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ARTICLE

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Abstract. Civics class teaches the traditional mode of law enforcement: The legislature adopts a regulatory statute, and the executive enforces it in the courts. But in an increasingly interconnected world, a nontraditional form of regulatory litigation is possible in which public enforcers from one government enforce laws adopted by a second government in the second government's courts. That is, one government provides the executive while the second provides the legislature and the judiciary. I call this nontraditional form "diagonal public enforcement."

Although diagonal public enforcement has escaped systematic study, one can find examples in U.S. courts going back more than a century. Foreign governments have used U.S. courts to enforce federal antitrust laws, state environmental laws, and civil rights statutes, among others. Recently, the U.S. Supreme Court heard a case in which the European Community sued U.S. tobacco companies in a federal court in New York under the Racketeer Influenced and Corrupt Organizations Act. Diagonal public enforcement occurs within the U.S. system as well. States routinely enforce federal laws in federal courts, and opportunities exist for states to enforce sister-state law, especially with respect to climate change and other cross-border issues.

Despite these examples, some view diagonal public enforcement as a category error: Why would legislatures rely on foreign governments to enforce domestic law, and why would foreign executives take up the task? In light of these questions, this Article attempts to demystify diagonal public enforcement by exploring when it is consistent with the rational pursuit of legislative and executive interests. Legislatures are likely to authorize diagonal public enforcement in order to increase deterrence or influence global regulation. Executives are likely to forum shop for diagonal options in order to achieve better

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outcomes in foreign courts. These predictions explain existing patterns of enforcement and suggest a larger role for diagonal public enforcement in the coming years.

Finally, this Article critically evaluates the costs and benefits of diagonal public enforcement at the interstate, intrastate, and individual levels. At first glance, diagonal public enforcement may seem to raise concerns about the diffusion of regulatory authority, the extraterritorial reach of domestic law, and the interference in relationships with foreign sovereigns. Upon closer scrutiny, however, diagonal public enforcement turns out to have the capacity to improve enforcement efficacy, promote the public interest, protect foreign and minority interests, and nudge gridlocked institutions. At least under certain conditions, therefore, these transgovernmental cases may be models for deeper cooperation and improved enforcement.

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Introduction

As part of a comprehensive plan to fight tobacco smuggling,[1] lawyers from the European Community adopted a seemingly radical strategy: sue Big Tobacco in the United States. Beginning in 2000, the European Community filed a series *of* civil lawsuits against tobacco companies in U.S. courts under U.S. law.[2]

In 2016, one of those cases reached the U.S. Supreme Court.[3] After counsel for the European Community introduced his case at oral argument, Justice Alito interjected: "Isn't it rather strange that countries in Europe . . . are suing in the courts of the United States for injuries sustained to their business interests in Europe? Why didn't they just sue in their own courts?"[4]

The Court ultimately rejected the European Community's suit, but not because the plaintiffs were foreign governments.[5] Indeed, for more than a century, foreign governments have sued in U.S. courts to enforce U.S. antitrust laws, environmental laws, civil rights laws, and others.[6]

Foreign governments are not the only sovereigns that enforce somone else's law. The U.S. federal system also creates opportunities for states to enforce the laws of other domestic sovereigns.[7] For example, eight states (and New York City) filed a climate change lawsuit against the five largest emitters of carbon dioxide in the United States.[8] The Supreme Court rejected the claim that was based on an asserted federal common law right to seek abatement, but it left for consideration on remand the claims based on sister-state nuisance law.[9] This suit was not unique. Opportunities exist for states to enforce sister

1. *See* Case C-131/03 P, R.J. Reynolds Tobacco Holdings v. Comm'n, 2006 E.C.R. I-7823, I-7827; Stephanie Francq, *A European Story*, 110 AM. J. INT'L L. UNBOUND 74, 74-77 (2016).
2. *See* RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2098 (2016); Francq, *supra* note 1, at 75-76.
3. *See RJR Nabisco*, 136 S. Ct. at 2098-99.
4. Transcript of Oral Argument at 29, *RJR Nabisco*, 136 S. Ct. 2090 (No. 15-138), 2016 WL 1090258.
5. *See RJR Nabisco*, 136 S. Ct. at 2111 (rejecting the claim for failure to allege a domestic injury); *see also infra* Part I.A (discussing this case).
6. *See infra* Part I (collecting examples of at least forty-two countries suing under various U.S. laws).
7. *See infra* Part II (collecting examples of states suing in federal and sister-state courts). Throughout this Article, I use the term "sister state" to denote the relationship between two (or more) U.S. states.
8. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 418 (2011).
9. *See id.* at 420-29; *see also infra* notes 121-26 and accompanying text (describing this case in more detail).

states' antitrust laws, environmental laws, and more,[10] and states routinely enforce federal laws of various types.[11]

In some ways, the decision to introduce foreign sovereign enforcers recalls the familiar debate about when a lawmaker should diffuse regulatory and enforcement authority. That debate asks whether the benefits of increased deterrence and enforcement are worth the risks of overenforcement and incoherence.[12]

But a foreign sovereign is not just any other enforcer. For one thing, a foreign government enforcing domestic law looks like a mismatch or a category error.[13] This intuition resonates with Justice Alito's question about why foreign governments should be allowed to enforce domestic laws at all. These cases also encounter the sovereignty-based objection that extraterritorial regulation impermissibly intrudes on the internal affairs of other sovereigns.[14] Indeed, the unusual configuration of these cases supplements this extraterritoriality objection with one based on the separation of powers: The domestic lawmaker may undercut its executive branch by bringing in a foreign enforcer, while the foreign executive may circumvent its home legislature and judiciary by accepting the invitation to litigate in the courts of another sovereign. Compare the solid arrows of traditional public enforcement with the dashed arrows of "diagonal public enforcement"[15] in Figure 1 below:

10. *See infra* Part II.A.

11. *See infra* Part II.B.

12. *Cf.* Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 661-71 (2013) (describing the costs and benefits of private enforcement); Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 306 n.138 (2016) (collecting sources on private and public enforcement).

13. In their discussion of separation of powers jurisprudence, Aziz Huq and Jon Michaels frame this question as whether a foreign government "properly belongs in the thick political surround" of the federal government. *See* Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 434 (2016) (emphasis omitted).

14. *See generally* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85 (1998) (exploring objections to the extraterritorial application of U.S. law); Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008) (exploring "myriad forms of state regulation"); Heather K. Gerken, William Howard Taft Lecture on Constitutional Law, *Living Under Someone Else's Law*, 84 U. CIN. L. REV. 377 (2016) (exploring the different paths of vertical and horizontal federalism); Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57 (2014) (exploring state-state and state-federal regulatory tensions); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006) (exploring the consequences of the Supreme Court's jurisprudence on interstate variation); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007) (exploring the scope of congressional authority to regulate interstate relations).

15. Eichensehr invoked the label "diagonal" to describe foreign states' participation as amici curiae in the Supreme Court. *See* Kristen E. Eichensehr, *Foreign Sovereigns as*

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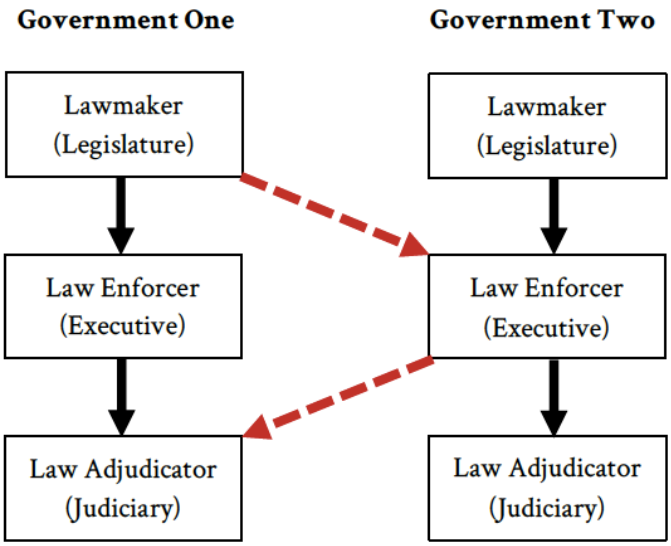
Figure 1



While these objections merit serious consideration, a systematic evaluation of this unusual form of regulatory governance reveals that its benefits may outweigh its costs. With respect to enforcement and deterrence, there are theoretical reasons to believe that adding new enforcers will increase the efficacy and efficiency of enforcement regimes, and by selecting government enforcers (albeit foreign ones), the risks to the public interest may be minimized.[16] Meanwhile, although in some ways these suits represent another form of extraterritorial regulation, their intergovernmental nature mitigates some of the strongest sovereignty objections to extraterritorial regulation by relying on foreign governments to enforce the law voluntarily.[17] At the same time, by disaggregating lawmakers and law enforcers, these arrangements have the capacity to stimulate gridlocked or inactive institutions in the enforcing state[18] and to better protect foreign and minority interests in the lawmaking

Friends of the Court, 102 VA. L. REV. 289, 291-92 (2016). With her permission, I have adopted the label in this Article.

16. *See infra* Parts III.A, IV.A.

17. For a discussion on how the voluntary nature of diagonal enforcement may mitigate at least some of the sovereignty-based objections, see text accompanying note 106 below.

18. *See infra* Part IV.B.

state.[19] At least under certain conditions, therefore, these transgovernmental cases may be models for deeper cooperation and improved enforcement.[20]

This Article systematically studies the phenomenon of diagonal public enforcement, or "diagonal enforcement" for short. I define diagonal enforcement to comprise cases in which one government enforces another government's laws in another government's courts.[21] The word "enforce" in this definition refers to a specific type of litigation. This Article is not concerned with every suit by a foreign or sister-state government;[22] instead, it addresses only cases in which that government sues on a regulatory or enforcement-style claim.[23] As a result, this Article focuses on areas of

19. *See infra* Part IV.C.

20. More theoretically, these suits resemble the type of transgovernmental collaboration described by Anne-Marie Slaughter and others. *See generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); Robert O. Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 WORLD POL. 39 (1974); Christopher A. Whytock, *A Rational Design Theory of Transgovernmentalism: The Case of E.U.-U.S. Merger Review Cooperation*, 23 B.U. INT'L L.J. 1 (2005). This type of enforcement also resonates with recent work in international relations on regulatory intermediation. *See infra* note 98 and accompanying text.

21. This definition avoids any formal or functional difficulties with courts applying the laws of other sovereigns. For example, in international cases, the "public law taboo" may preclude courts from hearing public law claims under foreign law. *See generally* William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161 (2002) (discussing the history and theory of the public law taboo); Philip J. McConnaughay, *Reviving the "Public Law Taboo" in International Conflict of Laws*, 35 STAN. J. INT'L L. 255 (1999) (same). This definition also pays no special attention to suits against other sovereigns. *See generally* Larry W. Yackle, *A Worthy Champion for Fourteenth Amendment Rights: The United States in* Parens Patriae, 92 NW. U. L. REV. 111, 115-17 (1997) (recommending that the United States bring parens patriae suits against states, under 42 U.S.C. § 1983, to enforce the guarantees of the Fourteenth Amendment). For sources on parens patriae suits, see note 43 below.

22. *See generally* Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against "Judicial Imperialism,"* 73 WASH. & LEE L. REV. 653 (2016) (addressing the general phenomenon of foreign governments suing in U.S. courts); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995) (discussing the law, history, and practice of U.S. states bringing suits as plaintiffs). These two articles in particular have made significant contributions to our understanding of foreign-country and U.S.-state suits, respectively, and they inform many parts of the analysis here.

23. When writing about private enforcement, Stephen Burbank and colleagues similarly focus on "situations in which government responds to a perception of unremedied systemic problems by creating or modifying a regulatory regime and relying in whole or in part on private actors as enforcers." Burbank et al., *supra* note 12, at 639-40; *see also* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1145-60 (2012) (documenting the history of private enforcement in U.S. law); Patrick Luff, *Risk Regulation and Regulatory Litigation*, 64 RUTGERS L. REV. 73, 112-15 (2011) (describing one conception of regulatory litigation). One alternative approach to studying diagonal enforcement might focus only on federal statutory rights. *See* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND

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traditional public concern such as antitrust, securities, civil rights, and environmental law. And, notably, these are areas in which legislatures routinely consider whether to expand enforcement authority beyond domestic public enforcement.[24]

As the definition of diagonal enforcement implies, this Article brings together international and interstate enforcement. Certainly, there are salient differences between California and Nevada, on the one hand, and the United States and France on the other. Legislatures reasonably might make different decisions about when to invite sister states into court as opposed to foreign governments. But these differences do not undermine this Article's goal of assessing diagonal enforcement conceptually. And, indeed, it is precisely the intergovernmental nature of these cases that gives them their unusual status.[25]

This Article proceeds as follows. The next two Parts describe examples of diagonal enforcement: Part I addresses international cases, and Part II addresses domestic cases. This descriptive work serves both as a proof of concept—diagonal enforcement is already happening at multiple levels—and as a demonstration of some of the conceptual and institutional building blocks for diagonal enforcement regimes.

Despite its prevalence, diagonal enforcement appears to generate some reflexive backlash: Why would legislatures ever rely on foreign sovereigns to enforce domestic law, and why would foreign executives take up that task? In light of these questions, Part III attempts to demystify diagonal enforcement by exploring when it would be consistent with legislative and executive interests. Although these diagonal options may appear unusual at first glance, rational legislatures may have reasons to authorize diagonal suits, and rational executives may have reasons to forum shop for diagonal options.[26] These predictions explain existing patterns of enforcement and suggest a larger role

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RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION, at xvii (2017) (limiting the study to issues "critical to the infrastructure of private enforcement of federal rights"). For my purposes, looking only at federal statutory rights would be underinclusive, at a minimum, because it would not include state or common law claims addressing a similar class of topics.

24. *See, e.g.*, Burbank et al., *supra* note 12, at 685 (identifying areas of federal statutory intervention); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 620 n.5 (2013) (identifying commentaries on these areas). Private enforcement is a common alternative, but transgovernmental public enforcement matters too.

25. This Article is unconcerned with interstate or international *private* enforcement.

26. Part III thus applies rational choice theory to the question of institutional design. *See infra* note 152. This is not to suggest that rational choice theory explains everything, but it is a useful way to ground the analysis.

for domestic and international diagonal enforcement after the election of President Donald Trump.[27]

Finally, Part IV turns from the institutional to the normative. First, it addresses diagonal enforcement's relationship to optimal deterrence and enforcement. Second, it assesses diagonal enforcement's effects on relationships among and within governments. Third, it asks how individual and minority interests fare when diagonal enforcement is introduced. This normative review connects to literatures on transgovernmental relations,[28] horizontal federalism,[29] and private enforcement.[30] So while Part III explains when legislatures and executives might be diagonally inclined, Part IV's normative analysis is useful for evaluating those policy choices.

In sum, diagonal enforcement is not new, but it deserves considered attention in an era when truly global solutions are out of reach and truly local solutions are not enough. This form of regulation not only has potential benefits for enforcement efficacy and interstate relations, but it also might protect minority interests and nudge governmental institutions out of gridlock.

I. International Cases

Since nearly the Founding, foreign states have filed lawsuits in U.S. courts.[31] Thus, when asked in 1870 if Napoleon III could sue in the United States,[32] the Supreme Court observed: "On this point not the slightest difficulty

27. *See infra* Part III.C. Tightening rules of personal jurisdiction also might increase the importance of this form because states suing on behalf of their residents might be compelled to look to sister-state courts. *Cf.* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1780-84 (2017) (holding that California courts lacked personal jurisdiction over nonresidents' claims brought against nonresident defendants).

28. *See* sources cited *supra* note 20.

29. *See* sources cited *supra* note 14.

30. *See* sources cited *supra* notes 12, 23.

31. In 1810, the King of Spain sued for lost customs duties in federal court. *See* King of Spain v. Oliver, 14 F. Cas. 572, 573 (C.C.D. Pa. 1816) (No. 7813); King of Spain v. Oliver, 14 F. Cas. 577, 578-79 (C.C.D. Pa. 1810) (No. 7814); *see also* U.S. CONST. art. III, § 2 (authorizing subject matter jurisdiction in U.S. courts for suits between U.S. parties and foreign states); 28 U.S.C. § 1332(a)(4) (2016) (establishing diversity jurisdiction for foreign-state plaintiffs). State courts have long been open to foreign sovereigns as well. *See, e.g.*, King of Prussia v. Kuepper's Adm'r, 22 Mo. 550, 556-59 (1856); Republic of Mexico v. de Arrangois, 11 How. Pr. 1, 2-5 (N.Y. Sup. Ct.), *aff'd*, 11 How. Pr. 576 (N.Y. 1855).

32. *See* The Sapphire, 78 U.S. (11 Wall.) 164, 167 (1870). The Court in *The Sapphire* also referred to a dozen cases in the previous five years in which foreign nations, including the United States, sued in English courts. *See id.* at 167-68. For a recent example of this phenomenon, see Blue Holding (1) Pte Ltd. v. United States [2014] EWCA (Civ) 1291 [4]-[6] (Eng.) (involving the United States's applying for a freezing injunction related to a

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exists. A foreign sovereign . . . who has a demand of a civil nature against any person here, may prosecute it in our courts."[33]

For more than a century, U.S. courts have entertained international enforcement actions as well.[34] For example, around the turn of the twentieth century, the French government filed at least two unfair competition suits in U.S. federal courts.[35]

This Part documents leading examples of international diagonal enforcement, focusing primarily on tobacco litigation and antitrust. This survey is not intended to be comprehensive, though I hope to identify many of the central examples of international diagonal enforcement in U.S. courts.[36]

Before proceeding to these case studies, though, two clarifications are in order. First, this Article is unconcerned with the various background norms and common law doctrines that may undermine particular cases. For example, the so-called Revenue Rule provides that courts need not enforce the tax laws of other sovereigns.[37] While the Revenue Rule interferes with some attempts at diagonal enforcement in practice,[38] it is not an impediment to diagonal

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prosecution for money laundering). U.S. states, too, have sued in foreign courts. *See, e.g.*, Geographic Res. Integrated Data Sols. Ltd. v. Peterson, 2015 CarswellOnt 12025 (Can. Ont. Sup. Ct. J.) (WL) (involving a patent suit filed by Oregon, along with a private corporation, on behalf of the patent holder in the courts of Ontario, Canada); Attorney Gen. of Or. v. Ericksen, 1988 CarswellBC 2602 (Can. B.C. Sup. Ct.) (WL) (involving a suit filed by the Attorney General of Oregon under Oregon law in the courts of British Columbia, Canada).

33. *The Sapphire*, 78 U.S. (11 Wall.) at 167. Indeed, even when diplomatic relations have been broken, U.S. courts have remained open to foreign states. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408-12 (1964), *superseded in other part by statute*, Foreign Assistance Act of 1964, Pub. L. No. 88-633, 78 Stat. 1009 (codified as amended in scattered sections of 22 U.S.C.). War between the two sovereigns, however, may be grounds to deny court access. *See id.* at 409-10.

34. The foregoing cases were not technically "enforcement" actions by my definition. *Cf. supra* note 21 and accompanying text.

35. *See* French Republic v. Saratoga Vichy Spring Co., 191 U.S. 427, 434-35 (1903); La Republique Francaise v. Schultz, 94 F. 500, 500 (C.C.S.D.N.Y. 1899). I have endeavored to find examples of the United States engaging in diagonal enforcement abroad. The best example I have found is that the U.S. Department of Justice filed a civil suit in West Germany under a West German law prohibiting restrictive trade practices—essentially an antitrust claim. *See* H.R. REP. NO. 97-476, at 11-12 (1982) (discussing the suit). The United States lost in the West German high court, but not because of its sovereign status. *See id.*

36. For a collection and examination of examples of foreign plaintiffs suing in U.S. courts, see Buxbaum, *supra* note 22, at 659-78.

37. *See Sabbatino*, 376 U.S. at 413-14.

38. *See, e.g.*, Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, 268 F.3d 103, 109-35 (2d Cir. 2001).

enforcement in theory.[39] Similarly, while courts may add prudential limits to domestic or international parens patriae standing, those limits are not fixed.[40]

Second, I have defined diagonal enforcement as one government enforcing a second government's laws in the second government's courts. In practice, this type of suit could take at least three forms: (a) a statute could expressly empower other governments to enforce domestic law;[41] (b) the enforcing government could qualify as an ordinary plaintiff—for instance, as a "person" granted a private right of action;[42] or (c) the enforcing government could sue in its representative capacity on behalf of its citizens or residents—for instance, under a parens patriae theory.[43] In each category, one government is enforcing another government's laws.[44]

39. First, diagonal enforcement suits need not seek tax-related damages. Second, Congress could abrogate the Revenue Rule. *See id.* at 128-29; *see also* City of Milwaukee v. Illinois, 451 U.S. 304, 316-17 (1981) (holding that an act of Congress may displace federal common law); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (implying that Congress has the power to violate international law); United States v. Yousef, 327 F.3d 56, 93 (2d Cir. 2003) ("If a statute makes plain Congress's intent . . . , then Article III courts, which can overrule Congressional enactments only when such enactments conflict with the Constitution, must enforce the intent of Congress irrespective of whether the statute conforms to customary international law." (citation omitted)).

40. Again, Congress has the last word. *See, e.g.*, Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332, 341 (1st Cir. 2000) (noting prudential considerations against recognizing parens patriae standing and inquiring whether Congress had resolved the issue by statute).

41. *See* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 708-09 (2011) (collecting statutes that directly authorize state enforcement of federal law); *see also infra* notes 52-56 and accompanying text (discussing the Racketeer Influenced and Corrupt Organizations Act (RICO)); *infra* notes 82-85 and accompanying text (discussing international antitrust law, which could be understood to approximate this modality).

42. *See, e.g.*, *infra* Part I.B.

43. *See generally* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600-08 (1982) (discussing the history and law of parens patriae); Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of* Parens Patriae, 74 TUL. L. REV. 1859, 1863-75 (2000) (same); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 492-98 (2012) (same).

44. The choice among these types may have consequences for claim scope, remedies, and other issues; where relevant, I comment on these topics throughout this Article.

A. Tobacco

In a way, the caption of the complaint reproduced in Figure 2 below says all you need to know.[45]

Figure 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE EUROPEAN COMMUNITY,
acting on its own behalf and on behalf of the
MEMBER STATES it has power to represent, and the
Kingdom of Belgium, Republic of Finland,
French Republic, Hellenic Republic,
Federal Republic of Germany, Italian Republic,
Grand Duchy of Luxembourg,
Kingdom of the Netherlands,
Portuguese Republic, and
Kingdom of Spain, individually,

Plaintiffs,

- against - COMPLAINT

RJR NABISCO, INC.,
R.J. REYNOLDS TOBACCO COMPANY,
R.J. REYNOLDS TOBACCO INTERNATIONAL, INC.,
RJR ACQUISITION CORP., f/k/a
NABISCO GROUP HOLDINGS CORP.,
RJR NABISCO HOLDINGS CORP.,
R.J. REYNOLDS TOBACCO HOLDINGS, INC.,

DEFENDANTS.

The *RJR Nabisco* litigation goes back to at least 2000.[46] On July 19 of that year, the European Commission approved "the principle of a civil action . . . [in the United States] against certain American tobacco companies."[47] The first such lawsuit was filed in November 2000 in the Eastern District of New

45. *See* Complaint, Eur. Cmty. v. RJR Nabisco, Inc., 814 F. Supp. 2d 189 (E.D.N.Y. 2011) (No. 1:02-cv-05771-NGG-VVP), 2002 WL 32153422.

46. Indeed, as early as 1998, European officials reached out to their U.S. counterparts for help with tobacco-related smuggling. *See* Raymond Bonner, *Europe Turning to U.S. to Fight Illicit Cigarettes*, N.Y. TIMES (May 8, 1998), https://perma.cc/7VA2-STXA.

47. *See* Case C-131/03 P, R.J. Reynolds Tobacco Holdings v. Comm'n, 2006 E.C.R. I-7823, I-7827.

York,[48] in large part relying on the federal Racketeer Influenced and Corrupt Organizations Act (RICO).[49] The European Community's allegations sound like the backstory for a James Bond film:

> Colombian and Russian drug traffickers smuggled narcotics into Europe and sold the drugs for euros that—through a series of transactions involving black-market money brokers, cigarette importers, and wholesalers—were used to pay for large shipments of RJR cigarettes into Europe. In other variations of this scheme, RJR allegedly dealt directly with drug traffickers and money launderers in South America and sold cigarettes to Iraq in violation of international sanctions.[50]

In this story, the Bond villains are part of a shadowy organization named (by the European Community's lawyers) the "RJR Money-Laundering Enterprise."[51]

Although the European Community has not fully explained why it sued in U.S. courts, a few potential reasons jump off the page. First, RICO is a particularly attractive vehicle to fight organized criminal activity because it comes with a lower standard of proof than the criminal standard of proof beyond a reasonable doubt[52] and offers the possibility of treble damages.[53] Second, when suing American defendants, personal jurisdiction and judgment

48. *See* Complaint, Eur. Cmty. v. RJR Nabisco, Inc., 150 F. Supp. 2d 456 (E.D.N.Y. 2001) (No. 1:00-cv-06617-NGG-VVP).

49. *See RJR Nabisco*, 150 F. Supp. 2d at 460; *see also* Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IX, 84 Stat. 922, 941-48 (codified as amended at 18 U.S.C. §§ 1961-1968 (2016)).

50. *See* RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2098 (2016) (summarizing the allegations in the plaintiffs' operative complaint). The plaintiffs further alleged:

> [I]t was virtually a monthly routine that employees of the RJR Defendants would travel from the [United States] to Colombia by way of Venezuela. These employees, traveling with authorized RJR distributors, would enter Colombia illegally, paying bribes to guards at the Colombian border so that they could enter the country without their passports being stamped. They would then travel by car to various locations such as Maicao where they would meet face to face with money launderers and narcotics traffickers. There the RJR employees would receive payments for cigarettes in the form of bulk cash that may be denominated in U.S. dollars or Venezuelan bolivars. They would also receive easily transferable instruments such as third-party checks, cashier's checks, and other such instruments. The employees of the RJR Defendants would then travel back to Venezuela, bribing border guards at the Venezuelan border to ensure that they could move the cash illegally across the border into Venezuela. Once the employees of the RJR Defendants reached a major Venezuelan city such as Maracaibo they would, by direct or indirect means, wire transfer the funds to bank accounts of the RJR Defendants in the United States, thereby completing the money-laundering cycle.

Second Amended Complaint ¶ 71, *RJR Nabisco*, 814 F. Supp. 2d 189 (No. 1:02-cv-05771-NGG-VVP), 2009 WL 4897429 (capitalization altered).

51. *See RJR Nabisco*, 136 S. Ct. at 2098.

52. *See, e.g.*, Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1302 (7th Cir. 1987) ("[P]roof by a preponderance of the evidence is sufficient to establish a civil violation of [18 U.S.C. § 1962]."); *id.* (collecting case law).

53. *See* 18 U.S.C. § 1964(c).

enforcement would be more easily obtained.[54] Third, U.S. courts are often understood to provide liberal discovery as compared to foreign counterparts.[55] And fourth, at the time of filing, there was no mechanism for a European-wide enforcement action in a European court.[56]

In any event, after at least two dismissals, two appeals, two amended complaints,[57] and a challenge in the Court of Justice of the European Union (CJEU),[58] the European Community's lawsuit was dealt a serious blow by the U.S. Supreme Court in 2016.[59] Importantly for present purposes, however, the Court's decision relied on a narrow interpretation of RICO's private damages provision.[60] The result applied to all plaintiffs suing under this statute. It did *not* suggest any limit on Congress's ability to provide for diagonal enforcement,

54. *See, e.g.*, Transcript of Oral Argument, *supra* note 4, at 29-30 (counsel for the European Community observing that "the fact that RJR has no subsidiary in Europe raised a question of personal jurisdiction that would have affected the enforceability of judgments").

55. *See, e.g.*, Smith Kline & French Labs. Ltd. v. Bloch [1983] 1 WLR 730 (CA) at 733 (Eng.) ("As a moth is drawn to the light, so is a litigant drawn to the United States."); GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 965-77 (5th ed. 2011) (contrasting U.S. and European discovery regimes). *But see* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 497-507 (2011) (disputing the conventional wisdom that the U.S. forum shopping system encourages transnational litigation in U.S. courts); *see also* Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT'L L. 31, 32-35 (2011) (same).

56. *See* Francq, *supra* note 1, at 75-76 ("Had the European Union decided in 2000 to go after Nabisco in the European Union, it would have been dependent on the willingness of national criminal and/or administrative authorities to bring such charges before Member State courts and it would have faced a series of practical difficulties. Coordination of the criminal proceedings launched in the various Member States was not yet officially organized. . . . There was no uniform standard as regards the admissibility of evidence . . . . The reach of the national proceedings would have been limited by the territorial jurisdiction of national authorities. . . . And the criminal penalties imposed by Member States . . . differed significantly.").

57. *See* Eur. Cmty. v. RJR Nabisco, Inc., No. 02-cv-05771 (NGG)(VVP), 2011 WL 843957, at *1-2 (E.D.N.Y. Mar. 8, 2011) (describing this series of events and granting in part the defendants' motion to dismiss the plaintiffs' second amended complaint), *vacated*, 764 F.3d 129 (2d Cir. 2014), *rev'd*, 136 S. Ct. 2090 (2016).

58. *See* Case C-131/03 P, R.J. Reynolds Tobacco Holdings v. Comm'n, 2006 E.C.R. I-7823.

59. *See* RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2111 (2016). The Court did not order the case dismissed. Instead, the opinion left open the possibility of equitable relief for domestic injuries under state law or RICO. *See id.* at 2111 n.13. Following the Court's decision, the plaintiffs sought and received leave to file a Third Amended Complaint, *see* Minute Entry, Eur. Cmty. v. RJR Nabisco, Inc., No. 1:02-cv-05771-NGG-PJ (E.D.N.Y. Aug. 24, 2016), but the parties ultimately reached a settlement, *see* Stipulation of Dismissal with Prejudice Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), Eur. Cmty. v. RJR Nabisco, Inc., No. 1:02-cv-05771-NGG-PJ (E.D.N.Y. Aug. 15, 2017).

60. *See RJR Nabisco*, 136 S. Ct. at 2106, 2111 ("A private RICO plaintiff therefore must allege and prove a *domestic* injury to its business or property." (emphasis added)).

on a foreign state's ability to bring a diagonal suit, or on a U.S. court's ability to adjudicate a diagonal claim. Indeed, despite Justice Alito's query at oral argument,[61] the majority opinion did not even mention the issue.[62]

I should note, too, that this suit is not the only example of foreign states suing Big Tobacco in U.S. courts. Hannah Buxbaum's larger study of foreign-government litigation identified tobacco suits filed by the governments of Belize, Bolivia, Canada, Ecuador, Guatemala, Honduras, the Marshall Islands, Nicaragua, Panama, Russia, Tajikistan, Ukraine, Venezuela, and multiple states of Brazil.[63] Admittedly, many of these cases faced roadblocks in various forms: the presumption against extraterritoriality,[64] the Revenue Rule,[65] standing,[66] and the inability to state a claim upon which relief can be granted.[67] But these are fairly standard hurdles for litigants in many cases—and none of these decisions rejected diagonal enforcement outright. The closest thing to a rejection in these cases was the holding that foreign states could not proceed under a parens patriae theory of standing,[68] but one court expressly acknowledged that such standing would be available with the imprimatur of

61. *See supra* text accompanying note 4.

62. Only the dissenters addressed the issue: "[A] foreign nation is generally entitled to prosecute any civil claim in the courts of the United States upon the same basis as a domestic corporation or individual might do." *See RJR Nabisco*, 136 S. Ct. at 2115 (Ginsburg, J., concurring in part and dissenting in part and from the judgment) (alteration in original) (quoting Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 318-19 (1978)).

63. *See* Buxbaum, *supra* note 22, at 679 n.111 (citing Republic of Honduras v. Philip Morris Cos., 341 F.3d 1253 (11th Cir. 2003); Republic of Venezuela v. Philip Morris Inc., 287 F.3d 192 (D.C. Cir. 2002); Serv. Emps. Int'l Union Health & Welfare Fund v. Philip Morris Inc., 249 F.3d 1068 (D.C. Cir. 2001); Attorney Gen. of Can. v. RJ Reynolds Tobacco Holdings, 103 F. Supp. 2d 134 (N.D.N.Y. 2000), *aff'd*, 268 F.3d 103 (2d Cir. 2001); Republic of Bolivia v. Philip Morris Cos., 39 F. Supp. 2d 1008 (S.D. Tex. 1999); Republic of Panama v. Am. Tobacco Co., C.A. Nos. 05C-07-181-RRC & 05C-07-180-RRC, 2006 WL 1933740 (Del. Super. Ct. June 23, 2006), *aff'd sub nom.* São Paulo v. Am. Tobacco Co., 919 A.2d 1116 (Del. 2007); Answer, Defenses & Jury Demand of Defendant R.J. Reynolds Tobacco Co. to Plaintiff's Complaint for Damages, Republic of Tajikistan v. Brooke Group Ltd., No. 01-607-Civ-Moore/O'Sullivan (S.D. Fla. Feb. 21, 2001), 2001 WL 34621727; and Complaint, Republic of the Marshall Islands v. Am. Tobacco Co., No. 1:97-cv-00846 (D. Haw. June 1997), 1997 WL 33633052.

64. *See, e.g.*, *RJR Nabisco*, 136 S. Ct. at 2106, 2111.

65. *See, e.g.*, Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, 268 F.3d 103, 126-29 (2d Cir. 2001); s*ee also supra* notes 37-39 and accompanying text.

66. *See, e.g.*, *Serv. Emps. Int'l*, 249 F.3d at 1073.

67. *See, e.g.*, *São Paulo*, 919 A.2d at 1123-26.

68. *See Serv. Emps. Int'l*, 249 F.3d at 1073; *São Paulo*, 919 A.2d at 1121-22. For more on parens patriae generally, see note 43 above.

the Supreme Court, Congress, or the executive branch.[69] And, again, parens patriae is but one form of diagonal public enforcement.[70]

B. Antitrust

Antitrust is a central site of "private enforcement" in U.S. law.[71] Since the nineteenth century,[72] "person[s]" harmed by antitrust violations have been authorized to sue under federal statutory provisions that, in other circumstances, would be enforced by the government.[73] To motivate private enforcers, the antitrust laws offer treble damages for private claims.[74]

In the 1970s, the governments of India, Iran, and the Philippines brought separate actions in federal courts alleging an antitrust conspiracy among manufacturers and distributors of broad-spectrum antibiotics.[75] Having purchased some of these antibiotics, the foreign governments claimed treble damages as "persons" injured by the alleged conspiracy.[76]

69. *See Serv. Emps. Int'l*, 249 F.3d at 1073 (rejecting foreign-state parens patriae standing "unless there is a clear indication by the Supreme Court or one of the two coordinate branches of government"). I find the reference to the executive unclear (if not troubling), but this is not the place to further assess it.

70. *See supra* text accompanying notes 41-43.

71. *See* Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 675 (2010) ("The United States is unique in the world insofar as private enforcement of the antitrust laws vastly outstrips public enforcement."); *see also* Clopton, *supra* note 12, at 296 (collecting sources on private enforcement of antitrust laws).

72. *See* Sherman Act of 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-38 (2016)).

73. *See* 15 U.S.C. § 15; *see also id.* § 15a (providing for suits by the United States).

74. *See, e.g., id.* § 15(a); *see also* Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) ("Congress created the treble-damages remedy [in the Sherman Act] precisely for the purpose of encouraging *private* challenges to antitrust violations.").

75. *See* Pfizer Inc. v. Gov't of India, 434 U.S. 308, 309-10 (1978). As noted above, foreign sovereigns have brought nonstatutory cases in U.S. courts on antitrust-like theories for more than a century. *See supra* note 35 and accompanying text.

76. *See Pfizer*, 434 U.S. at 310-12 (relying on 15 U.S.C. § 15). Interestingly, a fourth diagonal enforcement action brought by the Republic of Vietnam (also known as South Vietnam) was rejected by the Eighth Circuit. *See* Republic of Vietnam v. Pfizer, Inc., 556 F.2d 892, 895 (8th Cir. 1977). Although the Republic of Vietnam existed at the time the suit was filed, one year later its government surrendered to the military forces of the Democratic Republic of Vietnam (also known as North Vietnam), resulting in a new consolidated state called the Socialist Republic of Vietnam. *See id.* at 893. The Eighth Circuit wrote: "Thus, the Republic of Vietnam, the plaintiff, is not simply moribund; it is defunct. The United States has not recognized the Socialist Republic of Vietnam and presently recognizes no government as the sovereign authority in the territory known formerly as South Vietnam." *Id.* at 893-94; *cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408-12 (1964) (discussing potential bases for denying court access to a foreign sovereign), *superseded in other part by statute*, Foreign Assistance Act of 1964, Pub. L. No. 88-633, 78 Stat. 1009 (codified as amended in scattered sections of 22 U.S.C.).

The U.S. Supreme Court blessed these diagonal actions in *Pfizer Inc. v. Government of India*.[77] The Court first affirmed that the antitrust laws were not limited to domestic purchasers and then concluded that the plaintiffs' sovereign status was not an obstacle to recovery.[78] The Court placed special emphasis on international comity, but unlike in more recent decisions,[79] comity was a reason to open rather than to close courthouse doors to transnational cases.[80] The Court explained:

> This Court has long recognized the rule that a foreign nation is generally entitled to prosecute any civil claim in the courts of the United States upon the same basis as a domestic corporation or individual might do. "To deny him this privilege would manifest a want of comity and friendly feeling." To allow a foreign sovereign to sue in our courts for treble damages to the same extent as any other person injured by an antitrust violation is thus no more than a specific application of a long-settled general rule.[81]

Pfizer was not the last word on international diagonal enforcement for antitrust. Following that case, Congress reconsidered the scope of federal antitrust law.[82] The most prominent response was the Foreign Trade Antitrust Improvements Act of 1982, which provided that foreign anticompetitive conduct was only actionable if it had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce or exports.[83] In the same year, Congress also addressed diagonal enforcement in an act "[t]o amend the Clayton Act to modify the amount of damages payable to foreign states and instrumentalities of foreign states which sue for violations of the antitrust laws."[84] This statute limited foreign states' potential recovery to actual damages, taking away the

77. *See* 434 U.S. at 320.

78. *See id.* at 313-18.

79. *Cf.* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664, 1668-69 (2013) (applying the presumption against extraterritoriality in part to avoid "international discord" (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991), *superseded in other part by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 29 and 42 U.S.C))).

80. *See Pfizer*, 434 U.S. at 318-19.

81. *Id.* (citations omitted) (quoting The Sapphire, 78 U.S. (11 Wall.) 164, 167 (1870)).

82. *See* Jean M. Parpal & Emory M. Sneeden, *Standing of Foreign Governments to Bring Antitrust Suits: Congress Responds to* Pfizer v. India, 19 HARV. J. ON LEGIS. 253, 264-74 (1982).

83. Pub. L. No. 97-290, tit. IV, § 402, 96 Stat. 1233, 1246 (codified at 15 U.S.C. § 6a (2016)); *see* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 161-62 (2004).

84. Act of Dec. 29, 1982, Pub. L. No. 97-393, 96 Stat. 1964 (codified as amended at 15 U.S.C. § 15(b)); *see also* Clayton Antitrust Act of 1914, Pub. L. No. 63-212, 38 Stat. 730 (codified as amended in scattered sections of 15 and 29 U.S.C.).

private treble-damages remedy and putting them on par with the U.S. government.[85]

In any event, this latter statute showed that Congress was aware of international diagonal enforcement and seemingly endorsed it in at least some circumstances.[86] Indeed, Congress considered but rejected a proposal to bar all suits by foreign governments.[87] Foreign sovereigns continue to bring claims under U.S. antitrust laws in U.S. courts,[88] though these suits are presumably less attractive to foreign states under the new remedial scheme.

C. Other Cases of Interest

In addition to tobacco and antitrust suits, foreign sovereigns have brought diagonal actions in a range of other contexts.[89]

RICO has been a focal point for international diagonal enforcement. A number of the tobacco cases discussed above involved RICO claims.[90] For another example, the post-Saddam Hussein government of Iraq brought RICO claims against entities that allegedly conspired to frustrate the United Nations's Oil-for-Food Programme.[91]

Moving beyond RICO, a Northern Ireland governmental agency brought a securities suit seeking treble damages against affiliated accounting firms in

85. *Compare* 15 U.S.C. § 15(b) (single damages for foreign states), *with id.* § 15(a) (treble damages for other persons). In the words of Senator Strom Thurmond in support of this change: "It appears to me that it is only fair and that commonsense would lead us to treat a foreign sovereign nation no better or no worse than we treat our own country in U.S. courts." 124 CONG. REC. 36 (1978) (statement of Sen. Thurmond).

Interestingly, Congress also considered adding a reciprocity requirement for foreign-state antitrust enforcement, which would have provided that foreign states' ability to sue under U.S. antitrust laws was contingent on their enactment of similar laws or their willingness to allow the federal government or U.S. citizens to access those foreign states' courts in similar circumstances. *See* Parpal & Sneeden, *supra* note 82, at 264-74. Current law contains no such requirement.

86. *See* Parpal & Sneeden, *supra* note 82, at 264-74.

87. *Compare* H.R. 11,942, 95th Cong. § 3 (1978) (presenting an amendment that would have prevented any foreign government or governmental agency from suing under the antitrust laws), *with* 15 U.S.C. § 15(b) (authorizing foreign-state suits).

88. *See, e.g.*, *In re* Tobacco/Governmental Health Care Costs Litig., 83 F. Supp. 2d 125, 127 (D.D.C. 1999), *aff'd in part, rev'd in part sub nom.* Serv. Emps. Int'l Union Health & Welfare Fund v. Philip Morris Inc., 249 F.3d 1068 (D.C. Cir. 2001).

89. *See* Buxbaum, *supra* note 22, at 665-78 (collecting cases).

90. *See id.* at 679-85 (citing Eur. Cmty. v. RJR Nabisco, Inc., 764 F.3d 129 (2d Cir. 2014), *rev'd*, 136 S. Ct. 2090 (2016); Republic of Honduras v. Philip Morris Cos., 341 F.3d 1253 (11th Cir. 2003); *Serv. Emps. Int'l*, 249 F.3d 1068; and Attorney Gen. of Can. v. RJ Reynolds Tobacco Holdings, 103 F. Supp. 2d 134 (N.D.N.Y. 2000), *aff'd*, 268 F.3d 103 (2d Cir. 2001)).

91. *See* Republic of Iraq v. ABB AG, 920 F. Supp. 2d 517, 529-30, 542-43 (S.D.N.Y. 2013), *aff'd*, 768 F.3d 145 (2d Cir. 2014).

federal court in New York.[92] The federal government of Mexico filed a civil rights suit parens patriae on behalf of Mexican nationals working on Maine egg farms, relying in part on the federal Migrant and Seasonal Agricultural Worker Protection Act.[93]

International diagonal enforcement has also turned to the states. For example, in the 1980s, the Canadian province of Ontario sued the city of Detroit in Michigan state court for failure to comply with Michigan law when issuing a permit for a solid-waste combustion facility.[94] Panama and the Brazilian state of São Paulo sued tobacco companies in Delaware state court under the state law of Delaware (as well as Brazilian law).[95]

To sum up, foreign sovereigns have practiced diagonal enforcement in U.S. courts. Again, these suits face the usual doctrinal hurdles,[96] but no court decision has created insurmountable obstacles to creating diagonal enforcement regimes or adjudicating diagonal suits.

Finally, I should a say a word about diagonal enforcement of international law.[97] Such cases would involve an international "sovereign" authorizing domestic executives to enforce international laws. The lack of an international sovereign means that pure examples will be hard to come by, but I want to raise potential analogies to the enforcement of international norms. Kenneth Abbott, Duncan Snidal, and others have theorized the ways international organizations use intermediaries (including states) when they lack the capacity to directly address targets.[98] And international treaties may include affirmative

92. *See* Dep't of Econ. Dev. v. Arthur Andersen & Co., 683 F. Supp. 1463, 1468 (S.D.N.Y. 1988).

93. *See* Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332, 334-35 (1st Cir. 2000); *see also* Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470, 96 Stat. 2583 (1983) (codified as amended at 29 U.S.C. §§ 1801-1872 (2016)). For the private right of action, see 29 U.S.C. § 1854. The *DeCoster* court concluded that Mexico could not pursue this particular claim under a parens patriae theory, but it did not rule out diagonal enforcement in general. *See* 229 F.3d at 335-37, 341-43.

94. *See* The Queen *ex rel.* Ontario v. City of Detroit, 874 F.2d 332, 333-35 (6th Cir. 1989). Detroit had removed the case to federal court, but the Sixth Circuit ultimately ordered that it be remanded to state court. *See id.* at 333-34, 344 (finding no federal question jurisdiction). Had this suit been filed *against* Ontario, it would have been removable based on the Foreign Sovereign Immunities Act (FSIA). *See* 28 U.S.C. §§ 1441(d), 1603(a) (2016); *see also* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

95. *See* São Paulo v. Am. Tobacco Co., 919 A.2d 1116, 1118-19 (Del. 2007). The Delaware Supreme Court held that the foreign-government plaintiffs lacked parens patriae standing to sue on behalf of their citizens and that even if they had standing they failed to state a claim upon which relief could be granted. *See id.* at 1121-26.

96. *See supra* text accompanying notes 64-67.

97. Analogous cases of state-federal diagonal enforcement are discussed in Part II.B below.

98. For extensive elaboration of these models, see INTERNATIONAL ORGANIZATIONS AS ORCHESTRATORS (Kenneth W. Abbott et al. eds., 2015) (collecting essays on the theme of

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obligations for states to enforce international law.[99] This burgeoning modality of international law enforcement merits further inquiry, but as readers may have surmised, it differs fundamentally from the balance of the cases this Article addresses.

II. Domestic Cases

The division of sovereignty within the United States permits domestic diagonal enforcement as well.[100] This Part reviews two types of domestic cases: (a) states (and subdivisions) enforcing sister-state law and (b) states (and subdivisions) enforcing federal law.[101]

A. States Enforcing Sister-State Law

The U.S. federal system creates opportunities for diagonal enforcement among U.S. states. As Woolhandler and Collins have ably documented, states historically were barred from suing outside their own courts,[102] with limited exceptions such as original jurisdiction cases in the U.S. Supreme Court.[103]

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international organizations as orchestrators—rather than direct enforcers—of international norms). *See generally* Kenneth W. Abbott et al., *Theorizing Regulatory Intermediaries: The RIT Model*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2017, at 14 (articulating a model of regulatory intermediation in international relations).

99. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, arts. I, V-VI, *adopted* Dec. 9, 1948, S. TREATY DOC. NO. 81-15, 78 U.N.T.S. 277 (committing treaty parties to undertake domestic punishment of genocide). Complementarity rules in international criminal law may incentivize similar behavior. *See* Rome Statute of the International Criminal Court, pmbl. & arts. 1, 17, 19, July 17, 1998, 2187 U.N.T.S. 90.

100. The primary executive actors in these cases are state attorneys general. *See generally* Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2124-27 (2015) (discussing the history and functions of state attorneys general); William P. Marshall, *Break Up the Presidency?: Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2449-55 (2006) (same).

101. As above, this survey is illustrative, not comprehensive, and it is unconcerned with doctrinal limits arising in individual cases. *See supra* notes 37-40 and accompanying text.

102. *See* Woolhandler & Collins, *supra* note 22, at 397-99.

103. *See id.* at 488-90. Although some readers might imagine original jurisdiction cases as exclusively between states, *cf., e.g.*, Kansas v. Nebraska, 135 S. Ct. 1042, 1051 (2015), Article III of the Constitution and federal statutes also provide for original jurisdiction where a state sues private citizens of another state (or a foreign country), *see* U.S. CONST. art. III, § 2, cls. 1-2; 28 U.S.C. § 1251(b)(3) (2016). *See generally* James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 555-62 (1994) (discussing original jurisdiction in suits brought by states against private citizens of other states). The Supreme Court, however, often exercises its

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Around the turn of the twentieth century, old limits fell away, and states began litigating cases in federal and sister-state courts.[104] In *Nevada v. Hall*, the U.S. Supreme Court held that a state may be sued in the courts of a second state under the second state's law.[105] While the viability of this decision is in doubt,[106] diagonal enforcement avoids its potential pitfalls: In diagonal

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discretion to decline jurisdiction in these cases, particularly when they present state law claims. *See, e.g.*, Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 498-99 (1971).

104. *See* Woolhandler & Collins, *supra* note 22, at 446-64 (collecting cases upholding state standing to sue in federal courts). Based on these developments, states have litigated in sister-state courts under common law claims. *See, e.g.*, Hoffman v. Connecticut, No. 09-CV-79-B-H, 2009 WL 3055137, at *1, *22 (D. Me. Aug. 7, 2009) (involving a suit by Connecticut filed in Maine state court, which was then removed to federal court, to set aside a Maine real estate conveyance), *adopted as modified*, 671 F. Supp. 2d 166 (D. Me. 2009); *see also* Buckley v. Huston, 291 A.2d 129, 130-32 (N.J. 1972) (collecting examples of interstate litigation in New Jersey and other courts); First Amended Consolidated Complaint for Violations of New York State Law at 56-59, King County v. IKB Deutsche Industriebank AG, 916 F. Supp. 2d 442 (S.D.N.Y. 2013) (No. 1:09-cv-08387-SAS), 2010 WL 10096782 (involving a Washington state subdivision alleging common law fraud under New York law). In an interstate constitutional law case before the U.S. Supreme Court, Louisiana used oral argument to "invite[]" the plaintiff states to join an ongoing private proceeding against it in Louisiana state court—even though there was no procedural mechanism under Louisiana law to accomplish this goal. *See* Maryland v. Louisiana, 451 U.S. 725, 741 & n.17 (1981); Transcript of Oral Argument at 55-58, *Maryland*, 451 U.S. 725 (No. 83 Original).

In two cases that garnered Supreme Court attention, state actors sought to take advantage of sister-state administrative proceedings. *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 338 (1977) ("[T]he Washington State Apple Advertising Commission petitioned the North Carolina Board of Agriculture to amend its regulation to permit the display of state grades. An administrative hearing was held on the question but no relief was granted."), *superseded in other part by statute*, Worker Adjustment and Retraining Notification Act, Pub. L. No. 100-379, 102 Stat. 890 (1988) (codified as amended at 29 U.S.C. §§ 2101-2109 (2016)), *as recognized in* United Food & Commercial Workers Union Local 751 v. Brown Grp., 517 U.S. 544 (1996); Pub. Serv. Co. of N.M. v. N.M. Envtl. Improvement Bd., 549 P.2d 638, 640 (N.M. Ct. App. 1976) (reviewing a challenge by an Arizona municipality against the New Mexico Environmental Improvement Board in New Mexico state court); *see also* Arizona v. New Mexico, 425 U.S. 794, 798 (1976) (Stevens, J., concurring) (alluding to *Public Service Co. of New Mexico*).

Finally, states and subdivisions also may select sister-state courts and laws by contract. *See, e.g.*, City of Raton v. Ark. River Power Auth., 611 F. Supp. 2d 1190, 1204 (D.N.M. 2008) (noting that an agreement between a New Mexico city and a Colorado political subdivision contained a choice-of-law clause selecting Colorado law); Lumbermens Mut. Cas. Co. v. Pennsylvania, 859 N.Y.S. 2d 146, 147 (App. Div. 2008) (per curiam) (noting that the Pennsylvania Department of Transportation had agreed to New York law and New York courts in an insurance contract).

105. *See* 440 U.S. 410, 424-27 (1979).

106. *See* Franchise Tax Bd. of Cal. v. Hyatt, 136 S. Ct. 1277, 1279 (2016) (noting that the eight-Justice Court was equally divided on whether to overrule *Hall*).

enforcement, the litigating state is a plaintiff voluntarily entering the second state's courts and voluntarily relying on the second state's law.

State-state diagonal enforcement is most likely to arise when federal law does not provide a remedy and the enforcing state's law either does not apply or cannot reach the relevant conduct. Environmental law and antitrust illustrate this general model.

First, a series of Supreme Court decisions implied an important role for diagonal enforcement in environmental cases.[107] In 1972, the Court held that Illinois's claims against the city of Milwaukee for the pollution of interstate waters were governed by federal common law.[108] Soon thereafter, Congress adopted comprehensive amendments to the Clean Water Act.[109] In a second case between Illinois and Milwaukee, the Court held that the updated Clean Water Act had preempted federal common law related to interstate water pollution.[110] That decision, however, did not hold that *state* common law was preempted,[111] and in *International Paper Co. v. Ouellette*, the Court confirmed that the Clean Water Act left some state law in place.[112]

An important wrinkle of *Ouellette* was that the state law claims were valid only under the law of the state that had been the source of the pollution.[113] So in *Ouellette*, Vermont landowners complaining of pollution by New York paper mills could bring common law nuisance suits—but only under New York law.[114] Some courts have extended *Ouellette* to the Clean Air Act,[115] allowing air pollution suits under source-state law only.[116]

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107. I treat public nuisance cases as enforcement litigation. Indeed, nuisance suits were early examples of interstate litigation. *See* Woolhandler & Collins, *supra* note 22, at 432-33, 446-47.

108. *See* Illinois v. City of Milwaukee, 406 U.S. 91, 103 (1972).

109. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1388 (2016)); *see also* Clean Water Act, Pub. L. No. 80-845, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251-1388).

110. *See* City of Milwaukee v. Illinois, 451 U.S. 304, 317-19, 332 (1981).

111. *See id.* at 316-17, 317 n.9. The Court explained that the standard for finding preemption of state common law was higher than that for finding preemption of federal common law. *See id.* at 316.

112. *See* 479 U.S. 481, 497-99 (1987).

113. *Id.* The Court found this approach consistent with the Clean Water Act and principles of interstate federalism. *See id.* at 498-99.

114. *See id.* The Court declined to hold that the suit must proceed in the courts of the source state, though it offered no reason that it could not. *See id.* at 499-500.

115. *See* Pub. L. No. 84-159, 69 Stat. 322 (1955) (codified as amended at 42 U.S.C. §§ 7401-7671q).

116. *See, e.g.*, Merrick v. Diageo Ams. Supply, Inc., 805 F.3d 685, 690-94 (6th Cir. 2015) (holding that the Clean Air Act does not preempt source-state common law); Bell v. Cheswick Generating Station, 734 F.3d 188, 196-97 (3d Cir. 2013) ("Given that we find no meaningful difference between the Clean Water Act and the Clean Air Act for the

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Although *Ouellette* was a private suit, it created the conditions for diagonal enforcement under source-state law. Based on the alleged discharge of chloride into Dunkard Creek in West Virginia, a Pennsylvania state agency sued the alleged polluters under West Virginia nuisance law in West Virginia state court.[117] An Oklahoma city sued Arkansas poultry businesses for polluting municipal drinking water under Arkansas nuisance law.[118] New York sued owners and operators of coal-fired power plants in Pennsylvania based on Pennsylvania law.[119] And, in an opinion hostile to state enforcement generally, the Fourth Circuit suggested that North Carolina could have a viable air quality nuisance claim under Alabama and Tennessee law, reflecting the location of the pollution sources.[120]

Perhaps the most interesting potential use of state diagonal enforcement arises in the area of climate change.[121] In 2004, California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, along with New York City, filed a lawsuit in the Southern District of New York against what they claimed were the five largest emitters of carbon dioxide in the United States.[122] The central claims for relief relied on federal common law

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purposes of our preemption analysis, we conclude that the Supreme Court's decision in *Ouellette* controls this case, and thus, the Clean Air Act does not preempt state common law claims based on the law of the state where the source of the pollution is located."); Freeman v. Grain Processing Corp., 848 N.W.2d 58, 85 (Iowa 2014) (holding that the Clean Air Act does not preempt source-state common law).

117. *See* Pa. Fish & Boat Comm'n v. Consol Energy, Inc., 758 S.E.2d 762, 763-64 (W. Va. 2014) (per curiam). The plaintiff originally sued in West Virginia state court. *See* Pa. Fish & Boat Comm'n v. Consol Energy, Inc., No. 1:11CV161, 2012 WL 3834878, at *1 (N.D. W. Va. Sept. 4, 2012). The defendants removed to federal district court on a complete preemption theory, but the court remanded to state court after finding that the Clean Water Act had not completely preempted the West Virginia common law claims. *See id.*

118. *See* City of Tulsa v. Tyson Foods, Inc., 258 F. Supp. 2d 1263, 1270 (N.D. Okla. 2003), *vacated pursuant to settlement*, No. 4:01-cv-00900-CVE-PJC (N.D. Okla. July 16, 2003).

119. *See* United States v. EME Homer City Generation L.P., 823 F. Supp. 2d 274, 294-97 (W.D. Pa. 2011), *aff'd*, 727 F.3d 274 (3d Cir. 2013).

120. *Compare* North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 301-09 (4th Cir. 2010) (rejecting claims under federal and North Carolina law), *with id.* at 306 (recognizing that "the law of the states where emissions sources are located . . . applies in an interstate nuisance dispute").

121. The model described here might also work for private plaintiffs stymied in federal climate change litigation: They could, perhaps, sue in a friendly state court under another state's common law.

122. *See* Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 267-68 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011). The plaintiffs alleged that the defendants' 650 million tons of emissions "constitute 25 percent of emissions from the domestic electric power sector, 10 percent of emissions from all domestic human activities, and 2.5 percent of all anthropogenic emissions worldwide." Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 418 (2011) (citations omitted).

and, in *American Electric Power Co. v. Connecticut*, the Supreme Court concluded that these claims were displaced by the Clean Air Act and the U.S. Environmental Protection Agency actions it authorizes.[123]

But the states' original complaint also included state law claims under the laws of the source states: Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, New Mexico, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin.[124] Citing *Ouellette*, the Supreme Court declined to dismiss nuisance claims based on source-state common law.[125] On remand, the plaintiff states voluntarily dismissed the suit,[126] but state diagonal enforcement seemed viable. Similarly, the Ninth Circuit dismissed federal claims brought by an Alaskan village against ExxonMobil for greenhouse gas emissions but expressly left open the possibility of state law nuisance claims on the same facts.[127]

A second area amenable to domestic diagonal enforcement is antitrust. Antitrust is governed by overlapping federal and state law.[128] For example, under the famed decision in *Illinois Brick Co. v. Illinois*, federal antitrust laws do not provide remedies for indirect purchasers—downstream buyers harmed by upstream anticompetitive behavior.[129] While *Illinois Brick* rejected federal indirect purchaser suits, it left open the door for state law to provide remedies for indirect purchasers,[130] and some states have done so.[131] Notably, some of those state indirect purchaser laws provide remedies for noncitizens as long as the laws reach the liability-creating conduct.[132]

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123. *See Am. Elec. Power*, 564 U.S. at 415.

124. *See* Complaint at 45-49, *Am. Elec. Power*, 406 F. Supp. 2d 265 (No. 1:04-cv-05669-LAP), 2004 WL 5614397. Wisconsin was the only source-state plaintiff.

125. *Am. Elec. Power*, 564 U.S. at 429.

126. *See* Notice of Dismissal, Connecticut v. Am. Elec. Power Co., No. 1:04-cv-05669-LAP (S.D.N.Y. Dec. 6, 2011).

127. *See* Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 854-55, 858 (9th Cir. 2012) (finding no subject matter jurisdiction for state law claims).

128. *See, e.g.*, Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 376 (1983) (noting "an immense overlap between federal and state antitrust authority").

129. *See* 431 U.S. 720, 746-47 (1977).

130. *See* California v. ARC Am. Corp., 490 U.S. 93, 103-06 (1989) (finding that federal antitrust laws did not preempt state laws).

131. *See generally* Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 ALA. L. REV. 447 (2010) (discussing state options for protecting indirect purchasers in light of *Illinois Brick*).

132. *See, e.g.*, AT&T Mobility LLC v. AU Optronics Corp., 707 F.3d 1106, 1112-13 (9th Cir. 2013) (explaining that California's indirect purchaser remedy applies when anticompetitive conduct takes place within California, not just when the downstream place of injury is California).

Attorneys general in states that have developed indirect purchaser laws in the wake of *Illinois Brick* would not have claims on behalf of indirect purchasers under home-state or federal law. But if the anticompetitive conduct were regulated by a state that provided indirect purchaser remedies, then those attorneys general might be able to sue under the second state's laws. For example, a group of state attorneys general sued semiconductor manufacturers under California's indirect purchaser statute.[133] A federal court construed state law to bar the claims but said nothing to suggest that diagonal enforcement could not have been authorized in this area.[134] Again, domestic diagonal enforcement remains a viable regulatory choice.

B. States Enforcing Federal Law

States also enforce the law of the federal sovereign. State-federal cases are both the best and worst examples of diagonal enforcement. On the one hand, U.S. states routinely enforce federal law, including as expressly authorized law enforcers on par with the federal executive. On the other hand, states as sovereigns are not completely independent from the federal government, and it is somewhat less remarkable when a higher authority delegates enforcement responsibility down to inferior levels. Given this limitation, this Subpart only briefly describes three models of states enforcing federal law: direct authorization, parens patriae suits, and private rights of action.

First, some federal statutes directly authorize states to enforce federal law.[135] For example, many federal consumer protection standards may be enforced by state attorneys general.[136] Similarly, many statutes that provide for "citizen suits"—provisions that essentially allow private parties to stand in the shoes of the federal executive—also expressly authorize states to bring

133. *See* California v. Infineon Techs. AG, 531 F. Supp. 2d 1124, 1135-40 (N.D. Cal. 2007) (involving claims by Alaska, Delaware, Hawaii, Kentucky, Louisiana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, and Virginia, as well as the Northern Mariana Islands), *clarified*, No. C 06-4333 PJH, 2007 WL 3034372 (N.D. Cal. Oct. 16, 2007).

134. *See id.* California antitrust law was also the basis for a diagonal action, though not an *Illinois Brick* case, by a Washington state public utility district against energy producers. *See* Pub. Util. Dist. No. 1 of Snohomish Cty. v. Dynegy Power Mktg., Inc., 384 F.3d 756, 758 (9th Cir. 2004) (dismissing the claims as preempted but raising no issue with the diagonal posture).

135. *See* Lemos, *supra* note 41, at 708-09 (collecting statutes).

136. *See id.* ("[S]tate attorneys general may sue to bring about compliance with federal standards regarding flammable fabrics, hazardous substances, packaging of household substances, and consumer products.").

enforcement actions.[137] Some of these statutes also permit enforcement by state subdivisions[138] or federally recognized tribes.[139]

Second, states may bring parens patriae suits on behalf of their citizens to enforce federal laws.[140] Some federal statutes expressly authorize these representational actions, and some of those statutes permit states to recover the exact damages that would have been available in a suit brought by private citizens.[141] States may also rely on state law authorizations to represent their citizens in federal cases.[142]

Third, states and their subdivisions may bring federal law actions to vindicate their own interests. In *Georgia v. Evans*, the Supreme Court held that Georgia could sue asphalt distributors under the Sherman Act for treble damages based on the state's injuries as an asphalt purchaser.[143] Last Term, the Court held that the city of Miami is an "aggrieved person" under the Fair Housing Act.[144] The Court's decision permitted Miami to proceed, on remand, with its Fair Housing Act claim[145]—an "ambitious fair housing lawsuit" alleging "a decade-long pattern of discriminatory lending in the residential housing market that caused the City economic harm."[146]

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137. *See id.* at 710 (collecting statutes). *See generally* Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 192-216 (discussing environmental citizen suits across a range of statutes).

138. *See, e.g.*, City of Jacksonville v. Dep't of the Navy, 348 F.3d 1307, 1309 (11th Cir. 2003) (involving a city suit under the Clean Air Act); City of Waukesha v. Viacom Int'l Inc., 362 F. Supp. 2d 1025, 1029 (E.D. Wis. 2005) (involving a city suit under the Resource Conservation and Recovery Act); *see also* Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended in scattered sections of 42 U.S.C.).

139. *See, e.g.*, 33 U.S.C. §§ 1362(4)-(5), 1365(a), (g) (2016).

140. *See supra* note 43 (collecting sources on parens patriae). I use parens patriae broadly to include any representational suit, not only those under common law authorities.

141. *See, e.g.*, Pennsylvania v. Porter, 659 F.2d 306, 318 (3d Cir. 1981) (en banc) (per curiam) (holding that a state may bring an action under 42 U.S.C. § 1983 as parens patriae); *see also* Lemos, *supra* note 43, at 495-96 & 496 nn.39-40 (collecting examples).

142. *See, e.g.*, New York *ex rel.* Abrams v. 11 Cornwell Co., 695 F.2d 34, 38-40 (2d Cir. 1982), *vacated in part*, 718 F.2d 22 (2d Cir. 1983) (en banc). For a comparison of the procedural requirements in public and private aggregate representation, see Lemos, *supra* note 43, at 499-511.

143. *See* 316 U.S. 159, 160, 162-63 (1942).

144. Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1301 (2017); *see* 42 U.S.C. § 3613(a)(1)(A) (providing a right of action to any "aggrieved person"); *see also* Fair Housing Act, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73, 81-89 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619, 3631 (2016)).

145. *See Bank of Am.*, 137 S. Ct. at 1306.

146. City of Miami v. Bank of Am. Corp., 800 F.3d 1262, 1266 (11th Cir. 2015), *vacated*, 137 S. Ct. 1296 (2017). Los Angeles and Baltimore filed similar suits following the foreclosure

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Though not exceedingly common, these cases are examples of one government enforcing a second government's laws in the second government's courts. More generally, this Part has demonstrated that diagonal enforcement exists at multiple levels, and there is capacity for more.

III. Institutional Analysis

The previous Parts contextualized the unusual but real phenomenon of diagonal enforcement. Moving from what to why, this Part asks why a legislature would authorize diagonal enforcement, and why an executive would take advantage of it.[147]

In one sense, these questions are perennial. "Newton's First Law applies to politics as well as physics: What requires explanation is change, not the continuation of the status quo."[148] Moreover, as suggested in the Introduction, there are some ineffable obstacles to diagonal enforcement. Diagonal enforcement seems like a category error: Why would a legislature allow a foreign government to take care that its laws be faithfully executed?[149] Why, as Justice Alito asked, would executives not sue in their own courts?[150] Policymakers authorizing or executing diagonal enforcement must also overcome deeply rooted notions of sovereignty and territoriality that seemingly militate against diagonal enforcement, regardless whether those intuitions are justified.[151]

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crisis. *See* City of Los Angeles v. Wells Fargo & Co., 22 F. Supp. 3d 1047, 1051 (C.D. Cal. 2014); Mayor of Balt. v. Wells Fargo Bank, N.A., 677 F. Supp. 2d 847, 848 (D. Md. 2010).

147. Although I use the labels "legislature" and "executive," those are simplifications. More properly, I am addressing the public actors that create causes of action and the public actors that bring civil lawsuits.

148. Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2084-85 (2013).

149. *Cf.* U.S. CONST. art. II, § 3 ("[The President] shall take care that the laws be faithfully executed . . . .").

150. *See supra* text accompanying note 4. Justice Alito is not alone. After the Supreme Court authorized foreign governments to sue under U.S. antitrust laws, Representative Andrew Ireland asked a similar question at a congressional hearing: "Can other countries enforce their own antitrust laws to control the conduct of U.S. firms who do business in those countries where the effects of the contact are felt there? . . . Why isn't that approach adequate to protect the foreign government?" *Clayton Act Amendments of 1978: Hearing and Markup Before the Subcomm. on Int'l Econ. Policy & Trade of the H. Comm. on Int'l Relations*, 95th Cong. 9 (1978) [hereinafter *Clayton Act Amendments*] (statement of Rep. Ireland during testimony of Lee R. Marks, Deputy Legal Adviser, Department of State).

151. As Gerken and Holtzblatt note in the context of horizontal federalism, arguments in favor of "living under someone else's law" run into a deep objection: "[L]awyers hate spillovers. And no wonder. There is something disquieting about one state's citizenry regulating another's. Spillovers don't just generate conflict but unsettle deeply held

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This Part seeks to demystify diagonal enforcement by looking to the rational pursuit of legislative and executive interests.[152] This rational choice account cannot explain everything, but it is a useful starting point for understanding diagonal enforcement, and it gives us a foothold for the normative analysis in Part IV below. This demystifying also can help future executives, legislatures, and courts called upon to evaluate diagonal enforcement to overcome any reflexive aversion to it.

A. Legislatures

The first step in diagonal enforcement is creating a diagonal cause of action. Again, the question here is not why a legislature would open its courts to foreign states generally, but rather why it would tap foreign states as enforcers of its domestic regulatory policy. This Subpart suggests that legislative authorization for diagonal enforcement may be consistent with legislative preferences for increased deterrence and enforcement or broader policy influence, or with ancillary interests such as foreign relations.

Before exploring these reasons in more detail, I should note that some legislative authorizations of diagonal enforcement might be inadvertent.[153] For example, when the Supreme Court considered diagonal enforcement in antitrust law, the Court observed that "the legislative history of the Sherman Act did not indicate that Congress ever considered whether a State would be entitled to sue."[154] At a minimum, though, even an inadvertent authorization

normative commitments to sovereignty, territoriality, and self-rule." *See* Gerken & Holtzblatt, *supra* note 14, at 66. Even assuming that public officials are rational actors, a rational pursuit of their own interests may lead them to act in accordance with the irrationalities of their constituents.

152. This focus on institutional interests is consistent with rational choice theory approaches in international relations. *See, e.g.*, Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 762 (2001) (applying rational choice theory to states designing international institutions). For further consideration of the range of governmental interests, see Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 917 (2005) (noting the common assumption that the pursuit of power or wealth drives government behavior). *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, 1008-10 (2015) (characterizing the provision of transnational legal options as a "market" with demand (plaintiff) and supply (lawmaker) sides in that lawmakers are responding to market-like incentives when creating opportunities for transnational litigation).

153. Alternatively, if the legislature and judiciary together make up the relevant public lawmaking body, *see supra* note 147, then even seemingly accidental or sub silentio authorization would not be inadvertent.

154. Pfizer Inc. v. Gov't of India, 434 U.S. 308, 317, 320 (1978). This is not uncommon. *Cf.* Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 393 (1980) ("[I]n the vast majority of cases, legislatures have no actual intent on territorial reach . . . ." (emphasis omitted)).

must not be at such variance with legislative interests as to induce an override.[155] Recall, for example, that Congress considered but declined to reverse the Court's decision about foreign-government plaintiffs in Sherman Act cases.[156] Therefore, even in "inadvertent" situations, we should ask why legislative interests may align with diagonal enforcement.

1. Deterrence and enforcement

Perhaps the clearest explanation for a legislative authorization of diagonal enforcement is that the legislature is interested in increasing deterrence and enforcement in an area of transjurisdictional regulation.[157] Legislatures might be interested in increased deterrence and enforcement for a variety of reasons, including public interest, reelection, or other interests—none of which is specific to diagonal enforcement. A legislature might hope to deter cross-border behavior in service of protecting constituents at home, as in the climate change context.[158] Or it might conclude that deterring domestic actors from engaging in wrongdoing is important regardless of the location of the harm.[159]

155. *See generally* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317 app. 1 at 1480-1514 (2014) (cataloging and analyzing statutes that have overridden Supreme Court decisions); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 app. 1 at 424-41 (1991) (same). I assume here that the legislature has the power to rewrite the statute. Consistent with public choice analysis, regulated parties have an interest in raising inadvertent authorizations with legislatures when overrides are obtainable.

156. *See* Parpal & Sneeden, *supra* note 82, at 264-74; *see also Pfizer*, 434 U.S. at 320.

157. *See, e.g.*, Memorandum for the United States as Amicus Curiae at 4, *Pfizer*, 434 U.S. 308 (No. 76-749), 1977 WL 189361 (linking foreign-government suits to the deterrence and compensatory purposes of the Clayton Act); *see also* H.R. REP. NO. 97-476, at 10 (1982) (explaining that the proposed reciprocity requirement for foreign-government antitrust suits was problematic because it would "reduce the deterrent value of existing remedies"). Of course, not all problems are transjurisdictional, and U.S. courts presume that "Congress is primarily concerned with domestic conditions." *See* Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949). *But see* Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. REV. 1, 13-15 (2014) (disputing this justification for the presumption against extraterritoriality).

158. *See, e.g.*, *supra* notes 121-27 and accompanying text (discussing climate change); *see also Clayton Act Amendments*, *supra* note 150, at 5 (statement of Ky P. Ewing, Jr., Deputy Assistant Att'y Gen., Antitrust Division, U.S. Department of Justice) ("[T]o preclude suits by the entire class of foreign government plaintiffs for any damages would reduce the deterrent value of the Clayton Act remedy, a remedy which inures to the benefit of consumers.").

159. *Cf.* 15 U.S.C. §§ 78dd-1 to -3 (2016) (prohibiting U.S. entities from engaging in certain forms of bribery of foreign officials, including when outside the territory of the United States).

For whatever purpose, diagonal enforcement can be used to increase deterrence and enforcement levels.[160] And it can achieve these ends without adding a penny to the budget of the lawmaking state.[161]

In this way, diagonal enforcement has a lot in common with private enforcement.[162] Both policies are versions of "redundant enforcement": legal regimes in which two or more agents may seek overlapping remedies for the same conduct on substantially similar theories.[163] The introduction of redundant private enforcement (on top of existing public enforcement) can promote deterrence and enforcement by increasing resources,[164] aggregating information and expertise,[165] and correcting errors.[166] The same could be said

160. Measuring the increased deterrence or enforcement resulting from diagonal enforcement is beyond the scope of this Article. The claim here is that a legislature might reasonably conclude that authorizing diagonal enforcement may have these effects.

161. Diagonal enforcement, therefore, could be consistent with fiscal austerity. *Cf.* David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. U. L. REV. 1689, 1751 (2013) ("[I]n an era of deepening fiscal austerity, private enforcement should be an increasingly attractive alternative to traditional—and on-budget—regulatory mechanisms."); Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 827, 835 (2008) (explaining the "budget constraint hypothesis" for private enforcement but suggesting that it is not consistent with his data). Diagonal enforcement may impose costs on home courts having to hear more cases, though presumably the courts would be handling other litigation if these cases were not brought. *Cf.* Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 51-53 (1975) (making this point about class actions). This is not to suggest, however, that foreign states will participate without financial rewards. Indeed, one potential role for diagonal enforcement is to provide incentives for cooperation that may be lacking without these remedies. *See infra* notes 197-205 and accompanying text (discussing executive interests).

162. *See generally* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 34-59 (2010) (describing, analyzing, and studying empirically the use of private enforcement in federal statutory regimes). Indeed, from the perspective of the authorizing legislature, diagonal enforcement may often be a subset of private enforcement. But from the perspective of the enforcing state, diagonal public enforcement differs meaningfully from foreign-citizen private enforcement.

163. *See* Clopton, *supra* note 12, at 289-90.

164. By drawing on different resource pools, redundant enforcement can increase enforcement capacity (and thus increase deterrence). *See id.* at 309. For a discussion of potential dynamic effects among enforcers, see *id.* at 301-13.

165. Redundant enforcement improves deterrence and enforcement if different enforcers possess or can acquire different information or expertise, which they can then formally or informally share. *See id.* at 309-10; *cf.* Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1462-74 (2011) (discussing incentives in multiple-agent investigations).

166. Redundant enforcement has the capacity to correct the false negatives of underenforcement. *See* Clopton, *supra* note 12, at 308-09. Any new agent should reduce

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for diagonal enforcement: Foreign governments may offer additional resources,[167] share and aggregate new information,[168] and correct the random or systematic errors of underenforcement.[169] Redundant enforcement of either type also may allow cases to be handled by more efficient enforcers,[170] and it may permit enforcer collaborations that multiply effectiveness.[171]

In his pathbreaking work on the rise of private enforcement, political scientist Sean Farhang demonstrated that legislatures tend to rely on private enforcers when they lack confidence in public enforcement—that is, when a pro-enforcement legislature faces an anti-enforcement executive.[172] This mechanism could explain diagonal enforcement, too. A pro-enforcement

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random errors by giving cases a second look. *See* David A. Weisbach, *Tax Expenditures, Principal-Agent Problems, and Redundancy*, 84 WASH. U. L. REV. 1823, 1826 (2006) (describing this feature of redundancy and calling it "purely engineering"). When errors are the result of systematic bias, the introduction of an additional agent should reduce errors as long as the agents are not subject to identical biases. *See, e.g.*, Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274, 275 (2003) (explaining this effect of redundancy).

167. *Cf.* Clopton, *supra* note 12, at 309 (discussing resources and multiple enforcers). Of course, foreign states face resource constraints too, and resources for diagonal enforcement probably will come at the expense of domestic enforcement in the foreign state. Diagonal enforcement's effects on enforcement resources, therefore, are likely less powerful than those of private enforcement.

168. *Cf. id.* at 309-10; Stephenson, *supra* note 165, at 1462-74. Foreign governments may possess different information or be able to procure it through different channels or at different costs. Most directly, foreign governments may be able to use domestic compulsory processes to acquire information beyond the reach of the enforcing court. Once obtained, public enforcers may be more likely to share the information in joint diagonal enforcement actions than if they were forced to sue independently in their home courts.

169. *Cf.* Clopton, *supra* note 12, at 308-09; Ting, *supra* note 166, at 275; Weisbach, *supra* note 166, at 1826. As long as foreign-government enforcers differ from domestic ones, we should expect diagonal enforcement to increase enforcement and deterrence by correcting some false negatives. This assumption does not seem unreasonable because public agencies in different jurisdictions may differ in meaningful ways: Institutional design may matter; local politics may matter; and individual actors may matter.

170. For example, foreign governments may have special access to information, and diagonal enforcement allows cases to be distributed to the enforcer with the best information, not the one that happens to be "at home." *Cf.* Clopton, *supra* note 12, at 315 (discussing the relationship between information and case allocation among public and private enforcers).

171. *Cf. id.* at 307-13 (describing circumstances in which collaboration may result in better results than individual (but cumulative) actions). It is also possible that foreign governments have enforcement slack that diagonal enforcement could pick up. Although this suggestion may seem fanciful, consider again the efforts of the European Community to fight cigarette smuggling. The European Community had an interest in pursuing enforcement but no European court system to take the case. *See* Francq, *supra* note 1, at 75-76.

172. *See* FARHANG, *supra* note 162, at 36.

legislature might authorize redundant enforcement, including diagonal enforcement, in response to an underenforcing domestic executive (or the prospect of one in the future).[173] Even if only one foreign executive were more pro-enforcement than the domestic executive, diagonal enforcement would (marginally) increase deterrence.

A similar mechanism also might generate opportunities for diagonal enforcement when a pro-enforcement legislature lacks confidence in private enforcers. Perhaps the legislature lacks confidence in private enforcement because the courts have made it too difficult—which is what some might say about litigation in federal court today.[174] Or perhaps legislators accept the common critique that private enforcers will take *any* case that produces a net recovery,[175] regardless of its effect on the public interest.[176] In that case, even though foreign-government enforcers likely have different visions of the public interest than does the home government, it is possible that the magnitude of the difference is smaller than for private enforcement: While a public enforcer from Sweden or Texas may not have identical views of the public interest as does Congress,[177] it is also conceivable that those executives

173. Indeed, the inadvertent authorization described above came in the context of intentional authorizations of private enforcement. *See* 15 U.S.C. § 15(a) (2016) (providing a private right of action for antitrust law); *supra* notes 153-54 and accompanying text.

174. *See* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 416-23 (2018) (collecting critiques of federal procedural retrenchment and discussing limits on class certification and pro-arbitration case law, which apply to private actions but not public ones). Redundant diagonal enforcement may be a second-best response when the legislature is unable to affect these limits directly. *See id.* at 441-45 (noting that state legislatures cannot replace federal procedures and that federal or state legislative responses to constitutional limits on personal jurisdiction are inapposite).

175. *See* Burbank et al., *supra* note 12, at 670-71; Clopton, *supra* note 12, at 287-88.

176. The definition of "public interest" is endogenous to the lawmaking principal, meaning that different principals may reach different conclusions about the "public interest." The question in these cases, therefore, is not whether an enforcer selects cases based on some abstract notion of the public interest, but whether the enforcer's choices are consistent with the goals of the lawmaking principal. In this way, the story here is one of agency costs. *See generally* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (defining agency costs and identifying primary contributors). Note that I do not specify the principal (that is, the public, the legislature, or the state). I leave this question to the political system at issue.

177. At least with respect to international diagonal enforcement, agency costs may persist if legislatures authorize all governments to use diagonal enforcement rather than picking and choosing those with similar priorities. *Compare* JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 162 (2017) (arguing against a formal differentiation in foreign-state access to administrative law), *with* Zachary D. Clopton, *Judging Foreign States*, 94 WASH. U. L. REV. 1, 10, 28-29 (2016) (identifying situations in which courts, executives, and legislatures discriminate among foreign states).

are closer matches than the plaintiffs' bar.[178] In other words, a legislature could use diagonal enforcement to increase deterrence with reduced agency costs relative to private enforcement if foreign executives perform closer to the legislature's ideal point. Consistent with this observation, in the domestic context Congress has sometimes authorized state enforcement without accompanying private enforcement.[179]

In sum, a legislature might authorize diagonal enforcement because it is interested in increased deterrence and enforcement. And, as a form of redundant enforcement, there are reasons to expect that diagonal enforcement may be effective in achieving these goals—and perhaps effective in reducing agency problems as compared to private enforcement as well.

2. Policy influence

Beyond seeking to increase enforcement and deterrence directly,[180] legislatures might also turn to diagonal enforcement in order to gain influence over multijurisdictional policy. For various reasons, a legislature might see value in controlling the content of regulatory policy.[181]

A legislature (usually) cannot require other states to adopt its standards, so it must pursue policy influence by other means.[182] One strategy would be for a legislature to attempt to capture a larger share of enforcement litigation, thereby increasing its share of policymaking influence. The mechanism is simple: The more cases in your courts applying your law, the greater the impact of your standards on regulated parties' behavior. This is a litigation version of the "California effect"[183] or a legislative version of Klerman and

178. This is not the place for an empirical assessment of the differences among domestic public enforcers, foreign public enforcers, and private enforcers. And, in any event, the selection of enforcers is ultimately a legislative choice reflecting legislative judgment.

179. *See, e.g.*, 15 U.S.C. §§ 1194(a), 1264(d), 1477, 1679h (2016).

180. These explanations are not necessarily inconsistent with increasing enforcement, but they are not dependent on that preference either.

181. This is what Donald Childress would call the "supply side in the transnational law market." *See* Childress, *supra* note 152, at 1008-09.

182. *See generally* Brian Galle & Joseph Leahy, *Laboratories of Democracy?: Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1368-70 (2009) (discussing literature on policy diffusion and applying it to legal analysis). In addition to the market capture account described below, states could resort to other tools of so-called soft power. *See generally* JOSEPH S. NYE, JR., SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS 1-32 (2004) (discussing various tools of soft power in international relations derived primarily from a state's culture, values, and foreign policies).

183. *See* DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 5-6, 259 (1995). The basic idea is that because California is such a large market, it is cheaper for firms to comply with strict California standards for all

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Reilly's "forum selling."[184]

By whatever name, were a legislature to authorize diagonal enforcement that was more attractive to foreign executives than enforcement in the executives' home courts, those executives might substitute diagonal for domestic enforcement. The result would be that the authorizing legislature would assert more control over regulatory policy.[185] This regulatory market capture could also have dynamic effects, motivating foreign legislatures to bring their laws into closer alignment with the first state's laws.[186]

Although introducing a new cause of action sounds pro-regulatory, this explanation for diagonal enforcement could be consistent with the usual public choice account that favors concentrated interests—often those of large defendants.[187] For one thing, concentrated interests might favor a single set of requirements over multifarious standards, and one jurisdiction hearing all enforcement actions and applying only its own law would achieve that end.[188] Further, and also consistent with a public choice account, a legislature could

products than to differentiate between high-standard and low-standard markets. *See id.* Here, when a jurisdiction applies its law to a large class of a firm's disputes, the firm might elect to follow those standards generally.

184. In Klerman and Reilly's conception of "forum selling," courts attempt to attract litigation in furtherance of "prestige, local benefits, or re-election." *See* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 242 (2016). It is possible that legislatures see increased court business as an independent benefit, though I doubt that any such benefit is sufficient on its own to justify diagonal enforcement authorizations. Instead, the "forum selling" here seeks to extend the reach of the government's substantive laws.

185. Domestically, this could be a story of federalization. *Cf.* Issacharoff & Sharkey, *supra* note 14, at 1358, 1368-69 (using the term "federalization" to describe a process by which federal law has usurped traditional areas of state law authority).

186. This suggestion has the feel of a reciprocity rule but without the teeth. *Cf.* Parpal & Sneeden, *supra* note 82, at 264-74 (discussing a proposed reciprocity rule for antitrust). Note that this dynamic effect need not be limited to substantive law; diagonal enforcement might hasten the spread of procedural mechanisms such as the U.S.-style class action. *See generally* Zachary D. Clopton, *The Global Class Action and Its Alternatives*, 19 THEORETICAL INQUIRIES L. 125 (2018) (discussing foreign countries' adoption of class action-like mechanisms).

187. *See generally* Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983) (articulating a classic public choice account); Frank B. Cross, Essay, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355 (1999) (applying public choice theory to the litigation context).

188. *See, e.g.*, J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1509 (2007) ("Industry pressure for a federal standard may . . . mount when regulatory uncertainty, induced or exacerbated by inconsistent state activity, produces significant costs . . . ."). Disuniformity is a common critique of redundant enforcement. *See, e.g.*, Burbank et al., *supra* note 12, at 667-68. But when redundant enforcement reduces other lawmakers' relative power or influence, it might result in more uniformity rather than less because there will be fewer laws that matter.

craft a regulatory regime that captures the market but also is less punitive than its alternatives.[189] A legislature so inclined would race *toward* (but not *to*) the bottom.[190] The limit would be that the legislature could not reduce court access and expected recoveries to such an extent that foreign enforcers are induced to shop for more attractive forums elsewhere.[191]

In these ways, a legislature that values policy influence—independent of any particular level of deterrence—might look to diagonal enforcement as a means of affecting the interstate regulatory market.

3. Ancillary benefits

Finally, a legislature might see diagonal enforcement as furthering some other priority unrelated to the content of the law.

Internationally, a legislature could see diagonal enforcement as consistent with its foreign relations interests. The legislature might conclude that diagonal enforcement is a low-cost way to fulfill an international obligation[192] or to diffuse claims of in-state bias,[193] either of which might be valuable for

189. *See, e.g.*, DeShazo & Freeman, *supra* note 188, at 1506 ("[I]ndustry support for federal regulation undoubtedly has a powerful effect on the prospect of its passage. Yet what will industry demand from Congress? It will demand a federal standard that preempts inconsistent state regulation and eliminates regulatory uncertainty. Uniformity is not enough, however. Industry will also try to undercut the most aggressive state standards by seeking a lower federal ceiling." (footnote omitted)).

190. *Cf.* William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 666, 705 (1974) (coining the phrase "race for the bottom" in the context of Delaware's increasingly corporate-friendly regulation of corporations).

191. *Cf. supra* notes 157-59 and accompanying text (discussing legislative interests in deterrence and enforcement). This suggestion brings to mind the device under Dutch law that allows for opt-out class settlements (but not opt-out litigation). *See* Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 310-12 (2011). This tool may become a potential focal point for transnational settlements of private claims. *Cf. id.* at 310, 316, 320 (noting examples of international settlements and conditions that make this mechanism attractive). And this settlement-only vehicle may advantage concentrated interests (defendants and plaintiffs' attorneys) over individual plaintiffs. *See* Zachary D. Clopton, *Transnational Class Actions in the Shadow of Preclusion*, 90 IND. L.J. 1387, 1419 n.190 (2015) (discussing this risk in international class actions and collecting additional sources).

192. For example, the United States understands RICO to satisfy its international obligations to fight organized crime under the Palermo Convention. *See* United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, S. TREATY DOC. NO. 108-16, 2225 U.N.T.S. 209; *Law Enforcement Treaties: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 60 (2004) (statement of Samuel M. Witten, Deputy Legal Adviser, U.S. Department of State, and Bruce Swartz, Deputy Assistant Att'y Gen., Criminal Division, U.S. Department of Justice).

193. If such a perception of in-state bias were ill founded, authorizing diagonal enforcement would be a clear signal that the state was not in fact biased. If on the other hand the

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intrinsic or instrumental reasons.[194] The legislature also might use diagonal enforcement to create a platform for intergovernmental cooperation that brings ancillary benefits to the state.[195]

Domestically, a federal legislator might have an instrumental preference for federalism, so authorizing states to enforce federal law might be consistent with those commitments.[196] A federal or state legislature also might envision diagonal enforcement as achieving cooperative benefits among the states. Once again, a rational legislature could see diagonal enforcement as a cheap way to pursue its interests.

B. Executives

Subpart A above explained that legislatures have multiple reasons to authorize diagonal enforcement. But legislatures do not enforce substantive rights themselves, so diagonal enforcement becomes real only when an executive takes up the task. This Subpart explores why executives might do so—in particular, why executives might choose foreign options over domestic ones.

1. Executive forum shopping

Most straightforwardly, foreign executives may turn to diagonal enforcement in order to achieve better outcomes at lower cost.[197] Recall *RJR Nabisco*,

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legislature wanted to correct actual in-state bias, then foreign enforcers would be especially well positioned to correct the error. *See supra* notes 166, 169 (discussing error correction).

This result has an unseemly quality insofar as it allows for the possibility that states may use enforcement for political gain. But the same is true with or without diagonal enforcement—states could use domestic enforcement for these ends. And perhaps the threat of tit-for-tat enforcement could lead to welfare-enhancing "mutual disarmament." *Cf., e.g.*, ROBERT AXELROD, THE EVOLUTION OF COOPERATION 124-41 (1984).

194. A legislature also might be inclined to use diagonal enforcement when its foreign relations interests diverge from those of the executive—for example, if legislators are more sensitive to backlash from foreign activity than are executive actors. *See infra* notes 211-15 and accompanying text (discussing divergent preferences between the executive and legislative branches).

195. *Cf.* Timothy N. Cason & Lata Gangadharan, *Cooperation Spillovers and Price Competition in Experimental Markets*, 51 ECON. INQUIRY 1715, 1716-17 (2013) (discussing spillovers from one type of cooperation to another for individuals). For example, cooperation in this area might promote cooperation in other areas, such as military policy or trade, consistent with legislative interests.

196. It is also possible for legislatures to have nonrational bases for pursuing diagonal enforcement—for example, a purely identity-based commitment to federalism or interstate cooperation. But, again, this Part focuses on the rational choice account.

197. The expected outcome would be measured by whatever criteria the executive applies, regardless whether the executive is motivated by the public interest. For a classic study

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the European Community's suit against Big Tobacco.[198] As noted above, diagonal enforcement may have been attractive because of the civil standard of proof, availability of treble damages, simple personal jurisdiction and judgment enforcement, liberal discovery rules, and the lack of a Europe-wide mechanism.[199]

This explanation is relevant to more than just *RJR Nabisco*. In her extensive survey of cases filed by foreign-government plaintiffs, Buxbaum identified "access to justice" as a principal reason foreign governments sue in U.S. courts.[200] She observed that developed countries turn to U.S. courts to "address conduct that falls into the transnational space," while developing countries turn to U.S. courts "to supplement local resources in various ways."[201]

Though not often used in this context, I call this phenomenon "forum shopping."[202] Executive plaintiffs look for courts that will hear their cases and afford them opportunities to win—and perhaps win big.[203] This forum shopping explanation is consistent with international diagonal enforcement in U.S. courts (perceived to be hospitable to plaintiffs),[204] and it is consistent with

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of the motivations underlying the exercise of executive enforcement discretion, see Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036 (1972).

198. *See supra* notes 45-62 and accompanying text.

199. *See supra* notes 52-56 and accompanying text.

200. *See* Buxbaum, *supra* note 22, at 696-99.

201. *Id.* at 696.

202. *Cf.* The Atlantic Star [1974] AC 436 (HL) at 471 (Eng.) ("'Forum shopping' is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor for indignation.").

Not everyone would call this forum shopping. Buxbaum suggests that in many of the diagonal cases, foreign states sue in the United States because their domestic legal systems lack the resources to provide meaningful access to justice for their citizens. *See* Buxbaum, *supra* note 22, at 696-99. Although this argument sounds different (and perhaps nobler) than the usual reasons ascribed to private forum shoppers, I contend that they are one and the same. If forum shopping is about finding the best return on litigation investment, then considering courts' relative capacities is an important part of the shopping decision. For more on this point, see note 206 below.

203. Not always, of course, but usually. *See* Clopton, *supra* note 12, at 321-24 (observing that a public enforcer could file sham or collusive suits in order to cut off private enforcement). Note that this discussion considers executive interests once a defendant is selected. Different incentives might influence the initial selection of defendants. *See id.* at 314-18 (discussing case selection by public and private enforcers).

204. *See supra* note 55 and accompanying text; *see also* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1122 (1996) ("In fact, in

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the fact that those suits frequently target U.S. defendants.[205]

But executive forum shopping differs from private forum shopping in at least one important respect. When an executive forum shops into another court system applying someone else's law, it is necessarily shopping *away* from its own coordinate branches.[206]

This vantage suggests potentially interesting intragovernmental dynamics at play. Consider three versions of executive forum shopping. First, it is possible that legislatures and judiciaries establish rules of jurisdiction, substantive law, and remedies but expect their executives to forum shop for better results.[207] Second, it is also possible that legislatures tacitly approve of their executives' diagonally enforcing harsh laws against foreign defendants while more lightly regulating domestic ones.[208] In these first two scenarios, the

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federal civil actions, foreign plaintiffs and defendants win substantially more often than domestic litigants." (footnote omitted)).

205. *See supra* Part I (collecting examples). I have found that examples of diagonal enforcement outside U.S. courts are harder to come by, but that may say more about the fealty of U.S. law to regulatory litigation than it does about the possibility of diagonal enforcement abroad. I also should note that I have not found evidence that foreign courts would be hostile to diagonal enforcement. And, as private enforcement becomes more prominent in Europe and elsewhere, *see generally* Clopton, *supra* note 186, we may see additional opportunities for diagonal enforcement as well.

206. I would like to especially thank Hannah Buxbaum for pushing me along these lines. Perhaps one reason I am more willing to call these cases "forum shopping" is because I am stipulating that the executive is seeking out someone else's law. *Cf. In re* Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842, 866 (S.D.N.Y. 1986) (applying Indian law to claims by the Government of India), *aff'd as modified*, 809 F.2d 195 (2d Cir. 1987). Buxbaum's access-to-justice account is most compelling when the home legal system lacks the capacity to provide justice. *See* Buxbaum, *supra* note 22, at 696. But on pure choice-of-law issues, the lack of capacity may reflect a policy choice: Perhaps the legislature and courts could have provided a cause of action for damages, and perhaps the courts could have found ways to accommodate these claims, but they have simply chosen not to do so—potentially for reasons of politics, principle, or convenience. I do not begrudge those choices, but I also would not deny that they are relevant to the executive's forum shopping decisions.

207. *Cf., e.g.*, CONN. GEN. STAT. § 3-129c (2017) (authorizing the state attorney general to sue on behalf of residents taxed by New York City); Woolhandler & Collins, *supra* note 22, at 443-44 (citing examples of state legislatures authorizing executives to sue in federal courts).

208. Indeed, diagonal forum shopping may be especially vigorous when executives are protecting their constituents against foreign harms. This is the inverse of the in-state bias mentioned above, *see supra* note 193 and accompanying text. And this concern motivated Congress's consideration of a reciprocity rule for antitrust following *Pfizer*. *See supra* notes 82-85 and accompanying text.

executive's home institutions should have no objection to forum shopping[209]—and the authorizing legislature would have no one to blame but itself.[210]

In a third scenario, however, diagonal enforcement might result from internal disagreements in the enforcing state. Diagonal enforcement might be attractive when an executive's preferences diverge from those of its legislature or judiciary. Flipping Farhang's private enforcement model,[211] diagonal enforcement may arise when pro-enforcement executives face anti-enforcement (or gridlocked) legislatures at home.[212] (An inactive legislature and an anti-enforcement court could produce the same result.) This arrangement might be more likely if executives are selected on different time scales or by different means than are the members of the coordinate branches, thereby increasing the chances of divergent preferences.[213]

There is also a vertical federalism version of this idea.[214] An anti-enforcement legislature may preempt pro-enforcement laws in the sovereign's political subdivisions, but those steps may not be enough (on their own) to stop pro-enforcement subunits from seeking to enforce someone else's law.[215] Would it be completely shocking if you learned tomorrow that the attorney general of Massachusetts, unhappy with Congress and the Supreme Court, had

209. Perhaps Buxbaum's low-resource governments fit best into these categories. *See* Buxbaum, *supra* note 22, at 696-99.

210. This would be "living under your own law." *Cf.* Gerken, *supra* note 14, at 378.

211. *See* FARHANG, *supra* note 162, at 34-59.

212. As described in more detail below, an anti-enforcement foreign legislature could presumably restrain its executive from pursuing diagonal enforcement, but the burden has flipped to the legislature. *See infra* notes 250-55, 265-67 and accompanying text.

213. Note also that the existence of independent executive enforcers, such as elected attorneys general or independent agencies, could result in diagonal enforcement even when the chief executive disagrees. *Cf., e.g.*, H.D. 913, 2017 Leg., 437th Sess. (Md. 2017) (enacted) (codified as amended at MD. CODE ANN., STATE GOV'T §§ 6-105(f), -106.1 (LexisNexis 2018)) (authorizing the state attorney general to sue the federal government without approval of the governor); Josh Hicks, *Maryland Lawmakers Give AG Blanket Authority to Sue Trump Administration*, WASH. POST (Feb. 15, 2017), https://perma.cc/3M3G-NKCW. *See generally* Marshall, *supra* note 100, at 2453-54 (2006) (discussing examples of divided state executives and noting the low rate of conflict among them).

214. States might deviate from federal preferences, and localities might deviate from states. *See, e.g.*, Niraj Chokshi, *Texas Governor Signs a Ban on Sanctuary Cities*, N.Y. TIMES (May 7, 2017), https://perma.cc/4QJ2-KKAA; Vivian Yee, *To Combat Trump, Democrats Ready a G.O.P. Tactic: Lawsuits*, N.Y. TIMES (Dec. 14, 2016), https://perma.cc/DY3S-FC2X; *see also* David J. Barron, Foreword, *Blue State Federalism at the Crossroads*, 3 HARV. L. & POL'Y REV. 1, 1-3 (2009) (discussing liberal states during the second Bush Administration); Robert A. Schapiro, Essay, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL'Y REV. 33, 33-35 (2009) (same).

215. *See* Clopton, *supra* note 174, at 455-56 (noting some difficulties with preempting enforcement as compared to preempting legislation).

turned to Canadian courts to fight climate change?[216] I explore in more detail below the normative consequences of these effects and the tools available to legislatures to counteract them[217]—but for the moment, I raise them predictively to identify when an executive might be inclined to diagonally forum shop.

2. Cooperating and signaling

Pure "forum shopping" is not the only reason an executive might enforce someone else's law. Diagonal enforcement might also have consequences for the executive's relationships with other actors.

For one thing, executives might leave their home jurisdictions in order to cooperate with other governments in joint enforcement actions.[218] Benefits of such cooperation could be as mundane as the efficiency gains of a single proceeding.[219] Enforcement joinder might also facilitate settlement, as potential defendants may be more willing to settle if they can obtain global peace with all potential regulators.[220] And joint enforcement might build goodwill with foreign governments that is valuable beyond the case at hand.[221] Indeed, I have identified many examples of joint diagonal enforcement at the international and interstate levels.[222]

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216. I have no evidence this is actually happening. But it is not implausible. *Cf.* Robert B. McKinstry, Jr., *Laboratories for Local Solutions for Global Problems: State, Local and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change*, 12 PENN ST. ENVTL. L. REV. 15, 31-35 (2004); Ian Austen, *Canada's Strategy on Climate Change: Work with American States*, N.Y. TIMES (June 7, 2017), https://perma.cc/3WZA-ZF2Q; Conference of New England Governors & E. Can. Premiers, Climate Change Action Plan 1-2 (2001) (on file with author).

217. *See infra* Part IV.B.

218. *See, e.g.*, Francq, *supra* note 1, at 76 (discussing the joint enforcement action of the European Community and its member states).

219. *See, e.g.*, Republic of Philippines v. Pimentel, 553 U.S. 851, 870-71 (2008) (noting that joinder serves the "social interest in the efficient administration of justice" (quoting Ill. Brick Co. v. Illinois, 431 U.S. 720, 737-38 (1977)). Domestically, state attorneys general might be inclined to sue in federal court in order to achieve consolidation (with other government suits or private actions) in a multidistrict litigation. *See* 28 U.S.C. § 1407 (2016); *see also In re* Pharm. Indus. Average Wholesale Price Litig., 237 F. Supp. 2d 1377, 1379 (J.P.M.L. 2002) (explaining that state parens patriae actions may be consolidated under § 1407).

220. *See generally, e.g.*, RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 183-216 (2007) (discussing multistate tobacco litigation and settlement); Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 398-403 (2014) (discussing settlement of private and public suits against BP).

221. *Cf. supra* note 195 (discussing ancillary benefits of cooperation).

222. *See, e.g.*, RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2098 (2016) (addressing claims on behalf of the European Community and its member countries); Republic of

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Executives also might use diagonal enforcement to send signals to specific audiences.[223] Two stylized examples can illustrate. First, perhaps suits brought in foreign courts are more salient to other governments or to nongovernmental organizations—either because such suits are more readily observed or are viewed as more important. An executive might pick diagonal enforcement to signal to an international audience that it is a strong defender of certain rights or a team player in global enforcement.[224] This could produce instrumental benefits for the enforcing state or executive official, such as foreign aid or the prospect of lucrative postgovernment employment.[225] Second, perhaps an executive can use diagonal enforcement for political cover. For example, an executive might want to do a favor for a political ally by bringing an enforcement action against the ally's competitor but might worry that the public would find this unseemly. But if it is too costly for the domestic public to monitor the executive's activity in foreign courts, the executive might be able to engage in the enforcement action without being held accountable. And, presumably, the ally would be aware of the foreign suit—or would soon be told of its existence by the interested executive.

C. Summary

The foregoing gives us some sense of when we might expect to observe diagonal enforcement. A legislature authorizing diagonal enforcement is likely interested in increasing deterrence or influencing global regulatory policy.[226] (Or, of course, it could have inadvertently authorized diagonal enforcement and then lacked the will to change it.)[227] Executives pursuing diagonal

Honduras v. Philip Morris Cos., 341 F.3d 1253, 1255 (11th Cir. 2003) (addressing claims of Belize, Ecuador, and Honduras); Serv. Emps. Int'l Union Health & Welfare Fund v. Philip Morris Inc., 249 F.3d 1068, 1070-71 (D.C. Cir. 2001) (addressing claims of Guatemala, Nicaragua, and Ukraine); São Paulo v. Am. Tobacco Co., 919 A.2d 1116, 1118 (Del. 2007) (addressing claims of Panama and the Brazilian state of São Paulo).

223. If all enforcement receives equal attention, then diagonal enforcement holds out no special promise. But if some groups pay different levels of attention to diagonal versus domestic cases, then some cases will send different messages (or messages with different strengths) to different groups.

224. Scholars have identified this pattern in other areas. *See, e.g.*, Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 INT'L REV. L. & ECON. 1, 17 (2014) (suggesting that pressure from aid donors contributes to the selection of domestic constitutional provisions).

225. *Cf. id.* (discussing foreign aid).

226. *See supra* Parts III.A.1-.2. The legislature then could set global standards less stringent than current levels or otherwise consistent with the interests of putative defendants.

227. *See supra* notes 153-55 and accompanying text. An inadvertent authorization, though, would likely have been part of an earlier effort to increase enforcement. *See supra* note 173 and accompanying text.

enforcement will likely come from jurisdictions providing weaker recoveries (or none at all).[228] This could reflect executive preferences diverging from those of home institutions or an exploitable asymmetry that favors local interests.[229] Diagonal enforcement may also be more common when multiple enforcers can pool claims or otherwise coordinate to produce positive externalities.[230]

These intuitions are consistent with the fact that at least in U.S. courts, antitrust law has been a significant source of multijurisdictional enforcement.[231] And they are suggestive of the promise of intergovernmental climate change litigation when single-state options fall short and truly global efforts stall.[232] At the same time, this analysis seems to suggest that it would be rational for legislatures to authorize more diagonal enforcement, and for executives to file more diagonal suits, than we have observed to date. The fact that they have not suggests, unsurprisingly, that rational choice theory does not explain everything—and that diagonal enforcement seems to offend background norms of international and interstate relations, which may cut against its use.

Finally, it seems possible that the Trump Administration will produce an increase in diagonal enforcement. President Trump could embody the anti-enforcement executive in Farhang's model,[233] not to mention the fact that he could serve as a catalyst for pro-enforcement politics in upcoming congressional elections.[234] Meanwhile, state and foreign governments seeking to pursue issues such as climate change or consumer protection may be rationally or ideologically motivated to eschew the U.S. federal executive (and the federal

228. *See supra* notes 197-201 and accompanying text.

229. *See supra* notes 208, 212-16 and accompanying text.

230. *See supra* note 220 and accompanying text. Indeed, many of the cases mentioned in Parts I and II above involved multiple governments enforcing together. *See, e.g.*, RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2098 (2016) (involving the European Community and twenty-six of its member countries); Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 418 (2011) (involving eight U.S. states and New York City); California v. Infineon Techs. AG, 531 F. Supp. 2d 1124, 1135 (N.D. Cal. 2007) (involving twelve U.S. states), *clarified*, No. C 06-4333 PJH, 2007 WL 3034372 (N.D. Cal. Oct. 16, 2007); São Paulo v. Am. Tobacco Co., 919 A.2d 1116, 1118 (Del. 2007) (involving Panama and the Brazilian state of São Paulo).

231. *See supra* Parts I.B, II.A. The U.S. suit in West German court also sounded in antitrust. *See supra* note 35.

232. *See supra* notes 121-27 and accompanying text (discussing climate change).

233. *See supra* text accompanying note 172 (discussing Farhang's work on the rise of private enforcement).

234. *See* Jonathan Martin & Alexander Burns, *"No District Is Off the Table": Health Vote Could Put House in Play*, N.Y. TIMES (May 6, 2017), https://perma.cc/F9FZ-FYP7.

courts it will populate[235]), again suggesting that more diagonal enforcement may be in the cards. Suits of this kind may also send a strong signal about opposition to President Trump. If one were looking for an example, note that the state plaintiffs in *American Electric* might have been more willing to drop their diagonal climate change claims[236] because the Environmental Protection Agency under the Obama Administration was actively regulating carbon emissions—a practice the Trump Administration has begun to roll back.[237]

IV. Normative Perspectives

Regardless of the motivations behind it, some diagonal enforcement exists, and we may see more in the years to come. The final question is what we should make of this unusual but potentially meaningful phenomenon. It is to that normative question that this Article now turns.

To assess diagonal enforcement on the merits, this Part begins with a brief discussion of enforcement and deterrence, which were also central to the institutional discussion in Part III above. One implication of the earlier discussion was that diagonal enforcement is in many ways unexceptional and thus is susceptible to the usual arguments for and against enforcement regimes. But diagonal enforcement may have some hidden benefits if we turn away from those well-worn topics to the features of diagonal enforcement that make it special. In brief, diagonal enforcement may have the capacity to stimulate gridlocked institutions in the enforcing state while remedying some representational inequalities among foreign or minority interests. These effects are not likely to be the reasons why legislatures or executives would pursue diagonal enforcement, but they are relevant to an overall assessment of it.

235. The assumption here is that the President's judicial appointments move the federal judiciary closer to the President's policy preferences. *See, e.g.*, Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"?: An Empirical Study of Establishment Clause Decisions in Federal Courts*, 110 MICH. L. REV. 1201, 1214 (2012) ("As a measure of judicial ideology, the Party of Appointing President (Republican or Democrat) proxy is the simplest, most commonly used, most unambiguously reliable (for accurate coding), most frequently verified as a meaningful and stable influence on judges, and the most easily interpreted."). If so, state and foreign governments with different views on these issues might conclude that the federal courts are less hospitable to their claims than are the alternatives.

236. *See supra* notes 121-26 and accompanying text.

237. *See, e.g.*, Lisa Friedman & Brad Plumer, *E.P.A. Announces Repeal of Major Obama-Era Carbon Emissions Rule*, N.Y. TIMES (Oct. 9, 2017), https://perma.cc/28FD-SCGB.

A. A Comment on Optimal Deterrence

A central frame for the literature on public and private enforcement is deterrence.[238] It is easy to say that enforcement regimes should aspire to optimal and accurate deterrence, punishing or deterring wrongful behavior as efficiently as possible.[239] But any comprehensive inquiry into optimal deterrence and enforcement levels would require context-specific evaluations and considerations of alternatives—both beyond the scope of this Article.

A slightly different question asks how successful particular interventions might be at achieving whatever level of deterrence is preferred. As noted above, diagonal enforcement is a form of redundant enforcement,[240] and thus it comes with the usual raft of costs and benefits—though I have explained elsewhere how properly designed redundant enforcement regimes could improve enforcement efficiency.[241] And diagonal enforcement could reduce agency costs relative to private enforcement in some cases.[242] But, again, addressing these issues comprehensively is beyond the scope of this Article.

This Part, therefore, addresses other dynamics that may be less well appreciated and for which diagonal enforcement has particular (and potentially important) consequences. These consequences may not drive initial policy choices, but they are important for any comprehensive evaluation of those policies.

B. Governmental Relations

First, diagonal enforcement may have consequences for relations among and within governments. This is, ultimately, a question of positive political theory, and this Subpart takes a first cut at working through some major threads of that analysis.

In one sense, diagonal regimes are themselves examples of transgovernmental cooperation: Every diagonal enforcement case involves the participation of public actors from at least two governments. And, as noted

238. Deterrence and compensation often move together, but particularly when dealing with regulatory litigation, they may be decoupled. *See* David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1876-78 (2002).

239. For classic discussions of optimal deterrence, see Robert D. Cooter, *Punitive Damages, Social Norms, and Economic Analysis*, LAW & CONTEMP. PROBS., Summer 1997, at 73, 74; and George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 526-27 (1970).

240. *See* Clopton, *supra* note 12, at 289-90; *supra* notes 163-71 and accompanying text.

241. *See* Clopton, *supra* note 12, at 306-31 (discussing various reasons why redundant enforcement regimes may produce more deterrence and enforcement for a lower cost).

242. *See supra* notes 175-79 and accompanying text.

above, diagonal enforcement might facilitate cooperation among public enforcers.[243]

More interestingly, diagonal enforcement may also have dynamic effects for governmental relations. Writing about horizontal federalism in the United States, Heather Gerken observed that state law spillovers might improve national policy by forcing issues onto the national agenda, eliciting national preferences, and making inaction costlier for national politicians.[244]

Similar effects might be attributable to diagonal enforcement. Imagine that Iowa's attorney general brings a consumer law action in a California court under California law.[245] The mere filing of this suit could raise the national profile of consumer issues, and it might motivate Congress to consider national solutions.[246] Indeed, that could be one of the goals of the litigation.[247] The suit could also inspire California's attorney general to act.[248] More aspirationally, perhaps diagonal suits will encourage the creation of multijurisdictional regulatory mechanisms.[249]

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243. *See supra* Part III.B.2.

244. *See* Gerken, *supra* note 14, at 394-96; Gerken & Holtzblatt, *supra* note 14, at 90-97.

245. As noted above, California antitrust law is a potential vessel for state diagonal enforcement. *See supra* note 132 and accompanying text.

246. Of course, the national solution (preempting state law) could ratchet up or down the regulatory standard. Moreover, even if national leaders were ultimately to decline to offer uniform solutions, that outcome would be the product of considered decision rather than inertia.

247. *Cf. supra* notes 223-25 and accompanying text (discussing litigation's signaling function).

248. Consistent with the signaling point, a diagonal enforcement suit might also be salient to voters and interest groups in the forum state.

249. *See, e.g.*, *supra* note 20 (collecting sources on transgovernmentalism). It is also conceivable that diagonal enforcement will hinder international engagement. For example, Steinitz and Gowder have championed an international court for civil claims, though they concede that it may be "an idealistic pipe dream." *See* Maya Steinitz & Paul Gowder, *Transnational Litigation as a Prisoner's Dilemma*, 94 N.C. L. REV. 751, 803 (2016). Whatever limited incentives exist for states to pursue a treaty, diagonal enforcement may undermine those incentives by providing many of the benefits without the costly treatymaking process. Relatedly, diagonal enforcement could undercut multilateralism by robbing the lawmaking jurisdiction of the stick of denying court access. *See* Dodge, *supra* note 21, at 224-25, 225 n.423 (explaining that voluntary judgment enforcement removes an incentive for other countries to bargain). *But see* Buxbaum, *supra* note 22, at 693-96 (rejecting this view). I am not convinced of either mechanism, but it is at least plausible that diagonal enforcement could undermine multilateral solutions by enabling "minilateral" ones. *See generally* CHRIS BRUMMER, MINILATERALISM: HOW TRADE ALLIANCES, SOFT LAW, AND FINANCIAL ENGINEERING ARE REDEFINING ECONOMIC STATECRAFT 17-21 (2014) (defining minilateralism and considering its relationship to multilateralism).

Gerken's analysis operates at the level of governments.[250] Diagonal enforcement departs from this approach and consequently may have these stimulating effects *within* governments. In my consumer law hypothetical, consider the political dynamics in Iowa.[251] Without diagonal enforcement, an enterprising Iowa attorney general would be limited to the substantive law adopted by the Iowa state legislature. The lack of a state cause of action could represent a genuine policy choice, or it could be the product of inertia or gridlock.[252] Diagonal enforcement allows Iowa's attorney general to rely on California law, and if the Iowa legislature has an objection, it could use its legislative authority to limit its executive's ability to pursue diagonal remedies.[253]

In this way, opportunities for diagonal enforcement disrupt the default presumption against enforcement. Legislatures disfavoring regulation not only must decline to regulate but also may need to affirmatively constrain their

250. *See* Gerken, *supra* note 14, at 394; Gerken & Holtzblatt, *supra* note 14, at 94.

251. Although this is hypothetical, I did not select Iowa at random. Iowa has an elected attorney general, Democrat Tom Miller. *See Elected Officials: State*, IOWA CITY PUB. LIBR., https://perma.cc/K5ZT-G4RD (archived Apr. 2, 2018). Most statewide elected officials in Iowa are Republicans, and both houses of the state legislature have Republican majorities. *See* Nat'l Conference of State Legislatures, 2018 State & Legislative Partisan Composition (2018), https://perma.cc/BTP5-VZSV.

252. *Cf., e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (suggesting that legislative inaction may represent "(1) approval of the status quo . . . , (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice").

253. *Cf., e.g.*, California v. Frito-Lay, Inc., 474 F.2d 774, 776-77 (9th Cir. 1973) (requiring state legislative authorization to pursue parens patriae suits under federal antitrust laws), *superseded in part by statute*, Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended in scattered sections of the U.S. Code). Though the discussion here has a domestic focus, similar institutional arrangements exist elsewhere. For example, the CJEU has articulated the circumstances under which the treaties of the European Union permit the European Commission to litigate in foreign or international tribunals. *See, e.g.*, Case C-73/14, Council v. Comm'n, ECLI:EU:C:2015:663, ¶¶ 1, 59 (holding that the treaties authorize the Commission to appear before the International Tribunal for the Law of the Sea); Case C-131/03 P, R.J. Reynolds Tobacco Holdings v. Comm'n, 2006 E.C.R. I-7823, I-7857 to -7859 (approving the lawsuit in U.S. courts that led to the U.S. Supreme Court's *RJR Nabisco* decision); *see also* Merijn Chamon & Valerie Demedts, *Constitutional Limits to the EU Agencies' External Relations* 5 (The Acad. Research Network on Agencification of EU Exec. Governance, Working Paper No. 11/2017, 2017), https://perma.cc/8KRF-LA6H. In *Council v. Commission*, the CJEU adjudicated a separation of powers-style dispute between the European Council and the European Commission, concluding that the treaties of the European Union allowed the Commission to make a submission to an international tribunal without Council approval—and it suggested that the situation might have been different if the Council had expressly rejected the Commission's position. *See* ECLI:EU:C:2015:663, ¶¶ 20-21, 34-35, 84-90.

executives from exercising diagonal options.[254] In this way, and paralleling Gerken's horizontal federalism, diagonal enforcement might improve government policy by forcing issues onto the legislative agenda, eliciting legislators' preferences, and making inaction costlier for legislators.[255]

Like Gerken's account of horizontal federalism, this case for diagonal enforcement might prompt criticisms grounded in notions of sovereignty. Gerken acknowledges, but ultimately is not persuaded by, these sovereignty objections.[256] But even if we take sovereignty seriously, diagonal enforcement seems consistent with it.[257] Diagonal enforcement treats states as coequals,[258] such that foreign governments have just as much right to appear in court as the domestic sovereign.[259] This day-in-court right comes with the ability to make policy choices about which cases to take, how to prosecute them, and when to

254. *Cf.* Josh Chafetz, *Gridlock?*, 130 HARV. L. REV. F. 51, 59 (2016) ("[T]he major questions doctrine . . . privileges only nonregulatory baselines, while allowing for regulatory ones to be rolled back more easily.").

255. *See* Gerken, *supra* note 14, at 394-95; Gerken & Holtzblatt, *supra* note 14, at 90-93. Many theories of horizontal federalism suggest that the mere existence of multiple sources of authority makes tyranny more difficult, but as Robert Schapiro and others have noted, preventing tyranny sometimes requires affirmative steps from one government actor or another. *See, e.g.*, ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 106-07 (2009). Diagonal enforcement might be such a step.

This is, of course, not a comprehensive accounting of the political effects of diagonal enforcement, but these dynamics are important to any accounting of this practice. For example, it is possible that encouraging legislatures to act would result in hasty outputs or reduce experimentation. I mention these possible effects for future study, though I am not convinced.

256. *See* Gerken & Holtzblatt, *supra* note 14, at 100-04 ("The main problem, in our view, is that the [sovereignty] model's factual underpinnings are too unstable to support the doctrinal edifice built upon them."); *see also* Gerken, *supra* note 14, at 391 (similar). For a friendlier account of the sovereignty objections, see Erbsen, *supra* note 14, at 499 n.9.

257. Gerken suggests that sovereignty reflects notions of state equality, self-rule, and territoriality. *See, e.g.*, Gerken, *supra* note 14, at 389-91. I use that framing here.

258. In *The Sapphire*, for instance, the Supreme Court remarked that denying a foreign sovereign access to U.S. courts "would manifest a want of comity and friendly feeling." 78 U.S. (11 Wall.) 164, 167 (1870); *see also* King of Prussia v. Kuepper's Adm'r, 22 Mo. 550, 556 (1856) ("[A] foreign sovereign may sue in this country, otherwise there would be a right without a remedy. He sues here on behalf of his subjects, and if foreign sovereigns were not allowed to do that, the refusal might be a cause of war." (quoting Hullet & Co. v. King of Spain (1828) 6 Eng. Rep. 488, 490; 1 Dow & Cl. 169, 175 (Eng.))).

259. This logic supported the early twentieth century move to allow states to vindicate public interests outside their courts. *See* Woolhandler & Collins, *supra* note 22, at 455-58, 467-68. One might worry, however, that diagonal enforcement actually disrespects foreign states by treating them as equivalent to private parties. Courts have adopted a similar frame in a number of international litigation settings, essentially choosing to abstain from international cases rather than risk offending foreign governments. *See* Clopton, *supra* note 177, at 8-11 (explaining but rejecting this logic).

settle.[260] Diagonal enforcement respects self-rule because it invites foreign governments to participate in ways consistent with their internal arrangements and priorities.[261] And diagonal enforcement connects with notions of territoriality,[262] inviting foreign governments to participate directly in what otherwise would be "extraterritorial" cases.

Unlike Gerken's horizontal federalism, though, diagonal enforcement also must contend with objections rooted in the separation of powers. Again, a defining feature of diagonal enforcement is that it disaggregates government institutions. Because diagonal enforcement allows an executive to file an enforcement suit even when its home legislature and judiciary would not have authorized it, it seemingly allows authorizing legislatures to counteract the enforcing state's regulatory decisions. More aggressively, the decision by one government to invite foreign diagonal enforcement disempowers foreign legislatures and courts, and in this way it may disrespect state sovereignty.[263] Consider Figure 3 below, which contains the same process as in Figure 1, except that the skipped-over branches have been grayed out.[264]

260. *See generally* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 682 (2014) (describing the role of enforcement discretion and its importance). Whether those states make their executive actors subject to democratic control depends on their own laws. Those are choices for each and every coequal sovereign.

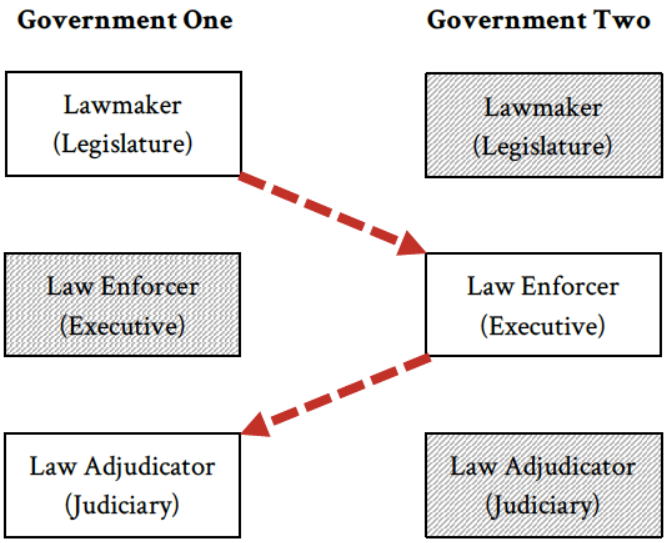
261. Foreign governments might also be able to use diagonal enforcement to achieve domestic ends not possible at home. For example, consider cases in which putative defendants consciously evade state jurisdiction. In these cases, diagonal enforcement empowers self-rule.

262. I use "territoriality" to refer to a general notion of territorial boundaries rather than any particular doctrinal version of territorial limits on the reach of a state's laws or enforcement powers. *Cf., e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) (discussing the presumption against extraterritoriality for federal statutes); Edgar v. MITE Corp., 457 U.S. 624, 640-43 (1982) (discussing the so-called dormant Commerce Clause—that is, the notion that the Commerce Clause, U.S. CONST. art. I, § 8, cl.3, forbids the states from directly regulating interstate commerce).

263. One might make a related objection to common law criminal prosecutions: that they allow the prosecutor, or the executive branch more broadly, to sidestep the legislature. And, indeed, common law crimes are disfavored in U.S. law. *See, e.g.*, United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33 (1812).

264. Note that the executive in the lawmaking state is not disempowered, but its monopoly on law enforcement is broken.

Figure 3



This is an important critique—and, indeed, it should give one pause about diagonal enforcement among coequal sovereigns. At least in this form, however, I think this critique is overstated. The legislative authorization of diagonal enforcement is a paper tiger unless the foreign government empowers its executives to use it.[265] It is ultimately a foreign legislature's choice whether its executive may sue, though diagonal enforcement statutes flip the burdens by compelling the foreign legislature to affirmatively take away an executive's enforcement authority. This still may be an intrusion, but it is less intrusive than a typical extraterritorial statute for which the foreign government has no recourse.[266] It is more of a nudge than an order.[267]

265. *See, e.g.*, Samantar v. Yousuf, 560 U.S. 305, 316 n.9 (2010) (noting for purposes of the FSIA that the capacity of foreign governmental entities to "sue or be sued" is a question of foreign law (quoting H.R. REP. NO. 94-1487, at 15 (1976))); Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 56-57 (1890) ("[T]he legislature is the *parens patriae* . . . ."); Ieyoub & Eisenberg, *supra* note 43, at 1882 ("Legal limits on [state] *parens patriae* are foremost a question of state law.").

266. When Congress creates a cause of action that expressly applies to conduct outside the United States, private parties may bring suit without the involvement or permission of the foreign government in whose territory the conduct took place.

267. *Cf.* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 5-8 (2008) (describing the logic and application of "nudges" to improve decisionmaking).

Indeed, although European governments routinely object to the extraterritorial application of U.S. law,[268] the same governments relied on extraterritorial RICO to sue U.S. tobacco companies for European harms.[269] Similarly, any objection from my hypothetical Iowa legislature should be weaker given that it has the power to cut off diagonal enforcement at the source.

In sum, diagonal enforcement can stimulate activity among and within governments, and it can do so while respecting sovereignty and relying on each state's existing interbranch arrangements.

C. Individual and Group Interests

Diagonal enforcement may also have normatively relevant consequences for individuals and groups.

First, potential defendants probably fare worse when diagonal enforcement is introduced. Potential defendants benefit from underenforcement, so any redundant enforcement regime should chip away at that benefit. But this is just another way of saying that enforcement may become more effective—so to the extent the goal of the intervention is to reduce misconduct, this would be a salutary change.

Potentially more concerning is that increased enforcement also increases the number of false positives, meaning that some defendants could be targeted erroneously.[270] Enforcement is never perfect, and so it seems likely that increasing enforcement also increases the absolute number of erroneous suits.[271] That said, it is conceivable that diagonal enforcement is a relatively gentle form of redundant enforcement, as any diagonal suit comes with the

268. *See* BORN & RUTLEDGE, *supra* note 55, at 971-72 (collecting examples).

269. *See* RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2098 (2016); *see also supra* notes 45-62 and accompanying text (discussing the *RJR Nabisco* litigation). Bookman suggests that the European Community's positions were consistent because *RJR Nabisco* involved U.S.-citizen defendants while other cases in which foreign sovereigns objected to the extraterritorial application of U.S. law involved foreign-citizen defendants. *See* Pamela K. Bookman, *Doubling Down on Litigation Isolationism*, 110 AM. J. INT'L L. UNBOUND 57, 60 (2016). While this may be true of the suit that reached the Supreme Court, it does not explain the European Community's decision to rely on U.S. courts and U.S. law to make similar claims against Japan Tobacco, Inc. (a Japanese citizen), Premier Brands, Ltd. (a Canadian citizen), or JT International S.A. (a Swiss citizen). *See* Complaint at 2, 10, Eur. Cmty. v. Japan Tobacco, Inc., 186 F. Supp. 2d 231 (E.D.N.Y. 2002) (No. 1:02-cv-00164-NGG-VVP).

270. For a discussion of the way jurisdictional overlaps in the terrorism context heighten the potential for false positives, see Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415, 1464-66 (2012).

271. I use "erroneous" to refer to suits in which the defendant did not in fact engage in the alleged wrongful conduct. For a discussion of the various definitions of "meritorious" suits, see Engstrom, *supra* note 24, at 665.

imprimatur of public actors from at least two jurisdictions. And, of course, defendants in these diagonal cases presumably receive the same procedural protections as do other defendants in the same courts.[272]

Perhaps more interesting are the effects of diagonal enforcement for individuals purportedly represented by foreign executives.[273] For many of the enforcement suits described in this Article, class actions are the only viable private options because individual suits would not be cost effective.[274] While the introduction of government representation may seem like an improvement over oft-criticized class actions,[275] the question is more complex. In the U.S. context, Margaret Lemos explored the due process protections for individuals in government suits as compared to class actions, and her appraisal is decidedly mixed.[276] Exit and voice options,[277] for example, are often weak or nonexistent in government litigation.[278] Similarly, although government actors may provide individual compensation in some cases, it is unclear whether they outperform private class actions.[279]

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272. None of the cases mentioned in Parts I and II above suggested that foreign governments should be treated *better* than other plaintiffs.

273. Representative litigation raises issues of adequate representation. *See generally* Hansberry v. Lee, 311 U.S. 32, 41-43 (1940) (discussing due process requirements for state class actions); MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 13, 46-47 (2009) (discussing the same for class actions generally); Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 672-73 (2014) (connecting notions of adequacy to cohesion in class actions); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 399-406 (2000) (connecting notions of adequate representation to economic incentives); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 353-58 (connecting notions of adequacy to loyalty and legitimacy of the agent). Note that the representation at issue here could arise from formal parens patriae standing or from the political conception of representative government.

274. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 8-9, 9 n.8 (1991).

275. *See* Clopton, *supra* note 174, at 443-50 (discussing this substitution).

276. *See* Lemos, *supra* note 43, at 499-510.

277. *Cf.* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 21-23, 32-34 (1970); Coffee, *supra* note 273, at 376-77, 376 n.17 (translating the exit, voice, and loyalty framework to class actions).

278. *See* Lemos, *supra* note 43, at 499-501.

279. *Cf.* Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 394-95 (2015) (describing and evaluating the compensation program of the U.S. Securities and Exchange Commission (SEC)); Adam Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 530-32, 534-35, 537-38 (2011) (describing and evaluating the compensation programs of the SEC, the Federal Trade Commission, and the U.S. Food and Drug Administration).

More theoretically, for private enforcement, we use civil procedure (and markets) to ensure that parties are adequately represented. For public enforcement, adequacy is shifted toward the political process, relying more on the methods of selecting public officials and the institutional context in which those officials operate.[280] The choice between civil procedure and politics is itself a political question and thus returns us to the internal political arrangements of the relevant actors.[281] But it is fair to say, I think, that diagonal enforcement is not necessarily better or worse at representing noncitizens than the private alternatives currently available to them.[282]

Turning to a slightly different vantage, diagonal enforcement may have salutary effects for equality among potentially represented parties.[283] Imagine that California allows for private enforcement of state law by citizens and noncitizens but permits public enforcement only by the state attorney general.[284] As long as public and private enforcement are not identical (for legal or practical reasons), there will be cases for which citizens may be covered by a public action (or its deterrent effects), while noncitizens will be left unprotected because their government cannot sue on their behalf.[285] This might be especially important if public enforcement takes on a more significant role because of the recent retrenchment of private enforcement.[286] At a minimum, therefore, diagonal enforcement can equalize treatment for citizens and noncitizens when representational suits matter.[287]

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280. *See, e.g.*, Lemos, *supra* note 43, at 489 & n.7.

281. *See supra* note 261 and accompanying text.

282. There is another version of this inquiry that asks whether, by granting foreign sovereigns the ability to enforce domestic law, the lawmaking jurisdiction is conferring (undeserved) legitimacy on them. This is an important question for international law and international relations, but it is beyond the scope of this Article.

283. It is also possible that diagonal enforcement equalizes treatment among potential defendants to the extent that it reduces systematic biases—for example, against foreign defendants. So while diagonal enforcement increases overall risks to potential defendants, the result might be a leveler playing field (at a less desirable level).

284. Some courts have interpreted California antitrust law this way. *See, e.g.*, AT&T Mobility LLC v. AU Optronics Corp., 707 F.3d 1106, 1112-13 (9th Cir. 2013).

285. I would expect that differences in treatment would favor citizens (voters). But even if it were worse for citizens to have public options, that still would involve unequal treatment. *Cf.* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74 (1938) ("*Swift v. Tyson*[, 41 U.S. (16 Pet.) 1 (1842),] introduced grave discrimination by non-citizens *against citizens*." (emphasis added)).

286. *See generally* BURBANK & FARHANG, *supra* note 23 (articulating this role for states); Clopton, *supra* note 174 (connecting procedural retrenchment to state enforcement).

287. This would be a form of national treatment, which is common in international treaty law. *See, e.g.*, General Agreement on Tariffs and Trade art. III, ¶¶ 1-2, Oct. 30, 1947, 61 Stat. A3, A18, 55 U.N.T.S. 187, 204-06 (equalizing treatment of foreign and domestic products).

Finally, the introduction of diagonal enforcement complicates questions of majority versus minority interests. Public enforcers are presumably subject to political pressures. But private enforcement may vindicate minority interests where majoritarian public institutions elect not to sue.[288] For example, in a state in which 80% of the public opposes transgender rights, the elected attorney general may be less likely to file a civil rights suit on behalf of transgender citizens than a private attorney might be.[289]

Diagonal enforcement seemingly replicates this tyranny of the majority.[290] Diagonal cases must withstand political scrutiny in the enforcing state, and so diagonal enforcement could be worse for minority interests than private enforcement.[291] But minority interests probably do better under diagonal enforcement than they would if only single-state public enforcement were available. If domestic public enforcers decline to prosecute a case favored only by a minority of residents, public enforcers from other jurisdictions in which that position is held by a majority of voters could sue instead. In short, while diagonal enforcement is majoritarian, it empowers multiple (and conflicting) majorities rather than just one.[292]

The same set of observations would apply if we shifted the frame from majority-minority to political power. Diagonal enforcement seemingly privileges the powerful, but it privileges the powerful in multiple jurisdictions—which may result in multiple (and conflicting) preferences being pursued in public suits. For example, as noted above, it was low-emission states

288. Although the private enforcement literature does not usually talk in these terms, the mechanism is similar to the way private enforcement may respond to regulatory capture. *See* Clopton, *supra* note 12, at 316-17. *See generally* Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1382-83 (2013) (describing the role of regulatory capture in administrative law).

289. *Cf.* Brief for States of Washington et al. as Amici Curiae Supporting Petitioners at 1-2, Fulcher v. Sec'y of Veterans Affairs, No. 17-1460 (Fed. Cir. June 28, 2017) (asking the court to order the U.S. Department of Veterans Affairs to amend or repeal a rule preventing the use of veterans' medical benefits for sex reassignment surgery). In this way, references to the legislative or executive pursuit of the "public interest" might be fairly relabeled as the pursuit of *majority* interests.

290. *Cf.* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 115-16 (Richard D. Heffner ed., New Am. Library 1956) (1835) (noting the potential for majorities to trammel minority rights); LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 3-4 (1994) (same).

291. Woolhandler and Collins voiced a similar objection to expansive notions of state standing. *See* Woolhandler & Collins, *supra* note 22, at 485-87.

292. This, too, has a parallel to "living under someone else's law," in that minority interests from one state can find a majority in another state. *See* Gerken, *supra* note 14, at 395; Gerken & Holtzblatt, *supra* note 14, at 93-97. This may be especially valuable given recent polarization in U.S. migration patterns. *See, e.g.*, Gerken & Holtzblatt, *supra* note 14, at 88-89 (citing BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART (2008)).

that had the political will to file climate change suits against out-of-state emitters.[293] And it was the Government of Mexico that attempted to enforce a federal civil rights statute on behalf of Mexican nationals working in the United States.[294] Given comments made during the last presidential campaign, it would not be surprising to find that these interests will continue to be represented diagonally by states and foreign governments.[295]

Conclusion

Some of the stories leading to diagonal enforcement sound praiseworthy: A legislature interested in increasing deterrence, protecting the public interest, and promoting international cooperation might authorize foreign executives interested in the same. Others sound pernicious: A legislature interested in capturing global regulation might authorize foreign executives to end-run their domestic institutions and pursue their private interests.

To put it another way, diagonal enforcement is not necessarily good or bad, and it is not necessarily the product of public choice or the public interest. Instead, first and foremost, diagonal enforcement depends on the substantive law it applies and the institutional protections that surround its application.

On its own terms, this unusual policy instrument has some capacity for unexpected benefits. In particular, in addition to gains for enforcement efficacy and efficiency, diagonal enforcement has the capacity to stimulate gridlocked institutions and protect some individual and minority interests.

Finally, diagonal enforcement might serve as a reminder of diagonal relationships more generally. Executives have long understood the benefits of working horizontally with executives from other sovereigns. Legislators, regulators, and judges are learning the same lesson. This Article suggests that diagonal relationships could also matter and that government actors should consider a wider range of relationships as they face global challenges in the twenty-first century.[296]

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293. *See supra* notes 122-24 and accompanying text.

294. *See supra* text accompanying note 93.

295. *See e.g.*, Janell Ross, *From Mexican Rapists to Bad Hombres, the Trump Campaign in Two Moments*, WASH. POST (Oct. 20, 2016), https://perma.cc/6DC6-Q9NF; *supra* notes 233-36 and accompanying text.

296. *See, e.g.*, Alexander Burns, *Going Around Trump, Governors Embark on Their Own Diplomatic Missions*, N.Y. TIMES (July 15, 2017), https://perma.cc/DB25-YXVN; Max Fisher, *Canada's Trump Strategy: Go Around Him*, N.Y. TIMES: INTERPRETER (June 22, 2017), https://perma.cc/CU7Z-44BK; Michael D. Shear, *Trump Will Withdraw U.S. from Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), https://perma.cc/RAP5-RPSL.