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Litigation Isolationism

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LITIGATION ISOLATIONISM

Pamela K. Bookman*

Over the past two decades, U.S. courts have pursued a studied avoidance of transnational litigation. The resulting litigation isolationism appears to be driven by courts' desire to promote separation of powers, international comity, and the interests of defendants. This Article demonstrates, however, that this new kind of "avoidance" in fact frequently undermines not only these values but also other significant U.S. interests by continuing to interfere with foreign relations and driving plaintiffs to sue in foreign courts.

This Article offers four contributions: First, it focuses the conversation about transnational litigation on those doctrines designed to avoid it—that is, doctrines that permit or require courts to dismiss a case based on its "foreignness." Doing so helps to identify the particular concerns justifying this kind of avoidance and to evaluate them on their own terms. Second, the Article presents evidence of emerging foreign trends that increasingly (and surprisingly) permit traditionally American, plaintiff-friendly procedures, including higher damages awards, aggregate litigation, and third-party litigation financing. Third, the Article demonstrates that, particularly in light of these foreign trends, avoidance has failed to achieve its stated goals, and in many instances has undermined them. Finally, the Article suggests ways to refine avoidance doctrines to address these unintended consequences. Its more basic and urgent task, however, is to identify the growing phenomenon of litigation isolationism, highlight its perversities, and caution against its further expansion.

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INTRODUCTION

In the 1990s, thousands of banana workers sued Dow Chemical Company in courts throughout the United States over alleged exposure to DBCP, a Dow-manufactured pesticide claimed to cause sterility.[1] Dow fought for years to have the cases dismissed on forum non conveniens grounds, arguing that the workers' home countries' courts would be the more natural forum for these suits.[2] It did so likely assuming that once dismissed from U.S. court, the cases would effectively be over, because the plaintiffs' home courts held no promise

1. *See generally* Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1335-40 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000); Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 489-90 (2011). Dow and Shell Oil Company manufactured DBCP, and either or both were named as defendants in the litigations. *See, e.g.*, Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1216 (11th Cir. 1985).

2. *See* Winston Anderson, *Forum Non Conveniens Checkmated?—The Emergence of Retaliatory Legislation*, 10 J. TRANSNAT'L L. & POL'Y 183, 191 (2001).

of damages awards sufficient to make it worthwhile to continue litigating.[3] But after a series of forum non conveniens dismissals, Nicaragua enacted a special law to enable its nationals to obtain U.S.-style relief for DBCP injuries (requiring, for example, a minimum damages award of $125,000 based on minimal evidentiary showings).[4] Nicaraguan courts issued over $2 billion in judgments.[5]

Back in U.S. court, Dow appeared to have "forum shopper's remorse" over having requested dismissal.[6] It sued groups of Nicaraguan plaintiffs, seeking a declaratory judgment that it was not liable for their injuries and that the Nicaraguan judgments were unenforceable.[7] These attempts failed for lack of personal jurisdiction over the Nicaraguan "plaintiffs" (now the defendants in the declaratory judgment action).[8] When Nicaraguan plaintiffs later sued Dow to enforce a similar Nicaraguan judgment in Florida, that court made the highly unusual move of refusing to enforce the judgment because (among other things) it was "rendered under a system which does not provide . . . procedures compatible with the requirements of due process."[9] Had the foreign procedures had some bare hallmarks of legitimacy, however, U.S. courts likely would have rubber-stamped the foreign judgments. U.S. states have relatively permissive regimes for enforcing foreign money judgments.[10]

The DBCP case is just one of many examples of the transnational cases that abound in U.S. courts.[11] Transnational suits—cases involving foreign par-

3. *See* Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT'L L. 157, 161 (2012) ("A successful forum non conveniens motion means that the case will not be heard in the United States and may not be heard elsewhere."). This conventional wisdom is often traced back to a 1987 study substantiating these assumptions. *See* David W. Robertson, Forum Non Conveniens *in America and England: "A Rather Fantastic Fiction,"* 103 LAW Q. REV. 398, 417-21 (1987).

4. *See* Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1337 (S.D. Fla. 2009), *aff'd sub nom.* Osorio v. Dow Chem. Co., 635 F.3d 1227 (11th Cir. 2011).

5. *Id.* at 1312-13.

6. *See* Michael D. Goldhaber, *Forum Shopper's Remorse*, CORP. COUNS., Apr. 2010, at 63.

7. Dow Chem. Co. v. Calderon, 422 F.3d 827, 829 (9th Cir. 2005).

8. *Id.* at 836.

9. *Osorio*, 665 F. Supp. 2d at 1352 (quoting FLA. STAT. § 55.605(1)(a)) (internal quotation mark omitted).

10. *See* Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L. 327, 352 (2004); Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1470 (2011).

11. *See generally* Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709 (2012). This Article focuses primarily on transnational litigation arising out of noncontractual relationships—for example, when U.S. parties are injured by a foreign-manufactured product. Contractual relationships often involve both parties' consent to a particular forum. U.S. courts' studied avoidance of transnational litigation outside the contractual context seems to contrast with their steady encouragement of the use of arbitration and forum selection clauses. *See* BG Grp. v. Republic of Argentina, 134 S. Ct. 1198, 1203-04 (2014) (recognizing more authority for ar-

ties, foreign conduct, foreign law, or foreign effects—and the law that governs them have growing significance in the United States and around the world.[12] There are countless other examples. Plaintiffs sue U.S. manufacturers alleging that their airplanes crashed overseas due to propellers malfunctioning.[13] They sue alleging that foreign-owned companies plotted securities fraud in the United States.[14] They sue alleging that foreign firms exported dangerous products to the United States that caused injury there.[15] Perhaps most controversially, they sue alleging that corporations aided and abetted human rights violations in foreign countries.[16]

In such cases, defendants, like Dow, whether they are foreign or domestic, typically rely on a set of defenses that I call "transnational litigation avoidance doctrines,"[17] or "avoidance doctrines" for short. These defenses—most prominently, lack of personal jurisdiction, forum non conveniens, "abstention comity" (the power to abstain based on international comity concerns), and the presumption against extraterritoriality—permit or require a court to dismiss a case because it is too "foreign."[18]

Over the past few decades, American courts have become increasingly responsive to requests like these, expanding the salience of avoidance doctrines. These doctrines represent a hodgepodge of approaches to the decision of whether to entertain transnational litigation, addressing prescriptive jurisdic-

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bitrators); Atl. Marine Constr. Co. v. U.S. Dist. Court, 134 S. Ct. 568, 582 (2013) ("[F]orum-selection clauses should control except in unusual cases."). The relationship between these two trends is worthy of further analysis but outside the scope of this Article.

12. *See, e.g.*, Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT'L L. REV. 745, 747 (2006); Austen Parrish, *Duplicative Foreign Litigation*, 78 GEO. WASH. L. REV. 237, 238-39 (2010).

13. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 238-39 (1981).

14. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 252 (2010).

15. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2786 (2011) (plurality opinion).

16. *See* Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1662 (2013).

17. *See* Pamela K. Bookman, *Once and Future U.S. Litigation*, *in* FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 35, 36-37 (Paul B. Stephan ed., 2014) (describing forum non conveniens, forum selection clauses, comity, personal jurisdiction, and the political question doctrine as "transnational litigation avoidance doctrines"); *cf.* George A. Bermann, *Parallel Jurisdiction: Is Convergence Possible?*, 13 Y.B. PRIV. INT'L L. 21, 23-28 (2011) (discussing "[i]nstruments of [s]elf-[r]estraint"); Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2289 (1991) (discussing doctrines that could be included in this category, such as the act of state doctrine, standing, and the limited enforcement of non-self-executing treaties).

18. At some level, these avoidance doctrines all speak to the nexus between the United States, the parties, and a given suit. Personal jurisdiction doctrine requires a sufficient nexus between "the defendant, the forum, and the litigation." *Nicastro*, 131 S. Ct. at 2798 (Ginsburg, J., dissenting) (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)) (internal quotation mark omitted). Forum non conveniens and abstention comity compare a litigation's nexus to the forum state with its nexus to other potentially interested nations. The presumption against extraterritoriality assumes that where conduct occurred abroad, that nexus is insufficient without a clear indication from Congress that it intended to regulate that conduct.

tion,[19] adjudicative jurisdiction,[20] and discretionary bases. But they all have a common effect: the dismissal of a case at least in part because of its "foreignness." And careful analysis of the cases reveals that they all purport to serve a common set of goals: promoting separation of powers and international comity (by keeping the courts away from disputes involving delicate foreign affairs issues), and protecting the interests of defendants (by sparing them the burdens of transnational litigation in U.S. courts).[21] I call this combination of common stated goals and effects "litigation isolationism."[22]

Some scholars have begun to take note of the Supreme Court's transnational litigation avoidance decisions. David Noll, for example, argues that developments in avoidance doctrines and other areas of the law have created a new way in which U.S. courts manage regulatory conflict.[23] As Noll recognizes,[24] these developments can be explained as part of a larger trend of growing "hostility to litigation," which some scholars believe has driven many decisions by the Rehnquist and Roberts Courts,[25] but this is not the only explanation. As consequences of these and other developments, scholars have identified decreased burdens for foreign defendants in U.S. courts,[26] an emerging market for transnational law,[27] and an evolving forum shopping system in which U.S. courts are losing popularity.[28]

19. Prescriptive jurisdiction refers to a nation's power "to make its law applicable" to persons or things—for example, by legislation or court determination. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987).

20. Adjudicative jurisdiction refers to a nation's power "to subject persons or things to the process of its courts." *Id.*

21. To be sure, some of these doctrines also have other aims, such as judicial efficiency and fairness. But these goals animate the transnational litigation avoidance trend as a whole.

22. By other definitions, the United States exhibits the opposite of isolationism. Delphine Nougayrède characterizes judicial isolationism as being based on courts' nonrecognition of foreign judgments and negative attitude toward arbitration. *See* Delphine Nougayrède, *Outsourcing Law in Post-Soviet Russia*, 6 J. EURASIAN L. 383, 439-40 (2013) (arguing that Russia is judicially isolationist). By these measures, the United States is one of the most anti-isolationist legal systems in the world.

23. *See* David L. Noll, *The New Conflicts Law*, 2 STAN. J. COMPLEX LITIG. 41, 43 (2014).

24. *Id.* at 82, 83 & n.245.

25. *See, e.g.*, Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1108 (2006) (defining the term); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 368 (2010).

26. *See* Stephen B. Burbank, *International Civil Litigation in U.S. Courts: Becoming a Paper Tiger?*, 33 U. PA. J. INT'L L. 663 (2012) (focusing on developments in personal jurisdiction, class actions, and pleading standards).

27. *See* Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. (forthcoming May 2015).

28. *See* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 497-98 (2011) (focusing on developments in personal jurisdiction and choice of law).

But scholarship has thus far neglected to focus on those doctrines that target transnational litigation and their particular stated goals. Nor has it assessed whether the doctrines are even capable of achieving these goals either on their own terms or in the context of foreign courts' evolving attitudes toward transnational litigation.[29]

This Article evaluates these questions. It starts by placing transnational litigation avoidance doctrines in context—vis-à-vis both each other and the changing transnational litigation landscape abroad. Understanding this context is essential to ensuring that these doctrines work toward establishing a level of transnational litigation in U.S. courts that is consistent not only with separation of powers and international comity, but also with U.S. sovereign interests, fairness, and efficiency (if not "convenience") for all parties.

The Article then seeks to fill these gaps in courts' and scholars' understandings of the role of avoidance doctrines in transnational litigation. It evaluates the success of avoidance on the doctrines' own terms and concludes that avoidance either fails to serve or positively undermines the values that the doctrines purport to advance. It concludes that the doctrines tend to be overbroad. In seeking to exclude cases that are "too foreign," courts end up dismissing cases that are in fact quite domestic. When a case involves American parties or events on U.S. territory, the United States is likely to have a strong interest in having that case proceed in U.S. court and in applying its procedures, and the public policies behind them, to the suit.[30] By excluding those cases along with others that lack almost any domestic contacts, courts are forgoing their ability to apply those procedures to such cases.

This Article proceeds in four parts. Part I describes the four avoidance doctrines highlighted here and their common effects and stated goals. It traces the history of the American view of what kind of nexus is required to permit a case to proceed in U.S. courts from its origins in territoriality to the incorporation of international law concepts of reasonableness and, in recent years, a partial return to territoriality. This Part demonstrates that, in the name of preserving separation of powers, international comity, and defendants' convenience, courts have developed broad rules that exclude substantial amounts of litigation that the United States has a sovereign interest in keeping in U.S. courts.

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29. In a forthcoming article, Donald Childress focuses on developments in extraterritoriality, personal jurisdiction, pleading standards, class action rules, and forum non conveniens, recommending increased regulatory cooperation as a solution to issues related to transnational forum shopping. *See* Childress, *supra* note 27. This Article, by contrast, explores in greater depth those doctrines that have evolved in the transnational context and identifies their common motivations as they relate to transnational challenges. It evaluates the success of those goals on their own terms, and considers prescriptions directed at courts, assuming that the regulatory cooperation that Childress envisions, while perhaps preferable in an ideal world, is an unrealistic option in the near future.

30. This is separate from the choice-of-law question that, in some states, evaluates which state has the strongest interest in having its substantive law apply. *See* SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS 42-44 (2014); *infra* note 279.

Part II places these developments in a global context. It describes foreign courts' growing attractiveness to transnational litigants. Political scientists and legal academics have begun to document the rise of American-style litigation features in many foreign countries, especially in Europe and Canada. These features include, most prominently, higher damages awards, aggregate litigation, and alternative litigation funding. This Part brings together insights from political science and legal scholarship with analysis of trends in foreign substantive law and prescriptive jurisdiction rules. It shows that foreign courts are growing more attractive as a forum not just for civil litigation in general, but also for transnational litigation in particular. The resulting legal landscape is one in which plaintiffs have increasingly diverse options for bringing suits. The rise of American litigation isolationism, therefore, encourages plaintiffs not only to sue abroad once a case is dismissed from a U.S. court, but also to sue abroad *instead* of suing in a U.S. court, or at the same time in a parallel litigation.

Part III analyzes whether avoidance doctrines have achieved their stated goals of protecting separation of powers, international comity, and the interests of defendants. It concludes that, particularly in light of the foreign developments described in Part II, avoidance falls short on all of these counts. Instead, the doctrines undermine both these values and other important U.S. sovereign interests. First, judicially driven avoidance developments are ill equipped to address the separation of powers and international comity concerns motivating avoidance because those concerns are largely a consequence of federal courts, rather than the political branches, deciding what transnational litigation will find a home in U.S. courts. So long as federal courts continue to make avoidance decisions, some separation of powers concerns will persist. And so long as they make them without appreciation for the international context, international comity concerns will also persist.

Second, the assumption that avoidance will protect defendants from the inconvenience of transnational litigation is similarly misplaced in light of emerging trends in foreign courts. The increasingly competitive market for transnational litigation reflected in these trends suggests that defendant "convenience" (as opposed to defendant fairness or judicial efficiency) is an unrealistic goal. Now more than ever, most plaintiff forum shopping should be understood as a strategic choice rather than a plot to vex and harass. This is particularly true when suing a defendant in its home forum, which has indicia of convenience and fairness for the defendant. Avoidance doctrines nevertheless dismiss transnational suits, even against U.S. defendants, in the name of defendant convenience. As a result, avoidance drives plaintiffs to bring transnational suits abroad not only after dismissal, but also in the first instance or in parallel with U.S. litigation, subjecting defendants to foreign courts, where they may fare no better than in U.S. courts and where they may face other challenges.

Avoidance also has serious consequences for U.S. sovereign interests. For example, avoidance fosters suits in U.S. courts to enforce foreign judgments. Because of the fairly lax American regime for enforcing foreign money judg-

ments, U.S. courts are likely to enforce these judgments even if a U.S. court hearing the case would have evaluated it differently or applied a different substantive law. Likewise, avoidance doctrines practically encourage courts to dismiss transnational cases even if they involve American parties or events or harms that occurred in the United States. As a result, courts forgo the opportunity to apply American procedures, choice-of-law rules, and sometimes even substantive law to such cases.

Finally, Part IV proposes substantive doctrinal shifts to address these unintended consequences. It suggests that the stated goals of avoidance, as well as other U.S. sovereign interests, would be better served if courts recognized not only a ceiling on domestic courts providing a forum for suits that have insufficient domestic contacts, but also a presumptive floor of providing a forum for suits that have a baseline level of contacts, relying on the internationally accepted concepts of territoriality and personality (i.e., nationality or domicile). The best way to implement this idea would be through federal legislation informed by international cooperation or treaty. But such efforts in this area have foundered, and so, in their absence, this Part addresses how courts should define and exercise their discretion.

Part IV approves of the Supreme Court's recent innovations in general personal jurisdiction. But it suggests broadening specific personal jurisdiction. It advocates reversing the premises inherent in today's forum non conveniens doctrine to create a presumption in favor of exercising jurisdiction over U.S. defendants. It also recommends refining abstention comity to reflect a modified *lis pendens* approach, usually favoring the first-filed suit where there is parallel duplicative litigation, but maintaining some discretion with the court to retain later-filed cases. With respect to extraterritoriality, it considers adopting one of two possible replacements for that canon that might better address avoidance's stated goals: a presumption that federal statutes regulate U.S. nationals, even when they are abroad, or a presumption that federal statutes do not violate international law.

I. TRANSNATIONAL LITIGATION IN U.S. COURTS

Several scholars have noted that the Supreme Court has exhibited a general hostility to litigation over the past few decades.[31] Whether as a byproduct of this sentiment or a consequence of a related but separate hostility to suits seen as having insufficient contacts with the United States,[32] courts have been pushing away *transnational* litigation in particular. But scholarly accounts thus far have failed to focus on the doctrines that specifically exclude transnational litigation or to judge their success on their own metrics in light of how they interact with each other and with global trends.[33] This Part addresses the first step in

31. *See supra* note 25.
32. *See, e.g.*, Burbank, *supra* note 26, at 664.
33. *See supra* notes 23-28 and accompanying text.

meeting that challenge: explaining the history of transnational litigation avoidance doctrines and the motivating forces behind their recent and growing influence.

Four doctrines exemplify U.S. courts' avoidance of transnational litigation: personal jurisdiction, forum non conveniens, abstention comity, and the presumption against extraterritoriality.[34] The doctrines address different aspects of a court's power to hear a case: personal jurisdiction considers a court's adjudicative power over the defendant; forum non conveniens and abstention comity afford courts a discretionary basis for declining to exercise jurisdiction; and extraterritoriality goes to the scope of a statutory cause of action, or, in international law terms, the legislature's power to regulate (i.e., prescriptive jurisdiction). These doctrines are disparate as a matter of judicial institutionalism: the personal jurisdiction limitations have developed as a form of constitutional interpretation directed primarily by the Supreme Court; forum non conveniens and abstention comity are discretionary, nonstatutory doctrines developed mostly by trial courts; and the anti-extraterritoriality presumption is a canon of statutory interpretation developed by the Supreme Court, often over the protests of lower courts.[35]

But each provides a mechanism for deciding a case—for the defendant—based on the dispute's "foreignness." Considered together, especially in their modern incarnations, avoidance doctrines create powerful tools for courts to avoid adjudicating transnational disputes. In many cases, they are interchangeable means of achieving this end; in others, they provide backstops for each other when one does not apply, making dismissal of transnational suits all the more likely.[36]

The doctrines are united not only in effect, but also by the values that courts say motivate them. In the decisions advancing avoidance, courts speak of preserving separation of powers, ensuring international comity, and preventing inconvenience for defendants. This Article takes courts at their word when they articulate these primary goals. It does so not only because the courts' expressed goals are good indications of their actual goals, but also because, even if the courts have other agendas, it is worthwhile to evaluate whether avoidance

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34. Some other doctrines that can be described as avoidance doctrines, such as the political question doctrine or the act of state doctrine, have not been gaining strength in recent years or are not motivated by all three of the same stated ambitions. *See, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1131 & n.122 (2013) (noting recent narrowing of the political question doctrine); John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. REV. 1973, 2001 n.110 (2010) (noting that the Court has construed the act of state doctrine narrowly).

35. Thanks to Paul Stephan for highlighting these distinctions.

36. *See, e.g.*, Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1674 (2013) (Breyer, J., concurring in the judgment) (noting that forum non conveniens and comity provide grounds for dismissing Alien Tort Statute suits); Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 427 (2007) ("Sinochem moved to dismiss the suit on . . . lack of personal jurisdiction, *forum non conveniens*, and international comity [grounds].").

has achieved or can achieve even courts' stated aims. Part III will show that litigation isolationism, the result of these avoidance developments, has failed to accomplish these ambitions, and that, in the process, it has also undermined important U.S. sovereign interests.

A. *The Growth of Transnational Litigation Avoidance*

In the late nineteenth century, principles of territoriality—the idea that sovereign power was confined by its territorial limits—governed courts' authority to hear cases and legislatures' authority to regulate.[37] By the mid-twentieth century, however, both domestic and international law recognized that this concept was outdated and ineffective.[38] It was replaced by a reasonableness standard that evaluated the factors connecting the case and the parties to the court, as well as conflicts among sovereign interests.[39]

This occurred with respect to both adjudicative and prescriptive jurisdiction.[40] Because of the broad American conceptions of this inquiry[41] and other distinctive features of the American legal system, U.S. courts became plaintiffs' first choice for bringing transnational litigation.[42] There were several reasons for this preference. U.S. courts offered the promise of large damages awards, including the possibility of punitive damages.[43] On the merits, U.S. law was thought to offer greater chances for recovery.[44] And U.S. choice-of-law rules were thought to favor U.S. laws, even for torts occurring overseas, which made plaintiff-friendly American substantive provisions more likely to apply.[45] Plaintiffs also favored U.S. courts because they entertained opt-out

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37. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909).

38. *See, e.g.*, Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 21-59 (1992).

39. *Id.* at 33-34.

40. *See infra* notes 51-54 and accompanying text (adjudicative jurisdiction); *infra* note 103 and accompanying text (prescriptive jurisdiction); *see also* Walter W. Heiser, *Toward Reasonable Limitations on the Exercise of General Jurisdiction*, 41 SAN DIEGO L. REV. 1035, 1055 (2004) (arguing that the forum non conveniens analysis is, "to a large extent, the same" as a due process reasonableness analysis).

41. *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945).

42. Lord Denning famously remarked, "As a moth is drawn to the light, so is a litigant drawn to the United States." Smith Kline & French Labs. Ltd. v. Bloch, [1983] 1 W.L.R. 730 (A.C.) at 733 (Eng.).

43. *See, e.g.*, Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 149 (2006); Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 323 (1994).

44. *See, e.g.*, Alan O. Sykes, *Transnational Forum Shopping as a Trade and Investment Issue*, 37 J. LEGAL STUD. 339, 341-42 (2008).

45. *See* Whytock, *supra* note 28, at 490-91. For the purposes of this Article, I hold constant certain conventional wisdom about choice-of-law rules, including that some U.S. states, at least some of the time, favor forum law. *See* Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 732-33 (2009) (summarizing scholarship regarding pro-domestic-law bias and pro-domestic-party bias held by

class actions, required parties to pay their own legal fees, permitted contingency fees, allowed extensive pretrial discovery, and took a broad approach to personal jurisdiction and the extraterritorial reach of federal statutes.[46] Most foreign fora lacked most if not all of these (widely criticized) characteristics.[47]

In the past two decades, however, courts have been restricting the accessibility of transnational litigation to U.S. courts. Most relevant here, with respect to both adjudicative and prescriptive jurisdiction, courts have retreated back to territoriality. But they have done so in ways that are insensitive to issues of *personality* (i.e., nationality or residence) and the needs of American parties.

1. *Personal jurisdiction*

The evolution of personal jurisdiction is a tale of the journey away from territoriality and back again.[48]

In the late nineteenth century, personal jurisdiction required a defendant to be present within the forum.[49] By the mid-twentieth century, however, courts could exercise jurisdiction over out-of-state defendants so long as they had "minimum contacts" with the forum state.[50] In 1987, the Court added a "reasonableness" inquiry to the specific jurisdiction analysis in light of a case's "international context."[51] That step could be seen as adding to the analysis an element of international comity[52] (informed by international law) in cases with foreign defendants.[53]

In general jurisdiction cases, the inquiry in lower courts also often focused on reasonableness. Before 2011, many lower courts had determined the general jurisdiction question by considering first whether a defendant's contacts with a forum were sufficiently "continuous and systematic" to render it subject to the

judges and inherent in modern U.S. choice-of-law rules, but arguing that these biases are overblown and in fact not present in transnational cases). For an example of proposed changes to choice-of-law rules, including the possibility of federalizing choice-of-law questions in transnational cases, see Donald Earl Childress III, *When* Erie *Goes International*, 105 NW. U. L. REV. 1531, 1574-75 (2011). Such issues are beyond the scope of this Article.

46. *See, e.g.*, Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1184 (2005).

47. *See, e.g.*, Geoffrey P. Miller, *The Legal-Economic Analysis of Comparative Civil Procedure*, 45 AM. J. COMP. L. 905, 908 (1997); *see also* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 823 (1985) (noting criticisms of "the expense and complexity of [U.S.] modes of discovery and trial").

48. *Cf.* J.R.R. TOLKIEN, THE HOBBIT, OR THERE AND BACK AGAIN (1937). *See generally* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1065 (3d ed. 2001).

49. *See* Pennoyer v. Neff, 95 U.S. 714, 723 (1878).

50. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

51. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116 (1987).

52. *See* discussion *infra* Part I.A.3.

53. Linda J. Silberman, Goodyear *and* Nicastro*: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 594 (2012).

forum's jurisdiction, and then whether that assertion of jurisdiction would be "reasonable."[54] Under this analysis, a company like Starbucks, which has stores, and therefore contacts, in every state, could be sued anywhere in the country for conduct anywhere in the world. International opinion criticized contacts-based general jurisdiction as exorbitant.[55] In many foreign nations, only a defendant's home forum has general jurisdiction over the defendant.[56]

In two recent cases, *Goodyear Dunlop Tires Operations, S.A. v. Brown*[57] and *Daimler AG v. Bauman*,[58] the Court narrowed the general jurisdiction question to whether the corporate defendant is "at home" in the forum state.[59]

What does "at home" mean?[60] The Court suggested that a corporation's home has similar characteristics to its place of incorporation and principal place of business,[61] and that it will be difficult to establish general jurisdiction outside of these two places.[62] This likely reduces the possible states with general jurisdiction over Starbucks to one—Washington—where it is both incorporated and headquartered. The decision also seems to assume that American companies will be subject to personal jurisdiction somewhere in the United States.

The "at home" standard thus will exclude a significant amount of transnational litigation arising from foreign conduct by foreign defendants.[63] Companies that are neither incorporated nor headquartered in the United States likely

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54. *See, e.g.*, Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 920 (9th Cir. 2011), *rev'd sub nom.* Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014); Heiser, *supra* note 40, at 1042 & n.26 (collecting lower court cases including reasonableness in the general jurisdiction analysis).

55. *See* Heiser, *supra* note 40, at 1036-38.

56. Ronald A. Brand, *Access-to-Justice Analysis on a Due Process Platform*, 112 COLUM. L. REV. SIDEBAR 76, 78 (2012), http://columbialawreview.org/wp-content/uploads/2012/04/76_Brand.pdf.

57. 131 S. Ct. 2846 (2011).

58. 134 S. Ct. 746.

59. *Goodyear*, 131 S. Ct. at 2851; *Daimler*, 134 S. Ct. at 751.

60. Alan Trammell has argued that the Court's definition of "at home" likely does not go beyond a corporation's principal place of business or place of incorporation. *See* Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 516 (2015). This definition makes the concept similar to other countries' conception of "domicile." *See* Council Regulation 44/2001, art. 60(1), 2001 O.J. (L 12) 1, 13 (EC) (defining domicile as the place where a legal entity has its "(a) statutory seat, or (b) central administration, or (c) principal place of business").

61. *Daimler*, 134 S. Ct. at 760.

62. *See id.* at 760-61; *see also* Trammell, *supra* note 60, at 21. *But cf. Daimler*, 134 S. Ct. at 761 n.19 (suggesting that a corporation could be at home in some third place "in an exceptional case").

63. *See, e.g.*, Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 136 (2d Cir. 2014); Sonera Holding B.V. v. Çukurova Holding A.Ş., 750 F.3d 221, 223 (2d Cir. 2014) (per curiam); Simon v. Republic of Hungary, No. 10-1770 (BAH), 2014 WL 1873411, at *32 (D.D.C. May 9, 2014); Alkanani v. Aegis Def. Servs., LLC, 976 F. Supp. 2d 13, 35 (D.D.C. 2014). *But cf.* Barriere v. Juluca, No. 12-23510-CIV, 2014 WL 652831, at *8 (S.D. Fla. Feb. 19, 2014) (finding general jurisdiction over an out-of-state defendant).

can no longer be subject to general jurisdiction in this country, no matter what contacts they have with a particular state.

Specific jurisdiction may still be available in cases arising out of the defendant's contacts with a given state. But a recent decision suggests that specific jurisdiction may not be able to fill the gaps left by the transformation of general jurisdiction.[64] In *J. McIntyre Machinery, Ltd. v. Nicastro*, the Court held that a New Jersey court lacked specific jurisdiction over a U.K. manufacturer whose shearing machine had mangled the hand of a New Jersey resident at work in New Jersey. The Court reasoned that the manufacturer did not "manifest an intention to submit to" New Jersey's power, even if it did target the U.S. market as a whole.[65] This result has been widely criticized for denying U.S. plaintiffs the ability to sue foreign defendants in U.S. courts over injuries in the United States,[66] and for encouraging foreign companies to avoid jurisdiction by structuring their business so as not to target individual states.[67]

In one sense, *Nicastro* seems to be an exception to the retreat to territoriality because it rejects jurisdiction even over a suit relating to harms felt in the United States. But in another sense, it is territoriality on steroids, fetishizing the concept of a purposeful contact with a specific sovereign (and its territory) such that even harm in a particular territory is insufficient to support jurisdiction without accompanying targeted contacts with that sovereign.[68]

Even if general jurisdiction is available in transnational suits against U.S. defendants and specific jurisdiction is available against foreigners, however, other avoidance doctrines, such as those discussed below, may nevertheless block the case from being heard in U.S. courts.

2. *Forum non conveniens*

As a matter of practice, forum non conveniens often excludes transnational cases involving foreign plaintiffs and foreign conduct from U.S. courts. This can afford U.S. defendants forum immunity in their home forum, creating tension with the principle that a defendant is subject to general jurisdiction where it is "at home."

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64. *See, e.g.*, Patrick J. Borchers, *One Step Forward and Two Back: Missed Opportunities in Refining the United States Minimum Contacts Test and the European Union Brussels I Regulation*, 31 ARIZ. J. INT'L & COMP. L. 1, 4 (2014) (suggesting that general jurisdiction had previously been a "partial antidote" to "gaps" in specific jurisdiction).

65. 131 S. Ct. 2780, 2788, 2790 (2011) (plurality opinion).

66. Federal Rule of Civil Procedure 4(k)(2) establishes personal jurisdiction in federal court for suits over which no state has personal jurisdiction, but that applies only to suits that "arise[] under federal law."

67. *See Nicastro*, 131 S. Ct. at 2794-95 (Ginsburg, J., dissenting); Arthur R. Miller, McIntyre *in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465, 475 (2012).

68. *See Nicastro*, 131 S. Ct. at 2789 (plurality opinion) ("[P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis. . . . Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.").

Forum non conveniens is a "federal common-law venue rule"[69] that today, in the federal courts, applies only in transnational cases.[70] Whereas personal jurisdiction has constitutional underpinnings, the forum non conveniens doctrine is based on the court's "inherent power."[71] The Supreme Court crystallized forum non conveniens in the mid-twentieth century,[72] just as courts were rejecting territoriality.[73] The doctrine articulates a multifactor balancing test for determining whether a court may decline to exercise jurisdiction if an alternative is available.[74] The inquiry considers a number of public interest factors, which focus on judicial resources, and private interest factors, which focus on defendant burdens.[75]

In the beginning, the Court emphasized that courts should "rarely" decline jurisdiction in these contexts.[76] But, although the formal doctrine of forum non conveniens in the transnational context has changed little since 1981, its application has morphed considerably. Over time, its use has snowballed into "the current most-suitable-forum version, under which the judge's belief, for virtually any reason, that trial elsewhere would be more appropriate justifies a forum non conveniens dismissal."[77] This is true even though technology and transportation advances have *reduced* the inconvenience of litigating in a distant forum.[78]

At several junctures, the Supreme Court has undermined the original presumption that forum non conveniens dismissals should be "rare." Most significantly, in *Piper Aircraft Co. v. Reyno*,[79] the Court added four important fea-

69. Am. Dredging Co. v. Miller, 510 U.S. 443, 453 (1994).

70. 28 U.S.C. § 1404 (2013), which authorizes transfers among federal district courts, has supplanted forum non conveniens in the domestic federal context. *See* Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1149 (2006).

71. *See* Lear, *supra* note 70, at 1207 (arguing that forum non conveniens is an unconstitutional use of this power); Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1100 (2010) (citing Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991)).

72. *See, e.g.*, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 502 (1947); Childress, *supra* note 3, at 165.

73. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

74. *See Gulf Oil*, 330 U.S. at 508-09.

75. In *Gulf Oil*, the Court enumerated nonexclusive "public" and "private" interest factors to guide a court's forum non conveniens decision. Public factors include court congestion, imposition of jury duty, "having localized controversies decided at home," and having a forum court that is at home with the law governing the case. *Id.* Private factors include "ease of access" to evidence and witnesses, "and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 508.

76. *Id.* at 508; *see* David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 940 (1990).

77. Robertson & Speck, *supra* note 76, at 940.

78. *See* Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 784 n.12 (1985).

79. 454 U.S. 235 (1981).

tures to the doctrine. First, and perhaps most importantly, it held that a foreign plaintiff should not enjoy the ordinary presumption of deference to the plaintiff's choice of forum because there is less reason to assume the plaintiff chose the forum out of convenience.[80] Second, it held that courts should not consider whether a plaintiff would confront less favorable law in the alternative forum, precisely because if that were the case, "dismissal would rarely be proper."[81] Third, courts should only "rare[ly]" find an alternative forum to be *un*available.[82] Fourth, and most subtly, the Court ignored (but did not dispute) the lower courts' holdings that Pennsylvania law should apply, rejecting a previous understanding in most circuits that jurisdiction should be retained if American law applies.[83]

In the Court's most recent case addressing forum non conveniens, the Court approved of the practice of considering forum non conveniens even before determining whether a court has jurisdiction.[84] Some scholars have speculated that this development may increase rates of forum non conveniens dismissals in federal courts.[85]

Today, studies by Chris Whytock and Donald Childress suggest that federal courts are more likely than not to grant forum non conveniens motions in cases involving foreign plaintiffs or foreign law.[86] This result is "doctrinally unsurprising" given that *Piper Aircraft* strips foreigners of the typical deference that courts afford plaintiffs' choice of forum.[87] But forum non conveniens dismissals occur even in cases against American defendants.[88] Without proper statistics on the amount of transnational litigation brought in the United States, it is admittedly difficult to determine the rate or cause of the increase in forum

80. *Id.* at 255-56.

81. *Id.* at 250.

82. *Id.* at 254 n.22.

83. *See* Robertson & Speck, *supra* note 76, at 941 n.22.

84. Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 428-29 (2007); *see* Alan M. Trammell, *Jurisdictional Sequencing*, 47 GA. L. REV. 1099, 1109-10 (2013).

85. *See* Whytock, *supra* note 28, at 502, 503 & n.116.

86. Rates of dismissal under forum non conveniens hover around fifty percent. Childress, *supra* note 3, at 168-70 (citing statistics that put dismissal under these circumstances at around fifty percent and explaining why these statistics underreport dismissals); Christopher A. Whytock, Politics and the Rule of Law in Transnational Judicial Governance: The Case of Forum Non Conveniens 16 (Feb. 28, 2007) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=969033. Those numbers go up, however, when foreign plaintiffs or foreign law are involved. Childress, *supra* note 72, at 169; Whytock, *supra* note 28, at 503.

87. Whytock, *supra* note 28, at 503.

88. *See, e.g.*, Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 67-68, 71, 73-74 (2d Cir. 2003); Aguinda v. Texaco, Inc., 303 F.3d 470, 480 (2d Cir. 2002); Can v. MD Helicopters, Inc., No. 1 CA-CV 10-0367, 2011 WL 1483783, at *1, *4 (Ariz. Ct. App. Apr. 19, 2011); Paulownia Plantations de Pan. Corp. v. Rajamannan, 793 N.W.2d 128, 130, 137-39 (Minn. 2009).

non conveniens dismissals, but it is clear today that such dismissals over the past few decades are far from "rare."[89]

Such a robust forum non conveniens regime, protecting domestic defendants from the inconvenience of litigation in cases brought by foreign plaintiffs, is unusual. Few other nations recognize forum non conveniens, and those that do tend to permit it more sparingly.[90]

3. *Abstention comity*

Courts cite international comity to explain much of what they do in transnational cases,[91] but it is a term that has "many, too many, meanings."[92] The Supreme Court has described comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."[93] In other words, it can mean practically anything or nothing. But it often describes a sort of intercourt diplomacy long assumed to be within courts' constitutional competence.

In one of its incarnations, comity is a freestanding doctrine that permits a court, in its discretion, "to decline to exercise jurisdiction in a case properly adjudicated in a foreign state."[94] It can be applied retrospectively, to abstain from

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89. *Cf.* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947) (describing forum non conveniens as a doctrine that "should be applied" only in "rather rare cases").

90. *See, e.g.*, *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 (Austl.) (denying a motion to dismiss to an alternative forum in a case against foreign defendants and applying foreign law where the tort occurred abroad and the only connection to the forum was the citizenship of the plaintiff); Goshawk Dedicated Ltd. v. Life Receivables Ir. Ltd., [2008] 2 I.L.R.M. 460 (H. Ct.) (Ir.) (declining to dismiss a case against an Irish national even though proceedings between the same parties, dealing with the same issues, had previously been instituted in U.S. court); John JA Burke, *Foreclosure of the Doctrine of* Forum Non Conveniens *Under the Brussels I Regulation: Advantages and Disadvantages*, 2008 EUR. LEGAL F. (E) I-121, I-122 to -123 (describing the U.K. doctrine of forum non conveniens); Christopher A. Whytock, *Foreign State Immunity and the Right to Court Access*, 93 B.U. L. REV. 2033, 2052 n.111 (2013) (listing the few nations that do have a forum non conveniens doctrine).

91. *See, e.g.*, William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. (forthcoming Dec. 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2558175.

92. United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996) (coining this oft-quoted phrase, which applies to many legal concepts, with respect to the notoriously malleable term "jurisdiction").

93. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895); *see also* ALEX MILLS, THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW 1-2 (2009) (noting that comity represents private international law's acknowledgement of its public international dimension).

94. Maxwell Commc'n Corp. v. Societe Generale (*In re* Maxwell Commc'n Corp.), 93 F.3d 1036, 1047 (2d Cir. 1996); *see, e.g.*, España v. ABSG Consulting, Inc., 334 F. App'x 383, 384 (2d Cir. 2009); Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1237-38

hearing a case if a foreign court has already adjudicated a duplicative suit; prospectively, to abstain from hearing a case that could be brought in a foreign court; or in parallel, to abstain from hearing a case brought while a duplicative suit is pending before a foreign court.[95] In the latter two situations, some federal courts consider whether "international comity," or other values, such as fairness and judicial economy, would counsel staying or dismissing the action.[96]

Abstaining from hearing a case in the name of international comity in any of these postures, a practice I call "abstention comity," occurs in circumstances that overlap with forum non conveniens. But the two doctrines are conceptually distinct. Comity allows "courts [to] abstain out of deference to the paramount interests of another sovereign," whereas forum non conveniens reflects "a far broader range of considerations, most notably the convenience to the parties and the practical difficulties" of entertaining transnational cases.[97] But the two can apply in the same or overlapping circumstances, such as the dismissal of parallel duplicative litigation.

Abstention comity is thus an additional, discretionary way for courts to dismiss transnational cases, albeit a less popular one. Current default presumptions do not favor dismissal on abstention comity grounds.[98] Some scholars argue, however, that courts should be more willing to stay or dismiss U.S. litigation brought after parallel suits have already been initiated in foreign fora.[99]

4. *Presumption against extraterritoriality*

One would be remiss to discuss transnational litigation avoidance without mentioning the statutory interpretation canon of the presumption against extraterritoriality. Although it speaks to whether the plaintiff has a statutory cause of

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(11th Cir. 2004); Sequihua v. Texaco, Inc., 847 F. Supp. 61, 63 (S.D. Tex. 1994); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797-98 (1993) (concluding that "international comity would not counsel against exercising jurisdiction" in a case involving foreign conduct).

95. *See Ungaro-Benages*, 379 F.3d at 1238 (conceiving of comity as either retrospective or prospective and including parallel litigation as retrospective comity).

96. Linda Silberman, *A Proposed* Lis Pendens *Rule for Courts in the United States: The International Judgments Projects of the American Law Institute*, *in* INTERCONTINENTAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW: ESSAYS IN MEMORY OF PETER E. NYGH 341, 351 (Talia Einhorn & Kurt Siehr eds., 2004); *see also* Parrish, *supra* note 12, at 243-44.

97. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 723 (1996) (citations omitted) (discussing the differences between forum non conveniens and domestic abstention doctrines based on comity among U.S. states).

98. *See* Parrish, *supra* note 12, at 242-43 (noting reasons why duplicative litigation proceeds "unhindered"). Also, unlike forum non conveniens, the Supreme Court has never directly addressed the issue of abstention comity in the context of duplicative international litigation. *Id.* at 241.

99. *See, e.g.*, *id.* at 243-44; Andreas F. Lowenfeld, *Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM. J. INT'L L. 314, 318 (1997).

action under federal law,[100] a question of prescriptive rather than adjudicatory jurisdiction, the presumption is another means of avoiding transnational litigation in U.S. courts. Especially in light of recent opinions strengthening the canon, it can cause both U.S. plaintiffs to lose a forum in which to sue and U.S. defendants to obtain home-forum immunity for conduct committed abroad.

In the early twentieth century, courts presumed that Congress did not intend to regulate extraterritorial conduct.[101] By the late 1980s, however, that presumption had all but been given up for dead.[102] In areas as diverse as antitrust, trademark, securities fraud, and human rights, courts instead used international law methods of interpreting the extraterritorial reach of laws on a case-by-case basis, considering "connecting factors" between the case and the forum and conflicts among national laws.[103]

Resuscitating the doctrine in *EEOC v. Arabian American Oil Co.* (*Aramco*),[104] the Court announced what seemed to be a clear statement rule requiring Congress to specify that it intended a statute to apply extraterritorially for the Court to interpret it that way.[105] But even after *Aramco*, some areas of the law, including securities fraud and human rights litigation, continued to appear immune from the presumption.[106]

In two recent cases involving foreign plaintiffs, foreign defendants, and foreign conduct (known as "foreign-cubed" cases[107]), however, the Court solidified its retreat to territoriality. First, in *Morrison v. National Australia Bank Ltd.*,[108] the Court rejected the Second Circuit's longstanding precedent and held that the anti-extraterritoriality presumption *did* apply to securities fraud

100. The Supreme Court recently clarified that the extraterritorial reach of a statute raises a merits question, not a question of subject matter jurisdiction, as it had long been understood. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 253-54 (2010).

101. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909).

102. *See* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 85-86 (1998).

103. Born, *supra* note 38, at 44-45.

104. 499 U.S. 244 (1991).

105. *Id.* at 248. The Court applied this rule even in the face of compelling evidence that Congress had intended for the relevant statute to apply abroad. *See id.* at 266-71 (Marshall, J., dissenting). Indeed, shortly after the decision, Congress amended the statute to overturn *Aramco*'s interpretation. Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077.

106. For decades, in areas including antitrust, securities fraud, RICO, federal criminal law, and international human rights litigation, the presumption was traditionally not applied. *See* Pamela K. Bookman, Note, *Solving the Extraterritoriality Problem: Lessons from the Honest Services Statute*, 92 VA. L. REV. 749, 758 (2006) (citing CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 528 (2003)).

107. Eugene Kontorovich, Kiobel *Surprise: Unexpected by Scholars but Consistent with International Trends*, 89 NOTRE DAME L. REV. 1671, 1689-90 (2014) (defining "foreign-cubed").

108. 561 U.S. 247 (2010).

actions.[109] This shift foreclosed a large amount of transnational litigation that had formerly been taken for granted, including suits by U.S. plaintiffs.[110]

Three years later, in *Kiobel v. Royal Dutch Petroleum Co.*,[111] the Court applied the presumption in a case in which the plaintiffs asserted jurisdiction under the Alien Tort Statute,[112] removing any doubt that the reinvigoration of the extraterritoriality doctrine announced in *Morrison* applied far beyond the securities context.[113] Lower courts are taking the directive seriously, applying the doctrine to other areas long thought to defeat the presumption, including RICO and federal criminal law.[114] After *Morrison* and *Kiobel*, the canon forecloses litigation in a variety of subject matter areas—brought against U.S. defendants, by U.S. plaintiffs, and even by the U.S. government—that had long escaped the *Aramco* presumption.[115]

B. *Stated Goals*

To understand whether avoidance decisions have succeeded and whether the resulting litigation isolationism is a worthy pursuit, one must look at what the doctrines are trying to achieve. Scholars studying U.S. courts' increasing hostility to litigation more generally have noted that the Supreme Court Justices justify those developments as reactions to the perceived ills of the U.S. judicial system: the threat of abuse, the expense of litigation, and the possibility of ex-

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109. *See id.* at 257, 261.

110. *See, e.g.*, Elliott Assocs. v. Porsche Automobil Holding SE, 759 F. Supp. 2d 469, 470-71 (S.D.N.Y. 2010). *But cf.* Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 62 (2d Cir. 2012) (discussing facts that could support a complaint by U.S. plaintiffs based on trading on a foreign exchange).

111. 133 S. Ct. 1659 (2013).

112. 28 U.S.C. § 1350 (2013).

113. *See* Anthony J. Colangelo, Kiobel*: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction*, 28 MD. J. INT'L L. 65, 66 (2013).

114. *See, e.g.*, Liu Meng-Lin v. Siemens AG, 763 F.3d 175, 176-81 (2d Cir. 2014) (applying *Morrison* to the Dodd-Frank Act antiretaliation provision); United States v. Vilar, 729 F.3d 62, 72-74 (2d Cir. 2013) (applying *Morrison* to criminal securities cases, contrary to the prior understanding that federal criminal laws were exempt from the anti-extraterritoriality presumption per *United States v. Bowman*, 260 U.S. 94 (1922)); Norex Petrol. Ltd. v. Access Indus., Inc., 631 F.3d 29, 30-31 (2d Cir. 2010) (per curiam) (applying *Morrison* to RICO claims). *But cf., e.g.*, European Community v. RJR Nabisco, Inc., 764 F.3d 129, 135-36 (2d Cir. 2014) (limiting *Norex*); United States v. Lawrence, 727 F.3d 386, 392 & n.2 (5th Cir. 2013) (declining to extend *Kiobel*'s reasoning to apply to 21 U.S.C. § 959(b)).

115. *See, e.g.*, City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 176 (2d Cir. 2014) (applying *Morrison* to bar a suit concerning securities offered by a foreign defendant and purchased by a domestic plaintiff in a foreign transaction, even though those securities were cross-listed on a domestic exchange); Balintulo v. Daimler AG, 727 F.3d 174, 179-80, 182 (2d Cir. 2013) (applying *Kiobel* to suits against U.S. defendants); John C. Coffee, Jr., *What Hath 'Morrison' Wrought*, N.Y. L.J., Sept. 16, 2010, at 5 ("[*Morrison*] denies American investors the ability to sue an American corporation when the purchase or sale transaction occurs offshore.").

torted settlements.[116] This Subpart focuses on what courts say motivates *transnational* litigation avoidance.

While these doctrinal developments may not form a single, concerted effort, courts appear to articulate three common values supporting the return to territoriality in these different doctrinal contexts. First, transnational litigation implicates separation of powers concerns because it involves federal courts adjudicating cases that touch on foreign affairs, which should be the province of the political branches.[117] Second, and relatedly, transnational litigation is sometimes believed to endanger international comity by offending foreign nations or infringing on their regulatory authority.[118] Third, courts and commentators contend that transnational litigation, particularly in U.S. courts, is especially cumbersome for defendants, whether they are foreigners litigating far from home[119] or local defendants embroiled in disputes arising overseas.[120] This focus on defendants is descriptive rather than normative; as discussed below, the doctrines focus on defendants' interests far more than plaintiffs'.

1. *Separation of powers*

Transnational litigation implicates complicated separation of powers issues because all three branches of the federal government have constitutional roles to play in defining jurisdiction itself: courts define court access rules and interpret statutes, Congress establishes courts' jurisdiction, and the executive branch dominates foreign relations, including treaty negotiations over matters of private international law.[121] But their interests and agendas may not always align.

Scholars and courts agree that transnational litigation implicates separation of powers concerns because such litigation can impact foreign affairs.[122] This concern is separate from courts' desire to promote international comity. It is, instead, a concern about courts' inferior competence and constitutional authori-

116. *See, e.g.*, Miller, *supra* note 67, at 477.

117. *See, e.g.*, Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 466-67 (2001).

118. *See infra* note 141.

119. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987).

120. *See, e.g.*, Aguinda v. Texaco, Inc., 303 F.3d 470, 473 (2d Cir. 2002).

121. *Cf., e.g.*, M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000) (distinguishing between "separation of functions" and the "balance of power" among the branches); Ryan M. Scoville, *Legislative Diplomacy*, 112 MICH. L. REV. 331 (2013) (analyzing Congress's role in foreign affairs).

122. *See, e.g.*, Torres v. S. Peru Copper Corp., 113 F.3d 540, 542-43 (5th Cir. 1997); Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 11 (1987); Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1498 (1991) (reviewing GARY B. BORN WITH DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS (1989)).

ty to make foreign affairs judgments and deference to the political branches' foreign affairs role.[123]

U.S. courts' treatment of foreign parties, whether they appear as plaintiffs or defendants, can trigger foreign relations concerns. When foreign defendants have been sued in U.S. courts, for example, foreign sovereigns have filed amicus briefs or even enacted retaliatory clawback statutes, enabling their nationals to recoup damages won in U.S. courts that would not have been available in their home courts.[124] Expansive concepts of general jurisdiction over foreigners can impose barriers to trade and foreign direct investment that may conflict with executive branch policies.[125]

Not entertaining such cases can also irk foreign nations. In response to U.S. courts *dismissing* cases brought by foreign plaintiffs on forum non conveniens grounds, some countries have enacted blocking statutes specifically designed to render their courts unavailable to cases dismissed from U.S. courts on this basis.[126] For example, Guatemala passed a law that a case refiled in Guatemala following a forum non conveniens dismissal is not a product of the plaintiff's free will and, therefore, will not generate jurisdiction in Guatemalan courts.[127]

Situations like these raise sensitive foreign relations issues best addressed by the political branches. But they arise in the context of disputes among private parties that are considered the bread and butter of the judicial function.[128]

In the 1980s, the Court responded to this tension by adopting a reasonableness analysis,[129] in part out of respect for separation of powers. Justice O'Connor noted that the "Federal Government's interest in its foreign relations policies" in every case "will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal

123. These concerns also animate the political question doctrine, although that doctrine does not bar "every case or controversy which touches foreign relations." Baker v. Carr, 369 U.S. 186, 211 (1962). Indeed, in a recent case addressing the political question doctrine, these concerns did not stay the Supreme Court's hand. *See* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1424-25 (2012).

124. *See* Bermann, *supra* note 17, at 32-33.

125. *See* Brief for the United States as Amicus Curiae, Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408 (1984) (No. 82-1127), 1983 U.S. S. Ct. Briefs LEXIS 201, at *10; HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS 144-45 (2008).

126. Henry Saint Dahl, Forum Non Conveniens*, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 21 (2004).

127. *Id.* at 24 (describing the Guatemalan law and other countries' similar efforts).

128. The problem is even more acute when governments or government-owned entities are involved. *See, e.g.*, Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522, 558 & n.14 (1987) (Blackmun, J., concurring in part and dissenting in part) (discussing foreign countries' diplomatic protests in response to federal courts' failure to apply the Hague Evidence Convention); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 409-10 (1964) (discussing foreign relations issues related to recognizing a Cuban government instrumentality as a plaintiff).

129. *See supra* note 40 and accompanying text.

interests on the part of the plaintiff or the forum State."[130] But the more recent avoidance developments have instead excluded categories of transnational litigation altogether in the name of similar interests. For example, in *Daimler*, the Court justified its holding in part based on the Solicitor General's warning that "foreign governments' objections to some domestic courts' expansive views of general jurisdiction have . . . impeded [the executive branch's] negotiations of international agreements on the reciprocal recognition and enforcement of judgments."[131]

The Court has likewise justified the anti-extraterritoriality presumption as a way of preventing judicial interference with the "delicate field of international relations."[132] Had Congress intended that a statute apply overseas, the Court reasoned, "it would have addressed the subject of conflicts with foreign laws and procedures."[133] A clear statement is required before courts will apply a statute to conduct abroad because Congress "alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain."[134] While there are several possible reasons for the presumption,[135] one of the most compelling is that when interpreting statutes, courts should not risk offending foreign sovereigns absent evidence that Congress "really wants" to do so.[136]

The Supreme Court has not yet justified forum non conveniens on separation of powers grounds.[137] Commentators, however, have noted that forum non conveniens permits courts to dismiss transnational cases without embroiling themselves in contentious international disputes between sovereigns.[138]

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130. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 115 (1987); *see also* KOH, *supra* note 125, at 146.

131. Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014) (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 2, *Daimler*, 134 S. Ct. 746 (No. 11-965), 2013 WL 3377321) (internal quotation marks omitted); *see also, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 727-28 (2004).

132. Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1664 (2013) (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)).

133. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 269 (2010) (quoting EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 256 (1991)) (internal quotation marks omitted).

134. *Kiobel*, 133 S. Ct. at 1664 (quoting *Benz*, 353 U.S. at 147) (internal quotation mark omitted).

135. Dodge, *supra* note 102, at 112-13 (identifying "six possible reasons for the presumption").

136. Franklin A. Gevurtz, *Determining Extraterritoriality*, 56 WM. & MARY L. REV. 341, 378 (2014) (arguing that this international relations rationale is the presumption's only useful purpose).

137. *See* Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 244 (2001).

138. *See, e.g.*, John Byron Sandage, Note, Forum Non Conveniens *and the Extraterritorial Application of United States Antitrust Law*, 94 YALE L.J. 1693, 1694 (1985); *cf.* Lear, *supra* note 70, at 1152 (arguing that forum non conveniens is "an unconstitutional usurpation of congressional power").

Finally, international comity is, of course, the primary concern driving abstention comity. But the idea has separation of powers underpinnings.[139] Like efforts to comply with international law itself, judicial efforts in the name of international comity seek to eliminate international discord to further perceived executive prerogatives.[140]

2. *International comity*

As just noted, the separation of powers and international comity concerns underlying avoidance are intertwined: When courts unilaterally interfere with foreign affairs in ways that may upset international comity, they can offend separation of powers. Indeed, courts' very evaluation of comity can be in tension with separation of powers principles.

Courts and commentators often cite international comity independently as a justification for avoidance doctrines.[141] What courts mean by this is not always clear or consistent. But the concept appears to be one over which judges have discretion[142] and that takes the place of reliance on international law.[143]

Abstention comity of course reflects notions of comity, but recent decisions about personal jurisdiction, forum non conveniens, and extraterritoriality also invoke this value. In *Daimler*, the Court relied directly on comity to justify its definition of general jurisdiction. Justice Ginsburg highlighted the "risks to international comity" created by a too-expansive view of general jurisdiction, noting that "[o]ther nations do not share" such an approach, that other nations' objections to such an approach have impeded negotiations of international agreements, and that the approach "could discourage foreign investors" and

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139. *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) ("The act of state doctrine . . . expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.").

140. *See* Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of* Charming Betsy, 67 OHIO ST. L.J. 1339, 1344 (2006).

141. *See, e.g.*, Born, *supra* note 122, at 29; Merritt B. Fox, *Securities Class Actions Against Foreign Issuers*, 64 STAN. L. REV. 1173, 1271 (2012); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 55 (2006); Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 526 (1993). *But cf.* Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 563 (2007) (arguing that "routinely dismissing foreign claims against American multinationals" raises comity concerns, but exercising jurisdiction does not). As noted, courts sometimes use international comity as an independent ground for dismissing a case. *See supra* Part I.A.3.

142. *See* Mujica v. AirScan Inc., 771 F.3d 580, 589 (9th Cir. 2014) (reviewing the district court's international comity decision for abuse of discretion).

143. In earlier eras, courts tended to rely more directly on international or natural law principles. *See, e.g.*, Lauritzen v. Larsen, 345 U.S. 571, 578 (1953) (relying on international law); Pennoyer v. Neff, 95 U.S. 714, 730, 735 (1878) (citing natural law).

"has led to 'international friction.'"[144] This one paragraph incorporates several values—appreciating international practice, facilitating the executive branch's ability to negotiate treaties, encouraging foreign investment, and preventing "international friction."

Courts have also justified forum non conveniens on comity grounds, dismissing cases on this basis in deference to other nations' interests in the case.[145] Some commentators agree that comity informs forum non conveniens.[146] Others, however, have questioned whether forum non conveniens is consistent with comity. Adrian Briggs argues that suggesting that a case (over which a U.S. judge otherwise has jurisdiction) should be transferred to a foreign judge, "almost whether he likes it or not," hardly reflects notions of comity.[147] Latin American "blocking statutes," enacted in response to the presumption against entertaining cases brought by foreign plaintiffs, suggest that forum non conveniens dismissals indeed create some international discord.[148] Some judges have argued that comity is best served by rejecting the doctrine of forum non conveniens altogether.[149]

The presumption against extraterritoriality likewise "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[150] But in *Morrison*, the Court muddied the intersection of international discord, comity, and customary international law. The Court noted the Solicitor General's point that the Second Circuit's approach to determining the extraterritorial reach of the securities laws[151] accorded with "prevailing notions of international comity," but concluded that, even if that approach "would not violate customary international law," that fact would

144. Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014) (quoting Brief for the Respondents at 35, *Daimler*, 134 S. Ct. 746 (No. 11-965), 2013 WL 4495139).

145. *See, e.g.*, Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru, 665 F.3d 384, 392 (2d Cir. 2011); *see also* Am. Dredging Co. v. Miller, 510 U.S. 443, 467 (1994) (Kennedy, J., dissenting) ("[T]he *forum non conveniens* defense promotes comity and trade."). *Contra* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 723 (1996) (distinguishing comity and forum non conveniens).

146. *See, e.g.*, N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT'L ECON. L. 601, 640 (2006).

147. Adrian Briggs, *The Principle of Comity in Private International Law*, 354 RECUEIL DES COURS 65, 119-21 (2011) (arguing that forum non conveniens is inconsistent with comity because it "tell[s] the foreign court what it ought to do").

148. *See supra* note 126 and accompanying text.

149. *See, e.g.*, Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 687 (Tex. 1990) (Doggett, J., concurring) ("Comity is not achieved when the United States allows its multinational corporations to adhere to a double standard when operating abroad and subsequently refuses to hold them accountable for those actions.").

150. EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991).

151. The Second Circuit had permitted such reach "when there was 'significant U.S. fraudulent conduct that directly caused the plaintiffs losses' (the conduct test) or when there were 'significant effects' on the U.S. securities markets (the effects test)." Linda J. Silberman, Morrison v. National Australia Bank*: Implications for Global Securities Actions*, 12 Y.B. PRIV. INT'L L. 123, 124 (2010).

not prove that Congress had intended to instantiate it.[152] This discussion seems to equate international comity with customary international law but then rejects reliance on either, leaving the reader guessing as to whether comity remains as a valid interest, and if so, what it means.

Other opinions, however, continue to assert comity's importance to the extraterritoriality canon. Justice Breyer's concurrence in *Kiobel* refers to the "notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its own laws and their enforcement,"[153] as well as citing comity as a "[f]urther limiting principle[]" that would reinforce his proposed approach to determining jurisdiction over Alien Tort Statute cases.[154] These references appear to refer to two concepts: limitations on the extraterritorial reach of U.S. laws and abstention comity.

The varied uses of international comity raise serious questions about comity's role in avoidance doctrines, and what the term means and should mean. Whereas the rejection of territoriality in the late twentieth century often relied on international law,[155] recent cases returning to territoriality instead invoke "international comity" as an amorphous concept that often refers to foreign nations' opinions or the possibility for regulatory conflict, but that affords little consistent instructive value.

3. *Defendants' convenience*

Finally, uniting most of the recent avoidance decisions appears to be a common concern that transnational litigation burdens defendants with tremendous inconvenience.[156] These concerns are expressed with respect to both foreign and domestic defendants.

In the personal jurisdiction context, as Ben Spencer and others have noted, it must be that the due process interests the Court discusses[157] also include consideration of convenience.[158] "[C]onstitutionally significant" inconvenience, as

152. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 272 (2010).

153. Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1671 (2013) (Breyer, J., concurring in the judgment).

154. *Id.* at 1674.

155. *See* Born, *supra* note 38, at 1.

156. Forum non conveniens and arguably the anti-extraterritoriality presumption are also concerned with judicial efficiency. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947) (forum non conveniens); *Morrison*, 561 U.S. at 270 (anti-extraterritoriality presumption).

157. *See, e.g.*, Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014).

158. *See* A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 627 (2006) ("The Court has clearly made inconvenience to defendants a central concern of the Due Process Clause within the doctrine of personal jurisdiction."); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1133 (1981); Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs*,*"* 100 CORNELL L. REV. (forthcoming July 2015)

Justice Brennan called it, could violate due process in cases of extreme inconvenience—for example, if "witnesses or evidence or the defendant himself were immobile."[159]

Forum non conveniens protects defendants from inconvenience of a more mundane sort. Courts justify forum non conveniens as based on fairness and judicial economy as well,[160] but, of the private concerns, defendants' convenience dominates.[161] And if the personal jurisdiction inquiry addresses issues of unconstitutional inconvenience, then forum non conveniens must provide a means for dismissing suits based on some lesser convenience standard.

Courts applying forum non conveniens, moreover, can conclude that a forum is inconvenient even where the defendant is a U.S. citizen sued in his home forum.[162] Such reasoning goes against traditional assumptions that the most fair and convenient place to sue a defendant is in his home forum[163] and that home fora are most likely to afford preferential or at least nonprejudicial treatment.[164] The presumption that defendants may be sued in their home fora is widely recognized internationally[165] and also creates a simple and logical starting point for plaintiffs' forum selection choices. Indeed, the Court may have adopted the "at home" rule for general jurisdiction in *Goodyear* and *Daimler* in part for these reasons.[166] Defendants' home fora also often have a significant sovereign interest over a suit, even if the underlying conduct occurred else-

(manuscript at 11), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2494969.

159. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 301 (1980) (Brennan, J., dissenting).

160. *See, e.g.*, Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 432 (2007); *see also id.* at 435 (noting that *Sinochem* was "a textbook case for immediate *forum non conveniens* dismissal" because personal jurisdiction discovery "would have burdened Sinochem with expense and delay").

161. *Piper Aircraft Co. v. Reyno* discounts any convenience considerations that might have caused a foreign plaintiff to choose a U.S. forum, leaving defendants' convenience to be the primary private interest factor. *See* 454 U.S. 235, 255-56 (1981).

162. *See, e.g.*, *id.* at 239-40, 243, 261 (approving of forum non conveniens dismissal of a suit against a Pennsylvania defendant in Pennsylvania federal court after the court determined that Pennsylvania law would apply); *supra* note 88 and accompanying text.

163. *See, e.g.*, *Piper Aircraft*, 454 U.S. at 255-56 ("[I]t is reasonable to assume that [a home forum] is convenient."); Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945) (framing the due process question as estimating inconveniences created by subjecting a defendant to suit *away from* home); Michael P. Verna, *Convenience Has Nothing to Do with FNC Motions*, 22 AIR & SPACE LAW., no. 4, 2008, at 9, 10 (mocking claims that a home forum is "inconvenient"). *But cf.* Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 74 (2d Cir. 2003) (rejecting the plaintiffs' argument for a per se rule favoring litigation in the defendant's home forum).

164. Whether this assumption continues to hold true may be a question for further inquiry. *See* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1122 (1996).

165. *See supra* note 56.

166. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014) (noting that Europe has domicile-based general jurisdiction).

where, because of the sovereign's interest in regulating the conduct of its own nationals and residents.[167]

Like personal jurisdiction and forum non conveniens, the anti-extraterritoriality presumption is in part intended to protect defendants from the burdens of transnational litigation. In *Morrison*, for example, the Court rejected the Solicitor General's proposed test for recognizing securities fraud actions because such a standard would attract litigation over fraud in foreign securities markets.[168] Such worries about large amounts of litigation reflect concerns for defendant inconvenience as well as judicial economy.[169]

Finally, abstention comity is informed not only by fairness and conservation of judicial resources,[170] but also by "international duty and convenience."[171]

By contrast, the avoidance decisions seem almost entirely unconcerned with plaintiffs' interests, even if the plaintiffs are American, as in *Goodyear*.[172] Scholars have criticized avoidance decisions for cutting off access to justice.[173]

The rhetoric of defendant convenience often goes hand in hand with concerns about judicial convenience and conservation of judicial resources.[174] But when it does not overlap with considerations of judicial inconvenience, defendant inconvenience should not get so much attention. One possibility for why it does is that the focus on defendants' interests is a proxy for related concerns about protecting perceived economic interests.[175] For example, scholars have criticized transnational litigation, particularly in the human rights context, for discouraging foreign investment in the United States.[176] Alan Sykes and others

167. *See* Lear, *supra* note 141, at 562.

168. 561 U.S. 247, 270 (2010) ("[S]ome fear that [the United States] has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.").

169. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558-59 (2007) (expressing similar concern about defendants' inconvenience stemming from the expenses of litigation).

170. *See* Turner Entm't Co. v. Degeto Film GmbH, 25 F.3d 1512, 1522 (11th Cir. 1994).

171. Hilton v. Guyot, 159 U.S. 113, 164 (1895).

172. Dissenting in *J. McIntyre Machinery, Ltd. v. Nicastro*, Justice Ginsburg expressed dismay that the Court's judgment "puts *United States plaintiffs* at a disadvantage in comparison to similarly situated complainants elsewhere in the world," who would likely be able to bring suit in the place where the harmful event occurred. 131 S. Ct. 2780, 2803-04 (2011) (Ginsburg, J., dissenting) (emphasis added).

173. *See* Whytock & Robertson, *supra* note 10, at 1450.

174. *See, e.g.*, *supra* notes 21, 75 and accompanying text.

175. This theory is consistent with the belief that the Supreme Court is generally business friendly, which often translates as defendant friendly. *See, e.g.*, Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317, 319 (2012) (arguing that the Roberts Court is "pro-business"). *But see* Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1471 (2013) (arguing that businesses "fare[] worse . . . than their nonbusiness opponents").

176. *See, e.g.*, Brief for Respondents at 46, Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 259389; Jack L. Goldsmith & Alan O. Sykes, Lex

have argued that because doing business in the United States makes companies subject to personal jurisdiction here, doing business in the United States subjects companies to a litigation tax inapplicable to companies that do no business here.[177] Indeed, the Court in *Daimler* cited this concern as further justification for its ruling.[178] But, although *Goodyear* and *Daimler*'s transformation of general jurisdiction significantly reduced any such litigation tax on foreign corporations, it exacerbated the effects for U.S. companies, and potentially discourages companies from incorporating or headquartering in the United States. In other words, for this and other reasons (discussed in Part III), defendant convenience is a poor proxy for U.S. economic interests and indeed undermines other U.S. interests.

II. Foreign Developments

The expansion of avoidance doctrines is largely a story about federal law and federal courts, and it has led scholars to predict that certain types of federal court litigation will now be brought under state law and at least sometimes in state court.[179] This may be true to some extent. But there are constitutional limits on personal jurisdiction in state and federal court. Forum non conveniens often exists in state law substantially in parallel to the federal doctrine.[180] And for the anti-extraterritoriality presumption and abstention comity, not only are there state law equivalents,[181] but the full reach of foreign affairs preemption has not yet been tested.[182] Aside from state courts, the alternative available fora are either non-U.S. tribunals or, as has long been assumed, no court at all.[183]

Loci Delictus *and Global Economic Welfare:* Spinozzi v. ITT Sheraton Corp., 120 HARV. L. REV. 1137, 1146 (2007); Sykes, *supra* note 44, at 340-41.

177. *See, e.g.*, Goldsmith & Sykes, *supra* note 176, at 1146 (warning that tort liability in U.S. courts can place U.S. firms at a competitive disadvantage). *But see* Miller, *supra* note 67, at 469 (arguing that "litigation tax" fears are based on "[b]ogus statistics").

178. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014).

179. *See, e.g.*, Childress, *supra* note 11, at 739; Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of* Morrison v. National Australia Bank, 92 B.U. L. REV. 535, 539 (2012) ("*Morrison* has the perverse effect of substituting state law for federal law in securities cases involving substantial foreign contacts.").

180. *See* Robertson & Speck, *supra* note 76, at 950-51 (noting differences among state approaches to forum non conveniens, but with few states rejecting the doctrine); *see also, e.g.*, Kedy v. A.W. Chesterton Co. (*In re* Asbestos Litig.), 946 A.2d 1171, 1175 (R.I. 2008).

181. *See, e.g.*, Global Reinsurance Corp. v. Equitas Ltd., 969 N.E.2d 187, 195 (N.Y. 2012) (applying New York State's presumption against extraterritoriality to New York antitrust laws); Exxon Research & Eng'g Co. v. Indus. Risk Insurers, 775 A.2d 601, 603 (N.J. Super. Ct. App. Div. 2001) (affirming dismissal on international comity grounds).

182. *See, e.g.*, Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1072, 1077 (9th Cir. 2012) (finding that the state statute of limitations was preempted by the dormant foreign affairs preemption); Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 964-66 (9th Cir. 2010) (same); Roger P. Alford, *Human Rights After* Kiobel*: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. 1158, 1159-60 (2014); Harlan

Recent developments in foreign courts have undermined the conventional wisdom that transnational litigation has no other place to go.[184] Political science scholars in particular have begun to document the adoption of many American-style procedures in foreign courts.[185] The absence of transnational tort litigation in U.S. courts, it turns out, may not signify its absence from domestic courts worldwide.

These developments are surprising to many[186] and disputed by some.[187] Foreign opinion has long looked down on American "adversarial legalism"—our system of "policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation"[188]—and foreign countries were not expected to adopt it. Europe, for example, was thought to have extensive regulation but limited civil litigation enforcement, whereas the United States, while still active in the regulatory arena, relied more heavily on civil litigation to enforce its laws.[189]

In fact, many nations have begun to recognize higher damages awards, aggregate litigation procedures, and third-party litigation funding. This Part brings together scholarship and primary evidence of these emerging trends with

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G. Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 396-97 (2015).

183. *See* Axel Halfmeier, *Transnationale Delikte vor nationalen Gerichten oder: Wie weiter nach dem Ende der amerikanischen Rechtshegemonie?*, *in* FESTSCHRIFT FÜR ULRICH MAGNUS 433, 439 (Peter Mankowski & Wolfgang Wurmnest eds., 2014) (suggesting avoidance decisions could result in a potential regulatory vacuum); Whytock & Robertson, *supra* note 10, at 1448 n.18 ("Historically, plaintiffs generally did not refile their suits in foreign courts following forum non conveniens dismissals; instead, they tended to settle on terms favorable to the defendants or abandon their suits altogether.").

184. *See* Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT'L LAW 31, 33 (2011); *infra* Part II.A. *But cf., e.g.*, Gonzalez v. Chrysler Corp., 301 F.3d 377, 382-83 (5th Cir. 2002) (dismissing the case on forum non conveniens grounds despite the parties' and court's agreement that the case was not financially viable in an alternative forum). Developments in other kinds of tribunals also offer possible alternative fora, but are beyond the scope of this Article. *See supra* note 11.

185. *See, e.g.*, R. DANIEL KELEMEN, EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION 7-8 (2011).

186. *See id.* at 9.

187. Some scholars disagree that American and foreign procedures are converging toward an American model. *See, e.g.*, Francesca Bignami, *Cooperative Legalism and the Non-Americanization of European Regulatory Styles: The Case of Data Privacy*, 59 AM. J. COMP. L. 411 (2011) (finding convergence of regulatory styles, not litigation); Robert A. Kagan, *Should Europe Worry About Adversarial Legalism?*, 17 OXFORD J. LEGAL STUD. 165, 165-66 (1997) (arguing that procedures are not converging). For purposes of this Article, I rest on the research and analysis of Kelemen and others who have convincingly demonstrated the growing influence of "Eurolegalism," Kelemen's term for the emerging European variant of Robert Kagan's "adversarial legalism," KELEMEN, *supra* note 185, at 7-8, and similar trends around the world.

188. ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 3 (2001).

189. KELEMEN, *supra* note 185, at 7.

analysis of substantive foreign law and foreign courts' adjudicative jurisdiction rules. Together, I argue, these developments signal the growing potential of foreign courts to attract transnational litigation. As illustrations of these phenomena, this Article draws heavily on the experiences of Europe and Canada, some of the United States' largest trading partners,[190] and, along with Australia, home to the foreign entities involved in prominent recent avoidance cases.[191] These are some of the best, but far from the only, examples.[192]

A. *The Developments*

Three major developments signal foreign courts' growing attractiveness to transnational litigants: the increasing availability of higher damages awards, aggregate litigation, and alternative litigation funding arrangements. These features are evolving against a backdrop where the United States may no longer have the substantive law with the strictest liability standards or with the greatest extraterritorial reach, and foreign courts have relatively permissive rules of adjudicatory jurisdiction. The result, as discussed in the next Subpart, will be a legal landscape with increasingly diverse forum choices for plaintiffs.

First, damages awards abroad are not yet reaching (and may never reach) U.S.-style levels, but they are growing and will likely continue to grow.[193] The most infamous examples are the Nicaraguan DBCP judgments described in the Introduction and the $18 billion Ecuadorian judgment against Chevron (after the cases were dismissed from U.S. courts on forum non conveniens grounds).[194] But there are many less notorious examples,[195] especially in cer-

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190. *See Top Trading Partners—December 2012*, U.S. CENSUS BUREAU, http://www.census.gov/foreign-trade/statistics/highlights/top/top1212yr.html#2012 (last visited Apr. 28, 2015).

191. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 750-51 (2014) (German defendant); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 251 (2010) (Australian defendant); *see also, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 248 (2d Cir. 2009) (Canadian defendant).

192. Foreign courts growing increasingly attractive to transnational litigants does not mean that these courts are adopting policies of universal jurisdiction. *Cf.* Donovan & Roberts, *supra* note 43, at 142 (discussing the emergence of civil universal jurisdiction). But the more nations that make their courts attractive to litigation generally and transnational litigation in particular, the more options there are for plaintiffs to sue outside the United States, particularly when a U.S. forum appears foreclosed.

193. *See* KELEMEN, *supra* note 185, at 74; Mark A. Behrens et al., *Global Litigation Trends*, 17 MICH. ST. J. INT'L L. 165, 192-93 (2009).

194. *See* Manuel A. Gómez, *The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador*, 1 STAN. J. COMPLEX LITIG. 429, 430, 432 (2013).

195. *See, e.g.*, Ohno v. Yasuma, 723 F.3d 984, 986-87 (9th Cir. 2013) (enforcing a $1.2 million tort judgment from a Japanese court); DeJoria v. Maghreb Petrol. Exploration S.A., 38 F. Supp. 3d 805, 807 (W.D. Tex. 2014) (refusing to enforce a $122.9 million Moroccan judgment).

tain areas, such as antitrust[196] and global securities fraud class actions, which have yielded settlements of hundreds of millions of dollars.[197]

Even punitive damages appear to be gaining legitimacy.[198] National courts in Europe, Canada, and Thailand have recently permitted punitive damages or recognized punitive damages awards from other countries.[199] In 2012, for example, the U.K. Competition Appeal Tribunal awarded compensatory as well as "exemplary" (i.e., punitive) damages for abuse of a dominant position.[200]

Second, aggregate litigation presents another example of a traditionally American, long-disdained practice that is gaining acceptance abroad.[201] Collective action mechanisms are appearing in various guises across Europe. Unlike U.S.-style opt-out class actions, these are often, but not exclusively, in opt-in form.[202] France and Belgium, for example, adopted class action laws in 2014.[203] In Canada, most provinces now permit American-style opt-out class actions,[204] with courts consistently lowering standards for class certification.[205]

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196. *See* KELEMEN, *supra* note 185, at 176, 180, 182-87, 189-94.

197. *See infra* note 244 (discussing a $353.6 million settlement approved by Dutch courts against Shell). Settlements this high suggest that judgments and/or litigation costs could have been even higher.

198. KELEMEN, *supra* note 185, at 73; Behrens et al., *supra* note 193, at 192-93.

199. KELEMEN, *supra* note 185, at 73; Christopher Hodges, *Europe: Part 1*, *in* RANDALL L. GOODDEN, LAWSUIT!: REDUCING THE RISK OF PRODUCT LIABILITY FOR MANUFACTURERS 71, 75 (2009); Tate E. McLeod, *"Never Having to Say You're Sorry": Are Canadian Punitive Damage Awards on the Rise?*, MONDAQ (Feb. 18, 2014), http://www.mondaq.com/canada/x/293946/trials+appeals+compensation/Never+Having+To+Say+Youre+Sorry+Are+Canadian+Punitive+Damage+Awards+On+The+Rise; Wendy Zeldin, *Thailand: First Product Liability Law Coming into Force*, LIBR. CONGRESS, http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l20540988_text (last updated Feb. 5, 2009).

200. 2 Travel Grp. plc (in liquidation) v. Cardiff City Transp. Servs., [2012] CAT 19 (U.K.).

201. *See, e.g.*, Behrens et al., *supra* note 193, at 167-68; Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 307 (2011). The pace and scope of these developments varies from country to country. *See* Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 312-13 (2003).

202. *See, e.g.*, Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 202 (2009); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 21-25 (2009).

203. Loi 2014-344 du 17 mars 2014 relative à la consommation [Law 2014-344 of March 17, 2014, on Consumption], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 18, 2014, p. 5400; S. Voet, *Belgium's New Consumer Class Action*, *in* MULTI-PARTY REDRESS MECHANISMS IN EUROPE: SQUEAKING MICE? 95, 96 (V. Harsági & C.H. van Rhee eds., 2014).

204. WORLD CLASS ACTIONS: A GUIDE TO GROUP AND REPRESENTATIVE ACTIONS AROUND THE GLOBE 63-65 (Paul G. Karlsgodt ed., 2012) (noting that all jurisdictions provide some mechanism for opt-in collective litigation, and that "[o]pt-out models vary by jurisdiction").

205. *See, e.g.*, Watson v. Bank of Am. Corp., 2014 BCSC 532, paras. 58-75 (Can.); Robert Staley et al., *Canadian Court Certifies Visa/Mastercard Class Action*, MONDAQ (Apr. 3, 2014), http://www.mondaq.com/canada/x/304426/Antitrust+Competition/Canadian+Court

In addition, several Latin American countries, Australia, Israel, Indonesia, South Africa, and Taiwan have also developed sophisticated structures for collective litigation that could involve plaintiffs or defendants who are foreign nationals.[206]

Third, and just as importantly, some foreign legal systems are beginning to permit alternative litigation funding structures.[207] This development both facilitates transnational litigation in foreign courts and reflects the growth of high-stakes litigation abroad.[208]

The structure of who pays litigation fees is another widely cited difference between American and foreign litigation. In the United States, each party typically bears its own litigation costs, and plaintiffs who cannot manage the costs may hire counsel on contingency.[209] Abroad, however, the rule is "loser pays," and contingency fees are widely outlawed.[210] Both of these rules discourage plaintiffs from filing lawsuits.

But some countries, most prominently the United Kingdom, Australia, and Canada, are beginning to recognize the benefits of allowing parties other than the plaintiffs to sponsor the initial filing of lawsuits.[211] Additional European

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+Certifies+VisaMastercard+Class+Action ("*Watson* continues a trend in which the [Canadian] courts appear determined to lower the bar to certification . . . .").

206. *See, e.g.*, *Gray v Cash Converters Int'l Ltd.* [2014] FCA 420 (2 May 2014) 36-46 (Austl.) (relaxing requirements for initiating class actions in Australia); Gidi, *supra* note 201, at 312-13; Manuel A. Gómez, *Will the Birds Stay South? The Rise of Class Actions and Other Forms of Group Litigation Across Latin America*, 43 U. MIAMI INTER-AM. L. REV. 481 (2012) (discussing developments in Argentina, Brazil, Chile, Colombia, and Mexico); Hensler, *supra* note 201, at 307 (noting that class action rules have been adopted in Israel, Indonesia, South Africa, and Taiwan, among other countries).

207. *See, e.g.*, Behrens et al., *supra* note 193, at 183-87; Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RES. J. INT'L L. 159, 161 (2011).

208. These developments parallel increasing legal costs in Europe. The United States has "the highest liability costs as a percentage of GDP" of any country surveyed in Europe or North America, but "liability costs in the U.K., Germany and Denmark have risen between 13% and 25% per year since 2008." DAVID L. MCKNIGHT & PAUL J. HINTON, U.S. CHAMBER INST. FOR LEGAL REFORM, INTERNATIONAL COMPARISONS OF LITIGATION COSTS: EUROPE, THE UNITED STATES AND CANADA 2 (2013), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/NERA_FULL.pdf.

209. *See* Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 267-68 (1998) (discussing contingency fees in the United States).

210. The "English Rule," the predominant practice almost everywhere, "provides that the losing party is responsible for the winning party's legal fees," and typically precludes contingency fee arrangements. Brandon Chad Bungard, *Fee! Fie! Foe! Fum!: I Smell the Efficiency of the English Rule: Finding the Right Approach to Tort Reform*, 31 SETON HALL LEGIS. J. 1, 6-7 (2006); Susan Lorde Martin, *Financing Plaintiffs' Lawsuits: An Increasingly Popular (and Legal) Business*, 33 U. MICH. J.L. REFORM 57, 72 (2000) (noting that most countries "outlaw contingency legal fees," although England, which had traditionally taken that approach, modified it in the 1990s).

211. *See* Dugal v. Manulife Fin. Corp., 2011 ONSC 1785, 105 O.R. 3d 364, paras. 1-2 (Can.) (endorsing third-party litigation funding in Canada); Behrens et al., *supra* note 193, at

countries are beginning to permit conditional fee arrangements, contingency fees, and third-party litigation funding.[212] Legal expenses insurance is also becoming more popular, further mitigating the effects of the "loser pays" rule.[213] Experts have begun to take note that "[t]he combination of global class actions with third-party litigation funding may prove to be a truly 'disruptive innovation' that changes the nature of private civil litigation worldwide."[214]

These developments are occurring in a fertile petri dish of favorable and potentially far-reaching substantive laws. The United States has a reputation for choice-of-law rules that favor forum law and plaintiff-friendly substantive law. But many foreign courts also use choice-of-law rules to apply the stricter (and thus more plaintiff-friendly) law.[215] And many of the American substantive rules have gained traction abroad. In the realm of product liability, for example, the United States was once one of the only places to recognize strict liability, but this doctrine is increasingly the general rule throughout the world.[216] Europe notoriously has stricter standards for antitrust liability, Internet privacy, and consumer and environmental protection.[217] Many of these laws, moreover, extend beyond the European Union's borders in unusual ways.[218] In the United Kingdom and the Netherlands, for instance, corporations may be held liable for domestic conduct that contributed to or failed to prevent extraterritorial human rights abuses.[219]

Finally, many foreign courts recognize jurisdiction over foreign defendants in ways that are as expansive as or even more so than American courts. In Europe, jurisdictional rules of national courts, including some of the more controversial (or "exorbitant") bases for jurisdiction that European states have agreed not to apply to each other's domiciliaries, do apply in cases involving non-E.U.

183-87; Hensler, *supra* note 201, at 321 (discussing the evolution of third-party litigation funding in Australia); Robertson, *supra* note 207, at 161.

212. KELEMEN, *supra* note 185, at 66-68; Hodges, *supra* note 199, at 75.

213. KELEMEN, *supra* note 185, at 68-71; LLOYD'S, LITIGATION AND BUSINESS: TRANS-ATLANTIC TRENDS 7, 10 (2008).

214. Hensler, *supra* note 201, at 323; *see also* Robertson, *supra* note 207, at 168 (suggesting that litigation finance may offset U.S. courts' "traditional magnet effect").

215. *See* SYMEONIDES, *supra* note 30, at 273-76 (describing rules that allow victims of cross-border torts to choose more favorable law); *id.* at 287 (concluding that plaintiff-oriented choice-of-law rules are not exclusive to the United States).

216. *Compare* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.18 (1981) ("[S]trict liability remains primarily an American innovation."), *and* Sheila L. Birnbaum & Douglas W. Dunham, *Foreign Plaintiffs and Forum Non Conveniens*, 16 BROOK. J. INT'L L. 241, 242-43 (1990) (noting that few foreign countries have adopted strict liability), *with* GOODDEN, *supra* note 199, ch. 2, at 35-91 (observing that strict liability is becoming increasingly common).

217. *See, e.g.*, Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 15, 20, 22-23 (2012).

218. *See, e.g.*, *id.* at 64 (describing the global effect of E.U. laws); Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 AM. J. COMP. L. 87, 89 (2014).

219. *See* Jodie A. Kirshner, *Why Is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 BERKELEY J. INT'L L. 259, 279, 281 (2012).

domiciliaries, including Americans.[220] This means, for example, that French courts may have jurisdiction in cases solely because they are brought by French domiciliaries[221] and British courts may have jurisdiction so long as the defendant was served in the forum.[222] Canadian conceptions of jurisdiction yield results similar to the pre-*Daimler* "doing business" U.S. standards.[223]

Other nations[224] also recognize a "forum of necessity" doctrine, which provides jurisdiction under certain circumstances if there is no other available forum, particularly if the plaintiffs are local residents.[225] For example, a Dutch court recognized "forum of necessity" jurisdiction in a case in which a Palestinian doctor sued unidentified Libyan government officials for unlawful imprisonment in Libya.[226] The suit's only connection to the Netherlands was the plaintiff's presence there.[227]

Finally, few foreign courts have the kind of "reverse forum shopping" tools that avoidance doctrines provide for defendants in U.S. courts.[228] Most nations

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220. *See* Council Regulation 44/2001, *supra* note 60, arts. 3, 4; *id.* Annex I (dictating that a set of exorbitant rules is unavailable as between E.U. parties, but available against non-E.U. parties); Borchers, *supra* note 64, at 2 (discussing the European Union's "continued use of exorbitant jurisdictional bases against non-E.U. defendants").

221. Silberman, *supra* note 53, at 607 & n.94. Jurisdiction based on the plaintiff's French nationality is admittedly highly controversial and employed infrequently. *See generally* Kevin M. Clermont & John R.B. Palmer, *French Article 14 Jurisdiction, Viewed from the United States*, *in* DE TOUS HORIZONS: MÉLANGES XAVIER BLANC-JOUVAN 473 (2005).

222. *See* Borchers, *supra* note 64, at 5 (discussing "the common law countries," which include the United Kingdom).

223. *See* Club Resorts Ltd. v. Van Breda, 2012 SCC 17, [2012] 1 S.C.R. 572 (Can.) (affirming a finding of jurisdiction over a Cayman Islands-incorporated defendant for torts that occurred at the defendant's hotels in Cuba); Tanya J. Monestier, *(Still) a "Real and Substantial" Mess: The Law of Jurisdiction in Canada*, 36 FORDHAM INT'L L.J. 396, 413 (2013) (analyzing the four "presumptive connecting factors that prima facie entitle a [Canadian] court to assume jurisdiction over a dispute," including that "the defendant carries on business in the province").

224. Switzerland, Belgium, Mexico, the Netherlands, Uruguay, Argentina, Austria, Costa Rica, Estonia, Finland, Germany, Iceland, Japan, Lithuania, Luxembourg, Poland, Portugal, Romania, Russia, South Africa, Spain, and Turkey have all adopted a version of the forum of necessity doctrine. Chilenye Nwapi, *Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor*, 30 UTRECHT J. INT'L & EUR. L. 24, 31-32 (2014).

225. It is unclear whether Canada is a part of this trend. *See* Van Breda v. Vill. Resorts Ltd., 2010 ONCA 84, 98 O.R. 3d 721, para. 54 (Can.) (recognizing "forum of necessity" jurisdiction), *aff'd on other grounds sub nom. Club Resorts*, 2012 SCC 17, 1 S.C.R. 572; Monestier, *supra* note 223, at 452-53. *But cf.* Anvil Mining Ltd. c. Ass'n Canadienne Contre L'Impunité, 2012 QCCA 117, [2012] R.J.Q. 153 (Can.) (rejecting an argument that Quebec was the forum of necessity).

226. Rb. 's-Gravenhage 21 maart 2012 m.nt. Van der Helm, No. 400882 / HA ZA 11-2252 (El-Hojouj/Derbal) (Neth.).

227. *See* Nicola Jägers et al., *The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case Against Shell*, AJIL UNBOUND (Jan. 2014), *reprinted in* AGORA: REFLECTIONS ON *KIOBEL*, at e-36, e-38 (2014), *available at* http://www.asil.org/sites/default/files/AGORA/201401/AJIL%20Agora-%20Reflections%20on%20Kiobel.pdf.

228. "Reverse forum shopping" refers to defense efforts to select the forum—for example, through a forum non conveniens dismissal. *See, e.g.*, Stein, *supra* note 78, at 826 n.199.

lack American-style due process protections for defendants sued in their courts.[229] Forum non conveniens tends to be either nonexistent or much less permissive in most other countries.[230]

B. *The Resulting Legal Landscape*

As a result of the combination of developments in U.S. and foreign courts, more and more transnational disputes—particularly in certain categories of cases—are appearing in foreign fora. They may be refiled in foreign courts after they are dismissed from U.S. court, filed in foreign courts instead of in U.S. court, or filed in foreign courts in parallel with U.S. litigation.[231] These cases usually have some connection to the forum in which they are brought, but this fact should not undermine the significance of the development.[232] As for transnational litigation with only remote connections to the forum, Canada and the Netherlands are currently the most likely countries to entertain such suits.[233]

Although it is too early to see the full effects of the recent Supreme Court decisions and still-emerging foreign trends,[234] evidence of the transition toward foreign fora is beginning to appear.[235] I do not claim that avoidance trends are *causing* the foreign developments but rather that they are contributing to plain-

229. In contrast to civil law jurisdictions, which focus on a court's "competen[ce]" to hear a case, "[t]he U.S. system of jurisdiction is defendant-friendly precisely because our Supreme Court has made jurisdiction a constitutional issue based on the due process 'rights' of the defendant." Brand, *supra* note 56, at 78-79 (emphasis omitted).

230. *See supra* note 90 and accompanying text.

231. Of course, because the foreign developments described here will not perfectly, or even mostly, replace the opportunities for litigation that U.S. courts used to offer, avoidance doctrines nevertheless will cause some litigation either to be dismissed from U.S. court and not filed elsewhere, or to fail to be brought in the first instance.

232. Almost any suit sustainable in U.S. court—before or after these avoidance developments—also requires some local connection. (The Alien Tort Statute used to provide the major exception to this rule.)

233. *See infra* notes 241-60 and accompanying text.

234. It is likely too early to empirically assess the effect of the recent avoidance decisions on litigation trends, and doing so when the time is ripe will likely be challenging. *See, e.g.*, Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1507 (2013) (discussing limitations on empirical evidence).

235. *See, e.g.*, Quintanilla & Whytock, *supra* note 184, at 33-35; Katy Dowell, *International Litigants in London Rise by a Third in Three Years*, LAWYER (May 7, 2013), http://www.thelawyer.com/news-and-analysis/practice-areas/litigation/international-litigants-inlondon-rise-by-a-third-in-three-years/3004520.article (noting the rise of U.S. litigants in English courts); William F. Sullivan et al., *A Global Concern: The Rise of International Securities Litigation*, BLOOMBERG BNA (Apr. 8, 2013), http://www.bna.com/a-global-concern-the-rise-of-international-securities-litigation. For some examples of U.S. cases mentioning parallel or prior-filed foreign suits, see Lam Yeen Leng v. Pinnacle Performance Ltd., 474 F. App'x 810 (2d Cir. 2012) (in Singapore); Bailey Shipping Ltd. v. Am. Bureau of Shipping, No. 12 Civ. 5959(KPF), 2013 WL 5312540 (S.D.N.Y. Sept. 23, 2013) (in Greece); and Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 474 B.R. 76, 79 (Bankr. S.D.N.Y. 2012) (in the Cayman Islands).

tiffs' choices to bring suits abroad. Some commentators contend that foreign-judgment enforcement actions are growing in U.S. courts.[236] This trend suggests plaintiffs are suing in foreign courts, which may then impose substantial judgments on companies with U.S. assets.

This may be happening in two main ways. First, some plaintiffs are refiling lawsuits in foreign courts after U.S. courts dismiss them on avoidance grounds.[237] Although avoidance doctrines, especially forum non conveniens, have ostensibly contemplated this happening for decades, in practice such refiling rarely occurred.[238]

Second, plaintiffs may bring certain types of cases in foreign fora in the first instance.[239] In these types of cases, the United States is no longer presumptively plaintiffs' favorite forum. Securities, environmental, and human rights litigation provide examples of types of litigation that are gradually migrating abroad.[240]

Global securities litigation, for example, is beginning to move to the Netherlands and Canada, even in cases in which the only connection to the forum is that some of the plaintiff-investors were citizens of those countries—a rather low threshold.[241] Both fora have replicated some of the most attractive attributes of the U.S. litigation system.[242]

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236. *See, e.g.*, WILLIAM E. THOMSON & PERLETTE MICHÈLE JURA, U.S. CHAMBER INST. FOR LEGAL REFORM, CONFRONTING THE NEW BREED OF TRANSNATIONAL LITIGATION: ABUSIVE FOREIGN JUDGMENTS 6 & n.40 (2011), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/TransnationalLitigation_AbusiveForeignJudgments.pdf; Quintanilla & Whytock, *supra* note 184, at 35.

237. *See, e.g.*, Childress, *supra* note 27, at 23 (noting that the plaintiffs in *Morrison* refiled their suit in Australia after its dismissal from U.S. courts); Wulf A. Kaal & Richard W. Painter, *Forum Competition and Choice of Law Competition in Securities Law After* Morrison v. National Australia Bank, 97 MINN. L. REV. 132, 175-77 (2012) (discussing cases refiled abroad after U.S. dismissal).

238. *See supra* note 184.

239. *See, e.g.*, Childress, *supra* note 27, at 6.

240. This phenomenon happens in other areas as well. *See, e.g.*, Allianz Suisse Versicherungs-Gesellschaft v. Miller, 24 F. Supp. 3d 670, 672 (W.D. Mich. 2014) (discussing an insurance action brought in Switzerland against a U.S. defendant); L'Institute National de L'Audiovisuel v. Kultur Int'l Films, Ltd., No. 11-6309, 2012 WL 296997, at *1 (D.N.J. Feb. 1, 2012) (discussing a copyright action brought in France against a U.S. defendant). *But cf., e.g.*, Martin Gelter, *Why Do Shareholder Derivative Suits Remain Rare in Continental Europe?*, 37 BROOK. J. INT'L L. 843 (2012).

241. Childress, *supra* note 27, at 27-28; *infra* note 244.

242. *See* Kaal & Painter, *supra* note 237, at 138-40 (discussing the Netherlands); *id.* at 186-90 (discussing Canada). Indeed, Dutch courts have recognized U.S. opt-out global class action awards, reasoning that the procedures that lead to those awards are similar to Dutch procedures. *See* Ianika Tzankova & Hélène van Lith, *Class Actions and Class Settlements Going Global: The Netherlands*, *in* EXTRATERRITORIALITY AND COLLECTIVE REDRESS 67, 89 (Duncan Fairgrieve & Eva Lein eds., 2012) (describing the Ahold litigation in the United States and the Netherlands); *Netherlands: Amsterdam Court Recognizes US Class Settlement*, 3 GLOBAL COMPETITION LITIG. REV. R-66 (2010).

The Dutch have created an innovative collective settlement procedure under which putative plaintiffs and defendants "can jointly petition the Amsterdam Court of Appeals to approve the settlement and make [it] binding on all class members who do not opt out."[243] Dutch civil procedure affords Dutch courts jurisdiction if at least one of the plaintiffs requesting the declaration or one of the defendants is a Dutch domiciliary.[244]

Canada is also becoming an increasingly popular jurisdiction for bringing transnational securities litigation.[245] Securities actions in Ontario,[246] for example, are not limited to securities traded on Canadian exchanges (if the issuer has sufficient connections to Canada)[247] and can include plaintiffs from all over the world.[248] On the merits, Ontario also does not require plaintiffs to prove reliance to certify a class.[249] And while the Ontario Securities Act caps a defendant corporation's liability, this provision does not apply to knowing misrepresentations or other potential damages, which limits the cap's practical effect.[250]

Some environmental tort litigation is also going overseas. For example, Nigerian plaintiffs sued Royal Dutch Shell and its Nigerian subsidiary in a

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243. Hensler, *supra* note 201, at 311.

244. WETBOEK VAN BURGERLIJKE RECHTSVORDERING [RV] art. III (Neth.). In the most significant (and largest) settlement under the Dutch collective settlement procedure to date, Shell Petroleum settled securities fraud claims (originally brought as a global class action in the United States) with plaintiffs from more than 100 countries (but not the United States) for over $350 million. Considering the fees awarded in the U.S. and Dutch proceedings, Deborah Hensler has calculated that both Shell and the U.S. plaintiffs' lawyers involved in the settlement (if not also the plaintiffs themselves) appear to have fared at least as well as, if not better than, they would have in U.S. court. Hensler, *supra* note 201, at 319.

245. Ashby Jones, *Lawyers Looking to Canada for Shareholder Litigation*, WALL ST. J. (Feb. 27, 2012), http://on.wsj.com/1DKPfsb; *see also* Noam Noked, *A New Playbook for Global Securities Litigation and Regulation*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 2, 2012, 9:53 AM), https://blogs.law.harvard.edu/corpgov/2012/02/02/a-new-playbook-for-global-securities-litigation-and-regulation (noting that currently pending Canadian securities class actions "represent approximately $15.9 billion in claims").

246. Canadian securities law is made at the provincial, not federal, level. Tanya J. Monestier, *Is Canada the New Shangri-La of Global Securities Class Actions?*, 32 NW. J. INT'L L. & BUS. 305, 317 n.49 (2012).

247. *See* Abdula v. Can. Solar Inc., 2012 ONCA 211, 110 O.R. 3d 256, paras. 72-81 (Can.); Kevin LaCroix, *Ontario Court: Company with Shares Trading Only on Foreign Exchange Subject to Canadian Securities Suit*, D&O DIARY (May 4, 2012), http://www.dandodiary.com/2012/05/articles/international-d-o/ontario-court-company-with-shares-trading-only-on-foreign-exchange-subject-to-canadian-securities-suit.

248. *See* Silver v. IMAX Corp., 2011 ONSC 1035, 105 O.R. 3d 212, paras. 57-69 (Can.) (certifying a global class in a suit against a Canadian company that traded on the NASDAQ); Daniel Jutras, *The American Illness and Comparative Civil Procedure*, *in* THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW 159, 168 (F.H. Buckley ed., 2013); Monestier, *supra* note 246, at 319 (discussing the potential consequences of the growth of global class actions in Canada).

249. *See, e.g.*, Securities Act, R.S.O. 1990, c. S.5, s. 138.3 (Can.); BRIAN ANDERSON & ANDREW TRASK, THE CLASS ACTION PLAYBOOK 294 (2d ed. 2012).

250. *See* Securities Act s. 138.7; Sullivan et al., *supra* note 235.

Dutch court, alleging damages resulting from an oil spill in Nigeria.[251] The court held the wholly owned Nigerian subsidiary liable to compensate one farmer but dismissed claims against the Dutch parent company.[252] To the Dutch court, the suit against the Nigerian subsidiary was foreign-cubed, but that did not stay the court's hand. Had the Dutch court followed American avoidance doctrines, it would have determined that it had no personal jurisdiction over the Nigerian subsidiary. Instead, it applied the substantive law of Nigeria.[253] This expansive concept of jurisdiction may make the Netherlands a choice destination for environmental and other transnational tort litigation.[254]

In the area of human rights litigation, Canada, several European nations, and the European Union are "loosening constraints on corporate liability."[255] Canada, the United Kingdom, and the Netherlands, for example, all appear to offer potential fora for such suits.[256] Canadian courts hold parent companies liable in negligence for failing to prevent foreign subsidiaries' human rights abuses in circumstances where, in the United States, the parent would likely be protected by the corporate veil.[257] This practice can circumvent restrictions on enforcing laws extraterritorially without addressing the extraterritoriality issue directly. In the United Kingdom, four out of five business human rights disputes litigated to conclusion (80%) have resulted in a payout, compared to 9.5% for U.S. corporate alien tort suits.[258] Similar cases in the United Kingdom have settled for tens of millions of dollars.[259] Dutch courts recognize corporate liability for human rights abuses under domestic tort law regardless of the location of the harms if the defendant has a domicile or headquarters in the Netherlands or if the defendant's place of residence is unknown, as was the case in the

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251. Ivana Sekularac & Anthony Deutsch, *Dutch Court Says Shell Responsible for Nigeria Spills*, REUTERS UK (Jan. 30, 2013), http://uk.reuters.com/article/2013/01/30/uk-shell-nigeria-lawsuit-idUKBRE90T0DC20130130. A parallel suit is pending before the High Court of London. Laura Carballo Piñeiro & Xandra Kramer, *The Role of Private International Law in Contemporary Society: Global Governance as a Challenge*, 7 ERASMUS L. REV. 109, 109 n.4 (2014).

252. Sekularac & Deutsch, *supra* note 251.

253. Childress, *supra* note 27, at 6.

254. *See* Jägers et al., *supra* note 219, at 38-39.

255. Caroline Kaeb & David Scheffer, *The Paradox of* Kiobel *in Europe*, 107 AM. J. INT'L L. 852, 854 (2013).

256. For a list of nations that provide for legal codification of criminal and often also joint civil liability for extraterritorial corporate conduct pertaining to international crimes, see Supplemental Brief of Ambassador David J. Scheffer, Northwestern University School of Law, as Amicus Curiae in Support of the Petitioners at 15-20, Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165350.

257. *See, e.g.*, Choc v. Hudbay Minerals Inc., 2013 ONSC 998, paras. 49, 54-58 (Can.).

258. Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127, 131 (2013).

259. *Id.* at 130-31.

litigation brought by the Palestinian doctor against unidentified Libyan officials.[260]

These developments have the potential to shape the landscape of litigation and liability worldwide.[261] Due in part to U.S. litigation isolationism, foreign courts may be increasingly attractive for foreign plaintiffs suing multinational corporations. Recognizing this eventuality, Donald Childress has called attention to the emergence of a law market for transnational litigation.[262] This market is a means of understanding how domestic and foreign courts compete through their legal regimes for transnational litigation.[263] But scholarship has not yet evaluated the systemic impact of these trends or their interaction with U.S. transnational litigation avoidance doctrines in terms of those doctrines' ability to accomplish their stated goals or otherwise further U.S. interests.[264]

III. JUDGING AVOIDANCE

Until this point, this Article has shown the development of litigation isolationism, identified its stated goals, and demonstrated the forces embracing transnational litigation in foreign courts. It now turns to consider whether, in light of these foreign court developments, avoidance decisions have accomplished their stated goals of protecting separation of powers, international comity, and defendants' convenience.

To some extent, the answer would seem to be yes, notwithstanding any foreign court trends. First, avoidance developments appear to reduce burdens on separation of powers and international comity simply by having courts not adjudicate contentious cases that could create such concerns. By hearing fewer transnational cases, U.S. courts seem to prevent themselves from interfering with political branch prerogatives or offending foreign nations.

Second, by making it easier for defendants to win pretrial dispositive motions and by discouraging plaintiffs from suing in U.S. courts, avoidance alleviates many burdens on defendants. Defendants' belief that foreign litigation will be less onerous than U.S. litigation is not unfounded. Even accounting for recent developments, foreign nations still tend to have less costly litigation,[265] less expansive discovery rules,[266] lower damages awards,[267] and a "loser pays"

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260. Jägers et al., *supra* note 219, at 36-41; *see supra* text accompanying note 226 (discussing the Palestinian doctor's case).

261. Civil antitrust or products liability litigation may be areas in which there is further future expansion in the European Union. *See* KELEMEN, *supra* note 185, at 171-194 (discussing antitrust); Rod Freeman, *Europe: Part 2*, *in* GOODDEN, *supra* note 199, at 76, 82 (discussing product liability).

262. *See* Childress, *supra* note 27, at 9.

263. *Id.* at 7.

264. *Cf. supra* note 29 (discussing Childress's work in this field).

265. *See* MCKNIGHT & HINTON, *supra* note 208, at 1-2.

266. *See* Robert Hardaway et al., *E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521, 524 (2011).

funding system that can provide winning defendants with attorneys' fees.[268] Limiting jurisdiction over foreign defendants also seems to lessen any perceived "litigation tax" of doing business in the United States, at least for foreign defendants, which seems to benefit the U.S. economy.[269]

But these first impressions of avoidance's unmitigated success are deceptive. In fact, avoidance does little to address separation of powers and international comity concerns because federal courts are still the major decisionmakers in deciding whether to entertain transnational suits. And hearing *too few* transnational cases, like hearing too many, can also offend foreign sovereigns and therefore interfere with political branch prerogatives. Furthermore, while most assume that excluding transnational cases is negative for plaintiffs but positive for defendants, litigation isolationism has unappreciated negative effects for *all* U.S. parties—both plaintiffs and defendants—and more broadly for U.S. sovereign interests.

A. *Separation of Powers and International Comity*

Avoidance doctrines strive to prevent federal courts from interfering with foreign relations policies that should be controlled by the political branches and from disrupting international comity in the process. But, as judicially driven developments mostly uninformed by international law or practice, they are simply ill equipped to do so. A signature feature of avoidance doctrines is the lack of political branch input and the domination of the area by courts. U.S. courts were long criticized for expanding transnational litigation. Today, courts have gone too far in the opposite direction.

Entertaining "too little" transnational litigation can raise the same separation of powers concerns as entertaining too much. In articulating the costs to U.S. democracy of international human rights litigation, Curtis Bradley has noted that the separation of powers problems that come from courts "invent[ing]" procedures to facilitate that kind of litigation (such as holding that customary international law has the status of federal common law) are likewise apparent in judicially created doctrines designed to *limit* such litigation (such as the political question doctrine and international comity).[270] The same can be said of similar judicially driven developments in areas of transnational litigation more generally. Cabining transnational overreach through judicially created avoidance doctrines does little to ameliorate the separation of powers problem the overreach created. The problem is a result of court (as opposed to political branch) control over these issues. Avoidance has not made that go away. Instead, it has flipped the question to whether the federal courts are now

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267. This is, at least, the conventional wisdom. *See* Borchers, *supra* note 64, at 19; Childress, *supra* note 27, at 4.

268. *See supra* note 210 and accompanying text.

269. *See supra* note 177 and accompanying text.

270. Bradley, *supra* note 117, at 466-67.

excluding (rather than including) transnational litigation out of keeping with political branch prerogatives and in a manner that interferes with the executive branch's conduct of foreign affairs.[271]

Similarly, avoiding transnational litigation beyond international standards does not necessarily preserve international comity. By eliminating categories of contentious cases from U.S. courts, the developments described here prevent U.S. courts from offending foreign nations or interfering with their regulatory authority to some extent.[272] If international law creates only a ceiling on the kinds of transnational cases domestic courts can hear and avoidance consistently keeps American courts below this ceiling, one might think avoidance had achieved this goal.

But there should also be a jurisdictional floor. Scholars have debated whether customary international law governs adjudicatory jurisdiction.[273] If it does govern this area, international law typically establishes the outer limits of a state's authority, not baseline requirements for how to exercise it.[274] But even if neither domestic nor international law *requires* a jurisdictional floor, U.S. sovereign interests and widely accepted international practice counsel in favor of one. There remains the potential for offending foreign sovereigns (or for interfering with foreign relations, when those are two different things) by *not* hearing cases in certain subject matter areas,[275] discriminating against foreign plaintiffs who are kept *out* of U.S. courts (e.g., through forum non

271. Avoidance decisions sometimes appear to disregard executive preferences. For example, in *Morrison v. National Australia Bank Ltd.*, the Court rejected the Solicitor General's proposed resolution of that case despite her arguments that her proposal, inter alia, complied with international comity. *See* 561 U.S. 247, 270-72 (2010). *But cf.* Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014) (incorporating considerations raised by the Solicitor General).

272. *See* Noll, *supra* note 23, at 44.

273. *Compare, e.g.*, JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 472 (8th ed. 2012) (explaining that international law requires nations to maintain courts and hear certain cases), *with* JAMES FAWCETT & JANEEN M. CARRUTHERS, CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW 9 (14th ed. 2008) (stating that, unlike public international law, "[p]rivate international law is not the same in all countries").

274. *See* Rebecca Ingber, *International Law Constraints as Executive Power*, 57 HARV. INT'L L.J. (forthcoming 2016) (manuscript at 10) (on file with author) (noting that international law is "conventionally understood in terms of constraint on state actors"); F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 9-10 (1964). *But cf.* CRAWFORD, *supra* note 273, at 472 (arguing that there is a jurisdictional floor).

275. *See, e.g.*, Statement of Interest of the United States, Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035, 94-9069), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/07/Doe-I-v-Karadzic-US-Statement-of-Interest-Sept-1995.pdf (arguing that the Second Circuit should order the district court to consider the case); Memorandum for the United States as Amicus Curiae at 22-23, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146 (arguing that "a refusal to recognize a private cause of action . . . might seriously damage the credibility of our nation's commitment to the protection of human rights").

conveniens),[276] or "routinely dismissing foreign claims against American multinationals."[277] The first two categories are even more problematic when they appear simultaneously with the third—that is, when the defendants are American nationals.[278]

This floor should take the form of at least a presumption that U.S. courts will exercise their jurisdiction in cases in which the United States has clear interests[279]—for example, cases involving U.S. defendants. In other words, when courts have personal jurisdiction over local defendants—which home fora will have in cases against American defendants after *Daimler*—they should usually exercise it.[280]

A defendant can traditionally be sued in its home forum. That forum is usually recognized as both fair and reasonably convenient for the defendant.[281] Moreover, it is also understood that the defendant's home forum has a sovereign interest in hearing a case against one of its own.[282] *Goodyear* and *Daimler* seem to assume this;[283] foreign courts assume this;[284] the executive branch as-

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276. *See* Brief of the Republic of Ecuador as Amicus Curiae at 4-5, Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002) (Nos. 01-7756L, 01-7758C), 2001 WL 34369154 (urging the court not to dismiss the Ecuadorians' suit); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 300-01 (6th ed. 2010) (noting that a failure to afford equal court access to foreign plaintiffs may violate treaties to which the United States is a signatory); Briggs, *supra* note 147, at 119-21. In 2008, a French court took the unusual step of declining jurisdiction in an airplane accident lawsuit "in order to enable the plaintiffs to go back to California and resume the proceedings that they had initiated there." Gilles Cuniberti, *French Court Declines Jurisdiction to Transfer Dispute Back to U.S. Court*, CONFLICT OF LAWS .NET (Mar. 27, 2008), http://conflictoflaws.net/2008/french-court-declines-jurisdiction-to-transfer-dispute-back-to-us-court. The State Department has also discouraged U.S. states from excluding certain categories of transnational litigation. *See* Bakalar v. Vavra, 619 F.3d 136, 142 (2d Cir. 2010) (noting that the Governor of New York had vetoed a statute of limitations bill because the State Department had advised that "if it went into effect, [it] would have caused New York to become 'a haven for cultural property stolen abroad'" (quoting Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 430 (N.Y. 1991))).

277. Lear, *supra* note 141, at 563.

278. *See, e.g.*, *In re* S. Afr. Apartheid Litig., 15 F. Supp. 3d 454, 461 (S.D.N.Y. 2014) (declining to apply *Kiobel*'s strengthened presumption against extraterritoriality in a suit against U.S. defendants).

279. The standard I envision for "clear interests" for a jurisdictional floor, particularly in cases involving U.S. defendants, would be lower than the bar set by interest analysis in the choice-of-law context. Interest analysis typically asks which state has the *strongest* connection to the case. *See* SYMEONIDES, *supra* note 30, at 42-44. The jurisdictional floor proposed here builds on the "minimum" concept of "minimum contacts." The jurisdictional question asks about *sufficient* contacts, which should be a lower standard.

280. *See supra* Part I.A.1.

281. *See supra* note 163.

282. By contrast, forum non conveniens is often justified as a way of ensuring that domestic courts are reserved for the disputes of the taxpayers that fund the judicial systems. *See* Robertson, *supra* note 71, at 1096.

283. If "a court may assert jurisdiction over a foreign corporation," Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014), when it is "essentially at home in the forum State," *id.* (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011))

sumes this.[285] And yet what *Daimler* establishes—personal jurisdiction over defendants sued at home—forum non conveniens takes away, at the court's discretion, in many transnational cases against U.S. nationals. Even if international law does not forbid this result, it is a problematic exercise of discretion because of the risk of undermining both foreign relations and U.S. sovereign interests in adjudicating cases against U.S. defendants.

B. *Consequences for U.S. Interests*

Opinions of avoidance doctrines tend to reflect sympathies for the interests of either plaintiffs or defendants.[286] Scholars have either criticized the expansion of avoidance for reducing access to justice[287] or endorsed it as correcting inefficiencies created by forum shopping.[288] Plaintiffs in these discussions tend to be individuals complaining of some injury, whereas defendants tend to be multinational corporations. This Subpart seeks to show that—contrary to conventional wisdom—avoidance developments are *not* categorically good for defendants and, with them, U.S. economic interests. To demonstrate this, I focus on the effects of avoiding three categories of transnational cases: suits against U.S. defendants, suits against foreign defendants, and suits brought by U.S. plaintiffs (against foreign or domestic defendants).

1. *Suits against U.S. defendants*

Bifurcating the world into the interests of plaintiffs and defendants, litigation isolationism's results for American defendants do not seem troubling initially: the court permitted dismissal and the defendant requested it. Indeed, dismissing suits against U.S. defendants on these grounds undoubtedly benefits the defendant in that particular case, at least in the short term, and the decision whether to advance an avoidance defense should be up to that defendant.[289]

(internal quotation mark omitted), then it appears, a fortiori, that a court may assert jurisdiction over a *domestic* corporation when it is *actually* at home.

284. *See supra* note 56 and accompanying text.

285. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 131, at 11-12 (recognizing that courts have jurisdiction over corporate defendants where they are "at home").

286. *But cf.* Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 884-85 (2002) (assessing similar issues in terms of global welfare).

287. *See, e.g.*, Miller, *supra* note 67, at 475-76; Whytock & Robertson, *supra* note 10, at 1450, 1453.

288. *See, e.g.*, Sykes, *supra* note 44, at 340.

289. Most avoidance doctrines are advanced at the defendant's discretion. Personal jurisdiction, forum non conveniens, and even abstention comity are all waivable. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) (personal jurisdiction); Aguas Lenders Recovery Grp. v. Suez, S.A., 585 F.3d 696, 700 (2d Cir. 2009) (forum non conveniens); Maersk, Inc. v. Neewra, Inc., No. 05 Civ. 4356(CM), 2008 WL 1986046, at *1 (S.D.N.Y. May 7, 2008) (international comity). The presumption against extraterritoriality is not. *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255

But widespread trends of avoidance dismissals in suits against U.S. defendants can have negative effects for U.S. defendants and U.S. interests at a macro level.

To begin, these avoidance trends may "deprive" U.S. defendants of the benefits of their home forum, which is traditionally considered the most fair and convenient forum available.[290] This is hardly a problem worth mentioning in particular cases in which defendants have forgone such advantages by moving for dismissal on avoidance grounds. But the overall effect of avoidance developments, combined with the expanding attractiveness of foreign courts described here, is to drive plaintiffs to sue abroad in the first instance.[291]

In such circumstances, common sense and anecdotal evidence suggest that U.S. defendants would try to have the case transferred to a U.S. court.[292] The fact that U.S. defendants reverse forum shop out of U.S. court does not necessarily reflect a systematic bias against U.S. courts; it may (at least sometimes) simply reflect good litigation strategy. No matter where the suit is brought, the basic incentives for defendants to reverse forum shop are almost always the same. The plaintiff sues in the jurisdiction most favorable to her, which, by definition, will often be least favorable to the defendant. The defendant then moves to dismiss on any available grounds, including avoidance, for several reasons: to try to make the plaintiff settle or drop the case, which may be more likely if the plaintiff cannot litigate in her preferred forum; to make litigation more expensive, difficult, and complicated for the plaintiff; and then, if dismissal does not make the case go away, to litigate in a more favorable forum.[293]

Efforts to reverse forum shop out of foreign courts may also represent an appreciation that in the long run, American defendants may not fare well in

(2010). But it is possible that the parties could jointly stipulate that a statute had extraterritorial application, and a court could rely on that stipulation. *See* Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 704-05 (2012).

290. *See supra* note 163.

291. *See supra* note 235 and accompanying text.

292. *See, e.g.*, Grammer, Inc. v. Custom Foam Sys., Ltd., 482 F. Supp. 2d 853, 854-55 (E.D. Mich. 2007) (identifying the case as parallel litigation in U.S. court following a Canadian suit); Douez v. Facebook, Inc., 2014 BCSC 953, paras. 7, 29 (Can.) (declining to enforce the California forum selection clause in Facebook's terms of use or to dismiss the case on the basis of forum non conveniens); Stefan Vogenauer, *Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence*, 21 EUR. REV. PRIV. L. 13, 44-45, 77 (2013) (arguing that choice of law and forum in contract clauses is driven primarily by familiarity with a legal system and judgments about its sophistication, at least in Europe and arguably in the United States as well).

293. *See, e.g.*, Robin Effron, Atlantic Marine *and the Future of Forum Non Conveniens*, 66 HASTINGS L.J. 693, 707 (2015) ("The costs of restarting the action, both real and psychological, are likely higher than those associated with continuing to litigate an existing case in a different forum within the same judicial system."); Thomas Orin Main, *Toward a Law of "Lovely Parting Gifts": Conditioning Forum Non Conveniens Dismissals*, 18 SW. J. INT'L LAW 475, 478 (2012).

those courts.[294] This may be true for several reasons. First, U.S. defendants will not have a "home court advantage," and instead will themselves be foreigners in potentially unsympathetic courts.[295] Second, U.S. defendants may also face less favorable procedures and judgments overseas.[296] Rising costs of litigation and damages awards abroad[297] should undermine intuitions that U.S. litigation always takes longer or is more expensive. And depending on the circumstances, such litigation may or may not in fact be more "convenient."[298] "Boomerang" litigation—going back and forth between U.S. and foreign courts[299]—or extended parallel litigation in multiple countries also undermines the value of repose,[300] which can have business and reputational importance beyond the four corners of any given litigation. Third, other kinds of costs may arise in foreign litigation. For example, foreign discovery regimes are typically less protective of attorney-client privilege and business secrets.[301] In addition, the new frontier of litigation in several foreign jurisdictions is still a work in progress. The uncertainty and risk associated with a jury trial and other aspects of U.S. litigation are exchanged for the uncertainty and risk arising from less familiar fora that may still be developing their private litigation rules.[302] In cases brought in foreign courts in the first instance, moreover, U.S. defendants will probably be stuck there because most foreign courts afford defendants only a limited oppor-

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294. *See* Quintanilla & Whytock, *supra* note 184, at 48, 49 & n.61.

295. *See supra* notes 163-64 and accompanying text.

296. *See, e.g.*, Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1202-04 (9th Cir. 2006); *see also* Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1173-74 (1992) (providing evidence undermining assumptions that juries are more plaintiff friendly than judges).

297. *See supra* note 208.

298. *Cf., e.g.*, Can v. MD Helicopters, Inc., No. 1 CA-CV 10-0367, 2011 WL 1483783, at *1-2 (Ariz. Ct. App. Apr. 19, 2011) (dismissing the case on forum non conveniens grounds, despite the appellants' contention that "'most of the documentary evidence and witnesses' they need to prove their product liability case are 'located . . . in the United States'").

299. *See* M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Convenient Is Forum Non Conveniens in Transnational Litigation?*, 4 BYU INT'L L. & MGMT. REV. 21, 22 & n.3 (2007).

300. *See* Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 290 ("Repose is a social and political value with economic consequences.").

301. *See, e.g.*, Joined Cases T-125/03 & T-253/03, Akzo Nobel Chems. Ltd. v. Comm'n, 2007 E.C.R. II-3532, II-3573 (Ct. First Instance); Antonio Lordi, *The Attorney-Client Privilege in the European Union and Italy: Time for a Change*, 11 DUQ. BUS. L.J. 47, 48 (2008). *But cf.* Kathryn Chalmers & Andrew Cunningham, *Privilege from Canadian and U.S. Perspectives: Reverence vs. Skepticism*, 19 LAW & BUS. REV. AM. 297, 298 (2013) (noting ways in which the Canadian privilege doctrine is more protective than the American one).

302. Nowhere was this risk more apparent, at least in retrospect, than in the Chevron/Ecuador case. *See* Gómez, *supra* note 194, at 434-44.

tunity to reverse forum shop.[303] Although foreign courts are increasingly adopting some of the more plaintiff-friendly aspects of U.S. litigation culture, most do not have comparable avoidance doctrines that give defendants opportunities for reverse forum shopping.[304]

U.S. defendants have already sometimes come to regret having moved for forum non conveniens dismissal to another forum, later requesting U.S. courts to block enforcement of the resulting unfavorable foreign judgments. The two most famous examples of such "boomerang" litigation are the Dow/Nicaragua case described in the Introduction and the Chevron/Ecuador litigation.[305] When those cases were first dismissed from U.S. courts on forum non conveniens grounds, few would have suspected that the plaintiffs could have sued in their home countries with a hope for large judgments. It was only after the first district court dismissals in those cases that both countries enacted legislation that paved the way for billions of dollars in judgments.[306] In the Chevron/Ecuador case, which arose out of alleged oil contamination in the Amazon, the Ecuadorian litigation yielded an $18 billion judgment and years of fighting over judgment enforcement in an assortment of jurisdictions, including the United States.[307] In the Nicaragua case, as mentioned above, the defendants' initial attempts to block enforcement of the judgments themselves ran aground because of avoidance doctrines.[308]

These cases present cautionary tales. Perhaps they are just extreme examples. What appear to have been corrupt and unfair procedures in Nicaragua and Ecuador led to the enormous judgments, which, in the Nicaragua case, were ultimately (and rightly) found unenforceable.[309] The developments described

303. In contrast to "the rest of the world," U.S. courts are focused on defendants' rights—protected through principles such as personal jurisdiction and forum non conveniens—rather than plaintiff access to courts. Brand, *supra* note 229, at 79.

304. *See id.* at 82 (discussing personal jurisdiction and forum non conveniens as protecting defendants); Tobias Kraetzschmar & Philipp K. Wagner, *Responding to Differing Procedural Concepts in U.S.-German Cross-Border Disputes*, 23 N.Y. ST. B.A. INT'L L. PRACTICUM 34, 34 (2010); Nougayrède, *supra* note 21, at 448 (advocating more use of forum non conveniens); *supra* note 90 and accompanying text.

305. *See* Casey & Ristroph, *supra* note 299, at 31-40.

306. *See supra* note 4 and accompanying text (describing the Dow/Nicaragua case). In the Chevron/Ecuador litigation, the U.S. district court first dismissed the case on the basis of forum non conveniens in 1996. Aguinda v. Texaco, Inc., 945 F. Supp. 625, 628 (S.D.N.Y. 1996), *vacated sub nom.* Jota v. Texaco Inc., 157 F.3d 153 (2d Cir. 1998). After Ecuador passed the Environmental Management Act in 1999, the plaintiffs filed suit in that country as well. Gómez, *supra* note 194, at 436. Meanwhile, the forum non conveniens litigation continued in U.S. court until the Second Circuit finally affirmed the forum non conveniens dismissal in 2002. Aguinda v. Texaco, Inc., 303 F.3d 470, 473 (2d Cir. 2002).

307. *See* Gómez, *supra* note 194, at 430-31.

308. *See supra* notes 1-10 and accompanying text.

309. *See* Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1312-21 (S.D. Fla. 2009) (describing the unfairness of the Nicaraguan litigation), *aff'd sub nom.* Osorio v. Dow Chem. Co., 635 F.3d 1277 (11th Cir. 2011). I am not aware of a court finding the Chevron judgment unenforceable, *see, e.g.*, Chevron Corp. v. Yaiguaje, 2014 CanLII 16022 (S.C.C.) (granting leave to appeal the suit over enforcement), but a federal court in New York has issued a

here, however, suggest that unfavorable judgments may increasingly come before U.S. courts under circumstances that American judges will be far more willing to endorse.[310] When that happens, an American court will likely recognize and enforce the foreign judgment in a case that it might have resolved differently.[311]

If this is all true, then cutting back on litigation isolationism could be an effort to save American defendants from themselves—that is, to limit their ability to opt for dismissals in situations where in the long run and in their collective interest they should proceed with the case in U.S. court. Such a crusade may be unappealing to some.

But litigation isolationism also has unappreciated effects on U.S. sovereign interests more broadly defined. As I have argued elsewhere, the combination of litigation isolationism at the front end with relatively liberal foreign-judgment enforcement rules at the back end can result in delegating to foreign courts the power to resolve disputes involving U.S. parties that Congress or the states intended to be covered by American law.[312] Such delegation—regardless of whether enforcement of the judgment is later sought in the United States, but all the more so if it is—may undermine broader U.S. interests in several ways.

First, U.S. courts forgo the opportunity to apply American procedures—and the policies behind them—to cases with strong U.S. ties. Whatever one's views on the goals of American procedure,[313] those goals are rarely vindicated by dismissing cases and discouraging plaintiffs from filing in U.S. courts.

Second, in a situation where a U.S. court and a foreign court would reach different conclusions about which substantive law should apply to a given dispute, the United States, through avoidance doctrines, forgoes not only the power to decide the choice-of-law question, but also the opportunity to have its law applied.[314] This happened in the seminal forum non conveniens case of *Piper Aircraft Co. v. Reyno*.[315] The lower courts had determined that Pennsylvania law should apply but that Scotland would find that its own law applied.[316] The Supreme Court's decision to enforce the district court's forum non conveniens

nearly 300-page opinion documenting the corruption in the Ecuadorian litigation leading to that award, *see* Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014).

310. *See* Quintanilla & Whytock, *supra* note 184, at 35-36 (noting the growth of foreign-judgment enforcement actions).

311. *See supra* note 10 and accompanying text.

312. *See* Bookman, *supra* note 17, at 35-36. Of course, the question of Congress's intent underlies the presumption against extraterritoriality itself.

313. *See* Richard Marcus, *'American Exceptionalism' in Goals for Civil Litigation*, *in* GOALS OF CIVIL JUSTICE AND CIVIL PROCEDURE IN CONTEMPORARY JUDICIAL SYSTEMS 123 (Alan Uzelac ed., 2014) (discussing debates about the goals of American procedure beyond conflict resolution).

314. *See* Noll, *supra* note 23, at 42 (arguing that avoidance doctrines and other developments yield a "new conflicts law" that "cede[s] power to coordinate legal systems").

315. 454 U.S. 235, 243, 247, 259-60 (1981).

316. Reyno v. Piper Aircraft Co., 630 F.2d 149, 163, 168 (3d Cir. 1980), *rev'd*, 454 U.S. 235.

dismissal upset the previous understanding that forum non conveniens should not apply if choice-of-law analysis indicated that U.S. law would apply to the dispute.[317] Today, choice-of-law analysis is typically conducted only after a case has survived a forum non conveniens motion to dismiss, but forum non conveniens dismissals are still disproportionately likely in suits where foreign law just *might* apply.[318]

Third, by pursuing litigation isolationism, U.S. courts are unilaterally deciding to limit the U.S. role in the emerging market for transnational litigation, a market in which the United States began as a principal player (although that, too, was primarily a judicially driven position). There are benefits to competing more actively in this market. Several countries have begun to recognize the economic value of exporting domestic law, particularly in the transnational commercial context.[319] The U.S. legal market and other parts of the economy currently gross substantial sums from transnational litigation.[320] American decisions still disproportionately influence world understandings of domestic and international law issues, although some argue that influence is diminishing.[321]

Avoidance doctrines either ignore or do not value these benefits. Or perhaps they assume that transnational commercial litigation can be promoted at the same time that transnational tort litigation is shunned.[322]

This may have some positive effects from a global perspective. But it has negative effects not only on U.S. control over suits involving its own nationals and regulation of conduct and harms that occur within its territory, but also on U.S. global influence.[323]

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317. *See* Stein, *supra* note 78, at 828 & n.204.

318. *See* Childress, *supra* note 3, at 170 ("[W]hen a federal court is asked to adjudicate a case filed by a foreign plaintiff where foreign law is arguably applicable, the trend is to dismiss in favor of a foreign forum."). This makes sense insofar as forum non conveniens is meant to protect courts from undertaking complicated choice-of-law analysis.

319. Vogenauer, *supra* note 292, at 30-32; *see also* MINISTRY OF JUSTICE & UK TRADE & INV., PLAN FOR GROWTH: PROMOTING THE UK'S LEGAL SERVICES SECTOR (2011), *available at* http://www.justice.gov.uk/downloads/publications/corporate-reports/MoJ/legal-services-action-plan.pdf.

320. *See Exorbitant Privilege*, ECONOMIST (May 10, 2014), http://www.economist.com/news/international/21601858-american-and-english-law-and-lawyers-have-stranglehold-cross-border-business-may.

321. *Compare* ANTHEA ROBERTS, IS INTERNATIONAL LAW *INTERNATIONAL*?: A STUDY IN THE GLOBALIZATION OF LEGAL EDUCATION AND SCHOLARSHIP (forthcoming 2015) (manuscript at 51) (on file with author) (arguing that "legal globalization has strongly privileged certain legal systems, most notably those of the United States and the United Kingdom," as developers of international law), *with* David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 850 (2012) (rebutting the conventional wisdom that U.S. constitutionalism guides foreign constitution making).

322. *See supra* note 11 (noting the coexistence of developments encouraging transnational commercial litigation—for example, by strongly enforcing forum selection clauses—and developments discouraging transnational tort cases).

323. *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 79 (2004) (arguing that failure to participate in transnational judicial dialogue "can sharply diminish the influence of any individual national court").

Fourth, as Cassandra Burke Robertson has argued, there are additional economic and political consequences of systematically dismissing cases against American defendants. To the extent that the U.S. tort system seeks to place the cost of defective products on the manufacturer, immunizing U.S. manufacturers from that system when they cause harm abroad skews incentives to make the product safer, even when the same products are sold domestically.[324] Relatedly, in response to transnational litigation avoidance in the United States, other countries may enact blocking statutes or otherwise disfavor foreign investment in or trade with U.S. companies.[325]

2. *Suits against foreign defendants*

Avoiding suits against foreign defendants likewise has negative ramifications for American interests, particularly if such suits are substantially more likely to be dismissed than suits against American defendants. Dismissing cases against foreign defendants but permitting them against U.S. defendants lessens the competitive disadvantage that foreign corporations doing business in the United States used to bear as a consequence of being subject to suit there. But it exacerbates the "litigation tax" on American companies.[326] The forum non conveniens safety valve for domestic defendants provides some relief from this burden, but the doctrine's application is too uncertain to equalize the status of U.S. and foreign companies in this regard. Companies incorporated or headquartered in the United States remain subject to personal jurisdiction in at least the state of their incorporation and principal place of business, and are no longer similarly situated with the foreign corporations doing business alongside them abroad. Foreign companies, meanwhile, gain immunity from U.S. liability for harm to Americans, even if federal or state substantive law would regulate such conduct according to state choice-of-law rules.[327] The resulting regime not only discriminates against American companies, it also provides disincentives for companies to incorporate or locate their headquarters in the United States, which harms U.S. economic interests as a whole.[328]

Foreign court developments somewhat mitigate the impact of this discrimination. Multinational corporations increasingly will be subject to suit abroad and may not be able to avoid liability in their home courts or in the courts of those countries where they may have caused harm. Royal Dutch Shell, the de-

324. Robertson, *supra* note 71, at 1109-10.

325. *Id.* at 1111-12.

326. *See* Kenneth Anderson, *Supreme Court to Review Bauman v. DaimlerChrysler*, OPINIO JURIS (July 17, 2013, 12:17 PM EDT), http://opiniojuris.org/2013/07/17/supreme-court-to-review-bauman-v-daimlerchrysler ("Kiobel has the effect of favoring economic activity abroad by foreign corporations and disfavoring US corporations.").

327. *See* Noll, *supra* note 23, at 63-64.

328. *But see infra* notes 383-84 and accompanying text (discussing the legal benefits of incorporating in the United States).

fendant in *Kiobel*,[329] has been sued in major transnational tort suits in both the Netherlands and the United Kingdom.[330] And with respect to conduct or harms that occur in the nations that have expanding litigation cultures, those nations' courts will likely entertain suits arising from that conduct or those harms.[331]

The winners of this recalibrated transnational litigation system that litigation isolationism helps create, then, are not U.S. parties, or an undifferentiated class of "foreign defendants," but multinational companies incorporated and headquartered in tax havens or states outside of the trends discussed here. Those entities may be able to escape a litigation tax and liability entirely for conduct abroad as well as, potentially, in the United States.[332]

3. *Suits brought by U.S. plaintiffs*

The consequence of both the strengthening of the presumption against extraterritoriality and the changes in personal jurisdiction has been to limit American plaintiffs' access to U.S. courts in transnational cases. This result is obviously detrimental to plaintiffs' interests.[333] It is likewise detrimental to parties—namely, corporations—that typically identify as defendants.

Appearing as a plaintiff or a defendant is not an immutable characteristic. Particularly for corporate entities, today's defendant may be tomorrow's plaintiff. In some circumstances, of course, corporations may want to initiate lawsuits, and in their capacity as plaintiffs, they may regret having advocated for the expansion of avoidance doctrines.[334] More to the point, even in the course of a single dispute, the parties may switch their locations vis-à-vis the "v." If a would-be defendant wants to take advantage of a U.S. forum by way of a declaratory judgment action, for example, avoidance doctrines may block such efforts.[335] Likewise, if a foreign court defendant tries to block enforcement of

329. Royal Dutch Petroleum, the named defendant in *Kiobel*, ceased to exist in 2005. *See Royal Dutch Petroleum Company (Archive)*, SHELL GLOBAL, http://www.shell.com/global/aboutshell/investor/shareholder-information/unification-archive/rd-archive.html (last visited Apr. 28, 2015).

330. *See supra* notes 244, 251-54 and accompanying text.

331. *See, e.g.*, Halfmeier, *supra* note 183, at 447-48 (arguing that the end of American hegemony over transnational torts creates a vacuum that can be filled to some extent by European courts).

332. *See* Noll, *supra* note 23, at 44 (discussing disabling of U.S. regulatory systems).

333. The bulk of domestic scholarship addressing the retraction of U.S. jurisdiction focuses on the resulting harms to plaintiffs. *See, e.g.*, Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 305-08 (2010); Miller, *supra* note 67, at 469. When focusing on transnational litigation, it is important to note that these harms apply to American as well as foreign plaintiffs.

334. *See, e.g.*, InduSoft, Inc. v. Taccolini, 560 F. App'x 245, 246-48, 252-53 (5th Cir. 2014) (per curiam) (affirming forum non conveniens dismissal in a case brought by a Texas software company).

335. *See, e.g.*, Delta Air Lines, Inc. v. Chimet, S.p.A., 619 F.3d 288, 291 (3d Cir. 2010) (dismissing a declaratory judgment suit on forum non conveniens grounds); ITL Int'l, Inc. v. Ninoshka, S.A., No. 01:10-cv-23493-JLK, 2011 WL 3205590, at *5-6 (S.D. Fla. July 27,

the judgment, avoidance doctrines may bar it from suing the original plaintiffs in U.S. court. This happened early on in the enforcement proceedings in the Dow/Nicaragua case: Dow's declaratory judgment action to block enforcement of the Nicaraguan judgment was dismissed for want of personal jurisdiction.[336]

It is difficult, however, to remedy directly the problem of excluding U.S. plaintiffs' suits. Grounding jurisdiction on the basis of the plaintiff's nationality—known as "passive personality jurisdiction"—is widely recognized as unfair outside the scope of prosecuting terrorists.[337] Other means of limiting litigation isolationism may therefore be the best way of ensuring that U.S. parties have access to U.S. courts.[338]

C. *Isolationism in Context*

Litigation isolationism has been fueled by the confluence of several unrelated doctrines that have developed largely in isolation from each other, as well as from the rest of the world. Although the doctrines purport to consider international comity, what they mean by this is unclear. The "at home" rule for general jurisdiction is internationally respected.[339] But neither forum non conveniens nor abstention comity follow or even consider worldwide approaches to the issues they confront; their approaches to comity are more ad hoc. *Morrison* and *Kiobel*, meanwhile, reached outcomes that foreign sovereigns had pushed in amicus briefs but did not adopt an international-law-based rule as those briefs had urged.[340]

Although they cite the same goals, moreover, the effects of these doctrines have butted against each other. On one hand, *Goodyear* and *Daimler* have

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2011) (relying on international comity and other principles to decline to exercise jurisdiction over a suit brought by a U.S. company).

336. Dow Chem. Co. v. Calderon, 422 F.3d 827, 829 (9th Cir. 2005); *see also, e.g.*, Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 379 F.3d 1120, 1121 (9th Cir. 2004) (dismissing the case for lack of personal jurisdiction), *aff'd on other grounds on reh'g en banc*, 433 F.3d 1199, 1211 (9th Cir. 2006) (finding personal jurisdiction while acknowledging that the issue was a close call).

337. *See* Clermont & Palmer, *supra* note 221, at 474-78 (explaining criticisms of French plaintiff-based "exorbitant" jurisdiction).

338. *See, e.g.*, Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 37-38 (2007) ("[S]ecurities claims involving U.S. plaintiffs are less likely to be dismissed—not just because of the general presumption in favor of their choice of forum, but because the claims of U.S. nationals more strongly implicate local regulatory interests." (footnote omitted)).

339. *See* Brand, *supra* note 229, at 78.

340. *See* Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1669 (2013); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 269-70 (2010); Brief of the Governments of the Kingdom of the Netherlands & the United Kingdom of Great Britain & Northern Ireland as Amici Curiae in Support of Neither Party at 11-16, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 2312825; Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants-Appellees at 23-27, *Morrison*, 561 U.S. 247 (No. 08-1191), 2010 WL 723006.

brought U.S. general jurisdiction principles into line with international practice recognizing a defendant's home as the most logical (and presumptively valid) forum for suit.[341] It is a practice that, if truly adopted worldwide, would guarantee at least one reasonable forum for every suit. Scholars have noted that this is a positive development *so long as* specific jurisdiction fills gaps left open by restricting general jurisdiction in cases in which the United States has a legitimate sovereign interest.[342] But the Supreme Court's interpretation of specific jurisdiction, most recently in the *Nicastro* plurality, calls into doubt whether specific jurisdiction can play that role.[343]

Today's forum non conveniens, moreover, undermines the promise of a general jurisdiction regime based on the defendant's home in a different way. One of the most internationally controversial aspects of forum non conveniens is that it provides a high likelihood of home-forum immunity for U.S. defendants.[344] It permits U.S. courts to dismiss cases brought *against U.S. defendants*, even though the court otherwise has jurisdiction, often simply because the court determines another court is "more suitable."[345] The rationales underlying *Goodyear* and *Daimler*'s concept of all-purpose "at home" jurisdiction are at loggerheads with the functional home-forum immunity that forum non conveniens affords.

Home-forum immunity is widely disdained in part because it would undermine global access to courts if it were widely accepted. Home-forum immunity would also short-circuit any case in which a plaintiff from one nation (maybe the United States) sought to sue a defendant from another nation in its home forum, leaving a large category of cases—including some brought by U.S. plaintiffs—with no forum at all in which to sue.

This further demonstrates that territoriality, though an important question when considering forum availability for transnational litigation, is not the only one. Personality—in the form of either nationality or domicile—must also play a role in establishing a workable international marketplace for transnational litigation. If the United States leads the charge in providing its nationals with

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341. *See supra* note 163 and accompanying text; Silberman, *supra* note 53, at 601 ("[*Goodyear*] brings general jurisdiction more closely in line with that of other countries.").

342. *See* Borchers, *supra* note 64, at 4; Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. REV. 527, 542 (2012); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 676 (1988) ("[W]e do not need to justify broad exercises of dispute-blind jurisdiction unless our interpretation of the scope of specific jurisdiction unreasonably limits state authority over nonresident defendants.").

343. *See* Stein, *supra* note 342, at 542.

344. *See* Lear, *supra* note 141, at 563 (noting that "routinely dismissing foreign claims against American multinationals" raises comity concerns); Robertson, *supra* note 71, at 1092-94 (describing other countries' retaliatory legislation in response to forum non conveniens dismissals); *see also supra* notes 148-49 and accompanying text.

345. *See* Stein, *supra* note 78, at 784-85; *supra* note 77 and accompanying text. *But cf.* Goshawk Dedicated Ltd. v. Life Receivables Ir. Ltd., [2008] 2 I.L.R.M. 460 (H. Ct.) (Ir.) (finding that an Irish court's jurisdiction over an Irish defendant was mandatory, despite the existence of a parallel duplicative suit filed earlier in U.S. court).

home-forum immunity in transnational cases brought in U.S. court, then Americans seeking access to foreign courts may pay the price.

IV. REFINING AVOIDANCE

Thus far, this Article has demonstrated that avoidance doctrines should be reconsidered. Scholars have suggested a variety of ways to reconfigure them. Some have suggested revisions to personal jurisdiction inquiries,[346] the forum non conveniens analysis,[347] abstention comity,[348] and the presumption against extraterritoriality.[349] Others have argued that Congress should play a larger role in defining some or all of these doctrines.[350] Still others have pushed for international cooperation.[351]

This Part considers ways to reorient all four avoidance doctrines around territoriality and personality.[352] These concepts provide presumptively valid, and internationally uncontested, bases for prescriptive and adjudicatory jurisdiction.[353] Grounding avoidance doctrines on these principles would better ad-

346. *See, e.g.*, Childress, *supra* note 234, at 1548 (proposing a multipart default rule for transnational personal jurisdiction cases); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1303 (2014) (suggesting "a system of nationwide federal personal jurisdiction").

347. *See, e.g.*, Lear, *supra* note 141, at 602-03; Robertson, *supra* note 71, at 1114 & n.212; Stein, *supra* note 78, at 785-86; Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CALIF. L. REV. 1259, 1324 (1986) (arguing that the doctrine should be abolished).

348. *See, e.g.*, Parrish, *supra* note 12, at 244 (advocating a "modified *lis alibi pendens* principle" and reversal of the current presumption against abstention comity); Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347, 1349 (2000).

349. *See, e.g.*, Born, *supra* note 38, at 1-2 (arguing that the presumption against extraterritoriality should be abandoned and replaced with an "international law" presumption); Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. REV. 1, 2 (2014) (calling for replacing the presumption against extraterritoriality with the *Charming Betsy* doctrine for private civil litigation); John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 353, 355-61 (2010) (proposing a clarified presumption against extrajurisdictionality).

350. *See, e.g.*, Robertson, *supra* note 71, at 1087, 1127-30.

351. *See, e.g.*, Childress, *supra* note 27, at 9.

352. Personality can take the form of either nationality or domicile. *See* MILLS, *supra* note 93, at 248-52. Nationality generally refers to citizenship and is a basis for prescriptive jurisdiction, whereas domicile refers to residence and is a basis for adjudicative jurisdiction. *Id.* For a corporate entity, the place of incorporation determines both the corporation's nationality and its domicile. *See* JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 91 (2002) (using place of incorporation to determine nationality); *see also* Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014) (using it to determine a corporation's "at home" status). A corporation's principal place of business can provide an additional domicile, and sometimes an additional nationality. *See Daimler*, 134 S. Ct. at 760 (defining "at home"); 28 U.S.C. § 1332(c)(1) (2013) ("[A] corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated *and* of the State or foreign state where it has its principal place of business . . . ." (emphasis added)).

353. They also form the basis for venue in the federal courts. *See* 28 U.S.C. § 1391(b).

dress separation of powers and international comity concerns. Courts would have a clearer way of establishing a level of transnational litigation in U.S. courts that would be unlikely to offend foreign nations by entertaining either "too much" or "too little" transnational litigation. Moreover, there is general international agreement that territoriality and personality are acceptable bases for jurisdiction,[354] and there are international comity concerns when countries fail to exercise jurisdiction on those bases. This approach would also advance important U.S. sovereign interests—for example, the interest that U.S. procedures, U.S. choice-of-law rules, and ultimately, where appropriate, U.S. substantive law rules apply in cases involving Americans and events or harms in the United States. And, as discussed above,[355] using this approach to establish a baseline of jurisdiction generates certain long-term benefits for American defendants, as well as, of course, for plaintiffs.

Ideally, realignment along these lines would be achieved through international cooperation and/or federal legislation.[356] Although doctrinally distinct, each area discussed here could probably be superseded by statute: Justice Kennedy suggested that the result in *Nicastro* could be changed by statute;[357] forum non conveniens and abstention comity could likely be amended by statute;[358] and extraterritoriality decisions can be, and often have been, "overruled" by statute.[359] Legislation informed by an international treaty on jurisdiction, which the executive branch helped to initiate in the 1990s,[360] could assuage separation of powers concerns arising from courts setting rules for U.S. transnational litigation, and would likely promote international comity. One hopes it would also provide greater clarity and predictability.

Efforts at international agreement and statutory guidance on these issues, however, have foundered for decades.[361] In the absence of treaties and statutes,

354. With respect to prescriptive jurisdiction, territoriality and nationality are recognized bases under international law. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a), (2) (1987). With respect to adjudicative jurisdiction, territoriality and domicile are widely adopted and not considered exorbitant. *Id.* § 421; *see, e.g.*, Council Regulation 44/2001, *supra* note 60, art. 2(1).

355. *See supra* Part III.B.

356. *See, e.g.*, Childress, *supra* note 27, at 47.

357. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2790 (2011) (plurality opinion); *see also* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 n.* (1987) (declining to address the question).

358. *See* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 833-35 (2008) (describing the debate over whether Congress can abrogate procedural common law rules, including forum non conveniens and abstention).

359. *See supra* Part I.A.4.

360. *See* Borchers, *supra* note 64, at 18.

361. *See id.* at 18-20 (describing attempts to design a judgments convention and arguing that such a convention is unlikely now); Silberman, *supra* note 53, at 604-05 (describing proposed federal statutes to clarify jurisdictional standards over foreign defendants after *Nicastro*); Arthur T. von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191, 195-96 (2001) (explaining the impasse in negotia-

courts are left to work out these issues on their own. Because court domination of this area is the current reality, the important question is how judges should define the confines of their discretion and how they should exercise that discretion.

The remainder of this Part discusses the benefits of linking avoidance doctrines more closely to internationally accepted principles of personality as well as territoriality and suggests doctrinal routes for doing so.

A. *Attainable (and Unattainable) Goals*

This Article has identified a series of goals that courts have articulated as the aims of avoidance: protecting separation of powers, international comity, and defendants' convenience. These goals are not always compatible, and sometimes work against each other or are simply orthogonal. For example, defendants' interests can stand at cross-purposes to U.S. sovereign interests in ensuring that U.S. law governs Americans when it is intended to do so. It is therefore worthwhile to identify which of these goals are attainable as well as which should take precedence.

First, there is the concern that transnational litigation requires courts to tread on foreign relations, disrupting separation of powers. But some separation of powers conflicts may be inevitable.[362] There is inherently a potential institutional conflict between courts' traditional and constitutional role in defining court access rules and interpreting statutes, Congress's authority to regulate jurisdiction, and the executive branch's dominant role in foreign relations.[363] Bill Dodge has argued that the way for courts to avoid interfering with foreign affairs is to ensure that courts apply comity doctrines and that the executive branch has no role in their application.[364] But that approach still requires designing courts' guidelines for how to exercise their discretion to interfere minimally with the political branches' foreign relations prerogatives. The "sensitive issues of the authority of the Executive over relations with foreign nations"[365] present less of a concern when the defendants are American.

Second, there is the international comity concern. To the extent that avoidance has resulted in U.S. courts entertaining *too few* transnational cases, foreign

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tions for a judgments convention on jurisdiction and foreign judgments in civil and commercial matters).

362. *See supra* notes 270-71 and accompanying text.

363. *See supra* note 121 and accompanying text. *Cf.* Robertson, *supra* note 71, at 1128-30 (advocating legislative and treaty-based revisions to forum non conveniens, in the interest of interbranch cooperation to address the issue, rather than acknowledging inherent branch conflicts).

364. *See* Dodge, *supra* note 91, at 40-44. This is the framework of the Foreign Sovereign Immunities Act. *See id.* at 43-44.

365. EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 265 (1991) (Marshall, J., dissenting) (quoting NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 500 (1979)) (internal quotation mark omitted).

sovereigns' reactions have taken two main forms: opposition to U.S. defendants' home-forum immunity and opposition to perceived prejudice against foreign plaintiffs.[366] Both of these practices primarily result from the evolution of the forum non conveniens analysis and could be ameliorated by changing some of the assumptions underlying forum non conveniens.

Third, defendant inconvenience is, perhaps obviously, an inevitable characteristic of transnational litigation. Recent developments have strengthened the basis for the forum non conveniens presumption that the alternative forum is "available." But the same developments should also undermine the presumption that foreign plaintiffs choose U.S. courts to "oppress[] and vex[]" the defendant "out of all proportion to plaintiff's convenience,"[367] especially when the defendant is American. Filing the same suit in multiple fora simultaneously, however, may be more suggestive of intent to harass.

When does such inconvenience rise to a level that warrants dismissing a case? A more balanced approach to this question—one that would appreciate the perspectives of plaintiffs as well as defendants—should consider the interests of fairness and judicial economy before "convenience." Forum non conveniens and abstention comity both pursue these values, but in different ways. Forum non conveniens permits courts to combine these considerations in relatively indiscriminate fashion. This broad discretion, moreover, arguably has stunted the growth of abstention comity or any other doctrine that specifically targets the problems of duplicative litigation.[368]

Finally, courts should be concerned with other U.S. sovereign interests compromised by litigation isolationism, such as the interest in hearing Americans' disputes in American courts, in having American choice-of-law rules determine when American law applies to American parties, and in participating in the expanding market for transnational litigation. Recognizing the presumptive validity of jurisdiction over cases against U.S. nationals, however, can go a long way in addressing these concerns.

B. *Guiding Principles*

To keep courts from unnecessarily infringing on foreign affairs and disrupting international comity, American courts' understanding of international comity interests in transnational cases should be informed by international practice, which generally recognizes territoriality and personality as valid bases for exercising adjudicative and prescriptive jurisdiction.

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366. *See supra* notes 275-78 and accompanying text.

367. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (quoting Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947)) (internal quotation mark omitted).

368. *See, e.g.*, Windt v. Qwest Commc'ns Int'l, Inc., 529 F.3d 183, 191 (3d Cir. 2008) (affirming dismissal of a parallel duplicative suit under forum non conveniens).

Of the four avoidance doctrines discussed here, only general jurisdiction now parallels widely accepted international practice.[369] Specific personal jurisdiction in the United States is more limited than it is in many foreign countries.[370] American forum non conveniens may be more ready to dismiss a case than even other common law versions of the doctrine; most civil law countries eschew the concept altogether.[371] The anti-extraterritoriality presumption likely goes even further than international law requires in contracting the long arm of U.S. regulatory statutes.[372] Abstention comity, on the other hand, likely fails to direct courts to stay their hand whenever *lis pendens* would have directed foreign courts to defer to the court where a parallel litigation was first filed.[373]

This is not to say that the United States must conform all of its laws to internationally accepted standards. Nor is there a need to engage in the debate over the role of international law in U.S. law or even the existence of international law in this area.[374] Rather, grounding jurisdiction in the two most basic, least controversial bases of adjudicatory and prescriptive jurisdiction—personality as well as territoriality—is a good idea. It would promote both international comity and the American sovereign interests identified here.

Note that half of the decisions focused on here *already purport to do this*. But the other half get in their way. The presumption against extraterritoriality, of course, already takes the approach of resting on *territoriality*—the place where the conduct at issue occurred—as a presumptively valid nexus to justify an American court entertaining and applying U.S. law to a case that has other foreign aspects. But *Nicastro* calls into question whether specific personal jurisdiction will be available even for cases arising out of harms felt within the United States.[375]

Similarly, in *Daimler*, the Court accepted the defendant's *domicile* as a valid nexus for adjudicatory jurisdiction.[376] But forum non conveniens (as well as, to some extent, the presumption against extraterritoriality and abstention comi-

369. *See* Brand, *supra* note 229, at 78 (noting that most legal systems permit general jurisdiction over domiciliary defendants); *supra* Part I.A.1.

370. *See* Silberman, *supra* note 53, at 606-09.

371. *See supra* note 90 and accompanying text.

372. As it is understood in the United States, international law recognizes a number of bases for prescriptive jurisdiction beyond territoriality, within reasonable bounds. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402-403 (1987); GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 595-98 (5th ed. 2011).

373. *See supra* Part I.A.3.

374. *See, e.g.*, Born, *supra* note 122, at 19-20 (discussing the debate over the existence of international law on adjudicatory jurisdiction); Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J. 373, 375 n.9, 378 n.17 (1995).

375. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2786 (2011) (plurality opinion).

376. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014).

ty) provides ways for domestic defendants nevertheless to avoid transnational suits in their home fora.

The doctrinal shifts proposed in the next Subpart aim to counteract these inconsistencies. Reinforcing the role of territoriality and personality as valid bases for jurisdiction and venue would better serve the avoidance doctrines' stated goals. It would also mitigate separation of powers concerns in two ways. First, it would alleviate concerns about courts declining to exercise legislatively granted jurisdiction by making such dismissals less frequent.[377] Second, reinforcing U.S. courts' commitment to the personality principle is similar to following a *Charming Betsy* rule that Congress intends to regulate in accord with international law.[378] Like the *Charming Betsy* presumption, a personality-based presumption would be more likely to keep the United States out of international discord, and thus also to avoid separation of powers problems. This approach would also do a better job of preventing the United States from offending foreign sovereigns to the best of courts' ability, without requiring courts to evaluate potential foreign relations effects.[379]

Keeping cases against American defendants in American courts would also address international comity concerns with granting American defendants home-forum immunity. After all, territoriality and personality are the metrics that the international community uses and would like the United States to use.[380] And this approach could cut off any trend of states using home-forum immunity as a form of deregulation of their nationals' foreign conduct. This would help ensure, albeit indirectly, that American plaintiffs have at least some forum available to them for their injuries abroad, even if that forum is not in the United States.

Preserving jurisdiction in cases against American defendants would also remedy some of litigation isolationism's negative effects on U.S. sovereign interests. It would respect the United States' interest in having its courts resolve suits involving U.S. parties and having its choice of law (and, under certain circumstances, its substantive laws) applied to suits involving those parties. It would also promote the United States' sovereign and economic interest in be-

377. *See* Richard D. Freer, *Refracting Domestic and Global Choice-of-Forum Doctrine Through the Lens of a Single Case*, 2007 BYU L. REV. 959, 975; Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 74 (1984) (arguing that judge-made abstention doctrines violate separation of powers).

378. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (describing the assumption that Congress intends to legislate in accord with international law); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 818 (1993) (Scalia, J., dissenting) ("[T]he practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence.").

379. *See* Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1396-97 (1999) (noting that courts are ill equipped for conducting this sort of inquiry).

380. *See* Brief of the Governments of the Kingdom of the Netherlands & the United Kingdom of Great Britain & Northern Ireland as Amici Curiae in Support of Neither Party, *supra* note 340, at 11-12.

ing a leader in hosting transnational litigation, within the reasonable limits of litigation involving U.S. parties. Finally, including a presumption against forum non conveniens dismissal in cases involving U.S. defendants, while retaining other aspects of courts' discretion under forum non conveniens and abstention comity, would afford courts sufficient flexibility to respond to the complex nature of transnational litigation.

One potential downside is that this move toward personality could harm American companies by creating a competitive disadvantage for them compared to their foreign counterparts. To be sure, litigation isolationism serves the U.S. defendant's interests in any given case, at least in the short term (unless and until the case shifts to a foreign court that is less favorable, as happened in the DBCP cases[381]). But there can be some bigger-picture benefits to U.S. companies defending suits in their home fora, including maintaining a potential home court advantage and avoiding the risks of changing procedures abroad.[382] Moreover, avoidance doctrines, including a more muted version of forum non conveniens, remain available to ensure that keeping American defendants in American courts is in the interest of fairness and efficiency, if not in the interest of overblown concerns for defendant "convenience."

Another disadvantage of this proposal may be that it could harm U.S. economic interests by discouraging companies from incorporating or locating their headquarters in the United States. But there is little evidence that fear of U.S. courts—rather than, for example, tax consequences—actually drives companies' behavior in choosing where to incorporate or locate their headquarters.[383] Indeed, access to features such as Delaware corporate governance law and protection of intellectual property rights is considered an advantage of incorporating in the United States.[384] To benefit from these U.S. laws, it is understood that one may also be haled into U.S. courts.[385]

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381. *See supra* notes 1-9 and accompanying text.

382. *See supra* notes 290-311 and accompanying text; *see also* Robertson, *supra* note 71, at 1130 (discussing foreign litigation threats to corporate defendants).

383. *See, e.g.*, Daniel Shaviro, *The Rising Tax-Electivity of U.S. Corporate Residence*, 64 TAX L. REV. 377 (2011) (describing the trend of tax-driven foreign incorporation decisions).

384. Indeed, studies seeking to determine why companies choose to incorporate in particular states rarely (if ever) mention consideration of issues such as jurisdiction as a driving force. *See, e.g.*, Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 411 (2003) (finding that strong antitakeover provisions attract corporations); Susan C. Morse, *Startup Ltd.: Tax Planning and Initial Incorporation Location*, 14 FLA. TAX REV. 319, 339 (2013) (identifying legal benefits as reasons to incorporate in the United States).

385. *See, e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302, 317-18 (1981) (plurality opinion).

C. *Incorporating Territoriality and Personality*

Implementing this emphasis on personality and territoriality takes different forms for each of the avoidance doctrines.

1. *Personal jurisdiction*

The Court in *Goodyear* and *Daimler* has already brought general personal jurisdiction doctrine into line with internationally accepted ideas that domicile (as opposed to other kinds of contacts) reflects a valid basis for jurisdiction. This rule lays the groundwork for litigation against U.S. defendants in U.S. courts. The *Daimler* decision appropriately considered both comity and the executive branch's foreign policy interest in establishing a domicile-based floor for personal jurisdiction.[386] Transnational litigation against foreign defendants will therefore find a forum only through specific jurisdiction. But the United States has a significant interest in ensuring that its courts hear cases involving conduct or harm felt in the United States. To ensure that such cases have a home here, courts should adopt an approach to jurisdiction that "g[i]ve[s] prime place to reason and fairness," consistent with Justice Ginsburg's dissent in *Nicastro*.[387]

2. *Forum non conveniens*

Under the "at home" rule for general jurisdiction, suits against U.S. defendants seem welcome in U.S. court.[388] Forum non conveniens, however, undermines this openness.[389] Courts should redesign forum non conveniens so that it at least ceases to provide de facto home-forum immunity to U.S. defendants. The original stated factors in the forum non conveniens test are legitimate considerations when making determinations about efficient use of judicial resources.[390] But the presumptions—de facto and de jure—that have arisen as a means of interpreting these factors do not all reflect the current reality of transnational litigation. The presumption that an alternative forum is available is actually appropriate in light of the foreign trends described here. But the presumption that a foreign plaintiff is more likely to choose a U.S. forum out of vexatiousness than convenience is misplaced today. To be sure, plaintiffs do not prioritize *defendants'* convenience when choosing a forum. But emerging trends[391] confirm what scholars have been noting for some time now: plain-

386. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014).
387. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2800 (2011) (Ginsburg, J., dissenting).
388. *See Daimler*, 134 S. Ct. at 754; *supra* Part I.A.1.
389. *See supra* Part III.C.
390. *See supra* note 75.
391. *See supra* Part II.A.

tiffs' forum-shopping choices may be strategic but should not be penalized as such.[392]

Instead, the same convenience reasoning should be applied to presume that a case brought in the defendant's home forum should remain there, both because the home forum should be presumptively fair and convenient to the defendant[393] and because it is presumptively in the United States' sovereign interest to entertain suits against its own nationals.[394] *Piper Aircraft* imposed two more glosses on forum non conveniens relating to choice of law: first, the fact that a less favorable law would apply in a foreign court should not counsel against forum non conveniens dismissal,[395] and, second, the fact that a finding that U.S. choice-of-law rules would direct the application of U.S. law should not compel the court to keep the suit.[396] The latter of these interpretations should be rejected to preserve the United States' interest in having its law apply to its own nationals when its own choice-of-law rules would so dictate.[397]

Revamping forum non conveniens along these lines would better serve international comity, separation of powers concerns, and U.S. sovereign interests in two ways. First, it would limit home-forum immunity that can offend foreign sovereigns, and, second, it would reduce federal courts' ability to decline congressionally granted jurisdiction and would ensure that U.S. procedures, choice-of-law rules, and, where appropriate, substantive law apply. The "convenience" factors should consider *judicial* efficiency (another sovereign interest), not defendant convenience. Concerns about excessive inconvenience to defendants, moreover, should instead be addressed by the personal jurisdiction inquiry. Due process, not forum non conveniens, should protect defendants from the inconvenience of transnational litigation if and when there is a "constitutionally significant 'burden'" on the defendant's defense—for example, due to the immobility of the defense.[398]

3. *Abstention comity*

The intent to "oppress and vex" that forum non conveniens seeks to confront is increasingly apparent, on the other hand, in the context of duplicative parallel litigation brought in multiple countries. Today, forum non conveniens

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392. *See, e.g.*, Lowenfeld, *supra* note 99, at 314. *But see* Daniel M. Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. (forthcoming Jan. 2016) (manuscript at 1-2), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2538857 (identifying "forum selling" as a downside of forum shopping).

393. *See supra* note 163.

394. *See* Lear, *supra* note 141, at 568-79.

395. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250 (1981).

396. *See supra* note 83 and accompanying text.

397. *Cf.* Stein, *supra* note 78, at 840 (arguing that a court's decision whether to exercise jurisdiction tacitly and inconsistently turns on the court's judgment about the sovereign interest at stake in the case).

398. World-Wide Volkswagen Corp. v. Woodson, 444 U.S 286, 301 (1980) (Brennan, J., dissenting).

and abstention comity overlap considerably as tools to address parallel duplicative transnational litigation, with forum non conveniens, the more flexible doctrine, doing most of the heavy lifting.[399] A complete assessment of how to address the complicated issue of duplicative litigation is beyond the scope of this Article. A good place to start reconciling forum non conveniens and abstention comity in this context, however, is the American Law Institute (ALI) draft statute on the recognition and enforcement of foreign country judgments.[400] The proposal recommends a modified *lis pendens* approach that would bring the United States more into line with international practice in abstaining or staying later-filed suits in favor of first-filed suits in other courts.[401] This approach would better address the problem of plaintiffs who file multiple lawsuits in multiple countries than would forum non conveniens and abstention comity because they are both over- and underinclusive. Forum non conveniens puts disproportionate emphasis on defendant convenience, and abstention comity makes judges too reluctant to abstain from exercising jurisdiction.

The resulting regime looks similar to the recast Brussels I Regulation, the rules that govern civil and commercial disputes among residents of the member states of the European Union.[402] Both regimes would allow general jurisdiction at the defendant's domicile, but likely no further. Likewise, the European model and Justice Ginsburg's approach typically allow specific jurisdiction in tort cases in the forum where the harm is felt.[403] Additionally, the ALI draft statute would adopt an approach to parallel duplicative litigation similar to the Brussels I Regulation's *lis pendens* model. But it is important to retain some discretion, in the context of forum non conveniens and abstention comity, for circumstances in which suits survive basic jurisdictional hurdles but nevertheless have very few contacts with the United States, as in *Sinochem International Co. v. Malaysia International Shipping Corp.*, for example.[404] The discretion is also needed to soften the strictness of the *lis pendens* rule in cases where favoring the winner of a race to the courthouse would work an injustice or unduly burden the court.

It is useful to apply the proposed reconfiguration to the two most recent Supreme Court forum non conveniens cases, *Sinochem* and *Piper Aircraft*.

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399. *See* Bermann, *supra* note 17, at 27 (noting U.S. courts' use of abstention comity "on occasion," and their apparent preference for forum non conveniens to confront situations involving duplicative litigation).

400. AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006).

401. *Id.* § 11; Silberman, *supra* note 96, at 354-56; *see also* Parrish, *supra* note 12, at 244 (proposing a "modified *lis alibi pendens* principle" and a reversal of the current presumption of allowing duplicative litigation to continue).

402. *See* Borchers, *supra* note 64, at 16-18 (describing the Brussels regime).

403. *See id.* at 16; J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2800-01 (2011) (Ginsburg, J., dissenting) (appealing to concepts of fairness and reasonableness).

404. 549 U.S. 422, 426, 435 (2007) (explaining that the dispute was between two foreign entities over an alleged misrepresentation to a foreign court, with parallel proceedings underway in China).

Sinochem involved "alleged misrepresentations by a Chinese corporation to a Chinese admiralty court resulting in the arrest of a Malaysian vessel in China."[405] It was, as one would say today, foreign-cubed, involving foreign plaintiffs, foreign defendants, and foreign conduct. That suit remains "a textbook case for . . . *forum non conveniens* dismissal"[406] under the doctrinal realignment proposed here. But *Piper Aircraft*, which involved a suit against U.S. defendants and the application of U.S. law,[407] would likely stay in U.S. court.

Likewise, a personality-based regime likely would have prevented the forum non conveniens dismissal in the DBCP litigation discussed at the outset of this Article.[408] Consolidation of all of the DBCP cases from across the globe against Dow and other American companies arguably would have improved defendant "convenience," and certainly would have improved global judicial efficiency by coordinating and streamlining the common issues among cases that were scattered to the winds after the forum non conveniens dismissals. The United States' sovereign interests in regulating its own nationals would have been preserved, and Nicaragua may have been spared the offense that led it to enact the special law under which the Nicaraguan plaintiffs later racked up such substantial judgments.

4. *Presumption against extraterritoriality*

Finally, what is to be done about the presumption against extraterritoriality? Prescriptive jurisdiction is a different beast from the adjudicative jurisdiction and discretionary doctrines just discussed. For our purposes, the relevant detail is that the presumption applies to prevent the application of federal law to Americans' conduct abroad.[409] One option would be to incorporate a contrary presumption that Congress intends to regulate U.S. nationals, even when they are acting abroad. Some courts and scholars, for example, have suggested that *Kiobel* should be read to mean that the Alien Tort Statute still applies to U.S. nationals.[410] While attractive in its outcome, there are several problems with this approach, including that it will interfere quite categorically with foreign nations' regulations within their own territories and that it is far from clear that

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405. *Id*. at 426.

406. *Id.* at 435.

407. In *Piper Aircraft*, two of the four defendants were American, and the district court held that Pennsylvania law would have applied to one of the defendants, while the Third Circuit held that it would have applied to both. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 239, 243-45 (1981). The Supreme Court did not state its position on the issue, but it expressed skepticism about the Third Circuit's reasoning. *See id.* at 245 n.11.

408. *See supra* notes 1-9 and accompanying text.

409. *See, e.g.*, EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991).

410. *See, e.g.*, *In re* S. Afr. Apartheid Litig., 15 F. Supp. 3d 454, 461 (S.D.N.Y. 2014); Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773 (2014).

Congress legislates with the intention of regulating U.S. nationals wherever they are located.

A better option might be, as others have suggested, replacing the presumption with one that assumes that Congress legislates to the full extent permissible under international law,[411] or with a *Charming Betsy* rule.[412] Aligning the presumption with international law should ground the inquiry in ideas of territoriality and nationality. Pegging the presumption to international law should also do a better job of channeling likely congressional intent, rather than forcing Congress's hand, which is an increasingly difficult proposition.[413] These parameters would do a better job of accommodating considerations of separation of powers, comity, and U.S. sovereign interests than the current overly strong presumption against extraterritoriality.

CONCLUSION

Litigation isolationism results in part from courts viewing two sets of interrelated subjects in isolation: the four avoidance doctrines themselves and U.S. and foreign developments. Both areas are deeply interconnected and should be understood as such. When they develop separately from each other, they get in each other's way. For example, what general jurisdiction gives with one hand—jurisdiction in a defendant's home forum—forum non conveniens takes away with the other. And what the anti-extraterritoriality presumption recognizes as fundamental—territoriality—recent specific jurisdiction developments are prepared to eschew. Likewise, discounting foreign court trends leads to assumptions about plaintiff forum choices that mischaracterize the entire endeavor of transnational litigation. Failure to see these doctrines as a coherent whole or to view them in a global context leads to the doctrines failing to achieve their own stated goals and undermining U.S. sovereign interests.

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411. *See* Born, *supra* note 349, at 1-2.

412. *See* Clopton, *supra* note 349, at 22-29 (suggesting such a rule for private civil cases).

413. This would turn the presumption from a preference-eliciting rule to a preference-estimating one. *See* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2036-37 (2002) (explaining the difference between statutory interpretation rules that seek to parallel the meaning the enacting Congress intended (preference-estimating) and those that "intentionally differ[] from likely political preferences in order to elicit a political response that will make it clearer just what the government desires" (preference-eliciting) (emphasis omitted)).