

## INTERNATIONAL CIVIL LITIGATION IN U.S. COURTS: BECOMING A PAPER TIGER?\*

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In July 2011, I participated in a panel discussion in Germany that was organized for corporate defense counsel. The underlying premise was that German and other foreign companies need protection against litigation in United States courts, and the goal was to discuss strategies that would meet that need. Thus, for instance, in a global litigation landscape that lacks the strict and mutually binding *lis pendens* rule of the Brussels regime,<sup>1</sup> is there a tactical weapon comparable to the infamous “Italian torpedo?” That colorful metaphor conceives a would-be plaintiff’s case as a ship and suggests the effect on it of conferring the benefits of the EU’s strict *lis pendens* rule on actions for a negative declaration (declaratory judgment) when filed first in Italy’s sclerotic judicial system, which is badly in need of angioplasty.<sup>2</sup>

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<sup>1</sup> Article 21 of the Brussels Convention has been described as “rigid, mechanical and crude” by a common law court. *Neste Chemicals SA v. DK Line SA*, [1994] 3 All E.R. 180 [184] (Eng.). This provision now appears as Article 27 of Council Regulation 44/2001, 2001 O.J. (L 12) 1 (providing that any court other than the first in which action is brought must stay proceedings until jurisdiction in the first is established and then must decline jurisdiction).

<sup>2</sup> See Case C-406/92, *The Maciej Rataj, Tatry v. Maciej Rataj*, 1994 E.C.R. I-05439 (“On a proper construction of Article 21 of the Convention, where it requires, as a condition of the obligation of the second court seised to decline jurisdiction, that the parties to the two actions be identical, that cannot depend on the procedural position of each of them in the two actions.”); Stephen B. Burbank, *All The World His Stage*, 52 AM. J. COMP. L. 741, 755–56 (2004) (reviewing ARTHUR TAYLOR VON MEHREN, *THEORY AND PRACTICE OF ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY OF THE DOCTRINE, POLICIES AND PRACTICE OF COMMON- AND CIVIL-LAW SYSTEMS* (2003)) (discussing von Mehren’s advocacy of a rule that would not give precedence to declaratory judgment actions).

Although I was delighted to participate in such a discussion, I suggested that, even if still correct in 2011, the underlying premise may be on the cutting edge of obsolescence. In my view, the need of foreign companies for protection against litigation in U.S. courts is less today than it has been in decades, in both absolute and comparative dimensions. As evidence supporting that hypothesis, I offer recent developments in three areas that are critical to access to United States courts: class actions, pleading, and personal jurisdiction.

The assault on class actions—which, given the Class Action Fairness Act of 2005 (CAFA)<sup>3</sup> and Supreme Court decisions worshipping one particular, highly contestable, vision of arbitration,<sup>4</sup> should be deemed a two-pronged attack aimed at both federal and state courts—is well underway. The class action decision of the past few years that may be best known abroad probably should not be described as such. I refer to *Morrison v. Nat'l Australia Bank*,<sup>5</sup> a 2010 decision in which the Court held that Section 10(b), the antifraud provision of the Securities Exchange Act,<sup>6</sup> does not apply extraterritorially to provide a cause of action to foreign plaintiffs suing foreign and American defendants for

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<sup>3</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 19 Stat. 4 (codified in scattered sections of 28 U.S.C.). For an account of CAFA that sets it in historical context and, while acknowledging a reasonable basis for federal legislation, argues that the exceptions are too narrow, inappropriately denying state courts the power to pursue an independent vision of class actions in cases where they should have that power, see Stephen B. Burbank, *The Class Action Fairness Act in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008).

<sup>4</sup> See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding that the Federal Arbitration Act (FAA) preempts unconscionability analysis under California law of class waivers in consumer contracts); *Rent-A-Center, W. v. Jackson*, 130 S. Ct. 2772, 2776–81 (2010) (holding that under the FAA where an arbitration agreement expressly delegates the decision of the arbitration agreement's enforceability to an arbitrator, a court may not intercede unless the claim of unconscionability is directed to that particular provision of the arbitration agreement); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) (holding that the FAA prohibits arbitrators from imposing class arbitration absent a contractual basis for concluding that the parties consented); see also Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of Arbitration*, AM. REV. INT'L ARB. (forthcoming 2012) (pointing to a pro-arbitration trend in recent court decisions that has limited the judiciary's oversight of arbitration). "Now, however, it should be apparent that in its zeal to further its evolving vision of the [Federal Arbitration Act] the Court has eliminated key safeguards aimed at ensuring fundamental fairness to consumers and employees in arbitration." *Id.* (manuscript at 113).

<sup>5</sup> 130 S. Ct. 2869 (2010).

<sup>6</sup> 15 U.S.C. § 78j(b) (2006).

alleged misconduct in connection with securities traded on foreign exchanges.

For American scholars of international civil litigation, *Morrison* is chiefly of interest because Justice Scalia was able to carry a majority in favor of a presumption against extraterritorial application of a federal statute that the lower federal courts—led by the great Second Circuit judge, Henry Friendly—had applied extraterritorially for more than forty years.<sup>7</sup> That said, no Justice who participated (Justice Sotomayor did not) disagreed with the result in this so-called “f-cubed” case—foreign plaintiffs purchasing shares of a foreign issuer on a foreign exchange. One reason may have been that, having acknowledged that “it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States,”<sup>8</sup> the majority made quite a convincing argument based on the language of the statute that “Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.”<sup>9</sup>

What does *Morrison* have to do with class actions? It was brought as a class action on behalf of foreign purchasers of the defendant bank’s ordinary shares. Moreover, although empirical studies suggest that some institutional investors prefer to opt out of class actions in order to pursue individual litigation under the securities laws,<sup>10</sup> class actions are undoubtedly more likely than individual actions to make potential foreign defendants quake

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<sup>7</sup> See, e.g., *Bersch v. Drexel Firestone*, 519 F.2d 974, 993 (2d Cir. 1975) (holding that anti-fraud provisions of the federal securities laws “[a]pply to losses from sales of securities to Americans resident abroad if, but only if, acts (or culpable failures to act) of material importance in the United States have significantly contributed thereto” but “[d]o not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses”); see *Morrison*, 130 S. Ct. at 2878–80, 2883 (critically reviewing the Second Circuit’s development of its own extraterritoriality tests and holding that there must be an “affirmative indication” of Congress’s intent for a law to apply extraterritorially).

<sup>8</sup> *Morrison*, 130 S. Ct. at 2878–80, at 2884.

<sup>9</sup> *Id.* at 2888.

<sup>10</sup> See Joshua H. Vinik et al, *Why Institutional Investors are Opting Out of Class-Action Litigation*, PENSIONS & INVESTMENTS (July 25, 2011), <http://www.pionline.com/article/20110725/PRINTSUB/307259985/> (identifying a growing trend among institutional investors to opt out of large class actions in light of successful individual settlements that have been up to fifty times larger than class settlements).

with fear, thereby making *Morrison* an even more welcome decision. Finally, a careful reader of the Court's opinion will have noticed another reason for celebration in those circles. For, in the course of rejecting the Solicitor General's proposed "significant and material conduct" test, the majority observed that someone "attracted by the desirable consequences of" that test "should also be repulsed by its adverse consequences."<sup>11</sup> Justice Scalia continued: "While there is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign securities markets, some fear that it has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets."<sup>12</sup> A majority of the Court was here signaling hostility to class actions that is not confined to the securities laws.

One of the foundational assumptions of the Federal Rules of Civil Procedure is that the same rules apply in every type of case – they are trans-substantive.<sup>13</sup> As a result, interpretations of Federal Rules that favor access to court do so over the entire domain of federal and state substantive law that governs actions in federal court. In the case of the federal class action rule, Rule 23, the result has been that, from the perspective of private enforcement, it has been a wild card, fortuitously serving or frustrating the enforcement goals of Congress and state legislatures.<sup>14</sup> In recent decades, however, an increasingly conservative federal judiciary has repented the early and sometimes unreflective embrace of Rule 23 and has made it progressively more difficult for classes to be

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<sup>11</sup> *Morrison*, 130 S. Ct. at 2886.

<sup>12</sup> *Id.*

<sup>13</sup> See Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules"*, 2009 WIS. L. REV. 535, 541-42 (discussing the assumption that "general rules" require uniformity across both geography and subject matter by the Advisory Committee appointed by the 1935 Supreme Court).

<sup>14</sup> See Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement of Statutory and Administrative Law in the United States (and Other Common Law Countries)* 47-48 (Scholarship at Penn Law, Paper No. 356, 2011), available at [http://lsr.nellco.org/upenn\\_wps/356/](http://lsr.nellco.org/upenn_wps/356/) (discussing the fact that Rule 23 creates incentives for private enforcement, but "might yield inefficient over-enforcement"); Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 53-74 (2010) (describing the development of Rule 23 and arguing that the plurality opinion in *Shady Grove* failed to accord state regulatory policy proper respect, preferring formalism to pragmatism).

certified.<sup>15</sup> This belt-tightening also has been necessarily trans-substantive. In addition, at least when controlled by Republicans, Congress has abetted the process of retrenchment, both directly through substance-specific legislation like the Private Securities Litigation Reform Act of 1995<sup>16</sup> and indirectly through CAFA.

The hostility to class actions, suggested in Justice Scalia's dictum in *Morrison*, was given room to operate with actual consequences in his opinion for the Court in *Wal-Mart Stores, Inc. v. Dukes*.<sup>17</sup> Nobody I know thought that the enormous national class certified in that employment discrimination case could survive review, and there were some who thought the decision might be unanimous. The Court *was* unanimous in reversing certification, but it was split 5-4 on the reasons for that decision. Speaking through Justice Scalia, the conservative majority put forty-five years of class action jurisprudence in question by very restrictively interpreting the so-called "commonality" requirement of Rule 23(a).<sup>18</sup> Together with decisions of courts of appeals imposing trial-like evidentiary burdens on proponents of class certification, including with respect to evidence offered by experts,<sup>19</sup> *Wal-Mart* suggests that prospective foreign defendants should look more closely before they quake.

Of course, just as differences in procedure may better explain both an initial choice of forum and a forum non conveniens motion than do substantive law differences,<sup>20</sup> potentially ruinous liability

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<sup>15</sup> See Burbank, *supra* note 3, at 1489-99, 1507 (noting the increasingly stringent application of the predominance requirement and other more demanding class certification requirements as a response to mass tort claims).

<sup>16</sup> Pub. L. No 104-67, 109 Stat. 737 (1995). See Stephen B. Burbank, *The Class Action in American Securities Regulation*, 4 ZEITSCHRIFT FÜR ZIVILPROZESS INT'L 321, 329-32 (1999) (evaluating the motivations underpinning the 1995 Republican Congress's adoption of the securities litigation reform act and its impact on securities litigation).

<sup>17</sup> 131 S. Ct. 2541 (2011).

<sup>18</sup> See *id.* at 2550-57 (holding that commonality requires plaintiffs to show that each member of the class suffered an identical injury that permits class-wide resolution of a single common question).

<sup>19</sup> See, e.g., *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008) (requiring factual determinations supporting certification to be made by a preponderance of the evidence and making clear that district courts must weigh conflicting expert testimony at the certification stage).

<sup>20</sup> See Stephen B. Burbank, *Jurisdictional Equilibration, The Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 242 (2001) ("The realities of international forum selection revealed by decisions in the United States and abroad demonstrate that the American legal system is distinctive as much for

on the merits is not the only reason foreign defendants want to avoid litigation in American courts. From that perspective, there is a good news/bad news quality to the increasingly agnostic, if not skeptical, posture of the federal courts with respect to class certification. For the more class certification procedure is assimilated to trial procedure, the more discovery courts will have to permit before ruling on certification. Moreover, even though good social science does not support claims that discovery everywhere and always imposes disproportionate expense,<sup>21</sup> it clearly may do so in complex, high-stakes cases of which class actions constitute the core. Indeed, the perfect storm of another enormous class action and the enormous cost of discovery that it could have entailed caused the Court, in 2007, to begin a process of dismantling the system of so-called “notice pleading” that had been in place since 1938 and that the Court had repeatedly reaffirmed in the intervening years. I refer to the Supreme Court’s decision in *Bell Atlantic Corp. v. Twombly*,<sup>22</sup> a massive putative class action that alleged an antitrust conspiracy by the firms remaining after the breakup of AT&T.

Believing that the cost of discovery is a widespread problem which federal judges are incapable of managing and that summary judgment comes too late—without evidence and without even referring to three sets of Federal Rules amendments addressing discovery over the past twenty years —<sup>23</sup>the Court sought to solve those problems not through interpretation of the discovery rules, but through judicial amendment of the pleading rules, thus facilitating early dismissals. Since those rules, like all Federal Rules, are trans-substantive, the resulting requirement that plaintiffs plead sufficient factual matter, taken as true, to state a claim that is “plausible” applies across-the-board.<sup>24</sup> The Court

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the rules by which it ensures and fructifies access to court as by its rules of substantive law.”).

<sup>21</sup> See, e.g., Linda Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences of Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994) (chronicling the absence of any strong evidence of discovery abuse at the federal level and the failure of the rulemaking committee to evaluate its absence before embarking on discovery reform).

<sup>22</sup> 550 U.S. 544 (2007).

<sup>23</sup> See *id.* at 558–60 (presuming antitrust discovery to be a costly affair that forces cost-conscious defendants to settle even when faced with a weaker case).

<sup>24</sup> See Burbank, *supra* note 13, at 561–62 (discussing the judiciary’s role in reinterpreting the trans-substantive pleading rules and a nation-wide movement

specifically so affirmed in *Ashcroft v. Iqbal*,<sup>25</sup> a 2009 decision in which the conservative majority consigned judgments about the plausibility of a complaint's allegations to the tender mercy of "judicial experience and common sense."<sup>26</sup> The result should be cause for celebration by Chambers of Commerce everywhere, whatever baneful effect it has on access to court for the usual victims of procedural reform in a society that is allergic to robust public enforcement of statutory and administrative law. The courthouse door must be closed to employment discrimination plaintiffs so that corporate defendants are spared potentially disproportionate discovery costs.

Finally, by way of evidence that the traditional view abroad of litigation in American courts may not have kept pace with more recent developments, *Wal-Mart* was not the only decision of the just-ended term of the Supreme Court that foreign enterprise should greet with champagne. CAFA has taken care of most of the mischief, real or imagined, perpetrated by state courts in large class actions. But, except for so-called "mass actions,"<sup>27</sup> CAFA does nothing to address excesses of forum shopping in litigation brought on behalf of individuals, including in particular litigation raising product liability claims. In two cases testing federal constitutional limitations on assertions of personal jurisdiction by state courts, the Supreme Court made it harder to sue foreign defendants.

In one of those cases, *Goodyear Dunlop Tires Operations, S.A. v. Brown*,<sup>28</sup> a unanimous Court reaffirmed the proposition that general jurisdiction based on the defendant's business activities—where the claim does not arise out of those activities in the forum—is available only in situations where the defendant has

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of chipping away at private litigation regimes to compensate injuries and enforce societal norms).

<sup>25</sup> 129 S. Ct. 1937, 1949–53 (2009) (holding that the *Twombly* plausibility requirement does not just apply to antitrust claims, but to all civil actions as a general pleading requirement).

<sup>26</sup> *Id.* at 1950. See Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 115 (2009) ("Relying on 'judicial experience and common sense,' the Court found the complaint implausible . . . . [T]he Court also made clear that its approach applies across the board—that *Twombly* cannot be confined to its substantive context . . . or according to some other criterion.").

<sup>27</sup> See 28 U.S.C. § 1332(d)(11) (2006) (defining "mass action"); *id.* § 11(A) (2006) (providing that it "shall be deemed to be a class action").

<sup>28</sup> 131 S. Ct. 2846, 2850–51 (2011).

conducted substantial systematic and continuous activities in the forum such that it can be deemed “at home” in that forum, a test that now may require that a corporation either be incorporated or have its principal place of business in the forum.<sup>29</sup> In the other, *J. McIntyre Machinery, Ltd. v. Nicastró*,<sup>30</sup> a badly divided Court held unconstitutional an assertion of specific jurisdiction by a state court in a case brought by a plaintiff who was injured in that state by a product manufactured in the United Kingdom by a company that engaged an independent distributor to market its products throughout the United States. The type of jurisdiction was specific rather than general because the plaintiff’s claim arose out of the operation of defendant’s product in the state where he sued. The constitutional issue turned on whether presence of the putatively defective machine in the state was the result of purposeful efforts of the defendant.

*Goodyear* is reasonably well done. Unfortunately, however, Justice Ginsburg’s opinion for the Court does not manifest understanding that, in thinking about doing business jurisdiction as involving defendants “essentially at home,”<sup>31</sup> the Court is replacing the fiction of presence, which it rejected long ago, with the fiction of domicile.<sup>32</sup> One might think that harmless error, but footnote 5 in the opinion strongly suggests that it is not. There, Justice Ginsburg confuses the question whether a plaintiff’s nationality or domicile can ground general jurisdiction with the question whether plaintiff’s nationality or domicile can be considered in the kind of all-things-considered due process

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<sup>29</sup> See *id.* at 2850–58. Of course, incorporation in the state is itself a sufficient basis for general jurisdiction by analogy to a natural person’s domicile. See *Milliken v. Meyer*, 311 U.S. 457, 462–65 (1940) (holding that domicile alone is sufficient to exercise general jurisdiction); Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 TULANE J. INT’L & COMP. L. 111, 118, 122 (1999) (justifying jurisdiction on that basis through ex ante categorical balancing).

<sup>30</sup> *J. McIntyre Mach. v. Nicastró*, 131 S. Ct. 2780 (2011).

<sup>31</sup> *Goodyear*, 131 S. Ct. at 2851.

<sup>32</sup> See Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 HOUS. J. INT’L L. 385, 390–91 (2004) (“It is one thing to say that a corporation should not be heard to complain if sued on an unrelated claim in the place that is its legal home. It is quite another endlessly to proliferate such homes—to debase the notion of a jurisdictional ‘headquarters’—in the process neglecting the fact that the original fiction was ‘presence,’ not ‘domicile.’”) (footnotes omitted).

analysis that I believe is appropriate for both specific and general doing business jurisdiction.<sup>33</sup>

In most cases of general activity-based jurisdiction, except perhaps those involving law animated by a deterrent purpose, the state lacks the sort of regulatory interest that, I was happy to see, the Court recognized as typical of cases involving specific jurisdiction.<sup>34</sup> In addition, unless the plaintiff is domiciled in the state where she sues, in most cases of general activity-based jurisdiction, it is hard to discern a legitimate plaintiff or state interest in having or providing access to the forum. But the Court's footnote seems to foreclose such reasoning altogether. Of course, the chosen metaphor (or fiction) also seems to foreclose the possibility that due process in the context of general doing business jurisdiction might mean one thing for a domestic corporation, which will always have at least one "home" in the United States, and a foreign corporation, which usually will not.<sup>35</sup>

*Nicastro* is close to an unmitigated disaster. Justice Kennedy for the plurality again proves himself distinguished only at platitudes ("the Constitution commands restraint before discarding liberty in the name of expediency").<sup>36</sup> He manages both to acknowledge and confound the Court's belated recognition that due process protects individual and not sovereign interests, and having observed that the case "presents an opportunity to provide greater clarity,"<sup>37</sup> proceeds to spread darkness rather than light. The whole notion that grounds of general jurisdiction—and in particular tag service—can be explained on a theory of consent or submission<sup>38</sup> is

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<sup>33</sup> See *Goodyear*, 131 S. Ct. at 2857 n.5; see also Burbank, *supra* note 2, 749–53 (2004) (discussing the due process analysis that is appropriate for general doing business jurisdiction).

<sup>34</sup> See *Goodyear*, 131 S. Ct. at 2855 ("[T]ies serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant.") (emphasis original).

<sup>35</sup> See Burbank, *supra* note 2, at 753 n.55 (pointing out that domestic defendants will always have domicile or place of incorporation in the United States and, therefore, will be subject to general jurisdiction, while foreign defendants have no "such legal home in this country").

<sup>36</sup> *Nicastro*, 131 S. Ct. at 2791.

<sup>37</sup> *Id.* at 2786.

<sup>38</sup> See *id.* at 278 ("A person may submit to a State's authority in a number of ways. There is, of course, explicit consent . . . . Presence within a State at the time suit commences through service of process is another example . . . . Citizenship or domicile—or, by analogy, incorporation or principal place of business for corporations—also indicates general submission to a State's powers.").

pure fiction and a far cry from the relational theories that some scholars have articulated.<sup>39</sup> The same is true of Kennedy's attempt to extend that justification to specific jurisdiction. An exercise of power does not indicate either submission or intent to submit to authority, unless submission is conceived in terms of brute force.

Justice Ginsburg's dissent is a far better-crafted opinion. Particularly noteworthy is her recognition that American states are irrelevant for purposes of international law and that the result in this case contrasts with the way in which the case would be decided in the EU (and thus could be thought to put U.S. manufacturers at a competitive disadvantage).<sup>40</sup> For the present, and depending upon the views of Justice Breyer and Justice Alito, who concurred in the judgment,<sup>41</sup> *Nicastro* deserves close study by counsel to foreign manufacturers that want to serve the U.S. market but do not want to be sued there.

There you have it: recent developments in three different doctrinal areas that make litigation harder to maintain in United States courts. I am reminded of empirical work by Kevin Clermont and Theodore Eisenberg demonstrating that, contrary to traditional wisdom, foreign litigants, both as plaintiffs and defendants, fare better than domestic litigants in the federal courts.<sup>42</sup> Granting the power of the explanation they suggest for

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<sup>39</sup> See ARTHUR T. VON MEHREN, THEORY AND PRACTICE OF ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY OF THE DOCTRINE, POLICIES AND PRACTICES OF COMMON- AND CIVIL-LAW SYSTEMS 29-36 (2003) (discussing relational, power and instrumental theories of jurisdiction); Burbank, *supra* note 2, at 742-43 (reviewing von Mehren and outlining the key arguments in the text).

<sup>40</sup> See *Nicastro*, 131 S. Ct. at 2801, 2803 (Ginsburg, J., dissenting) (arguing that McIntyre UK should be brought to trial in the United States because it chose to do business in the United States as a nation and was not concerned with its component States and that the European Court of Justice would have exercised jurisdiction in an identical case, suggesting a disadvantage for U.S. plaintiffs); see also Brief of Law Professors as Amici Curiae in Support of Respondent at 24 n.14, *J. McIntyre Machinery Ltd. v. Nicastro*, 131 S. Ct. 2791 (2011) (No. 09-1343) (questioning whether foreign defendants should be required to establish minimum contacts with any particular state, rather than the United States as a single entity). The author contributed to this amicus brief.

<sup>41</sup> See *Nicastro*, 131 S. Ct. at 2791-94 (Breyer, J., concurring in the judgment) (refusing to depart from what, in Justice Breyer's opinion, is settled precedent). Justice Alito joined Justice Breyer's opinion.

<sup>42</sup> See Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1122 (1996) (discussing empirical study showing that foreign defendants and plaintiffs actually win more often and offering tentative explanations of their results).

their results—case selection driven in part by the traditional wisdom—<sup>43</sup> now may be a particularly good time to reassess how well the traditional wisdom about American litigation reflects reality. There is evidence of greater affinity for at least some aspects of American litigation in Europe. To the extent that the move towards greater reliance on private enforcement, including through representative litigation, is attributable to the direct and indirect power of the European Union,<sup>44</sup> the traditional forces for the status quo are at risk, and the reassessment I have counseled should include comparative dimensions.

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<sup>43</sup> See *id.* at 1133 (“We believe that the most plausible and powerful explanation for the foreigner effect is that foreigners are reluctant to litigate in America for a variety of reasons, including the apprehension that American courts exhibit xenophobic bias and the pecuniary and non-pecuniary distastes for litigating in a distant place.”) (footnotes omitted).

<sup>44</sup> See Burbank, Farhang & Kritzer, *supra* note 14, at 100 (suggesting that EU member states turned to private enforcement due to institutional fragmentation in the EU that is akin to the separation of powers dynamic driving private enforcement in the United States).