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## Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism

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## INTRODUCTION

In long-running debates over civil justice reform, two points remain broadly shared: the legal regime for civil litigation in this country is exceptional by comparison to European systems as a positive matter, and the United States is much the worse for it in normative terms. The positive dimension of this account pinpoints several exceptional features of the U.S. civil justice system: class actions, primarily on an opt-out basis; contingency-fee financing of litigation; rejection of Euro-style “loser-pays” rules that link responsibility for the fees of both sides to the outcome of the litigation; extensive reliance on juries as factfinders; costly pretrial discovery; and the availability of punitive damages in substantial areas of civil litigation, such as torts.<sup>1</sup>

One normative implication drawn by some proponents of civil justice reform, particularly as to tort litigation, is that the foregoing features generate a considerable and undesirable drag on the U.S. economy.<sup>2</sup> A related criticism posits that the civil justice system yields a paltry ratio between the compensation actually received by claimants and the expenses incurred by the legal system to deliver it.<sup>3</sup> Some popular proponents even go so far as to suggest that much of the U.S. civil justice landscape facilitates a kind of interest group rent-seeking by the plaintiffs’ bar, with the result of an “overlawyered” nation.<sup>4</sup>

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1. Prominent arguments for civil justice reform in the general interest press highlight several of these differences. See, e.g., WALTER K. OLSON, *THE LITIGATION EXPLOSION* (1991) (reviewing historical developments behind differences in American and European civil justice systems); *id.* at 37 (contingency fees); *id.* at 56–66 (class actions); *id.* at 280 (punitive damages); *id.* at 334 (lack of loser-pays rule). Much the same litany appears in discussions of aggregate procedure in Europe directed to the practicing bar. See, e.g., Laurel J. Harbour & Marc E. Shelley, *The Emerging European Class Action: Expanding Multi-Party Litigation to a Shrinking World*, *PRAC. LITIGATOR*, July 2007, at 23, 23 (canvassing European developments in aggregate procedure).

2. See, e.g., TILLINGHAST, TOWERS PERRIN, 2006 UPDATE ON U.S. TORT COST TRENDS 3 (2006), available at [http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200611/Tort\\_2006\\_FINAL.pdf](http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200611/Tort_2006_FINAL.pdf) (estimating cost of U.S. tort system as \$261 billion in 2005).

3. For a critical overview of research on the compensation ratio in the civil justice system, see Charles Silver, *Does Civil Litigation Cost Too Much?*, 80 *TEX. L. REV.* 2073, 2075–81 (2002) (discussing “shortcomings associated with efforts to use the compensation ratio . . . as a normative standard when gauging the performance of litigation processes”).

4. The name of the prominent legal blog site “Overlawyered” captures this view of the plaintiffs’ bar. See <http://www.overlawyered.com> (“[c]hronicling the high cost of our legal system”).

Other observers share the positive description of American exceptionalism but see its implications quite differently. These observers regard U.S.-style civil litigation as the regrettable byproduct of a deep cultural hostility to the kind of robust bureaucratic administration by public regulatory bodies embraced in Europe.<sup>5</sup> Versions of this second view cast U.S.-style tort litigation, for instance, as an unwieldy substitute for social insurance programs<sup>6</sup> and the plaintiffs' bar as a useful form of privatized bureaucracy, at least in the absence of robust Euro-style public administration.<sup>7</sup>

Differences of prescription aside, however, the shared points remain: the United States is indeed exceptional in matters of civil litigation, and its exceptionalism is a bad thing. If only the United States could get over its bugaboos, so the implication goes, then its policymakers would realize the wisdom of civil justice measures that would be, in one way or another, more along the lines of their counterparts in Europe.

This Article examines recent developments in aggregate civil litigation across the Atlantic as a way to advance two points. The first consists of a modest challenge to the familiar positive claim of American exceptionalism. The second and more important point counsels a reorientation of the exceptionalism discussion to encompass not only the comparing of rules, procedures, and practices but also, more broadly, what one might label as the structural dynamics of aggregate litigation. These structural dynamics, not so much the particular procedures that a given nation might embrace for aggregation, comprise the real story of convergence likely to unfold in the coming decades.

The positive challenge is this: far from maintaining or increasing their divergence from U.S. practices, European nations in recent years have come to embrace civil procedure reforms to authorize aggregate litigation. By "aggregate litigation," I refer, in the manner of the American Law Institute ("ALI") project on the subject, to litigation that undertakes some manner of unified resolution with regard to re-

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5. For a thoughtful statement of this view, see ROBERT A. KAGAN, *ADVERSARIAL LEGALISM* (2001).

6. One classic statement of this view remains STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* (1989). On the historical connection between the emergence of modern U.S. tort law and earlier, private versions of social insurance for industrial workers, see JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC* (2004).

7. See John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 *DEPAUL L. REV.* 261, 290–91 (2007) (concluding that the private tort bar has "created a massive private administration system with many of the same attributes" as a public administration system).

lated civil claims held by multiple persons.<sup>8</sup> The term embraces procedures in the nature of representative litigation, such as class actions. In representative litigation, the vast majority of persons whose claims are to be resolved are not formal parties to the action but, rather, are represented by someone (or, perhaps, some organization) similarly situated. But “aggregate litigation” also embraces procedures for unified resolution of multiple, related lawsuits, each nominally brought by a different person with formal party status.

Looking across the European landscape, one can situate within the broad rubric of “aggregate litigation” such differing procedures as Dutch collective settlement actions,<sup>9</sup> English group litigation orders,<sup>10</sup> German model cases in securities litigation,<sup>11</sup> and Italian class actions,<sup>12</sup> among other procedures.<sup>13</sup> Additional moves in the offing suggest a similar openness to possible reforms in the direction of more rather than less aggregate litigation. These include major studies by the European Commission of new measures for aggregate redress in anti-

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8. See PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.02 cmt. a (Council Draft No. 2, at 12, Nov. 18, 2008) (“All aggregate proceedings combine claims or defenses by many persons for unified resolution, which may be by trial or settlement.”). I serve as one of the Associate Reporters for this project.

9. Burgerlijk Wetboek [Civil Code] [BW] arts. 3:305a–b; Harbour & Shelley, *supra* note 1, at 28.

10. Civil Procedure Rules 1998, S.I. 1998/3132, Part 19, § III.

11. Kapitalanleger-Musterverfahrensgesetz [Act on the Initiation of Model Case Proceedings in Respect of Investors in the Capital Markets], Aug. 16, 2005, BGBl. I at 2437, *translated* at <http://www.bmj.bund.de/kapmug>.

12. CODICE DEL CONSUMO [C. CONSUMO] art. 140, *translated* at [http://lawprofessors.typepad.com/mass\\_tort\\_litigation/2008/01/italys-new-clas.html](http://lawprofessors.typepad.com/mass_tort_litigation/2008/01/italys-new-clas.html).

13. For an overview of the various European approaches to aggregate litigation, see Part II.B *infra* (table of recent European developments in aggregate litigation); see also CHRISTOPHER HODGES, THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS 51–92 (2008) [hereinafter HODGES, REFORM]; Christopher Hodges, *Europeanisation of Civil Justice: Trends and Issues*, 26 CIV. JUST. Q. 96, 114–20 (2007) [hereinafter Hodges, *Europeanisation*]. In keeping with the European literature, *infra* note 14, I focus on aggregate litigation in the context of damage claims against defendant businesses, the analogues to the sorts of anti-trust, securities, tort, contract, and consumer claims familiar to U.S. class actions.

An important development in Europe beyond the scope of this Article consists of the emergence of “pilot judgments” from the European Court of Human Rights, whereby that body uses the first applicant before it as the procedural vehicle through which to address systematic violations of the European Convention on Human Rights by signatory nations. See Laurence R. Helfer, *Redesigning the ECHR: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT’L L. 125, 148, 154 (2008) (discussing development of “pilot judgments” and first uses thereof). These pilot judgments have encompassed damage remedies as well as non-monetary remedies against non-complying governments. See *id.* at 154 (noting troubling possibility of first applicant settling for more favorable “individual damages award over systematic non-monetary remedies”). On the potential significance of human rights litigation for the development of class action law in the United States, see Elizabeth J. Cabraser, *Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System*, 57 VAND. L. REV. 2211 (2004).

trust and consumer litigation<sup>14</sup> and by the Civil Justice Council of England and Wales on reform of collective redress.<sup>15</sup>

The move toward greater receptiveness for aggregate litigation in Europe predictably has prompted consternation from defense-side practitioners,<sup>16</sup> even while that development presents a potentially lucrative new venue for their legal services. A 2007 survey of business executives and lawyers by the Intelligence Unit of *The Economist* reports a widespread expectation that aggregate litigation along the lines described here will become “prevalent” in Europe over the next decade.<sup>17</sup> The notion of entrepreneurial opportunity certainly has not been lost on U.S. plaintiffs’ lawyers, with prominent class action firms Cohen Milstein Hausfeld & Toll and Quinn Emanuel Urquhart Oliver & Hedges establishing London offices.<sup>18</sup> These moves stand as market evidence that meaningful change is in progress. Recognition of these developments has formed the starting point for two significant trans-Atlantic conferences in recent years: the first in December 2007, co-sponsored by Stanford Law School and the Centre for Socio-Legal Studies at Oxford University<sup>19</sup> and the second in June 2008, cospon-

14. COMMISSION OF THE EUROPEAN COMMUNITIES, WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES 4 (2008), available at [http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files\\_white\\_paper/whitepaper\\_en.pdf](http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf); JULES STUYCK ET AL., THE STUDY CENTRE FOR CONSUMER LAW – CENTRE FOR EUROPEAN ECONOMIC LAW, AN ANALYSIS AND EVALUATION OF ALTERNATIVE MEANS OF CONSUMER REDRESS OTHER THAN REDRESS THROUGH ORDINARY JUDICIAL PROCEEDINGS 12–13 (2007), available at [http://ec.europa.eu/consumers/redress/reports\\_studies/comparative\\_report\\_en.pdf](http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf).

15. CIVIL JUSTICE COUNCIL, “IMPROVING ACCESS TO JUSTICE THROUGH COLLECTIVE ACTIONS”: DEVELOPING A MORE EFFICIENT AND EFFECTIVE PROCEDURE FOR COLLECTIVE ACTIONS: A SERIES OF RECOMMENDATIONS TO THE LORD CHANCELLOR 118–52 (2008), available at [http://www.civiljusticecouncil.gov.uk/files/Improving\\_Access\\_to\\_Justice\\_through\\_Collective\\_Actions.pdf](http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf); see also RACHEL MULHERON, REFORM OF COLLECTIVE REDRESS IN ENGLAND AND WALES: A PERSPECTIVE OF NEED 157–60 (2008), available at [http://www.civiljusticecouncil.gov.uk/files/collective\\_redress.pdf](http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf) (concluding that “there is overwhelming evidence of the need for a further collective redress mechanism”).

16. See, e.g., JOHN H. BEISNER & CHARLES E. BORDEN, ON THE ROAD TO LITIGATION ABUSE: THE CONTINUING EXPORT OF U.S. CLASS ACTION AND ANTITRUST LAW 20 (2006), available at <http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1061> (warning of increasing susceptibility in Europe to the “same litigation abuse crisis that has plagued the United States”).

17. ECONOMIST INTELLIGENCE UNIT, COLLECTIVE LITIGATION IN EUROPE 7 (2007), available at [http://viewswire.eiu.com/report\\_dl.asp?mode=fi&fi=1383861523.PDF](http://viewswire.eiu.com/report_dl.asp?mode=fi&fi=1383861523.PDF) (finding “88% [of business leaders surveyed] expect group litigation will become prevalent in the EU within the next ten years.”).

18. Brooke Masters, *US Law Firm Makes Move on Europe*, FIN. TIMES (London), Jan. 3, 2007, at 22; Kellie Schmitt, *Quinn Emanuel Jumps at London Opportunity*, RECORDER (S.F.), Apr. 23, 2008, available at <http://www.law.com/jsp/article.jsp?id=1208947717234>.

19. This event yielded detailed descriptions of aggregate litigation across twenty-seven nations, including several outside of North America and Europe. See Conference, *The Globalization of Class Actions* (2007), [http://www.law.stanford.edu/calendar/details/1066/The\\_Globalization\\_of\\_Class\\_Actions/#related\\_information\\_and\\_recordings](http://www.law.stanford.edu/calendar/details/1066/The_Globalization_of_Class_Actions/#related_information_and_recordings) (listing the respective nations’ reports on

sored by New York University School of Law, the ALI, and the European University Institute.

The embrace of aggregate litigation in Europe in widely varying forms makes the U.S.-style class action less exceptional within the Western world. As I shall elaborate, even this modest lessening in the degree of American exceptionalism in the area of aggregate litigation has had important implications for the capacity of class actions in U.S. courts to encompass persons in Europe in the context of securities class actions.

One must take care not to overstate the positive point, however. European receptiveness to new procedures for aggregate litigation, in one form or another, stops markedly short of full-fledged embrace for U.S.-style class actions, much less related features of litigation finance. Even while counseling in favor of greater receptiveness for aggregate litigation as a vehicle for consumer redress, leaders of the European Union ("EU") hasten to underscore their disinclination to import the "litigation culture" of the United States.<sup>20</sup> The juxtaposition of these two sentiments, I argue, represents an effort to embrace what one might call the potential of aggregate procedure to achieve closure but without its potential to "enable" litigation.<sup>21</sup> European leaders, in short, seek to provide new vehicles to make peace in the aggregate for related claims already in the civil justice system but to avoid a litigation bonanza. As a result, the law is unlikely to see anything like a trans-Atlantic convergence toward the specifics of U.S.-style class actions along the lines of what some prominent scholars have envisioned (controversially) as convergence toward U.S.-style corporate governance centered on shareholder primacy.<sup>22</sup> The global-

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aggregate litigation). For an important precursor, see Symposium, *Debates over Group Litigation in Comparative Perspective: What Can We Learn from Each Other?*, 11 DUKE J. COMP. & INT'L L. 157 (2001).

20. See David Gow, *Business Chiefs Attack Plan for US-Style Consumer Litigation*, GUARDIAN, Mar. 19, 2007, at 28 (quoting EU Competition Commissioner Neelie Kroes); see also Michael Peel, *Class Action Lawsuits Could Take Root*, FIN. TIMES (London), Oct. 30, 2007, at 4 (describing a "growing sense of alarm" in the European business community" and a "'consensus that the US system is not what we want'").

21. I draw here on terminology in the U.S. class action literature. See William B. Rubenstein, *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 710 (2006) (discussing how class actions can "enable" litigation and generate positive externalities for society); cf. Fabrizio Cafaggi & Hans-W. Micklitz, *Collective Enforcement of Consumer Law: A Framework for Comparative Assessment*, 16 EUR. REV. PRIVATE L. 391, 401 (2008) (distinguishing between "adversarial and bargaining enforcement models" for consumer litigation in Europe).

22. The leading account of the convergence hypothesis for corporate governance is Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001). For assessments of this prediction, see CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE (Jeffrey N. Gordon & Mark J. Roe eds., 2004).

ization of commerce, in other words, portends no grandiose “end of history” for the law of aggregate litigation.<sup>23</sup>

The cataloguing of nuanced differences in aggregate procedure across the United States and Europe is surely a useful start. But the discussion thus far has proceeded with comparatively little in the way of an overall analytical frame within which to set the particulars.<sup>24</sup> To borrow roughly from evolutionary biology: the present state of discussion is rather like a delineation of minute differences in the beaks of Galapagos finches, but without Darwin’s theory of the overarching mechanism by which evolution occurs.<sup>25</sup> This Article offers something considerably less than a theory to explain the evolution of life on earth. My suggestion, nonetheless, is that there is a kind of evolution afoot in aggregate litigation across the Atlantic, but its workings are not well understood. This observation leads, in turn, to the second, more significant claim of this Article.

Simply put, the structural dynamics of aggregate litigation across the Atlantic will tend to recreate, to a considerable degree, the difficulties seen in recent decades in the context of nationwide class action litigation within the United States. The nationalization of commerce in the United States during the twentieth century led to aggregate litigation of a commensurately national scope. What followed were efforts on the part of courts in one state to resolve on a class-wide basis the claims of persons dispersed throughout the nation. The goal was to expand the scope of aggregation in procedural terms to match the scope of the underlying disputed activity, rather than the jurisdictional sovereignty of the forum. At its extreme, this process of “regulatory mismatch”<sup>26</sup> between the forum for aggregate

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23. Hansmann and Kraakman’s article title alludes to the title of a then-contemporary suggestion of convergence toward Western-style liberal democracy in the post-Cold-War era. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1996).

24. Significant exceptions in the European literature are the analytical frameworks developed in HODGES, *REFORM*, *supra* note 13; Cafaggi & Micklitz, *supra* note 21; and Hans-W. Micklitz, *Collective Private Enforcement of Consumer Law: The Key Questions*, in *COLLECTIVE ENFORCEMENT OF CONSUMER LAW 11* (Willem van Boom & Marco Loos eds., 2007), though in none of these instances by reference to the notions of regulatory mismatch and anomalous courts featured here.

25. For discussion of the experiments demonstrating finch beak evolution and the central conceptual role of natural selection to the understanding of such evolution, see generally JONATHAN WEINER, *THE BEAK OF THE FINCH* (1994). I am grateful to Owen Jones for helpful discussion of the analogy drawn here.

26. The terminology here builds on the treatment of U.S. class action litigation in Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1674–75 (2008). For discussion of mismatches between the forum for litigation and the source of the governing substantive law in the context of federal-state relations more generally, see Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1415 (2006).



litigation and its potential preclusive scope was no accident. Rather, class counsel would select the state-court forum for such a class action precisely for its anomalous features—paradigmatically, for its perceived proclivity to certify a nationwide class action that the vast majority of other courts in the United States would not certify. The Class Action Fairness Act of 2005 (“CAFA”) represents an indirect and partial response in federal statutory law to this phenomenon.

Now, consider the economy of the twenty-first century, a time when the scope of commerce is no longer national but increasingly global. Then, add to the picture different procedural regimes for aggregation in different courts that are the creatures not of the various states within the United States but, rather, of the nation-states of the West.<sup>27</sup> When coupled with this diversity of approaches to aggregate litigation, the globalization of commerce has a considerable tendency to invite a replication of regulatory mismatches—now, with international proportions. Courts in one nation-state will seek to resolve claims on the part of persons in others—perhaps, even worldwide—in keeping with the scope of the disputed conduct. This structural dynamic, not so much the marked differences in the particulars of aggregate litigation procedure, represents the real story of convergence today.

True enough, U.S.-style class actions are likely to remain exceptional from a trans-Atlantic perspective. But the U.S. experience with regulatory mismatches between state authority and the scope of attempted claims resolution on an aggregate basis is likely to become increasingly unexceptional at the level of nation-states.<sup>28</sup> In this light, this Article analyzes both the Vivendi securities class action in the United States and the pathbreaking Royal Dutch Shell settlement for investors across Europe under the 2005 Dutch Collective Settlement Act, situating the two examples in relationship to one another.

On this account, even the stated resistance to the “litigation culture” of the United States on the part of European systems will not—indeed, cannot—immunize Europe from the kinds of structural dynamics exhibited by U.S.-style aggregate litigation. The combined

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27. My attention to the distinction between the word “state” in the U.S. domestic sphere and the same word in international law discourse stems from the U.S. constitutional literature on state sovereign immunity. See Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 821 (1999) (discussing issues raised by the use of the word “state” in the constitutional text).

28. For a similar argument concerning international trade under the auspices of the World Trade Organization and interstate commerce in the early history of the United States, see John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000).

effect here is rather like the expressed resistance in France toward U.S.-style capitalism, coupled with the on-the-ground observation that France is now among the strongest foreign markets for McDonald's restaurants.<sup>29</sup> If anything, the structural dynamics of aggregate litigation have the potential to become even more difficult for the law to address in a world of global commerce than in the U.S. setting.

The nationalization of commerce in the United States during the twentieth century took place in tandem with considerable nationalization of formal governing authority. Whatever one might make of its content, CAFA was possible only because a federal Congress existed to enact national law. By contrast, the globalization of commerce and the consequent demands for the global resolution of claims take place in the absence of a correspondingly global system of governance—at least, the absence of one with formal institutional status like that of the United States. As a result, considerable pressure is likely to build on one doctrinal feature that is the closest thing within the present-day, trans-Atlantic world of civil litigation: the principles of preclusion across nation-states or, in more technical terms, the law governing the transnational recognition of judgments. Discussions of aggregate litigation across the Atlantic should be as much about the appropriate parameters for preclusion as they are now about the Galapagos finch particulars of different nation-states' procedural regimes.

Even when Europe consciously seeks to avoid the U.S. experience—to harness the closure potential of aggregation, without its enabling potential—developments in the United States loom large. One lingering point of uncertainty in the U.S. law of class actions after the Supreme Court's 1997 decision in *Amchem Products, Inc. v. Windsor* consists of the latitude available for so-called settlement classes—aggregations solely for the purpose of peacemaking, with class counsel “disarmed,” in the Court's words, from threatening the defendant with actual trial in the aggregate.<sup>30</sup> As I shall detail, the workings of the Royal Dutch Shell settlement invite renewed attention—now, at the transnational level—to when and how a lack of embrace for the enabling potential of aggregation might undermine the legitimacy of aggregate peacemaking. In doctrinal terms, the question of legitimacy stands to play out as a question of the preclusive effect that the peace arrangement properly may wield.

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29. See Paul Betts, *Sarkozy and Kerviel Chase a French-American Dream*, FIN. TIMES (London), Feb. 2, 2008 (Asia ed.), at 7 (“France has become McDonald's' fastest-growing market.”).

30. 521 U.S. 591, 621 (1997).

For that matter, one need not regard litigation as the sole, or even the primary, mode for claims resolution in a globalized world. One controversial development in U.S. aggregate litigation in recent years has consisted of the prevalent use of contractual arbitration clauses that channel disputes in consumer settings to private arbitration rather than civil litigation.<sup>31</sup> The move to substitute arbitration for litigation is in keeping with larger trends by which contracting parties might choose their desired legal regime.<sup>32</sup> The U.S. experience suggests that, preclusion principles aside, private contracts might seek to provide a degree of de facto global governance in civil justice, though conceivably of a less transparent sort.

This Article proceeds in three Parts. Part I lays out the underlying architecture of the argument, discussing the features that give rise to the structural dynamics of aggregate litigation. Part II frames the problem of regulatory mismatch between the rendering court and the scope of preclusion on an aggregate basis, looking first at the U.S. experience and then turning to recent developments that point toward its replication in Europe with even greater difficulties. These developments include the efforts of aggregate litigation in U.S. courts to encompass persons across the Atlantic and the response that those efforts have engendered in the design of civil procedure in Europe. Part III then underscores the centrality of preclusion principles and private contracting for discussions of aggregate litigation in Europe. Those subjects—the content of which remains largely unsettled with respect to European aggregate litigation—stand to have at least as much of a real-world impact as the particulars of the procedures that a given nation might adopt.

## I. A STRUCTURAL PERSPECTIVE ON AGGREGATE LITIGATION

The structural dynamics of aggregate litigation arise from the relationship among three features: (1) the scope of the contested activity that is the subject of the litigation, (2) the desired scope of preclusive effect for the judgment in the aggregate proceeding, and (3) the territorial authority of the government that has constituted the court

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31. For criticism, see Myriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005). On the broader trend toward displacement of conventional civil procedure by provisions in private contracts, see Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005); see also Cafaggi & Micklitz, *supra* note 21, at 399–401, and accompanying text.

32. See ERIN A. O'HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 3-16 (2009) (discussing the emergence of a "law market," whereby governing laws are chosen by private persons and firms rather than mandated by nation-states).

where the litigation takes place. With some imprecision, one might summarize these three features, in colloquial terms, as posing the following series of questions: What is the aggregate litigation about? Who is to be precluded thereby? And where is the litigation to take place?

The scope of the contested activity provides the most straightforward point of entry into a discussion of aggregate litigation across the Atlantic. The simple point here is that much economic activity today transcends the territorial boundaries of individual nations. Commerce is no longer national or regional but, rather, global. In particular, global commerce often involves commodities that are undifferentiated in practical terms, either because they literally are the same regardless of the nation in which the ultimate consumer resides or because they are only nominally or modestly differentiated—say, in the manner of equity interests in a global firm bought and sold on different securities markets. On this view, it comes as no surprise that the perceived need for fresh thinking in Europe about avenues “other than redress through ordinary judicial proceedings” should have arisen in such settings as consumer and antitrust law, both of which concern the marketing of goods and services that are more or less uniform.<sup>33</sup> The transnational marketing of undifferentiated commodities broadens the scope of adverse effects, whether of a defectively designed consumer product, a price-fixing conspiracy among businesses, or a fraudulent misstatement about the financial posture of a publicly traded firm.

The desired scope of preclusion in aggregate litigation has a tendency to assume a scope commensurate with the underlying activity in question. One can see this point most easily by regarding aggregate procedure as a vehicle for comprehensive resolution of the underlying dispute. From the standpoint of the settling defendant, comprehensive peace means putting the dispute behind it, such that the defendant may refocus its attention on its usual activities. The sorts of businesses that conduct activity on an international level generally do not see themselves as being in the business of litigation, after all. For such defendants, comprehensive peace holds the promise of both reducing the transaction costs associated with ongoing litigation and improving the financial posture of the business itself—chiefly, by removing the litigation uncertainties that otherwise discourage capital

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33. The quoted language comes from the title of STUYCK ET AL., *supra* note 14.

market support for the firm.<sup>34</sup> Thus, even in the United States, where defense-side criticism of class actions is commonplace, defendants in a settlement posture routinely prefer a class definition that is as broad as possible in order to maximize the preclusive effect of the desired deal.<sup>35</sup>

The tendency for the scope of preclusion to track the scope of the underlying activity at issue in the litigation also can extend to aggregation in the face of resistance from the defendant. The connection in that setting may be less robust, however, depending on the financial arrangements on the claimants' side. For U.S. class actions, class counsel tend to prefer a class definition that is as broadly encompassing as possible. Broadly defined classes increase the pressure on the defendant to settle<sup>36</sup> and enable class counsel to assert control of the litigation vis-à-vis would-be rivals within the plaintiffs' bar who otherwise might represent claimants, whether individually or on some aggregate basis.<sup>37</sup>

Disputed activity on a transnational scale plus demands for preclusive effect commensurate with the scope of that activity, together, place tremendous pressure on the remaining feature of the landscape for aggregate litigation: the scope of authority wielded by the government within which the rendering court operates. The court is an institution of the state, whether in the sense of U.S.-style federalism or in the parlance of international law for nation-states. In this respect, all courts are the creatures of "some definite authority."<sup>38</sup> And, still today, states have a territorial connection in the sense that, at least as a first-cut notion, they are supposed to govern within their respective territories but not without.<sup>39</sup> Aggregate litigation is simply

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34. This generalizes an observation made in a significant area of aggregate litigation—mass torts—permeated by the drive toward broadly encompassing settlements in one form or another. RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* x-xi (2007).

35. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1349–50 (1995) (arguing that class actions are "increasingly becoming a shield for defendants").

36. The descriptive observation that aggregation increases settlement pressure by increasing the variance of the litigation and, often, the absolute number of claims pending against the defendant is entirely separate from the normative question whether such pressure is desirable or undesirable.

37. The effect that features like the loser-pays rule might have on this preference remains a question as yet unexplored, no doubt due largely to the recentness of interest in aggregate litigation from European systems that embrace the rule.

38. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

39. In *Pennoyer v. Neff*, 95 U.S. 714 (1877), the Supreme Court embraced this notion as the centerpiece of its personal jurisdiction jurisprudence for the nineteenth-century United States, emphasizing that "[t]he authority of every tribunal is necessarily restricted by the territorial lim-

a matter of the state governing its own affairs when the scope of the underlying activity, the scope of preclusion, and the territorial authority of the rendering court operate in synchronization. In short, aggregate litigation in which states “mind their own business” is unlikely to prompt controversy. The problem comes when the three structural features of aggregate litigation go out of synchronization with one another—when there is a regulatory mismatch among them, in other words.

In our world, no formal political state has authority of a scope commensurate with modern global business. As a result, our world is one that virtually invites regulatory mismatches. The underlying dispute is likely to be global, as might well be the desired preclusive scope for litigation. But aggregate litigation necessarily must proceed in some court within some government whose territorial authority stops considerably short of the entire globe. When the underlying activity transcends state boundaries, it may be possible procedurally to limit the resulting judgment to the territorial boundaries of the state that has constituted the rendering court.<sup>40</sup> But one or the other side in the litigation—quite possibly, both—might well regard such a limitation as undesirable in practical terms for the reasons suggested earlier. The desired preclusive effect of the judgment in the aggregate proceeding then would expand so as to be commensurate with the scope of the underlying dispute. The resulting structural dynamics in aggregate litigation occupy the next Part.

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its of the State in which it is established.” *Id.* at 720. The advent of long-arm statutes complicated this picture in the twentieth-century, enabling the courts of a given state in ordinary, one-on-one litigation to assert personal jurisdiction over out-of-state citizens. *See, e.g.,* SUZANNA SHERRY & JAY TIDMARSH, *ESSENTIALS: CIVIL PROCEDURE* 238–39 (2007) (discussing the shift from the territorial conception of *Pennoyer* to the focus on “minimum contacts” of the defendant with the forum state in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

It is commonplace, moreover, for courts constituted by a particular sovereign to apply the substantive law of another—often, a superior—sovereign. State courts do this with regularity pursuant to the Supremacy Clause of the Constitution. In addition, the Supreme Court has long grappled with questions concerning the extraterritorial application of particular U.S. statutes and, in that setting, has noted the need to “construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.” *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (analyzing extraterritorial application of the Sherman Act).

40. A recent \$200 million antitrust settlement by British Airways and Virgin Atlantic regarding alleged collusion to set fuel surcharges resolves the claims of ticket purchasers in the United States by way of an opt-out class action in a U.S. court and the claims of purchasers in the United Kingdom via an opt-in procedure there. *Airlines Settle U.K., U.S. Suits; International Lawyers Call Class Action a First for Britain*, 9 *Class Action Litig. Rep.* (BNA) 157 (Feb. 22, 2008).

## II. REGULATORY MISMATCHES AND THEIR STRUCTURAL DYNAMICS

With the problem of regulatory mismatches now in mind, this Part sketches its implications, initially within the United States and increasingly across the Atlantic. The U.S. setting raises at least the possibility of formal governing authority that is of a scope commensurate with the scope of commerce for much of the nation's history. There is, after all, a national government for the United States. Even so, as Section A notes, nationwide commerce and resulting nationwide aggregate litigation still have proven difficult to address. Section B explains that the trans-Atlantic domain magnifies these problems due to the relative paucity of formalized means for litigation governance that are commensurately trans-Atlantic in their reach. Here, oddly enough, the potential for class actions in U.S. courts to encompass European claimants has unleashed a dynamic that pushes in the direction of recognition for aggregate litigation in some form by European nations. Yet, as I shall explain, recognition of this dynamic actually increases the likelihood of mismatches between rendering U.S. courts in class actions and European claimants.

*A. Mismatches Within the United States*

The scholarly literature on class actions ably catalogues the problems of regulatory mismatch that have arisen in the United States in recent decades, enabling me to compress the discussion here.<sup>41</sup> The starting point for the discussion builds on the treatment in Part I of the relationship between the scope of the underlying dispute and the court that serves as the forum for aggregate litigation. When the disputed activity extends nationwide, the potential fora for a class action on that subject extend similarly, across both federal and state courts. The procedural rules for aggregation track the governmental regime within which the court operates. So, for example, as to a class action in Illinois state court, Illinois's class action rule applies, not Rule 23 of the Federal Rules of Civil Procedure. One simplifying feature of the U.S. landscape, however, consists of a relative lack of significant variation in class action rules among the federal courts (all of which apply Rule 23) and state courts (which generally use rules that either mimic Rule 23 or track its basic requirements).<sup>42</sup> The Supreme

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41. See *supra* note 26 (citing to works on regulatory mismatch).

42. The procedural rules of two states—Mississippi and Virginia—do not authorize class actions. Thomas D. Rowe, Jr., *State and Foreign Class-Action Rules and Statutes: Differences from – and Lessons for? – Federal Rule 23*, 35 W. ST. U. L. REV. 147, 148 (2007).

Court has made clear, moreover, that the most commonly used form of class action in the U.S. setting—an opt-out class action under Rule 23(b)(3) or a counterpart state rule—may encompass absent class members who lack the kinds of “minimum contacts” with the forum otherwise required for the assertion of personal jurisdiction over a defendant.<sup>43</sup> The result is to make possible within the U.S. domestic sphere precisely the kind of mismatches described in Part I: a class action in, say, Illinois state court that would resolve the claims of persons nationwide, most of whom otherwise lack a substantial connection with that state.

The relative similarity in class action rules across the United States, however, does not assure uniformity of application. The content of the rules themselves—particularly, the requirement in Rule 23(b)(3) that common questions “predominate” over individual ones—entails a substantial degree of judicial discretion in application.<sup>44</sup> Class actions that involve claims under state rather than federal substantive law—tort or contract claims, for instance—add a further layer of discretion to the predominance inquiry in the form of choice-of-law principles that may call for multi-factor judicial balancing.<sup>45</sup> The upshot is to focus attention on which court stands to wield discretion in the application of broadly shared class action rules.

The disinclination of a court in one judicial system to certify a nationwide class action under its rules is unlikely to exert issue-preclusive effect over an effort to certify an identically composed nationwide class in the court of a different judicial system, even when the class action rule in the second court is identical textually to that in

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43. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808–12 (1985) (grounding this holding on differences between absent class members and out-of-state defendants).

44. See Allan Erbsen, *From “Predominance” to “Resolvability”: A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1005–06 (2005) (characterizing the predominance test as “rel[ying] on a subjective comparison of inherently incomparable factors”).

45. See O’HARA & RIBSTEIN, *supra* note 32, at 45:

[The Restatement (Second) of Conflict of Laws] manages to stay young forever by saying nothing and everything at once by accommodating all of the judicial approaches to choice of law. Although the Second Restatement provides presumptive rules, which are favored by more traditional judges, courts can ignore those rules any time in favor of a multifaceted analysis, which may indicate that a different state’s law should apply. The multifaceted analysis takes into account virtually every consideration that courts have examined when choosing governing law. As a result, courts can use the Second Restatement to justify any result they want to reach. This is great for courts, but obviously not for people seeking guidance as to what legal rules govern their conduct.



the first. Rather, the second court generally retains discretion to interpret differently its own class action rule.<sup>46</sup>

Now, consider the strategic implication of the preceding point for nationwide class actions brought in federal court or the various state courts across the country. If, at first, class counsel do not succeed on the class certification question, then they generally may try, try again in different courts. The nature of the class certification ruling is such that, in the words of one prominent federal judge:

A single positive trumps all the negatives. Even if just one judge in ten believes that a nationwide class is lawful, then if the plaintiffs file in ten different states the probability that at least one will certify a nationwide class is 65% ( $0.9^{10} = 0.349$ ). Filing in 20 states produces an 88% probability of national class certification ( $0.9^{20} = 0.122$ ).<sup>47</sup>

The recent Class Action Fairness Act alters the choice of forum for nationwide class actions involving state-law claims as an indirect and partial response to the problem of the anomalous certifying court. CAFA makes it much easier for a defendant that wishes to resist the certification of such a class action to remove it from state to federal court.<sup>48</sup> The indirection of this approach lies in the expectation of CAFA proponents that a change in the court positioned to exercise discretion on the class certification inquiry would make for a difference in result.<sup>49</sup> To be sure, not every federal judge will rule the same way on every contested class certification question. The implicit expectation nonetheless is that the variance in result among federal judges—all of whom are appointed rather than elected, unlike many of their state-court counterparts<sup>50</sup>—will be less than that among state-court judges.

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46. See, e.g., *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 146 (3d Cir. 1998) (“[O]ur construction of Rule 23 and application to the provisional settlement class is not controlling on the Louisiana court, because it is not bound by our interpretation of Rule 23.”); *J.R. Clearwater, Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 180 (5th Cir. 1996) (stating that “the wide discretion inherent in the decision as to whether or not to certify a class dictates that each court—or at least each jurisdiction—be free to make its own determination in this regard”). But see *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 763–69 (7th Cir. 2003) (finding federal court decertification of nationwide class action to be issue preclusive as to efforts to obtain certification of same nationwide class in state court).

47. *In re Bridgestone/Firestone*, 333 F.3d at 766–67 (Easterbrook, J.).

48. See 28 U.S.C. § 1332(d)(2) (2000) (conferring federal diversity jurisdiction over class actions with more than \$5 million in controversy and minimal diversity of citizenship).

49. See S. REP. NO. 109-14, at 22–27 (2005) (suggesting that federal courts are less inclined toward certification of nationwide class actions); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2037 (2008) (“The shift to the federal forum . . . is expected and intended to alter the outcome in class litigation based on state law.”).

50. See Michael Richard Diminio, Sr., *Counter-Majoritarian Power and Judges’ Political Speech*, 58 FLA. L. REV. 53, 54 n.1 (2006) (“Judges in thirty-nine states, comprising eighty-seven percent of all judges in the United States, are elected.”).

Through removal to federal court, defendants effectively may put the anomalous certifying state court out of the class certification business—at least, when defendants so prefer. The scope of the underlying dispute, the scope of preclusion, and the territorial authority of the government that has constituted the rendering court would all be national. CAFA remains only a partial response to regulatory mismatches, however, for the legislation leaves the power of removal where it usually lies: at the option of the defendant. The result is to leave open the possibility that a defendant might prefer the anomalous certifying state court to lend nationwide preclusive effect to a class settlement negotiated by the defendant and class counsel.<sup>51</sup> In the extreme, such a class settlement would perpetuate a phenomenon observed prior to CAFA, whereby the defendant in search of a deal on desirable terms could play off competing law firms within the class-action plaintiffs' bar in what observers dub a "reverse auction."<sup>52</sup> The classic denouement consists of an approving judgment from a state court situated in the locale of collaborating class counsel. Mismatches might be perfectly desirable from the standpoint of defendants, in other words, when they afford nationwide preclusive effect to settlement terms that undervalue the claims of class members.

The potential for mismatches as to both contested class certifications and collusive class settlements is well understood in the U.S. class action literature, but a further problem is less readily grasped. Considerable debate continues to rage in U.S. law over the parameters for collateral attacks on the preclusive effect of class settlements. In their typical form, these collateral attacks involve new litigation by absent members of the class in a judicial system different from the one that blessed the class settlement. The defendant seeks to interpose the affirmative defense of claim preclusion, which the plaintiff attempts to defeat by alleging a defect of federal constitutional due process—usually, a lack of adequate class representation—in the judgment that approved the class settlement. As Part III shall elaborate, the ferment over collateral attacks in the U.S. context holds important lessons for preclusion in the transnational setting. For present purposes, the important point is that collateral attacks form an avenue for mismatches to reemerge—now, in the form of the court inclined to bust the na-

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51. See Wolff, *supra* note 49, at 2041–42 (noting defendants' disinclination to remove when they wish to use the more permissive state court to "bind the entire class to a bargain-basement settlement").

52. See Coffee, *supra* note 35, at 1354 (describing a reverse auction as a process "with the low bidder among the plaintiffs' attorneys winning the right to settle with the defendant").

tional deal, rather than to bless it, in the name of an anomalous conception of adequacy in class representation.<sup>53</sup>

Here, yet again, the nationwide scope of the underlying class action brings into play the various courts within the United States from which rivals to class counsel may choose the forum for a collateral attack. To be sure, collateral attacks might not exhibit quite the potential for a “single positive” ruling of inadequate class representation to “trump all the negatives” in the manner of contested nationwide class certifications.<sup>54</sup> And the potential for mismatches also decreases, insofar as collateral attack plaintiffs exhibit a tendency to sue on their home turf. Still, the strategic implications of collateral attacks can be far from trivial. By busting the deal, at least in part, rivals to class counsel might manage to force the defendant into another round of dealmaking—this time, with the rival law firm positioned to garner a portion of the joint gains from resolution of the underlying litigation, something from which they would have been excluded under the original deal fashioned by class counsel. In this sense, collateral attacks might raise the familiar problem in economics whereby the lone hold-out with regard to a transaction seeks to extract rents from the joint gains that the deal would generate for those who put it together.<sup>55</sup>

Procedural law at the national level injects a fair degree of regulation into the collateral attack process. When the court that approved the class settlement is a federal court, that court—not a potentially anomalous one in a state judicial system—effectively evaluates the preclusive effect of its own judgment by ruling on a motion to enjoin collateral litigation under the federal Anti-Injunction Act.<sup>56</sup> But when the rendering court is a state court, that court has essentially no authority to enjoin collateral attacks on its judgments in other judicial systems. The preclusive effect of a state-court class action judgment, instead, is a matter for other courts to evaluate under principles of

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53. For further discussion of this problem and the conflicting secondary literature on collateral attacks, see Issacharoff & Nagareda, *supra* note 26, at 1668–69.

54. One scenario to “trump all the negatives” would consist of a successful collateral attack via a second class action, the members of which consist of the same persons said to have been inadequately represented in the initial class action.

55. The prospect of such an impasse in bargaining provides the conventional economic justification for governmental powers of eminent domain in property law, for example. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 124–25 (2004).

56. The Act generally prohibits federal court injunctions of state court proceedings, but an important exception to this stricture permits such injunctions “to protect or effectuate” a federal court judgment. 28 U.S.C. § 2283 (2000).

“full faith and credit.”<sup>57</sup> And, a difference in the court that rules on preclusion in the posture of a collateral attack has the potential to drive a difference in result. Proponents of collateral attacks—particularly, such attacks as vehicles for rivalry within the plaintiffs’ bar over control of the underlying litigation—understandably will tend to select a forum that maximizes their chances of success.

The overarching point from the U.S. setting is this: court systems with the capacity to resolve in the aggregate the claims of persons outside the territorial boundaries of the governments in which those courts operate are prone to a particular strategic dynamic. They have a considerable potential to give rise to regulatory mismatches. At its extreme, in the U.S. experience, a state court—quite possibly, an anomalous one as to class certification or class settlement approval—effectively may govern the nation. The further prospect of a collateral attack on the judgment rendered in an aggregate proceeding injects additional potential for an anomalous court to reenter the picture. The law may chasten these tendencies, in part, insofar as some political authority of a scope commensurate with the scope of the underlying dispute actually exists and chooses to intervene. In the U.S. setting, such authority exists in the form of CAFA and the Anti-Injunction Act, both of which are creatures of federal, rather than state, law. The next Section takes these observations about structural dynamics within the United States and translates them into the setting of nation-states on both sides of the Atlantic.

### *B. Mismatches Go Transnational*

One simplifying feature of the U.S. landscape consists of the lack of dramatic variations, for the most part, in the procedural rules for class actions. The same feature does not obtain at the trans-Atlantic level. As Subsection B.1 observes, the increased receptiveness to aggregate litigation in Europe offers a modest corrective to depictions of rampant American exceptionalism in civil justice. In broad-brush terms, the United States and Europe have grown more similar rather than less as to aggregate litigation. Still, U.S.-style class actions and the constellation of rules and practices within which they operate remain significantly different from the face of aggregate litigation in Europe today.

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57. U.S. CONST. art. IV, § 1 (establishing the obligation of states to accord “full faith and credit” to the judgments of courts in other states); 28 U.S.C. § 1738 (establishing the same obligation of federal courts to accord “full faith and credit” to state-court judgments).

Subsection B.2 traces the emergence in recent years of regulatory mismatches in the trans-Atlantic context that are analogous to those seen in the U.S. setting. The leading edge for these mismatches has come in the form of securities class actions in U.S. courts in which the plaintiff class members consist overwhelmingly of European shareholders. These securities class actions are the trans-Atlantic counterparts to the phenomenon of state courts within the United States effectively seeking to govern the resolution of claims nationwide. It would be a mistake, nonetheless, to see this phenomenon as merely the product of overreaching judges. Rather, the structural dynamics of mismatches situate lawyers in the role of prime movers and judges in a more reactive mode. Subsection B.2 analyzes the curious dynamic to which the recent phenomenon of trans-Atlantic mismatches has contributed, integrating the discussion of aggregate litigation in Europe with an account of lawyering and competition within the plaintiffs' bar. When the scope of that competition has taken on a trans-Atlantic dimension, it should not surprise us that dynamics like the ones seen within the United States have begun to emerge transnationally.

### 1. Comparative Procedure

The existing literature catalogues the specifics of the various regimes for aggregate litigation in one form or another across Europe.<sup>58</sup> My goal here is not to replicate the comprehensiveness of those treatments but, rather, to highlight the big-picture points that emerge. Perhaps the biggest of all is that the exceptionalism of U.S.-style class actions within the realm of aggregate litigation is not as pronounced today as in decades past. To a degree, this observation is the byproduct of terminology cast at a bird's-eye level. The term "aggregate litigation" creates a big tent, within which one may place both representative litigation for claimants as a collective group and consolidated litigation whereby each claimant's suit has a nominally separate existence.<sup>59</sup> The term likewise embraces both kinds of default rules—opt-in or opt-out—that a given procedural system might use to

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58. See, e.g., HODGES, REFORM, *supra* note 13, at 51-92 (analyzing court rules in Europe for multiple claims); STUYCK ET AL., *supra* note 14, at 260-322 (detailing report's findings with respect to collective actions); Harbour & Shelley, *supra* note 1, at 23-33 (describing emerging procedures for aggregate litigation in Europe); Hodges, *Europeanisation*, *supra* note 13, at 114-20 (analyzing "European trends in relation to multi-party representation mechanisms").

59. For further comparison of class actions and consolidations, see Charles Silver, *Comparing Class Actions and Consolidations*, 10 REV. LITIG. 495 (1991). For a helpful overview of the widely varying European terminology for what I describe here as "aggregate litigation," see HODGES, REFORM, *supra* note 13, at 2-3.

ascertain who is encompassed in an aggregate proceeding. In addition, the term carves out aggregation from the array of surrounding rules and practices—those concerning permissible means of litigation finance, rules for fee allocation, and latitude available for discovery, among other topics—that stand to affect dramatically the real-world impact of any manner of aggregate procedure. Still, the new configuration of the forest today is striking, for all the remaining variations in the trees. There simply is a less dramatic difference in aggregate litigation across the Atlantic today than in times past, as the following table reflects:

TABLE OF RECENT EUROPEAN DEVELOPMENTS  
IN AGGREGATE LITIGATION  
(*alphabetical by nation*)

Development	Enactment	Characteristics
Denmark: “Danish Class Action Act” <sup>60</sup>	2007 <sup>61</sup>	Class certification requires, <i>inter alia</i> , common claims, procedural superiority, adequate notice and representation <sup>62</sup> Class representatives may be individual plaintiffs, public bodies, or private associations <sup>63</sup> Opt-in or opt-out procedure, at judge’s discretion <sup>64</sup> Opt-out proceedings appropriate if unmarketable claims <sup>65</sup> Only public bodies may serve as class representatives in opt-out proceedings <sup>66</sup> Class members may be required

60. See ERIK WERLAUFF, CLASS ACTIONS IN DENMARK—FROM 2008 2 (2007), [http://www.law.stanford.edu/display/images/dynamic/events\\_media/Demark\\_Legislation.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/Demark_Legislation.pdf) (citing Administration of Justice Act § 254); Harbour & Shelley, *supra* note 1, at 30–31 (discussing the Danish Class Action Act).

61. See Harbour & Shelley, *supra* note 1, at 30–31 (reporting effective date of Act as January 1, 2008).

62. *Id.*

63. WERLAUFF, *supra* note 60, at 3.

64. Harbour & Shelley, *supra* note 1, at 31.

65. See WERLAUFF, *supra* note 60, at 5 (stating that opt-out proceedings may be used when “the claims cannot be expected to be made in individual actions because of their small size”).

66. *Id.* at 3.

67. *Id.* at 3–4.

		to provide security for opposing parties' costs <sup>67</sup>
England & Wales: "Group Litigation Order" <sup>68</sup>	1999 <sup>69</sup>	Private claims that "give rise to common or related issues of fact or law" managed together in same court <sup>70</sup> Not representative litigation, but may employ test cases and lead solicitors <sup>71</sup> Initiated by parties or court <sup>72</sup> Opt-in procedure <sup>73</sup> Loser pays <sup>74</sup> No formal judicial oversight of settlements <sup>75</sup>
Finland: "Group Actions" <sup>76</sup>	2007 <sup>77</sup>	Applies only to consumer cases <sup>78</sup> Government-funded "Consumer Ombudsman" is only party permitted to bring claims <sup>79</sup> Opt-in procedure <sup>80</sup>

68. Civil Procedure Rules, 1998, pt. 19, § III (U.K.); HODGES, REFORM, *supra* note 13, at 295-97; CHRISTOPHER HODGES, GLOBAL CLASS ACTIONS PROJECT COUNTRY REPORT: ENGLAND AND WALES 3 (2007), [http://www.law.stanford.edu/display/images/dynamic/events\\_media/England\\_Legislation.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/England_Legislation.pdf) [hereinafter HODGES, ENGLAND AND WALES]; Harbour & Shelley, *supra* note 1, at 28-29.

69. HODGES, ENGLAND AND WALES, *supra* note 68, at 3.

70. *Id.* at 10 (quoting Civil Procedure Rules, 1998, pt. 19.10 (U.K.)).

71. *Id.* at 2, 10.

72. Harbour & Shelley, *supra* note 1, at 29.

73. HODGES, ENGLAND AND WALES, *supra* note 68, at 10. For a recent proposal to move to an opt-out procedure in England, see Mulheron, *supra* note 15, at 157-61; *see also* Rachael Mulheron, *Justice Enhanced: Framing an Opt-Out Class Action for England*, 70 MOD. L. REV. 550, 579 (2007) (contending that "the omission of an opt-out regime from English civil procedure is a failure of immense proportions").

74. HODGES, ENGLAND AND WALES, *supra* note 68, at 19.

75. *Id.* at 25.

76. *See* HODGES, REFORM, *supra* note 13, at 285-90 (translating Ryhmäkannelaki 444/2007 [Act on Class Actions]); *see also* Mikko Valimäki, *Introducing Class Actions in Finland - An Example of Lawmaking Without Economic Analysis 1* (Working Paper Series, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1261623](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1261623).

77. HODGES, REFORM, *supra* note 13, at 285.

78. *Id.*

79. *Id.* at 286.

80. *Id.* at 287.

France: "Actions Taken in a Collective Interest" <sup>81</sup>	Mid-1990s <sup>82</sup>	Authorized associations may bring actions "in the collective interest" in such areas as consumer contracts, health care, environmental protection, and financial investment <sup>83</sup>
France: "Joint Representative Actions" <sup>84</sup>	1992 <sup>85</sup>	Authorized associations may sue for damages on behalf of consumers or investors with injuries of "common origin" <sup>86</sup> Action may be brought only if two or more individuals authorize an association to sue in their name <sup>87</sup> Applicable in such areas as product liability and antitrust <sup>88</sup> Opt-in procedure <sup>89</sup>
Germany: "Capital Markets Test Case Act" <sup>90</sup>	2005 <sup>91</sup>	Common issues of law or fact tried in model proceeding <sup>92</sup> Applies to claims for damages

81. See VERONIQUE MAGNIER, CLASS ACTIONS, GROUP LITIGATION & OTHER FORMS OF COLLECTIVE LITIGATION, PROTOCOL FOR NATIONAL REPORTERS, FRANCE 5, 7 (2007), [http://www.law.stanford.edu/display/images/dynamic/events\\_media/France\\_National\\_Report.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/France_National_Report.pdf) (citing Article L. 421 of the Consumer Code; Article L. 1114-2 of the Public Health Code; Article L. 142-2 of the Environmental Code). For English translations of these Code provisions, see HODGES, REFORM, *supra* note 13, at 251-53.

82. MAGNIER, *supra* note 81, at 6.

83. *Id.* at 6-8.

84. See *id.* at 8 (citing Article L. 422-1 of the Consumer Code; Article 452-2, al. 1 of the Monetary and Financial Code).

85. *Id.* at 14.

86. *Id.* at 8-9.

87. *Id.* at 12.

88. *Id.* at 8.

89. *Id.* at 12-13.

90. Kapitalanleger-Musterverfahrensgesetz [Act on the Initiation of Model Case Proceedings in Respect of Investors in the Capital Markets], FED. LAW GAZETTE (Germany), Aug. 19, 2005, at 2437, *translated at* <http://www.bmj.bund.de/kapmug>; see also HODGES, REFORM, *supra* note 13, at 299-310; DIETMAR BAETGE, CLASS ACTIONS, GROUP LITIGATION & OTHER FORMS OF COLLECTIVE LITIGATION - GERMANY 7 (2007), [http://www.law.stanford.edu/display/images/dynamic/events\\_media/Germany\\_National\\_Report.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/Germany_National_Report.pdf); Harbour & Shelley, *supra* note 1, at 29.

91. Harbour & Shelley, *supra* note 1, at 29.

92. *Id.*

93. BAETGE, *supra* note 90, at 13.

94. Harbour & Shelley, *supra* note 1, at 29.



		<p>arising from “false, misleading, or omitted” financial information<sup>93</sup></p> <p>Opt-in procedure<sup>94</sup></p> <p>Acts only on existing claims<sup>95</sup></p> <p>Damages determined for each individual case, drawing upon model decision<sup>96</sup></p> <p>Settlement requires consent of all claimants<sup>97</sup></p>
Italy: “Class Action Law” <sup>98</sup>	2007 <sup>99</sup>	<p>Grants qualified organizations authority to sue in such areas as tort, antitrust, and unfair trade<sup>100</sup></p> <p>Parties select “conciliation committee” consisting of one attorney selected by plaintiff organization, one selected by defendant, and one selected by the chief judge<sup>101</sup></p>
The Netherlands: “Collective Settlement of Mass Damages Claims” <sup>102</sup>	2005 <sup>103</sup>	<p>Allows representative organizations to obtain binding settlements in, for example, securities litigation<sup>104</sup></p> <p>Opt-out procedure<sup>105</sup></p>

95. See BAETGE, *supra* note 90, at 15 (“Model Proceedings under the Capital Markets Model Case Act start with the application to the State District Court, where the case is pending, for the establishment of a model case procedure.”).

96. See *id.* at 24 (“It is . . . up to the trial court to award monetary compensation to each individual plaintiff, based on the outcome of the model proceedings.”).

97. Harbour & Shelley, *supra* note 1, at 29.

98. CODICE DEL CONSUMO [C. CONSUMO] art. 140, *translated at* Mass Tort Litigation Blog, [http://lawprofessors.typepad.com/mass\\_tort\\_litigation/2008/01/italys-new-clas.html](http://lawprofessors.typepad.com/mass_tort_litigation/2008/01/italys-new-clas.html) (Jan. 11, 2008).

99. *Id.*

100. *Id.*

101. *Id.*

102. See Harbour & Shelley, *supra* note 1, at 28 (citing BW arts. 3:305a, 305B).

103. *Id.*

104. *Id.*

105. *Id.*

Norway: "Mediation and Civil Procedure Act" <sup>106</sup>	2008 <sup>107</sup>	Class certification requires, <i>inter alia</i> , common issues of law or fact, procedural superiority, and adequate representation <sup>108</sup> May be initiated by individual plaintiffs, authorized public bodies, or qualified private organizations <sup>109</sup> Opt-in or opt-out procedure, at judge's discretion <sup>110</sup> Opt-out proceedings appropriate if unmarketable claims <sup>111</sup>
Sweden: "Swedish Group Proceedings Act" <sup>112</sup>	2002 <sup>113</sup>	Allows for class actions in such areas as consumer and environmental law <sup>114</sup> Provides for damages and injunctive relief <sup>115</sup> Opt-in procedure <sup>116</sup> Prerequisites for class treatment include common questions of fact and procedural superiority <sup>117</sup>

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106. CAMILLA BERNT-HAMRE, CLASS ACTIONS, GROUP LITIGATION & OTHER FORMS OF COLLECTIVE LITIGATION IN THE NORWEGIAN COURTS 2, 4 (2007), [http://www.law.stanford.edu/display/images/dynasmic/events\\_media/Norway\\_National\\_Report.pdf](http://www.law.stanford.edu/display/images/dynasmic/events_media/Norway_National_Report.pdf) (citing LOV-2005-06-17-90, Act Relating to Mediation and Procedure in Civil Disputes, 17 June 2005 no. 90); Harbour & Shelley, *supra* note 1, at 27.

107. BERNT-HAMRE, *supra* note 106, at 4.

108. *See id.* at 11 (explaining that, to bring a class action, "several legal persons must have claims or obligations, which have identical or substantially similar factual and legal basis," courts must be able to hear claims with the "same composition and mainly pursuant to the same procedural rules," and "it must be possible to nominate a class representative").

109. *Id.* at 13.

110. *Id.* at 15.

111. *See id.* (explaining that opting out is availing "[i]f the individual claims 'on their own involve amounts and interests that are so small that it must be assumed that a considerable majority of them would not be brought as individual actions'" (quoting The Dispute Act, section 35-7(1))).

112. *See* HODGES, REFORM, *supra* note 13, at 263-75 (translating SFS 2002:599 [Group Proceedings Act]).

113. *Id.* at 263.

114. Harbour & Shelley, *supra* note 1, at 27.

115. *Id.*

116. *Id.*

117. *Id.*

*a. Aggregation and Commerce*

Timing is revealing here. In Europe, attention to the possibility of aggregate litigation in some form is a phenomenon largely of the past fifteen years or so. This is not to deny the existence of deeper historical themes. The lineage of U.S.-style class actions extends back to medieval group litigation in Europe,<sup>118</sup> and contemporary developments in Europe draw on that same history. Still, one cannot help but notice the number of reforms across Europe in the direction of aggregate litigation during the 1990s and thereafter.

In keeping with the analysis in Part I, the scope of commerce may well be contributing substantially to European interest in aggregate litigation. In fact, officials of the European Union explicitly link their interest in the subject to the integration of the European market.<sup>119</sup> To note this linkage is not to suggest that markets somehow determine the destiny of aggregate litigation. It is simply to recognize the similarity between the European situation today and the context in which U.S.-style class actions took hold in the 1966 amendments to the Federal Rules of Civil Procedure.

By the 1960s, the national highway system in the post-World-War-II period had added to the integration of the U.S. economy already well under way from the age of railroads.<sup>120</sup> Today, European economic integration extends beyond obvious features, such as a common currency, to the harmonization of substantive law in areas familiar to aggregate litigation in the United States. As two commentators observe:

The vast majority of substantive consumer law in the member states of the European Union nowadays is of European origin, varying from legislation on consumer health and safety, including the regulation of foodstuffs, . . . insurance law, product liability, unfair contract terms, unfair commercial practices, distance selling of goods and services, distance marketing of financial services and consumer sales and consumer guarantees.<sup>121</sup>

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118. For a thorough history of U.S.-style class actions, see STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987).

119. See, e.g., George Parker, *Class Actions Sought to Shield Shoppers*, FIN. TIMES (London), Mar. 5, 2007, at 8 (“[I]f consumers are to have sufficient confidence in shopping outside their own member state and take advantage of the internal market, they need assurance that if things go wrong they have effective mechanisms to seek redress.” (quoting Meglena Kuneva, EU Consumer Affairs Commissioner)).

120. For a more extensive commentary on the contribution of interstate transportation to the integration of the U.S. economy, see MARK H. ROSE, BRUCE E. SEELY & PAUL F. BARRETT, *THE BEST TRANSPORTATION SYSTEM IN THE WORLD* (2006).

121. Willem van Boom & Marco Loos, *Introduction* to COLLECTIVE ENFORCEMENT OF CONSUMER LAW 3 (Willem van Boom & Marco Loos eds., 2007).

Within the United States, the notion of nationalized substantive law has sparked considerable controversy. The debate takes a rather circuitous form, however, focusing not so much on new national legislation as on the preemption doctrine. Defendant manufacturers often contend that existing *ex ante* regulation by federal administrative agencies displaces substantial areas of *ex post* state-law litigation, particularly as to product liability in tort.<sup>122</sup> The ferment over preemption has spawned multiple scholarly conferences,<sup>123</sup> with the Supreme Court taking four preemption cases for decision over two successive terms.<sup>124</sup>

One must take care, nevertheless, to avoid overstating the effect that economic integration might have on civil procedure. The still-modest degree of similarity between the United States and Europe with regard to aggregate litigation does not portend a more dramatic convergence toward any particular model, much less the U.S.-style class action with all its accoutrements. European leaders speak of designing distinctively European solutions that do not import what they

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122. On the prospects for preemption of product liability actions and the debate over the deference, if any, owed by courts to the pro-preemption stance of the Bush Administration, see Mary J. Davis, *The Battle over Implied Preemption: Products Liability and the FDA*, 48 B.C. L. REV. 1089 (2007); Richard A. Epstein, *Why the FDA Must Preempt Tort Litigation: A Critique of Chevron Deference and a Response to Richard Nagareda*, 1 J. TORT L. iss. 1, art. 5 (2006), available at <http://www.bepress.com/jtl/vol1/iss1/art5>; Richard A. Nagareda, *FDA Preemption: When Tort Law Meets the Administrative State*, 1 J. TORT L. iss. 1, art. 4 (2006), available at <http://www.bepress.com/jtl/vol1/iss1/art4>; Peter H. Schuck, *FDA Preemption of State Tort Law in Drug Regulation: Finding the Sweet Spot*, 13 ROGER WILLIAMS U. L. REV. 73 (2008); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449 (2008). For broader challenges to the current doctrinal framework for preemption itself, see Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000). On the distinctiveness of the U.S. approach to *ex ante* regulation and *ex post* litigation, see Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375 (2007).

123. See FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS (Richard A. Epstein & Michael S. Greve eds., 2007) (collecting articles prepared for American Enterprise Institute conference); Symposium, *Ordering State-Federal Relations Through Federal Preemption Doctrine*, 102 NW. U. L. REV. 503 (2008).

124. See *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008) (holding that Federal Trade Commission's regulatory framework for "light" cigarettes does not preempt action under state unfair trade practices statute); *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008) (holding that state product liability action for defective design and inadequate warning would give rise to a state law "requirement" expressly preempted by federal law requirements imposed via premarket approval of Class III medical device by Food and Drug Administration ("FDA")); *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85 (2d Cir. 2006), *aff'd by an equally divided Court sub. nom. Warner-Lambert Co. v. Kent*, 128 S. Ct. 1168 (2008) (non-precedential affirmation of lower court decision that FDA approval of prescription drug labeling does not impliedly preempt state tort action under fraud exception to state regulatory compliance defense); *Levine v. Wyeth*, 944 A.2d 179 (Vt. 2006), *cert. granted*, 128 S. Ct. 1118 (2008) (No. 06-1249) (considering whether FDA approval of prescription drug labeling impliedly preempts state product liability action).

see as the “litigation culture” of the United States.<sup>125</sup> EU Competition Commissioner Neelie Kroes emphasizes: “I do not want to cut and paste an American-style system here. We must avoid excessive levels of litigation.”<sup>126</sup> EU Consumer Protection Commissioner Meglena Kuneva adds: “This is not a John Grisham story.”<sup>127</sup> The point here is not merely rhetorical, however.

*b. Achieving Closure Versus Enabling Litigation*

One can lend greater specificity to the rhetoric from European policymakers. In a recent book, Christopher Hodges ventures that “[t]he key question that is facing European legislators is how to enable collective redress without producing the undesirable consequences that are associated with the most obvious historical model, namely the US class action.”<sup>128</sup> To put the point somewhat differently, one might say that Europe seeks to strike a precarious balance—to facilitate the closure of related civil claims in the aggregate but, at the same time, not to “enable” litigation.<sup>129</sup>

The potential for aggregate procedure to enable litigation lies precisely in the possibility that aggregation might bring more claims into the civil justice system by making economically viable some claims that otherwise would not garner legal representation on an individual basis.<sup>130</sup> Aggregation, however, is just one way in which a given civil justice system might enable litigation. In this light, one may situate procedures for aggregation in continuity with surrounding rules and practices that affect the economics of litigation. In the United States, two such features add to the attraction of class action litigation, at least by comparison to Europe: the default rule for membership in the aggregate unit and the lack of linkage between responsibility for legal fees and litigation outcome.

The usual mode of U.S.-style class action litigation on an opt-out basis has the effect of positioning class counsel to garner a lawyer-client relationship with class members through the comparatively low-

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125. See sources cited *supra* note 20.

126. Kieron Wood, *Judge Raps EU Competition Law Plans*, SUN. BUS. POST (Dublin), Mar. 19, 2006, at 27, available at 2006 WLNR 5121216.

127. Meglena Kuneva, EU Comm'r for Consumer Prot., Speech Before the European Parliament: Consumer Strategy 2007-2013 (Mar. 13, 2007), available at [http://ec.europa.eu/commission\\_barroso/kuneva/speeches/verbatim\\_transcr\\_speech13032007\\_en.pdf](http://ec.europa.eu/commission_barroso/kuneva/speeches/verbatim_transcr_speech13032007_en.pdf), at 8.

128. HODGES, REFORM, *supra* note 13, at 1.

129. See *supra* note 21 and accompanying text.

130. The Supreme Court has characterized this enabling function as no less than “[t]he policy at the very core of the class action mechanism.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

cost method of a class certification ruling from the court. Class counsel need not undertake a potentially high-cost campaign of client recruitment, as would be necessary, in practical effect, under the opposite default rule of opt-in. An opt-out rule, coupled with the relative rarity of opt-outs in practice,<sup>131</sup> has the further effect of boosting the size of the class and thus the basis for class counsel's fee award in the event of success—again, at least by comparison to an opt-in proceeding.

Even within the "litigation culture" attributed to the United States, class actions remain far from a risk-free enterprise. Class counsel stand to lose their investment in the litigation in the absence of a judgment or settlement that positions them to seek a fee award. This risk nonetheless remains of a kind broadly analogous to the notion of limited liability embraced in corporate law as a way to attract investment by shareholders: they, too, might lose their entire investment if the corporation is a flop, but they stand to suffer no additional loss beyond that sum. The widespread embrace in Europe of "loser-pays" rules moves beyond the litigation equivalent of limited liability by giving rise to an additional downside risk: the possibility of also having to bear the fees of one's opponent.<sup>132</sup>

Aggregate procedure as an option for closure need not entail the embrace of measures that further enable litigation, whether by boosting the potential upside or cabining the potential downside of the litigation. A given procedural regime might enable with one hand but disable, or at least not further enable, with the other. Even while aggregate litigation in one or another form has become less exceptional across the Western world, Europe still has not converged toward U.S.-style class actions and shows no sign of doing so. The main inhibitors of such a convergence toward the U.S. class action format consist of differences not only over the particulars of aggregation itself but also over surrounding features that affect the attractiveness of such litigation.

In broad-brush terms, much of Europe appears to regard aggregation more as a way to resolve efficiently those related civil claims that otherwise have entered the civil justice system and less as a

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131. See Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004) ("Opt-outs from class participations and objections to class action resolutions are rare.")

132. In some European systems, however, a market has emerged for insurance coverage whereby a party may hedge against the risk that a loss on the merits will trigger responsibility for its opponent's legal fees under the loser-pays rule. See MARIE GRYPHON, GREATER JUSTICE, LOWER COST: HOW A "LOSER PAYS" RULE WOULD IMPROVE THE AMERICAN LEGAL SYSTEM, MANHATTAN INST., CIV. JUSTICE REP. NO. 11, at 16-18 (2008), available at [http://www.manhattan-institute.org/pdf/cjr\\_11.pdf](http://www.manhattan-institute.org/pdf/cjr_11.pdf).

means to alter the claim rate itself. Opt-out procedures remain very much the exception in Europe, albeit, not entirely unheard of.<sup>133</sup> One must take care, moreover, to state the comparison here in relative terms. Aggregation in any form enhances the attractiveness of claiming by increasing the variance of outcomes in the litigation.<sup>134</sup> Still, the relative emphasis in Europe on closure over enabling is revealing. Such a view accords considerable normative significance to the individual civil claim in the sense of taking it as something like a strong baseline for what one might call the appropriate level of claiming.<sup>135</sup> On this view, aggregate procedure—if embraced at all—largely comes along afterwards to deal with the claims already in the system.

This is not to say that the individual claim carries no normative weight in the United States. Class actions remain the deviation, not the norm, in U.S. civil procedure,<sup>136</sup> and they accordingly call for an affirmative justification for their certification. In the United States, nonetheless, the “policy at the very core of the class action mechanism” consists of altering the claim rate.<sup>137</sup> Going from a world of few, if any, claims marketable on an individual basis to a world in which all are now marketable via an opt-out class action is no small step. It amounts to a dramatic enabling of litigation. On this point, the contrast between the United States and Europe makes for an ironic juxtaposition. The nation known in stylized fashion for a kind of “cowboy” individualism actually accords less normative significance to the indi-

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133. See *supra* notes 64, 105, 110–11 and accompanying text.

134. On the centrality of variance, and hence of aggregation, to settlement behavior, see Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1268 (2006) (noting that “increases in variance can increase a lawsuit’s settlement option value”).

135. One commentator traces this view to deeply rooted features of continental legal systems: [C]ivil law nations interpret a class action—even with an opt-out provision—as an infringement of a non-representative plaintiff’s right to decide when and how to exercise his or her right to a cause of action. Because the right to an individual cause of action is inviolate and cannot be overcome by arguments of social or judicial efficiency, civil law nations resist a wide rule allowing representative actions.

S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT’L L. 1, 22–23 (2008).

136. See *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979) (characterizing the class action as “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only”). The Court recently reaffirmed this principle. See *Taylor v. Sturgell*, 128 S. Ct. 2161, 2176 (2008) (rejecting the doctrine of “virtual representation” as a proper exception to the general rule against preclusion of non-parties, for such a doctrine effectively would recognize “a common-law kind of class action’ . . . shorn of the procedural protections prescribed in . . . Rule 23”).

137. *Supra* note 130.

vidual civil claim, in a sense, than do nations in which ideals of socialism and collectivization continue to enjoy greater purchase.

Even in U.S. class action doctrine, nonetheless, one aspect of the enabling function remains a point of lingering uncertainty in the settlement context. In *Amchem Products, Inc. v. Windsor*, the Supreme Court left open the possibility that some class actions might be certified for purposes of settlement that could not be certified for trial, pointing to the greater manageability of the former within the parlance of the procedural requirements for class certification.<sup>138</sup> The Court specifically rejected the strict, categorical view taken by the Third Circuit, which had posited that a proposed class action may not be certified for settlement when it could not be certified for trial.<sup>139</sup> The breadth of the window left open by *Amchem* for settlement-only classes remains unclear, however. Significant controversy continues to attend the notion of a class settlement negotiated by class counsel “disarmed” by their inability to threaten the defendant with an actual class-wide trial or other adversarial litigation of roughly similar breadth.<sup>140</sup>

The uncertain status of settlement-only class actions in the U.S. setting sheds additional light on the seeming European preference for closure over enabling. In their Essay in this issue, Samuel Issacharoff and Geoffrey Miller insightfully question whether the desire for closure in the aggregate without the enabling of litigation in the aggregate will emerge as a stable equilibrium in Europe over the long run.<sup>141</sup> Aggregate closure without the threat of aggregate adversarial litigation might undermine the very peace being sought. This concern is far from hypothetical. If anything, recent experience in Europe in-

138. See 521 U.S. 591, 620 (1997) (“Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial.”).

139. *Id.* at 593 (“The Third Circuit’s opinion [that each of Rule 23 requirements must be satisfied without taking into account the settlement] bears modification.”). Some commentators go further to question the constitutionality, under Article III, of settlement-only class actions. Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545 (2006).

140. See, e.g., *Amchem*, 521 U.S. at 621:

[I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, . . . and the court would face a bargain proffered for its approval without benefit of adversarial investigation.

(citation omitted).

141. See Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179 (2009).



volves a striking separation of closure and enabling functions in aggregate procedure.

The next Subsection elaborates on collective settlement actions in the Netherlands. For now, their singular feature consists of their authorization of aggregation on an opt-out basis—itsself a marked departure from practices elsewhere in Europe—but exclusively for purposes of settlement, not for trial.<sup>142</sup> One might say that Dutch procedure brings about a full-scale *Amchem*-ization of aggregate litigation, casting it exclusively as an avenue for peacemaking, not as a way to enable claiming in an adversarial posture.

## 2. Structural Dynamics Across the Atlantic

To note that the United States and the nation-states of Europe have embraced differing mixtures of closure and enabling functions for aggregate litigation is not enough. Such an account would miss the structural dynamics to which those differences give rise. Here, I return to the problem of regulatory mismatches but, now, on a trans-Atlantic scale. The connection between aggregation and the underlying scope of commerce again provides a subtext for the discussion. The principal setting for mismatches in aggregate litigation on a trans-Atlantic scale has consisted of securities fraud suits of a commensurately trans-Atlantic scope.

It is a commonplace observation in recent years that capital markets, like so many others, are global, not national.<sup>143</sup> Some U.S. observers have expressed considerable consternation over the loss of market share by U.S. exchanges to competitor markets in Europe and elsewhere for initial public offerings of securities.<sup>144</sup> Others see the same as reflecting more of a sorting effect. Use of a U.S. stock exchange appears to bring with it a premium in market capitalization, along with a comparatively robust regime of enforcement for securities regulation. Use of other nations' exchanges, on the other hand, generally brings issuers a different mix of capitalization and regulation.<sup>145</sup>

The trading of securities on multiple markets forms the backdrop for the new trans-Atlantic mismatches in aggregate litigation.

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142. See *supra* notes 104-05 and accompanying text.

143. On the cross-listing of publicly traded firms on multiple exchanges, see John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 236-42 (2007).

144. See INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION x (2006), available at [http://www.capmktreg.org/pdfs/11.30Committee\\_Interim\\_ReportREV2.pdf](http://www.capmktreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf) (discussing the reasons for “[t]he loss of U.S. public market competitiveness compared to global public markets”). For further analysis of competition among stock exchanges, see Chris Brummer, *Stock Exchanges and the New Markets for Securities Laws*, 75 U. CHI. L. REV. 1435 (2008).

145. See Coffee, *supra* note 143, at 245-46.

Securities in a given firm sold on multiple exchanges, coupled with allegations of financial fraud concerning the firm, place great pressure on the court responsible for resolving those allegations. Here, again, the scope of resolution tends to expand to the scope of the underlying disputed conduct. As in the U.S. domestic sphere, the tendency has been for the court to assert authority to resolve claims on a scale that outstrips the territorial authority of the government within which the court is constituted. Interestingly enough, mismatches of this sort emanating from the United States have the potential to spur the development of distinctively European modes of aggregation. Juxtaposition of securities fraud litigation involving Vivendi Universal and Royal Dutch/Shell Transport (“Royal Dutch Shell”), respectively, illustrates this dynamic.

*a. Mismatches Emanating from the United States*

*In re Vivendi Universal, S.A. Securities Litigation*<sup>146</sup> involved a securities class action in federal district court in New York that was, in many respects, quite routine within the U.S. context. The basic allegation on the merits involved misrepresentations concerning Vivendi’s financial posture, all to the detriment of its shareholders. So far, a textbook case of alleged securities fraud that U.S. courts long have treated by way of class certification, with relatively little difficulty in procedural terms. The twist here lay in the trans-Atlantic scope of Vivendi’s capitalization. Though the plaintiff class encompassed a modest number of U.S. shareholders who had purchased Vivendi shares on the New York Stock Exchange, the vast majority of shares said to have been adversely affected by the alleged fraud were purchased on European exchanges—primarily, the Bourse de Paris.<sup>147</sup>

The defendants sought to defeat class certification by suggesting that a defense loss on the merits would be binding on them vis-à-vis the entire class but that a defense victory might not bind all of the plaintiff shareholders in Europe.<sup>148</sup> In doctrinal terms, the defendants

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146. 242 F.R.D. 76 (S.D.N.Y. 2007).

147. *Id.* at 81. The *Vivendi* litigation thus fit the description of what has come to be known as “foreign-cubed” or “f-cubed” securities class actions—situations in which “a set of (1) *foreign* plaintiffs is suing (2) a *foreign* issuer in an American court for violations of American securities laws based on securities transactions in (3) *foreign* countries.” *Morrison v. Nat’l Australian Bank Ltd.*, 547 F.3d 167, 172 (2d Cir. 2008) (emphasis in original; defining the term “foreign-cubed”); see also George T. Conway III, *The Rise and (Coming) Fall of F-Cubed Securities Litigation*, ENGAGE, Feb. 2008, at 33, available at [http://www.fed-soc.org/doclib/20080313\\_FCubed.Securities.Engage.9.1.pdf](http://www.fed-soc.org/doclib/20080313_FCubed.Securities.Engage.9.1.pdf) (essay by defense counsel in *Morrison*, using equivalently the term “f-cubed”).

148. *Vivendi*, 242 F.R.D. at 92.

argued that the difficulties associated with preclusion of the European shareholders belied the notion that the proposed class action was “superior” to other procedural alternatives<sup>149</sup>—here, the prospect of leaving those shareholders with the option to sue in Europe, if at all. The district court readily agreed that a lack of two-way preclusion would endanger the superiority of a proposed class action under Rule 23(b)(3). But, said the *Vivendi* court, its counterparts in the European nations where most of the plaintiff shareholders were located would likely give preclusive effect vis-à-vis their citizens to a class-wide judgment in the United States.<sup>150</sup>

The *Vivendi* court’s reasoning deserves exposition, for it sheds light on the practical impact of even the modest degree of convergence between the United States and Europe with regard to aggregate litigation. In *Vivendi*, it was not necessary for a given nation to embrace all of the features associated with U.S.-style class actions—their opt-out nature, the lack of a “loser-pays” rule for fees, and the like. It was enough merely that the nation in question had not rejected categorically the notion of representative litigation on some aggregate basis. Thus, for example, the opt-in, test-case approach of German civil procedure for securities claims—a quite modest form of voluntary consolidation—was not enough for the *Vivendi* court to conclude that a German court would accord preclusive effect to a U.S.-court judgment rendered on a representative basis. Though both are forms of aggregation, representative litigation and consolidated litigation differ as to the party status of the affected claimants, among other matters. In consolidated litigation, all claimants are parties, whereas the whole point of representative litigation is for certain named parties to represent many others described simply in terms of their general character-

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149. See *id.* at 91 (referencing the required finding under FED. R. CIV. P. 23(b)(3) that a class action must be “superior to other available methods for the fair and efficient adjudication of the controversy”).

150. *Id.* at 107. An influential earlier opinion from the Second Circuit, authored by the iconic Judge Henry Friendly, had cast the inquiry in terms that were, if anything, even more favorable to the encompassing of non-U.S. shareholders in a U.S. court securities class action. See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996 (2d Cir. 1975) (calling for the exclusion of non-U.S. shareholders from a proposed class action in a U.S. court only if there exists a “near certainty” that a foreign court would not recognize the resulting class judgment); cf. *Morrison*, 547 F.3d at 173 (reaffirming *Bersch* as to the subject matter jurisdiction of U.S. courts over securities fraud claims of foreign shareholders, but not speaking to the issue of class certification). The *Vivendi* court recognized that intervening case law from the Second Circuit had cast the satisfaction of applicable class certification requirements in preponderance terms. See 242 F.R.D. at 83 (citing *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006)).

For analysis of *Vivendi* in the European literature, see Andrea Pinna, *Recognition and Res Judicata of US Class Action Judgments in European Legal Systems*, 1 ERASMUS L. REV. 31, 37 (2008).

istics. But the embrace of representative litigation in England—albeit, not of an opt-out sort akin to Rule 23(b)(3)—was sufficient to make preclusion likely there, such that the U.S. class action in *Vivendi* could include English shareholders.<sup>151</sup>

In more of a stretch, the *Vivendi* court went on to conclude that preclusion problems also were unlikely to arise as to the substantial majority of shareholders located in France. The court pointed to French precedents that call for the recognition of foreign judgments, as long as they do not “infringe [on] principles of universal justice.”<sup>152</sup> And that hardly could be true in *Vivendi*, the court said, given the serious consideration given by the French government in recent years to a major proposal for representative litigation that would encompass the securities area, among others.<sup>153</sup> On this view, just the serious consideration of representative litigation—even short of its actual adoption—was enough to support the inclusion of the French shareholders in the U.S. class action.

The *Vivendi* court’s analysis of developments in France met with subsequent disagreement—from within its own federal district, no less. In a 2008 decision involving yet another trans-Atlantic securities fraud class action proposed to include European investors—*In re Alstom SA Securities Litigation*<sup>154</sup>—a different judge for the Southern District of New York concluded that French investors must be excluded. Able to draw on developments in France since the decision in *Vivendi*, the *Alstom* court pointed to the conclusion ultimately reached by French policymakers with respect to proposals for representative litigation—namely, that opt-out procedures would indeed contravene principles established by the French Constitutional Council.<sup>155</sup> For the *Alstom* court, the resulting unlikelihood that a French court would afford preclusive effect to a U.S.-style opt-out class judgment sufficed to defeat the notion that such an action would comprise a “superior” way to resolve French investors’ claims.

Superiority analysis for purposes of class certification, moreover, coexists with other procedural doctrines—most prominently, *forum non conveniens*<sup>156</sup>—that cut against the inclusion of European

151. 242 F.R.D. at 102–03.

152. *Id.* at 100 (quoting *Lautour v. Guiraud*, Cass. 1e civ., May 25, 1948, Bull. civ. I).

153. *Id.* at 101–02.

154. 253 F.R.D. 266 (S.D.N.Y. 2008).

155. *Id.* at 285–87.

156. For an overview of *forum non conveniens* limitations in U.S. procedural doctrine, see RONALD A. BRAND & SCOTT R. JABLONSKI, *FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS* 37–73 (2007). For an example of a post-*Vivendi* dismissal of transnational securities fraud class ac-

shareholders when some avenue of aggregate recourse is available in their home country. Even on its own terms, superiority analysis does not obviously cut in a single direction. True enough, a U.S.-style class action that would not yield two-way preclusion would be problematic. The 1966 amendments to the Federal Rules of Civil Procedure added the opt-out class action precisely to ensure two-way preclusion.<sup>157</sup> But, by the same token, such a class action might well be all the more “superior” to available procedural alternatives when the home country of a given shareholder affords her no avenue for recourse on an aggregate basis. On this second view, a U.S.-court class action—even by way of a procedural format dramatically different from what a given shareholder would have in her home country—might well be superior to no action at all.

Still another nuance to the superiority analysis flows from the observed aftermath of the *Vivendi* decision itself. Several institutional investors from Europe with substantial Vivendi share holdings subsequently brought conventional, individual actions in the United States for securities fraud, with the notable assistance of plaintiffs’ law firms in this country.<sup>158</sup> By comparison, the superiority of an all-encompassing U.S.-court class action might lie in its capacity to avoid a situation in which big-cat investors obtain recourse on their own but smaller-fish investors do not.

The ultimate propriety of U.S.-court class actions comprised overwhelmingly of non-U.S. claimants remains a question unresolved by the Supreme Court.<sup>159</sup> That question, however, is not my primary concern here; rather, the circumstances behind both *Vivendi* and *Alstom* suffice to expose the structural dynamics of aggregate litigation across the Atlantic. In response to such decisions, European nations might seek to develop their own distinctive avenues for aggregate redress for their citizens. One can understand such a European response as an effort to meet mismatches emanating from the United States with home-grown procedures to lessen the degree of mismatch in one

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tions on *forum non conveniens* grounds, see *LaSala v. UBS, AG*, 510 F. Supp. 2d 213 (S.D.N.Y. 2007).

157. See FED. R. CIV. P. 23(c)(3), advisory committee’s note to 1966 amendments (discussing the problem of one-way intervention that the innovation of the opt-out class action was designed to avoid).

158. See Risk Metrics Group, Securities Litigation Watch, *When Opting Out is Really Opting In*, <http://slw.riskmetrics.com/2007/11/post.html> (Nov. 7, 2007) (“A number of large international institutional investors that were excluded from the class definition [in *Vivendi*] have now started to file individual or group actions in the United States.”).

159. For a scholarly treatment of multinational class actions in the securities setting, see Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT’L L. 14 (2007).

sense: European procedures used exclusively for European claimants would increase the congruence between the scope of preclusion on an aggregate basis and the governing authority of the nation-state that has constituted the rendering court.

The foregoing enterprise remains an unstable one, however, for it could perpetuate—even accentuate—the mismatch between the scope of preclusion and the authority of the rendering court, on the one hand, and the scope of the underlying disputed conduct, on the other. A world of globalized capitalization is a world in which allegations of securities fraud on the part of a given business necessarily ripple across the world. Yet, a regime in which the shareholders in each nation essentially must fend for themselves under their home nation’s procedures makes for a kind of balkanization out of line with the global scope of the underlying misconduct. It is a replay in the transnational sphere of the notion of each U.S. state “minding its own business” in litigation.

A second effect is less well understood and forms the focal point for the remainder of this Part. One can see in the European landscape the emergence of structural dynamics broadly similar to those exhibited by U.S. class action litigation in state courts pre-CAFA—namely, the strategic selection of the forum for the aggregate proceeding, both as a way for the defendant to seek an advantageous deal and as an outgrowth of competition within the plaintiffs’ bar over control of the litigation. As to both, the pathbreaking Royal Dutch Shell settlement in the Netherlands warrants exposition.

### *b. Mismatch Begetting Mismatch*

Spurred by the earlier filing in the United States of a *Vivendi*-style class action—that is, one proposed to encompass shareholders in Europe, along with their American counterparts<sup>160</sup>—Royal Dutch Shell negotiated what is, in effect, a \$450 million class settlement for European shareholders and proposed it to the Amsterdam Court of Appeals for approval under the Dutch Act on Collective Settlement of Mass Damages.<sup>161</sup> Recall that the unusual feature of this Act consists of its authorization of aggregation on an opt-out basis, but only for purposes of settlement, not for adversarial litigation.<sup>162</sup>

160. See *In re Royal Dutch/Shell Transp. Sec. Litig.*, 522 F. Supp. 2d 712, 715–16 (D.N.J. 2007) (describing Shell’s motions to dismiss non-U.S. claimants from the class action).

161. See *Precis Settlement Agreement 1–2* (Apr. 11, 2007), available at <http://https://www.royaldutchshellsettlement.com/Documents/Settlement%20Agreement.pdf> (summarizing settlement agreement).

162. See *supra* notes 104-05, 142 and accompanying text.

The Dutch court has yet to approve the proposed deal, but one crucial point warrants attention regardless: the structural dynamics of aggregate procedure relate closely to competition in the market for representation of claimants. The Royal Dutch Shell deal not only splits off European shareholders from their U.S. counterparts, who together would have comprised the plaintiff class in the proposed U.S.-court class action. The deal also involves a splitting of the proposed class representation—specifically, an effort by one U.S. securities plaintiffs' law firm (Grant & Eisenhofer, which negotiated the Royal Dutch Shell deal on the European claimants' side) to gain effective control of that litigation in the face of an attempt by a rival law firm (Bernstein, Liebhard & Lifshitz) to get all shareholders worldwide into a single U.S.-court class action. As in the U.S. domestic setting, aggregate procedure here serves as a proxy, in part, for competitive rivalry between plaintiffs' law firms.

The interesting strategic question is why Royal Dutch Shell would want to cut a separate deal for European shareholders with a plaintiffs' law firm other than the one that was pushing the proposed U.S.-court class action—indeed, a deal contingent on a subsequent determination by the U.S. court to exclude the European shareholders from the proposed U.S. class action.<sup>163</sup> From the settling defendant's standpoint, the most notable feature of the Royal Dutch Shell deal does not lie so much in its widely reported invocation of the Dutch Act. An equally significant aspect of the deal consists of its “most favored nation” (“MFN”) clause—that is, a promise to all shareholders to boost the benefits under the deal in the event that the remaining U.S. shareholders somehow manage to fare better than their European counterparts in what remains of the U.S.-court class action.<sup>164</sup>

Most-favored-nation clauses have spawned a scholarly literature of their own in the United States.<sup>165</sup> The crucial strategic dimension of an MFN clause consists of the settling defendant's credible commitment that the settlement terms it has provided are likely to be the best deal that the defendant will make available for anyone else. MFN clauses effectively enable the defendant to say: “Don't think about getting a better deal, because any better deal that we cut for you

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163. *Id.* at 2.

164. *See id.* at 6–8.

165. *See* Andrew F. Daughety & Jennifer F. Reinganum, *Exploiting Future Settlements: A Signaling Model of Most-Favored-Nation Clauses in Settlement Bargaining*, 35 RAND J. ECON. 467 (2004); Kathryn E. Spier, “*Tied to the Mast*”: *Most Favored Nation Clauses in Settlement Contracts*, 32 J. LEGAL STUD. 91 (2003) [hereinafter Spier, *Tied to the Mast*]; Kathryn E. Spier, *The Use of “Most-Favored-Nation” Clauses in Settlement of Litigation*, 34 RAND J. ECON. 78 (2003) [hereinafter Spier, *Use of MFN Clauses*].

will oblige us to boost the benefits for everyone we've already paid." Formal economic analysis reinforces this point, observing that MFN clauses "limit the surplus that future plaintiffs can capture in settlement negotiations, surplus that may be shared among the defendant and the early-settling plaintiffs."<sup>166</sup> This effect is especially pronounced when the stakes of the early-settling claims and those that remain to be settled are roughly similar,<sup>167</sup> as is likely to be true when all claims concern equity shares in the same defendant business. A share is a share, though a given shareholder, of course, might hold more shares in total than another.

Details aside, the gambit on Royal Dutch Shell's part should begin to sound curiously familiar from the standpoint of the U.S. domestic experience. The defendant's gambit appears to be to use the Dutch settlement to establish a credible baseline for resolution of the remaining U.S. dimensions of the litigation. Yet that baseline flows from a procedural format in the Netherlands that, by its terms, could not have given rise to adversarial litigation on an aggregate basis. One hardly can gainsay the value of this gambit to Royal Dutch Shell, given its willingness to countenance a fee award request for a reported \$47 million in connection with the Dutch settlement.<sup>168</sup>

This is far from a suggestion that Grant & Eisenhofer was completely "disarmed" in negotiations on behalf of European shareholders. In light of U.S. precedents like *Vivendi*, there remained at least a possibility that the U.S.-court class action otherwise might have encompassed the European shareholders. But the strategic implications of such an action would be different in the absence of a separate settlement for shareholders in Europe.

An all-encompassing U.S.-court class action would have positioned Bernstein, Liebhard & Lifshitz to seek to leverage the presence of the U.S. shareholders in the class so as to garner a deal—and thus a

166. Spier, *Tied to the Mast*, *supra* note 165, at 104; *see also* Spier, *Use of MFN Clauses*, *supra* note 165, at 92.

This is not to say that claimants outside the class who might be affected by an MFN clause in a class settlement agreement necessarily would have recourse within the settlement review process, at least under current U.S. doctrine. Even while acknowledging the likely effect of an MFN clause on claimants who had opted out of a class settlement, the D.C. Circuit went so far as to hold that such claimants lack standing to challenge an MFN clause as part of the district court's hearing on the fairness of that settlement. *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 28 (D.C. Cir. 2000). Under this view, "the district court's duty [under Rule 23(e)] is to the class members themselves; it lacks the power to conduct a free-ranging analysis as to the broader implications of the proposed settlement agreement." *Id.* at 30.

167. *See* Spier, *Tied to the Mast*, *supra* note 165, at 106.

168. *See* Jessica Jones, *Bad Blood Over Royal Dutch Fees*, AM. LAW., June 2007, at 58 (reporting that the Royal Dutch Shell settlement provides for \$47 million in fees to be divided between Grant & Eisenhofer and two allied law firms).



common fund from which any fee award would flow—that would also include the European shareholders.<sup>169</sup> By way of the MFN clause included in the Dutch settlement, Royal Dutch Shell would deploy a converse kind of leverage. Royal Dutch Shell could use the Dutch deal for European shareholders only—a deal priced without the threat of trial in the Netherlands—to drive the terms for resolution of the securities fraud dispute overall. Developments in the United States after the announcement of the Dutch settlement bear out in spades the cleverness of the defendant's gambit. With the claims of the substantial majority of shareholders in Europe proposed for resolution via the Dutch procedure, Royal Dutch Shell announced in June 2008 an "agreement in principle" to resolve the claims of U.S. shareholders for—surprise, surprise!—"amounts proportional to the amounts payable to the potential participants in the proposed Dutch settlement."<sup>170</sup>

The important big-picture observation here is that the Dutch settlement stands as a less transparent version of what the United States has already seen: mismatches in aggregate litigation tend to beget mismatches in aggregate settlement. In the U.S. setting, the first form of mismatch consisted, prior to CAFA, of the certification of nationwide classes by the anomalous state court inclined to govern the country; and the second form consisted of settlement classes parked by colluding class counsel and defendants in a friendly, approving state forum.<sup>171</sup> The story of the Royal Dutch Shell litigation admits of both phenomena, but with a bit of indirection.

The first form of mismatch consists of the attempt at a *Vivendi*-style U.S.-court class action against Royal Dutch Shell that would have encompassed shareholders worldwide. The second form of mismatch consists of the settlement reached in the Netherlands that—although nominally limited to European shareholders and touted simply as a "Uniquely European Resolution to [a] European Problem"<sup>172</sup>—effectively sets a settlement price ceiling for all shareholders worldwide by way of the MFN clause. Once again, attempts at mismatch in contested aggregations have yielded still further efforts at mismatch

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169. This also can be accomplished, to a degree, even when the scope of aggregation corresponds to nation-state boundaries. See *supra* note 40 (discussing British Airways and Virgin Atlantic settlement).

170. See Press Release, Royal Dutch Shell, Shell Announces Settlement of Reserve-Related Claims with US Investors (June 3, 2008), available at [http://www.shell.com/home/content/investor/news\\_and\\_library/press\\_releases/2008/us\\_reserves\\_settlement\\_06032008.html](http://www.shell.com/home/content/investor/news_and_library/press_releases/2008/us_reserves_settlement_06032008.html).

171. Issacharoff & Nagareda, *supra* note 26, at 1663–68.

172. See Press Release, Grant & Eisenhofer, European Investor Group and Royal Dutch Shell Agree to \$450 Million Settlement over Shell's Misstatements of Proven Oil & Gas Reserves (Apr. 11, 2007), available at [http://www.lawdragon.com/images/uploads/pdf/grant\\_royal\\_4197.pdf](http://www.lawdragon.com/images/uploads/pdf/grant_royal_4197.pdf).

in the settlement domain, all with the overlay of competition between plaintiffs' law firms for control of the litigation and defendants' efforts to play on that rivalry.

The remaining question is whether Amsterdam ultimately will emerge as the trans-Atlantic successor to anomalous state courts within the United States—as a kind of procedural “red-light district” for aggregate dealmaking, like its namesake for other transactions pursued by consenting parties.<sup>173</sup> The answer to this question turns on the latitude available for still another round of regulatory mismatches that, once more, have counterparts in the U.S. experience—namely, the framework for transnational recognition of judgments, such as to protect them from collateral attack. The next Part takes up that subject. The central point for now is this: much attention has focused thus far on the variations in aggregate procedures seen across the Atlantic. But those differences stand to dwindle in practical significance insofar as the law of preclusion enables the binding effect of a judgment in the aggregate to transcend the territorial boundaries of the government within which the rendering court operates. If anything, the degree of difference in aggregate procedure now emerging across the Western world makes efforts to generate and to exploit mismatches all the more inviting.

Whatever its ultimate fate, the Royal Dutch Shell settlement marks the emergence in the trans-Atlantic realm of a need for hard thinking about the grounds for proper preclusion in global litigation. Those grounds, as much as the minutia of procedural variations across Europe and the United States, comprise the subject now ripe for discussion across the Atlantic. As the next Part shall add, any such discussion of transnational preclusion should also encompass the appropriate latitude for private contracts to bring about a kind of de facto governance in the aggregate.

### III. THE PROSPECTS FOR GLOBAL GOVERNANCE OF AGGREGATE LITIGATION

Within the United States, there at least exists a formal governmental unit with authority commensurate with the scope of nationwide commerce. As noted earlier, both CAFA and the Anti-Injunction Act in federal law provide a measure of national govern-

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173. Ironically enough, consensual civil settlement on an aggregate basis actually seems to be faring somewhat better in Amsterdam in recent years than the usual consensual commerce in the red-light district. See Marlise Simons, *Amsterdam Tries Upscale Fix for Red-Light District Crime*, N.Y. TIMES, Feb. 24, 2008, at A10.

ance over potential regulatory mismatches in nationwide class actions. But no counterpart governing body exists at the trans-Atlantic level, at least not in formal terms. The result is to place all the more pressure on the vehicles that remain to regulate mismatches. Here, too, the U.S. experience is illuminating, for it both identifies the main vehicles for such de facto regulation—preclusion principles and private contracts—and highlights the hard questions presented by each. The Sections of this Part speak to these two vehicles, in turn.

### *A. Governance by Preclusion*

Within U.S. practice, the preclusive effect that a state-court class judgment may exert over class members nationwide remains closely related to the question of who stands to determine that effect. There are two basic answers to the “who” question: the rendering court system (that is, the trial-level court that first enters the class judgment and the appellate courts positioned to undertake direct review of its rulings) and the multiplicity of courts in which class members might sue anew on claims purportedly settled in the class action. The latter vehicle consists of “collateral attacks.”<sup>174</sup>

The notion that proper preclusion—like beauty—may be in the eye of the beholder stems, in part, from the sheer multiplicity of courts in which collateral attacks might be brought by a member of a nationwide class. The new trans-Atlantic landscape portends to replicate at the transnational level the multiplicity of courts in which class counsel might seek certification of a nationwide class action over the defendant’s opposition or settling counsel might seek approval of a nationwide class settlement. As Part II suggested, the search will be on once again for the anomalous court—this time, one inclined to bust the deal rather than to bless it. In the United States, this process of collateral attack may take place notwithstanding substantial consensus about the basics of class action procedure across federal- and state-court systems and, for that matter, substantial consensus on preclusion principles outside of aggregate litigation. A landscape in which the nation-states of the West embrace markedly different notions of

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174. This understanding of collateral attacks distinguishes, on the one hand, review by courts other than those of the rendering judicial system via the ordinary process of direct review and, on the other hand, situations in which a lawsuit nominally separate from the underlying class action is channeled back to the rendering court—for example, within the federal judicial system, via a consolidation order by the Judicial Panel on Multidistrict Litigation. The latter scenario presents a collateral lawsuit in the sense of one separate from the class judgment whose preclusive effect it seeks to challenge, but not a case of collateral attack as understood here. The same court that rendered the class judgment ultimately stands to rule on the preclusion defense invoked to shut down the collateral lawsuit before it.

what makes for a sensible regime for aggregate litigation, if anything, will accentuate the tendency to seek out the anomalous court.

A significant additional source of difficulty in the U.S. setting stems not from the multiplicity of possible fora for collateral attacks but, more fundamentally, from longstanding confusion over the central concepts implicated by such attacks. The nature of this confusion occupies two of my previous writings,<sup>175</sup> thereby enabling me to streamline the discussion here. Simply put, the law of collateral attacks on class settlements in the United States exhibits confusion between two different things: concerns discernible at the outset of the class action that bear on its legitimacy irrespective of its outcome and concerns discernible only at later stages of the proceeding that relate inextricably to its outcome.

Much of the confusion stems from the Supreme Court itself—primarily, though by no means exclusively, the Court’s 1985 decision in *Phillips Petroleum Co. v. Shutts*.<sup>176</sup> The upshot of *Shutts* is that a state court properly may assert personal jurisdiction over the absent members of a class, even when those persons lack “minimum contacts” with the rendering state.<sup>177</sup> The *Shutts* Court held that, in lieu of “minimum contacts,” an array of procedural protections make such a proceeding fundamentally fair and, hence, constitutionally permissible.<sup>178</sup> The inclusion of “adequate representation at all times” in the *Shutts* Court’s checklist stems from the Court’s own pre-Rule-23 treatment of adequate representation as an aspect of constitutional due process in its 1940 *Hansberry v. Lee* decision.<sup>179</sup> So far, so good.

The mixture of personal jurisdiction, constitutional due process, and “adequate representation at all times” has made for a vexing brew, however, for purposes of collateral attacks on class settlements. The confusion has enabled the plaintiff in a collateral attack to label as both a jurisdictional defect and a constitutional affront two quite different aspects of the class representation: structural defects (that go to the existence of conflicting interests within the class or between the class and class counsel) and performance defects (that go to whether

175. See Issacharoff & Nagareda, *supra* note 26, at 1712–20; see also Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287 (2003).

176. 472 U.S. 797 (1985).

177. *Id.* at 811–12. The holding in *Shutts* effectively blessed the assertion of personal jurisdiction via nationwide, opt-out class actions in the federal courts as well, for those courts must use the same framework for the assertion of personal jurisdiction as the courts of the states in which they sit. See FED. R. CIV. P. 4(k)(1)(A) (generally establishing personal jurisdiction in federal district court on same grounds as counterpart state courts of general jurisdiction).

178. 472 U.S. at 812.

179. *Id.* (citing *Hansberry v. Lee*, 311 U.S. 32, 42–43, 45 (1940)).

the class settlement terms negotiated by class counsel amount to a fair deal). Only structural defects are discernible from the outset of the action and bespeak a proceeding illegitimate without regard to its outcome—a kind of illegitimacy equivalent to that presented by a lack of proper jurisdiction. Indeed, a commonplace insight from the economic literature on class actions is that they carry an inherent risk of shirking—even on the part of unconflicted class counsel for a highly cohesive class—that might yield a too-cheap settlement. Yet current U.S. doctrine is susceptible to being misread as suggesting that this risk inherent in any class action can amount to a defect of constitutional and jurisdictional proportions.<sup>180</sup>

The structure of the modern class action rule itself distinguishes between matters that bear on the certification of such actions and those that concern the fairness of any resulting settlement.<sup>181</sup> If the fairness of a class settlement cannot itself supply the grounds needed to justify class certification—as the Supreme Court rightly underscored in *Amchem*<sup>182</sup>—so, too, a bad deal cannot render a properly certified class defective in a due-process sense. Still, federal courts of appeals have diverged over the permissible latitude for collateral attacks on class settlements predicated on allegations of inadequate representation.<sup>183</sup>

This is hardly to say that inquiry into the fairness of class settlements is unimportant, only that the ordinary process of appellate review exists for that purpose. If anything, U.S. law has embraced a lenient conception of the class members who may seek direct review,

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180. For more extensive treatment of the distinctions drawn in this paragraph, see Issacharoff & Nagareda, *supra* note 26, at 1678–1700.

181. These two matters are treated in separate subsections of Rule 23. Compare FED. R. CIV. P. 23(a)–(b) (class certification requirements), with FED. R. CIV. P. 23(e) (review of class settlement for fairness).

182. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

183. See *In re Diet Drugs Prods. Liability Litig.*, 431 F.3d 141, 146 (3d Cir. 2005) (holding that “[o]nce a court has decided that the due process protections did occur for a particular class member or group of class members, the issue may not be relitigated,” but noting the contrary view in *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), *aff’d by equally divided Court*, 539 U.S. 111 (2003)).

In one much-debated round of litigation, judges of the Ninth Circuit at various points embraced three markedly different views of collateral attacks. See *Epstein v. MCA, Inc.*, 179 F.3d 641, 649 (9th Cir. 1999) (O’Scannlain, J.) (asking simply whether the rendering court afforded absent class members a “full and fair opportunity” to challenge the adequacy of class representation); *id.* at 651 (Wiggins, J., concurring) (asking whether representational adequacy was “fully and fairly litigated and necessarily decided” by the rendering court); *Epstein v. MCA, Inc.*, 126 F.3d 1235, 1244 (9th Cir. 1997) (Norris, J.) (permitting the collateral attack on the ground that “[t]o hold otherwise . . . would be to require absent class members to monitor the proceedings in order to secure their rights to adequate representation,” something such persons “are not required” to do).

empowering all who stand to be bound by the deal to do so, without the need for formal intervention in the trial-court proceeding on the fairness of the settlement.<sup>184</sup> The law of civil procedure in the United States, moreover, has long recognized a circumscribed opportunity to reopen civil judgments due to fraud or new information.<sup>185</sup> But the key point remains that these avenues take place within the channel of direct review, not via a process of searching the land for the anomalous court in some other judicial system to serve as the forum for a collateral attack.

The point here is not to resolve the ongoing debate within the United States over collateral attacks but, rather, to draw on the U.S. experience as a cautionary warning about the level of precision with which debates over proper preclusion in the transnational sphere should take place. Whatever the law of preclusion might conclude on the subject, that body of law is best advised not to use the identical terminology—“adequate representation at all times”—to embrace both structural defects and performance defects, both defects of a constitutional or jurisdictional character and those not so, and both intra-class conflicts discernible from the outset of the proceeding and those that might emerge only later. Conceptual precision here starts with terminological precision.

The timing for precise thinking could not be more auspicious. In the world of class certification, one can see decisions like *Vivendi* as struggling to formulate a trans-Atlantic counterpart in case law to *Shutts* in the U.S. domestic sphere—to lay out the basic conceptual landscape for aggregate judgments that encompass both U.S. and European claimants. The landscape for collateral review of such judgments remains even more uncharted, though developments like the Royal Dutch Shell settlement provide an occasion for movement in that direction.

Interestingly enough, the main European source of guidance on the recognition of civil judgments offers a glimmer of hope for improvement on the terms of the U.S. debate. The EU’s 2000 Regulation on Jurisdiction and the Recognition and Enforcement of Judgments (“EU Regulation”) replaced the earlier Brussels Convention on the same subjects.<sup>186</sup> The EU Regulation understandably does not con-

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184. *E.g.*, *Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002).

185. *E.g.*, FED. R. CIV. P. 60(b).

186. Council Regulation 44/2001, art. 34.1, Jurisdiction and the Recognition and Enforcement of Judgment in Civil and Commercial Matters, 2000 O.J. (L 12) 1 [hereinafter EU Regulation]. On the unsuccessful earlier effort to negotiate an international convention on the recognition of judgments through the vehicle of the Hague Conference on Private International Law, see Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing a Reciprocity Re-*

sider with any specificity the recognition of judgments by way of aggregate settlements, that phenomenon having gained prominence only later with developments like the Royal Dutch Shell settlement. The crucial language of the EU Regulation consists of the general proposition stated in its Article 34: "A judgment shall not be recognized . . . if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought." Similar language appears in the ALI's proposal for the recognition of foreign judgments in U.S. courts, modeled in this regard on Article 34 of the EU Regulation.<sup>187</sup>

The use of the word "judgment" in both of these sources includes "inquiry into the process by which the judgment was obtained in the particular case."<sup>188</sup> But the standard for the withholding of recognition on this ground remains "quite high," such that "the procedures in the individual foreign proceeding need only meet an 'international standard' of fairness."<sup>189</sup> For aggregate litigation, such an approach effectively would replicate under the auspices of judgment recognition principles an inquiry rather like the Rule 23(b)(3) superiority analysis undertaken by the U.S. courts in *Vivendi* and *Alstom*. On such a view, the embrace of aggregate procedure along the lines underlying the judgment in question—perhaps, even if only vaguely so—might suffice to obligate Forum 2 ("F2") to recognize the judgment of Forum 1. Still, open questions remain as to the outer limits of this approach. Recall that the *Alstom* court declined to encompass French shareholders when faced with relatively specific indications in deliberations over aggregate procedure there that an opt-out approach on the U.S. model would violate French constitutional principles.<sup>190</sup>

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quirement into U.S. International Recognition and Enforcement Law, 35 GEO. J. INT'L L. 239, 257-61 (2004).

187. See RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 5(a)(vi) (2006):

A foreign judgment shall not be recognized or enforced in a court in the United States if the party resisting recognition or enforcement establishes that . . . the judgment or the claim on which the judgment is based is repugnant to the public policy of the United States, or to the public policy of a particular state of the United States when the relevant legal interest, right, or policy is regulated by state law.

On the grounding of this language in Article 34 of the EU Regulation, see *id.* § 5 reporters' notes at 78-79. On the relationship between the ALI proposal and the Hague Conference negotiations, see Andreas F. Lowenfeld & Linda J. Silberman, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635 (2000).

188. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, *supra* note 187, § 5 reporters' notes at 77.

189. *Id.*

190. *In re Alstom SA Sec. Litig.*, 253 F.R.D. 266, 285-87 (S.D.N.Y. 2008).

If anything, the EU Regulation contains the makings for more precise delineation of defects that undermine the legitimacy of the aggregate proceeding as an initial matter, in contrast to those related to its outcome. The same chapter of the EU Regulation that qualifies the general obligation to recognize the judgments of other EU nations by reference to public policy in F2 goes on to emphasize that “[u]nder no circumstances may a foreign judgment be reviewed [in F2] as to its substance.”<sup>191</sup> Yet that is precisely what “adequate representation at all times” would countenance in U.S. law, if construed so broadly as to embrace collateral inquiry into adequate performance by class counsel in crafting a deal that is fair for claimants in substance. Again, this is by no means to say that performance defects somehow do not matter, only that it is possible to cast them in the manner of the EU Regulation for civil judgments generally: the proper subject for direct review within the rendering court system. The adequacy of the processes for direct review, as distinct from the substance of the judgment, accordingly would comprise an appropriate subject for collateral inquiry, as even the most restrictive regimes suggested for collateral attacks in the United States would recognize.<sup>192</sup>

Whatever the particulars ultimately chosen for collateral review of transnational judgments rendered in the aggregate, the crucial starting point remains: the discussion best occurs based on precise conceptualization of the differing meanings that one might attach to adequate representation. Here, the law of transnational preclusion would do well to render exceptional the overloaded phrase “adequate representation at all times” that has long dominated discussions of collateral attacks in the United States.

A further permutation of the emerging debate over proper preclusion in the transnational setting speaks to the situation presented by the Royal Dutch Shell settlement. The question of adequate representation there recalls the discussion in Part II of European efforts to separate the capacity of aggregate procedure for purposes of closure from its potential to enable litigation.<sup>193</sup> The question at which the Royal Dutch Shell deal hints is whether peace by way of aggregation, without the threat of litigation, gives rise to a fatal inadequacy in such aggregate resolution. Can one, in other words, ultimately separate the closure function from the enabling function? The latitude left by the *Amchem* Court for settlement-only class actions—uncertain though its

191. EU Regulation, *supra* note 186, art. 36.

192. See *Epstein v. MCA, Inc.*, 179 F.3d 641, 649 (9th Cir. 1999) (O’Scannlain, J.) (evincing a more “restrictive regime”).

193. See *supra* Part II.B.1.b.



dimensions remain—strongly suggests that they exhibit no knock-down, categorical due-process defect under the U.S. Constitution. But it is by no means required for other nations to understand similarly their own outer limits on proper preclusion, and the search for the anomalous court as the vehicle for mismatch will continue accordingly. Interestingly enough, the seeming preference for closure over enabling in European aggregate procedure arguably suggests that, over time, the U.S. critics of settlement-only class actions might be the ones who emerge as the anomaly from a global perspective with regard to proper preclusion.

Whatever its ultimate parameters, the development of a genuinely trans-Atlantic body of learning on proper preclusion in aggregate litigation has a considerable potential to point beyond procedure to substantive law. Here, too, comparison of *Vivendi* and *Alstom* in the trans-Atlantic realm to *Shutts* in the U.S. sphere provides illumination. It is no accident that the discussion of personal jurisdiction over the members of the opt-out class in *Shutts* appeared alongside later portions of the Court's opinion that address the outer limits imposed by constitutional due process on the choice of law to govern the merits of such a lawsuit.<sup>194</sup> Expansion in the preclusive scope of the class beyond the territorial authority of the governmental unit that has constituted the rendering court puts increased pressure on the choice of substantive law to govern the merits. The concern here is that the substantive law of one state—perhaps an outlier—effectively will govern the nation.

On this point, the *Shutts* Court enables with one hand (rejecting the due process challenge to personal jurisdiction over the absent class members, the vast majority of whom lacked “minimum contacts” with the Kansas forum) but disables at least a bit with the other hand (holding that the Due Process Clause calls for a non-arbitrary choice of law to govern the merits). Preclusion on a trans-Atlantic basis portends an analogous debate over the outer bounds for trans-Atlantic choice of law by the rendering court. The law awaits what one might call a Euro-*Shutts*. As I now explain, however, judicial administration—whether by way of principles for proper preclusion or for choice of law—does not necessarily represent the only option for governance of transnational aggregate litigation.

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194. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814–23 (1985) (overturning class certification on choice-of-law grounds).

*B. Governance by Contract*

The multiplicity of procedures for aggregate litigation across the United States and Europe has implications not just for collateral attacks and preclusion. It also casts attention to the use of private contracts as a vehicle for the parties, in effect, to choose in advance the legal regime that shall govern their relationship. To be sure, contractual relationships are not the only context for aggregate litigation; tort law deals largely with instances in which the parties have no pre-existing contract. Even with this important caveat, however, the point remains that governance might occur even without a governmental regime commensurate in scope to global commerce, not only by way of transnational preclusion *ex post* but also via private contracts *ex ante*. Once more, the U.S. experience is instructive.

In recent years, the major challenge to the domain of aggregate litigation in the United States—particularly, with regard to low-stakes consumer claims—has come from arbitration provisions in private contracts. This development proceeds from the well-established use of arbitration to resolve disputes between sophisticated businesses positioned to negotiate the full breadth of their contractual relationships point by point. In consumer contracts, by contrast, the arbitration clause is not the product of back-and-forth negotiation but, instead, is presented to the consumer by a seller of goods or services on a take-it-or-leave-it basis. The movement in the direction of arbitration in consumer contracts has proceeded largely unabated. If anything, the Supreme Court has contributed significantly to this process in a series of decisions under the Federal Arbitration Act, reading that statute as embodying “a federal policy favoring arbitration”<sup>195</sup> that may be overcome based only on generally applicable defenses in the law of contracts, not contractual doctrines that specifically disfavor arbitration clauses.<sup>196</sup> For the Court, a contractual obligation to arbitrate works a mere change in the forum for dispute resolution, at least as long as would-be litigants “effectively may vindicate” their preexisting rights of action in the arbitral forum.<sup>197</sup>

The Court nonetheless has yet to resolve the status of arbitration clauses that seek to go a step further by not only requiring the use of arbitration in lieu of litigation but also purporting to waive any otherwise available opportunity to aggregate claims—whether by way of a U.S.-style class action or a class-wide arbitration proceeding. Ar-

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195. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

196. 9 U.S.C. § 2 (2000).

197. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

bitration clauses that contain waivers of aggregation portend a substantial diminution of the class action domain due to the pervasiveness of contracts—particularly, of an adhesive sort—as the basis for much commerce today.<sup>198</sup>

Some judicial and scholarly discussions of these waivers in recent years cast doubt on their legitimacy in terms of the proper boundary between what private contracts may do and what only legislatures may do.<sup>199</sup> The basic move here is to take seriously the Court's foundational insight that the legitimacy of arbitration rests on its working of a mere change in the forum for dispute resolution, not a repeal of claimants' private right of action in practical effect. On this account, only public institutions of government, not contracts among private persons, may accomplish such repeals.

An additional feature complicates the picture still further. Arbitration clauses that contain waivers of aggregate procedures often coexist in contracts with provisions to subject the parties' relationship to the substantive law of a specified sovereign. Here, too, practices that originated in contracting between sophisticated commercial parties migrated over to contracting that involves unsophisticated consumers. In the commercial setting, it is commonplace for contracts to include a choice-of-law clause.<sup>200</sup> In U.S. consumer credit card agreements today, moreover, the usual practice is for the issuing bank to provide, on a take-it-or-leave-it basis, for application of the substantive law of its own home base—say, South Dakota. Yet the bank is quite likely to have selected that location as its home base because of anomalously favorable substantive law along any number of dimensions—from permissible interest rates to the validity of clauses that waive aggregation.<sup>201</sup> Litigation to challenge waivers of aggregation then replays the quasi-Newtonian dynamics observed in U.S. class action practice: the invocation of anomaly elicits an equal and opposite invocation of anomaly. Specifically, the bank's effort to project the substantive law of its home base nationwide begets a nationwide class

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198. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1638–39 (2005).

199. Some sources cast the inquiry in terms of whether statutory rights may be vindicated in the arbitral setting. See, e.g., *Kristian v. Comcast Corp.*, 446 F.3d 25, 37 (1st Cir. 2006); J. Maria Glover, Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1764–67 (2006). For elaboration in terms of the contrast in law reform authority between private contracts and public legislation, see Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1906–07 (2006).

200. See O'HARA & RIBSTEIN, *supra* note 32, at 5.

201. On the role of federal banking law in accentuating this tendency, see Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 159–61 (2006).

action to challenge the waiver in a jurisdiction believed to hold anomalously pro-consumer views on, say, unconscionability as a matter of its contract law.<sup>202</sup>

The transnational setting places even greater pressure on both the tension between private contracts and public governance and the relationship of arbitration to choice-of-law principles. As in the United States, efforts at regulatory mismatch in the scope of aggregate litigation are likely to elicit corresponding efforts at mismatch in the reach of contracts that purport to foreclose such litigation. The important observation at this early juncture concerns the relative lack of transparency that such a process could exhibit. The game could be to make claiming unviable through the interaction of an arbitration clause, a waiver of aggregation, and a choice-of-law clause.

The near-uniform recognition afforded to class actions across the jurisdictions of the United States at least puts those who wish to compel dispute resolution through some other mode in the position of having to speak explicitly to that topic. Waivers of class-wide treatment within contractual arbitration clauses are the result. To be sure, there remains debate over the degree to which ordinary consumers pay attention to standardized contract language of any sort. But at least a waiver of aggregate procedure must say just that. A trans-Atlantic world well short of any operational consensus, much less convergence, on the basic parameters for aggregate litigation is a world in which the game may be played *sotto voce*. Sellers of goods and services in the global marketplace might seek to foreclose aggregation simply by way of a clause that chooses the law, including the procedural law, of the anomalous sovereign.

## CONCLUSION

The usual account of U.S.-style civil litigation situates its principal features, including the opt-out class action, as exceptional by comparison to other Western industrialized democracies. The emergence in Europe of procedures for aggregate litigation and moves toward further reform in the same direction make for a modest lessening of American exceptionalism. Discussions of aggregation across the Atlantic, however, should not confine themselves to mere positive cataloguing of procedural differences.

To a degree, the tendency toward positive cataloguing reflects a well-taken prudence to describe new developments in detail before

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202. See Nagareda, *supra* note 199, at 1900 (discussing in this light a significant California decision, *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)).

analyzing them. The same tendency also may reflect an inclination toward the cataloguing of procedural doctrine as embodied in rules and other authoritative sources—an enterprise that comprised the bulk of litigation-related scholarship in the United States during the 1950s and 60s. One signal development in U.S. procedural scholarship in more recent decades has been a broadening of the discussion by reference not simply to procedural doctrine, as found in rules and judicial decisions, but also to the strategic and economic underpinnings of litigation on the part of the real-world lawyers involved. In keeping with this emerging genre of litigation scholarship, this Article has argued for a broader analytical perspective, one that situates procedural differences within the larger landscape of the structural dynamics that they elicit from lawyers.

The scope of commerce, and thus the potential scope for disputes in the aggregate, is increasingly global. A central challenge for transnational aggregate litigation in the twenty-first century consists of developing a working regime to regulate mismatches between the preclusive scope of such lawsuits and the governing authority of the rendering court. These regulatory mismatches are the global analogues to phenomena familiar in nationwide class action litigation within the United States during the late-twentieth century. The structural dynamics of these mismatches, not so much the specifics chosen for aggregate procedure, represent the real story now playing out in aggregate litigation across the Atlantic. What is likely to emerge is not the exceptionalism of the U.S. experience but, instead, a striking lack of exceptionalism—McDonald's on the Champs-Elysees, but with its Quarter Pounder famously restyled as a Royale with Cheese.<sup>203</sup>

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203. See *PULP FICTION* (Miramax 1994).