THE UNSUNG VIRTUES OF GLOBAL FORUM SHOPPING

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ABSTRACT

Forum shopping gets a bad name. This is even more true in the context of transnational litigation. The term is associated with unprincipled gamesmanship and undeserved victories. Courts therefore often seek to thwart the practice. But in recent years, exaggerated perceptions of the "evils" of forum shopping among courts in different countries have led U.S. courts to impose high barriers to global forum shopping. These extreme measures prevent global forum shopping from serving three unappreciated functions: protecting access to justice, promoting private regulatory enforcement, and fostering legal reform.

This Article challenges common perceptions about global forum shopping that have supported recent doctrinal developments. It traces the history of concerns about global forum shopping and distinguishes between domestic and global forum shopping to discern the core objections to the practice. It then identifies these unappreciated virtues of global forum shopping and suggests balanced ways for courts to protect them.

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INTRODUCTION

In September 2015, Volkswagen announced it had rigged diesel emissions tests to make its "Clean Diesel" cars seem to comply with U.S. environmental regulations while they were being tested.[1] In fact, the cars emitted pollutants up to forty times more than U.S. law permits. After that announcement, which affected 11 million cars worldwide,[2] Volkswagen's market value dropped by about $25 billion, or thirty percent.[3] Volkswagen owners, car dealerships, and shareholders around the world started wondering how they could hold Volkswagen accountable.

Outside the United States, affected consumers, car dealerships, and shareholders are suing Volkswagen.[4] Aggregate litigation is pending in countries from Canada,[5] to Australia,[6] to South Korea.[7] In Europe, Volkswagen is facing litigation in many different countries on civil, criminal, and regulatory

1 Jack Ewing & Jad Mouawad, *Directors Say Volkswagen Delayed Informing Them of Trickery*, N.Y. TIMES (Oct. 23, 2015), http://www.nytimes.com/2015/10/24/business/international/directors-say-volkswagen-delayed-informing-them-of-trickery.html.

2 Guilbert Gates et al., *Explaining Volkswagen's Emissions Scandal*, N.Y. TIMES (Sept. 12, 2016), http://www.nytimes.com/interactive/2015/business/international/vw-diesel-emissions-scandal-explained.html?_r=0.

3 Paul R. La Monica, *Volkswagen Has Plunged 50%. Will It Ever Recover?*, CNN (Sept. 24, 2015), http://money.cnn.com/2015/09/24/investing/volkswagen-vw-emissions-scandal-stock/; Geoffrey Smith, *Billions Wiped Off Volkswagen Shares by Emissions Cheating Scandal*, FORTUNE (Sept. 21, 2015), http://fortune.com/2015/09/21/billions-wiped-off-volkswagen-shares-by-emissions-cheating-scandal/.

4 Pamela Bookman, *Volkswagen and the Changing Landscape of Transnational Litigation*, TEMPLE 10-Q (Nov. 12, 2015) http://www2.law.temple.edu/10q/volkswagen-and-the-changing-landscape-of-transnational-litigation/; *5,000 Dutch Volkswagen Owners Sign Up for 'Dieselgate' Case*, DUTCHNEWS (Jan. 12, 2016), http://www.dutchnews.nl/news/archives/2016/01/83160-2/; Mike Spector, *VW Faces Barrage of Litigation*, WALL ST. J. (Sept. 29, 2015), http://www.wsj.com/articles/vw-faces-barrage-of-litigation-1443465416; Christopher Tan, *VW Singapore Faces First Lawsuit Over Emission Cheating Scandal*, STRAITS TIMES (Mar. 18, 2016), http://www.straitstimes.com/singapore/transport/vw-singapore-faces-first-lawsuit-over-emission-cheating-scandal (Singapore); *Volkswagen Faces Lawsuit in China over Emissions*, WALL ST. J. (Dec. 15, 2015), http://www.wsj.com/articles/volkswagen-faces-lawsuit-in-china-over-emissions-1450176206.

5 *Class Action Claim Filed over Volkswagen Emissions*, CBC NEWS (Sept. 22, 2015), http://www.cbc.ca/news/canada/saskatchewan/class-action-claim-filed-over-volkswagen-emissions-1.3239330; *Volkswagen Canada Recall*, LAWYERSANDSETTLEMENTS.COM, https://www.lawyersandsettlements.com/lawsuit/vw-canada.html#.VnmFvfkrLBQ (last updated Oct. 6, 2015); *Volkswagen Faces Canadian Class Action over Fraudulent Defect Devices*, BIGCLASSACTION.COM (Sept. 24, 2015), https://www.bigclassaction.com/lawsuit/volkswagen-faces-canadian-class-action-over.php.

6 Rob Taylor, *Volkswagen Faces Class-Action Suit in Australia over Emissions Scandal*, WALL ST. J. (Nov. 19, 2015), http://www.wsj.com/articles/volkswagen-faces-class-action-suit-in-australia-over-emissions-scandal-1447910466.

7 Michael Herh, *Suing for Lost Fuel: Korean Consumers Take Volkswagen to Court*, BUS. KOREA (Sept. 30, 2015), http://www.businesskorea.co.kr/english/news/industry/12277-suing-lost-fuel-korean-consumers-take-volkswagen-court.

fronts.[8] Litigation funding firms and U.S. law firms are leading many of these efforts.[9] In Germany, Volkswagen faces private securities fraud litigation.[10] Consumer suits are in the works.[11]

Within the United States, groups of Volkswagen owners sued in many different state and federal courts, seeking the best forum under different criteria.[12] These efforts were examples of domestic forum shopping. Volkswagen shareholders around the world have also sought out the best possible forum for their securities litigation. Some who bought American Depositary Receipts (ADRs) on U.S. exchanges have sued in federal district court.[13] But many shareholders have filed suit in Germany, Volkswagen's home forum.[14] It is possible that as the litigation progresses, groups of shareholders may ultimately seek out a court in the Netherlands to recognize a global settlement. These choices are examples of transnational or global forum shopping.

From one perspective, these lawsuits represent efforts of scheming, opportunistic lawyers searching worldwide for the best forum for extorting the highest possible judgment or settlement out of Volkswagen.[15] From another perspective, however, Volkswagen's actions harmed parties all over

8 *See* Michael McAleer, *Mayo Motorist Files Lawsuit Against VW over Emissions Scandal*, Irish Times (Nov. 14, 2015), http://www.irishtimes.com/business/manufacturing/mayo-motorist-files-lawsuit-against-vw-over-emissions-scandal-1.2429416 (Ireland); Hugo Miller & Richard Weiss, *VW Deals with More European Lawsuits from Emission Cheating*, Bloomberg (Oct. 2, 2015), http://www.bloomberg.com/news/articles/2015-10-02/vw-deals-with-more-european-legal-action-from-emission-cheating (France, Germany, Italy, Switzerland); *VW Faces Biggest-Ever Lawsuit in Europe*, Deutsche Welle (Jan. 14, 2016), http://www.dw.com/en/vw-faces-biggest-ever-lawsuit-in-europe/a-18977471 (Netherlands); Harro ten Wolde, *VW Sued by German States of Hesse, Baden-Wuerttemberg over Diesel Scandal*, Auto. News Europe (Sept. 16, 2016), http://europe.autonews.com/article/20160916/ANE/160919898/vw-sued-by-german-states-of-hesse-baden-wuerttemberg-over-diesel (Germany).

9 Alison Frankel, *U.S. Law Firms Are Betting on Control of VW Litigation Overseas*, Reuters (Dec. 2, 2015), http://blogs.reuters.com/alison-frankel/2015/12/02/u-s-law-firms-are-betting-on-control-of-vw-litigation-overseas/. On October 25, 2016, District Judge Charles Breyer of the Northern District of California approved a $14.7 billion settlement for United States drivers suing Volkswagen AG. Kartikay Mehrotra & Margaret Cronin Fisk, *VW Judge Approves $14.7 Billion Diesel-Cheating Settlement*, Bloomberg (Oct. 25, 2016), https://www.bloomberglaw.com/product/blaw/document/OFM39CSYF01V?emc=BLAW%3A115366889%3A7&resource_id=afd8899ccef477c518badfdf92b24ef6.

10 *See, e.g.*, Aebra Coe, *VW to Face German Investor Actions, Litigation Funder Says*, Law360 (Oct. 2, 2015), http://www.law360.com/articles/710492/vw-to-face-german-investor-actions-litigation-funder-says.

11 Caroline Copley, *Volkswagen Faces First German Lawsuit over Rigged Diesel Tests*, Reuters (Oct. 7, 2015), http://www.reuters.com/article/volkswagen-emissions-germany-lawsuit-idUSL8N1273S220151007; Frankel, *supra* note 9.

12 *See* Spector, *supra* note 4.

13 *See* Karin Matussek, *Volkswagen Seeks Dismissal of U.S. Investor Class-Action Lawsuit*, Bloomberg (Aug. 2, 2016), http://www.bloomberg.com/news/articles/2016-08-02/volkswagen-seeks-dismissal-of-u-s-investor-class-action-lawsuit.

14 *Id.*

15 *See* Frankel, *supra* note 9.

the world; since many different nations empower private citizens to sue Volkswagen under such circumstances, it is only natural for those parties to hold Volkswagen accountable anywhere they can. Indeed, one might even view with sympathy affected parties' efforts to seek out courts that might consider experimenting with innovative approaches to affording them relief.

Nevertheless, the practice of global forum shopping is widely reviled.[16] It is called "a dirty word,"[17] "evil,"[18] "deplorable,"[19] and something that "must be deterred."[20] The Supreme Court speaks of the practice with great disdain, vowing to protect U.S. courts from it.[21] One of global forum shopping's most vocal opponents, the U.S. Chamber of Commerce, equates global forum shopping with fraud and other "out-of-court tactics."[22]

This categorical denunciation of global forum shopping has several flaws. First, the practice of global forum shopping is deplored but poorly defined. Critics often pin the derogatory term "forum shopping" on forum choices or litigation that they simply do not like for any number of reasons. Second, critics rarely offer specific explanations as to why global forum shop-

16 *See, e.g.*, Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 337 (2006) (citing disparaging statements about domestic forum shopping); Louise Ellen Teitz, *Where to Sue: Finding the Most Effective Forum in the World*, *in* INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE 49, 49 (Barton Legum ed., 2005) (labeling "forum shopping" the "longest four-letter word in international litigation"); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 531, 531 n.220 (2011) (collecting scholarship concerned about transnational forum shopping in U.S. courts).

17 *See* Franco Ferrari, *Forum Shopping: A Plea for a Broad and Value-Neutral Definition*, N.Y.U. LECTURES, Aug. 2014, at 1 (quoting Atlantic Star v. Bona Spes, [1974] AC 436, 471 (Eng.) (opinion of Lord Simon)).

18 *Id.* (first quoting Charles Evan Stewart, *The Government Suspension Provision of the Clayton Act's Statute of Limitations: For Whom Does It Toll?*, 60 ST. JOHN'S L. REV. 70, 70 n.1 (1985); then quoting Wells v. Simonds Abrasive Co., 345 U.S. 514, 521 (1953) (Jackson, J., dissenting)).

19 *Id.* (citing Sharad K. Bijanki, *Redefining Attorney-Fee Shifting Under the Lanham Act: Protecting Small Businesses and Deterring Trademark Infringement*, 98 IOWA L. REV. 809, 822, 831 (2013)).

20 *Id.* at 2 (citing Ralph U. Whitten, *Improving the "Better Law" System: Some Impudent Suggestions for Reordering and Reformulating Leflar's Choice-Influencing Considerations*, 52 ARK. L. REV. 177, 226 (1999)); *see also id.* (collecting statements of detractors). *See generally* LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005).

21 *See infra* notes 146–49 and accompanying discussion.

22 JONATHAN DRIMMER, U.S. CHAMBER INST. FOR LEGAL REFORM, THINK GLOBALLY, SUE LOCALLY: OUT-OF-COURT TACTICS EMPLOYED BY PLAINTIFFS, THEIR LAWYERS, AND THEIR ADVOCATES IN TRANSNATIONAL TORT CASES 4 (2010). "Plaintiffs' attorneys have employed audacious and wide-scale legal and extra-legal tactics, from outright forum shopping to manufacturing evidence to creating favorable foreign laws to extensive use of the media to locate plaintiffs, pressure corporate defendants, and obtain favorable judgments." *Id.* at 33; *see also, e.g.*, Perlette Michèle Jura et al., *Disparate Treatment of the Corporate Citizen: Stark Differences Across Borders in Transnational Lawsuits*, 15 BUS. L. INT'L 85 (2014) (disparaging forum shopping).

ping should be so widely condemned. And third, critics ignore the possibility that global forum shopping has any redeeming virtues whatsoever.

This Article responds to each of these flaws. It highlights three unappreciated virtues of global forum shopping: forum shopping's importance in protecting access to justice, promoting regulatory enforcement, and propelling substantive and procedural reform. First, concerning access to justice, Justice Jackson pointed out in the domestic context that having multiple choices for filing suit can ensure that there is at least one available forum to vindicate one's rights.[23] This can be all the more true transnationally.[24] Second, with respect to regulatory enforcement, limiting forum choice can impede courts' ability to enforce substantive laws through litigation. As the Volkswagen example shows, courts around the world are increasingly called upon to serve this function.[25]

Third, global forum shopping can facilitate legal reform. A classic example appeared in 1980, when a group of public interest lawyers persuaded the Second Circuit to read a long-neglected federal statute to recognize jurisdiction over international human rights claims.[26] Ever since, courts have experimented with the scope of that jurisdiction, going from a broad concept resembling universal jurisdiction, to a limited jurisdiction over only cases that "touch and concern" the United States.[27] Regardless of those debates, however, that 1980 Second Circuit decision led not only to numerous cases brought under the Alien Tort Statute (ATS) concerning human rights violations, but also to global human rights initiatives,[28] the enactment of the Torture Victim Protection Act,[29] and a deeply held conviction that U.S. courts should provide a forum for such cases.[30]

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23 Gulf Oil Corp v. Gilbert, 330 U.S. 501, 507 (1947).

24 *See infra* Section III.A.

25 *See supra* notes 1–15 and accompanying text; *see also, e.g.*, Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79 (1999); John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288 (2010); S.I. Strong, *Regulatory Litigation in the European Union: Does the U.S. Class Action Have a New Analogue?*, 88 NOTRE DAME L. REV. 899 (2012).

26 *See* Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); *infra* notes 286–94 and accompanying text. *But see, e.g.*, Donald J. Kochan, *No Longer Little Known But Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 100, 104 (2005) (citing *Human Rights in Court*, WASH. POST, Apr. 6, 2004, at A20).

27 *See, e.g.*, Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1669 (2013); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Doe v. Exxon Mobil Corp., 69 F. Supp. 3d 75 (D.D.C. 2014); *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

28 Ingrid Wuerth, Kiobel v. Royal Dutch Petroleum Co.*: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 620–21 (2013) (arguing that ATS litigation allows "human rights activists to achieve in one forum what they could not in another").

29 *See, e.g.*, Philip Mariani, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 156 U. PA. L. REV. 1383 (2008).

30 *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring); *id.* at 1670 (Breyer, J., concurring); Pierre N. Leval, *The Long Arm of International Law: Giving Victims of Human Rights*

Transnational forum shopping can play a similar role in courts around the world. Take, for instance, an Austrian law student's suit against Facebook. In 2013, the student filed complaints with an Irish privacy regulator against Facebook Ireland Limited, the company that contracts with all Facebook users outside of the United States and Canada.[31] The student alleged that Facebook, through its participation in the U.S. government's Prism surveillance program, had violated European privacy laws. Unsatisfied with the slow pace of the Irish response, the student withdrew most of his complaints and refiled in Austria.[32] The student also advertised online that Facebook users all over the world should assign their claims to him, and through a claim-assignment procedure already recognized in Austrian courts,[33] he has created the largest putative class action in Europe, financed in part by crowd-sourced funding.[34] This case, which the Austrian Supreme Court recently referred to the Court of Justice of the European Union (ECJ), may make Austria and its courts confront some of the most perplexing procedural issues in transnational litigation, including claim aggregation, litigation funding, and law's extraterritorial reach.

In addition to calling attention to these virtues, this Article also seeks to draw out distinctions between domestic and global forum shopping. *Domestically*, the scholarly narrative about forum shopping tends to be more nuanced. There is a recognized tension between provisions that allow or even encourage forum shopping among state and federal courts, and the numerous laws and doctrines that try to thwart the practice.[35]

Abuses Their Day in Court, FOREIGN AFF. (March/April 2013), https://www.foreignaffairs.com/articles/united-states/2013-02-05/long-arm-international-law.

31 *See generally Legal Procedure Against "Facebook Ireland Limited"*, EUROPE VERSUS FACEBOOK, http://europe-v-facebook.org/EN/Complaints/complaints.html (last visited Oct. 19, 2016) (linking to twenty-two of the complaints against Facebook).

32 Part of the case remained in Ireland. On appeal, the ECJ favored the Austrian student's argument on the merits, upending fifteen years of transatlantic privacy control regimes. *See* James Cook & Rob Price, *Europe's Highest Court Just Rejected the 'Safe Harbor' Agreement Used by American Tech Companies*, BUS. INSIDER (Oct. 6, 2015), http://www.businessinsider.com/european-court-of-justice-safe-harbor-ruling-2015-10; *see also* Derek Scally, *Austrian Court Dismisses Schrems' Facebook Privacy Case*, IRISH TIMES (July 1, 2015), http://www.irishtimes.com/business/technology/austrian-court-dismisses-schrems-facebook-privacy-case-1.2269365.

33 *See* Christian Klausegger, *Austria*, *in* WORLD CLASS ACTIONS: A GUIDE TO GROUP AND REPRESENTATIVE ACTIONS AROUND THE GLOBE 252 (Paul G. Karlsgodt ed., 2012) (describing conventional uses of this procedure).

34 *See generally* FACEBOOK CLASS ACTION, https://www.fbclaim.com (last visited Oct. 19, 2016). To donate, see *Joining Forces for Online Privacy!*, EUROPE VERSUS FACEBOOK, https://www.crowd4privacy.org/ (last visited Oct. 19, 2016).

35 *See* Aaron D. Simowitz, *A U.S. Perspective on Forum Shopping, Ethical Obligations, and International Commercial Arbitration*, *in* FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT 23, 27–37 (Franco Ferrari ed., 2013).

At a transnational level, domestic, foreign, and international law provide abundant opportunities for forum choice.[36] The U.S. Constitution recognizes the possibility of transnational forum shopping.[37] But the practice is nevertheless widely condemned. When courts believe that foreign plaintiffs are "guilty" of forum shopping,[38] they dismiss their cases and adopt doctrines to combat the practice.[39] In recent years, U.S. courts have been particularly active in erecting barricades against global forum shopping.[40] Through developments in a number of seemingly disparate doctrines, U.S. courts have sought to protect themselves from a perceived flood of litigation, especially transnational litigation.[41]

I have shown in earlier work that closing off U.S. courts to transnational litigation has unintended negative consequences for some of the U.S.-focused interests that these recent developments are supposed to promote.[42]

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36 *See, e.g.*, 28 U.S.C. § 1332 (2012); CODE CIVIL [C. CIV.] [CIVIL CODE] art. 14 (Fr.); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1921 (2009) (observing that there is always a forum choice); Ferrari, *supra* note 17, at 12–14; Simowitz, *supra* note 35, at 51 ("[T]he U.S. system is replete with mechanisms of forum access and forum selection that are fundamental, inextricable, and perhaps ineradicable.").

37 U.S. CONST. art. III, § 2 (extending the federal judicial power to cases "arising under . . . Treaties," "affecting Ambassadors," in "admiralty and maritime Jurisdiction," and "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects"); *see also* Diane P. Wood, *The Changing Face of Diversity Jurisdiction*, 82 TEMP. L. REV. 593, 593 (2009) (discussing the framers' decision to provide for diversity jurisdiction).

38 Simcox v. McDermott Int'l, Inc., 152 F.R.D. 689, 699–700 (S.D. Tex. 1994).

39 *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 270 (2010) (countenancing the purported "fear that [the United States] has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets"); Carijano v. Occidental Petrol. Corp., 643 F.3d 1216, 1224 (9th Cir. 2011) (explaining the purpose of forum non conveniens is to "root out cases in which the 'open door' of broad jurisdiction and venue laws 'may admit those who seek not simply justice but perhaps justice blended with some harassment,' and particularly cases in which a plaintiff resorts 'to a strategy of forcing the trial at a most inconvenient place for an adversary'" (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947))); Iragorri v. United Techs. Corp., 274 F.3d 65, 75 (2d Cir. 2001) (en banc) (condemning "choos[ing] a forum for forum-shopping reasons"); *see also* Whytock, *supra* note 16 (discussing the history of responses to domestic forum shopping).

40 The rhetoric against transnational forum shopping has escalated in recent decades. A study of cases referring to "forum shopping" and "foreign plaintiffs" shows a dramatic spike beginning in the 2000s in cases labeling plaintiffs' forum choices as "forum shopping" and dismissing them accordingly, often under the doctrine of forum non conveniens. Pamela K. Bookman, Forum Shopping Research (unpublished research) (on file with author).

41 *See* Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1088–97 (2015); David L. Noll, *The New Conflicts Law*, 2 STAN. J. COMPLEX LITIG. 41, 41 (2014) (arguing these developments seek to limit U.S. interference with foreign regulation); Whytock, *supra* note 16, at 532.

42 *See* Bookman, *supra* note 41. The trend has continued since I published that article. *See* Pamela K. Bookman, *Doubling Down on Litigation Isolationism*, 110 AJIL UNBOUND 57 (2016).

Nevertheless, some commentators contend that the United States should erect even stronger barriers, for example, by strengthening forum non conveniens and modifying choice-of-law frameworks.[43]

In addition to contradicting their stated goals, these developments can end up expelling litigation from U.S. courts, including litigation that "has the United States written all over it."[44] The message of global-forum-shopping critics and U.S. courts seems to be that foreign plaintiffs should go elsewhere for their justice. Litigation isolationism thus contributes to an environment in which forum shopping *in other countries' courts* can thrive.[45] Perhaps surprisingly to some,[46] however, many countries are increasingly hospitable to litigation. Critics, meanwhile, also malign shopping for a forum *in a foreign country*, as shown by recent commentary urging that the United States adopt stricter standards regarding enforcement of foreign judgments.[47] In short, plaintiffs with choices among U.S. or foreign courts are criticized if they choose U.S. courts or if they choose foreign ones.[48] At times there is little daylight between anti-litigation and anti-forum-shopping rhetoric.

In other contexts, however, scholars applaud when parties designate a forum for disputes. Some scholars argue that forum shopping through contractual forum selection clauses is essential to encourage governments to develop better laws.[49] Because the parties' choices reflect their joint agreement, some scholars contend that through these clauses, individuals and firms seek out the best regulatory regimes, and that interested states—like Delaware—may be encouraged to compete for the parties' presence and bus-

43 *See, e.g.*, Alan O. Sykes, *Transnational Forum Shopping as a Trade and Investment Issue*, 37 J. LEGAL STUD. 339, 340 (2008) (arguing in favor of "limiting foreign tort plaintiffs to the law and forum of the jurisdiction in which their harm arose"); Whytock, *supra* note 16, at 531–32 n.221 (collecting scholarship).

44 RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2115 (2016) (Ginsburg, J., concurring in part, dissenting in part, and dissenting from the judgment).

45 *See id.*; Bookman, *supra* note 41, at 1115 nn.234–35 (discussing limitations on empirical evidence and on claims of causation, but citing evidence that this appears to be true); Bookman, *supra* note 4.

46 *See* Pamela K. Bookman, *Once and Future U.S. Litigation*, *in* FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 35, 40 (Paul B. Stephan ed., 2014) (describing the conventional wisdom that once dismissed from U.S. court, cases would go away or be settled for a pittance).

47 *See* John B. Bellinger, III & R. Reeves Anderson, *Tort Tourism: The Case for a Federal Law on Foreign Judgment Recognition*, 54 VA. J. INT'L L. 501, 544 (2014).

48 Litigants might therefore heed that sage advice: "Do what you feel in your heart to be right—for you'll be criticized, anyway. You'll be 'damned if you do, and damned if you don't.'" DALE CARNEGIE, HOW TO STOP WORRYING AND START LIVING 219 (1984).

49 A robust body of literature supports forum shopping through forum-selection clauses in contracts. *See, e.g.*, ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET (2009); Noll, *supra* note 41, at 69 (noting additional potential benefits of forum selection clauses).

iness.[50] Interested governments, in turn, will seek to provide those legal "products."[51]

The Article thus focuses on cases *outside* the contractual context, where commentators typically assume the benefits of competition do not apply. Indeed, where forum choices are made unilaterally, scholars argue, some courts will instead race to accommodate only plaintiffs, resulting in laws and procedures that are unduly unfair to defendants. This Article shows that such unilateral choices are made on both sides of the "v," and neither kind of unilateral choice is more legitimate than the other.

The Article thus contributes to an emerging literature coming to the defense of global forum shopping. Existing scholarship makes the important point that forum shopping is often a neutral practice, pursued by plaintiffs and defendants alike as an element of zealous advocacy.[52] But such analysis tends to start and end with a discussion of parties' motives. There has been little direct engagement with critiques of transnational forum shopping (in part because they are difficult to pin down), either to respond on their own terms or to demonstrate the virtues of transnational forum shopping. This Article provides the first cohesive defense of global forum shopping on functional grounds, emphasizing the complex role of global forum shopping at the intersection of debates not just about choice of forum, but also about personal jurisdiction, choice of law, and international comity.[53]

The Article proceeds in four Parts. Part I defines global forum shopping. Part II identifies the standard critiques of the practice: concerns about legitimacy, fairness, wastefulness, and efficiency. Acknowledging the validity of the critiques in some respects, Part II responds to them, drawing on comparisons between domestic and transnational forum shopping.

Having highlighted some of the negative aspects of global forum shopping in the previous Part, Part III identifies and explores three virtues of global forum shopping: preserving access to justice, protecting regulatory

50 *See, e.g.*, Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 227–32 (1985) (praising Delaware's innovations in corporate law and casting them as a race to the top). *But see, e.g.*, Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1444–45 (1992) (countering Romano and arguing that state competition leads to a race to the bottom).

51 *See* O'HARA & RIBSTEIN, *supra* note 49; Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1399 (2000) (arguing that designating a bankruptcy jurisdiction before a company files for bankruptcy creates positive incentives for parties and bankruptcy courts).

52 *See, e.g.*, Ferrari, *supra* note 17, at 13–14; Simowitz, *supra* note 35, at 23–25 (arguing that forum shopping should be judged based on whether it violates ethical standards); *see also* Whytock, *supra* note 16, at 522–34 (empirically showing that rates of transnational litigation in U.S. courts are not, in fact, rising, and cautioning against further anti-forum-shopping reforms on that basis).

53 William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2078 (2015) (defining international comity as "deference to foreign government actors that is not required by international law but is incorporated in domestic law" (emphasis omitted)).

prerogatives, and facilitating procedural innovation and reform. Part III also presents case studies to show how forum shopping in U.S. and European national courts exhibits these virtues.

Finally, Part IV suggests ways that U.S. courts and scholars can learn from this reevaluation of global forum shopping. First, courts and scholars should abandon subjective analysis of "forum shopping motives" in applying doctrines like forum non conveniens. The castigation of "forum shopping motives" is a poor fit for most of the alleged "evils" caused by global forum shopping. Second, U.S. courts and other domestic courts should recognize jurisdiction over suits where international law permits it on the basis of territoriality or personality. Third, courts should apply a similar jurisdictional legitimacy test when deciding whether to recognize and enforce a foreign judgment.

I. GLOBAL FORUM SHOPPING DEFINED

The term "forum shopping" is familiar from the domestic litigation context, but a precise definition consistent with everyday usage of the term is elusive. At its broadest, forum shopping can describe the "practice of choosing the most favorable jurisdiction or court in which a claim might be heard."[54] By this definition, forum shopping embraces, among other things, the plaintiff's choice of where to file a lawsuit (if there is more than one option), both parties' selection of a particular court or arbitration procedure by contract, and the defendant's efforts to thwart initial forum choice through removal or forum non conveniens.[55] It can include "forum hopping,"[56] seeking out a second forum after a party has not had success in the first attempted forum; or duplicative litigation, i.e., filing in multiple fora simultaneously.[57]

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54 *Forum-Shopping*, BLACK'S LAW DICTIONARY 726 (9th ed. 2009); *see also* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 554 (1989).

55 Ferrari, *supra* note 17, at 21–23. A broad definition of forum shopping could also include, e.g., defendant settlement shopping, where defendants settle class actions with the most favorable plaintiffs' lawyers they can find to represent a national or global class. *See, e.g.*, Xandra E. Kramer, *Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries*, 27 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 235, 240 (2014) (discussing global settlements under the Dutch collective action mechanism known as the WCAM); D. Theodore Rave, *When Peace Is Not the Goal of a Class Action Settlement*, 50 GA. L. REV. 475 (2016) (discussing nationwide settlement proceedings).

56 Thanks to Cymie Payne for this term.

57 Ronald A. Brand, *Challenges to* Forum Non Conveniens, 45 N.Y.U. J. INT'L L. & POL. 1003, 1004 (2013); *see, e.g.*, *In re* Ski Train Fire in Kaprun Austria on Nov. 11, 2000, 499 F. Supp. 2d 437, 447–50 (S.D.N.Y. 2007), *aff'd sub nom.* Geier v. Omniglow Corp., 357 F. App'x 377 (2d Cir. 2009) (granting forum non conveniens dismissal where foreign plaintiffs were simultaneously pursuing actions in Austrian courts).

Some scholars urge the adoption of such a broad, value-neutral definition.[58] But it does not capture conventional understanding. Many understand choosing the most favorable jurisdiction as a demonstration of plaintiff opportunism. To these commentators, judges, and litigants, forum shopping means choosing a forum for somehow illegitimate reasons. To them, forum shopping "conveys a sense . . . [of] 'cheating'—unscrupulously manipulating the choice of forum in order to gain an unfair result (one to which the litigant is not entitled)."[59] The forum shopper's intended goal—gaining an *unfair* result—supposedly differentiates forum shopping from other choices in the course of litigation regarding forum and otherwise.

For example, the Second Circuit, a hotbed of transnational litigation, uses this "intent-based" definition. That court will not defer to a foreign plaintiff's choice of forum if "a plausible likelihood exists that the selection was made *for forum-shopping reasons*."[60] Nefarious "forum-shopping reasons" include "the perception that United States courts award higher damages than are common in other countries,"[61] or "attempts to win a tactical advantage . . . that favor[s] the plaintiff's case."[62] Forum hopping and duplicative litigation are also seen as illegitimately strategic forum shopping.[63] An example of such practices would be if, after losing suits against Volkswagen in the United States, plaintiffs then refiled nearly identical suits in Germany, or if American Volkswagen consumers sought to litigate against Volkswagen in Germany and the United States at the same time.[64]

In addition to the broad definition and the motive-based definition, there is a third, less common one. Some courts and scholars use the term "forum shopping" to refer to a narrower subset of illegitimately motivated conduct, defining forum shopping as seeking to use a forum that has little connection to the dispute.[65] This "contacts-based" definition, which presup-

58 *See, e.g.*, Patrick J. Borchers, *Punitive Damages, Forum Shopping, and the Conflict of Laws*, 70 LA. L. REV. 529, 530 (2010); Ferrari, *supra* note 17, at 22–23; Whytock, *supra* note 16, at 485 n.13.

59 Bassett, *supra* note 16, at 342.

60 Iragorri v. United Techs. Corp., 274 F.3d 65, 71 (2d Cir. 2001) (en banc) (emphasis added); *see also, e.g.*, Vivendi SA v. T-Mobile USA Inc., 586 F.3d 689, 694 (9th Cir. 2009) (reducing deference to American co-plaintiff for engaging in forum shopping).

61 *Iragorri*, 274 F.3d at 71.

62 *Id.* at 72.

63 *See* Austen L. Parrish, *Duplicative Foreign Litigation*, 78 GEO. WASH. L. REV. 237 (2010).

64 For more intricate international examples, see Andreas F. Lowenfeld, *Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM. J. INT'L L. 314, 315–19 (1997).

65 Holt Cargo Sys. Inc. v. ABC Containerline N.V., 1999 CarswellNat 381 (Can. Fed. Ct.) (WL) ("If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as 'forum shopping'. On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides." (emphasis omitted) (quoting Amchem Prods. Inc. v. B.C. (Workers' Compensation Bd.), [1993] 1 S.C.R. 897 (Can.))).

poses the illegitimacy of the chosen forum, occurs due to exorbitant jurisdictional rules that authorize jurisdiction over cases that have weak ties to the forum. Alien Tort Statute litigation like *Filártiga* was often condemned as "forum shopping," for example, because it involved foreign plaintiffs pursuing remedies in U.S. courts in cases that had little to nothing to do with the United States.[66]

The problem with the most popular, motive-based understanding of forum shopping is that it is tautological. How do you know if a plaintiff chose where to sue based on forum shopping? Apparently, if the choice was motivated by "forum-shopping reasons." But these reasons—which include choosing a U.S. court because it may yield a more favorable result—are often indistinguishable from otherwise acceptable (even if strategic) reasons for litigation moves. The third option, defining "forum shopping"—the "bad" kind of forum choice—by whether the chosen court has a legitimate claim to jurisdiction, is likewise problematic if the case challenges the definition of legitimacy. These definitions lead inexorably to the conclusion that forum shopping is a terrible practice that must be stopped. It leaves little room even to ask whether the practice has any virtues.

This definitional problem exists to some extent in domestic forum shopping debates, but it appears in stark relief in the transnational litigation context, where litigants are choosing among courts in different countries. Motives may appear more exaggerated because choices are between more disparate forums in different countries; the "legitimacy" of the forum is informed by international law; permitting or not permitting global forum shopping can have foreign policy implications. And indeed, opponents of global forum shopping—most vocally, the Chamber of Commerce—paint *transnational* forum shopping as having exaggerated versions of all the bad attributes of domestic forum shopping.[67]

This Article therefore uses the broad definition of forum shopping, but it focuses its discussion on the "opportunistic" forum choices most often characterized as "forum shopping" either because they seem opportunistic or illegitimate. If this seems imprecise, that is the point: it is difficult to identify the line between purportedly legitimate "forum choices" and illegitimate "forum shopping." Moreover, the perceived legitimacy of forum choices often depends on speakers' perceptions about the particular case and subjective analysis of the litigants' motives.[68]

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66 *See, e.g.*, Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457 (2001); Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against "Judicial Imperialism"*, 73 WASH. & LEE L. REV. 653 (2016); *see also infra* Section II.A.

67 *See* Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners at 27, Goodyear Lux. Tires, S.A. v. Brown, 561 U.S. 1058 (2010) (No. 10-76).

68 *See, e.g.*, Chigirinskiy v. Panchenkova, No. 14-CV-4410, 2015 WL 1454646, at *10 (S.D.N.Y. Mar. 31, 2015) (declining to find "forum-shopping" motives); *In re* Ski Train Fire in Kaprun Austria on Nov. 11, 2000, 499 F. Supp. 2d 437, 444–46 (S.D.N.Y. 2007), *aff'd sub nom.* Geier v. Omniglow Corp., 357 F. App'x 377 (2d Cir. 2009).

Piper Aircraft Co. v. Reyno, which involved several domestic and transnational forum choices, illustrates the difference between domestic and transnational forum shopping as well as the definitional problem.[69] A Pennsylvania-manufactured airplane with Ohio-made propellers crashed in Scotland, killing the passengers.[70] The California lawyer hired by the passengers' Scottish next-of-kin asked the court to appoint his legal assistant, Gaynell Reyno, to administer the deceased passengers' estates.[71] Reyno, a California resident, filed wrongful death actions in California state court on the estates' behalf against the manufacturers, alleging that mechanical problems with the plane or the propellers caused the crash.[72]

The case involved a series of strategic forum choices on both sides of the "v." The plaintiffs decided to sue in the United States, rather than Scotland (a transnational forum choice); in California, rather than the defendants' home states of Ohio or Pennsylvania; and in state rather than federal court (two domestic forum choices). The defendants removed the case to federal court and then had the case transferred from the Northern District of California to the Middle District of Pennsylvania.[73] The defendants then moved for forum non conveniens dismissal, arguing that the case had closer ties to Scotland and should be heard there.[74] The motion succeeded, but the plaintiffs never refiled in Scotland.[75]

Which of these choices qualifies as forum shopping? Under a broad definition, all of them. Under a contacts-based definition, the plaintiffs' pursuit of a U.S. forum would not be forum shopping, especially after the case was transferred to Pennsylvania, because under private international law it is typically considered legitimate to sue a defendant at home. But if forum shopping refers only to *illegitimately motivated* choices, which of these moves qualify?[76]

With each of these moves, the plaintiff and defendants were seeking the most advantageous forum, as is true of almost any forum decision. Nevertheless, the maligned forum choice in *Piper* was the plaintiffs' choice of U.S. court over Scottish court—not the choice of California over Pennsylvania, or state over federal court.[77] Those latter choices—similarly strategically moti-

69 454 U.S. 235, 250 (1981).

70 *Id.* at 235.

71 *Id.* at 239.

72 *Id.* at 238–40.

73 *Id.* at 240.

74 *Id.* at 241.

75 *See* Richard D. Freer, *Refracting Domestic and Global Choice-of-Forum Doctrine Through the Lens of a Single Case*, 2007 BYU L. Rev. 959, 974.

76 It cannot be the difference between domestic and transnational choices. Under different circumstances, choosing among courts within the United States is criticized in its own right. *See, e.g.*, Am. Tort Reform Found., Judicial Hellholes (2007) [hereinafter Judicial Hellholes], http://www.atra.org/reports/hellholes.

77 *See Piper*, 454 U.S. at 252 (worrying that an alternative ruling would make "[t]he American courts, which are already extremely attractive to foreign plaintiffs . . . , even more attractive" (footnote omitted)).

vated—are broadly considered to be within the plaintiff's discretion. Likewise, the defendants' efforts to remove the case from state to federal court, from one district court to another, and out of the country are considered wise parts of a thoughtful litigation strategy.[78] This is true even if the defendants' intention was to defeat the litigation entirely and prevent consideration of the case on the merits.[79]

In the domestic context, there is intense negative rhetoric against forum shopping[80] even though "the law generally, the Supreme Court's jurisprudence specifically, and the ethical rules do not prohibit—and, in fact, condone—forum shopping."[81] In the transnational context, both domestic and international law are likewise structured to give ample opportunity for global forum shopping. But global forum shopping seems to be even more widely criticized, especially at the Supreme Court.[82] And critics seem, if possible, even more fervent in their arguments about the illegitimacy of and harm resulting from global forum shopping.[83]

In recent years, some scholars have come to global forum shopping's defense. For example, Chris Whytock cautions that global forum shopping does not cause all of the negative results attributed to it.[84] Other defenders focus on the motives behind litigants' forum choices.[85] They respond to critics from the Chamber of Commerce to the Second Circuit who disparage forum-shopping plaintiffs for choosing a forum "for forum-shopping reasons"[86] as opposed to other, more legitimate ones.[87] By contrast, defenders maintain everyone has forum-shopping reasons,[88] such as the intention to extract some benefit from a court's exercise of jurisdiction.[89] Even these defenders, however, still differentiate between acceptable forum choices and unacceptable forum shopping by trying to examine the "real reason" for liti-

78 *See* Freer, *supra* note 75, at 971–73.

79 *See id.*

80 *See, e.g.*, JUDICIAL HELLHOLES, *supra* note 76.

81 Bassett, *supra* note 16, at 373.

82 *See* Keeton v. Hustler, 465 U.S. 770 (1984); *infra* 146–49.

83 *Compare* JUDICIAL HELLHOLES, *supra* note 76, *with* DRIMMER, *supra* note 22.

84 *See* Whytock, *supra* note 16.

85 *See infra* notes 198–99 and accompanying text (discussing the Chamber of Commerce's anti-forum-shopping campaign).

86 Iragorri v. United Techs. Corp., 274 F.3d 65, 71, 75 (2d Cir. 2001) (en banc).

87 *See* Bassett, *supra* note 16, at 352–55 (discussing the differences between reasons considered "legitimate" or "illegitimate"); *see also supra* note 16 and accompanying text. It is rarely acknowledged that this is in tension with the principle that "penalizing litigants with nonfrivolous claims because of their purposes for bringing those claims raises concerns under the First Amendment right to petition." Jerold S. Solovy et al., *Sanctions Under Rule 11: A Cross-Circuit Comparison*, 37 LOY. L.A. L. REV. 727, 740 (2004); *see also* Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L.J. 665 (2000).

88 *See, e.g.*, Bassett, *supra* note 16, at 352 ("[F]orum shopping is, at its core, merely the decision that a lawyer makes when more than one lawful forum is available.").

89 These scholars urge a broad, value-neutral definition of forum shopping. *See generally, e.g.*, Ferrari, *supra* note 17.

gants' choices. Franco Ferrari, for example, who urges a "broad and value-neutral definition" of forum shopping, nevertheless deems forum shopping to be acceptable or permissible based on "the reasons for a choice of one forum over another."[90]

Despite these academic defenses, courts and some commentators retain a pejorative perception of global forum shopping.[91] This perception, fueled by anti-global-forum-shopping rhetoric,[92] has real-life consequences specific to global forum shopping. It feeds litigation isolationism in the courts and other anti-global-forum-shopping measures by Congress and the states.[93]

The conversation about global forum shopping among many defenders as well as critics is trapped by the tautological definition that provides its foundation. Because global forum shopping, by definition, is driven by bad motives, the conversation assumes that global forum shopping has no redeeming social value,[94] leaving critics to debate how to nip the practice in the bud. But the definition, and therefore the assumptions that follow it, are ill-considered. The existing conversations also fail to consider the differences between domestic and global forum shopping. Some of the analysis in this Article should provide fodder for defenders of domestic forum shopping as well. But as the next Part will discuss, differences between global and domestic forum shopping should matter as we identify what global forum shopping's critics are truly afraid of, and whether those fears are justified.

II. WHO'S AFRAID OF GLOBAL FORUM SHOPPING—AND WHY?

This Part unpacks and responds to traditional criticisms of forum shopping, drawing out differences between domestic and global forum shopping.

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90 Ferrari, *supra* note 17, at 1, 24; *see also* Bassett, *supra* note 16, at 343 (discussing domestic context).

91 *See supra* notes 16–19 and accompanying text.

92 *See, e.g.*, DRIMMER, *supra* note 22; *Foreign Judgment Enforcement*, U.S. CHAMBER INST. FOR LEGAL REFORM, http://www.instituteforlegalreform.com/issues/foreign-judgment-enforcement (last visited Sept. 20, 2016).

93 *See* Bookman, *supra* note 41, at 1085; *see also* EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA 1870–1958 (1992); Bassett, *supra* note 16.

94 International human rights lawyers historically have contended that the United States should provide a forum in which to vindicate international human rights for a variety of reasons, but these tend to be arguments in favor of the United States providing a world court of universal jurisdiction to address these global wrongs. *See, e.g.*, Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991); Pierre N. Leval, *Distant Genocides*, 38 YALE J. INT'L L. 231, (2013); Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002). The potential social values discussed in this Article focus on the virtues of U.S. courts acting as domestic courts with more limited jurisdiction. This focus is appropriate because the Supreme Court has substantially stifled the ability of the ATS to transform U.S. courts into a forum for adjudicating international human rights violations around the world. *See* Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659 (2013); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

Although forum shopping is widely condemned,[95] scholars frequently note that it is unclear why exactly the practice has its bad rap, and whether the problem is serious.[96]

In the domestic debate, Debra Bassett catalogs three main objections to domestic forum shopping: it can lead to higher damages awards; it can permit suits that would otherwise be time-barred; and it can pressure "innocent" defendants to settle cases that are brought in plaintiff-friendly fora.[97] These objections appear in the global-forum-shopping debates as well. Critics—including courts, scholars, and the Chamber of Commerce—fault transnational forum shopping for leading to non-uniform outcomes, including potentially higher damages awards, and for generating unnecessary litigation and settlement.[98] But critics also fault *global* forum shopping for creating more systemic problems: resulting in litigation in courts with no legitimate claim to jurisdiction; wasting time and resources of U.S. courts and society on foreign cases; and leading to the development of bad laws through a "race to the bottom."[99] These are all incommensurable values that are difficult to weigh against each other. But in drawing out these criticisms of global forum shopping from the cacophony of disparagement of forum shoppers' illicit opportunism, this Part demonstrates that the focus on global forum shoppers' *motives* are misplaced.

A. Legitimacy and Judicial Imperialism

The narrowest, contacts-based definition of global forum shopping describes a plaintiff's attempt to take advantage of a court that has no legitimate connection to the suit.[100] Entertaining litigation under those circumstances seems unfair to the defendant and seems to infringe on the sovereignty of nations interested in the case. These are important concerns that have particular valence in global-forum-shopping contexts and they should help courts define the scope of their jurisdictions. But they also raise difficult line-drawing questions that benefit from international debate. Moreover, these concerns can be expressed and addressed without reference to plaintiffs' "forum shopping motives."

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95 *See supra* notes 16–19 and accompanying text.

96 *See* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241 (2016).

97 Bassett, *supra* note 16, at 340.

98 *See supra* notes 16–19 and accompanying text.

99 *See, e.g.*, Ferrari, *supra* note 17, at 8–9 (cataloging expressions of concern). This list is not intended to be exhaustive, but rather representative of the principal causes of concern.

100 *See, e.g.*, Holt Cargo Sys. Inc. v. ABC Containerline N.V., 1999 CarswellNat 381 (Can. Fed. Ct.) (WL), at 3; Linda J. Silberman, Daimler AG v. Bauman*: A New Era for Judicial Jurisdiction in the United States*, 16 Y.B. PRIV. INT'L L. 217, 232 & n.76 (2015) (noting that *Daimler*, a foreign-cubed case asserting "claims that have little or nothing to do with the United States," presented "the paradigmatic example of the global forum shopping concern").

U.S. courts have a history of exercising "exorbitant" jurisdiction, that is, jurisdiction under local law that is "unfair to the defendant because of a lack of significant connection between the sovereign and either the parties or the dispute."[101] Although a variety of U.S. doctrines limit courts to hearing only those cases in which they have legitimate authority,[102] the United States has also historically recognized a broad reach for federal statutes and permitted general personal jurisdiction based on a defendant's doing business in a state,[103] or being "tagged" and served with process.[104] Outside the United States, such exercises of jurisdiction have often been viewed as exorbitant.[105]

Piper again provides an illustration. There, the plaintiff sued Ohio and Pennsylvania corporations in California over a plane crash in Scotland. Some might consider such jurisdiction to be "exorbitant" because of the lack of a significant connection between the forum (California) and the parties or the plane crash.[106] On the other hand, the California court likely had personal jurisdiction over these defendants under the law at the time because of the extent of their business contacts with California.[107] And by the time the litigation moved to one defendant's home state of Pennsylvania, it became more difficult to claim that the forum was unfair to the defendants.

A second, related criticism of global forum shopping is that cases with insufficient connections to the forum raise concerns about "judicial imperialism."[108] If litigants can choose unconnected courts, global forum shopping can lead to international jurisdictional conflicts and offenses to foreign nations.[109] If the choice of an unconnected court includes suing under a

101 Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 Me. L. Rev. 474, 474 (2006).

102 For example, personal jurisdiction ensures that courts have authority over the persons brought before them that comports with "traditional notions of fair play and substantial justice," Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)), and venue rules try to ensure that the plaintiff's chosen court has a sufficient connection to the parties or the case, 28 U.S.C. § 1391 (2012); *see also* Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. Pa. L. Rev. 781, 794 (1985).

103 *See* Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 Vand. L. Rev. 501, 506 (2015).

104 *See* Burnham v. Superior Court, 495 U.S. 604, 610–17 (1990) (plurality opinion) (upholding a California court's exercise of personal jurisdiction over a New Jersey resident who was served with process while temporarily in the state).

105 *See* Clermont & Palmer, *supra* note 101.

106 *Id.*

107 *See* Freer, *supra* note 75, at 962 n.12.

108 *See* Buxbaum, *supra* note 66, at 657 (defining judicial imperialism as the idea that U.S. courts' engagement "in the global arena . . . interfere[s] with the sovereign authority of other countries"). In the domestic context, horizontal federalism issues raise parallel concerns.

109 *See, e.g.*, Republic of Philippines v. Pimentel, 553 U.S. 851, 866 (2008) ("There is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so. The dignity of a foreign state is not enhanced if other nations bypass its courts without right or good cause."); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984). *But see, e.g.*, Book-

U.S. law that extends extraterritorially, the overreach of the U.S. legislation could not only offend but also possibly violate international law.[110] The exemplar of this danger is a "foreign-cubed" lawsuit involving foreign plaintiffs, foreign defendants, and foreign conduct.[111] Such suits are a small percentage of U.S. dockets, but they arise (or used to) in certain high-profile contexts, such as transnational human rights cases and global securities litigation.[112]

Curbing exorbitant jurisdiction has been one response to these criticisms of global forum shopping in U.S. courts. In recent years, the Supreme Court has addressed these concerns by narrowing the breadth of personal jurisdiction.[113] The Court has also narrowed the presumptive extraterritorial reach of federal statutes.[114] Both of these changes to longstanding doctrine occurred through transnational cases that critics and the Court viewed as case studies of global forum shopping's dangers, including, for both changes, cases brought under the Alien Tort Statute.[115] And as a result of these targeted responses to global forum shopping, opportunities for "foreign-cubed" cases have been greatly reduced, particularly in combination with forum non conveniens and international comity considerations.[116] Indeed, these developments will keep out a large swath of transnational litigation, even cases with "the United States written all over [them]."[117]

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man, *supra* note 41, at 1083–84 (collecting examples of cases where foreign sovereigns ask U.S. courts to entertain cases involving their citizens); Kristen E. Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 VA. L. REV. 289 (2016).

110 *See* F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155 (2004); EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991); Brief for the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants-Appellees, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191).

111 *See* Bookman, *supra* note 41, at 1098 (describing the term); *cf.* Gilbert v. Gulf Oil Corp., 153 F.2d 883, 884 (2d Cir. 1946), *rev'd*, 330 U.S. 501 (1947) (finding, in a New York court, the Virginia plaintiff, Pennsylvania defendant, and conduct in Virginia were all foreign).

112 *See* Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251 (2006) (counting under 100 foreign-cubed securities suits); Cortelyou C. Kenney, *Measuring Transnational Human Rights*, 84 FORDHAM L. REV. 1053, 1054 (2015) (counting hundreds of transnational human rights cases over thirty-five years); Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177 (providing the much larger denominator of non-foreign-cubed cases).

113 *See* Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *A Shifting Equilibrium: Personal Jurisdiction, Transnational Litigation, and the Problem of Nonparties*, 19 LEWIS & CLARK L. REV. 643, 650–56 (2015).

114 *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010); Bookman, *supra* note 41.

115 *See* Daimler AG v. Bauman, 134 S. Ct. 746 (2014); Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659 (2013).

116 *See* Bookman, *supra* note 41, at 1103–05 (discussing forum non conveniens and comity).

117 RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2115 (2016) (Ginsburg, J., concurring in part, dissenting in part, and dissenting from the judgment); *see also* Bookman, *supra* note 41, at 1121–23 (discussing the limits of comity benefits from litigation

The criticism that global forum shopping imports cases with too little connection to the forum is therefore increasingly addressed in the United States by personal jurisdiction and statutory interpretation principles.[118] The Volkswagen litigation demonstrates this result.[119] Whereas ten years ago securities fraud litigation from the scandal might have been brought primarily in U.S. courts, today that litigation proceeds primarily in Germany, where Volkswagen stock is traded.[120] Likewise, consumer litigation in the United States arises primarily out of sales of Volkswagen cars in the United States.[121] Thus, these reforms have succeeded in keeping foreign-cubed cases out of U.S. courts by refining jurisdictional limits and by developing effective means of dealing with "improper" plaintiff "forum shopping motives."[122] This success does not mean, however, that the reforms have necessarily established the "right" extent of transnational litigation in U.S. courts. I have argued elsewhere that they have gone too far.[123]

B. Decisional Harmony

Critics denounce both domestic and transnational forum shopping for compromising the goal of decisional harmony, under which similar cases should come out alike regardless of which court decides them.[124] While this is a noble abstract goal, where there is overlapping regulatory jurisdiction—for example, when certain conduct can be regulated by multiple U.S. states, or by multiple countries—it is easy and unremarkable to lose decisional harmony. This is not just because of differences in substantive law. Differences in countries' legal systems include vastly different procedures, remedies, and litigation cultures. The decisional-harmony critique is one area where criticisms of domestic forum shopping have bled into criticisms of global forum shopping in unwarranted ways.

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isolationism). *See generally* Buxbaum, *supra* note 66 (questioning the judicial imperialism thesis).

118 Other examples of exorbitant jurisdiction—e.g., jurisdiction based on attachment of property—remain, but are increasingly rare. *See* Clermont & Palmer, *supra* note 101. The reasoning in *Daimler*, moreover, further imperils the logic of these bases. *See* Tanya J. Monestier, *Where Is Home Depot "At Home"?:* Daimler v. Bauman *and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233 (2014).

119 *See* Bookman, *supra* note 4.

120 Only holders of Volkswagen American Depositary Receipts are bringing securities litigation in U.S. court. *See* Matussek, *supra* note 13; *see also supra* note 14 and accompanying text.

121 *See In re* Volkswagen "Clean Diesel" Litig., 148 F. Supp. 3d 1367 (J.P.M.L. 2015). *But see* Park Jin-hai, *Korean VW Customers Pursue Class Action Lawsuit in U.S.*, KOREA TIMES (Jan. 26, 2016), http://www.koreatimes.co.kr/www/news/biz/2016/08/388_196398.html.

122 *See infra* Part IV.

123 *See* Bookman, *supra* note 42; Bookman, *supra* note 41.

124 *See, e.g.*, Friedrich K. Juenger, *Jurisdiction, Choice of Law and the Elusive Goal of Decisional Harmony, in* LAW AND REALITY: ESSAYS ON NATIONAL AND INTERNATIONAL PROCEDURAL LAW 137 (Mathilde Sumampouw et al. eds., 1992).

An early concern with regard to *domestic* forum shopping was that concurrent federal and state authority could lead to different outcomes for similar cases in state and federal courts. The Supreme Court, in *Erie*[125] and its progeny,[126] balked at the idea that forum shopping should lead to non-uniform outcomes. *Erie*'s response was to end federal general common law and try to stabilize uncertainty about substantive choice of law.[127] But although *Erie*'s solution addressed the difference in substantive law applied in state and federal courthouses across the street from each other,[128] it did nothing to address the incentives for forum shopping based on different *procedures* in state and federal court, or incentives for forum shopping *between* different U.S. states.[129] Opportunities for the latter kinds of forum shopping flourish under *Erie*[130] and are countenanced by the constitutional structure.[131] Indeed, much early domestic forum shopping was driven by differences in available procedures, not differences in substantive law.[132] Some scholars contend that lack of decisional harmony should be addressed by making choice-of-law rules uniform, or harmonizing substantive law.[133] But even assuming substantive law or choice-of-law rules could be held constant, parties would still forum shop. Although it is impossible actually to isolate these factors, especially in the transnational litigation context, domestic forum shopping between state and federal courts supports this point.[134] Removal

125 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

126 *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 468 (1965) (describing *Erie*'s "twin aims" of avoiding forum shopping and the inequitable administration of the laws); Craig Green, *Repressing* Erie*'s Myth*, 96 CAL. L. REV. 595, 615 (2008) (supporting the common understanding of "*Erie* as a rule that avoids disparities and forum shopping"). *But see, e.g.*, Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 416 (2010) ("[F]orum shopping[ ] is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure.").

127 *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 79 (2000).

128 Guaranty Tr. Co. v. York, 326 U.S. 99, 109 (1945) ("The nub of the policy that underlies *Erie* . . . is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."). *Klaxon Co. v. Stentor Electric Manufacturing Co.* reinforces this result by having federal courts apply the choice-of-law rules of the forum state in which they sit. 313 U.S. 487 (1941); *see* Michael Steven Green, *The Twin Aims of* Erie, 88 NOTRE DAME L. REV. 1865, 1886–87 (2013).

129 Adam N. Steinman, *What Is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 248 (2008).

130 *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

131 *See* U.S. CONST. art. III, § 2; Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

132 *See* PURCELL, *supra* note 93, at 179.

133 *See* Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002).

134 For a recent example in the news, Roger Ailes removed Gretchen Carlson's sexual harassment suit from New Jersey state court to federal court, and then tried to transfer it to New York federal court. Roger Parloff, *Gretchen Carlson Lawsuit: Fox News Wants No News About Roger Ailes*, FORTUNE (July 11, 2016), http://fortune.com/2016/07/11/gretchen-carl-

statutes do not question the defendants' motives for seeking out a federal forum.

The U.S. legal system values this kind of forum shopping. Plaintiffs, the injured parties, get to choose among multiple fora, despite the possibility of disharmony.[135] Courts assume "that plaintiffs are in the best position to determine what is for them a convenient and appropriate forum in which to litigate their claims."[136] Federal diversity jurisdiction permits Congress to authorize forum shopping between state and federal court precisely to enable out-of-state parties to forum shop away from state courts. Alexander Hamilton defended this provision by arguing that state courts could not "be supposed to be impartial and unbias[ ]ed"[137] in cases involving local citizens. There is considerable skepticism about whether this rationale was justified at the time or remains true today.[138] But even some critics of diversity jurisdiction domestically nevertheless recognize the importance of providing a federal forum for cases involving foreigners.[139] In short, the U.S. domestic judicial system encourages (or at least permits) some forms of forum shopping but discourages others.

On a transnational level, the problem of forum shopping, and its attendant lack of decisional harmony, can take on new significance.[140] This is not solely because of differences in substantive law. There is also greater disuniformity among courts of different nations than among American states. Perhaps, given such variation, commentators trust outlier countries and their justice systems less than outlier states. Perhaps some litigation is financially viable in American courts but not in others, so American resident defendants may be subject to suits in the United States when foreign companies acting alongside them might not be.[141] Alan Sykes, for example, contends that one problem with global forum shopping is that similarly situated firms may be subject to suit or not depending on their nationality.[142] Debates about venue in the domestic context, by contrast, tend to assume that the suit can be brought *someplace*.[143]

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son-roger-ailes-arbitration/; David Voreacos, *Ailes' Judge Ponders Request to Move Sex-Bias Case to New York*, BLOOMBERG (July 20, 2016), http://www.bloomberg.com/news/articles/2016-07-20/ailes-judge-ponders-request-to-move-sex-bias-case-to-new-york.

135 *See, e.g.*, Juenger, *supra* note 124, at 146.

136 Espinoza v. Evergreen Helicopters, Inc., 337 P.3d 169, 183 (Or. Ct. App. 2014), *aff'd*, 376 P.3d 960 (Or. 2016) (finding this reasonable assumption applies equally to local and foreign plaintiffs).

137 THE FEDERALIST NO. 80, at 422 (Alexander Hamilton) (J.R. Pole ed., 2005).

138 *See, e.g.*, Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 119–21.

139 *See, e.g.*, *id.* at 121–23.

140 *See* ANDREW BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION 90 (2003); LOPUCKI, *supra* note 20, at 200.

141 *See* Bookman, *supra* note 41, at 1107–08; Sykes, *supra* note 43, at 349.

142 *See* Sykes, *supra* note 43, at 349.

143 This assumption is sometimes untrue. *See, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

For whatever reason, foreign plaintiffs do not receive the same deference as domestic plaintiffs with respect to their forum choices.[144] The Supreme Court is quite blasé about certain kinds of domestic forum shopping,[145] yet it countenances fears about floods of foreign lawsuits.[146] As noted above, in recent years, the Court has strengthened the barriers against such suits by fortifying the presumption against extraterritorial application of federal statutes,[147] the forum non conveniens doctrine,[148] and a restrictive view of personal jurisdiction.[149] There is a judicial crusade against global forum shopping.

Of these reforms, the presumption against extraterritoriality comes closest to tackling the kind of forum shopping that *Erie* addressed: the problem of two different substantive laws applying to conduct in one state.[150] But the Supreme Court's decision in *Morrison v. Australia National Bank*[151] does not mean exactly that Volkswagen can now concentrate on abiding by German securities laws without regard for U.S. securities laws. *Morrison* did nothing to curb the reach of U.S. securities laws—only the ability of private plaintiffs to enforce them.[152] Moreover, from a global perspective, *Morrison* may have thwarted private plaintiffs' global forum shopping *in the United States*, but it promotes forum shopping elsewhere.[153]

144 *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981). Not all states follow this rule in their versions of forum non conveniens. *See, e.g.*, NFL v. Fireman's Fund Ins. Co., 216 Cal. App. 4th, 902, 929 (Cal. Ct. App. 2013) (holding that California resident plaintiffs receive a "strong presumption" in favor of their choice of forum; non-resident plaintiffs' choice of forum is entitled to "due deference," though not a "strong presumption"); Espinoza v. Evergreen Helicopters, Inc., 376 P.3d 960, 987 (Or. 2016) (adopting the Washington Supreme Court's position that there is "no principled reason to vary the degree of deference afforded to the plaintiff's choice of forum based on where the plaintiff . . . resides"); Myers v. Boeing Co., 794 P.2d 1272, 1280 (Wash. 1990) (expressly rejecting *Piper*'s foreign-plaintiff-lesser-deference standard in favor of a multi-factor balancing test).

145 *See, e.g.*, Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393 (2010); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

146 *See, e.g.*, Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659 (2013); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010).

147 *See Kiobel*, 133 S. Ct. at 1659; *Morrison*, 561 U.S. at 268–70.

148 *See* Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422 (2007) (holding that cases may be dismissed on forum non conveniens grounds before a court establishes jurisdiction over the case); *Piper*, 454 U.S. at 235.

149 *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 8730 (2011) (plurality opinion); Bookman, *supra* note 41.

150 *See, e.g.*, Guzman, *supra* note 133.

151 561 U.S. 247.

152 *See* Anthony J. Colangelo, *The Frankenstein's Monster of Extraterritoriality Law*, 110 AJIL UNBOUND 51 (2016).

153 *See, e.g.*, Wulf A. Kaal & Richard W. Painter, *Forum Competition and Choice of Law Competition in Securities Law After* Morrison v. National Australia Bank, 97 MINN. L. REV. 132 (2012); Tanya J. Monestier, *Is Canada the New Shangri-La of Global Securities Class Actions?*, 32 NW. J. INT'L L. & BUS. 305 (2012); *see also* Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995, 1039 (2015) (arguing more generally that closing the doors to federal court will lead plain-

These consequences raise the question of whether decisional harmony at the transnational level is even the appropriate goal. It seems instead that at best it is elusive, and at worst it distracts from other worthier, more realistic goals.

In the global-forum-shopping context, decisional disharmony is to be expected. Countries regulate conduct within their territorial borders, but of course people, conduct, and effects cross borders all the time, as do the effects of national laws. International law rules of prescriptive jurisdiction,[154] which are reflected in U.S. domestic law through concepts like international comity[155] and the presumption against extraterritoriality,[156] limit the circumstances under which one country's laws can apply in territories beyond its borders. These rules permit jurisdiction when a tort (a) occurs on the country's territory, (b) is committed by the country's national, or (c) affects certain interests of the country.[157] While the last category raises complicated questions, the first two are well established and widely agreed upon. Indeed, they look remarkably like the primary bases for exercising venue under federal law.[158] These rules try to provide predictability about regulatory authority, but transnational litigation often arises in situations where there is regulatory overlap. For example, both Germany and the United States have a valid claim under international law to regulate Volkswagen's car sales in the United States.[159] They may impose different standards. It is also possible that one country may regulate the conduct and the other will not at all.

But adjudicative jurisdiction is not limited by international law.[160] To achieve decisional harmony in transnational litigation, one would not only need to harmonize these substantive laws. It would also require international consensus on issues like procedure and jurisdiction. Such consensus would be extremely difficult, if not impossible, to achieve. National procedural regimes in particular vary greatly from one another and are deeply embed-

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tiffs to shop for other fora); *id.* at 1044 (asserting that U.S. jurisdictional limits will only work to narrow plaintiffs' choices "if other countries adopt similar rules").

154 *See generally* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 99 (AM. LAW INST., Tentative Draft No. 2, 2016); Wuerth, *supra* note 28.

155 *See generally* Dodge, *supra* note 53.

156 Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1670–78 (2013) (Breyer, J., concurring in the judgment).

157 *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (AM. LAW INST. 1987); Bookman, *supra* note 41, at 1105; Wuerth, *supra* note 28 (comparing international law norms with Justice Breyer's concurrence in *Kiobel*).

158 *See* 28 USC § 1391 (2012).

159 Likewise, a recent Supreme Court case involved allegations of a money laundering conspiracy in Russia and Colombia perpetrated by U.S. companies and harming European interests. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016). All of those countries have the authority under international law to regulate that conduct, but only some of them do.

160 RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 99 (AM. LAW INST., Tentative Draft No. 2, 2016).

ded in legal and social culture.[161] International consensus, particularly in areas of procedure, is therefore difficult to produce.[162] Efforts in the late 1990s to draft a model set of transnational rules of civil procedure[163] were met with much skepticism, and have not been adopted by any country to date.[164] Efforts to synchronize jurisdiction and enforcement of foreign judgments through treaties have also foundered,[165] although these processes are ongoing.[166]

Moreover, even "uniform laws are not uniform."[167] Where deep divisions exist, harmonization often instantiates flexible rules to accommodate conflicting viewpoints, which leads to continued diversity of results.[168] And differences—and forum shopping—often persist notwithstanding the adoption of uniform substantive rules.[169]

This lack of uniformity, which contributes to the lack of decisional harmony attributed to the "evils" of global forum shopping, is not necessarily a bad thing. As many others have studied, it reflects the importance of

161 Kevin M. Clermont, *Why Comparative Civil Procedure?*, *Foreword* to KUO-CHANG HUANG, INTRODUCING DISCOVERY INTO CIVIL LAW, at xii (2003) ("[P]rocedure is surprisingly culture-bound, reflecting the fundamental values, sensibilities, and beliefs of the society."); Geoffrey P. Miller, *The Legal-Economic Analysis of Comparative Civil Procedure*, 45 AM. J. COMP. L. 905, 905 (1997) (discussing the costs and benefits of harmonization).

162 *See* George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589 (1990).

163 *ALI/UNIDROIT Principles of Transnational Civil Procedure*, 9 UNIF. L. REV. 758 (2004); Geoffrey C. Hazard, Jr. & Michele Taruffo, *Transnational Rules of Civil Procedure Rules and Commentary*, 30 CORNELL INT'L L.J. 493, 493–94 (1997).

164 *See* Gerhard Walter & Samuel P. Baumgartner, *Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard-Taruffo Project*, 33 TEX. INT'L L.J. 463, 467–68 (1998) (reporting on German and Swiss proceduralists' skepticism of the Principles of Transnational Civil Procedure). This contrasts with international uniformity initiatives in other areas, such as the Vienna Convention on the International Sale of Goods (CISG). *See* Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 745 (1999).

165 *See, e.g.*, Patrick J. Borchers, *One Step Forward and Two Back: Missed Opportunities in Refining the United States Minimum Contacts Test and the European Union Brussels I Regulation*, 31 ARIZ. J. INT'L & COMP. L. 1, 4 (2014); Ronald A. Brand, *Jurisdictional Developments and the New Hague Judgments Project*, *in* A COMMITMENT TO PRIVATE INTERNATIONAL LAW—ESSAYS IN HONOUR OF HANS VAN LOON 89 (2013); Arthur T. von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191, 195–96 (2001) (explaining the impasse in negotiations for a judgments convention on jurisdiction and foreign judgments).

166 *See, e.g.*, Silberman, *supra* note 100, at 227–28 (discussing Hague developments).

167 Stephen B. Burbank, *A Tea Party at The Hague?*, 18 SW. J. INT'L L. 629, 644 (2012); *see* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008).

168 *See* Stephan, *supra* note 164.

169 Ferrari, *supra* note 17, at 10–13.

national sovereignty and the benefits of global pluralism.[170] More importantly for our purposes, it exists independently of forum shopping and would continue irrespective of litigants pursuing "forum shopping motives." The cure—if lack of harmony is a disease—is harmonization, not targeting global forum shopping itself.

C. Waste

A third common critique of global forum shopping is that it promotes wasteful and inefficient litigation that harms courts and litigants. This argument, too, is familiar from domestic forum shopping debates. Both kinds of forum shopping can drive courts and litigants to spend time and resources determining the most strategic forum and litigating over that forum choice.[171] It can lead to expensive and cumbersome litigation in a forum not ideally suited to hear the case, which inconveniences courts and parties alike.[172] Forum shopping can drag out litigation, either to avoid liability or to compel settlement[173]—a drain on the entire judicial system.[174] Finally, simultaneous or seriatim proceedings in multiple courts duplicate effort and further prolong litigation—creating waste from the point of view of both the courts and the parties.[175] In the global-forum-shopping context, these arguments gain strength in combination with claims about legitimacy—the United States shouldn't waste its time and resources, the argument goes, on *foreign* litigants and *foreign* cases.

Although widely vented, the wastefulness concerns have at least three limitations. First, as an effort to protect *U.S. courts* from transnational cases over which they otherwise have jurisdiction, the argument rings hollow. Marin Levy has demonstrated convincingly that courts' use of the domestic

170 *See generally, e.g.*, Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 243 (2009) (describing how disciplines such as conflict of laws have come to adopt the ideas of legal pluralism).

171 *See, e.g.*, Ori Aronson, *Forum by Coin Flip: A Random Allocation Model for Jurisdictional Overlap*, 45 SETON HALL L. REV. 63, 74 (2015) ("[N]ormally investing resources in this kind of strategic planning—gathering information on beneficial forums followed by strategic forum shopping—is socially wasteful."); Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 12 (1991) (discussing the wastefulness of choice-of-law inquiries).

172 *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249 (1981) (discussing the convenience of both parties). *But cf.* Bookman, *supra* note 41, at 1106 & n.161 (questioning the sincerity of questions of plaintiff convenience).

173 Conversely, reverse forum shopping by defendants can prolong litigation, *see, e.g.*, *Piper*, 454 U.S. at 238, although some argue it improves the justice of outcomes, *see* Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507 (1995).

174 *See infra* notes 189–90 and accompanying text (discussing the Italian torpedo).

175 *See* Austen L. Parrish, *Duplicative Foreign Litigation*, 78 GEO. WASH. L. REV. 237, 244–47 (2010).

"floodgates" argument can be an illegitimate self-protectionist measure.[176] When forum non conveniens and other transnational litigation avoidance doctrines are deployed to avoid a feared flood of foreign-initiated litigation, those efforts may be illegitimate for similar reasons.[177] Forum non conveniens dismissal differs from a transfer of venue between federal district courts in that "forum non conveniens results in . . . a full exit from the federal court system, whereas a § 1404(a) transfer quite literally changes only the venue."[178] Courts should thus be *more* wary of dismissing cases under forum non conveniens. Indeed, the Supreme Court held in 1955 that district courts have broader discretion under § 1404(a) than under forum non conveniens.[179] But that was before the Court's announcement that *foreign* plaintiffs' forum choices receive less deference than those of domestic plaintiffs,[180] and before the Court seemed to equate § 1404(a) and forum non conveniens in *Atlantic Marine*.[181]

Second, today, a non-merits dismissal on grounds like forum non conveniens may make a case go away, which is perhaps a net gain for the U.S. judicial system in the form of one fewer case for U.S. courts to consider. But the case may also return in the form of a suit to enforce a foreign judgment or as a follow-on proceeding if the foreign litigation goes awry.[182]

From the plaintiff's perspective, sending the case abroad is typically more expensive, and sometimes prohibitively so. From the defendant's point of view, non-merits dismissals were long thought to be a boon—a great way to end litigation. And indeed, this is why *defendants* drive most forum litigation. But that perception is slowly changing, as defendants unexpectedly face litigation abroad after forum non conveniens dismissals and thereby suffer

176 Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1007 (2013) (making this argument). Courts may have more leeway to restrict their own jurisdiction for fear of "opening the floodgates" when they are concerned with the proper interpretation of Congress's intent, *see* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255–65 (2010) (discussing congressional intent), or intrusions on the sovereignty of other nations, *see, e.g.*, *In re* Richardson-Merrell, Inc., 545 F. Supp. 1130, 1135 (S.D. Ohio 1982).

177 Bookman, *supra* note 41 (defining avoidance doctrines).

178 Robin Effron, Atlantic Marine *and the Future of Forum Non Conveniens*, 66 HASTINGS L.J. 693, 707 (2015); *see also* Bookman, *supra* note 41, at 1115–16 (noting that the rate of cases being refiled abroad after forum non conveniens dismissal is likely increasing); Effron, *supra*, at 707–08 ("The costs of restarting the action, both real and psychological, are likely higher than those associated with continuing to litigate an existing case in a different forum within the same judicial system.").

179 *See* Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955); 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3848 (4th ed.), Westlaw (database updated Apr. 2016).

180 Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255–56 (1981).

181 Effron, *supra* note 178, at 694. *See generally* Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex., 134 S. Ct. 568 (2013).

182 *See* Bookman, *supra* note 46; J. Stanton Hill, Note, *Towards Global Convenience, Fairness, and Judicial Economy: An Argument in Support of Conditional Forum Non Conveniens Dismissals Before Determining Jurisdiction in United States Federal District Courts*, 41 VAND. J. TRANSNAT'L L. 1177, 1187 (2008).

"forum shoppers' remorse."[183] We are once again reminded of the admonition that we may be "damned if [we] do, and damned if [we] don't"[184]—it is possible that if the case is refiled abroad, that may lead to more expensive litigation at least from certain perspectives;[185] if it is not, the discretionary dismissal may cut off a meritorious case. Both outcomes can generate different kinds of waste.

Third, the wasted-energy argument tends to ignore the court-access and regulatory interests behind the laws that plaintiffs are seeking to vindicate by pursuing their rights.[186] The forum question includes consideration of whether domestic courts have a sovereign interest in providing a forum. That consideration is not a legal technicality, nor is this concern exclusively the province of choice-of-law rules; indeed, a court dismissing a case on forum non conveniens grounds may never reach the choice-of-law inquiry.

Accordingly, it is inappropriate to deem the time and resources spent on forum choices and judicial consideration of them to be categorically wasteful.[187] European examples have shown that bright-line rules about jurisdiction—like the first-filed rule of *lis pendens*[188]—which should be faster and more efficient to adjudicate, can themselves promote wastefulness. "Italian torpedo" actions,[189] for example, seek to take advantage of the rigidity of that rule. In such cases, putative patent infringers file declaratory judgment actions first in Italy, home to one of the slowest court systems in Europe, in the hopes of prolonging litigation and extending the time to infringe before judgment issues.[190] Because other European courts must decline jurisdiction in favor of the first-filed court, this strict rule allows Italian torpedo-ists to "beat" the system.

Another form of forum shopping, filing repetitive suits in multiple courts, seems to waste the time and resources of courts and defendants. But even if one assumes the rough equivalence of different domestic court systems, defendants sometimes prefer this approach to a global settlement or other unifying procedures.[191] And the assumption of equivalence is naïve in

183 *See* Bookman, *supra* note 41, at 1083; Bookman, *supra* note 46, at 51.

184 *See* CARNEGIE, *supra* note 48, at 219.

185 *See* Bookman, *supra* note 46, at 48–49.

186 *See* David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. (forthcoming 2017) (discussing Congress's reasons for creating private rights of action).

187 *See* Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657 (2016).

188 *See, e.g.*, Brand, *supra* note 57, at 1009–10.

189 The "Italian torpedo" is named for advantages accruing from the notoriously slow speed of the Italian judicial system. *See* Mario Franzosi, *Worldwide Patent Litigation and the Italian Torpedo*, 7 EUR. INTELL. PROP. REV. 382 (1997) (comparing the European *lis pendens* (first-filed) rule to a convoy of ships, where the convoy moves at the speed of the slowest ship, here, Italian courts).

190 The EU has recently introduced more flexibility to address torpedo actions. *See* Margaret Moses, *Arbitration/Litigation Interface: The European Debate*, 35 NW. J. INT'L L. & BUS. 1, 15–16 (2014).

191 *See infra* Section IV.B (discussing Volkswagen).

terms of the fairness and efficiency of procedures, as well as the ability to effectuate sovereign regulatory interests. The Volkswagen scandal may lead to much duplicative litigation in different countries, but in its many and varied forms, it may afford court access to affected consumers in different countries, effectuate different nations' regulatory interests, and push judicial systems to find ways to accommodate the litigation.

Moreover, one's view of global forum shopping in particular instances often depends on one's views of the merits.[192] In the Facebook privacy litigation described in the Introduction, the Austrian law-student plaintiff withdrew his Irish complaints and filed suit in Austria after years of only incremental progress and the appearance that Facebook and other tech companies had captured the Irish authorities.[193] Depending on one's point of view, this forum hopping may seem either "manipulative" or necessary to putting Facebook users' European-law privacy rights before a neutral tribunal.[194]

D. Race to the Bottom?: Distinguishing Domestic and Global Forum Shopping

Finally, some scholars worry that domestic forum shopping leads to a "race to the bottom" wherein some courts compete for litigation by developing excessively plaintiff-friendly procedures. Patent scholars have developed this argument the most thoroughly, but the argument appears in other domestic contexts as well.[195]

Transnational litigation scholars note the development of a transnational law market, in which parties shop among jurisdictions for courts and

192 Juenger, *supra* note 124, at 143 ("[V]iews on forum shopping vary depending on whose ox is being gored.").

193 *See* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 13 (Daniel Carpenter & David A. Moss eds., 2014). *See generally Legal Procedure Against "Facebook Ireland Limited"*, *supra* note 31 (linking to twenty-two of the complaints against Facebook).

194 *See* Anupam Chander, *Facebookistan*, 90 N.C. L. REV. 1807, 1825–28 (2012) (discussing the domestic and EU law at issue in the Irish and Austrian cases). Similar analysis applies in many different contexts, from antitrust defendants seeking to take advantage of foreign clawback statutes to undo treble damages awarded in U.S. courts, to Yahoo! asking U.S. courts to undo French court injunctions against selling Nazi paraphernalia online. *See* Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 433 F.3d 1199, 1211 (9th Cir. 2006) (en banc) (opinion of Fletcher, J.).

195 J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 645 (2015); Aronson, *supra* note 171, at 75; Klerman & Reilly, *supra* note 96, at 243. A frequently cited domestic example is the ability of the Eastern District of Texas, located in a rural corner of that state, to attract over a quarter of U.S. patent litigation. Klerman & Reilly, *supra* note 96, at 243. Because venue may be appropriate for patent cases anywhere in the United States, enterprising district courts can shift their practices—including procedural rules—to attract plaintiffs. *See id.*; LastWeekTonight, *Patent Trolls*, YOUTUBE (Apr. 19, 2015), https://www.youtube.com/watch?v=3bxcc3SM_KA. The Supreme Court recently granted cert. to determine the validity of this rule under the venue statutes. ___ S. Ct. ___, 2016 WL 4944616 (mem.) (Dec. 14, 2016).

law.[196] Within this market, there are two arguments that reflect a fear that courts may race to the bottom to attract plaintiffs. First, the classic version is that national courts favor domestic plaintiffs over foreign defendants and adjust procedures accordingly.[197] In more recent articulations of this point, global-forum-shopping critics—most prominently the Chamber of Commerce—cite high-profile examples of huge, seemingly unfair foreign judgments rendered by courts in favor of domestic plaintiffs and against foreign defendants as evidence that foreign legal systems are descending into an anti-defendant abyss.[198] Such arguments highlight tremendous judgments against Chevron in Ecuador and against Dow and Dole in Nicaragua.[199] In both of those cases, foreign plaintiffs sought to sue U.S. companies in U.S. court, only to have their cases dismissed on forum non conveniens grounds. But when the plaintiffs refiled in their home countries, they were accused of "global forum shopping," a crime characterized by "trying to hold American companies hostage in the world's least accountable and transparent legal systems."[200] The plaintiffs' home courts awarded tremendous judgments, and, by some accounts, employed procedures so deferential to the plaintiffs' allegations that they violated basic due process.[201]

These examples have taken on an oversized influence in discussions of global forum shopping[202] and have fueled calls for limiting U.S. courts' ability to enforce foreign judgments.[203] There may be a growing trend of litiga-

196 *See, e.g.*, Donald Earl Childress III, *General Jurisdiction and the Transnational Law Market*, 66 VAND. L. REV. EN BANC 67, 68 (2013); Donald Earl Childress III, *Private International Law and Transnational Litigation*, 61 AM. J. COMP. L. 461, 466 (2013) (reviewing INTERNATIONAL ANTITRUST LITIGATION: CONFLICT OF LAWS AND COORDINATION (Jürgen Basedow et al. eds., 2012)).

197 *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11*, 4 J. EMPIRICAL LEGAL STUD. 441, 442 (2007); Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1121–22 (1996) (describing and rebutting this conventional wisdom); *cf.* THE FEDERALIST NO. 80 (Alexander Hamilton) (J.R. Pole ed., 2005) (state courts cannot be trusted not to favor locals).

198 *See, e.g.*, DRIMMER, *supra* note 22, at 26; *Foreign Judgment Enforcement*, *supra* note 92 ("To prevent abusive forum shopping [such as the $18-billion Ecuadorian judgment against Chevron], Congress should adopt uniform federal standards governing the recognition and enforcement of foreign judgments.").

199 *See Foreign Judgment Enforcement*, *supra* note 92.

200 Robert V. Percival, *Global Law and the Environment*, 86 WASH. L. REV. 579, 613 (2011) (quoting Editorial, *Shakedown in Ecuador*, WALL ST. J., Feb. 16, 2011, at A16).

201 In both cases, U.S. courts have condemned the local proceedings. *See* Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (assessing RICO suit alleging fraud in obtaining the Ecuadorian judgment); Osorio v. Dole Food Co., 665 F. Supp. 2d, 1307 (S.D. Fla. 2009) (declining to enforce the Nicaraguan judgment for violation of due process). *But see* Chevron Corp. v. Naranjo, 667 F.3d 232 (2d Cir. 2012); Chevron Corp. v. Yaiguaje, [2015] 3 S.C.R. 69 (Can.) (recognizing jurisdiction over Ecuadorian plaintiffs' suit to recognize and enforce Ecuadorian judgment).

202 *See, e.g.*, Christopher A. Whytock, *Some Cautionary Notes on the "Chevronization" of Transnational Litigation*, 1 STAN. J. COMPLEX LITIG. 467 (2013).

203 *See, e.g.*, Bellinger & Anderson, *supra* note 47.

tions going abroad after being dismissed from U.S. court, or being filed abroad in the first instance.[204] Further empirical evidence is needed to confirm these trends, but growing rates of judgment-enforcement litigation in the United States support this perception. Outside of flashy outliers, however, evidence does not demonstrate numerous unfair foreign judgments against U.S. defendants or a need to deny enforcement of foreign judgments.[205]

The fear of a "race to the bottom" can also be seen in a second area: when foreign officials and critics involved in making procedural reforms seek to avoid replicating what is viewed as an overly plaintiff-friendly American example.[206] As court systems experiment with different approaches to procedure, foreign officials and critics repeatedly cast the American example as the "bottom" to avoid. U.S. commentators are likewise critical of the American example.[207]

These arguments ignore at least three differences between the domestic- and global-forum-shopping contexts that make the race-to-the-bottom arguments against the former (assuming they are valid) weaker as applied to the latter: the existence of an overarching constitutional structure; the effect of competition among courts transnationally; and the limiting power of specific, rather than universal, jurisdiction.

First, domestic forum shopping occurs under domestic legal oversight that is, of course, absent in the transnational context. This oversight can make certain kinds of uniformity goals more realistic, and domestically, uniformity has broader claims to desirability. But in the transnational context, where uniformity and coordination are more challenging, one way nation

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204 *See* Bookman, *supra* note 41, at 1110–15.

205 As a separate matter, it would make sense for a number of reasons for Congress to regulate the standard for enforcing foreign judgments. *See, e.g.*, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (AM. LAW INST. 2006).

206 This is especially prevalent when countries adopt collective action legislation. *See, e.g.*, Enterprise Act 2002, c. 40, § 19 (Eng.); Wet van 23 juni 2005 tot wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de collectieve afwikkeling van massaschades te vergemakkelijken (Wet collectieve afwikkeling massaschade), Stb. 2005, 340 (Neth.) (Collective Settlement of Mass Damage Act); RESOLVING MASS DISPUTES: ADR AND SETTLEMENT OF MASS CLAIMS 75–76 (Christopher Hodges & Astrid Stadler eds., 2013); THE DUTCH 'CLASS ACTION (FINANCIAL SETTLEMENT) ACT' ('WCAM'), RIJKSOVERHEID (2008), https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/circulaires/2008/06/24/the-dutch-class-action-financial-settlement-act-wcam/wcamenglish.pdf; Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 312–13 (2003).

207 *E.g.*, PHILIP K. HOWARD, THE COLLAPSE OF THE COMMON GOOD: HOW AMERICA'S LAWSUIT CULTURE UNDERMINES OUR FREEDOM (2001); WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 5 (1983); Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977).

states develop law is by interacting with each other.[208] The domestic legal structure limits the extent to which U.S. states can interact with each other in similar ways to develop certain kinds of norms.[209]

The Full Faith and Credit Clause, for example, ensures that U.S. states respect each other's judgments and apply each other's substantive laws. Federal court decisions are recognized and enforced nationwide. The international level has no Full Faith and Credit Clause. If the Eastern District of Texas were a separate country vying for litigation (let's say, patent litigation[210]), its judgments might not be recognized and enforced abroad. And the fact that few corporate assets are located in the Eastern District of Texas would make the forum unattractive because its judgments might be difficult to enforce.[211] Lynn LoPucki states that "this . . . need for recognition is the linchpin that holds the international bankruptcy system together" if any one bankruptcy court overreaches in taking a case.[212] This transnational interplay also appears, for example, in other countries' refusal to enforce the UK's permissive libel laws.[213]

Likewise, the Privileges and Immunities Clause and the Dormant Commerce Clause forbid U.S. states from discriminating against out-of-state parties, and against each other for inappropriate exercises of jurisdiction. Not so on the international level. Notwithstanding the existence of treaties that supposedly guarantee equal treatment of foreign and domestic parties, U.S. courts regularly disadvantage foreign plaintiffs by declining to defer to their forum choices.[214] As for nation-to-nation responses, nations may impose anti-suit injunctions against each other,[215] enact clawback statutes to allow their citizens to recoup damages perceived as excessive,[216] or use other diplomatic means to express dissatisfaction with how another country's courts are exercising jurisdiction in transnational cases.[217] These kinds of interactions

208 *See* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184 (1996).

209 *See* Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741 (2010).

210 Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. REV. 1444 (2010); Klerman & Reilly, *supra* note 96.

211 This is not necessarily an argument against a judgment enforcement treaty like The Hague Convention on the Recognition and Enforcement of Judgments. *See, e.g.*, Brand, *supra* note 165. But it might be an argument against Full Faith and Credit-esque terms in such a treaty.

212 LOPUCKI, *supra* note 20, at 205.

213 *See, e.g.*, Lili Levi, *The Problem of Trans-National Libel*, 60 AM. J. COMP. L. 507 (2012).

214 *See* Bookman, *supra* note 41, at 1094–95.

215 *See* Bermann, *supra* note 162.

216 *See, e.g.*, Protection of Trading Interests Act 1980, c. ll, § 5 (Eng.); Amerika gasshuukoku no 1916 nen no han futuo renbai hou ni motoduki uketa rieki no henkan gimu tou ni kansuru tokubetsu sochi hou [Special Measures Law Concerning the Obligation of Return of the Benefits and the Like Under the United States Antidumping Act of 1916], Law No. 162 of 2004, art. 3, para. 6 (Japan); *see also* Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd., 435 F. Supp. 2d 919 (N.D. Iowa 2006) (discussing the Japanese statute). See Joseph E. Neuhaus, Note, *Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law*, 81 COLUM. L. REV. 1097 (1981), for a discussion of the U.K. statute.

217 *See* Bookman, *supra* note 41, at 1101 & n.128; *see also* Eichensehr, *supra* note 109.

may not be the most "efficient" forms of communication, but they are an integral part of how nations communicate and develop private international law.

Indeed, this nation-to-nation, court-on-court interaction molds private international law—and some domestic procedure.[218] This law can and should address unfairness and inefficiencies that arise in transnational litigation—concerns often blamed on forum shopping. But targeting "forum-shopping-motivated" conduct distracts from addressing the identified problematic consequences, and interferes with this important mechanism for developing the law.

For example, there are multiple ways to respond to concerns over the use of the Italian torpedo,[219] but some are better than others. Italian courts or legislatures could improve Italian procedures; courts in other countries could recognize jurisdiction over appropriate cases even if the cases are filed first in Italian courts;[220] or Italian or European authorities could dismiss cases if the courts determine that the plaintiffs chose to file in Italian courts for "forum shopping reasons." The last approach is inferior to the first two. It is an ad hoc metric bound to be inconsistently applied, but it is also a band-aid that does not address the heart of the problem and is unlikely to heal the wound.

The second distinction between domestic and global forum shopping relates to the "market" for courts in the different contexts. A race to the bottom is arguably likely among national courts because they will favor local plaintiffs in cases against foreign defendants.[221] But such a race among national courts should be less expected than among courts within a single country.[222] To the extent that nations are competing with each other, they are more likely to be competing for capital, trade, business, and jobs than for plaintiffs to bring suits in their courts.[223] There are a few nations—like the

218 *See* Harold Hongju Koh, *Transnational Legal Process After September 11th*, 22 BERKELEY J. INT'L L. 337 (2004).

219 *See supra* notes 189–90.

220 *See* Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 2012 O.J. (L 351) 1.

221 *Foreign* plaintiffs are an occasional but unusual constituency for domestic courts. *But see* David A. Anderson, *Transnational Libel*, 53 VA. J. INT'L L. 71 (2012) (describing the phenomenon known as "libel tourism," where libel plaintiffs forum shop for favorable libel laws); Juenger, *supra* note 54, at 564 ("No one who comes to these courts asking for justice should come in vain. . . . This right to come here is not confined to Englishmen. It extends to any friendly foreigner." (alteration in original) (quoting The Atlantic Star [1973] 1 Q.B. 364, 381–82) (Eng.))).

222 Indeed, in practice, foreign transnational forum selling is more muted. *See infra* Section III.D.

223 *See* BELL, *supra* note 140, at 33 ("Germany has been described as a haven for defendants."); O'HARA & RIBSTEIN, *supra* note 49, at 74; Peter J. Spiro, *Contextual Determinism and Foreign Relations Federalism*, 2 CHI. J. INT'L L. 363, 367–68 (2001) ("In the face of globalization, international economic competitiveness is critical to local economic prosperity."); Tsilly Dagan, Pay as You Wish: Globalization, Forum Shopping, and Distributive Justice

UK and the Netherlands—that seem to be innovating in order to become or maintain their status as litigation hubs.[224] But even these efforts have intrinsic limitations, as discussed below.[225]

The classic race-to-the-bottom argument "posits that states will try to induce geographically mobile firms to locate within their jurisdictions, in order to benefit from additional jobs and tax revenues, by offering them suboptimally lax [regulatory] standards."[226]

Translated into the litigation context, this argument would suggest that nations, and sometimes their courts, would seek to *protect* likely defendants, whether foreign or domestic. There are myriad opportunities for firms to structure their business and arrange their assets to minimize their ability to be sued, including locating in jurisdictions with favorable procedures or even immunity from suit or regulation.[227] This was the kind of manipulation that *Erie* fought by *eliminating* the "uniform" federal general common law.[228] Indeed, most developing countries' court systems do not offer financially viable or otherwise available or favorable fora for the resolution of disputes—domestic or transnational.[229] These courts operate at the "overly defendant

(June 10, 2014) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2457212.

224 *See, e.g.*, MINISTRY OF JUSTICE, PLAN FOR GROWTH: PROMOTING THE UK'S LEGAL SERVICES SECTOR (2011), http://www.justice.gov.uk/downloads/publications/corporate-reports/MoJ/legal-services-action-plan.pdf; Bookman, *supra* note 41, at 1118; Stefan Vogenauer, *Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence*, 21 EUR. REV. PRIV. L. 13, 30–32 (2013).

225 *See infra* subsection III.D.2; *see also* Peter Bert, *Law Made in Germany On Tour: Madrid, April 21, 2016*, PETER BERT'S BLOG ABOUT LITIGATION, ARBITRATION AND MEDIATION IN GERMANY—ART LAW, CASE LAW, NEWS ETC. (Apr. 1, 2016, 10:34 AM), http://www.disputeresolutiongermany.com/2016/04/law-made-in-germany-on-tour-madrid-april-21-2016/#sthash.NbeAFmP3.dpuf ("*Law Made in Germany* is the initiative of the German legal profession to promote the use of German law and German courts in international commercial transactions.").

226 Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 538 (1997).

227 *See, e.g.*, Complaint at 3–12, Korea Resolution and Collection Corp. v. Ahae Press, Inc., (N.Y. Sup. Ct. filed Feb. 6, 2016) (No. 650349/2015), https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=GY8ukfMGMHoYo02AukNDFg==&system=prod (alleging that U.S. shell corporations controlled by judgment debtor's children held the bulk of debtor's wealth); *see also* Dagan, *supra* note 223; Eric L. Talley, *Corporate Inversions and the Unbundling of Regulatory Competition*, 101 VA. L. REV. 1649 (2015).

228 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74–78 (1938); *see also* PURCELL, *supra* note 93, at 127 (questioning the federal common law's "ostensibly nonpartisan 'uniformity'").

229 A complex system of international investment protection exists in part to protect foreign investment in the face of such inadequate court systems. *See* CARLOS CORREA & NAGESH KUMAR, PROTECTING FOREIGN INVESTMENT: IMPLICATIONS OF A WTO REGIME AND POLICY OPTIONS 134 (2003).

friendly" end of the spectrum. Moving away from *this* "bottom" is a pressing concern for global justice initiatives.[230]

A third distinction between domestic and transnational forum shopping is that courts' adjudicatory jurisdiction over foreign defendants is generally limited to specific jurisdiction. In other words, defendants will typically be sued in foreign courts only when they have availed themselves of the forum in a way that relates to the cause of the litigation. Although this description is in U.S. doctrinal terms, the concept is not unique to the United States.[231]

This specific-jurisdiction limitation provides another safeguard against courts racing to an overly plaintiff-friendly bottom.[232] As a result, any individual case often has a limited *and different* set of potential available fora as compared to other similar cases. The choices and considerations facing plaintiffs wishing to sue Volkswagen over the clean diesel fiasco are different from those facing plaintiffs wishing to sue Facebook over violation of privacy rights. This arrangement differs from the choices available to patent plaintiffs, who typically face a broad *and consistent* assortment of forum choices. Because of the ubiquity of consumer goods and intellectual property, patent cases can usually be brought in any district court in the United States. In other kinds of litigation, the role of specific jurisdiction may be one way in which forum shopping moves from being a clumping force—pushing as many cases as possible toward one magnet forum (like the United States)—to a spreading force.[233]

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230 To be sure, nations may compete along different dimensions; providing a forum for litigation disputes is not the only such dimension. Substantive law and tax incentives are among the other ways that countries can compete for capital. *See* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998).

231 *See* Bookman, *supra* note 41, at 1142 (discussing Brussels Regulation).

232 States' interest in regulating visitors "justifies only specific jurisdiction to regulate local activities and not transient jurisdiction over unrelated claims." Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 754 (1988).

233 Admittedly, this force is more constraining in some contexts than others. *Compare* Phillips Petrol. Co. v. Shutts, 472 U.S. 797 (1985), *with* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011).

It is noteworthy that universal civil jurisdiction—jurisdiction based on the nature of the conduct regulated rather than on the nationality of the defendant or the location of the conduct or its effects—is not gaining traction, although scholars once argued that litigation under the Alien Tort Statute would cement universal jurisdiction's legitimacy. *See* Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 149 (2006); Wuerth, *supra* note 28, at 621. Pauwelyn and Salles, for example, have argued that "the more that international courts move away from specific jurisdiction towards broader bases of jurisdiction, the more forum shopping will become a genuine problem (similar to overlaps between domestic courts)." Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 CORNELL INT'L L.J. 77, 84–85 (2009) (footnote omitted). Instead, domestic courts appear to be moving towards specific jurisdiction. *See* Wuerth, *supra* note 28, at 618 (noting that "[n]ot a single justice . . . adopted universal civil jurisdiction in *Kiobel*"); Jim Yardley, *Spain Seeks to Curb Law Allowing Judges to Pursue Cases Globally*, N.Y. TIMES (Feb. 10, 2014), http://www.nytimes.com/2014/02/11/world/europe/span-

III. Global Forum Shopping's Unsung Virtues

Thus far, this Article has identified and responded to the principal objections to global forum shopping. In doing so, it has highlighted important differences between domestic and global forum shopping and has argued against conflating the two. This Part introduces three unappreciated virtues of global forum shopping that come to light following this analysis—the importance of forum shopping in protecting access to justice, promoting regulatory enforcement, and facilitating law reform. This is not to say that forum shopping cannot weaken decisional harmony and create other concerns, or that it is categorically good. But as is recognized more commonly in the domestic context, forum shopping and the preservation of plaintiff choice also serve important countervailing functions. It is not categorically bad.

A. Court Access

As Justice Jackson once wrote, "giv[ing] a plaintiff a choice of courts" is important "so that he may be quite sure of some place in which to pursue his remedy."[234] Domestically, it is commonplace for venue statutes to limit plaintiffs' choice of forum, but they often also give plaintiffs multiple options for where to sue in cases that cross state borders.[235] The absence of such plaintiff forum choice may mean that no suit will be brought at all, thus prejudicing the claim and compromising the efficacy of the underlying law. This is particularly true when the only available forum is effectively chosen by the defendant, such as the defendant's home.[236]

Transnationally, the issues quickly become more complicated. If multiple countries permit a certain claim or type of claim to be brought in their courts—and that's a big "if"—forum shopping can help ensure that there is at least one forum to hear such a claim.[237] For example, after a series of

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ish-legislators-seek-new-limits-on-universal-jurisdiction-law.html?_r=0 (discussing Spain's universal criminal jurisdiction law). "'It's not just that China is against [universal jurisdiction],' Professor Spiro said. 'It is still a little out of step with prevailing international norms on issues of jurisdiction.'" *Id.* *But cf.* Kurt Siehr, *Global Jurisdiction of Local Courts and Recognition of Their Judgments Abroad*, *in* Festschrift für Ulrich Magnus zum 70, at 515, 517–18 (Peter Mankowski & Wolfgang Wurmnest eds., 2014) (describing expansive Israeli jurisdiction).

234 Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947); *see also, e.g.*, Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 Wm. & Mary L. Rev. 639 (1981); Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 Tul. L. Rev. 2369, 2372 (2008) ("[W]e should consider the ability of multiple centers of adjudication to encourage socially beneficial institutional conflict and plural conceptions of the good.").

235 *See* Bassett, *supra* note 16, at 354 & n.61.

236 *See, e.g.*, Klerman & Reilly, *supra* note 96, at 303–04.

237 *But cf.* Brian J. Springer, Comment, *An Inconvenient Truth: How Forum Non Conveniens Doctrine Allows Defendants to Escape State Court Jurisdiction*, 163 U. Pa. L. Rev. 833, 834 (2015).

cases brought by plaintiffs from many Latin American countries against Dow Chemical and Dole Foods over the use of the pesticide DBCP on banana fields were dismissed on forum non conveniens grounds, the plaintiffs were sent back to their various home courts.[238] Very few refiled their cases.[239] This is not to say, however, that these countries did not want the cases to be litigated. The conflict was not one of substantive law—international law and the law of the relevant Latin American country would have likely applied wherever the case was litigated. And several Latin American countries have enacted statutes to deprive their own courts of jurisdiction and disarm the effect of a U.S. forum-non-conveniens dismissal because they want their plaintiffs to be able to sue in U.S. courts.[240] On the other hand, some commentators have argued that the availability of other countries' courts can thwart needed development of local courts.[241]

This clash of court availability is different from a situation involving a clash of substantive law as in *Morrison*, or a situation where a nation has decided not to allow private litigation over certain claims, as South Africa did with respect to claims arising out of apartheid.[242] In those cases, the existence of a U.S. forum itself creates a conflict of laws. This court-access point is a modest but important one: under certain circumstances, plaintiffs' forum choices, even if they are strategic or opportunistic, can protect court access in a way that can be consistent with the laws of the nations involved as well as international law.

Protecting the plaintiff's choice of where to sue can also counter the alternative possibility of defendants choosing where to be sued. The manipulability of businesses and assets can empower defendants to control forum selection for certain kinds of litigation against them. Such a result will typically either defang or eliminate litigation altogether. This is one potential explanation of the Austrian Facebook litigation.[243] Outside the United States and Canada, Facebook's global headquarters is in Ireland, which offers

238 *See* Henry Saint Dahl, Forum Non Conveniens*, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21 (2003) (discussing the effects of forum non conveniens doctrine in Latin America).

239 *See* Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transitional Tort Actions*, 29 BERKELEY J. INT'L L., 456, 471 (2011). Nicaragua was the exception, although the litigation that proceeded there has become the focus of anti-global-forum-shopping attention. *See, e.g.*, Bookman, *supra* note 41, at 1082–83; Dahl, *supra* note 238.

240 *See* Bookman, *supra* note 41, at 1101 (discussing these statutes).

241 *See* Delphine Nougayrède, *Outsourcing Law in Post-Soviet Russia*, 6 J. EURASIAN L. 383 (2013).

242 *See generally* Julian Simcock, Note, *Unfinished Business: Reconciling the Apartheid Reparation Litigation with South Africa's Truth and Reconciliation Commission*, 47 STAN. J. INT'L L. 239, 242–49 (2011) (discussing the structure and purpose of the Truth and Reconciliation Commission).

243 *See infra* subsection III.D.2.

multinational companies tax advantages and other incentives.[244] Thus, it is perhaps unsurprising that Irish regulators dragged their feet in evaluating claims that Facebook was violating European privacy laws.[245] To have these claims evaluated, an Austrian plaintiff might reasonably seek out an Austrian court to vindicate these privacy rights, despite Facebook's argument that it would properly be subject to suit only in Ireland or the United States.[246]

B. Law Enforcement

A more controversial scenario arises when global forum shopping enables private plaintiffs to seek to enforce a particular regulatory regime. While such plaintiffs are castigated for "taking advantage" of favorable local laws,[247] there is an alternative perspective: forum shoppers seek to enforce and potentially broaden the influence of those laws. This is often not a popular perspective, especially when the forum's claim to jurisdiction is weak. For example, *Morrison* was a foreign-cubed case where foreign plaintiffs sued foreign defendants for securities fraud on a foreign market.[248] Several foreign countries objected to the lawsuit, pointing out, among other things, that recognizing a cause of action in this case effectuated U.S. regulatory law in a way that abruptly interfered with balanced (non-private-litigation-based) regulatory regimes in other countries.[249] But in the recent Supreme Court case of *RJR Nabisco v. European Community*, the European Community itself and many of its Member States sued an American tobacco company for alleged international money-laundering schemes that harmed Europe.[250] The United States exercising jurisdiction in this case, these foreign plaintiffs argued,

244 *See, e.g.*, Jesse Drucker, *Google 2.4% Rate Shows How $60 Billion Is Lost to Tax Loopholes*, BLOOMBERG (Oct. 21, 2000), http://www.bloomberg.com/news/2010-10-21/google-2-4-rate-shows-how-60-billion-u-s-revenue-lost-to-tax-loopholes.html/ (noting Facebook's use of this structure); Jeffrey L. Rubinger & Summer Ayers Lepree, *Death of the "Double Irish Dutch Sandwich"? Not So Fast.*, TAXES WITHOUT BORDERS (Oct. 23, 2014), http://www.taxes-withoutbordersblog.com/2014/10/death-of-the-double-irish-dutch-sandwich-not-so-fast/.

245 *See Legal Procedure Against "Facebook Ireland Limited"*, *supra* note 31 (detailing twenty-two complaints regarding Facebook filed with the Irish Data Protection Commissioner in August and September 2011 by an Austrian citizen, and alleging lack of cooperation from Irish authorities regarding those complaints).

246 *See* David Munkittrick, *In the E.U., Where to Bring Suit When the Subject Is Data and the Defendant Is a U.S. Company? Hint: It's About More than Just Location*, PRIVACY L. BLOG (July 10, 2015), http://privacylaw.proskauer.com/2015/07/articles/european-union/in-the-e-u-where-to-bring-suit-when-the-subject-is-data-and-the-defendant-is-a-u-s-company-hint-its-about-more-than-just-location/.

247 *See supra* notes 16–22, 62.

248 Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 283 n.11 (2010) (Stevens, J., concurring).

249 *See* Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants-Appellees, *Morrison*, 561 U.S. 247 (No. 08-1191); Brief for the Republic of France as Amicus Curiae in Support of Respondents, *Morrison*, 561 U.S. 247 (No. 08-1191); Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents, *Morrison*, 561 U.S. 247 (No. 08-1191).

250 RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2098 (2016).

would not disrupt the international legal order.[251] The Court found the foreign sovereigns' positions in *Morrison* and *RJR* contradictory.[252] I have argued that they are distinguishable because, among other things, international law recognizes the United States has jurisdiction in *RJR* over U.S. defendants.[253]

But for purposes of the virtues of global forum shopping, the point is that the issue is complicated. Allowing forum shopping in *RJR* could have furthered Congress's regulatory purposes in enacting RICO, and it would have permitted the influence of U.S. laws to extend to U.S. nationals' conduct abroad without violating international law. This result could have advanced U.S. interests, without interfering with U.S. foreign policy or international harmony.

Nations and their legislatures create causes of action, establish jurisdiction, incentivize certain kinds of lawsuits,[254] and otherwise provide a forum for the vindication of rights so that private litigants can enforce public prerogatives. In Europe and elsewhere, regulatory enforcement through private litigation is gaining popularity, which has increased court access and *forum shopping*, often within the bounds of international law.[255] The Volkswagen litigation in countries from Canada to South Korea demonstrates this role for global forum shopping. To be effective in regulating conduct that crosses borders, private enforcement regimes must countenance at least some forum shopping.

C. Driving Experimentation

This Article also suggests a third virtue that other scholars have not discussed. Global forum shopping can promote experimentation and reform in areas of both substantive and procedural law.[256]

Forum shopping brings cases to courts and compels courts to interact with each other, to set jurisdictional standards for themselves based on domestic and transnational considerations, and to seek out procedures to accommodate the evolving demands of modern dispute resolution. By presenting these procedural and jurisdictional challenges to courts, transnational litigation—almost inevitably fueled by forum shopping—requires courts to address issues in concrete terms and can thereby demonstrate to legislatures the flaws in existing procedures. Global forum shopping's ability to promote this experimentation is an unappreciated benefit of the much-

251 *Id.* at 2107.

252 *See id.* at 2106–08 (discussing foreign sovereigns' amicus briefs).

253 *See* Bookman, *supra* note 42, at 60.

254 Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782 (2011).

255 *See* R. DANIEL KELEMEN, EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION (2011).

256 This observation need not be limited to national court systems. It may apply as well to other dispute resolution mechanisms, such as mediation and arbitration, although those fields are beyond the scope of this Article. *See* Cover, *supra* note 234, at 639 (discussing the "jurisdictional complexities" of having fifty separate state court systems).

maligned practice. Even though the experiments don't always "work" at achieving even their stated goals or consistently lead to "good" results, the experimentation itself is beneficial as a process of developing law.[257]

Many studies have evaluated jurisdictional concurrence as a driver of experimentation with substantive law. The classic and increasingly controversial example is Delaware's development of corporate law,[258] but the argument is explored internationally in substantive law realms as well.[259] Forum shopping can facilitate substantive law development because of its role in transnational legal processes.[260] Indeed, litigants are often shopping for favorable substantive law, and forum shopping provides a platform for courts to defend their countries' policy choices, such as their countries' view of free speech or privacy.[261] Even when consistent choice-of-law rules would cause different courts to apply the same law, different forums' interpretations can contribute to the development of that single law.[262]

This Section and the next call attention to global forum shopping's ability to facilitate procedural legal reform.[263] As the U.S. and European examples below show,[264] courts respond to litigants' requests. Whether such requests relate to accommodating procedures or expanded conceptions of jurisdiction, litigant requests are not always sufficient to spark useful reform,

257 *See* Juenger, *supra* note 54, at 571 ("The reaction of a federal district court judge, for instance, to members of the bar who had flown to India shortly after the Bhopal disaster with calling cards in their pockets, is not surprising. But this extreme case of international ambulance-chasing did at least alert the Indian Government to the need to pursue the victims' claims aggressively." (footnote omitted)).

258 *See, e.g.*, Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 227–32 (1985) (praising Delaware's innovations in corporate law and casting them as a race to the top); *see also* Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1484 (1992) (countering Romano's argument with contentions that the state competition leads to a race to the bottom); O'HARA & RIBSTEIN, *supra* note 49, at 107–31.

259 *See, e.g.*, Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1004–05 (debating whether global jurisdiction causes or hinders the convergence of legal standards); Lisa Larrimore Ouellette, *Patent Experimentalism*, 101 VA. L. REV. 65, 100–02 (2015) (discussing experimentation with patent policies across countries); Scott J. Shackelford, *Toward Cyberpeace: Managing Cyberattacks Through Polycentric Governance*, 62 AM. U. L. REV. 1273, 1352 (2013) (arguing that nations should be "laboratories for polycentric governance in cyberspace").

260 Koh, *supra* note 208, at 206.

261 *See, e.g.*, Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 433 F.3d 1199, 1211 (9th Cir. 2006) (en banc) (opinion of Fletcher, J.) (per curiam); Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (AEPD), 2014 E.C.R. 317, http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0131&lang1=en&type=TXT&ancre=.

262 Thanks to Scott Dodson for offering this point.

263 Here, I do not wish to engage in debates about the line between substance and procedure, but rather to focus on the clearly procedural side of the developments fostered by forum shopping. *See, e.g.*, Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801 (2010) (discussing the overlap between procedural law and substantive law in the context of forum choice).

264 *See infra* Section III.D.

but they are almost always necessary. Whether these plaintiffs are intrepid or annoying may depend on one's view of the merits of their cause or of their underlying "motives," but their suits present opportunities for courts to develop responses to the changing demands of litigation. Recent years have been particularly fertile in the realm of procedural reform, and global forum shopping has played a significant role. And yet few scholars have drawn attention to this phenomenon or its importance when they explore and respond to the common criticisms of global forum shopping.[265]

Global forum shopping can facilitate procedural experimentation in several ways. It can cross-pollinate courts with lawyers and litigants from other jurisdictions who bring experiences with other systems and creative applications of those other systems to transplant into the local domestic court system.[266] This presses courts to determine whether to accommodate these different kinds of procedures.

Lawyers and litigants have been bringing legal theories from one nation to another for centuries. The lawyers in *Hadley v. Baxendale*,[267] for example, argued French principles of consequential contract damages to the English courts, which adopted them.[268] More recently, Dan Kelemen has documented how U.S. plaintiffs' lawyers have opened offices abroad, particularly in Europe, influencing legal culture there.[269] Similarly, after *Morrison* closed the doors on global securities class actions in the United States, American lawyers started studying for the Canadian bar.[270]

When lawyers and litigants are the vehicles for ideas to travel from one jurisdiction to the next, the process is sometimes understood to be diffusion.[271] Classic diffusion theory states that diverse laws "spread quickly within regions and around the globe" through mechanisms such as mimicry, competition, and learning.[272] These mechanisms all play a role in leading to changes in domestic procedures throughout the world today.

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265 *See supra* notes 52–53 and accompanying text.

266 *See, e.g.*, KELEMEN, *supra* note 255 (describing the role of American lawyers in shaping Eurolegalism).

267 (1854) 156 Eng. Rep. 145 (Ex.).

268 *See* Richard Danzig, Hadley v. Baxendale*: A Study in the Industrialization of the Law*, *in* CONTRACTS STORIES 1, 4–6 (Douglas G. Baird ed., 2007).

269 *See* KELEMEN, *supra* note 255, at 82.

270 *See* Bookman, *supra* note 41, at 1116; Monestier, *supra* note 153, at 308.

271 *See, e.g.*, RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW 37 (2013); Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 839 (1997) ("Inspiration for procedural reform is increasingly sought in the legal thesaurus of foreign countries."); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 893–94 (1998).

272 *See* KATERINA LINOS, THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY AND EMPLOYMENT LAW SPREAD ACROSS COUNTRIES 1, 86, 139 (2013); *see also, e.g.*, Frank Dobbin et al., *The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?*, 33 ANN. REV. OF SOC. 449, 450 (2007); Jeffrey L. Dunoff, *A New Approach to Regime Interaction*, *in* REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 136 (Margaret A. Young ed., 2012) (proposing a holistic approach to

But diffusion theory[273] is not a complete fit to describe the influence of forum shopping. Innovations promoted by forum shoppers need not take an idea from one jurisdiction and transplant it to the next. Indeed, sometimes innovation involves creatively working within a system. In the terms of Richard Marcus's "modes of procedural reform," global forum shopping can drive development of procedure by the judiciary, increase borrowing, and encourage both bottom-up and top-down reform.[274]

More fundamentally, forum shopping can involve litigants trying to convince courts to entertain certain claims—based on forum or foreign law—within the confines of the existing domestic court procedural rubrics.[275] In *Filártiga*, for example, the litigants advocated using a little-known federal statute to permit a federal court claim under international law.[276] In the Austrian Facebook case, the only available mechanism for aggregating claims was by assignment, so the plaintiff took to the Internet to request that other Facebook users assign him their claims.[277] He is now asking the European Court of Justice to recognize the largest putative "class action" Europe has ever seen.[278] The U.S. Volkswagen litigation has tested the limits of the multi-district litigation (MDL) process and its interaction with privately created settlement funds. Outside the United States, claimants are suing Volkswagen under new or little used domestic procedures that may need to adapt to accommodate the case.[279]

These efforts involved litigants who pushed the envelope, asserting litigation strategies that were not time-tested, and potentially trying the boundaries of the line between "legitimate" forum *choices* and "illegitimate" forum *shopping*. But these efforts have the potential to make a significant impact on the development of procedural mechanisms in their respective domestic court systems.

Forum shopping also leads courts to interact with each other, providing occasions for them to learn about other legal systems, including choice-of-law

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understanding the interaction among regimes); Gregory Shaffer, *Transnational Legal Process and State Change*, 37 LAW & SOC. INQUIRY 229, 236 (2012) ("Transnational norms do not travel by themselves. They are constructed, conveyed, and carried by actors . . . ."); *id.* at 259 ("[F]ocusing on the construction and migration of transnational legal norms through transnational legal processes is critical for the analysis of how national law and institutions are shaped and understood. It is where the action is.").

273 *See* Dobbin et al., *supra* note 272, at 450; Shaffer, *supra* note 272, at 236.

274 Richard L. Marcus, *Modes of Procedural Reform*, 31 HASTINGS INT'L & COMP. L. REV. 157, 159, 162–63 (2008).

275 *Cf.* Olga Frishman, *Should Courts Fear Transnational Engagement?*, 49 VAND. J. TRANSNAT'L L. 59, 100–01 (2016) (discussing the use of transnational practices by the U.S. Supreme Court and the Supreme Court of Israel).

276 Filártiga v. Peña-Irala, 630 F.2d 876, 879 (2d Cir. 1980); *infra* notes 286–301 and accompanying text.

277 *See supra* notes 33–34 and accompanying text.

278 *See supra* notes 33–34 and accompanying text.

279 *See supra* notes 1–9 and accompanying text.

analysis or enforcing foreign judgments.[280] Relatedly, litigating these cases forces courts to develop rules about the interaction among courts, including rules of private international law regarding jurisdiction, choice of law, and enforcement of foreign judgments.

Indeed, forum shopping's influence is perhaps most clear with respect to conflicts of law. Conflicts arise when parties bring cases that have ties to multiple fora. In this context, the two component parts of forum shopping—jurisdictional concurrence and litigant choice—cyclically redefine each other. That is, parties "shop" to debate principles of jurisdiction, while courts and lawmakers respond by refining, expanding, or contracting those principles. The process continues repeatedly, and as the examples discussed below demonstrate, such developments are not and should not be a ratchet in any one direction.[281]

This is not to defend global forum shopping simply because it encourages creative solutions to the problems it creates. Rather, forum shopping may be necessary without being a necessary evil. In today's globalized world, there may not be a single "best" forum, and it may be folly to conceive of cases in that way.[282] Worldwide consolidation of the Volkswagen litigation in Germany might represent some abstract ideal, for example, but it would undermine access to justice for far-flung claimants and the ability of other countries to provide a forum in which to vindicate their laws.

Forum shopping may lead courts to entertain and accommodate litigation within the confines of their own procedures in order to vindicate any number of sovereign interests of the forum. Litigants may ask courts to afford a forum for domestic parties as a plaintiff or defendant, or for a tort that occurred within its territory, or to vindicate a domestic law or regulatory interest. Whether the court wants to afford such a forum may be a different story. For example, some judges dismissed fraud cases based on the Madoff Ponzi scheme on forum non conveniens grounds, but other judges kept similar cases in federal court because of the connections between the fraud and

280 *See, e.g.*, Paul B. Stephan, *Courts on Courts: Contracting for Engagement and Indifference in International Judicial Encounters*, 100 VA. L. REV. 17 (2014).

281 Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons*, 82 TUL. L. REV. 1741 (2008) (arguing that recent developments in European international conflicts law originated from changes in U.S. conflicts law).

282 *Cf.* Bassett, *supra* note 16, at 384–85 (revealing the myth of the best forum in the domestic context). Likewise, the seemingly "best" forum may be effectively unavailable. *See supra* note 234 and accompanying text; *see also, e.g.*, *In re* Volkswagen "Clean Diesel" Litig., 148 F. Supp. 3d 1367, 1369 (J.P.M.L. 2015) (discussing states with connections to the litigation and noting that "no single district possesses a paramount factual connection to these cases"). For other examples of cases with no clear "best" forum, see *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *In re Optimal U.S. Litig.*, 837 F. Supp. 2d 244, 255–56 (S.D.N.Y. 2011) (declining to grant forum non conveniens dismissal and attempting to distinguish other similar cases).

the United States.[283] These cases demonstrate that part of the analysis of whether plaintiffs are "forum shopping" appears to depend on whether and to what extent the court countenances the plaintiffs' assertion of these U.S. goals.

Jurisdictional concurrence opens up multiple fora in multiple countries where litigants can assert these needs. As Adam Zimmerman put it, "[T]he global convergence of class action attorneys, regulatory agencies, state attorneys general, and even criminal prosecutors commencing overlapp[ ]ing actions create new pressures on what we want and expect from our courts," which may drive courts (and legislatures) "to adopt yet another model to balance the interests of individual and collective justice in mass litigation."[284]

It may appear that procedural experimentation and cross-pollination of ideas would exist without concurrent jurisdiction and global litigant choices. Indeed, it may be impossible to quantify how much additional force global forum shopping offers to drive experimentation. But forum shopping is one of several forces—even if not the only one—that promote a rich, concrete version of "court-on-court" interactions.[285] Its force can be likened to the requirement that federal courts confront only cases or controversies. It provides a forum in which courts *must* grapple with balancing court access, convenience, fairness, and sovereignty.

D. Case Studies

To illustrate the virtues of global forum shopping, the following two subsections describe the dynamics of transnational litigation in the United States and Europe over the past few decades. In the United States, global forum shopping contributed to an expansion of court access and other procedural developments starting in the 1980s, but in recent years, fears of global forum shopping have contributed to the development of a more restrictive ethos with respect to transnational litigation. Meanwhile, several European nations are growing friendlier to litigation generally and transnational litigation in particular. As they welcome global forum shopping, they provide opportunities for procedural innovation.

1. Global Forum Shopping in the United States

A signature example of global forum shopping's effect on procedural innovation is *Filártiga v. Peña-Irala*.[286] In the late 1970s, a group of interna-

283 *See In re Optimal*, 837 F. Supp. 2d at 256 (distinguishing one Madoff-based litigation from others that were dismissed on forum non conveniens grounds on the basis that its claims were based on federal laws, although the distinguished cases also included such claims).

284 Adam Zimmerman, *The Convergence of Global Settlements*, PRAWFSBLAWG (Feb. 1, 2012, 2:02 PM), http://prawfsblawg.blogs.com/prawfsblawg/2012/02/the-convergence-of-global-settlements.html.

285 *See* Stephan, *supra* note 280, at 84–89.

286 630 F.2d 876 (2d Cir. 1980).

tional human rights lawyers unearthed the forgotten Alien Tort Statute[287] to assert federal jurisdiction over a Paraguayan official for torturing a Paraguayan national in Paraguay in violation of international law.[288] In recognizing federal jurisdiction over such a case,[289] the Second Circuit laid the groundwork for decades of transnational human rights litigation. Although *Filártiga* has come under harsh criticism,[290] and recent Supreme Court decisions have significantly cabined its potential reach,[291] the core contribution of *Filártiga*—federal question jurisdiction over allegations of foreign torture in violation of international law—inspired Congress to codify such jurisdiction in 1991.[292] The decision opened avenues for international human rights initiatives,[293] and it continues to inspire some jurists to open U.S. courts to similar claims.[294]

The 1980s were perhaps the high-water mark for transnational forum shopping in the United States.[295] Confronted by what appeared to be a deluge of foreign forum shoppers,[296] U.S. courts for the past three decades have sought to stem that tide.[297] In a recent example, the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum* quashed ATS jurisdiction over cases arising out of alleged foreign conduct.[298] To reach this conclusion, the Court rewrote the question presented to evaluate an issue the parties hadn't raised:[299] the "extraterritorial" application of the statute it had called jurisdictional (and thus, thought to be immune from "extraterritoriality" analysis)

287 28 U.S.C. § 1350 (2012).

288 *See, e.g.*, WILLIAM J. ACEVES, THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF *FILÁRTIGA V. PEÑA-IRALA* 5 (2007); Harold Hongju Koh, Filártiga v. Peña-Irala*: Judicial Internalization into Domestic Law of the Customary International Law Norm Against Torture*, *in* INTERNATIONAL LAW STORIES 45, 45 (John E. Noyes et al. eds., 2007).

289 *Filártiga*, 630 F.2d at 878.

290 *See, e.g.*, Bradley, *supra* note 66; Curtis A. Bradley et al., Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869 (2007); Sykes, *supra* note 43, at 372–73.

291 *See* Daimler AG v. Bauman, 134 S. Ct. 746, 762–63 (2014); Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1665 (2013); Sosa v. Alvarez-Machain, 542 U.S. 692, 699 (2004).

292 *See* Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350).

293 *See* Wuerth, *supra* note 28, at 601.

294 *See Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring); *id.* at 1670–78 (Breyer, J., concurring in the judgment); *see also* Leval, *supra* note 94, at 234 (urging the importance of ATS jurisdiction).

295 *See* Bookman, *supra* note 41, at 1098; Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 12 GA. J. INT'L & COMP. L. 1 (1987).

296 *See* Whytock, *supra* note 16, at 506 (arguing that this apparent deluge of cases was not as large as it seemed).

297 *See* Bookman, *supra* note 41, at 1115; Burbank, *supra* note 167, at 632; Childress, *supra* note 153. In a random sampling of cases, the rhetoric against forum shopping appears to have spiked in the 2000s.

298 *Kiobel*, 133 S. Ct. at 1669.

299 *Id.* at 1663.

just nine years earlier.[300] Using unconventional extraterritoriality analysis, the Court restricted foreign plaintiffs' ability to invoke the ATS in cases that did not "touch and concern" the United States.[301]

One cannot help but speculate that this and other efforts to contract transnational litigants' access to U.S. courts are partly a response to perceived excesses in forum shopping in the United States.[302] At times, courts specify that they are targeting global forum shopping.[303] In *Kiobel*, the Court criticized, and declined to adopt, interpretations of the ATS that made "the United States a uniquely hospitable forum for the enforcement of international norms."[304] In *Morrison*, the Court acknowledged the legitimacy of fears that U.S. courts "ha[ve] become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets," when it curbed the extraterritorial reach of the U.S. securities statute.[305] In *Piper*, the Court worried that without its decision strengthening forum non conveniens, American courts "would become even more attractive" to foreign plaintiffs and the "flow of litigation into the United States would increase and further congest already crowded courts."[306]

Forum shopping brought these cases to U.S. courts and compelled the courts to confront the questions of choice of law,[307] jurisdiction, and venue. The resulting doctrinal developments ended up excluding even cases with

300 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 713 (2004); William S. Dodge, *The Presumption Against Extraterritoriality Does Not Apply to Jurisdictional Statutes*, OPINIO JURIS (Jan. 28, 2014, 12:00 PM), http://opiniojuris.org/2014/01/28/guest-post-dodge-presumption-extraterritoriality-apply-jurisdictional-statutes/; William S. Dodge, *The Presumption Against Extraterritoriality Still Does Not Apply to Jurisdictional Statutes*, OPINIO JURIS (July 1, 2016, 4:57 PM), http://opiniojuris.org/2016/07/01/32658/.

301 *Kiobel*, 133 S. Ct. at 1669; *see* Ralph G. Steinhardt, Kiobel *and the Weakening of Precedent: A Long Walk for a Short Drink*, 107 AM. J. INT'L L. 841, 841 (2013) ("*Kiobel* is the first time that the presumption against extraterritoriality has been applied to a purely jurisdictional statute."); Carlos M. Vázquez, *Things We Do with Presumptions: Reflections on* Kiobel v. Royal Dutch Petroleum, 89 NOTRE DAME L. REV. 1719, 1723 (2014) ("Neither of the explanations for the presumption against extraterritoriality supports its application to this [jurisdictional] sort of statute.").

302 *See, e.g.*, Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Petitioners at 27–30, Goodyear Dunlop Tires, S.A. v. Brown, 564 U.S. 915 (2011) (No. 10-76); Whytock, *supra* note 16, at 495–97; *cf.* Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. (forthcoming 2017).

303 *See, e.g.*, Simmtech Co. v. Citibank, N.A., No. 13-cv-6768, 2015 WL 542284, at *3–4 (S.D.N.Y. Feb. 10, 2015); Augstein v. Leslie, No. 11 Civ. 7512, 2012 WL 77880, at *1–2 (S.D.N.Y. Jan. 10, 2012); Gilstrap v. Radianz Ltd., 443 F. Supp. 2d 474, 481 (S.D.N.Y. 2006); Corporacion Tim, S.A. v. Schumacher, 418 F. Supp. 2d 529, 534 (S.D.N.Y. 2006); *In re* Rezulin Prods. Liab. Litig., 214 F. Supp. 2d 396, 399–400 (S.D.N.Y. 2002).

304 *Kiobel*, 133 S. Ct. at 1668.

305 Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 270 (2010).

306 Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 (1981).

307 *See* Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657 (2013) (discussing how extraterritoriality is a kind of choice of law).

strong U.S. ties.[308] Recent developments in civil procedure, especially in transnational cases, reveal narrowed court access and jurisdictional power.[309] For the pendulum to swing in the other direction, as some scholars predict it will[310] (though others lament that it won't[311]), there will need to be more forum shopping.[312]

2. Global Forum Shopping in Europe

Likewise, global forum shopping has been instrumental in developing procedures in European countries. This subsection profiles such reforms, using collective action mechanisms as a case study of how forum shopping can facilitate procedural experimentation. Europe is an important focus because commentators who are concerned about the migration of global forum shopping typically cite nascent European reforms, especially the development of collective action mechanisms.[313] While these developments are

308 RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2115 (2016) (Ginsburg, J., concurring in part, dissenting in part, and dissenting from the judgment) (noting that the case, which will likely be dismissed on remand following the Supreme Court's decision, had "the United States written all over it"); Bookman, *supra* note 4.

309 *See, e.g.*, Bookman, *supra* note 41, at 1092; Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 694 (2012); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1853–55 (2014).

310 *See, e.g.*, Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 306 (2014); Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 692 (2015); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353 (2010).

311 *See, e.g.*, Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1108 (2006); Subrin & Main, *supra* note 309, at 1841.

312 For example, there is an emerging scholarly debate about the impact of the *Daimler* decision and its interaction with consent-based jurisdiction over corporations registered to do business in a given state. *See, e.g.*, Buxbaum, *supra* note 112, at 314; Monestier, *supra* note 118; Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. REV. 527 (2012). Against the backdrop of those who interpret *Daimler* to draw a bright line that general jurisdiction exists only where a corporation is at home, bringing suit based on a registration theory of general jurisdiction would likely be deemed "blatant forum shopping," at least by detractors. But such litigation may be the only way of answering the question. *See* Ferrari, *supra* note 17, at 19 & n.99 (discussing blatant forum shopping).

313 *See, e.g.*, *Class Actions Around the Globe*, U.S. CHAMBER COM., INST. FOR LEGAL REFORM, http://www.instituteforlegalreform.com/issues/class-actions-around-the-globe (last visited Oct. 10, 2016); *see also, e.g.*, Spencer Weber Waller & Olivia Popal, *The Fall and Rise of the Antitrust Class Action*, 39 WORLD COMP. L. & ECON. REV. 29, 41–55 (2016) (discussing the rise of antitrust class action mechanisms in Europe, Canada, and Mexico); *id.* at 32 (discussing "the irony of how the rest of the world is seeking out how best to empower plaintiffs to bring appropriate class action proceedings while the U.S. Supreme Court remains principally concerned with how to restrain or eliminate that very same type of action").

not limited to Europe,[314] Europe provides an interesting and important case study.[315]

The Facebook example described in the Introduction provides an entry point for the comparison. There, the Austrian plaintiff moved the litigation over Facebook's alleged violation of European privacy laws to Austrian courts after being frustrated with the progress of the case he brought before Irish authorities.[316] The Austrian litigation may be pressuring Austrian courts to adapt their procedures to accommodate the case, which could become the largest putative class action in European history.[317] Even within existing procedures, the Facebook case presents opportunities for procedural innovation.

Three more examples are illuminating. First, an interesting counterpoint to U.S. anti-global-forum-shopping doctrines is the European Commission's (EC) approach to collective damages actions for infringement of national competition law.[318] The EC's Impact Assessment Report on such actions identified a problem: in Europe, private litigation follows successful public antitrust enforcement actions only about twenty-five percent of the time.[319] Moreover, the "uneven litigation landscape" and lack of uniform competition rules in Europe have led to a concentration of antitrust damages actions in the UK, the Netherlands, and Germany.[320] This is a problem, the EC argued, *not* because of *excessive* litigation rates in these three "magnet" countries, but because victims of antitrust violations in other Member States had less access to justice, making it harder for those states to effectuate their own competition laws.[321] Private antitrust litigation was not adequately compensating victims of antitrust conspiracies (without involving governmental

314 *See, e.g.*, Dow Chem. Co. v. Calderon, 422 F.3d 827, 829 (9th Cir. 2005) (describing procedural reforms in Nicaragua); Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002) (describing procedural reforms in Ecuador); *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India, in Dec. 1984, 809 F.2d 195 (2d Cir. 1987) (shopping for a forum to address the Bhopal disaster, which required Indian courts to develop procedures to address those cases); *see also* Bookman, *supra* note 41, at 1117–18 (Canada); *id.* at 1112 (Latin American countries, Australia, Israel, Indonesia, South Africa, and Taiwan); Gidi, *supra* note 206, at 314 (Brazil).

315 *See* Hannah L. Buxbaum, *Class Actions, Conflict and the Global Economy*, 21 IND. J. OF GLOBAL LEGAL STUD. 585 (2014).

316 *See supra* notes 31–34 and accompanying text.

317 *See supra* notes 31–34 and accompanying text.

318 *See* Waller & Popal, *supra* note 313, at 12–16; *see also Commission Staff Impact Assessment Report: Damages Actions for Breach of the EU Antitrust Rules Accompanying the Proposal for a Directive of the European Parliament and of the Council*, COM (2013) 404 final (June 11, 2013) [hereinafter *Impact Assessment Report*], http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/? uri=CELEX:52013SC0203&qid=1474478600122&from=EN.

319 *Impact Assessment Report*, *supra* note 318, at 19. By contrast, in the United States, private antitrust suits commonly follow antitrust convictions or guilty pleas. *See id.* at 23 n.58; *see also* Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207, 225 (2003).

320 *Impact Assessment Report*, *supra* note 318, at 19.

321 *Id.* at 19–20.

antitrust agencies' scarce resources).[322] Moreover, cartels in non-magnet countries may enjoy an unfair anti-competitive advantage.[323] The solution discussed was to amplify opportunities for litigation in these other states,[324] thereby increasing forum shopping in transnational competition cases.[325]

Second, the German securities class action law exemplifies how courts respond to transnational litigants' demands. In 2001, thousands of Deutsche Telekom shareholders sued the company in U.S. and German courts,[326] alleging that the company's securities filings misleadingly failed to disclose a planned merger and overstated the company's real estate portfolio by at least $2 billion.[327] Because Germany had no mechanism for aggregating these claims, they overwhelmed local courts and languished while Deutsche Telekom simultaneously defended itself in U.S. litigation.[328] After three years, the Frankfurt courts *began* to evaluate the claims. They started by "expediting" ten cases that raised the most important issues,[329] but commentators lamented that the German civil law model of a two-party dispute "sim-

322 *See, e.g.*, UK CIVIL JUSTICE COUNCIL, IMPROVING ACCESS TO JUSTICE THROUGH COLLECTIVE ACTIONS: DEVELOPING A MORE EFFICIENT AND EFFECTIVE PROCEDURE FOR COLLECTIVE ACTIONS 17 (2008), https://www.ucl.ac.uk/laws/judicial-institute/files/Improving_Access_to_Justice_through_Collective_Actions_-_final_report.pdf.

323 *Impact Assessment Report*, *supra* note 318, at 20; JUDICIAL HELLHOLES, *supra* note 76 (identifying legal "hellholes," or magnets for forum shoppers); *cf. supra* notes 65–73 and accompanying text.

324 *Impact Assessment Report*, *supra* note 318, at 27.

325 National initiatives, like the UK's 2015 antitrust law, could maintain the UK's place as the preferred forum for such litigation and thereby counteract the EC's efforts to level the playing field, but the Brexit vote in 2016 poses challenges for Britain's status as a magnet forum. *See* Simon Camilleri et al., *How Antitrust Class Actions Will Work in the UK*, LAW360 (Apr. 9, 2015), http://www.law360.com/articles/640749/how-antitrust-class-actions-will-work-in-the-uk; *see also* Richard Kreindler et al., *Impact of Brexit on UK Competition Litigation and Arbitration*, 33 J. INT'L ARB. 521, 521 (2016). One such challenge is that British judgments will not be automatically enforceable throughout the rest of Europe. *Id.* at 527–28.

326 Holders of American Depository Shares sued in U.S. district court; German shareholders sued in Frankfurt. *See* Michael Halberstam, *The American Advantage in Civil Procedure? An Autopsy of the Deutsche Telekom Litigation*, 48 CONN. L. REV. 817, 817 (2016). A non-German institutional investor filed and then withdrew its claims from the Frankfurt court after being requested to guarantee court costs. Andreas W. Tilp & Thomas A. Roth, *The German Capital Market Model Proceedings Act as Illustrated by the Example of the Frankfurt Deutsche Telekom Claims*, *in* MASS TORTS IN EUROPE 131 (Willem H. van Boom & Gerhard Wagner eds., 2014). Goldman Sachs, the share offering's global coordinator, was a defendant in some of the German cases. *Id.* at 133.

327 *See* Consolidated Amended Class Action Complaint at 2, *In re* Deutsche Telekom AG Sec. Litig., No. 100CV09475, 2001 WL 36163316 (S.D.N.Y. May 31, 2001); Dietmar Baetge, *Germany*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 125, 127 (2009); Halberstam, *supra* note 326, at 834; Bruce Wardhaugh, *Bogeymen, Lunatics, and Fanatics: Collective Actions and the Private Enforcement of European Competition Law*, 34 LEGAL STUD. 1 (2014).

328 Halberstam, *supra* note 326, at 844.

329 *Id.*

ply could not process such a large number of claims."[330] Responding to this situation, the German legislature enacted its first collective action mechanism in 2004, specifically for securities claims. This experimental procedure created a "model proceeding" to adjudicate common issues in multiple lawsuits.[331]

The parallel suits in the United States and Germany provide a useful contrast between the two countries' procedures. The German litigation, filed over ten years ago, continues on appeal today, while the U.S. litigation settled within five years of the complaints' filing.[332] Michael Halberstam, who has thoroughly analyzed the two litigations, contends that the German statute failed to provide meaningful private enforcement of German securities laws in part because German procedure is weak on discovery.[333] This shortcoming, Halberstam argues, prevented the German court from learning more about the alleged fraud and reaching a more just conclusion (notwithstanding relatively similar substantive law standards).[334] Other commentators agree that the German experiment in aggregate securities litigation was "a flop."[335] Yet the 2004 act further demonstrates how litigants' needs drive procedural innovation. It also shows how transnational forum shopping in multiple jurisdictions can illuminate parallel procedures, albeit in experiments that are far from controlled.

Third, the Dutch collective settlement mechanism, known as the WCAM, is another experiment aimed at addressing litigant-driven needs.[336] The WCAM was enacted in response to a domestic crisis over an anti-miscarriage drug that was linked to health problems in the children of mothers who took the drug. The scandal led to thousands of similar lawsuits, but the Dutch courts could not accommodate a mass settlement.[337] The WCAM allows plaintiffs and defendants to petition the Amsterdam Court of Appeals to make a settlement binding on all class members who do not opt out.[338]

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330 *Id.* at 846.

331 *Id.* at 847.

332 *Id.* at 863.

333 *See* Érica Gorga & Michael Halberstam, *Litigation Discovery and Corporate Governance: The Missing Story About the "Genius of American Corporate Law"*, 63 EMORY L.J. 1383, 1484 (2014) (describing limitations on discovery in civil law systems, including Germany).

334 Halberstam, *supra* note 326, at 868.

335 Gorga & Halberstam, *supra* note 333, at 1491 (citing Daniela Kuhr, *Sammelklagen Floppen in Deutschland*, SÜDDEUTSCHE ZEITUNG (Apr. 24, 2012), http://www.sueddeutsche.de/wirtschaft/telekom-prozess-und-seine-folgensammelklagen-floppen-in-deutschland-1.1340101).

336 Wet van 23 juni 2005 tot wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de collectieve afwikkeling van massaschades te vergemakkelijken (Wet collectieve afwikkeling massaschade), Stb. 2005, 340 (Neth.) (Collective Settlement of Mass Damages Act); *see* Kramer, *supra* note 55, at 240.

337 *See* Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. (forthcoming 2017) (manuscript at 34–36) (on file with author) (describing the circumstances leading up to the WCAM in detail).

338 Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 311 (2011).

Some see the WCAM as proof that the Netherlands "hop[es] to take over" the U.S. class action business.[339] The largest and most significant settlement under the WCAM occurred in 2007 for securities fraud claims against Shell Petroleum.[340] The WCAM approved a settlement worth more than $350 million between Shell and plaintiffs from more than one hundred countries.[341] In a parallel U.S. court proceeding, Shell reached a settlement with U.S. shareholders.[342]

The creation of the WCAM was an innovative response to the needs of both plaintiffs and defendants. For some commentators, the procedure may have all the beneficial attributes of other inducements to settle.[343] For others, one criticism may be that the procedure benefits plaintiffs' *lawyers* and defendants, but not plaintiffs.[344] Whatever the verdict on the current version of the WCAM, however, it was created as a procedural experiment to address the modern demands of a particular case,[345] and the experimentation continues. The Dutch legislature specified that it was inspired by U.S. class actions, but that it chose to recognize collective settlements that did not involve litigation "to avoid the complications that arise fairly often in American damages class actions."[346] Responding in part to the perceived success, popularity, and necessity of the WCAM procedure, the Dutch government has proposed adding collective litigation for damages procedures to complement the WCAM.[347]

In sum, global forum shopping in the United States and Europe has facilitated procedural reform affecting numerous subject-matter areas. Some of these developments have opened courts to more litigation; others have closed off court access. Domestic courts have reevaluated their roles in transnational litigation and have been forced to confront, within their own procedural systems, some of the most perplexing issues facing modern litigation today. These developments have paved the way for new kinds of litigation and strong incentives for global forum shopping.

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339 *See* Kramer, *supra* note 55, at 237 (quoting Anne de Groot, *Nederland Hoopt Stokje VS Over te Nemen als Land van Class-Actions*, HET FINANCIEELE DAGBLAD, Nov. 17, 2010, at 13).

340 Settlement Agreement 1–2 (Apr. 11, 2007), http://shellsettlement.com/docs/Exhibit%201%20Settlement%20Agreement.pdf.

341 *Id.* at 1.

342 *Id.* at 2.

343 *See* Kramer, *supra* note 55, at 236 (describing the debate); *cf.* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

344 *See* Hensler, *supra* note 338, at 319.

345 *See* Kramer, *supra* note 55, at 239 (describing domestic litigation that led to the WCAM).

346 *Id.* at 240 (quoting THE DUTCH 'CLASS ACTION (FINANCIAL SETTLEMENT) ACT' ('WCAM'), *supra* note 206).

347 *See* Xandra Kramer, *Dutch Draft Bill on Collective Action for Compensation—A Note on Extraterritorial Application*, CONFLICT OF LAWS.NET (Nov. 20, 2014), http://conflictoflaws.net/2014/dutch-draft-bill-on-collective-action-for-compensation-a-note-on-extraterritorial-application/.

IV. Reevaluating Global Forum Shopping

By revealing global forum shopping's virtues, this Article has painted a more nuanced picture of the practice—its relationship to domestic forum shopping, its potential harms, and its potential benefits. Global forum shopping questions overlap with complex inquiries not only about forum choice, but also about personal jurisdiction, choice of law, and international comity. This discussion should make courts, scholars, and critics reevaluate their prejudices against global forum shopping.

This Part discusses three areas of the law where this more nuanced understanding of global forum shopping can have an impact. Courts should excise discussion of forum-shopping motives from doctrinal tests like forum non conveniens; they should recognize the legitimacy of exercising jurisdiction that comports with international law; and they should reciprocate that recognition of legitimacy when evaluating whether to recognize and enforce foreign judgments.

This approach attempts to address both the vices and the virtues of global forum shopping. First, emphasizing legitimacy concerns and international law, rather than forum-shopping motives, responds appropriately to the legitimacy concerns raised by global-forum-shopping critics without hampering the ability of global forum shopping to promote court access, private law enforcement, or legal experimentation. Second, this approach recognizes the difficulty of striving for decisional harmony, and it relies on international comity principles to temper the level of decisional disharmony on the international sphere. Bill Dodge has defined international comity as "deference to foreign government actors that is not required by international law but is incorporated in domestic law."[348] International law permits (but does not require) prescriptive jurisdiction over a country's own nationals and over conduct in the country's territory; "[w]ith the exception of sovereign immunity," it imposes no guidelines for adjudicative jurisdiction,[349] although there are some bases of jurisdiction that other countries find exorbitant, such as "doing business" jurisdiction or tag jurisdiction.[350] When they are not violating international law or exercising exorbitant jurisdiction, courts should presume that their exercise of jurisdiction will comport with international comity and not risk undue international discord. Third, these principles could provide more clarity with respect to what kinds of cases courts will accept, thus reducing wastefulness to some (admittedly unmeasurable) extent. Fourth, this approach should promote experimentation and protect against a race to the bottom that would be overly plaintiff-friendly or overly defendant-friendly.

These recommendations are directed at courts. Courts can, do, and should play an important role in regulating global forum shopping. Of

348 Dodge, *supra* note 53, at 2078 (emphasis omitted).

349 Restatement (Fourth) of Foreign Relations of the United States § 302 reporters' note 1 (Am. Law Inst., Tentative Draft No. 2, 2016).

350 Clermont & Palmer, *supra* note 101, at 481.

course, judicial responses are not the only ways to do this, or even necessarily the most effective in the long term. Other commentators have focused on international or regulatory responses to curb global forum shopping.[351] Some of these approaches may be effective in working towards a balanced amount of global forum shopping, particularly in certain areas of the law, like bankruptcy, where international consensus has identified a problem with the lack of uniformity in substantive as well as procedural rules.[352]

But international coordination can be challenging,[353] and domestic legislation can be slow,[354] and these days, unpredictable. In the meantime, courts are often positioned as first (and sometimes last) responders to emerging developments in transnational litigation. This Part therefore focuses on how courts can incorporate the more nuanced understanding of global forum shopping developed in this Article.

A. Eliminating the Focus on "Forum-Shopping Motives"

One key implication of this Article's approach is that courts should eliminate the doctrinal and rhetorical focus on "improperly motivated" forum shopping. Preoccupation with litigants' intent obscures something critical. The relationship between global forum shopping's evils and benefits does not depend on litigants' forum-choice motivations. Global forum shopping promotes beneficial legal experimentation regardless of whether it is motivated by "legitimate" considerations. Nor is global forum shopping that generates waste or threatens decisional disharmony always motivated by "strategic" considerations. Most forum choices are and probably should be strategic.[355] And many forum choices, whatever motivations drive them, will lead to some decisional disharmony and wastefulness. These may be inexorable byproducts of what Chris Whytock calls the "evolving forum shopping system."[356] In the *domestic*-forum-shopping context, courts often tolerate these byproducts because they are counterbalanced by other interests, including access to justice and a related vindication of regulatory prerogatives.[357] Global forum shopping furthers these latter goals in the transnational context as well.

Courts and scholars should not lightly accuse lawyers and litigants of employing abusive, bad-faith litigation tactics when they engage in forum shopping. Forum shopping may overlap with opportunities for abusive litigation, but the idea of bad faith in litigation strategy should be approached

351 *Cf.* Childress, *supra* note 153, at 1022 (advocating international regulatory responses).

352 *See, e.g.*, LOPUCKI, *supra* note 20.

353 *See supra* text accompanying notes 155–65 (discussing uniformity).

354 *See* CAL JILLSON, AMERICAN GOVERNMENT: POLITICAL DEVELOPMENT AND INSTITUTIONAL CHANGE 148 (1999).

355 *See* Clermont, *supra* note 36, at 1921 (observing that there are always forum choices).

356 Whytock, *supra* note 16.

357 *See supra* Part II.

with caution in an adversarial system, lest restrictions thwart zealous advocacy and global forum shopping's virtues.[358] Global forum shopping's detractors attempt to equate the practice with unconscionable tactics.[359] But improper tactics should be combatted with the tools intended to regulate legal ethics, not with doctrines designed to regulate the kind of transnational litigation permitted in American courts.[360] Federal Rule of Civil Procedure 11, for example, recognizes that legal arguments are permissible so long as they are nonfrivolous and not "being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."[361] Domestically, seeking forum advantages rarely triggers Rule 11 concerns,[362] as the practice is considered an element of zealous advocacy.[363] That should be true in the global-forum-shopping context as well—in terms of whether forum shopping can trigger Rule 11 sanctions or other kinds of effective sanctions, like dismissing a case under forum non conveniens.

To implement this idea, discretionary doctrines such as forum non conveniens must stop disregarding plaintiffs' forum choices because those choices reflect egregious forum shopping or forum shopping "for forum-shopping reasons."[364] Instead, courts should engage with the problems they are trying to address: the objective connections among the case, forum, and parties. Foreign plaintiffs should receive the same "venue privilege"[365] that domestic plaintiffs receive.

To apply this approach to the Volkswagen litigation, one must look to litigation in the United States and abroad. The Volkswagen MDL panel, for

358 A full exploration of bad faith in litigation is beyond the scope of this Article.

359 *See supra* note 22 and accompanying text.

360 *See supra* notes 137–38 (discussing *The Federalist No. 80*).

361 FED. R. CIV. P. 11(b). Sanctions are available only if allegations are "utterly lacking in support," and "objectionably frivolous." Leigh Handelman Smollar, *The Importance of Conducting Thorough Investigations of Confidential Witnesses in Securities Fraud Litigation*, 46 LOY. U. CHI. L.J. 503, 520–21 (2015) (internal quotation marks omitted) (first quoting O'Brien v. Alexander, 101 F.3d 1479, 1489 (2d Cir. 1996); then quoting *In re* BankAtlantic Bancorp, Inc. Sec. Litig., 851 F. Supp. 2d 1299, 1308 (S.D. Fla. 2011)). "'A legal claim is frivolous if no reasonably competent attorney could conclude that it has any reasonable chance of success or is a reasonable argument to change existing law. . . .' Rule 11 is not a best-practices standard." *Id.* at 521 (quoting *In re BankAtlantic*, 851 F. Supp. 2d at 1308) (citing Fed R. Civ. P. 11(b)). *But cf.* Michael P. Stone & Thomas J. Miceli, *The Impact of Frivolous Lawsuits on Deterrence: Do They Have Some Redeeming Value?*, 10 J.L. ECON. & POL'Y 301, 337 (2014) (arguing that frivolous lawsuits are not necessarily detrimental to social welfare).

362 *See supra* notes 84–100 and accompanying text. Domestically, forum-shopping critics seek out legislative action to restructure the forum-shopping system; they cannot rely on courts rejecting forum shopping efforts based on plaintiffs' motives. *See, e.g.*, Bassett, *supra* note 16, at 338 n.15 (discussing the Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2012)).

363 *See, e.g.*, Linda S. Mullenix, *The American Class Action Fairness Bill and Forum-Shopping American-Style*, 31 GENEVA PAPERS ON RISK & INS. 357, 357 (2006).

364 Iragorri v. United Techs. Corp., 274 F.3d 65, 75 (2d Cir. 2001) (en banc).

365 Van Dusen v. Barrack, 376 U.S. 612, 635 (1964).

example, did not criticize the domestic plaintiffs for forum shopping all over the United States, but that case primarily involved domestic plaintiffs. If foreign plaintiffs had joined the litigation, the court should have analyzed its jurisdiction to adjudicate those claims, not whether those plaintiffs were "forum shopping." Motives should be assessed in conjunction with an analysis of whether the arguments brought are frivolous, as they are in instances of Rule 11 sanctions.[366] Forum shopping itself should not be considered a sanctionable offense.[367] Likewise, the German courts should not dismiss U.S. or other foreign plaintiffs from the securities fraud litigation against Volkswagen as a sanction for forum shopping. Nor should the WCAM—if a settlement is ever filed—reject certain parties on such a ground.

B. Exercising Jurisdiction in Domestic Courts

Instead of focusing on curbing global forum shopping and weeding out opportunistic plaintiffs, gatekeeping principles should incorporate legitimacy concerns by recognizing jurisdiction when international law would permit it. Doing so will sometimes permit or even encourage global forum shopping—but as we have seen, that need not be viewed as inexorably negative. This approach should inform courts' decisions about whether to entertain transnational cases.

I have addressed these issues before. In an earlier work, I confronted the growing phenomenon of litigation isolationism, through which U.S. courts have been raising doctrinal and other legal barriers that keep out transnational litigation. To curb this phenomenon, I recommended that four "transnational litigation avoidance doctrines"—personal jurisdiction, forum non conveniens, abstention comity,[368] and the presumption against extraterritoriality—should be reoriented around territoriality and personality. That is, U.S. courts should exercise jurisdiction over cases where the con-

366 *See, e.g.*, Diaz-Barba v. Superior Court, 187 Cal. Rptr. 3d 403, 416 (Cal. Ct. App. 2015) ("A party should not be allowed to assert the unavailability of an alternative forum [in opposition to a dismissal on forum non conveniens grounds] when the unavailability is a product of its own purposeful conduct." (quoting *In re* Air Crash Over the Mid-Atl. on June 1, 2009, 792 F. Supp. 2d 1090, 1094 (N.D. Cal. 2011))); *see also* Arnaud Nuyts, *The Enforcement of Jurisdiction Agreements Further to* Gasser *and the Community Principle of Abuse of Rights*, *in* FORUM SHOPPING IN THE EUROPEAN JUDICIAL ARENA 55 (Pascal de Vareilles-Sommières ed., 2007) (suggesting bad-faith litigants should be dealt with under the EC abuse of process principle).

367 *But cf.* Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 329–30 (1996) (noting that courts generally have not imposed Rule 11 sanctions in forum-shopping cases but suggesting that sanctions are appropriate); *id.* at 326–28 (stating that restrictions on forum shopping "can be enforced through Rule 11 of the Federal Rules of Civil Procedure, Rule 11's state counterparts and the forum's own ethics rules" (footnotes omitted)).

368 International comity takes several forms. *See* Dodge, *supra* note 53. "Abstention comity" refers to the doctrine of international comity when it is used as a freestanding doctrine that gives courts the discretion to decline to exercise jurisdiction over a case. *See* Bookman, *supra* note 41, at 1084.

duct or harm involved occurred on U.S. territory (territoriality) or where there is a U.S. citizen defendant (personality). Territoriality and personality are two concepts that "provide presumptively valid, and internationally uncontested, bases for prescriptive and adjudicatory jurisdiction."[369] International law recognizes both as valid bases for prescriptive jurisdiction.[370] Domestically, territoriality and personality are also foundational bases for exercising venue in federal court.[371]

The Volkswagen litigation is largely lining up along these lines. Securities litigation is proceeding in Volkswagen's home forum (Germany), but the consumer and dealership fraud cases are being brought in countries around the world where the fraud occurred, provided that the legal systems give some kind of opening to such private enforcement litigation.[372]

The recent decision in *RJR Nabisco*, however, does not follow this prescription. There, the Court applied the presumption against extraterritoriality to hold that the statutory cause of action for a RICO violation does not cover claims for foreign injuries.[373] Recognizing such a cause of action, the Court argued, would risk international discord, notwithstanding the protestations by the plaintiffs—the European Community and many European nations—that it would not.[374] The Court grounded its international discord arguments in foreign sovereign amicus briefs filed in "foreign-cubed" cases.[375] But the test for whether exercising jurisdiction would be illegitimate and thus risk causing international discord should be whether such an exercise would violate international law. In *RJR Nabisco*, the defendant was a U.S. national, and nationality-based adjudicative jurisdiction is widely recognized as legitimate. As for prescriptive jurisdiction, the Court held that Congress had overcome the presumption against extraterritoriality, and many of the RICO predicates alleged to be violated actually regulated domestic conduct, like the use of the U.S. wires to commit fraud.[376] Under the theory articulated here, the Court should have allowed the *RJR* case to proceed, and affirmed the Second Circuit.

C. Recognizing and Enforcing Foreign Judgments

This legitimacy-focused approach should also inform U.S. doctrine on the recognition and enforcement of foreign judgments. When a U.S. court

369 Bookman, *supra* note 41, at 1133.

370 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (AM. LAW INST. 1987); Wuerth, *supra* note 28, at 619.

371 28 U.S.C. § 1391 (2012).

372 *See supra* Introduction (discussing litigation around the world).

373 RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100–02 (2016).

374 *Id.* at 2100.

375 *Id.* at 2116 (Breyer, J., concurring in part, dissenting in part, and dissenting from the judgment).

376 *Id.* at 2105–06 (majority opinion); *see* Pamela Karten Bookman, Note, *Solving the Extraterritoriality Problem: Lessons from the Honest Services Statute*, 92 VA. L. REV. 749, 752 (2006) (discussing the domestic-conduct basis of the wire fraud statute).

considers recognizing or enforcing a foreign judgment, whether forum shopping led to the foreign judgment should be irrelevant.

Recent anti-forum-shopping rhetoric has urged strict standards for recognition and enforcement of foreign judgments.[377] But this approach juxtaposes an unwillingness to hear cases at home with a refusal to recognize judgments when plaintiffs bring those cases abroad. This disconnect is most pronounced in cases where the same suit is dismissed on forum non conveniens grounds, proceeds abroad, and then results in a foreign judgment that is not recognized by U.S. courts.[378]

Principles of recognition and enforcement must balance many factors, including fairness to defendants and plaintiffs' need for court access. A federal statute on foreign judgment recognition and enforcement, like the one proposed by the American Law Institute,[379] should recognize and enforce foreign judgments arising out of proceedings that meet basic requirements of fairness. But those requirements should not demand that foreign procedures mirror American ones. Some commentators urge U.S. courts not to enforce judgments like those against Chevron in Ecuador and against Dow and Dole in Nicaragua.[380] But these outliers are poor examples upon which to structure doctrinal rules.[381] Based on the defendants' accounts of those proceedings, they would fail almost any fairness review. The relevant standard should not enforce flagrantly unfair judgments, but should still recognize innovative procedures like the Dutch settlement judgment, or variations on opt-in or opt-out aggregate litigation mechanisms. Like U.S. court jurisdiction, foreign courts' jurisdiction should also be judged against the international-law standards of legitimacy.

* * *

Volkswagen is currently facing litigation around the world over consumer fraud, dealership fraud, government fraud, and securities fraud. Much of this litigation is necessarily redundant in certain ways. Some of it—the securities litigation—is mostly concentrated in Germany. Other kinds of litigation are happening around the world and are likely to continue for quite some time. This litigation is "wasteful" in the sense that global forum shopping is often accused of promoting waste. It is far from harmonious—different standards apply to essentially the same fraud in different coun-

377 *See, e.g.*, Bellinger & Anderson, *supra* note 47, at 502; *see also supra* note 47 and accompanying text (describing forum-shopping critics' shift to focus on foreign judgment enforcement).

378 *See* Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1450 (2011).

379 Linda Silberman, *Transnational Litigation: Is There a "Field"? A Tribute to Hal Maier*, 39 VAND. J. TRANSNAT'L L. 1427, 1434 (2006) (describing the draft ALI statute).

380 *See* Bellinger & Anderson, *supra* note 47, at 544; *supra* notes 196–99 and accompanying text.

381 *Cf.* Bookman & Noll, *supra* note 337 (describing the pitfalls of designing laws based on specific cases).

tries.[382] But the courts are acting within international-law bounds on the legitimate exercise of jurisdiction either over local defendants (in Germany) or over fraud that occurred within their borders (like consumer fraud actions in different countries brought by local plaintiffs). These suits may push innovation in these countries to address the complex nature of these litigations. While the court recently approved Volkswagen's settlement with government officials and the Plaintiffs' Steering Committee in the main MDL, Volkswagen will likely continue to face much more litigation—and continued efforts at global forum shopping—in the future.

Conclusion

Forum shopping has a long history as a maligned practice. Reflecting domestic forum shopping debates, global forum shopping has likewise obtained a negative reputation, contributing to U.S. doctrinal barriers to stop foreign plaintiffs from "taking advantage" of favorable U.S. substantive law and procedure. This Article has shown that this critical view of global forum shopping is overblown and that the virtues of global forum shopping—with its important role in the development of domestic law, particularly procedure—have been overlooked. Appreciating global forum shopping in this context recommends that the campaign to strengthen the barricades should cease and be scaled back, and that a focus on jurisdictional legitimacy under international law should replace over-emphasis on transnational plaintiffs' allegedly illicit motives for forum shopping.

382 *See Historic Settlement with VW Provides Roadmap for European Resolution*, Globe Newswire (June 30, 2016), https://globenewswire.com/news-release/2016/06/30/852486/0/en/Historic-Settlement-with-VW-Provides-Roadmap-for-European-Resolution.html.