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# Fading Extraterritoriality and Isolationism? Developments in the United States

Austen L. Parrish

*Indiana University Maurer School of Law*, [austparr@indiana.edu](mailto:austparr@indiana.edu)

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# Fading Extraterritoriality and Isolationism? Developments in the United States

THE 2016 EARL A. SNYDER LECTURE

AUSTEN L. PARRISH\*

## INTRODUCTION

Thank you, Eyal, for that kind introduction and warm welcome. Last year, I had the pleasure of spending time with Professor Marc Weller when he traveled to Bloomington to give the annual Snyder lecture, and I have long admired Professor Benvenisti's scholarship.<sup>1</sup> So I am grateful to Cambridge University, the Lauterpacht Center, and Professor Benvenisti for hosting me this year, as we continue to strengthen our schools' longstanding friendship and collaborations. Having the opportunity to deliver the twelfth Snyder Lecture is a privilege in part because of the distinguished scholars who have given the lecture in the past. It is also a privilege because of Earl Snyder himself. Earl was visionary in supporting these cross-Atlantic intellectual exchanges and ahead of his time in appreciating the value of studying transnationalism in its many forms. Today, in that tradition, my aim is to give you a sense of how the procedural rules of international civil litigation are developing and changing in the United States, and how those developments in turn affect more traditional

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\* Dean and James H. Rudy Professor, Indiana University Maurer School of Law. This article is a slightly expanded version of my Snyder Lecture delivered at Cambridge in May 2016.

1. Of particular relevance to this lecture's topic, see Eyal Benvenisti & George W. Downs, *The Democratizing Effects of Transjudicial Coordination*, 8 *UTRECHT L. REV.* 158 (2012); Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 *EUR. J. INT'L L.* 59 (2009); Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Norms: An Analysis of Attitudes of National Courts*, 4 *EUR. J. INT'L L.* 159 (1993) [hereinafter Benvenisti, *Judicial Misgivings*].

forms of international lawmaking. In so doing, I part ways from many of my American colleagues, who are more pessimistic about recent trends.<sup>2</sup>

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In the United States, globalization and transnational law have been closely intertwined. For the last twenty-five years or more, international civil litigation has been one of the ways the United States engages in the international arena.<sup>3</sup> Extraterritorial regulation through litigation has permitted unilateral private initiative to advance global justice while avoiding messy political battles, the anti-internationalism often present in Congress, and the traditional American uneasiness in embracing additional international commitments.<sup>4</sup> Litigation in domestic courts has also been perceived as a way to close, at least to some degree, the international system's enforcement gap. Until recently, many scholars seemed bullish that this kind of litigation would be a primary way to integrate international legal norms into domestic law and to enforce those norms in advancing global justice. This attempt to further public goals through private litigation was viewed as a uniquely American-styled response, progressive in its orientation, to globalization.

That effort, however, has been derailed. In a number of recent decisions, the U.S. Supreme Court has scaled back on the ability of plaintiffs to litigate foreign claims against foreign defendants in the United States. The Court is not enamored with the idea that American courts should be the world's courts, and is wary of adjudicating claims absent a meaningful connection between the case and the United States. The Court has rejected the notion that we live in a postnational world or, at least, has declined the invitation to hasten a move in that direction. This trend to limiting international litigation has occurred, to varying degrees, in both public and private law cases.

For many committed to transnational justice, the trend is worrisome. Commentators see it as additional evidence of an American

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2. This lecture builds on themes found in earlier remarks that were made following the U.S. Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum*. See Austen L. Parrish, *Kiobel, Unilateralism, and the Retreat from Extraterritoriality*, 28 MD. J. INT'L L. 208 (2013).

3. See generally GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (5th ed. 2011) (providing an overview of international civil litigation in the United States).

4. See generally David Kaye, *Stealth Multilateralism: U.S. Foreign Policy Without Treaties—or the Senate*, 92 FOREIGN AFF. 113 (2013) (describing the U.S. Senate's resistance to multilateral treaties).

retreat from international law,<sup>5</sup> a turn toward isolationism,<sup>6</sup> and the Court's reinvention of itself with a particular brand of conservative activism.<sup>7</sup> The worry is the trend portends a growing judicial parochialism,<sup>8</sup> problematic in a globalized world where transnational challenges predominate. In the now conventional telling, the U.S. judiciary has once again disengaged from the broader world.

But there's an alternative to this conventional perspective, one that's less pessimistic in outlook. In certain respects, the recent decisions are more charitable to international institutions and the foundational principles upon which international law rests. Admittedly, these decisions have been largely driven by domestic considerations untethered to transnational ones. But the Court is not necessarily anti-international or isolationist. Instead it has been skeptical of academic theories that have sought to expand international jurisdictional doctrines. In this way, the recent decisions—whether explicitly or not—embrace a vision for global governance and a role for domestic courts in that system that is more consistent with foundational principles of international law and, in many ways, more sustainable and coherent.

In these remarks, I first provide an overview of the recent U.S. Supreme Court decisions that are the cornerstones of the trend. In so doing, I trace a slightly different story than the one commonly told. I connect earlier doctrinal developments to particular legal theories that sought to broaden jurisdictional law. While this effort to reinvent doctrine was often well intentioned, the new legal orthodoxy has not been adept at formulating a role for national courts in global governance that meaningfully advances transnational justice over the long term. At

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5. John F. Coyle, *The Case for Writing International Law into the U.S. Code*, 56 B.C. L. REV. 433, 444 (2015) (describing a judicial retreat from international law using *Kiobel* as evidence of the trend); Ralph G. Steinhardt, *Kiobel and the Weakening of Precedent: A Long Walk for a Short Drink*, 107 AM. J. INT'L L. 841, 845 (2013) (arguing that “the Rehnquist and Roberts Courts have opted to minimize the authority of much of international law by deploying existing doctrine in an aggressive and unprecedented way”).

6. Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1084-85 (2015) (describing the tendency of American courts to avoid foreign cases to promote separation of powers and international comity).

7. Geoffrey R. Stone, *When Is Judicial Activism Appropriate?*, CHI. TRIB. (April 13, 2012), [http://articles.chicagotribune.com/2012-04-13/opinion/ct-perspec-0413-restraint-20120413\\_1\\_judicial-activism-judicial-deference-judicial-restraint](http://articles.chicagotribune.com/2012-04-13/opinion/ct-perspec-0413-restraint-20120413_1_judicial-activism-judicial-deference-judicial-restraint) (asserting that “we have now entered a troubling era of conservative constitutional jurisprudence [that] is best characterized as ‘conservative activism’”).

8. See Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. (forthcoming 2017) (manuscript at 2-3, 7) (on file at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2651453](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2651453)) (describing the assumption that U.S. courts favor U.S. parties over foreigners and U.S. law over relevant foreign or international law, but challenging that assumption).

worst, it may have detracted from other multilateral efforts to advance global justice.

My remarks end on a note of concern. The response to the Court's retreat from broad assertions of unilateral extraterritorial judicial power<sup>9</sup> has led some to encourage doubling down on the same failed strategy in state courts and foreign courts.<sup>10</sup> Doing so diverts attention from the more important task of building respect for international law and the work of international lawyers. As other nations begin to imitate and embrace the more exorbitant and problematic aspects of U.S. practice, one worries that the unilateral use of domestic law to regulate foreigners for activity occurring abroad, an approach the United States spurred but has now partly abandoned, will further fragment the international legal system in a particularly pernicious way.

### I. A PAROCHIAL TURN?

For those who believe that the U.S. Supreme Court has become isolationist, the focus primarily is on procedural decisions in two jurisdictional areas. The first is in the legislative jurisdiction area with decisions addressing the presumption against extraterritoriality. The second is in the adjudicatory jurisdiction area with decisions involving the personal jurisdiction doctrine.

Inklings of what were to come began in 2010 with *Morrison v. National Australia Bank*.<sup>11</sup> *Morrison* was a product of the U.S. housing bubble and mortgage crisis, involving Australian investors who had bought stock in Australia's largest bank. The investors claimed that the bank's Florida-based subsidiaries had miscalculated interest rates on mortgages it was servicing, causing the value of the parent bank's stock to plummet. Seeking a class action remedy, the investors sued in the United States, claiming the subsidiaries had made false and misleading statements to the U.S. Securities and Exchange Commission. The critical issue was whether the antifraud provisions of the U.S. securities laws applied when foreign plaintiffs sued "foreign and American defendants for misconduct in connection with securities traded on

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9. In these remarks I focus on unilateral, domestic regulation of foreigners. I do not focus on regulation of U.S. citizens or entities under established principles of nationality jurisdiction. See generally Gerald L. Neuman, *Extraterritoriality and the Interest of the United States in Regulating its Own*, 99 CORNELL L. REV. 1441 (2014) (exploring the regulation of harmful conduct of the U.S. government's own officials and nationals outside the country's borders).

10. See *infra* notes 37-38.

11. 561 U.S. 247 (2010).

foreign exchanges.”<sup>12</sup> The Court concluded that the American Securities laws did not apply. Section 10(b) of the Exchange Act, the Court held, applies “only” to “transactions in securities listed on domestic exchanges, and domestic transactions in other securities.”<sup>13</sup>

While the full implications of *Morrison* may have been initially obscured,<sup>14</sup> the decision put an end (absent unmistakably clear contrary Congressional intent) to so-called “foreign-cubed” securities litigation—cases brought by foreign claimants against foreigners in relation to shares bought on a foreign exchange. Applying a strong presumption against extraterritoriality as a canon of construction, Justice Scalia’s opinion focused on separation of powers issues and issues of legislative primacy.<sup>15</sup> Justice Stevens’s concurrence—while worried that Justice Scalia was attempting to render the securities laws toothless—agreed that the conduct in question did not have sufficient links to, or ramifications for, the United States.<sup>16</sup> Justice Stevens and the Court’s more liberal members were worried over American courts meddling in matters in another nation’s domain.

*Morrison* ultimately foreshadowed what was to come. In 2013, in the landmark *Kiobel* decision,<sup>17</sup> the Court again emphasized that courts should not presume that Congress intends to regulate foreigners for conduct occurring abroad absent clear directive, even in cases involving human rights abuses under international law. That case involved Esther Kiobel and other Nigerian nationals who alleged that Dutch and British oil corporations aided and abetted the Nigerian government during the 1990s to kill, torture, and unlawfully detain them or their relatives. The majority focused on separation of powers and foreign policy concerns, but the decision was also animated by the implication that courts anywhere in the world could claim universal jurisdiction over U.S. nationals for activity in the United States. Doubling down on *Morrison* and arguably expanding it, the majority found that a presumption against extraterritoriality exists even in the context of a jurisdictional statute.

Justice Breyer’s concurrence invoked long-standing principles of international jurisdictional law. While he would have avoided reliance on the presumption against extraterritoriality, Justice Breyer would

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12. *Id.* at 250-51.

13. *Id.* at 267.

14. See generally *Harmony and Dissonance in Extraterritorial Regulation*, 105 AM. SOC. INT’L L. PROC. (2011) (commenting on the implications of the *Morrison* decision).

15. See Lea Brilmayer, *The New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. L. REV. 655, 658 (2011).

16. *Morrison*, 561 U.S. at 286.

17. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1666 (2013).

only find jurisdiction where “the alleged tort occurs on American soil,” “the defendant is an American national,” or “the defendant’s conduct substantially and adversely affects an important American national interest.”<sup>18</sup> As Breyer explained, “adjudicating any such claim must, in my view, also be consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its own laws and their enforcement.”<sup>19</sup>

And most recently, just this year, the Court again signaled its wariness of transnational litigation. In *RJR Nabisco*,<sup>20</sup> the European Union alleged that RJR played a role in an international money-laundering scheme and sought to find it liable under the federal Racketeer Influenced and Corrupt Organizations Act (RICO), a law enacted to fight organized crime. While finding that Congress affirmatively intended RICO to apply extraterritorially in certain contexts, the Court noted, “allowing recovery for foreign injuries in a civil RICO action creates a danger of international friction that militates against recognizing foreign-injury claims without clear direction from Congress.”<sup>21</sup> While the Court split on whether domestic injury is a necessary predicate to a private civil suit, the Court again was unanimous in cautioning (and distinguishing the facts of the case before them) that generally courts should be reluctant to find U.S. law applies to the conduct of foreigners occurring on foreign soil.<sup>22</sup>

These concerns about the overextension of American power also revealed themselves in a second line of decisions focused on adjudicatory jurisdiction. By 2011, it had been more than two decades since the U.S. Supreme Court had decided a personal jurisdiction case. That year, the Court decided two cases back-to-back, both with foreign elements. In the first case—*J. McIntyre Machinery v. Nicastro*—a plaintiff suffered serious injuries while operating a shearing machine in New Jersey.<sup>23</sup> The plaintiff filed a lawsuit in state court against the shearing machine’s British manufacturer. The question was whether the New Jersey court had personal jurisdiction over the British corporation. In the second case—*Goodyear Dunlop Tires v. Brown*—the parents of two boys who were killed in France in a bus accident brought a lawsuit in North Carolina.<sup>24</sup> The lawsuit alleged that a defective tire

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18. *Id.* at 1671.

19. *Id.*

20. *RJR Nabisco Inc. v. European Cmty.*, 130 S. Ct. 2090, 2093 (2016).

21. *Id.* at 2095; *see also* *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007) (“United States law governs domestically but does not rule the world.”).

22. *See RJR Nabisco*, 130 S. Ct. at 2115 (distinguishing foreign-cubed cases and noting that “this case has the United States written all over it”).

23. 564 U.S. 873, 877 (2011).

24. 564 U.S. 915, 918 (2011).

manufactured in Turkey, at the plant of one of Goodyear's foreign subsidiaries, caused the accident. The lawsuit named Goodyear, as well as three of its subsidiaries organized and separately incorporated in Turkey, France, and Luxembourg, as defendants. The foreign defendants moved to dismiss, asserting that the North Carolina court lacked personal jurisdiction.

In both cases the Court emphasized—echoing the language from the legislative jurisdiction context—that connections to territory are relevant to the Court's personal jurisdiction analysis. The Court in *Goodyear* explained that defendants are not subject to general jurisdiction unless they are “essentially at home” in the forum.<sup>25</sup> In *McIntyre*, a divided Court found that without greater connections and contacts with New Jersey, the exercise of jurisdiction would be inconsistent with due process. While the Court was divided on the facts of *McIntyre*, whether jurisdiction should exist at the place of injury, and the salience of nation-wide contacts, all agreed that due process would not permit a foreign manufacturer to be haled into a U.S. court to litigate a dispute with a foreign party over a transaction taking place outside the United States.<sup>26</sup>

Whatever doubt existed that *Goodyear* and *McIntyre* might have been isolated decisions was laid to rest two years later. In 2013, the same year as *Kiobel*, the Court decided *Daimler v. Bauman*.<sup>27</sup> During the Argentine “Dirty War,” as many as thirty thousand left-wing sympathizers reportedly disappeared. In 2004, Bauman and other Argentine nationals sued DaimlerChrysler AG (“Daimler”) for violations under the Alien Tort Claims Act, claiming that Daimler's subsidiary in Argentina ordered state security forces to rid its plant of left-wing sympathizers. Daimler was a German company that did not manufacture or sell products in the United States, but owned a subsidiary, Mercedes Benz USA, that did. Bauman sued in California federal court, claiming the court had general personal jurisdiction over Daimler through its subsidiary's contacts with California. The Supreme Court again rejected a “global reach.” Reaffirming its decision in *Goodyear* and in a unanimous decision, Justice Ginsburg criticized the lower court for insufficiently accounting for international comity considerations.<sup>28</sup>

Decisions in other contexts had similar bents. In 2015, in a foreign sovereign immunity case, the Supreme Court unanimously found that

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25. *Id.* at 919.

26. *McIntyre*, 564 U.S. at 907-08 (noting under such circumstances jurisdiction would not “be a close call”) (Ginsburg, J., dissenting).

27. 134 S. Ct. 746 (2014).

28. *Id.* at 763.



an Austrian state-owned railway was immune from suit for personal injuries occurring in Austria.<sup>29</sup> And these decisions complement earlier decisions in other areas<sup>30</sup>—including in the context of forum non conveniens<sup>31</sup> and parallel proceedings<sup>32</sup>—that make it difficult to successfully sue foreigners in the United States for alleged unlawful acts occurring abroad.

The reaction to these decisions, collectively and individually, was not positive. *Kiobel* was decried and viewed as a betrayal.<sup>33</sup> Pamela Bookman, in a widely-read Stanford Law Review article, characterized the decisions collectively as extreme and isolationist.<sup>34</sup> Steve Burbank opined that international civil litigation had become a “paper tiger.”<sup>35</sup> Others reached similar conclusions.<sup>36</sup> Overall, scholars lamented what they perceived to be evidence of disengagement with international law. Some urged lawyers to bring state law claims in state courts under theories of universal jurisdiction.<sup>37</sup> Others predicted foreign courts will

29. OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390, 398 (2015).

30. See generally William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015) (exploring different doctrines of U.S. foreign relations law and the concept of international comity).

31. See generally Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (dismissing wrongful-death claims arising from air crash in Scotland); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (AM. LAW INST. 1969) (explaining “[a] state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff”).

32. See generally Austen L. Parrish, *Duplicative Foreign Litigation*, 78 GEO. WASH. L. REV. 237 (2010) (examining the problem of duplicative foreign litigation resulting from increased transnational litigation).

33. See, e.g., *A Giant Setback for Human Rights*, N.Y. TIMES (April 17, 2013), <http://nytimes.com/100UTMb>; David G. Savage, *Justices Rule U.S. Courts Not World Forum for Human Rights Suits*, L.A. TIMES, (April 17, 2013), <http://articles.latimes.com/print/2013/apr/17/nation/la-na-court-human-rights-20130418>; Parrish, *supra* note 2, at 210 n.9 (noting critical commentary on blogs immediately following the *Kiobel* decision).

34. Bookman, *supra* note 6, at 126-27; see also Pamela Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579 (2016) (arguing that U.S. courts have taken “extreme measures” like “impos[ing] high barriers to global forum shopping”).

35. Stephen B. Burbank, *International Civil Litigation in U.S. Courts: Becoming a Paper Tiger?*, 33 U. PA. J. INT’L L. 663 (2012).

36. Gardner, *supra* note 8 (manuscript at 1) (noting that many view the Court’s decisions as parochial); cf. Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1084 (2010) (describing judicial efforts to reduce U.S. court access in transnational cases).

37. See, e.g., Christopher A. Whytock, Donald Earl Childress III & Michael D. Ramsey, *Foreword: After Kiobel—International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1, 5-6 (2013) (introducing symposium on topic).

step into the perceived breach to adjudicate transnational claims.<sup>38</sup> The prevailing assessment for the future of international law and the U.S. role in the international system has been mostly bleak.

## II. A CRITIQUE OF THE PREVAILING VIEW

I start with a preliminary observation that complicates the analysis. As with many battles before the U.S. Supreme Court, these transnational cases were not solely, or even primarily, focused on international and transnational issues. On the contrary, the decisions often seemed more about separation of powers and federalism. While the foreign affairs issues in some of the cases were at best hidden,<sup>39</sup> the concern of stepping on executive prerogative in the area of foreign affairs appeared to predominate. And, at least for some on the Court, the results in these cases may simply have been part of a broader hesitation over private litigation as public regulation.<sup>40</sup> Recast this way, these cases were as much a debate about public law litigation and tort reform<sup>41</sup> as they were about international litigation or transnational justice. They were also the backdrop against which the Justices focused on other long-standing issues—the appropriateness of clear-statement rules, the use of canons of construction, and whether rules should be preferred over standards.<sup>42</sup> And finally, even on these domestic issues,

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38. See Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO L.J. 709 (2012); Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995, 1000-01 (2015).

39. Cf. Hannah Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against “Judicial Imperialism,”* 73 WASH. & LEE. L. REV. 653, 699-712 (2016) (describing concerns over legal imperialism, the ascendance of an imperialism narrative, and its impact on Supreme Court cases over the past decade).

40. See Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097, 1107-08 (2006).

41. For a stark view of transnational litigation as a product of an aggressive plaintiff’s bar, see INSTITUTE FOR LEGAL REFORM, TAMING TORT TOURISM: THE CASE FOR A FEDERAL SOLUTION TO FOREIGN JUDGMENT RECOGNITION (2013).

42. International cases are often seen as little more than extensions of domestic doctrines. See Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1899 (2015) (describing how the Court began to treat “foreign relations issues as if they were run-of-the-mill domestic policy issues, suitable for judicial review and governed by ordinary separation of powers and statutory interpretation principles”); Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT’L L. 301, 341 (2008) (asserting that courts are prone to using domestic doctrines without analysis when addressing transnational issues).

the decisions were not doctrinally clear and could be criticized for their internal inconsistencies.

But putting these observations aside, the prevailing assessment that the decisions reflect anti-international tendencies is problematic. One of the core problems is the breadth of agreement from the Court's members, including those that are broadly supportive of international norm development.<sup>43</sup> In *Daimler*, Justice Ginsburg—long sensitive to international issues—wrote the majority. In Justice Breyer's concurrence to *Kiobel* and *RJR Nabisco*, he invoked international jurisdictional law as supporting the majority's conclusion.<sup>44</sup> And Justice Stevens in *Morrison* expressed concern over the breadth of U.S. jurisdictional assertions.<sup>45</sup> All three justices are hardly isolationist.<sup>46</sup> Indeed, several justices have been threatened with impeachment<sup>47</sup> and have received death threats for their willingness to consider foreign and international law sources.<sup>48</sup> And even those justices more reticent in considering international norms appeared concerned with how aggressively broad lower court decisions had become.<sup>49</sup>

The decisions also are more consistent with international law than what those advocating an expansion of jurisdictional authority would suggest. Long-established public international law principles of

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43. Alan M. Trammell, *Isolating Litigants: A Response to Pamela Bookman*, 68 STAN. L. REV. ONLINE 33, 35 (2015) (making this point and noting that "Justice Ginsburg is the opposite of a litigation isolationist").

44. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1673 (2013) (Breyer, J., concurring); *RJR Nabisco Inc. v. European Cmty.*, 130 S. Ct. 2090, 2116 (2016).

45. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 274-86 (2010) (Stevens, J., concurring).

46. See STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* (2015).

47. Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST (Apr. 9, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/04/08/AR2005040801860.html> (noting commentary saying "Kennedy 'should be the poster boy for impeachment' for citing international norms in his opinions"); Carl Hulse & David D. Kirkpatrick, *DeLay Says Federal Judiciary Has 'Run Amok,' Adding Congress Is Partly to Blame*, N.Y. TIMES (Apr. 8, 2005), <http://www.nytimes.com/2005/04/08/politics/delay-says-federal-judiciary-has-run-amok-adding-congress-is.html> (describing how Senator's Coburn's Chief of Staff has called for "mass impeachment" of federal judges).

48. See, e.g., Tony Mauro, *Ginsburg Discloses Threats on Her Life: In Speeches, Justice Says She and Sandra Day O'Connor Were Targeted Because of Use of Foreign Law in Cases*, NAT'L L.J. (Mar. 20, 2006), <http://www.nationallawjournal.com/id=900005449255/Ginsburg-Discloses-Threats-on-Her-Life?slreturn=20160911224648>.

49. See Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1306 (2014) (noting that "courts have been willing to hang U.S. jurisdiction on the hook that some aspect of transnational activity comprising a claim falls within the geographic scope of U.S. authority, even if that aspect is fleeting and minor relative to the rest of the conduct comprising the claim").

territorial integrity, sovereign equality, nonintervention, and self-determination limit one nation from interfering with the conduct of foreigners occurring abroad absent consent or international agreement.<sup>50</sup> International jurisdictional principles reflect these foundational concepts, preventing adjudication of claims in the absence of a close factual nexus between the dispute's subject matter and the United States.<sup>51</sup> While scholars from time to time have sought to recast international jurisdictional law to make it broader, extraterritorial regulation of foreigners for foreign activity has long been, with narrow exceptions, exceptional.<sup>52</sup> The desire to dramatically move international law from its state-based moorings may have been an ambition, but there's little authority supporting that the move has fully occurred.<sup>53</sup> For good or bad, jurisdiction under international law remains tied to territorial sovereignty, and states continue to consider territoriality as the most straightforward and lawful way under international law of delimiting authority between them.<sup>54</sup> The adherence to this long-standing approach isn't anti-international or isolationist.

Notably, the presumption against extraterritoriality, as used in recent transnational cases, is fairly similar to how the Court has treated jurisdiction in other contexts. With federal court jurisdiction, the Court has refused—absent direct and explicit Congressional authorization—to assume that Congress has conferred on the Court the full jurisdiction permitted under the Constitution.<sup>55</sup> Similarly, the Court has assumed

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50. For a more detailed treatment, see Austen Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815 (2009).

51. OPPENHEIM'S INTERNATIONAL LAW 457-58 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (noting that the exercise of civil jurisdiction by a State is dependent on there being "a sufficiently close connection" with the State to justify the exercise of jurisdiction).

52. See *Developments in the Law – Extraterritoriality*, 124 HARV. L. REV. 1226, 1228 (2011) (noting that "[t]he exceptionalism of extraterritoriality reflects the foundational ideals of the international state system").

53. See Alex Mills, *Rethinking Jurisdiction in International Law*, 84 BRIT. Y.B. INT'L L. 187, 194, 198 (2014) (explaining that the international rules of jurisdiction remain dominated by territorial considerations); VAUGHAN LOWE & CHRISTOPHER STAKER, INTERNATIONAL LAW 320 (2010) ("The best view is that it is necessary for there to be some clear connecting factor, of a kind whose use is approved by international law, between the legislating state and the conduct that it seeks to regulate.").

54. See INT'L BAR ASS'N, REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 11 (2008) (describing the "principle of territoriality" as "[t]he starting point for jurisdiction" and "the most common and least controversial basis for jurisdiction"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. b (AM. LAW INST. 1987) ("Territoriality is considered the normal, and nationality an exceptional, basis for the exercise of jurisdiction.").

55. Generally the Court assumes that Congress has not intended to utilize all potential jurisdiction allocated to it. See, e.g., *Finley v. United States*, 490 U.S. 545, 554 (1989) (declining to find pendant party jurisdictional absent explicit affirmative grant by

that Congress does not usually intend to utilize the full jurisdiction permitted under international law or the U.S. Constitution.<sup>56</sup> The presumption may be overly broad and even problematic when considering regulation of U.S. officials, but it hardly seems extreme to err on the side of caution in areas where unilateral extraterritorial regulation has been the most contentious.

In many ways then, the U.S. Supreme Court's most recent pronouncements reflect not a hostility to international law, but rather a rejection of a new legal orthodoxy that sought to reinvent jurisdictional rules for a perceived postnational or poststatist world. Harold Koh, for example, while not focused on jurisdictional principles, envisioned the rise of transnational public litigation—drawing from how domestic public law litigation advanced civil rights in the United States—as a way to enforce international human rights.<sup>57</sup> Other scholars advocated in a similar vein and focused on expanding the role of substate actors in the international system.<sup>58</sup> Indeed, as interdisciplinarity and transdisciplinarity surged in legal academia, a host of legal scholars borrowed descriptive theories from other disciplines and turned those descriptions into normative visions for global governance. So while anthropologists and social scientists explained how the international order has become pluralistic, legal scholars made the jump that pluralism is normatively desirable.<sup>59</sup> And while international relations

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Congress); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152-53 (1908) (interpreting the statutory grant of federal question jurisdiction to be narrower than what is constitutionally permitted); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (interpreting the statutory grant of diversity jurisdiction to be narrower than constitutional limits).

56. See, e.g., *Morrison v. National Australia Bank*, 561 U.S. 247 (2010) (looking at Congressional intent behind enacting statute for determining geographic reach of the law).

57. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2347-48 (1991) (“Like its domestic counterpart . . . transnational public law litigation seeks to vindicate public rights and values through judicial remedies.”); cf. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281 (1976) (landmark article describing public law litigation in the domestic context).

58. See Jose E. Alvarez, *Interliberal Law: Comment*, 94 AM. SOC'Y INT'L L. PROC. 249, 250 (2000) (describing the central assumption of liberal theory that “the future of effective international regulation lies not with traditional treaties . . . but with transnational networks”).

59. See, e.g., NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* (2010) (explaining that many areas of regional and global governance can be understood in pluralist terms that hold normative appeal); PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* (2012) (describing the desirable normative force of multiple overlapping communities in our globalized world). For an overview of global legal pluralism, see Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 243 (2009).

scholars and political scientists described how the state has disaggregated, legal scholars urged that the state should disaggregate with law becoming postnational in orientation.<sup>60</sup>

The desire to move beyond territorial sovereignty as a defining principle of international law and the attempt to change international jurisdictional principles has some understandable short-term appeal. First, strict territoriality has long been discarded domestically where concepts of individual liberty and reasonableness have replaced strict territorial theories of jurisdiction,<sup>61</sup> and territoriality has been jettisoned in conflict of laws doctrine.<sup>62</sup> Second, transnational solutions are often demanded in an integrated, globalized world, given the ease of modern transportation and communication, the growth of international trade and multinational corporations doing business across borders, technological developments such as the internet, and the emergence of transnational criminal organizations.<sup>63</sup> Third, as the United States has become less willing to enter into treaties and cooperate multilaterally, the need to find other solutions to temper the negative aspects of globalization became more pressing.<sup>64</sup>

Under international law and in other countries, however, the turn to unilateral extraterritorial regulation of foreigners (whether through the courts or otherwise) has rarely been viewed as legitimate. The unilateral attempt to prescribe conduct abroad has been roundly viewed as exorbitant and usually inconsistent with international law.<sup>65</sup>

60. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 8 (2004) (describing international networks globalizing justice).

61. See Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 100 (1999) (describing the shift of focus to an individual liberty's interest from concerns of reciprocal sovereignty); cf. ANDREAS LOWENFELD, *INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS* (1996) (advocating for a reasonableness standard over territorial-based standards).

62. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 31 (replacing vested rights theory and territorial approaches that had been advanced by the first restatement).

63. See KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* 118 (2009) (describing and critiquing the commonly held position that law must become less territorially constrained when social and economic activity globalizes).

64. See Harold Hongju Koh, *Setting the World Right* 115 YALE L.J. 2350, 2354 (2006) (noting American strategic unilateralism and tactical multilateralism "characterized by a broad antipathy toward international law and global regime-building through treaty negotiation").

65. See *Doe v. Exxon Mobil Corp.*, 654 F. 3d 11, 77-78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part) (listing objections to extraterritorial applications of American law by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom); A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257, 257 (1981) (describing deep feelings of anti-Americanism based on perceived unlawful extraterritorial application

Unilateral extraterritorial regulation also can be deeply undemocratic and not easily reconciled with principles of self-determination.<sup>66</sup> Aside from the legitimacy question, there is also pragmatic consideration: progress in international regulation is unlikely to be made in hodgepodge and piece-meal fashion. The move away from multilateral lawmaking leads to fragmentation of the international system<sup>67</sup> and to the perception of American exceptionalism.<sup>68</sup> In a range of contexts, because the use of extraterritorial laws are highly contentious, attention is diverted away from the alleged violators and the unlawful acts, and directed instead to those bringing the claims.<sup>69</sup> And after all that, the likelihood of success for such claims remains small, thereby giving the illusion that serious steps are being taken, when in actuality little progress has been made.<sup>70</sup>

### III. MOVING BEYOND EXTRATERRITORIALITY

Let me begin winding down my remarks by suggesting that recent decisions provide more opportunity than cause for alarm. I begin by highlighting common misconceptions.

One false concern is the belief that curtailing unilateral extraterritorial regulation necessarily suggests a more limited role for national courts. But the two are not companion concepts. One can be concerned over unilateral extra-jurisdictional power, while believing that domestic courts can and should play a robust role in enforcing and

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of U.S. laws); John Byron Sandage, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law*, 94 YALE L.J. 1693, 1698 (1985) (explaining that justifications for broad extraterritorial jurisdiction was perceived as “Yankee ‘jurisdictional jingoism’” spurring “wide-spread resentment”); cf. Brigitte Stern, *Can the United States Set Rules for the World? A French View*, 31 J. WORLD TRADE 5, 10 (1997) (describing Helms-Burton Act as a “blatant violation of the international rules governing extraterritoriality”).

66. For a detailed treatment, see Parrish, *supra* note 50, at 859-60.

67. See Eyal Benvenisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 626 (2007).

68. See Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT’L L. 369, 403 (2005).

69. See *Developments in the Law – Extraterritoriality*, *supra* note 52, at 1228 (observing some benefits, but noting the “serious legal, diplomatic, and moral tensions inherent in the extraterritorial application of law”).

70. See Cortelyou C. Kenney, *Measuring Transnational Human Rights*, 84 FORDHAM L. REV. 1053, 1113 (2015) (examining database of human rights civil suits and finding only modest success despite lack of evidence of parochial bias).

developing international norms.<sup>71</sup> A reluctance to have national courts adjudicate, absent agreement, claims against foreign defendants for activity abroad, does not prevent adjudication of claims against U.S. citizens under nationality jurisdiction principles,<sup>72</sup> does not prevent incorporation of international norms in U.S. decision-making, and does not prevent judges from engaging with international law.<sup>73</sup> More importantly, nothing in the Court's extraterritoriality jurisprudence prevents treaty-based jurisdiction (e.g., reciprocal court access as part of a bilateral or multilateral treaty scheme), and later unilateral action sometimes is permitted when anticipated by the treaty framework itself.<sup>74</sup> While the United States may have withdrawn from multilateral commitments<sup>75</sup>—and indeed the rise of extraterritorial regulation may have contributed to that withdrawal<sup>76</sup>—one does not necessarily lead to the other.

A similar persistent reductionist tendency is the notion that in a globalized world, unilateral extraterritorial regulation is inevitable and necessary. But why that would be so is unclear. Those opposed to extensive unilateral extraterritorial regulation are not advocating for regulatory free-zones. The position is only that transnational regulation more meaningfully occurs through cooperative, rather than unilateral, means. As a descriptive matter, the notion of extraterritorial inevitability is also wrong. In the past, when the world's economy has been highly integrated, domestic law has remained strictly territorially prescribed.<sup>77</sup> And we have seen nations use extraterritorial laws

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71. See Benvenisti, *Judicial Misgivings*, *supra* note 1, at 160. See generally Richard A. Falk, *The Role of Domestic Courts in the International Legal Order*, 39 *IND. L.J.* 429 (1964) (examining “the proper role of domestic courts in the international legal order”).

72. See *RESTATEMENT (THIRD) OF FOREIGN RELATIONS* § 402(2) (AM. LAW. INST. 1987); *Blackmer v. United States*, 284 U.S. 421, 437 (1932).

73. See, e.g., Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 *AM. J. INT'L L.* 241, 241 (2008).

74. Cf. Maggie Gardner, *Channeling Unilateralism*, 56 *HARV. J. INT'L L.* 297, 297 (2015) (“Because states generally cannot enforce their laws outside their own territory, transnational criminals can evade prosecution as long as some states are unable or unwilling to meet these treaty commitments. One solution for improving compliance with these treaties may be, counterintuitively, more unilateralism.”).

75. See Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 *YALE J. INT'L L.* 51, 90 (2012) (“The courts of the United States are today less willing than at any previous time in history to directly enforce the Article II treaty obligations of the United States through a private right of action.”).

76. See TONYA PUTNAM, *COURTS WITHOUT BORDERS: LAW, POLITICS, AND US EXTRATERRITORIALITY* 101-201, 264 (2016) (“[W]here judicial extraterritorially is (or becomes) less efficacious, the United States may seek to bargain internationally.”).

77. RAUSTIALA, *supra* note 63, at 118-19.



aggressively, even during times of isolation.<sup>78</sup> In any case, the U.S. Supreme Court decisions do not prohibit extraterritorial regulation, but merely presume Congress generally does not intend to regulate extraterritorially absent a clear indication otherwise.

Ironically, in many ways aggressive extraterritorial regulation of foreigners is its own form of parochialism. On the one hand, it reflects an unwillingness to move beyond narrow expertise and comfort in U.S. law, and to engage more widely with international law and institutions.<sup>79</sup> On the other hand, attempts to legitimize unilateral regulation are a weak way to justify American exceptionalism (a “belief that the United States has a unique mission to lead the world, but ought logically to be exempt from the rules it promotes”).<sup>80</sup> While extraterritorial regulation was once a last resort—used when multilateral international cooperation was beyond reasonable grasp and when pressing problems demanded a response—no longer is it exceptional. Its rapid and dramatic proliferation in the last few decades suggests it is often now a first resort and a means to avoiding cooperative involvement. As a result, broad unilateral extraterritorial regulation itself may be reflective of a particular kind of isolationism.

The Supreme Court’s recent pronouncements curtailing private enforcement of extraterritorial regulation might then be viewed as an opportunity and an invitation to reinvigorate multilateral negotiation and international lawmaking. In contexts where U.S. law has applied only domestically, the United States has been incentivized to coordinate and negotiate multilaterally.<sup>81</sup> Conversely, extraterritorial laws have taken the pressure off the United States to engage with international lawmaking,<sup>82</sup> and sometimes have derailed the ability to reach

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78. *Id.* at 119; see also DANIEL S. MARGOLIES, SPACES OF LAW IN AMERICAN FOREIGN RELATIONS (2011) (describing U.S. use of extraterritorial laws as a foreign policy tool in the 19th Century).

79. See Nico Krisch, *More Equal than the Rest? Hierarchy, Equality, and U.S. Predominance in International Law* (describing the U.S. shift from international law to domestic law as a tool of foreign policy), in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 135 (Michael Byers & Greg Nolte eds., 2003).

80. James C. Hathaway, *America, Defender of Democratic Legitimacy?*, 11 EUR. J. INT’L L. 121, 121, 129 (2001) (criticizing unilateralism and explaining how consent-based international law leads to political legitimacy and successful enforcement).

81. See PUTNAM, *supra* note 76, at 6, 152-201 (describing the failure of courts to extend intellectual property rights extraterritorially fueled U.S. engagement in efforts to remake international intellectual property rules).

82. See Parrish, *supra* note 50, at 871-72 (describing how extraterritorial laws undermine incentives for cooperation, using the antitrust context as an example).

multilateral agreement.<sup>83</sup> In a thoughtful new book, Tonya Putnam describes this dynamic well:

Patterns of domestic rule following (or rule evasion) among regulated actors also shape U.S. government incentives to engage with the governments of other states on transnational issues. Where U.S. extraterritoriality has been proven effective in safeguarding the transnational interests of U.S. entities, there is often little urgency for the U.S. government to bargain with others over coordinated rules. . . . Where, by contrast, U.S. federal courts have shown themselves unwilling or unable to protect the interests of those seeking extraterritorial application of U.S. law, the U.S. government has come under considerably more domestic pressure to reach formal agreements with other states.<sup>84</sup>

To the extent this readjustment occurs, it would be a good thing. Longer-term progress in international law appears to demand it.<sup>85</sup> In a globalized world, international engagement and cooperation with others is critical to addressing global problems. Rather than withdrawing into the sovereign self, the United States must persuade others of the need for change and cooperative solutions. As others have argued, “the United States and the rest of the world would benefit from a return to responsible multilateral engagement in which treaties regain their central role.”<sup>86</sup>

The Court’s curtailing of extraterritorial judicial regulation may also permit a reinvigoration of academic thought in this area. So much scholarship is focused on the narrow doctrinal issues of whether lawsuits, themselves rarely successful, should be entertained. If extraterritoriality is waning, it may provide incentives for scholars to

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83. See Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 SUP. CT. REV. 289, 324 (describing how use of extraterritorial measures led to retaliation and destroyed “a spirit of cooperation and common purpose in solving international economic problems”); cf. A.V. LOWE, *EXTRATERRITORIAL JURISDICTION: AN ANNOTATED COLLECTION OF LEGAL MATERIALS* 197, 201 (1983) (describing diplomatic protests to export administration regulations and noting that “[t]he United States measures as they apply in the present case are unacceptable under international law because . . . [t]hey seek to regulate companies not of United States nationality in respect of their conduct outside the United States”).

84. PUTNAM, *supra* note 76, at 6.

85. See JOSEPH S. NYE, JR., *THE PARADOX OF AMERICAN POWER: WHY THE WORLD’S ONLY SUPERPOWER CAN’T GO IT ALONE* 1-4 (2002).

86. Kaye, *supra* note 4, at 114.

move beyond domestic debates that have little to do with global governance. Instead, legal academics may be challenged to more broadly study how the United States and lawyers can play a more effective role in coordinating the development and legitimization of international norms and the rule of law in a way that serves U.S. interests.<sup>87</sup>

I end on a note of worry. A decade ago, scholars like myself worried about the risk of fragmentation if foreign tribunals embraced broad-based jurisdictional power. That has arguably occurred in some areas.<sup>88</sup> We are in the odd circumstances where just when the United States is modestly pulling back (at least from the judicial perspective) from broad extraterritorial assertions, other countries have begun to push in the opposite direction.<sup>89</sup> If the cat is out of the bag, then there may be a risk if the United States is not a player in crafting international norms in a new market of transnational litigation.<sup>90</sup> The idea of countries embracing unilateral extraterritorial regulation in a pluralistic free-for-all, however, is problematic, particularly at time when nationalistic, xenophobic, and illiberal tendencies seem on the rise. There's little evidence that in such a free-for-all international norms will develop in a positive direction.

#### CONCLUSION

Over the past few years, the U.S. Supreme Court has stalled efforts to broaden U.S. extraterritorial judicial power. The immediate reaction has been negative, with proclamations that the retrenchment reflects an isolationist and anti-internationalist tendency. That assessment, however, if not mistaken, is overstated. It's unclear that the Justices were motivated with anti-international animus. And the effect may not be anti-internationalist either. To the extent U.S. domestic court actions are less viable options to providing redress against foreigners for foreign conduct, it may prompt, at least on the margins, a reinvigoration of other more cooperative and multilateral approaches to solving global challenges. For those skeptical of the legitimacy and efficacy of unilateral approaches (whether through the courts or elsewhere),

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87. For a discussion of scholars engaged in the empirical study of transnational regulation, see Greg Shaffer, *New Legal Realism and International Law*, in *THE NEW LEGAL REALISM: STUDYING LAW GLOBALLY* Vol. II at 145 (Heinz Klug & Sally Engle Merry eds., 2016).

88. See Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 *CORNELL L. REV.* 481, 497-98 (2011); Bookman, *The Unsung Virtues*, *supra* note 34 (manuscript at 1-9).

89. See Childress, *Escaping Federal Law*, *supra* note 38, at 1001-02 (arguing that foreign countries are engaged in forum competition to attract transnational cases).

90. See Bookman, *supra* note 6, at 1081 (making this point).

modest pressure to spur further responsible multilateral coordination and engagement may be a positive development. If such coordination did occur, I can only believe that Earl Snyder—who was devoted to studying the development of international law for almost half a century—would be pleased.