In my view, the statute grants international organizations that immunity—just as foreign governments possessed that immunity when Congress enacted the statute in 1945. In reaching this conclusion, I rest more heavily than does the majority upon the statute’s history, its context, its purposes, and its consequences. . . .

II

. . . Congressional reports explain that Congress, acting in the immediate aftermath of World War II, intended the Immunities Act to serve two related purposes. First, it would “enabl[e] this country to fulfill its commitments in connection with its membership in international organizations.” . . . And second, it would “facilitate fully the functioning of international organizations in this country.” . . .

. . . Consider, for example, the mission of UNRRA [United Nations Relief and Rehabilitation Administration]. The United States and other nations created that organization in 1943, as the end of World War II seemed in sight. . . . By the time Congress passed the Immunities Act in 1945, UNRRA had obtained and shipped billions of pounds of food, clothing, and other relief supplies to children freed from Nazi concentration camps and to others in serious need. . . .

These activities involved contracts, often made in the United States, for transportation and for numerous commercial goods. . . . Indeed, the United States conditioned its participation on UNRRA’s spending what amounted to 67% of its budget on purchases of goods and services in the United States. . . . Would Congress, believing that it had provided the absolute immunity that UNRRA sought and expected, also have intended that the statute be interpreted “dynamically,” thereby removing most of the immunity that it had then provided—not only potentially from UNRRA itself but also from other future international organizations with UNRRA-like objectives and tasks? . . .

III

Now consider the consequences that the majority’s reading of the statute will likely produce—consequences that run counter to the statute’s basic purposes. Although the UN
itself is no longer dependent upon the Immunities Act, many other organizations, such as the FAO and several multilateral development banks, continue to rely upon that Act to secure immunity, for the United States has never ratified treaties nor enacted statutes that might extend the necessary immunity, commercial and noncommercial alike.

A

The “commercial activity” exception to the sovereign immunity of foreign nations is broad. We have said that a foreign state engages in “commercial activity” when it exercises “‘powers that can also be exercised by private citizens.’” Republic of Argentina, 504 U.S. at 614, 112 S.Ct. 2160. Thus, “a contract to buy army boots or even bullets is a ‘commercial’ activity,” even if the government enters into the contract to “fulfil[l] uniquely sovereign objectives.” Ibid.; see also H. R. Rep. No. 94–1487, p. 16 (1976) (“[A] transaction to obtain goods or services from private parties would not lose its otherwise commercial character because it was entered into in connection with an [Agency for International Development] program”).

As a result of the majority’s interpretation, many of the international organizations to which the United States belongs will discover that they are now exposed to civil lawsuits based on their (U.S.-law-defined) commercial activity. And because “commercial activity” may well have a broad definition, today’s holding will at the very least create uncertainty for organizations involved in finance, such as the World Bank, the Inter-American Development Bank, and the Multilateral Investment Guarantee Agency. The core functions of these organizations are at least arguably “commercial” in nature; the organizations exist to promote international development by investing in foreign companies and projects across the world. . . . The World Bank, for example, encourages development either by guaranteeing private loans or by providing financing from its own funds if private capital is not available. See Articles of Agreement of the International Bank for Reconstruction and Development, Art. I, Dec. 27, 1945, 60 Stat. 1440, T. I. A. S. No. 1502.

Some of these organizations, including the International Finance Corporation (IFC), themselves believe they do not need broad immunity in commercial areas, and they have waived it. See, e.g., Articles of Agreement of the International Finance Corporation, Art. 6, § 3, Dec. 5, 1955, 7 U.S.T. 2214, 264 U. N. T. S. 118 (implemented by 22 U.S.C. § 282g); see also 860 F.3d 703, 706 (CADC 2017). But today’s decision will affect them nonetheless. That is because courts have long interpreted their waivers in a manner that protects their core objectives. . . . But today’s decision exposes these organizations to potential liability in all cases arising from their commercial activities, without regard to the scope of their waivers. . . .
The majority’s opinion will have a further important consequence—one that more clearly contradicts the statute’s objectives and overall scheme. It concerns the important goal of weeding out lawsuits that are likely bad or harmful—those likely to produce rules of law that interfere with an international organization’s public interest tasks.

To understand its importance, consider again that international organizations, unlike foreign nations, are multilateral, with members from many different nations. See H. R. Rep. No. 1203, at 1. That multilateralism is threatened if one nation alone, through application of its own liability rules (by nonexpert judges), can shape the policy choices or actions that an international organization believes it must take or refrain from taking. Yet that is the effect of the majority’s interpretation. By restricting the immunity that international organizations enjoy, it “opens the door to divided decisions of the courts of different member states,” including U.S. courts, “passing judgment on the rules, regulations, and decisions of the international bodies.” . . .

Many international organizations, fully aware of their moral (if not legal) obligations to prevent harm to others and to compensate individuals when they do cause harm, have sought to fulfill those obligations without compromising their ability to operate effectively. Some, as I have said, waive their immunity in U.S. courts at least in part. . . .

Other organizations have attempted to solve the liability/immunity problem by turning to multilateral, not single-nation, solutions. The UN, for instance, has agreed to “make provisions for appropriate modes of settlement of . . . disputes arising out of contracts or other disputes of a private law character.” Convention on Privileges and Immunities of the United Nations, Art. VIII, § 29, 21 U.S.T. 1438, T. I. A. S. No. 6900. It generally does so by agreeing to submit commercial disputes to arbitration. . . . Other organizations, including the IFC, have set up alternative accountability schemes to resolve disputes that might otherwise end up in court. . . .

These alternatives may sometimes prove inadequate. And, if so, the Immunities Act itself offers a way for America’s Executive Branch to set aside an organization’s immunity and to allow a lawsuit to proceed in U.S. courts. The Act grants to the President the authority to “withhold,” to “withdraw,” to “condition,” or to “limit” any of the Act’s “immunities” in “light of the functions performed by any such international organization.” 22 U.S.C. § 288.

Were we to interpret the statute statically, then, the default rule would be immunity in suits arising from an organization’s commercial activities. But the Executive Branch would have the power to withdraw immunity where immunity is not warranted, as the Act itself provides. And in making that determination, it could consider whether allowing the lawsuit
would jeopardize the organization’s ability to carry out its public interest tasks. In a word, the Executive Branch, under a static interpretation, would have the authority needed to separate lawsuit sheep from lawsuit goats.

Under the majority’s interpretation, by contrast, there is no such flexibility. The Executive does not have the power to tailor immunity by taking into account the risk of a lawsuit’s unjustified interference with institutional objectives or other institutional needs. Rather, the majority’s holding takes away an international organization’s immunity (in cases arising from “commercial” activities) across the board. And without a new statute, there is no way to restore it, in whole or in part. Nothing in the present statute gives the Executive, the courts, or the organization the power to restore immunity, or to tailor any resulting potential liability, where a lawsuit threatens seriously to interfere with an organization’s legitimate needs and goals.

. . . It seems highly unlikely that Congress would have wanted this result. . .

With respect, I dissent.