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The Private Law of Terror

Aaron D. Simowitz*

ABSTRACT

When we think of the law of terrorism, we think of the state and the terrorists. We think of the many steps that states take to detect, deter, and destroy terrorist groups. But that frame captures only a small piece of the overall picture of terrorism regulation. Regulation directed at and shaped by terrorism policy has inserted itself into many facets of private life. These interventions distort private law in predictable ways. These interventions are always presented as exceptions: terrorism is different, so they say. But these exceptions are generative. Terrorism has become the testing ground for new and different ideas about how to regulate private conduct—ideas that have a tendency to spread beyond the borders of terror policy.

This Article examines disparate areas of U.S. law, each of which has been shaped by terror regulation. In tort, civil procedure, and banking, terror regulation has distorted the background principles guiding the intervention of law in private conduct. In tort law, terror regulation has led to a profound loosening of causation requirements, based on import of concepts from criminal law into civil liability. In civil procedure, federal statutes have expanded the power of courts to hear private terror suits and curbed the discretion of courts to stay or dismiss them. In banking law, terror regulation has led to a dramatic expansion of know-your-customer laws, as well as a persistent private litigation against multi-national banks.

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Terror regulation shapes each of these bodies of law in similar and predictable ways. The state feels justified in inserting itself into private relationships more forcefully than in any other area of regulation. Protections owed to defendants are loosened, as are limitations on the power of courts. These innovations do not remain comfortably at home in the law of terrorism. They spread into other areas of private law once they have been broached in the private law of terrorism.

The private law of terror is likely to follow a different path than the public law of terror, however. In public law, terrorism legislation has displayed a "one-way ratchet" effect, making areas like criminal, immigration, and sanctions law consistently more punitive. In private law, powerful and well-organized interests, like banks and other financial intermediaries, are able to push back. Their intervention creates a different problem in private law—the rise of legislation that targets a single defendant or even a single lawsuit, like the Iran Threat Reduction Act or the recently passed Promoting Security and Justice For Victims of Terrorism Act. These laws undermine rule of law values, even if they target legitimate policy goals.

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INTRODUCTION

Terrorism makes law. On October 7, 1985, terrorists seized the cruise ship *Achille Lauro*. They killed a passenger, Leon Klinghoffer, and threw his body and wheelchair into the ocean.[1] On September 11, 2001, terrorists flew two passenger jets into the World Trade Center towers in New York City, destroying both and killing nearly three thousand people.[2] Later reporting suggested that the world's ten largest terrorist groups had a combined annual budget of over $4 billion.[3]

These and other acts of terror led to significant and well-documented reforms in many areas of public law, including criminal law, immigration, sanctions, and privacy.[4] But terrorism also makes private law.[5] Private law regulates the interactions between private parties—how they contract or litigate, for example.[6] Private law shapes our lives as much as public law[7]

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1. *See* Gill v. Arab Bank, PLC, 893 F. Supp. 2d 474, 494 (E.D.N.Y. 2012) ("[L]egislative history indicates that the civil remedy provision became law in large part because of the Klinghoffer litigation." (citing Klinghoffer v. S.N.C. Achille Lauro, 739 F. Supp. 854 (S.D.N.Y. 1990), *vacated*, 937 F.2d 44 (2d Cir. 1991))).

2. *See* Maryam Jamshidi, *How the War on Terror Is Transforming Private U.S. Law*, 96 WASH. U. L. REV. 559, 561 n.3 (2018) (noting that the Anti-Terrorism Act (ATA) "was passed before September 11th, 2001 but remained largely dormant before the attacks" (citing Seth N. Stratton, *Taking Terrorists to Court: A Practical Evaluation of Civil Suits Against Terrorists Under the Anti-Terrorism Act*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 27, 32 (2004))).

3. *See The World's 10 Richest Terrorist Organizations*, FORBES (Dec. 12, 2014, 1:00 PM), https://bit.ly/3tWbkPN.

4. *See* Jamshidi, *supra* note 2, at 559. Public law regulates interactions between the private citizen and the state—how people are taxed, policed, and surveilled, for example. Terrorism has become, for good or ill, a source of innovation in public law. *See, e.g.*, Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CAL. L. REV. 991, 994 (2018) ("[S]ome courts are experimenting with new approaches to review and manage government claims that information is too sensitive to be exposed in court.").

5. *See* Jamshidi, *supra* note 2, at 559 ("In thinking about the War on Terror's impact on U.S. law, what most likely comes to mind are its corrosive effects on public law, including criminal law, immigration, and constitutional law. What is less appreciated is whether and how the fight against terrorism has also impacted private law.").

6. *See* John C. Reitz, *Centennial World Congress on Comparative Law: Political Economy as a Major Architectural Principle of Public Law*, 75 TUL. L. REV. 1121, 1142 (2001) ("[T]he dividing line between private and public law states that private law governs relationships among equals, but public law governs the relationship between the state and its citizens when they are not in a relation of equality because the citizens are to be treated as subjects of the state." (citing UWE WESEL, JURISTISCHE WELTKUNDE 118–19 (1984); A.L. MAKOVSKY & S.A. KHOKHLOV, INTRODUCTORY COMMENTARY TO THE CIVIL CODE OF THE RUSSIAN FEDERATION, at lvi, lvi–xcix (Peter B. Maggs & A.N. Zhiltsov eds. & trans., 1997))).

7. *See generally* JOHN GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW (2018) (arguing that private law pervades our personal lives).

but receives far less attention, perhaps because the hand of the state is more hidden.

Terror regulation has followed a predictable path through private law reform, mirroring its path through public law.[8] First, law reform due to terrorism is presented as an exception to the rule: "terrorism is different."[9] Second, the exceptional becomes normalized. Third, the innovations that were once justified as needed for the exceptional threat of terrorism, now routine, spread to other areas of law. The exceptional becomes normal, then common.[10] These innovations, once broached in the law of terrorism, do not necessarily stay there. Terrorism regulation has become a laboratory and proving ground.

This pattern has held across multiple areas of private law, including tort, civil procedure, and banking law. The path of terror regulation through private law is at an inflection point. Legislatures have made increasingly rapid changes to multiple areas of private law and are now considering whether and how to export those innovations into areas of private law having little or nothing to do with terrorism.

For example, Congress enacted the Foreign Sovereign Immunities Act (FSIA) in 1976 to govern when sovereigns and their organs or instrumentalities would be subject to suit and to seizure of assets as if they were private parties.[11] Since then, every amendment except one has sought to strip immunity for acts of terrorism. Congress amended the FSIA in 1996 (twice), 1998, 2002, and in 2015.[12] In 2015, Congress enacted the Justice Against Sponsors of Terrorism Act (JASTA)[13] over President

8. The effect of terror regulation on public law has been profound and highly visible, scrutinized in both the popular press and academic literature. *See, e.g.*, Charlie Savage, *What Could a Domestic Terrorism Law Do?*, THE NEW YORK TIMES (Aug. 7, 2019), https://nyti.ms/3byeOBL; Shirin Sinnar, *Protecting Rights From Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013).

9. *See* THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 5 (2002) ("The struggle against global terrorism is different from any other war in our history . . . . Our priority will be first to disrupt and destroy terrorist organizations of global reach and attack their leadership; command, control, and communications; material support; and finances.").

10. *See, e.g.*, Rebecca Ananian-Welsh & George Williams, *The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia*, 38 MELB. U. L. REV. 362, 362 (2014) ("Australia's federal Parliament has enacted a range of exceptional measures aimed at preventing terrorism. These measures include control orders, which were not designed or intended for use outside of the terrorism context. What has followed, however, has been the migration of this measure to new contexts in the states and territories . . . .").

11. *See* 28 U.S.C.A. §§ 1602–1611 (West).

12. *See infra* Section I.B.2.

13. *See* Justice Against Sponsors of Terrorism Act ("JASTA"), Pub. L. No. 114-222, 130 Stat. 852 (2016) (codified at 28 U.S.C.A. § 1605B (West)).

Obama's veto[14] and the objections of the State Department.[15] Among other innovations, JASTA imputed to the sovereign the tortious conduct, anywhere in the world, of "any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency . . . ."[16]

The immunity stripping innovations of JASTA have now become the template for immunity stripping bills currently before Congress. Three bills have used JASTA as a model for stripping immunity from the People's Republic of China for acts associated with the COVID-19 pandemic.[17] The Homeland and Cyber Threat Act (HACT Act)[18] used JASTA as a model for stripping immunity for cyber threats.[19] This form of private law innovation was introduced to regulate terrorism, became normalized over time, and is now poised to expand into other areas of law that have little to do with terrorism.

Congress has not been idle in other areas of private law. When Congress enacted the Anti-Terrorism Act (ATA) in 1990,[20] it included numerous innovations, including significant alterations to tort law, damages, and forum choice.[21] In the past two years, Congress has amended the ATA twice to create the most aggressive jurisdictional "long-arm"

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14. *See* Presidential Message to the Senate Returning Without Approval the Justice Against Sponsors of Terrorism Act, 2016 DAILY COMP. PRES. DOC. 628 (Sept. 23, 2016) (stating that JASTA may "reduce the effectiveness of our response to indications that a foreign government has taken steps outside our borders to provide support for terrorism, by taking such matters out of the hands of national security and foreign policy professionals and placing them in the hands of private litigants and courts").

15. *See Justice Against Sponsors of Terrorism Act: Hearing on S. 2040 Before the H. Comm. on the Judiciary*, 114th Cong. (2016) (statement of Anne W. Paterson, Assistant Secretary of State for Near Eastern Affairs) ("While these efforts will continue, I am here today to explain why the Administration believes that JASTA is not the right path forward.").

16. 28 U.S.C.A. § 1605B(b)(2) (West).

17. *See* Chimène Keitner, *Missouri's Lawsuit Doesn't Abrogate China's Sovereign Immunity*, JUST SEC. (Apr. 22, 2020), https://bit.ly/3tYdPkH ("Congress cannot create an exception to foreign sovereign immunity every time the United States is adversely affected—even catastrophically—by another country's actions. Not only would this likely violate international law, but it would virtually guarantee reciprocal lawsuits in other countries' courts.").

18. H.R. 4189, 116th Cong. (2019).

19. *See* Chimène Keitner & Allison Peters, *Private Lawsuits Against Nation-States Are Not the Way to Deal With America's Cyber Threats*, LAWFARE (June 15, 2020, 9:09 AM), https://bit.ly/3tYN9jI ("Legislators are understandably tempted to enact the [HACT Act], which would allow private lawsuits against foreign states for alleged unauthorized cyber activity. Yet this response is deeply misguided and would create more problems than it solves.").

20. *See* 18 U.S.C.A. §§ 2331–2339D (West); *see also* Jamshidi, *supra* note 2, at 561 n.1 ("The ATA was originally enacted in 1990 but was repealed and reenacted in 1992 due to a technical error." (citing Federal Courts Administration Act of 1992, Pub. L. No. 102-572, §1003, 106 Stat. 4506, 4521 (1992))).

21. *See infra* Sections I.A, I.B.1, I.B.3.

statute in the federal system.[22] If this system is successful, it may well be deployed in other areas, such as products liability, where efforts at jurisdictional reform have languished for years.[23]

Terrorism regulation seems poised to expand its influence into other areas of private law. The trajectory of terrorism regulation in public law would suggest a similar expansion, with similar effects, in private law. In public law, protections for criminal defendants and immigrants have been stripped away or reduced. Civil rights for citizens have been relaxed. Harsher penalties have been imposed on individuals and on developing nations with less process.[24]

In private law, terror regulation has begun to have similar impacts but may have a different ultimate trajectory. The political economy of private law differs from that of public law. In criminal law, for example, terror regulation is part of the "law and order" agenda with a well-documented "one-way ratchet" effect.[25] Political bodies generally find imposing harsher penalties appealing but rarely find lessening penalties palatable.[26] This is particularly true for terrorism.[27] The same is true for immigration law.[28] In both areas, the groups opposing greater penalties and lesser

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22. *See* Aaron D. Simowitz, *Defining Daimler's Domain: Consent, Jurisdiction, and the Regulation of Terrorism*, 55 WILLAMETTE L. REV. 581, 583 (2019) [hereinafter Simowitz, *Defining Daimler*] ("The most controversial and novel feature of the [Anti-Terrorism Clarification Act or "ATCA"] speaks to the conflict between personal jurisdiction and regulatory power. The ATCA proposes to create a system of transnational consent jurisdiction.").

23. *See* Aaron D. Simowitz, *Jurisdiction as Dialogue*, 52 N.Y.U. J. INT'L L. & POL. 485, 513–15 (2020) [hereinafter Simowitz, *Jurisdiction as Dialogue*] (discussing the Foreign Manufacturers Liability and Accountability Act or "FMLAA").

24. *See* Jamshidi, *supra* note 2, at 566 ("Much has been written about the War on Terror's erosion of public law, particularly in the areas of constitutional, criminal, and immigration law. Scholars have, for example, examined constitutional concerns raised by the criminal material support statutes." (citing David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 10–15 (2003))).

25. *See, e.g.*, Austen D. Givens, *The NSA Surveillance Controversy: How the Ratchet Effect Can Impact Anti-Terrorism Laws*, HARV. NAT'L SEC. J. (July 2, 2013), https://bit.ly/3tZ3fd8 ("The ratchet effect is a unidirectional change in some legal variable that can become entrenched over time, setting in motion a process that can then repeat itself indefinitely. For example, some scholars argued that anti-terrorism laws tend to erode civil liberties and establish a new baseline of legal 'normalcy' from which further extraordinary measures spring in future crises.").

26. *See* OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 35–79 (2006).

27. *See, e.g.*, Austen D. Givens, *The NSA Surveillance Controversy: How the Ratchet Effect Can Impact Anti-Terrorism Laws*, HARV. NAT'L SEC. J. (July 2, 2013), https://bit.ly/2VnMYCM.

28. *See* Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 UC IRVINE L. REV. 1, 7–8 (2012) ("Consider: if the landmark 1990 Immigration Act that raised worldwide ceilings for immigration illustrates how American immigration policy is far from a one-way ratchet fueled by restrictionist sentiment, it is also quite plain that such a statute . . . would stand little chance of passage today.").

protections are relatively disempowered—criminal defendants and immigrants.

The parties resisting changes to private law are much more powerful. Multinational banks in particular have moved to the center of the process, as the Supreme Court's jurisdictional retrenchment has made them the principal class of defendants in private terrorism suits.[29] Therefore, the political economy and ultimate trajectory of terrorism-driven law reform in private law may be rather different.

Where the political economies of terrorism law and private law collide, so-called "special legislation" is born. These laws target a single defendant or even a single lawsuit, such as the Iran Threat Reduction Act or the recently passed Promoting Security and Justice for the Victims of Terrorism Act. Even when these laws promote legitimate policy aims, their hyper-targeted nature runs the risk of undermining rule-of-law values. At a minimum, bills that target only one lawsuit against Iran or only entities representing Palestinians are likely to feature expansive powers coupled with poor drafting.

This Article makes several novel contributions. This is the first piece to consider the effect of terror regulation across multiple areas of private law, to note how the well-documented effect of terror regulation on public law resembles the effect on private law, and to observe the significant reasons that terror regulation's ultimate effect on private law may differ from the public law realm.

This Article proceeds in three Sections. The first Section describes how terrorism regulation has shaped multiple areas of private law, including tort, procedure, and banking law. The second Section examines how terrorism regulation has moved in private law, as in public law, from the exceptional to the normal and is now poised to expand into other areas of private law. The third Section assesses the differences in the political economies of public and private law and concludes that terrorism regulation may ultimately take a very different path in private law than it has in public law.

I. TERROR POLICY IN PRIVATE LAW

Terrorism regulation has become a driving force of change and innovation across multiple areas of private law, including tort, civil procedure, and banking law. In each of these areas, the demands of terrorism regulation have been used as the reason to loosen protections for

29. *See* Simowitz, *Defining Daimler*, *supra* note 22, at 582–83 ("Congress passed the Anti-Terrorism Act (ATA) to enable private claimants to overcome 'jurisdictional hurdles' in bringing private actions against the alleged perpetrators of international terror. With the intended targets of the ATA unavailable, the ATA has become a statute about multinational banks.").

defendants, to expand the power of courts, and to impose additional obligations on private parties, particularly banks and other financial intermediaries.

A. Tort

Terrorism regulation has worked several marked departures from baseline tort law. The Anti-Terrorism Act (ATA), enacted in 1990,[30] is at the heart of these changes, though courts have also used the ATA as a jumping off point for further expansions. The ATA codified terrorism-related torts, loosened causation requirements, and imposed the extraordinary treble damages remedy.

1. Statutory Codification

On October 7, 1985, four terrorists seized control of the *Achille Lauro*, a cruise ship sailing from Alexandria to Ashdod, Israel. The terrorists murdered Leon Klinghoffer and threw his body and wheelchair overboard. Klinghoffer's spouse and estate brought suit against several defendants, who in turn moved to implead the Palestinian Liberation Organization (PLO). Other passengers filed suit against the PLO as well.[31]

The PLO moved to dismiss on the grounds that the U.S. court lacked subject matter jurisdiction over the claims and personal jurisdiction over the PLO. The court ruled against the PLO, holding that it had subject matter jurisdiction over the tort action under admiralty law and the Death on the High Seas Act.[32] The court sounded a cautionary note, which Congress would later echo, that a "similar attack occurring on an airplane or in some other locale might not have been subject to civil action in the U.S."[33]

The court also found that it had personal jurisdiction over the PLO, ruling that it was subject to general jurisdiction in New York. The court found that the PLO was "doing business" in New York because it "owns a building in Manhattan, which it uses as an office and residence for its employees, and it owns an automobile, maintains a bank account, and has a telephone listing in New York as well[,]" and in "terms of its activities, it participates actively at the United Nations headquarters in Manhattan as a Permanent Observer, and its representatives have at times engaged in speaking tours and fund-raising activities throughout the State."[34] The

30. 18 U.S.C.A. § 2333(a) (West).

31. *See, e.g.*, Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 937 F.2d 44, 47 (2d Cir. 1991) (setting out the factual and procedural history of the *Klinghoffer* case).

32. *See Klinghoffer*, 937 F.2d at n.2.

33. *See* H.R. REP. NO. 102-1040, at 5 (1992).

34. *Klinghoffer*, 937 F.2d at 51.

United States Court of Appeals for the Second Circuit reversed and remanded because "basing jurisdiction on the PLO's participation in UN-related activities would put an undue burden on the ability of foreign organizations to participate in the UN's affairs."[35]

The case finally settled over ten years later. The U.S. Congress concluded that it was necessary to provide victims of terrorisms with a federal statutory tort, rather than leaving them to rely on a mixture of common law and state statutory torts that were not specific to terrorism.[36] In 1990, Congress enacted the ATA.

The ATA has many features that depart from garden-variety tort and procedure law. The first departure is the mere fact of its existence. This is the "Age of Statutes,"[37] when even "the venerable common law area of torts is not immune from the pervasive influence of statutes."[38] And yet, the ATA is unusual. It created a stand-alone federal statutory tort that neither modifies nor supplants a common law tort. Rather, the ATA creates a tort precisely because courts had held that no legal theory existed to support claims in this area.[39] Federal statutory torts are still the exception, not the rule.[40]

The peculiar nature of the ATA avoids many of the common pitfalls of the classic conflict between common law torts and federal statutory torts. There is no issue of whether a state law tort is preempted or modified. Because of the explicit nature of the private right of action, there is no question of whether courts should create an "implied" statutory tort. Nor are there issues of "whether a statutory violation establishes negligence per se, or whether compliance with a safety statute or regulation constitutes a complete defense to tort liability."[41]

Nevertheless, the ATA does present an odd incarnation of a classic conflict—the tension between the tort and the regulatory system. The detection, deterrence, and punishment of terrorism (and its financing) are the subject of an enormous domestic and international regulatory and

35. *Id.* at 51–52.

36. For example, in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984), the Court of Appeals for the D.C. Circuit held the District Court properly dismissed an action brought by Israeli citizens who were victims and representatives of victims murdered in an armed attack on a civilian bus in Israel seeking compensatory and punitive damages from various Arab organizations for tortious acts in violation of law of nations, treaties of the United States, and criminal laws of United States, as well as common law.

37. *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

38. Caroline Forell, *Statutory Torts, Statutory Duty Actions, and Negligence Per Se: What's the Difference?*, 77 OR. L. REV. 497, 497 (1998).

39. *See Tel-Oren*, 726 F.2d at 774.

40. *See supra* note 36; *see also* Christopher J. Robinette, *Introduction*, 17 WIDENER L.J. 705, 706–07 (2008) ("[C]riminal law is statutory; torts is mostly common law.").

41. Mark A. Geistfeld, *Tort Law in the Age of Statutes*, 99 IOWA L. REV. 957, 960 (2014).

diplomatic apparatus. Private torts under the FSIA or the ATA empower private plaintiffs in a way that can complement this regulatory apparatus[42] but frequently conflict instead.

For example, the Executive has the power, granted by Congress, to freeze assets of state or non-state entities.[43] The Executive is free to decide, in theory, whether to disburse these assets to victims of terrorism or to use them as leverage for diplomatic gains.[44] (Executives have normally chosen the latter, regardless of party affiliation.)[45] Congress has simultaneously granted this power to the Executive while granting private plaintiffs the power to sue state and non-state entities and to execute on their assets. The executive branch has typically resisted Congress's interventions and, in some instances, the President has vetoed the enabling legislation or used other means to nullify it.[46] Congress has responded by expanding plaintiffs' remedies and, in some cases, making the Executive's actions more politically unpalatable by forcing the Executive to publicly declare, repeatedly and with specificity, that it is keeping the assets out of plaintiffs' hands.[47] The Congressionally imposed public declarations have become a model for similar requirements in other areas, such as the

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42. *See id.*

43. *See, e.g.*, International Emergency Economic Powers Act (IEEPA), 50 U.S.C.A. §§ 1701–1702 (West).

44. *See* Quinton Cannon Farrar, *U.S. Energy Sanctions and the Race to Prevent Iran from Acquiring Weapons of Mass Destruction*, 79 FORDHAM L. REV. 2347, 2372 (2011) (noting that the Obama administration viewed sanctions authority as important "not necessarily to impose sanctions per se, but rather to use them as credible diplomatic leverage").

45. *See* Allison Taylor, *Another Front in the War on Terrorism? Problems with Recent Changes to the Foreign Sovereign Immunities Act*, 45 ARIZ. L. REV. 533, 540 (2003) ("The [Clinton] Administration claimed that diplomatic assets could not be released because they were protected by international agreements, and frozen assets could not be released because they were a valuable foreign policy tool and possibly subject to other claims by U.S. nationals.").

46. *See* Sean K. Mangan, *Compensation for "Certain" Victims of Terrorism Under Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000: Individual Payments at an Institutional Cost*, 42 VA. J. INT'L L. 1037, 1046 (2002) ("Immediately upon signing the legislation, President Clinton exercised this waiver authority in blanket fashion and thus nullified the Act by continuing to keep blocked assets in the hands of the U.S. government and immune from attachment by plaintiffs.").

47. *See, e.g.*, Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, 116 Stat. 2322 (2002) (establishing the Terrorism Risk Insurance Program (TRIP) enacting no currently effective sections); Terrorism Risk Insurance Extension Act of 2005 (TRIEA 2005), Public Law 109-144, 119 Stat. 2660 (2005) (extending TRIP); Terrorism Risk Insurance Program Reauthorization Act of 2007 (TRIPPRA 2007), Pub. L. No. 110-160, 121 Stat. 1839 (2007) (extending TRIP); Terrorism Risk Insurance Program Reauthorization Act of 2015 (2015 Reauthorization Act), Pub. L. No. 114-1, 129 Stat. 3 (2015) (codified at 15 U.S.C.A. §§ 6751–6764); Terrorism Risk Insurance Program Reauthorization Act of 2019 (2019 Reauthorization Act), Pub. L. No. 116-94, Div. I, Tit. V, 133 Stat. 3026 (2019) (extending TRIP).

requirement that the Executive declare a "national emergency" to activate remedies under the IEEPA.[48]

In this context, terrorism torts are at once a part of the regulatory scheme and an attack on it. In particular, the creation of a private tort becomes a means of "dialogue" between the elected branches. In creating these torts, Congress is not just empowering private plaintiffs. (Indeed, private plaintiffs may be restricted to symbolic, paper victories without the acquiescence of the Executive.) Congress is also pressuring the Executive and attempting to insert itself more directly into the conduct of foreign affairs.

2. Causation

The ATA provided for a private statutory tort for claims arising from action of international terrorism, codified in Section 2333.[49] Section 2333 did not produce a single reported decision for ten years.[50] The U.S. Congress passed the Violent Crime Control and Law Enforcement Act in 1994[51] and the Anti-Terrorism and Effective Death Penalty Act in 1996.[52] These statutes criminalized material support of terrorism. U.S. courts read the expanded criminal statutes to modify the pre-existing civil tort in Section 2333 expansively to cover "aiders and abettors" of international terrorism to further "Congress' stated purpose of cutting off the flow of money to terrorists at every point along the chain of causation."[53]

As Maryam Jamshidi has observed, "[n]otwithstanding Section 2333's close relationship to the criminal material support laws, courts have repeatedly and correctly described the civil statute as a traditional tort."[54] Nonetheless, "a growing number of courts have upended basic tort requirements in deciding Section 2333 cases and significantly expanded liability under the statute."[55] This divergence has been particularly plain in the area of causation.

When courts did start hearing claims under Section 2333, they initially hewed to the traditional tort standard of causation, specifically that

48. *See, e.g.*, 50 U.S.C.A. § 1701(a) (West).

49. *See* 18 U.S.C.A. § 2333 (West) ("Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.").

50. *See e.g.*, Boim v. Quranic Literacy Inst. (*Boim I*), 291 F.3d 1000 (7th Cir. 2002).

51. Violent Crime Control and Law Enforcement Act (VCCA), Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified in scattered sections of Titles 16, 18, 21, 28, and 34).

52. Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of Titles 8, 18, 22, 28 and 34).

53. *Boim I*, 291 F.3d at 1019.

54. Jamshidi, *supra* note 2, at 580.

55. *Id.*

the defendant must have intended both the action and its consequence. According to Jamshidi however, courts soon "nearly all . . . took the radical step of eliminating factual causation." However, most courts still "required that defendant possess both kinds of scienter and satisfy the requirements of legal cause."[56] Even these courts, over time, "abandoned their commitment to these norms and adopted more expansive approaches to the statute."[57] Some courts "also effectively eliminated legal causation in cases where support allegedly went directly to a terrorist organization, its agents, or alter-egos . . . ."[58]

Jamshidi argues that these departures from background private law principle have consequences. These deviations from "prevailing tort law theories" could harm "tort law's coherence and consistency," elide important distinctions between tort and criminal law, and reinforce "a belief in terrorism's existential danger—a perspective with little to no empirical support."[59] Jamshidi concludes that, although the disease is complicated, the cure is simple: return to ATA's statutory civil tort to generally applicable tort principles and, in doing so, "discourage tendencies to use the statute, which carries a high potential damages award, to pursue deep-pocketed defendants with tenuous connections to terrorism and terrorist organizations."[60]

3. Damages

The ATA expressly authorizes an automatic award of treble damages for successful claims.[61] The treble damages routine is not unique, but it is reserved for private torts that are intimately and necessarily embedded in an important regulatory scheme, such as antitrust. Across various areas, U.S. courts have consistently held that the extraordinary nature of the treble damages remedy implies a scienter requirement even if the statute is silent on mens rea.[62]

Courts were initially united in imposing a mens rea requirement on the ATA, though they took somewhat different paths. Some courts "created an independent scienter element for the statute," some "imported Sections 2339A and 2339B's mens rea," while others "combined the two approaches."[63] However, courts in each of these camps "progressively

56. *Id.* at 563.
57. *Id.* at 563–64.
58. *Id.* at 564.
59. *Id.* at 565.
60. *Id.*
61. *See* 18 U.S.C.A. § 2333(a) (West).
62. *See* Jamshidi, *supra* note 2, at 581 ("Although Section 2333's text does not include an explicit mens rea element, courts have consistently held that scienter is required because of the statute's automatic treble damages award.").
63. *Id.*

loosened" the ATA's scienter requirement.[64] Now, a "plaintiff need only show that defendant knew or consciously and recklessly disregarded the fact that she was providing support to a terrorist group, whether directly or indirectly," and "need not prove defendant had the intent to support terrorist violence or consciously and recklessly disregarded the risk her support would facilitate such violence."[65] Jamshidi painstakingly explores how and why U.S. courts have loosened the scienter requirement attached to the treble damages remedy, even as their underlying approaches have differed.[66]

Mandatory treble damages are quite rare—though certainly not unique to terrorism torts.[67] The mandatory treble damages remedy is most closely associated with private antitrust actions in the United States. Since 1890, Section 4 of the Clayton Act has provided that a private antitrust plaintiff is entitled to a mandatory award of treble damages.[68] For almost a century, this extraordinary remedy was nearly unique to antitrust. Over time, treble damages began to percolate through various areas of state law, punishing various types of willful conduct, such as willful overage of tenants or deceptive trade practices. These state law impositions of treble damages were discretionary, however. Mandatory treble damages remained rare.

In the 1980s, mandatory trebling of damages for antitrust actions came under sustained criticisms from the early titans of the law and economics school. The Reagan Administration signaled an interest in removing mandatory treble damages, exciting more commentary.[69] Despite this disrepute, the mandatory treble damages remedy—after nearly a century in waiting—found its way into two new statutes, the Racketeering Influences and Corrupt Organization Act (RICO)[70] and the ATA.[71]

RICO and the ATA have similarities. Initially, they were both focused on willful conduct and on civil wrongs closely connected with criminal conduct. They differed significantly, however. RICO was a

64. *Id.*

65. *Id.*

66. *See id.* ("This section will explore the three avenues for defining Section 2333's mens rea and the similar ways in which the statute's scienter requirement has developed under each of these approaches.").

67. *See generally* 1 LINDA L. SCHLUETER, PUNITIVE DAMAGES § 2.1(B) (8th ed. 2020) (explaining the general nature of treble damages); 2 LINDA L. SCHLUETER, PUNITIVE DAMAGES § 20.1 (8th ed. 2020) (listing all state statutory punitive damages, including when treble damages are available or required).

68. *See* 15 U.S.C.A. § 15(a) (flush language) (West).

69. *See, e.g.*, *generally* Antitrust Remedies Improvements Act, S. 2162, 99th Cong., 2d. Sess. (1986); H.R. 4250, 99th Cong., 2d. Sess. (1986).

70. *See* 18 U.S.C.A. § 1964(c) (West).

71. *See* 18 U.S.C.A. § 2333(a) (West).

classic example of "regulation on the cheap."[72] The U.S. Congress was concerned about the lack of resources among federal and state prosecutors to detect, prosecute, and deter sophisticated racketeering conspiracies. RICO was a classic example of empowering private attorney generals to seek out, investigate, and punish these enterprises.

Over time, the ATA has come to resemble the original vision for RICO, particularly with the advent of the civil material support action and the turn to focus on deep-pocketed multinational entities. But at the time of its passage, even the ATA's sponsors admitted that it might be mostly symbolic. The Palestinian Liberation Organization (PLO) was at the forefront of Congress's concern. Few believed that even prevailing ATA plaintiffs would be able to collect against the PLO, or other state or non-state entities accused of engaging in international terrorism. But even if the ATA was just symbolic, the bill's sponsors felt that it was important and necessary symbolism. In this light, the ATA's mandatory treble damages remedy was unique in that it was principally expressive. If an ATA judgment has symbolic value, perhaps a bigger judgment has more.

The ATA's use of treble damages is also unique in that it is the only instance in which this remedy has been deliberately used to restrict and channel forum choice. As discussed below, the drafters of the ATA were deeply concerned about ATA actions staying in U.S. courts with a minimum of procedural obstacles. Accordingly, the ATA prohibited dismissals in favor of another country's courts unless those courts would provide "substantially the same" remedy.[73] Mandatory treble damages are almost unknown outside U.S. law. The drafters of the ATA knew this and knew that deploying the mandatory treble damages remedy in this way would almost entirely eliminate dismissals in favor of a foreign forum.

B. Procedure

Congress has turned private civil suits into a central pillar of legislative approach to terrorism. In successive terrorism laws, Congress has expanded the power of courts, diminished the protections owed to

72. William K. Black, *The Department of Justice "Chases Mice While Lions Roam the Campsite:" Why the Department Has Failed to Prosecute the Elite Frauds That Drove the Financial Crisis*, 80 UMKC L. REV. 987, 1017–18 (2012) ("Regulation on the cheap can, however, be supplemented by private rights of action. I suspect that most financial institutions would prefer competent official oversight to sporadic civil actions. But cutting back on both simultaneously allows fraudulent practices to multiply.").

73. *See* 18 U.S.C.A. § 2334(d) (West) ("Convenience of the forum.–The district court shall not dismiss any action brought under section 2333 of this title on the grounds of the inconvenience or inappropriateness of the forum chosen, unless–(1) the action may be maintained in a foreign court that has jurisdiction over the subject matter and over all the defendants; (2) that foreign court is significantly more convenient and appropriate; and (3) that foreign court offers a remedy which is substantially the same as the one available in the courts of the United States.").

defendants, and restricted defendants' ability to affect forum choice. In its most recent enactment, Congress created a uniquely aggressive jurisdictional regime but limited only to entities claiming to represent Palestinians.

1. Jurisdiction

The saga of the *Achille Lauro* litigation spurred Congress to pass the ATA. The jurisdictional obstacles that had plagued the plaintiffs were uppermost in the minds of the bill's sponsors.[74] Senator Charles Grassley, one of co-sponsors of the ATA, emphasized that the bill was necessary to remove "jurisdictional hurdles."[75] The Congressional Report on the ATA described the "gap in [Congress's] efforts to develop a comprehensive legal response to international terrorism."[76] The Report particularly noted that, if the PLO had not maintained assets and carried on activities in New York, no U.S. court would have been "able to establish jurisdiction."[77]

The ATA did not, however, explicitly address personal jurisdiction, though it certainly embodied Congress's judgment that personal jurisdiction in U.S. courts should exist when a foreign terrorist organization injures a U.S. national abroad.[78] At the time, the breadth of general personal jurisdiction and expansions in the U.S. Supreme Court's interpretation of specific jurisdiction may have rendered such an explicit statement unnecessary.

In past several years, however, the Supreme Court has dramatically reversed course and narrowed both general and specific jurisdiction.[79] The decisions that have "had the most notable impact on terrorism litigation"[80] were not themselves about terrorism. In *Daimler v. Bauman*, the Court

74. *See* Simowitz, *Defining Daimler*, *supra* note 22, at 585 ("Congress took note of these difficulties.").

75. 137 CONG. REC. S4,511 (daily ed. Apr. 16, 1991) ("The ATA removes the jurisdictional hurdles in the courts confronting victims and it empowers victims with all the weapons available in civil litigation, including: Subpoenas for financial records, banking information, and shipping receipts—this bill provides victims with the tools necessary to find terrorists' assets and seize them.").

76. H.R. REP. NO. 102-1040, at 5 (1992).

77. *Id.*

78. *See* Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 VA. J. INT'L L. 325, 366 (2018) [hereinafter Simowitz, *Legislating*] ("Congress enacted the Anti-Terrorism Act (ATA) specifically to provide an avenue of civil relief to U.S. victims of terror who had previously been without a clear cause of action.").

79. *See* Simowitz, *Defining Daimler*, *supra* note 22, at 586–87 ("[T]he United States Supreme Court took the simmering fire of ATA suits against multinational banks and unintentionally dumped gasoline on it. The Court did so by dramatically narrowing the personal jurisdiction available to U.S. courts such that the original targets of the ATA, international terrorist organizations, could no longer be haled into U.S. court.").

80. *Id.* at 587 ("That left only corporate multinational entities that had some connection to the United States that could potentially support jurisdiction.").

considered a transnational tort suit alleging human rights abuses by an Argentine subsidiary of Daimler AG.[81] The Court held that the suit could not be litigated in a U.S. court merely because a Daimler subsidiary was incorporated in a U.S. state.[82] The Court did not rely on the corporate separateness of the subsidiary, but rather "confirmed what it had only hinted at previously—that general jurisdiction would be sharply limited to only those states where the corporation was at home."[83] The Court swept away decades of cases exercising power over corporate and natural persons because they had "continuous and systematic" contacts with the forum, "such as leasing a small sales office with a handful of temporary employees."[84] The Court held that a corporation would be subject to jurisdiction for any and all claims or where it was "at home"—absent "exceptional circumstances," only at its place of incorporation or principal place of business.[85] In short, "the Court reduced the number of forums in which a large multinational corporation would be subject to general jurisdiction from scores to just two."[86] The Court predicted that claim-specific jurisdiction would fill the gap.

Then the Court followed *Daimler* by repeatedly narrowing specific jurisdiction. In *Walden v. Fiore*, the Court held that a suit alleging that a federal agent had deliberately filed a false declaration knowing that it would affect residents of Nevada could not be litigated in Nevada because the officer's conduct merely targeted Nevada residents and not the forum of Nevada itself.[87] The Court observed that when the "relevant conduct" comprising an intentional tort occurs entirely outside the forum, "the mere fact that [this] conduct affected [plaintiffs] with connections to the forum State does not suffice to authorize jurisdiction."[88] A defendant's "suit-related conduct" must have a "substantial connection" with the forum

81. *See* Daimler AG v. Bauman, 571 U.S. 117, 120 (2014) ("This case concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United State.").

82. *See id.* at 139 (holding that Daimler AG, "even with MBUSA's contacts attributed to it," was not "at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California").

83. Simowitz, *Defining Daimler*, *supra* note 22, at 587 (citing Walden v. Fiore, 571 U.S. 277, 285 (2014)); *see also Daimler AG*, 571 U.S. at 120.

84. *See id.* (describing the breadth of general, all-purpose jurisdiction before *Daimler*).

85. *See Daimler AG*, 571 U.S. at 137–39, 138 n.19 (2014) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).

86. Simowitz, *Legislating*, *supra* note 78, at 340 ("[I]ntentional torts committed against residents of another state, with knowledge that effects would be felt in that state, could not, without additional actions directed to that forum, ground jurisdiction.").

87. *See* Walden v. Fiore, 571 U.S. 277, 282 (2014).

88. *Id.* at 285.

itself.[89] In *Bristol-Myers Squibb v. Superior Court of California*, the Court emphasized that "[w]hat is needed . . . is a connection between the forum and the specific claims at issue."[90]

Daimler and *Walden*, both decided in 2014, did not concern terrorism. The *Daimler* majority specifically sought to counter concerns about overly narrow jurisdiction by noting that the plaintiff's federal claims had been rendered "infirm" for other reasons.[91] Nonetheless, these cases had an immediate impact on private claims under the ATA. Of four pending cases under the ATA, only one survived jurisdictional objections.[92] That case led directly to the passage of the Antiterrorism Clarification Act (ATCA).

One case, *Sokolow v. Palestine Liberation Organization*,[93] survived in large part because those objections came before the court on a motion for reconsideration of a judgment. The "defendants had failed to meet their burden on reconsideration because the record before the court" was "insufficient to conclude that either defendant is 'at home' in a particular

89. *See id.* at 284.

90. Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cnty., 137 S. Ct. 1773, 1781 (2017).

91. *See Daimler AG*, 571 U.S. at 141 ("Recent decisions of this Court, however, have rendered plaintiffs' ATS and TVPA claims infirm.").

92. In *Klieman v. Palestinian Authority*, a U.S. national was visiting Israel when she was the victim of a terrorist attack. *See* Estate of Klieman v. Palestinian Auth., 467 F. Supp. 2d 107, 110 (D.D.C. 2006). Klieman's relatives brought claims under the ATA. *See id.* at 109. Before Daimler, the district court had held that it could exercise general personal jurisdiction over the PA. *See id.* at 113. "After *Daimler*, the district court granted reconsideration on jurisdiction, held that the Palestinian Authority was not 'at home' in the United States, and did not endorse any of plaintiff's theories of specific jurisdiction." Simowitz, *Legislating*, *supra* note 78, at 367; *see* Estate of Klieman v. Palestinian Auth., 82 F. Supp. 3d 237, 240 (D.D.C. 2015), *aff'd sub nom.* Kesner v. Palestinian Auth., 923 F.3d 1115 (D.C. Cir. 2019), *cert. granted, and vacated*, 140 S. Ct. 2713, (2020), *and opinion reinstated in part*, No. 15-7034, 2020 WL 5361653 (D.C. Cir. Aug. 18, 2020). In *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 21 (D.D.C. 2015), *aff'd*, 851 F.3d 45 (D.C. Cir. 2017), and *Safra v. Palestinian Auth.*, 82 F. Supp. 3d 37, 39 (D.D.C. 2015), *aff'd sub nom.* Livnat v. Palestinian Auth., 851 F.3d 45 (D.C. Cir. 2017), U.S. relatives of the decedents brought claims under the ATA and had their claims dismissed because the Palestinian Authority was not amenable to general jurisdiction in the United States. *See Livnat*, 82 F. Supp. 3d at 22; *Safra*, 82 F. Supp. 3d at 40; *see also* Simowitz, *supra* note 78, *Legislating* at 368. The district court in "*Livnat* and *Safra* also rejected specific jurisdiction as a ground to hale the Palestinian Authority into a U.S. court—another avenue that [has] been sometimes [used to] bring foreign terrorist entities into U.S. court—noting that the Supreme Court's recent decision in *Walden v. Fiore* foreclosed exercise of specific jurisdiction based on defendant's knowledge that their actions would likely harm U.S. citizens." *See id.* The district court explicitly rejected the argument that "a more flexible inquiry is necessary because Congress has demonstrated clear intent for the Anti-Terrorism Act to apply extraterritorially." *See Livnat*, 82 F. Supp. 3d at 29, 46–47.

93. Sokolow v. Palestine Liberation Org., No. 04 Civ. 397, 2014 WL 6811395, at *2 (S.D.N.Y. Dec. 1, 2014).

jurisdiction other than the United States."[94] The defendants prevailed on appeal. The panel for the United States Court of Appeals for the Second Circuit held that "*Walden* forecloses the plaintiffs' arguments . . . [that] the mere knowledge that United States citizens might be wronged in a foreign country goes beyond the jurisdictional limit set forth in *Walden*."[95] The court reasoned that this holding would not eviscerate the ATA because attacks "specifically targeted against United States citizens" abroad would satisfy *Walden*'s requirements, but that the "plaintiffs point[ed] us to no evidence" of such deliberate targeting.[96]

The plaintiffs "sought certiorari from the U.S. Supreme Court, attracting amicus briefs in support from the U.S. House of Representatives, twenty-three currently serving U.S. Senators, and a group of former federal officials."[97] The Solicitor General's office "recommended against on certiorari, in significant part relying on the lower court's optimistic prediction" that *Walden* would not foreclose jurisdiction where terrorists target Americans abroad.[98] No court has "yet held that terrorist attacks targeting U.S. citizens abroad necessarily also targets the *forum* of the United States—as required by *Walden*."[99] The Supreme Court denied certiorari.[100]

Congress passed the ATCA in direct response.[101] The ATCA stated any defendant "shall be deemed to have consented to personal jurisdiction" if, within 120 days of the enactment of the ATCA, the defendant either receives certain types of economic assistance from the United States or operates a facility within the United States while benefitting from a waiver or suspension of the statutory bar to "the PLO or any of its constituent groups" operating such a facility within the United States.[102] The ATCA quickly provoked disagreement among

94. Simowitz, *Defining Daimler*, *supra* note 22, at 589; *see also* Waldman v. Palestine Liberation Org., 835 F.3d 317, 337 (2d Cir. 2016) (quoting *Sokolow*, 2014 WL 6811395, at *2).

95. *Waldman*, 835 F.3d at 337–38.

96. *See id.* at 338.

97. Simowitz, *Defining Daimler*, *supra* note 22, at 589.

98. *See id.*; *see also* Brief for the United States as Amicus Curiae at 17–18, Sokolow v. Palestine Liberation Org., 138 S. Ct. 1438 (2018) (No. 16-1071), 2018 WL 1251857, at *17–18 ("It is far from clear that the court of appeals' approach will foreclose many claims that would otherwise go forward in federal courts. As the court of appeals explained, its approach permits U.S. courts to exercise jurisdiction over defendants accused of targeting U.S. citizens in an act of international terrorism.").

99. Simowitz, *Defining Daimler*, *supra* note 22, at 589.

100. *See* Waldman v Palestine Liberation Org., 835 F.3d 317 (2d Cir. 2016), *cert. denied sub nom.* Sokolow v. Palestine Liberation Org., 138 S. Ct. 1438 (2018).

101. *See* Simowitz, *Jurisdiction as Dialogue*, *supra* note 23, at 519–20 (discussing the origins of the ATCA).

102. *See* 18 U.S.C. § 2334(d); *see also* Simowitz, *Jurisdiction as Dialogue*, *supra* note 23, at 520.

commentators. In the courts, it was essentially a nullity.[103] The Trump Administration's aggressive actions toward the Palestinian Authority meant that the conditions to consent were no longer satisfied and, by the statute's terms, did not operate retroactively.[104]

Congress returned to the fray following the second dismissal of the *Sokolow* case, which had given rise to the ATCA in the first place. On December 20, 2019, Congress enacted the Promoting Security and Justice for Victims of Terrorism Act (PSJVTA) (apparently unsatisfied with calling it the Anti-Terrorism Clarification Act).[105] The PSJVTA was specifically designed to "overcome[] each of the lower court's objections to applying the ATCA."[106] It amended Section 2334(e)(1) to omit the "benefiting from a waiver or suspension" requirement, and instead simply applied the statute to "defendants," defined to include the PLO and PA by name.[107] The PSJVTA also amended the ATA to specifically include the PA's facility in midtown Manhattan as a basis for consent jurisdiction, reversing lower court decisions excepting the facility from the statute's reach because it was used principally in furtherance of the PA's U.N. observer status.[108] Finally, Congress amended the statute to apply to "any case pending on or after August 30, 2016"[109]—"the day before the Second Circuit issued its decision in this case reversing the judgment for petitioners" in *Sokolow*.[110] In light of the amendments to the amendments to the ATA, the Supreme Court granted certiorari, vacated the decision below in *Sokolow*, and remanded.

However, the PSJVTA is more than simply an attempt to clean up the ATCA. It has several novel elements. First, it states that the term "defendant," according to the statute, means:

> (A) the Palestinian Authority; (B) the Palestine Liberation Organization; (C) any organization or other entity that is a successor to or affiliated with the Palestinian Authority or the Palestine

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103. *See* Waldman v. Palestine Liberation Org., 925 F.3d 570, 575 (2d Cir. 2019) ("In sum, the plaintiffs have provided no basis to conclude that a factual predicate of Section 4 of the ATCA has been met in this case."), *cert. granted, judgment vacated sub nom.* Sokolow v. Palestine Liberation Org., 206 L. Ed. 2d 852 (Apr. 27, 2020).

104. Although the statute applies "regardless of the date of the occurrence of the act of international terrorism," the conditions for consent must be met 120 days after enactment of the ATCA. *See* 18 U.S.C. § 2334(e)(1).

105. Promoting Security and Justice for Victims of Terrorism Act of 2019, Pub. L. No. 116-94, § 903, 133 Stat. 2534, 3082 (2019) (codified at 18 U.S.C. § 2334(e)).

106. *See* Motion for Leave to File Amicus Curiae Brief and Brief of Senator Charles Grassley et al. at 21–22, Sokolow v. Palestine Liberation Org., 140 S. Ct. 2714 (2020), (No. 19-764), 2020 WL 290959, at *21–22.

107. *See* Promoting Security and Justice for Victims of Terrorism Act of 2019, Pub. L. No. 116-94, § 903(c)(1)–(5), 133 Stat. 2534, 3082 (2019).

108. *See* § 903(c)(1)–(3), 133 Stat. at 3082.

109. *See* § 903(d)(2), 133 Stat. at 3082.

110. *See* Brief of Senator Grassley et al., *supra* note 106, at 22.

> Liberation Organization; or (D) any organization or other entity that . . . self identifies as, holds itself out to be, or carries out conduct in the name of, the 'State of Palestine' or 'Palestine' in connection with official business of the United Nations.[111]

The PSJVTA does not merely include these entities; it could be interpreted to extend solely to them. This sort of hyper-targeted jurisdictional provision has the benefit of being honest about its intended objects—but if procedure benefits from trans-substantivity, it is extremely troubling.

Second, the PSJVTA added a new, broader basis for "consent" jurisdiction. The PSJVTA excepted certain activities, particularly those associated with petitioning the United Nations or the United States, but added that a defendant "shall be deemed to have consented to personal jurisdiction" in an ATA action if it:

> makes any payment, directly or indirectly–(i) to any payee designated by any individual who, after being fairly tried or pleading guilty, has been imprisoned for committing any act of terrorism that injured or killed a national of the United States, if such payment is made by reason of such imprisonment; or (ii) to any family member of any individual, following such individual's death while committing an act of terrorism that injured or killed a national of the United States, if such payment is made by reason of the death of such individual.[112]

This provision bases consent jurisdiction on the making of payments colloquially referred to as "martyr payments." It stretches the meaning of consent well beyond its public meaning and perhaps to a breaking point if the term jurisdiction and its associated concepts have any intrinsic content.[113]

The PSJVTA would face significant obstacles under a specific jurisdiction analysis. It relies on conduct that takes place entirely abroad. Under *Walden*, this may not inherently pose a problem if the conduct targets the forum of the United States itself. But note that the question of targeting is complicated here. The attack itself need not have targeted U.S. nationals—it could have harmed them incidentally. The payment itself is made on account of an attack that harmed U.S. nationals. The PSJVTA would seem to rely on the notion that paying the perpetrator or the family of a person who has attached U.S. nationals constitutes targeting of the United States. That notion stands in conflict with *Walden*. Therefore, the

111. 18 U.S.C. § 2334.

112. *Id.*

113. *See* John F. Preis, *Jurisdictional Idealism and Positivism*, 59 WM. & MARY L. REV. 1413, 1415–17 (2018) (discussing idealist and positivist conceptions of "jurisdiction").

PSJVTA seems to rely on the framing of this exercise of power as "consent" to insulate it from constitutional challenge.

2. Immunity

For most of its history, the United States "afforded foreign sovereigns absolute immunity from suit in U.S. courts as a matter of common law."[114] The rise of international trade and commerce in the middle of the twentieth century prompted the United States to adopt a more restrictive theory of immunity which permitted suits arising out of a foreign state's commercial activity.[115] This approach was formalized in the famous Tate Letter.[116] Under this system, the State Department made formal suggestions of immunity that carried significant weight, though the final determination rested with the courts.[117] This approach was criticized as unpredictable and haphazard. The State Department held formal internal hearings on immunity, but as the foreign state often did not appear, these hearings were sometimes conducted in front of an empty chair.

In 1976, the United States codified the restrictive approach in the Foreign Sovereign Immunities Act (FSIA) and transferred the determination of immunity from the executive to the judiciary, subject to standards laid out in the FSIA. The FSIA provided foreign sovereigns and their instrumentalities and organs with immunity from suit except in cases involving: "[1] an explicit or implied waiver of immunity by a foreign state, [2] commercial activity of the foreign state in or directly affecting the United States, [3] non-commercial torts committed by a foreign state (including by its officials and employees), or [4] disputes involving certain real estate and real property."[118]

Since the enactment of the FSIA, every amendment but one has concerned stripping sovereign immunity for acts of terrorism. In 1996, Congress responded to the dismissal of cases against Libya for the

114. *See* Sean Hennessy, *In Re the Foreign Sovereign Immunities Act: How the 9/11 Litigation Shows the Shortcomings of FSIA as a Tool in the War on Global Terrorism*, 42 GEO. J. INT'L L. 855, 858 (2011); *see also* The Schooner Exch. v. McFaddon, 11 U.S. 116, 127 (1812).

115. *See* Flatlow v. Islamic Republic of Iran, 999 F. Supp. 1, 11 (D.C. Cir. 1998).

116. *See* Letter from Acting Legal Advisor Jack B. Tate to Acting Attorney General Philip B. Perlman (May 19, 1952), *in* 26 DEP'T OF STATE BULL. 984–85 (Off. of Pub. Commc'n 1952) ("[T]he Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.").

117. *See* H.R. REP. NO. 94-1487, at 7 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6606 ("Today, when a foreign state wishes to assert immunity, it will often request the Department of State to make a formal suggestion of immunity to the court.").

118. *See* Hennessy, *supra* note 114, at 860; *see also* 28 U.S.C. § 1605(a).

bombing of Pan Am Flight 103 by enacting the Antiterrorism and Effective Death Penalty Act (AEDPA).[119] This exception "provides that U.S. citizens injured in a terrorist act, or their survivors if the attack is fatal, may file civil suit against a foreign state or its instrumentality that either committed the terrorist act or provided aid to a group that committed the act."[120] The amendment, codified under 28 U.S.C. § 1605(a)(7), states that immunity is lost if five elements are satisfied:

> (1) either the claimant or the victim was a U.S. national at the time of the act; (2) the foreign sovereign has been designated by the State Department as [a state sponsor of terrorism or SST]; (3) the foreign sovereign engaged in conduct that involves torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such acts; (4) the act or the provision of material support was engaged in by an official, employee, or agent of the foreign state acting within the scope of his or her duty; and (5) if the act occurred in the foreign state against which the claim is brought, the claimant must have afforded the foreign state a reasonable opportunity to arbitrate the claim.[121]

The 1605(a)(7) exception failed to provide a private right of action. Later that year, Stephen Flatow was therefore unable to sue when his daughter was killed by a terrorist attack in Israel. Flatow successfully lobbied for enactment of the Civil Liability for Acts of State Sponsored Terrorism Act, commonly known as the Flatow amendment, that explicitly permitted for private suits and punitive damages against designated SSTs.[122]

Private plaintiffs face further difficulties in terrorism litigation. Private plaintiffs were able to file suits but could not collect on them, as the Executive would frequently prevent plaintiffs from collecting from defendants' assets. The Office of Foreign Assets Control (OFAC) has the power to prohibit the transfer of use of assets unless the Executive consents to the transfer. Prevailing plaintiffs were unable to satisfy their judgments out of these blocked assets, which the Executive preferred to keep frozen as leverage "to accomplish foreign policy or national security goals."[123] Congress sought to undermine this Executive reluctance in 1998

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119. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303(a), 110 Stat. 1214, 1250–53 (codified at 18 U.S.C. § 2339(B) (2006)); *see also* Ilana Arnowitz Drescher, *Seeking Justice for America's Forgotten Victims: Reforming the Foreign Sovereign Immunities Act Terrorism Exception*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 791, 834 (2012).

120. Drescher, *supra* note 119, at 801–02.

121. *Id.* at 802.

122. *See* 28 U.S.C. § 1605A(c).

123. *Sanctions Programs and Country Information*, U.S. DEP'T OF THE TREAS., https://bit.ly/3bGusLj (last visited June 28, 2021).

by amending the FSIA to make blocked assets available for execution and attachment, subject to a waiver of the provision by the Executive.[124] In effect, if the Executive wanted to prevent victims of terrorism from seizing these assets, it would have to make a specific public statement to that effect. A day after signing the bill, President Clinton did so.[125] This push-and-pull between the elected branches was typical of immunity-stripping measures. Nonetheless, this round of amendments contained other forms of assistance for private judgment creditors, including that the Departments of State and Treasury is "to . . . assist . . . in . . . locating and executing [judgments] against property [owned by the] foreign state . . . ."[126]

After the attacks on September 11, 2001, "victims and their families filed lawsuits against many different foreign defendants, alleging the defendants negligently, recklessly, or intentionally aided and abetted the hijackers on 9/11."[127] Six of these lawsuits were consolidated in the United States District Court for the Southern District of New York.[128] Several of the defendants, including the Kingdom of Saudi Arabia, claimed that immunity under the FSIA prevented the court from asserting subject matter jurisdiction over the case. The plaintiffs claimed the Kingdom and several Saudi princes had "donated funds to charity, using both personal and state accounts, knowing that the charity would transfer the funds to al-Qaeda."[129]

The district court "dismissed the princes and the Kingdom from the lawsuit because of foreign sovereign immunity."[130] A panel for the United States Court of Appeals for the Second Circuit affirmed. The terrorism exception only applied to entities designated by the Executive as SSTs.[131] Commentators observed that the plaintiffs' resort to the domestic tort

124. *See* 28 U.S.C.A. § 1610 (West).

125. *See* Presidential Determination No. 99-1, 63 Fed. Reg. 59201 (Oct. 21, 1998). Clinton explained, in part, "[i]f this section were to result in attachment and execution against foreign embassy properties, it would encroach on my authority under the Constitution to 'receive Ambassadors and other public Ministers.'" Presidential Statement on Signing H.R. 4328, Pub. L. No. 105-277, 1998 U.S.C.C.A.N. 576 (Oct. 23, 1998).

126. *See* 28 U.S.C. § 1610(f)(2)(A); *see also* Drescher, *supra* note 119, at 803.

127. *See* Eric T. Kohan, *A Natural Progression of Restrictive Immunity: Why the JASTA Amendment Does Not Violate International Law*, 92 WASH. L. REV. 1515, 1569 (2017) (citing *In re* Terrorist Attacks on Sept. 11, 2001 (*Terrorist Attacks II*), 392 F. Supp. 2d 539, 546 (S.D.N.Y. 2005); In re Terrorist Attacks on Sept. 11, 2001 (*Terrorist Attacks I*), 349 F. Supp. 2d 765, 779–80 (S.D.N.Y. 2005).

128. *See Terrorist Attacks II*, 392 F. Supp. 2d 539, 553 (S.D.N.Y. 2005), *aff'd*, 538 F.3d 71 (2d Cir. 2008).

129. Kohan, *supra* note 127, at 1569 (citing *In re* Terrorist Attacks on Sept. 11, 2001 (*Terrorist Attacks III*), 538 F.3d 71, 77–78 (2d Cir. 2008)).

130. *Id.*; *see also Terrorist Attacks II*, 392 F. Supp. 2d 539, 553 (S.D.N.Y. 2005), *aff'd*, 538 F.3d 71 (2d Cir. 2008).

131. *See Terrorist Attacks II*, 538 F.3d 71 (2d Cir. 2008).

exception looked like an attempt to circumvent this restriction on the terrorism exception.[132]

The September 11th attacks and the obstacles to the subsequent litigation prompted further rounds of immunity stripping legislation. In 2002, Congress enacted the Terrorism Risk Insurance Act, which limited the effectiveness of Executive waivers and required the Executive to make "an asset-by-asset determination that a waiver is necessary in the national security interest[,]" rather than issuing a blanket waiver.[133]

As with these previous immunity stripping amendments and with the ATA, the Justice Against Sponsors of Terrorism Act (JASTA) was a direct response to courts' action (or inaction) on private terrorism claims. JASTA was introduced in the Senate shortly after the appellate decision in In re *Terrorist Attacks* and stated that the court's decision gave "undue protection from civil liability" to foreign groups that "provide material support or resources to foreign terrorist organizations." The bill quoted Judge Posner for the view that private "suits against financiers of terrorism can cut the terrorists' lifeline" and added that private plaintiffs must have access to U.S. courts to seek redress against terrorist groups for injuries they or their loved ones have suffered. The bill aimed to provide private plaintiffs with the "broadest possible basis" to "seek civil liability against persons, groups, and foreign countries that directly or indirectly provide material support to terrorist activities against the United States."[134]

JASTA finally became law in 2015, passing over President Obama's veto. JASTA stripped immunity from foreign states for:

> any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by–(1) an act of international terrorism in the United States; and (2) a tortious act or acts of the foreign state; or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred.[135]

JASTA explicitly permitted a private right of action and applied retroactively to any suits relating to the September 11th attacks. JASTA did recognize the possibility of international conflict and included "a provision that allows the Attorney General to intervene in civil

132. *See* Kohan, *supra* note 127.

133. *See* Drescher, *supra* note 119, at 804. "Now, even if invoked, the presidential waiver only protected certain limited types of diplomatic property specifically subject to the Vienna Convention." *Id.* at 804, n.91.

134. Kohan, *supra* note 127.

135. Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, § 2(b), 130 Stat. 852 (2016) (codified at 28 U.S.C. § 1605B).

proceedings to seek a stay, as long as the United States is engaging in discussions with the foreign state to resolve the civil claims."[136]

JASTA "received large amounts of criticisms, both domestic and abroad, regarding its practicality and legality."[137] Commentators debated whether it violated international law. The European Union encouraged President Obama to veto JASTA as it "would be in conflict with fundamental principles of international law and in particular the principle of State sovereign immunity."[138] President Obama did so, in part because of the belief that JASTA "departs from longstanding standards and practice under our Foreign Sovereign Immunities Act and threatens to strip all foreign governments of immunity from judicial process in the United States based solely upon allegations by private litigants."[139] President Obama also noted that other states might take similar actions toward the United States.[140]

3. Forum Choice

The ATA does not stop at changing the background rules for jurisdiction and damages. It also essentially eliminates one of the most common defenses in transnational suits, *forum non conveniens*. Section 2334(d) bars a dismissal for *forum non conveniens* unless the remedies available in the foreign forum are "substantially the same" as those in the United States.[141] This requirement works in tandem with the ATA's grant of treble damages to render nearly every foreign forum inadequate.

Courts have interpreted this section of the ATA strictly, even though the garden variety *forum non conveniens* dismissal does not require

136. Kohan, *supra* note 127, at 1557.

137. *Id.* at 1558.

138. European Union Delegation to the United States of America, *EU on JASTA*, WASH. POST. (Sept. 14, 2016), https://wapo.st/3i3av3J.

139. Barack Obama, *Veto Message from the President—S. 2040*, THE WHITE HOUSE (Sept. 23, 2016), https://bit.ly/3fnVCcf.

140. *See id.* ("JASTA would upset longstanding international principles regarding sovereign immunity, putting in place rules that, if applied globally, could have serious implications for U.S. national interests . . . . These principles also protect U.S. Government assets from attempted seizure by private litigants abroad.").

141. *See* 18 U.S.C.A. § 2334(d) (West) ("The district court shall not dismiss any action brought under section 2333 of this title on the grounds of the inconvenience or inappropriateness of the forum chosen, unless–(1) the action may be maintained in a foreign court that has jurisdiction over the subject matter and over all the defendants; (2) that foreign court is significantly more convenient and appropriate; and (3) that foreign court offers a remedy which is substantially the same as the one available in the courts of the United States."); *see also* Goldberg v. UBS AG, 660 F. Supp. 2d 410, 420 (E.D.N.Y. 2009) (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249 (1981)).

equivalent or even similar remedies.[142] In one prominent case, the United States District Court for the Eastern District of New York rejected a motion to dismiss for *forum non conveniens* by Arab Bank for the case to be heard in Jordan, reasoning that even if "a Jordanian court would be significantly more convenient and appropriate," the foreign court would be unlikely to provide "'substantially the same" remedy as the U.S. court.[143] Overall, U.S. courts "have expressed an adamant refusal to dismiss these cases in light of the venue provisions of the ATA[,]" even "in those cases where the act of terrorism giving rise to the suit occurred in a foreign jurisdiction . . . ."[144]

The September 11th attacks prompted Congress to take further action to narrow forum choice in private terrorism suits. In response to the attacks, Congress passed the Air Transportation Safety and System Stabilization Act (ATSSSA), providing that the district court for the Southern District of New York shall have "exclusive jurisdiction over all actions brought for any claim . . . resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001."[145] The text of the ATSSSA, "[r]ead in isolation," seems "unambiguous and appears to require that plaintiffs' claims be heard in the Southern District of New York[,]" regardless of location of the plaintiff or defendant and of the nature of the cause of action.[146] Nonetheless, several "courts have toiled over the legislative history of ATSSSA, ultimately determining that Congress did not intend to centralize all terrorism lawsuits,"[147] but rather meant only to "promote the efficiency and rationality of litigation" and "limit the aggregate exposure of the non-terrorist defendants."[148] In particular, U.S. courts have attempted to avoid an interpretation of the ATSSSA that draws it "irreconcilably into conflict with the ATA," which permits plaintiffs to file private terrorism suits in "any appropriate district

142. *See* Robert Force, *The Position in the United States on Foreign Forum Selection and Arbitration Clauses, Forum Non Conveniens, and Antisuit Injunctions*, 35 TUL. MAR. L. J. 401, 441 (2011) (citing Goldberg v. UBS AG, 660 F. Supp. 2d 410, 422–23 (E.D.N.Y. 2009)).

143. *See* Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 591, n.13 (E.D.N.Y. 2005).

144. John D. Shipman, Comment, *Taking Terrorism to Court: A Legal Examination of the New Front in the War on Terrorism*, 86 N.C. L. REV. 526, 554 (2008) (quoting Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 591 n.5 (E.D.N.Y. 2005)).

145. Air Transportation Safety and System Stabilization Act (ATSSSA), 107 Pub. L. No. 42, § 408(b)(3), 115 Stat. 230 (2001) (codified as amended at 48 U.S.C. § 40101); *see also* Hickey v. City of New York (*In re* World Trade Ctr. Disaster Site Litig.), 270 F. Supp. 2d 357, 368 (S.D.N.Y. 2003).

146. Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86, 93 (D.D.C. 2003).

147. John D. Shipman, Comment, *Taking Terrorism to Court: A Legal Examination of the New Front in the War on Terrorism*, 86 N.C. L. REV. 526, 555 (2008).

148. *Id.* (quoting *In re* World Trade Ctr. Disaster Site Litig., 270 F. Supp. 2d 357, 371 (S.D.N.Y. 2003) (internal quotations omitted).

court of the United States."[149] A "narrow construction to the 'exclusive jurisdiction' language of Section 408(b)(3)" of the ATSSSA allows the pieces of legislation "to be harmonized."[150]

C. Banking

For at least a quarter of a century, domestic and international laws have been deployed specifically to combat terrorist financing and money laundering. The "know your customer" or KYC principle is the main domestic and international approach to enlisting banks and other financial intermediaries to police material support of terrorism. Under the KYC principle, "the financial intermediaries are supposed to conduct due diligence to determine if their financial services are being used to launder money or finance terrorism by identifying individual customers."[151]

The United States has deployed various approaches to enlisting financial intermediaries in the battle against terrorist financing. After the September 11th attacks, the United States established the Foreign Terrorist Asset Tracking Center, "an inter-agency team focused on disrupting terrorist fundraising by identifying foreign terrorist groups, assessing their funding sources and methods, and providing information to law enforcement officials."[152] The center is part of the Office of Foreign Assets Control (OFAC).

OFAC is "a subdivision of the Treasury Department tasked with administering and enforcing economic and trade sanctions based on U.S. foreign policy and national security goals" and "directs its activities against targeted foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction."[153] OFAC operates in tandem with the International Emergency Economic Powers Act (IEEPA),[154] which "grants the President the authority to freeze the assets of an individual or organization designated a national security threat which had its source in whole or in substantial part outside the United States only if the government had declared a national emergency."[155]

149. *Id.* (quoting Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86, 93 (D.D.C. 2003)).

150. *Id.*

151. Christian Leuprecht et al., *Tracking Transnational Terrorist Resourcing Nodes and Networks*, 36 FLA. ST. U. L. REV. 289, 310 (2019).

152. Sireesha Chenumolu, *Revamping International Securities Laws to Break the Financial Infrastructure of Global Terrorism*, 31 GA. J. INT'L & COMP. L. 385, 400 (2003).

153. Vanessa Ortblad, Comment, *Criminal Prosecution in Sheep's Clothing: The Punitive Effects of OFAC Freezing Sanctions*, 98 J. CRIM. L. & CRIMINOLOGY 1439, 1442 (2008).

154. International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, 91 Stat. 1625 (1997) (codified as amended at 50 U.S.C. §§ 1701–1702).

155. Ortblad, *supra* note 153, at 1442–43.

1. Confidentiality and Bookkeeping

Title III of the U.S.A. PATRIOT Act "provides specific details on the role of financial institutions in fighting terrorism."[156] This legislation contained significant departures from generally applicable banking law, including that "financial institutions are protected from civil liability when they reveal information about suspicious transactions[,]" allowing financial intermediaries to "escape liability for violating client confidentiality or being linked themselves to the suspicious funds."

Congress "also expanded existing money-laundering provisions" in the U.S.A. PATRIOT Act.[157] The International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 requires "special measures including record keeping and reporting requirements, for specific financial transactions[,]" though it "allows the Secretary of Treasury to determine precisely what these measures might be."[158] Title III of the U.S.A. PATRIOT Act extended these provisions to securities firms and requires greater "cooperation between financial institutions, law enforcement, and regulatory authorities."[159]

2. Freezing and Forfeiture

The U.S.A. PATRIOT Act "also significantly expands the power of the government in dealing with suspected terrorists financing" by, among other things, permitting asset freezes early in an investigation.[160] After the September 11th attacks, Congress lowered the evidentiary burdens required for OFAC to freeze assets. This led one commentator to describe OFAC freezing actions as "criminal prosecution[s] in sheep's clothing."[161]

The staff of the National Commission on Terrorist Attacks (the "9/11 Commission") prepared a lengthy monograph on the funding of Al-Qaeda and the flaws in the U.S. system of regulating terrorism financing.[162] The monographs particularly criticized OFAC freezing orders. The financing monograph noted that because "prosecuting criminal terrorist fund-raising cases can be difficult and time-consuming, the government has at times used administrative orders under the IEEPA to block transactions and freeze assets even against U.S. citizens and entities," but "the use of

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156. Sireesha Chenumolu, *Revamping International Securities Laws to Break the Financial Infrastructure of Global Terrorism*, 31 GA. J. INT'L & COMP. L. 385, 401 (2003).

157. *See id.*

158. *Id.*

159. *Id.* at 399–401.

160. *See id.* at 401.

161. Ortblad, *supra* note 153, at 1439.

162. *See* John Roth et al., *National Commission on Terrorist Attacks upon the United States: Monograph on Terrorist Financing*, NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES (2004), https://bit.ly/2Stln1L.

administrative orders with few due process protections, particularly against our own citizens, raises significant civil liberty concerns . . . ."[163]

In particular, the monograph noted that a "designated person or entity in such a situation does not have certain rights that might be available in a civil forfeiture action," where the government "must file a lawsuit and bear the burden of proof by a preponderance of the evidence[,]" and where "the owner of the property has the right to conduct discovery of the government's evidence, such as taking sworn depositions and obtaining documents."[164] The property owner further lacks the ability to contest the asset freeze "by demonstrating that he or she is an innocent owner—that is, obtained or possessed the property in question without knowing its illegal character or nature[,]" because an IEEPA "freeze does not technically divest title[,]" even though, "when a freeze separates the owner from his or her money for dozens of years, as it has in other IEEPA contexts, that is a distinction without a difference."[165]

The monograph also criticized the innovation in the U.S.A. PATRIOT Act to permit asset freezes "during the pendency of an investigation." The monograph noted that the "government is able to (and has, on at least three occasions) shut down U.S. entities without developing even the administrative record necessary for a designation[,]" as such an "action requires only the signature of a midlevel government official."[166] These freezing actions may also reinforce an "outdated" premise—"that terrorist operations need a financial support network" operating "from a central source or group of identifiable sources."[167]

The U.S.A. PATRIOT Act not only allowed freezes earlier in the process, but it also expanded the government's powers to impose asset forfeiture. For example, the government now has "long-arm jurisdiction over property for forfeiture procedures[,]" meaning that "if a terrorist moves the proceeds of his American investments to a money market account in the Bahamas, the U.S. government may still access it."[168] The government may now also "forfeit funds held in a foreign bank account by forfeiting funds from a corresponding account that the foreign bank has in a financial institution in the United States," and "does not need to show that the funds it forfeits from the U.S. account are directly traceable to the

163. *Id.* at 50.
164. *Id.*
165. *Id.* at 50–51.
166. *Id.* at 51.
167. *Id.*
168. Chenumolu, *supra* note 156, at 401 (citing International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, Pub. L. No. 107-56, § 311, 115 Stat. 298–299 (2001) (codified at 31 U.S.C. §§ 5311, 5322, 5332)).

criminal proceeds in the foreign account."[169] Defendants can no longer mount an "innocent owner defense."[170] These are significant departures from garden-variety forfeiture—already regarded as potentially abusive.

II. THE PATH OF TERROR REGULATION IN PRIVATE LAW

The path of terror regulation in private law has followed the path of terror regulation in public law but only up to a point. Innovations in terror regulation are initially presented as exceptional—broad powers crafted for the particular threat of terrorism. Over time, these exceptional powers become normalized, even routine. Once these innovations become normalized, they spread to new areas, sometimes far afield from terrorism. This expansionary phase can be driven by legislatures, by courts, or by both.

A. Exceptionalism and Normalization

Terrorism regulation has blazed a well-documented trail through various areas public law. Terrorism regulation has shown signs of following the same path in private law. In brief, legislatures present terrorism regulation as exceptional or "in a class by itself."[171] Repeated use and long-term acceptance of these exceptional interventions begets familiarity and normalization. Once innovations have become routine in the terrorism context, they spread to other areas of law.

The law of sovereign immunity illustrates this path in the context of private law. The FSIA was enacted into law in 1976.[172] Since then, Congress has amended the FSIA several times—almost every time to strip immunity for various terrorism regulations. Congress initially regarded amending the FSIA as an extraordinary step, required by an exceptional need. Over time, amending the FSIA to strip immunity for terrorism-related offenses became normalized, even routine.

In the context of terrorism regulation, Congress's comfort with aggressive immunity stripping led to the Justice Against Sponsors of Terrorism Act (JASTA) of 2016,[173] which made extraordinary changes to background principles of sovereign immunity. JASTA greatly expanded

169. Anne C. Pogue, *If It Weren't for the Flip Side-Can the USA Patriot Act Help the U.S. Pursue Drug Dealers and Terrorists Overseas, Without Overstepping Constitutional Boundaries at Home?*, 14 CORNELL J. L. & PUB. POL'Y 477, 486–87 (2005).

170. *Id.*

171. Maryam Jamshidi, *How the War on Terror Is Transforming Private U.S. Law*, 96 WASH. U. L. REV. 559, 613–15 (2018).

172. *See* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1602–1611).

173. Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, § 4(b), 130 Stat. 852, 854 (2016) (codified at 28 U.S.C. § 1605B) (amending the FSIA to include 28 U.S.C. § 1605B, or "JASTA claims").

how and when the actions of agents could be imputed to the sovereign to destroy sovereign immunity.

The FSIA's background rule for non-commercial torts is that activities of agents cannot be imputed to the sovereign if the agent is acting in her discretionary capacity.[174] In essence, the sovereign's immunity from suit and execution cannot be waived by the actions of agents unless the agents are acting pursuant to a policy of the sovereign that leaves them with no discretion. JASTA appears to eliminate this "discretionary functions" exception.[175]

Members of Congress were blunt about the purpose of JASTA. JASTA targeted the government for the Kingdom of Saudi Arabia, specifically to remove obstacles to litigation and enforcement by victims and families of victims of the September 11th attacks. Plaintiffs alleged that prominent Saudi officials have taken steps to channel funds to the ultimate perpetrators of the attacks. The discretionary functions exception barred suits against the Kingdom of Saudi Arabia based on the alleged actions of these agents.

Congress passed JASTA over the significant objections of the Obama administration. Representatives of the State Department warned that JASTA would prompt reciprocal changes in the law of other nations that would expose the United States to suits and enforcement in other countries' courts.[176] President Obama vetoed the legislation and was overridden by a Congressional supermajority.[177] The State Department's dire predictions did not come to pass, although this is likely owed to the particular diplomatic relationship between the United States and the Kingdom of Saudi Arabia.

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174. *See* 28 U.S.C. § 1605(a)(5)(A) (stating that the non-commercial tort exception to sovereign immunity shall not apply to "any claim based upon" the exercise or failure to exercise a "discretionary function").

175. *See* Stephen J. Schnably, *The Transformation of Human Rights Litigation: The Alien Tort Statute, the Anti-Terrorism Act, and JASTA*, 24 U. MIAMI INT'L & COMP. L. REV. 285, 379–80 (2017) ("In contrast to the non-commercial tort provision of the FSIA, JASTA says nothing about an exception for discretionary functions. If the court interprets this silence as Congressional rejection of the discretionary function exception for JASTA claims, that would be significant . . . .").

176. *See Evaluating the Justice Against Sponsors of Terrorism: Hearing on Act, S. 2930 Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 101st Cong., 25 (2010) (statement of John B. Bellinger, Legal Advisor, U.S. Dep't of State); *see also Justice Against Sponsors of Terrorism Act: Hearing on H.R. 2040 Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong., 19 (2016) (statement of Assistant Secretary of State for Near Eastern Affairs of the U.S. Dep't of State Anne W. Patterson); *id.* at 25 (statement of Legal Adviser of the U.S. Department of State Brian Egan); *id.* at 37 (statement of Michael B. Mukasey).

177. *See* Barack Obama, *Veto Message from the President—S. 2040*, THE WHITE HOUSE (Sept. 23, 2016), https://bit.ly/3fnVCcf; *see also* Seung Min Kim, *Congress Hands Obama First Veto Override*, POLITICO (Sept. 28, 2016), https://politi.co/3cyvfOM.

Amendments to the Anti-terrorism Act (ATA) have followed a similar pattern, albeit over a shorter and more recent period. Congress enacted the ATA in 1990,[178] motivated by acts of terrorism allegedly sponsored by the Palestinian Liberation Organization (PLO).[179] The ATA changed many of the background assumptions of tort and procedure, including doctrines of forum choice and damages. It remained relatively undisturbed until 2018.

In 2018, Congress passed the Anti-Terrorism Clarification Act (ATCA),[180] which made several significant alterations to the ATA statutory scheme. In particular, Congress overhauled the approach to personal jurisdiction for ATA suits.[181] Congress created a unique system of federal consent jurisdiction in which any entity that, for example, received certain forms of foreign aid was deemed to have consented to the power of a U.S. court.[182] As with the original ATA, the ATCA was aimed squarely at the PLO and the Palestinian Authority (PA).[183]

Congress seemed to miss the mark. The Trump administration had already cut off many forms of aid to the PLO and PA.[184] The PLO and PA announced that they would not accept any U.S. aid that would subject them to the jurisdiction of U.S. courts. Congress returned to ATA and the ATCA at the end of 2019. Congress enacted the PSJVTA, which purported to expand the powers created under the ATCA, while narrowing its scope.[185]

The PSJVTA created new conditions for consent to jurisdiction.[186] Most notably, it premised consent to jurisdiction on so-called "martyr's fund" payments—money paid to perpetrators or the families of

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178. *See* Antiterrorism Act of 1990, Pub. L. No. 101-519, § 131, 104 Stat. 2250 (codified as amended at 18 U.S.C. §§ 2331–2338).

179. *See* Jesse D. H. Snyder, *Reading Between the Lines: Statutory Silence and Congressional Intent Under the Antiterrorism Act*, 1 BRIT. J. AM. LEGAL STUD. 265, 269 (2012).

180. *See* Anti-Terrorism Clarification Act of 2018, Pub. L. No. 115-253, § 4, 132 Stat. 3183, 3184 (2018); *see also* JIM ZANOTTI & JENNIFER K. ELSEA, CONG. RSCH. SERV., R46274, THE PALESTINIANS AND AMENDMENTS TO THE ANTI-TERRORISM ACT: U.S. AID AND PERSONAL JURISDICTION 1–2 (2020).

181. *See* Lindsey D. Simon, *Claim Preclusion and the Problem of Fictional Consent*, 41 CARDOZO L. REV. 2561, 2615 n.41 (2020).

182. *See id.*

183. *See* Anti-Terrorism Clarification Act of 2018, Pub. L. No. 115-223, § 4, 132 Stat. 3183 (codified at 18 U.S.C. § 2333).

184. *See Palestine Brings a Case Against the United States in the International Court of Justice at A Fraught Time for U.S.-Palestinian Relations*, 113 AM. J. INT'L L. 143, 149 n.40 (2019) (citing David Brunnstrom, *Trump Cuts More Than $200 Million in U.S. Aid to Palestinians*, REUTERS (Aug. 24, 2018), https://reut.rs/3wApzeD).

185. *See* Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA), Pub. L. No. 116-94, § 903, 133 Stat. 3082 (2018) (codified at 18 U.S.C. § 2334).

186. *See* Zanotti & Elsea, *supra* note 180, at 2.

perpetrators of terrorist attacks.[187] The PSJVTA would authorize jurisdiction even if the attacks, the tortious activities, and the payments that triggered consent all took place beyond the territory of the United States. However, the PSJVTA narrowed the universe of potential defendants covered by the statute to only the PLO, PA, and any entity claiming to represent the Palestinian people.[188]

It is too early to tell whether the experimental impulse reflected in the ATCA and the PSJVTA will become normalized over time. However, courts are likely to expand the principle embodied in the ATCA and PSJVTA to other areas of law, perhaps even moving before the elected branches. As for the innovations embodied in JASTA, Congress has already started to export them into other areas of law.

B. Expansion by Courts

Legislatures are in the process of expanding the innovations of terror regulation into other areas of private law. However, courts may play just as active a role in spreading these innovations. The ATCA and PSJVTA provide particularly fertile ground for such judicial cross-pollination. The ATCA will force U.S. courts to consider the restrictions of personal jurisdiction imposed by the Fifth Amendment to the United States Constitution. U.S. courts will take up these questions in the context of terror regulation but are then likely to export those constitutional law holdings to other areas of law.

In the United States, jurisdiction to adjudicate claims is principally constrained by the Fifth and Fourteenth Amendments to the United States Constitution. The Supreme Court confirmed in *Shaffer v. Heitner* that all assertions of jurisdiction to adjudicate, whether personal, in rem, consent, or another form of jurisdiction, are subject to some form of constitutional inquiry.[189] The Fourteenth Amendment governs assertion of jurisdiction in state courts[190] and by federal courts sitting in diversity.[191] The Fifth Amendment to the Constitution governs assertions of jurisdiction by federal courts applying federal law.[192]

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187. *See id.*

188. *See* 18 U.S.C. § 2334(e)(5).

189. *See* Shaffer v. Heitner, 433 U.S. 186, 207 (1977).

190. *See* Future Tech. Today, Inc. v. OSF Healthcare Sys., 218 F.3d 1247, 1249 (11th Cir. 2000).

191. *See* Meier *ex rel.* Meier v. Sun Intern. Hotels, Ltd., 288 F.3d 1264, 1269 (11th Cir. 2002) ("A federal district court sitting in diversity may exercise personal jurisdiction to the extent authorized by the law of the state in which it sits and to the extent allowed under the Constitution.").

192. *See* Catrone v. Ogden Suffolk Downs, Inc., 647 F. Supp. 850, 852 (D. Mass. 1986) (citing Driver v. Helms, 577 F.2d 147, 157 (1st Cir. 1978), *rev'd other grounds sub nom.* Stafford v. Briggs, 444 U.S. 527 (1980)).

The United States Supreme Court has produced dozens of rulings on the constraints imposed by the Fourteenth Amendment. In recent years, the Court has returned to this subject repeatedly, producing *Goodyear*,[193] *Nicastro*,[194] *Daimler*,[195] *Walden*,[196] *BMS*,[197] *BNSF*,[198] and *Ford*.[199] Indeed, the Court's restrictive approach in *Daimler* and *Walden* directly prompted congressional action in the ATCA.[200] The Court has never squarely decided on the nature of constraints imposed by the Fifth Amendment.

The Court has held that the Fifth and Fourteenth Amendments impose different constraints. The Federal Rules of Civil Procedure require that federal courts follow the jurisdictional analysis of the states where they sit in most cases, effectively requiring federal courts by statute to adhere to the requirements of the Fourteenth Amendment.[201] However, the Rules authorize federal courts to ignore the boundaries of the state where they sit in some instances, such as where a party is joined under Rule 14 or Rule 19.[202] In that instance, the Rules permit a federal court to reach out 100-miles from the courthouse, potentially crossing state boundaries.[203] This so-called "100-mile bulge rule" is permissible under the Fifth Amendment, although it would clearly violate the Fourteenth

193. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011) (holding that foreign subsidiaries of a United States tire manufacturer are not subject to specific or general jurisdiction in a U.S. lawsuit brought by estates of two minors killed in bus accident in France).

194. J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873 (2011).

195. Daimler AG v. Bauman, 571 U.S. 117 (2014).

196. Walden v. Fiore, 571 U.S. 277 (2014).

197. Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773 (2017).

198. BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017).

199. Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021).

200. *See* Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 VA. L. REV. 1703, 1706–07 (2020) ("But because the individual states lack jurisdiction in these cases, and because the attacks weren't specifically aimed at Americans, the defendants' U.S. contacts fell short. Congress has twice amended the statute to try different approaches, and these may yet succeed.").

201. *See* McNic Oil & Gas Co. v. Ibex Res. Co., 23 F. Supp. 2d 729, 732 (E.D. Mich. 1998) ("A federal court sitting in diversity may exercise personal jurisdiction over an out-of-state defendant only after engaging in a two-step analysis. First, the court must determine whether the state long-arm statute authorizes jurisdiction over the nonresident defendant. Second, the court must consider whether the exercise of personal jurisdiction would not deny defendant his constitutional right to due process of law." (citing Omni Capital Int'l Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987), *superseded by statute*, Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527, *as recognized in* United States v. Offshore Marine, 179 F.R.D. 156, 159-160 (D.V.I. 1998))).

202. *See, e.g.*, Fitzgerald v. Wal-Mart Stores E., LP, 296 F.R.D. 392, 394 (D. Md. 2013) ("As Snow Patrol was impleaded as a third party defendant under Rule 14 of the Federal Rules, it is subject to the '100–mile bulge' of Rule 4(k)(1)(B)." (citing Hollerbach & Andrews Equip. Co. v. S. Concrete Pumping, No. 95-826, 1995 U.S. Dist. LEXIS 14990, *2 (D. Md. Sep. 29, 1995))).

203. *See* FED. R. CIV. P. 4(k)(1)(B).

Amendment.[204] In other words, the Fifth and Fourteenth Amendments impose different restrictions, and the Fifth Amendment is the only constitutional constraint on federal courts; however, what those differences might be, except for the 100-mile bulge and other variations specifically permitted under Federal Rule of Civil Procedure 4(k), is largely unexplored.

The ATCA and PSJVTA will require U.S. courts to take up the jurisdictional constraints of the Fifth Amendment. Indeed, there was strong support for the U.S. Supreme Court to take up the *Sokolow* case before Congress even passed ATCA.[205] After ATCA was passed, the case made its way back to the certiorari stage before the Court.[206] Then Congress passed the PSJVTA, prompting the Court to remand once again for the lower courts to consider the PSJVTA in the first instance.[207] There will be intense pressure for the Court to take up *Sokolow* when it again reaches the Court, particularly if the lower courts hold that the Fifth Amendment does not permit the assertion of jurisdiction or split on the issue. The ATCA will require the Court to take up several important issues of constitutional law, including the ways in which personal jurisdiction differs under the Fifth and Fourteenth Amendments and whether legislatures' power to define and impose consent jurisdiction is constrained by the Constitution, and if so, to what extent.

U.S. courts will not treat these holdings as limited to the ATCA or to terrorism regulation. In the United States, jurisdiction to adjudicate is a matter of constitutional law.[208] Courts therefore reflexively treat holdings on jurisdiction as trans-substantive. In other words, U.S. courts are very likely to apply holdings on the constraints of the Fifth Amendment on personal jurisdiction across all areas of substantive law.

The implications for other areas of private law are profound. If the Court takes this opportunity to explore the exact differences between the Fifth and Fourteenth Amendments, it would be answering in the context of terrorism regulation a pressing question across all areas of personal jurisdiction. If the Court continues to treat the two amendments as mostly congruent, its ATCA holding would shape currently pending disputes on important state assertions of jurisdiction, particularly the hotly debated

204. *See Omni Capital Int'l, Ltd.*, 484 U.S. at 102–03.

205. *See* Yishai Schwartz, Sokolow v. PLO: *Another Blow Against Recovery for Foreign Wrongs*, LAWFARE (Sept. 8, 2016), https://bit.ly/3wzLXVI.

206. *See* Waldman v. Palestine Liberation Org., 925 F.3d 570, 573 (2d Cir. 2019), *cert. granted sub nom.* Sokolow v. Palestine Liberation Org., 140 S. Ct. 2714 (2020), *and vacated*, 140 S. Ct. 2714 (2020).

207. *See Sokolow*, 140 S. Ct. at 2714.

208. *See, e.g.*, Burnham v. Superior Court of Cal., 495 U.S. 604, 609 (1990) (determining "whether the assertion of personal jurisdiction is consistent with due process").

issue of corporate registration statutes which require that foreign corporations consent to jurisdiction in the state. Either way, the Court's holding will determine to what extent the federal government may use assertions of jurisdiction by consent in other areas, such as in the pending Foreign Manufacturers Liability and Accountability Act (FMLAA), which would authorize a similar jurisdiction by consent regime in products liability suits.

If the federal courts hold that the Fifth Amendment permits assertions of jurisdiction like those in ATCA, this very decision is likely to embolden Congress by opening a plain pathway for statutory authorizations of jurisdiction that evade the restrictions imposed by the Court in cases like *Daimler* and *Walden*. If the federal courts hold that the Fifth and Fourteenth Amendments permit ATCA style jurisdiction, state legislatures are also likely to follow suit.

C. Expansion by Legislatures

Courts have the potential to spread innovations in terror regulation into other areas of private law, but Congress is already doing so.[209] In 2019 and 2020, members of Congress introduced three bills inspired by the provisions of JASTA. Two bills concerned liability for harms associated with COVID-19.[210] One concerned sovereign-sponsored acts of cyberespionage.[211] All three bills adopted, among other provisions, JASTA's unique approach to immunity stripping based on the acts of agents.

The COVID-19 pandemic produced multiple suits by various government and non-government plaintiffs seeking relief against the People's Republic of China (PRC) and related entities.[212] The first suits filed were class actions that would likely not have survived class certification and failed to deal with the biggest obstacle, the PRC's sovereign immunity under the FSIA.[213] The Missouri Attorney General

209. *See* JENNIFER K. ELSEA, CONG. RSCH. SERV., LSB10467, FOREIGN SOVEREIGN IMMUNITY AND COVID-19 LAWSUITS AGAINST CHINA 3 (2020) ("Members of the 116th Congress have introduced several bills that reduce the FSIA's obstacles.").

210. *See, e.g.*, Stop China-Originated Viral Infectious Diseases Act of 2020, H.R. 6444, 116th Cong. (2020); Stop COVID Act of 2020, S. 3592, 116th Cong. (2020); Holding the Chinese Communist Party Accountable for Infecting Americans Act of 2020, H.R. 6519, 116th Cong. (2020); Compensation for the Victims of State Misrepresentations to the World Health Organization Act of 2020, H.R. 6524, 116th Cong. (2020).

211. *See* Homeland and Cyber Threat Act, H.R. 4189, 116th Cong. (2019).

212. *See* Chimène I. Keitner, Letter to the Journal, *To Litigate a Pandemic: Cases in the United States Against China and the Chinese Communist Party and Foreign Sovereign Immunities*, 19 CHINESE J. INT'L L. 229, 229 (2020) (stating that at least twenty lawsuits had been filed as of June 2020).

213. *See* Chimène Keitner, *Don't Bother Suing China for Coronavirus*, JUST SEC. (Apr. 8, 2020) [hereinafter Keitner, *Don't Bother Suing*], https://bit.ly/3oSGFSu.

brought another suit that sought to evade the PRC's sovereign immunity by naming the Communist Party of China (CCP) as the principal defendant, alleging that the CCP "exercised direction and control" over the other defendants.[214] Perhaps realizing that this was an uphill climb, the Missouri suit also sought to fit the alleged conduct within the FSIA's commercial activity and territorial tort exceptions, although these arguments also faced serious problems.[215]

Missouri may have recognized that the more likely path forward was legislative. Senator Josh Hawley introduced the Justice for Victims of Coronavirus Act, in the words of the Senator's office, to "hold the Chinese Communist Party (CCP) responsible for causing the COVID-19 global pandemic."[216] The bill would "strip China of its sovereign immunity and create a cause of action against the CCP for reckless actions like silencing whistleblowers and withholding critical information about COVID-19[,]" and "would also create the Justice for Victims of Coronavirus Task Force at the State Department to launch an international investigation into Beijing's handling of the COVID-19 outbreak and to secure compensation from the Chinese government."[217] Senators Marsha Blackburn and Martha McSally co-sponsored the ''Stop China-Originated Viral Infectious Diseases Act of 2020'' (Stop COVID Act of 2020) which "would create an exception to sovereign immunity where a foreign state is alleged 'whether intentionally or unintentionally, to have discharged a biological weapon.'"[218]

Professor Chimène Keitner chronicled these bills in real time, testified against them in Congressional hearings, and described them as "[a]nother JASTA."[219] Keitner expressed guarded optimism about the State Department proposal—though while noting that it did not require a new statute—but unequivocally condemned the immunity stripping provisions. Keitner argued that "Congress cannot create an exception to foreign sovereign immunity every time the United States is adversely affected—even catastrophically—by another country's actions[,]" and that "[n]ot only would this likely violate international law, but it would virtually guarantee reciprocal lawsuits in other countries' courts."[220]

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214. *See* Chimène Keitner, *Missouri's Lawsuit Doesn't Abrogate China's Sovereign Immunity*, JUST SEC. (Apr. 22, 2020) [hereinafter Keitner, *Missouri's Lawsuit*], https://bit.ly/34hy42n.

215. *See id.*

216. Josh Hawley, *Senator Hawley Announces Bill to Hold Chinese Communist Party Responsible for COVID-19 Pandemic*, JOSH HAWLEY: U.S. SENATOR FOR MISSOURI (Apr. 14, 2020), https://bit.ly/3vqkCFh.

217. *Id.*

218. Keitner, *Missouri's Lawsuit*, *supra* note 214.

219. *Id.*

220. *Id.*

Congress also considered another JASTA for cyberespionage, the Homeland and Cyber Threat Act (H.R. 4189, or HACT Act). The HACT Act "would allow private lawsuits against foreign states for alleged unauthorized cyber activity."[221] In several recent cases, the FSIA has barred suits by victims of "malicious cyber activity" where "a foreign state or state-sponsored actor [has] play[ed] a role in committing malicious cyber activity against a U.S. person or entity . . . ."[222] The HACT Act would have created "an FSIA exception to allow a U.S. national to seek money damages from a foreign government for personal injury, harm to reputation, or damages or losses to property resulting from malicious cyber activity (regardless of whether the activity occurs in the United States)" and would have covered "broad categories of activity," including "everything from unauthorized access to a U.S.-based computer, to damage to computers due to various forms of malicious cyber activity, to the provision of material support for such activity."[223] This liability is neither conditioned on a finding of intent nor on any defined standard of attribution. Commentators described the bill as "fundamentally flaw[ed]."[224] Nonetheless, it "enjoy[ed] broad bipartisan support from a wide range of members across the ideological spectrum . . . ."[225]

Professor Keitner, among others, leveled several criticisms at JASTA that apply with equal or stronger force against these new immunity stripping bills. The FSIA is the only source of immunity for foreign sovereigns in U.S. courts.[226] The United States does not extend this immunity to foreign sovereigns as a matter of charity.[227] Rather, the United States benefits from a general trend toward reciprocity. The United States shields foreign sovereigns from suit in its courts in the hopes that the United States itself will be shielded from suits in foreign courts.[228] (The United States likely has more asset exposure abroad than any other nation.)[229] Exceptions in the original FSIA were narrowly crafted to affect

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221. Chimène Keitner & Allison Peters, *Private Lawsuits Against Nation-States Are Not the Way to Deal with America's Cyber Threats*, LAWFARE (June 15, 2020, 9:09 AM), https://bit.ly/34ogYj2.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).

227. *See Immunities of Foreign States: Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 29 (1973) (testimony of Bruno Ristau, Chief, Foreign Litigation Section, Civil Division, U.S. Department of Justice).

228. *See id.*

229. *See Direct Investment by Country and Industry, 2019*, U.S. DEP'T OF COM., BUREAU OF ECON. ANALYSIS (July 23, 2020), https://bit.ly/34hdWxj (showing U.S. investment abroad at $5.96 trillion).

particular policy objectives. For example, the commercial activity exception was narrowly crafted to encourage cross-border commercial transactions in which a sovereign or its organ or instrumentality was a participant.

The terrorism exception was subject to an important constraint—it applied only to nations designated by the State Department as state sponsors of terrorism. This limitation blocked suits by families of victims of the September 11th attacks against Saudi Arabia, which had not been so designated. JASTA eliminated this constraint for "any foreign state whose wrongful act causes an act of international terrorism in the United States . . . ."[230] Commentators have argued that JASTA undermined intelligence, security, and diplomatic goals. Nonetheless, JASTA did not prompt a dramatic reciprocal response from Saudi Arabia. And to this point, JASTA does not appear to have prompted a raft of suits against the United States, though this may reflect that the United States is not a leading sponsor of international terrorism.

The United States government has been a leading purveyor of cyberespionage and COVID-19 denialism. These new extensions of terrorism-style immunity stripping threaten to "declare a free-for-all in disregarding traditional principles of sovereign immunity for conduct the U.S. itself engages in, which the trend toward immunity-stripping legislation could eventually threaten to do."[231]

Chimène Keitner and Allison Peters argued that the HACT Act suffers from three serious flaws. First, the "categories of malicious cyber activity covered in this bill are so broad that they would include activity that the United States itself intentionally and legitimately conducts on a regular basis."[232] Second, "broad categorization of acts that would expose a foreign state to litigation could also expose the U.S. or its allies to litigation for unintentional actions such as the accidental release of malware or other cyber tools."[233] And third, "the HACT Act fails to include any standards for who can authoritatively attribute the harmful activity to a particular foreign state."[234] Attribution is both a technical and diplomatic decision. The HACT Act leaves the role of the Executive, and its ability to weigh policy and political concerns, out of the picture. Keitner and Peters argued against the HACT Act's turn toward a private law solution and in favor of classically public solution: an expanded role for the diplomatic core and public intervention, such as espousal of claims.[235]

230. Keitner & Peters, *supra* note 221.
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *See id.*

Professor Keitner leveled similar critiques against the COVID-19 immunity stripping bills in her testimony before Congress.[236] Again, she made three main points, that the "United States has more to lose than any other country by removing the shield of foreign sovereign immunity for a pandemic," that "[p]rivate litigation will not bring China to the negotiating table, and it will not produce answers or compensation for U.S. victims," and that "Congress should focus on the inadequate federal response to COVID-19, and on restoring U.S. leadership in global public health."[237] In her answers to questions from the Senate Judiciary Committee, Professor Keitner noted that private claimants had already filed COVID-19 based suits against the United States in Chinese courts and that, though the Chinese view of foreign sovereign immunity blocked these suits, the National People's Congress had ordered a study of possible changes to immunity law.[238] Professor Keitner also noted that Iran had already taken that step, authorizing massive (though as of yet unenforced) private judgments against the United States.[239]

III. THE DYNAMICS OF TERROR REGULATION IN PRIVATE LAW REFORM

The path of terror regulation through public law is well known. Terror regulation has followed a similar path through multiple areas of private law in recent years. Yet, there are significant differences between private and public law, particularly in the players and pathologies in these somewhat different spheres.

"[T]he distinction between public and private law" is "related to political economy."[240] Although the distinction may be more "fundamental" in civil law systems, it remains "meaningful" in the "common law world."[241] Yet, the distinction between public and private law is somewhat slippery. As John C. Reitz observes, a common approach to the distinction "between private and public law states that private law governs relationships among equals, but public law governs the relationship between the state and its citizens when they are not in a relation of equality because the citizens are to be treated as subjects of the state."[242] In civil law systems, the distinction tends "to turn on the special nature of the rules in public law, which are different from the rules of

236. *The Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability, Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2020) (statement of Chimène Keitner, Professor of International and Comparative Law, UC Hastings Law).

237. *Id.* at 1.

238. *See id.* at 25.

239. *See id.* at 26.

240. Reitz, *supra* note 6, at 1141.

241. *Id.* at 1141–42.

242. *Id.* at 1142.

private law and therefore grant the state certain special or 'prerogative' rights by comparison with the rights that private parties have under private law."[243]

Scholars have written volumes "about the War on Terror's erosion of public law, particularly in the areas of constitutional, criminal, and immigration law."[244] In constitutional law, scholars have explored "constitutional concerns raised by the criminal material support statutes[,]" in particular on how "broad definition[s] of 'material support'" undermine "paradigmatic free speech and association rights[,]" "religious freedom protections[,]" and "Fourth Amendment privacy rights."[245] In criminal law, scholars have observed that "terrorism exceptionalism" is eroding "traditional investigatory practices, notions of liability, due process protections, as well as incarceration norms[,]" leading to "rampant use of suspicion-less spying and informants[,]" criminalization of activities "which are not otherwise dangerous or directly linked to the commission of terrorist violence[,]" and "the application of terrorism-specific sentencing enhancements mandating exceedingly long prison terms for defendants."[246] In immigration law, scholars have observed that "post-9/11 counterterrorism objectives" have led to a "near complete . . . subordination of immigration and immigration policy to terrorism policy[,]" producing "a steep rise in ethnic and religious profiling in immigration law enforcement and an increase in restrictive immigration practices."[247]

The dynamics of private law are different, although the impact of those differences is only now becoming apparent.

A. From Individuals to Corporations

Terrorism litigation in U.S. courts on behalf of U.S. nationals typically invokes the ATA. Terrorism litigation in U.S. courts on behalf of foreign nationals has frequently invoked the Alien Tort Statute (ATS). Indeed, the two categories of claims have been joined together in the same suits. However, ATA and ATS claims have met with very different fates. The reasons for the divergence are rooted in the shift from using private law to police individuals to corporate multinationals. The demise of the ATS as a source of private law liability for terrorism and other violations of international law contains a cautionary tale for the future of the ATA.

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243. *Id.*

244. Maryam Jamshidi, *How the War on Terror Is Transforming Private U.S. Law*, 96 WASH. U. L. REV. 559, 566 (2018).

245. *Id.* at 566–67.

246. *Id.* at 567.

247. *Id.* at 567–68 (quoting Karen C. Tumlin, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173, 1176 (2004)).

The first federal law on the judiciary, enacted in 1789, contained the following provision: "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."[248] This "sparse and opaque"[249] provision "had been an enigmatic relic of no practical significance."[250] In the 1970s, human rights advocates unearthed the ATS as a means to enforce international human rights law through private litigation.

These efforts bore fruit in the United States Court of Appeals for the Second Circuit's decision in *Filártiga v. Peña-Irala*.[251] The court held, with the support of the Carter Administration, that "as a jurisdictional matter [] foreign nationals could sue one another in U.S. courts for international-human-rights violations occurring abroad."[252] The *Filártiga* case involved "claims by private persons against a government official for acts that could violate international law only if they involved an exercise of official authority."[253] This aspect of *Filártiga*'s holding was adopted into statute when Congress enacted the Torture Victims Protection Act (TVPA) in 1992.[254] However, the scope of the ATS remained a mystery.

The first hurdle was whether the ATS could be expanded to individuals not acting under state authority. The United States Court of Appeals for the Second Circuit crossed that "threshold" in *Kadic v. Karadžić*, holding that the leader of an unrecognized state of Srpska could be held liable for acts of genocide, crimes against humanity, and war crimes.[255] A federal district court took "the next logical step" only two years later, extending the ATS to cover corporations as "private legal persons" that "had the capacity to violate international law and thus to be

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248. 28 U.S.C. § 1350.

249. Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 712 (2012).

250. Pierre Hugues-Verdier & Paul B. Stephan, *International Human Rights and Multinational Corporations: An FCPA Approach*, 101 B.U. L. REV. (forthcoming 2021) (manuscript at 7) (https://bit.ly/3xBD4vs).

251. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

252. *Should State Law Rule The World? A Call for Caution in Applying State Law to Transnational Tort Cases*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM 4 (Sept. 2013), https://bit.ly/3AQv5eO.

253. Hugues-Verdier & Stephan, *supra* note 250, at 8.

254. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2, 106 Stat. 73 (codified at 28 U.S.C. § 1350) (creating a federal cause of action for victims of torture or extrajudicial killing against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation" perpetrated certain prescribed acts).

255. Kadic v. Karadzic, 70 F.3d 232, 239–43 (2d Cir. 1995).

held accountable through tort suits."[256] More suits against corporations followed.

In 2004, the Supreme Court began a long campaign to narrow the ATS and to eliminate suits against corporations, while preserving suits akin to *Filártiga*. In *Sosa v. Alvarez-Machain*, the Court held that liability for international law violations could extend only to claims "based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized[,]" such as offenses against ambassadors, violations of safe conduct, and piracy.[257] Nonetheless, ATS litigation against private corporations seemed to increase.

The *Kiobel v. Royal Dutch Petroleum* case seemed to put the case of corporate liability under the ATS squarely before the Supreme Court. A panel for the United States Court of Appeals for the Second Circuit had held that "customary international law did not recognize corporate responsibility for international crimes, and hence the ATS did not support a cause of action for suits against corporations."[258] The Supreme Court granted certiorari on that question. At oral argument, the Court ordered additional briefing and another argument on whether the ATS reached conduct occurring abroad.[259] The Court then decided the second question and ducked the first, holding that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application [of U.S. law]."[260]

The *Kiobel* decision was a setback for ATS litigation against both corporations and individuals. The ATS is limited to claims brought by alien plaintiffs. Most ATS claims against individuals or corporations had been based on conduct occurring abroad. The Supreme Court's skepticism of international human rights litigation against corporations seemed to have undermined not only corporation litigation, but also suits against individual conduct abroad that had been considered only a modest extension of *Filártiga*.

Meanwhile, decisions in other areas seemed designed to prune corporate human rights litigation while preserving suits against

256. Hugues-Verdier & Stephan, *supra* note 250, at 8 (citing Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part*, 395 F.3d 932 (9th Cir. 2002), *pet. for rehearing en banc granted*, 395 F.3d 978 (9th Cir. 2003), *pet. dismissed upon motion of the parties*, 403 F.3d 708 (9th Cir. 2005)).

257. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004).

258. Hugues-Verdier & Stephan, *supra* note 250, at 10 (citing Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2d Cir. 2010)).

259. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 114 (2013).

260. *Id.* at 124–25.

individuals. In *Mohamad v. Palestinian Authority*, the Court held that the TVPA's imposition of liability on an "individual," did not "contemplate[] liability against . . . nonsovereign organizations."[261] In *Daimler v. Bauman*—another international human rights suit—the Court dramatically restricted general personal jurisdiction over corporations, which had been an essential ingredient for many types of transnational suits against corporate multinationals.[262]

The Court dealt a near-fatal blow for corporate human-rights litigation under the ATS in *Jesner v. Arab Bank, PLC*.[263] The Court held that the ATS could not support any claim grounded in customary international law against a foreign corporation, although the majority splintered in its reasoning. The Court left only the narrow possibility of ATS suits against a domestic corporation.

Most recently, the Court decided *Nestlé USA, Inc. v. Doe*.[264] The Court had decided in *Kiobel* that the ATS did not apply extraterritorially. The Court now took up the question of what might constitute a domestic application of the ATS. The Court held that corporate "operational decisions" in the United States were insufficient to establish that the ATS was being applied domestically.[265] Once again, the Court included language that, if taken literally, could undermine ATS suits against individuals. Justice Thomas's opinion for eight members of the Court seemed to suggest that a domestic application of the ATA must involve domestic *conduct*, as opposed to other possible domestic connections that might be the "focus" of the ATS.[266] If that is so, it could eliminate practically all ATS suits against individuals, including cases like the seminal *Filártiga* decision, where the conduct occurred abroad, but the perpetrator then sought refuge in the United States.[267]

The story of corporate human rights litigation stands as a cautionary tale. International human rights advocates unearthed the ATS as a potent tool against individuals. They then turned to corporate multinationals, kicking off a 15-year period of retrenchment led by the Supreme Court.

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261. Mohamed v. Palestinian Authority, 566 U.S. 449, 453 (2012).

262. *See* Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 VA. J. INT'L L. 325, 327 (2018).

263. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018).

264. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1936–37 (2021) ("Even if we resolved all these disputes in respondents' favor, their complaint would impermissibly seek extraterritorial application of the ATS.").

265. *See id.* at 1937 ("To plead facts sufficient to support a domestic application of the ATS, plaintiffs must allege more domestic conduct than general corporate activity. The Ninth Circuit erred when it held otherwise.").

266. *See id.* at 1936.

267. *See* William S. Dodge, *The Surprisingly Broad Implications of* Nestlé USA, Inc. v. Doe *for Human Rights Litigation and Extraterritoriality*, JUST SEC. (June 18, 2021), https://bit.ly/3l3KR1y.

The Court's skepticism insulated corporate multinationals from ATS claims but also had spillover effects into other forms of international human rights litigation. ATS litigation against individuals has been curtailed by the Court's decision in *Kiobel*, among others. Many forms of transnational litigation against corporations have been cut off by the Court's decision in *Daimler*, which was premised in part on ATS claims.

B. From Terrorists to Banks

Most terrorism legislation was initially passed to directly affect alleged terrorists. The *Achille Lauro* hijacking prompted legislation designed to combat the activities of the PLO. The bombing of Pan Am Flight 103 prompted legislation aimed at Hamas and other Iranian-backed groups. The September 11th attacks produced legislation aimed at Al Qaeda. In each instance, U.S. lawmakers envisioned alleged terrorist groups themselves as the defendants in private civil actions that were being authorized or expanded.

In some instances, lawmakers viewed this legislation as essentially symbolic. This expectation likely sped passage of the ATA itself. Even the bill's sponsors were not confident that judgments obtained under the ATA would ever be successfully enforced against foreign entities like the PLO. But symbolism matters, especially in politics. Nevertheless, the debates on the passage of the ATA do not suggest that the statute might have teeth for entities other than the alleged terrorists themselves and, perhaps, not even for them.

Over time, the focus of these statutes, and the paradigmatic defendants in the private actions they authorize, have shifted from alleged terrorists to corporate multinationals. The two groups that have found themselves most directly affected are financial intermediaries and social media companies. In the words of one prominent banking lawyer: "So banks are terrorists now?"[268]

The forces behind this shift are both intentional and not. After the September 11th attacks, a series of studies revealed the expansive financing network that enabled the terrorist attacks. These revelations prompted legislative interventions aimed at detecting and policing the terrorist financing networks that, in some cases, even the staff of the 9/11 Commission regards as overaggressive and potentially misguided.[269]

The courts have prompted unintentional shifts in the focus of terrorism regulation away from alleged terrorists and toward corporate multinationals. The U.S. Supreme Court's decision in *Daimler v. Bauman*

268. Geoffrey Sant, *So Banks Are Terrorists Now?: The Misuse of the Civil Suit Provision of the Anti-Terrorism Act*, 45 ARIZ. ST. L.J. 533, 533 (2013).

269. *See supra* Section I.C.

now carries a long list of unintended consequences. In *Daimler*, the Court eliminated "doing business" jurisdiction.[270] Under the old "doing business" standard, a court could constitutionally hale a foreign party into court if it had "continuous and systematic" contacts with the forum.[271] These contacts need not have been extensive. For example, a leased sales office with a handful of temporary employees would suffice. "Doing business" was, however, a common basis for jurisdiction in U.S. courts and a background assumption of much legislation.

In *Daimler*, the Court cut the trunk of "doing business" jurisdiction to the ground without much care for the legislation that had grown up around it. The ATA was among the statutes that had assumed the existence of "doing business" jurisdiction. There were at least four pending ATA cases against the PA and PLO when the Court decided *Daimler*.[272] All four were proceeding under the basis of "doing business" jurisdiction. Eventually, all four were dismissed for lack of personal jurisdiction. Some of those cases now carry on under the jurisdictional bases provided by the ATCA and, now, the PSJVTA.

The *Daimler* decision essentially removed the typical jurisdictional bases for haling alleged terrorists into U.S. courts for ATA claims. Plaintiffs therefore turned their attention to potential defendants with sufficient jurisdictional ties to a U.S. forum. In other words, they sued corporate multinationals: first banks, and later, social media companies.

"In search of identifiable and deep pockets, plaintiffs focus attention at financial institutions that handle transactions for terrorist groups"—multinational banks.[273] Litigation under the ATA overwhelmingly focuses on three broad classes of cases: "Those involving financial services that directly benefit terrorist organizations and include non-routine bank services on behalf of the terrorist group; those that involve routine financial services with the terrorist organization such as are done predominantly, if not entirely, by computers; and those that involve violations of laws regarding financial transactions with nation states sponsoring terrorism."[274]

The *Linde v. Arab Bank* case "best represents a situation of active interaction between the bank and the terrorist organization," where "the court required some kind of plausible linkage between the bank's conduct and the terrorist act."[275] Litigation against the Bank of China "represents a

270. *See Daimler AG*, 571 U.S. at 138.

271. *See id.*

272. *See* Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 VA. J. INT'L L. 325, 367 (2018) (describing cases).

273. 2 VED P. NANDA ET AL., LITIG. OF INT'L DISPS. IN U.S. COURTS § 9:42 (2d ed. 2005 & Supp. 2020) (describing the types of civil terrorism suits against banks).

274. *Id.*

275. *Id.*

middle ground," in which "the bank was informed that it was making financial transactions on behalf of terrorist organizations, but persisted in providing services."[276] The *Rothstein* case "arguably represents the weakest case for plaintiff," in which the court held that "currency transfers into state sponsors of terrorism in violation of U.S. law does not satisfy requisite proximate cause as regards terrorist attacks that were allegedly funded by the state sponsor of terrorism."[277]

This dynamic means that multinational financial institutions are directly interested in and affected by private law regulation of terrorism. In modern market economies, financial institutions exert great power on the lawmaking process, even in areas that affect them less directly. Douglass North pioneered the institutional economics of this field.[278] The study of how these differences in economic institutions lead to differences in law generation and reform is sometimes referred to as "new comparative economics."[279] (Though some theorists in the field rejected the usefulness of the private/public distinction outright.)[280]

In this account, the United States is "a financialized economy, where the financial sector and its priorities have become increasingly dominant in all aspects of the economy."[281] This "financialization" is described "as a process of income redistribution" that allows "rent seeking by an increasingly concentrated and politically influential finance sector . . . leading to the pooling of profits and income in the finance sector."[282]

The United States has essentially leaned into this process of "financialization" of its political economy, placing the "emphasis over the years . . . on bringing about greater integration of regulatory agencies."[283] In the aftermath of the 2008 financial crisis, the U.S. Treasury Department proposed a set of institutional reforms referred to as the "Paulson Plan."[284]

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276. *Id.*

277. *Id.*

278. *See generally* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990).

279. *See, e.g.*, Simeon Djankov et al., *The New Comparative Economics*, 31 J. COMP. ECON. 595, 595 (2003).

280. *See* Christopher A. Whytock, *Taking Causality Seriously in Comparative Constitutional Law: Insights from Comparative Politics and Comparative Political Economy*, 41 LOY. L.A. L. REV. 629, n.78 (2008) ("I use the term 'private law' for convenience only; I have doubts about its analytic utility . . . . For example, property rights are as much a part of public law as private law." (citing Martin Shapiro, *From Public Law to Public Policy, or the "Public" in "Public Law,"* 5 PS: POL. SCI. & POL. 410 (1972))).

281. Donald Tomaskovic-Devey & Ken-Hou Lin, *Financialization: Causes, Inequality Consequences, and Policy Implications*, 18 N.C. BANKING INST. 167, 167 (2013).

282. *Id.*

283. Michael W. Taylor, *Regulatory Reform in the U.K.*, 18 N.C. BANKING INST. 227, 247 (2013).

284. *Id.*

The Paulson Plan proposed "a new Prudential Financial Regulatory Authority (PFRA) that would be responsible for the safety and soundness of individual firms with some type of explicit government guarantee of their business operations (e.g. banks and insurance companies)[,]" as well as "a consolidated business conduct regulator (a Conduct of Business Regulatory Agency or CBRA) [that] would be responsible for monitoring the business conduct of all financial firms."[285] The CBRA was created in an "attenuated form of the Consumer Finance Protection Bureau (without the addition of the consumer protection role of the SEC and CFTC as originally envisaged)."[286] However, "few of the other ideas embodied in the Paulson Plan survived into the Dodd-Frank Act[,]" due to "a change of administration, the lobbying of industry groups that had established close links with existing regulatory agencies, and reluctance of Congressional committees to abandon their oversight role of specific agencies . . . ."[287]

Mark Roe may have provided the most compelling account of the pre-2008 crisis of U.S. resistance to the "financialization" of its political economy in his book "Strong Managers, Weak Owners."[288] Roe argues that "the structure of the large firm is highly sensitive to the structure of financial intermediaries, which in turn is highly sensitive to law."[289] In Roe's account, the structure of the American corporation is shaped by both economics and law. Roe "suggests that American politics made it difficult or impossible for financial intermediaries" to "either to become large enough to hold substantial blocks of common stock or, if large enough and allowed to hold such blocks, effectively to exercise a powerful owner's voice in the governance of American corporations."[290] Rather, financial intermediaries were "fragmented" among "dispersed owners, including financial institutions" who could not "easily coordinate their activities."[291]

285. *Id.* ("The underlying logic of these proposals was obviously very close to the objectives-based concept that underpinned the Twin Peaks approach that the U.K. eventually adopted.").

286. *Id.*

287. *Id.*

288. *See* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994); *see also* Gregory Mark, Book Review Essay, *Realms of Choice: Finance Capitalism and Corporate Governance*, 95 COLUM. L. REV. 969, 969–70 (1995) ("The publication of Strong Managers, Weak Owners may lead a return to a more richly contextualized understanding of the American business corporation. Its author, Mark Roe, has provided a truly original contribution to our literature on the legal history of the corporation in the political economy.").

289. Roe, *supra* note 288, at 196–97.

290. Gregory Mark, Book Review Essay, *Realms of Choice: Finance Capitalism and Corporate Governance*, 95 COLUM. L. REV. 969, 970 (1995).

291. *Id.*

This fragmentation among financial intermediaries was a significant factor in the "development of the American political economy."[292]

K. Sabeel Rahman's account of the post-crisis political economy of private law stands in stark contrast to Roe's pre-crisis history.[293] Rahman argues that, "[f]rom the standpoint of domination and power, one of the central problems of today's political economy is the increasingly concentrated power of corporations," including the "too-big-to-fail banks." Rahman observed that "we live in an era marked by new forms of what Brandeis famously called 'the curse of bigness.'"[294]

C. From General to Special Legislation

ATCA and the Iran Threat Reduction Act address different areas of private law but share an important and troubling similarity. Both statutes grant broad powers but over a very narrow class of defendants. They are both examples of legislation that targets a single nation, single defendant, or even a single case. This type of law is referred to as "special legislation."[295]

A divided Supreme Court upheld the constitutionality of one example of special legislation, the Iran Threat Reduction Act, in *Bank Markazi v. Peterson*. In the Iran Threat Reduction Act, the elected branches sought to intervene not only against a single party, but in a particular lawsuit. The Supreme Court held, six to three, that this did not offend the separation of powers and judicial independence.[296]

The Supreme Court "does not recognize a constitutional principle disfavoring special legislation, that is, legislation that singles out identifiable individuals for benefits or harms that are not applied to the rest of the population."[297] Evan Zoldan has argued that as "a result, both Congress and state legislatures routinely enact special legislation despite the fact that it has been linked to a variety of social harms, including

292. *Id.* at 970–71.

293. *See* K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1345 (2016).

294. K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards A Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1359 (2016) (quoting Louis D. Brandeis, *A Curse of Bigness*, HARPER'S WEEKLY, Jan. 10, 1914, at 18).

295. *See, e.g.*, Evan C. Zoldan, *Legislative Design and the Controllable Costs of Special Legislation*, 78 MD. L. REV. 415, 415 (2019) ("Legislation that singles out an identifiable individual for benefits or harms that do not apply to the rest of the population is called 'special legislation.'").

296. *See* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1317 (2016) (holding that asset execution portion of the Iran Threat Reduction Act "does not transgress constraints placed on Congress and the President by the Constitution").

297. Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625, 625 (2014).

corruption and the exacerbation of social inequality."[298] Zoldan argues that special legislation is constitutionally disfavored and goes on to lay out a normative framework for distinguishing good special legislation from bad.

Special legislation is "costly when it reflects the corruption of the legislative process and leads to low-quality legislation, unjustifiably unequal treatment, and legislative encroachment on the judicial and executive functions."[299] However, "special legislation is normatively attractive when it addresses a problem unique to a particular location, when it addresses a matter of public concern, when it reduces rather than exacerbates disuniformity in the law, and when it provides relief for underrepresented political minorities."[300] Zoldan argues that, although special legislation is not all bad, it is recklessly overused, constitutionally suspect, offends principles of equal treatment, and should be curtailed by courts and by modifications of the legislative process.[301]

The ATCA fares poorly on these metrics. The poor drafting of the ATCA led to it causing unintended problems for international non-governmental entities.[302] Even more telling, the statute was essentially ineffective-on-arrival for its intended purpose, as the Trump Administration had essentially already eliminated the aid and other assistance that would have triggered jurisdiction over the PLO and PA. These defects led the to the legislation to clarify the Anti-Terrorism Clarification Act, the PSJVTA.

The clarification to the clarification had its own problems. Indeed, these shortcomings sharply illustrate the dangers of special legislation. Congress broadened jurisdictional triggers of the statute significantly, making them more aggressive, less tied to any nexus to the United States, and more vague. These expanded and opaque powers were rendered palatable by the PSJVTA's explicit narrowing of its scope to the PLA, PA, or any entity holding itself out as representing the Palestinian people. The ATCA had always been directly motivated by cases against the PLO and PA—there was no mystery about that—but the PSJVTA dropped all pretense of legislative generality and was therefore able to embrace even broader powers. And even then, the quality of the legislative drafting remained poor, failing to adequately describe which provisions of the previous version of the statute were still in effect.

This combination of broad powers with narrow targeting is typical of terrorism legislation. This pattern is a natural outgrowth of the political

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298. *Id.*

299. Evan C. Zoldan, *Legislative Design and the Controllable Costs of Special Legislation*, 78 MD. L. REV. 415, 415 (2019).

300. *Id.*

301. *See id.*

302. *See* Teresa Welsh, *USAID, US NGOs Leave Gaza, West Bank Over Terrorism Law*, DEVEX (Jan. 29, 2019), https://bit.ly/3mm5w02.

economy of terrorism legislation, which involves highly sympathetic plaintiffs and strongly disfavored defendants, similar to the well-documented problems of criminal and immigration legislation. The political economy of terrorism legislation is distinguished, however, by the fact that the disfavored defendants are frequently entities (rather than individuals) that are well-defined (particularly state or non-state governmental entities) and ascertainable beforehand. These characteristics encourage special legislation by enabling legislators to direct their effects to, say, the PLO or to Iran specifically, rather than to all criminal defendants generally.

This is not to say that individual terrorists are not targets of private law terrorism legislation. But they are not the predominant targets. The types of remedies available under private law, particularly damages, are largely ineffective against individual actors. For various reasons, they are likely be judgment proof. Organizations that sponsor or provide material support to terrorism are a different story, however, and are, therefore, the most likely targets of terrorism legislation in private law.

Terrorism defendants and targets of special legislation may be disfavored for different reasons than targets of public legislation—for example, in the criminal or immigration areas. In public law legislation, certain groups are often disfavored because of structural deficits, such as institutionalized racism, persistent wealth disparities, or differing abilities to organize collectively. Disfavored entities in terrorism legislation—Iran, the PLO, or the PA, for example—may be quite powerful in some arenas. But due to diplomatic, geopolitical, or simply political conflict, they find themselves on the outside of the legislative process looking in. However, their status may change—and change more quickly than disfavored persons in the public law setting.

In private law terrorism legislation, the political economies of terrorism legislation and of private legislation meet. Private legislation in this area directly affects the interests of powerful, well-organized interest groups and financial intermediaries, particularly transnational banks. The "financialization" of the American political process has given financial intermediaries profound influence on the legislative process. As you would expect, they have been largely successful in resisting legislation that would expose them to significant tort liability. Indeed, the expansion of the ATA to banks was largely court-driven, rather than the product of new legislation.

In private terrorism legislation, however, financial intermediaries are up against the profound pressure to provide tangible relief to victims of terrorism. The financial intermediaries have responded not by trying to scuttle such legislation outright, but by narrowing it such that they have significant protections or, as in the amended ATCA, are not covered at all.

The pressures of terrorism legislation produce aggressive, indeed unique, powers while the pressures of private law produce a narrow scope that excludes powerful groups and, sometimes, includes only one potential defendant.

CONCLUSION

Lawmakers' response to terrorism is based on the premise that the "struggle against global terrorism is different from any other war in our history."[303] Legislators and judges approach lawmaking for terrorism differently than any other area of law. These innovations take predictable forms—protections for defendants are loosened, the power of the state is expanded. Many of these innovations have divided lawmakers both on their advisability and their legality.

This Article has examined how those innovations do not remain at home in terrorism regulation, but rather spread into other areas of law, such as cyberespionage and public health. This phenomenon is well known in public law but has not before been examined across multiple areas of private law, which many think of as insulated from political pressures. In fact, terror regulation has served as a laboratory and proving ground for innovations in private law as well.

It is difficult to condemn every aspect of terror regulation's spread into other areas of private law. Some of these innovations may be broadly beneficial. Nevertheless, their origins in terror regulation should give us pause, precisely because lawmakers treat terror regulation so differently from other areas of law.

Some problems are already plain. When the political economy of terror regulation collides with that of private law, a rise in special legislation is the predictable result. Special legislation threatens to subvert rule of law values and encourage the passage of poorly drafted laws. The ATCA is only one example. It is not alone now—and there will doubtless be more like it.

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303. *See* THE PRESIDENT OF THE UNITED STATES, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002).