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Transnational Litigation in U.S. Courts: A Theoretical and Empirical Reassessment

*Christopher A. Whytock**

It is widely claimed that the level of transnational litigation in U.S. courts is high and increasing, primarily due to forum shopping by foreign plaintiffs. This "transnational forum shopping claim" reflects the conventional wisdom among transnational litigation scholars. Lawyers use the claim in briefs; judges use it in court opinions; and interest groups use it to promote law reform. This article reassesses the transnational forum shopping claim theoretically and empirically. It argues that despite globalization, there are reasons to doubt the claim. Changes in procedural and substantive law have made the U.S. legal system less attractive to plaintiffs than it supposedly once was. Meanwhile, other legal systems have been adopting features similar to those that are said to have made the United States a "magnet forum" for foreign plaintiffs, and arbitration is growing as an alternative to transnational litigation. Empirically, using data on approximately 8 million civil actions filed in the U.S. district courts since 1988, the article shows that transnational diversity cases represent only a small portion of overall litigation, their level has decreased overall, and U.S., not foreign, plaintiffs file most of them. The data also reveal that federal question filings by foreign resident plaintiffs are not extensive or increasing either. These findings challenge the transnational forum shopping claim and law reforms based on it, and suggest that it should no longer be used by lawyers, judges, and scholars—at least not without supporting data. The article's analysis also suggests new directions for transnational litigation as a field of scholarship that would move it beyond its current focus on U.S. courts toward a focus on understanding the dynamics of transnational litigation in global context.

Keywords: comparative law; civil procedure; federal courts; forum shopping; globalization; international arbitration; international law; international litigation; litigation; tort reform; transnational arbitration; transnational law; transnational litigation

*Address correspondence to Christopher A. Whytock, UC Irvine School of Law, 401 E. Peltason Drive, Irvine, CA 92697; email: cwhytock@law.uci.edu. Whytock is Professor of Law and Political Science at the University of California, Irvine, School of Law.

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I. Introduction

Transnational litigation is an increasingly active field of scholarship (Baumgartner, 2007; Bookman, 2015; Childress, 2012; Dodge & Dodson, 2018; Gardner, 2019; Silberman & Simowitz, 2016; Whytock & Robertson, 2011), teaching (Born & Rutledge, 2018; Childress et al., 2020; Reimann et al., 2013; Zekoll et al., 2013), and legal practice (Childress et al., 2020, pp. xxix–xxx; Zekoll et al., 2013, p. v). So far, however, scholars have devoted relatively little effort to the empirical study of transnational litigation.[1] As a result, we have a limited understanding of—and a limited ability to assess claims about—transnational litigation in action.[2]

One such claim is the "transnational forum shopping claim"—the claim that the level of transnational litigation in U.S. courts is high and increasing, primarily due to forum shopping by foreign plaintiffs. It is said, for example, that there has been a "growing torrent" of transnational cases in the last 30 years (Koh, 2008, p. v) and that there has been a "flood of foreign plaintiffs" taking advantage of a "generous forum" in the United States (Lewis, 2013, p. 337). Scholars, lawyers, judges, and interest groups alike make these assertions, which have come to represent the conventional wisdom about transnational forum shopping and U.S. courts.[3] As Lord Denning famously quipped, "As a moth is drawn to the light, so is a litigant drawn to the United States" (*Smith Kline & French Laboratories Ltd and others v Bloch*, 1983, p. 74).

So far, those making the transnational forum shopping claim have not supported it with empirical evidence. Nevertheless, it is a claim with impact. It helps define domestic and global perceptions of transnational litigation in U.S. courts and the role of the U.S. legal system in transnational dispute resolution. It amplifies concerns about transnational forum shopping and is used to promote anti-forum shopping law reform efforts. It is also used to justify transnational litigation as a distinct field of scholarship and teaching.[4]

Recently, however, some scholars have started to raise doubts about this understanding of transnational litigation in U.S. courts. They have argued that the United States has entered a period of "litigation isolationism" (Bookman, 2015); that "American courts no longer welcome plaintiffs from all over the world seeking to recover wrongs suffered in other states" (Lehmann, 2018, p. 221); that U.S. courts may "no

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[1]As Dubinsky (2007) explains: "Surprisingly, little has been done by the Federal Judicial Center, the National Center for State Courts, or the Judicial Conference of the United States to provide Congress or the public with hard data on the number and kind of suits in the system with a transnational component, however that may be defined" (Footnote 10). Exceptions include Clermont and Eisenberg (1996) (empirical analysis of win rates of foreign litigants in U.S. courts); Putnam (2016) (empirical analysis of extraterritoriality decisions by U.S. courts); and Whytock (2009) (empirical analysis of international choice-of-law decisions by U.S. courts).

[2]Pound (1910) explained that "if we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man and those that in fact govern them, will appear, and it will be found that today also the distinction between legal theory and judicial administration is often a very real and a very deep one" (p. 15).

[3]I thoroughly document the transnational forum shopping claim and its underlying premises in Sections II.A and II.B.

[4]I explain the significance of the transnational forum shopping claim in Section II.C.

longer [be] the threat they once were to foreign corporations" (Bonomi & Nadakavukaren Schefer, 2018, p. 7); and that transnational litigation is no longer U.S. centric but instead increasingly multipolar (Quintanilla & Whytock, 2011). After discussing several reasons why the U.S. legal system might be less attractive to plaintiffs than it supposedly once was, Professor Burbank (2012) challenged scholars to take a fresh look, suggesting that "now may be a particularly good time to reassess how well the traditional wisdom about American litigation reflects reality" (p. 673).

This article takes up that challenge by reassessing the conventional wisdom about transnational litigation in U.S. courts theoretically and empirically. Theoretically, it gives reasons to question the transnational forum shopping claim's premise that the U.S. legal system is a "magnet forum" that is distinctively favorable to plaintiffs compared to other countries' legal systems and, more broadly, compared to other forms of transnational dispute resolution. Empirically, it analyzes a dataset of approximately 8 million cases filed in the U.S. District Courts since 1988 to reveal trends in transnational litigation. The results show that transnational diversity cases represent only a small portion of overall litigation in the U.S. federal courts, their level has decreased overall,[5] and most of them are filed by U.S. plaintiffs, not foreign plaintiffs. Data on transnational federal question cases are more limited but suggest that this type of transnational litigation is not extensive or increasing, either. These results cast significant doubt on the transnational forum shopping claim.

The article's analysis has several broader implications. First, it points toward a new understanding of transnational litigation in U.S. courts, according to which the United States remains an important forum for transnational dispute resolution, but only one among a growing number of increasingly attractive alternatives. Second, while the analysis cannot resolve normative questions about transnational forum shopping, it does challenge the case that has been made for some anti-forum shopping measures.[6] Third, rather than raising doubts about the importance of transnational litigation as a field of scholarship and teaching, the analysis suggests new directions for the field that would move it beyond its current focus on U.S. courts toward a focus on understanding the dynamics of transnational litigation in global context.

The article proceeds as follows. Section II documents the transnational forum shopping claim, showing how it has been used by scholars, lawyers, judges, and interest groups, and explaining its significance for scholarship, legal practice, and law and policy. Section III critically evaluates the theory behind the transnational litigation claim. Section IV describes the data and presents the empirical analysis. Section V concludes by drawing out the implications of its findings for law, policy, and legal scholarship.

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[5]This portion of the analysis builds on the older and less systematic analysis in Whytock (2011) (identifying downward trend in transnational diversity litigation in the U.S. District Courts during the period studied), as well as on the findings of Clermont and Eisenberg (1996), focusing on win rates of U.S. and foreign litigants but also identifying a decline of judgments in transnational diversity cases.

[6]On the normative aspects of transnational forum shopping, see, for example, Bookman (2016).

II. The Transnational Forum Shopping Claim

A. The Empirical Claim

The transnational forum shopping claim is the frequently made claim that the amount of transnational litigation in U.S. courts is high and increasing, due largely to forum shopping by foreign plaintiffs. Scholars have asserted that there has been an "explosive growth of transnational litigation" (Waller, 1993, p. 102);[7] that "certain facts on the ground are clear: [i]n recent decades, litigation in U.S. courts with a foreign or international component has been growing in volume" (Dubinsky, 2007, p. 366); and that there has been a "growing torrent" of transnational cases in the last 30 years (Koh, 2008, p. v). They have referred to the "growth" (Epstein & Baldwin, 2010, p. 1) and "growing incidence" (Miller, 2013b, p. 292) of transnational litigation. And they have stated that "the number of transnational cases … is on the rise" (Parrish, 2010, pp. 239–240) and that "litigation in the United States is increasingly international" (Dodge & Dodson, 2018, p. 1206).[8] Articles and books on transnational litigation sometimes begin with assertions like these to establish the topic's importance (Epstein & Baldwin, 2010, p. 1; Koh, 2008, p. v). In short, the transnational forum shopping claim reflects how scholars—in both the United States and around the world—tend to understand transnational litigation in U.S. courts and the role of the U.S. legal system in transnational dispute resolution.

Scholars have not been alone in making this claim. U.S. courts have dismissed lawsuits filed by foreign plaintiffs based in part on the premise that "an increasing number of foreign citizens are being injured by, and bringing lawsuits against, [American] companies" (*Radeljak v. Daimlerchrysler Corp.*, 2006, p. 50 [Markman, J., concurring]).[9] Business-oriented interest groups have claimed that "[o]ver the past several decades, American companies have faced a tidal wave of lawsuits attempting to import foreign controversies into U.S. courts" (U.S. Chamber Institute for Legal Reform, 2014, p. 1). Similarly,

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[7]Similarly, Bies (2000) refers to an "explosion of international civil litigation in U.S. courts" (p. 489).

[8]Likewise, according to Buxbaum (2016), "Civil litigation in the United States has become increasingly transnational" (p. 655); Skinner (2014) refers to the "proliferation of international and transnational litigation in recent years" (p. 20); and Bonomi and Nadakavukaren Schefer (2018) argue from a European perspective that "litigation in the United States evolved into something that businesses around the world feared" due to its transnational reach (p. 7).

[9]In the same opinion, Justice Markman cited with approval a law review comment asserting that "[i]n the 1990s, foreign plaintiffs have commenced product liability actions in the United States with increasing frequency." For another example, see *Tsai-Yi Yang v. Fu-Chiang Tsui* (2007, p. 280) ("Globalization has [led] to a dramatic increase in litigation of international family disputes.") (Nygaard, J., concurring). Some judges, however, are skeptical about this claim, including dissenting justice Cavanaugh in *Radeljak v. Daimlerchrysler Corp.* (2006), who argued: "Despite the authority discussing the attractiveness of American courts, there is little to demonstrate that Michigan has become an especially attractive forum. There is no evidence that foreign nationals are rushing to file products-liability or other tort cases in Michigan. When specifically asked about the number of such cases in Michigan, defendant's attorney could point to only a handful, and he could specifically name just two. There is simply no evidence that Michigan's courts are flooded with cases brought by foreign nationals. And there is no indication that a sudden influx will occur if the law is not immediately altered. Without a disease, there is no need for a cure" (p. 70).

members of the corporate defense bar claim that "[t]he United States has seen a dramatic increase in transnational lawsuits" (Jura et al., 2014, p. 85) and that "[t]he trend towards global litigation shows no signs of subsiding" (Stengel & Trautmann, 2016, p. 3).

The transnational forum shopping claim tends to focus specifically on foreign plaintiffs. For example, it is often said that "U.S. courts are seeing a dramatic increase in litigation involving foreign plaintiffs" (Diaz, 2005, p. 1647), that a "very clear trend" is "an increase in litigation brought by overseas plaintiffs" (Easton, 2006, p. 9), and that there is a "flood of foreign plaintiffs" to take advantage of a "generous forum" in the United States (Lewis, 2013, p. 337).[10]

B. The Underlying Premises

The transnational forum shopping claim is based on two premises, both of which are quite plausible on their face. First, globalization is increasing, which has caused an increase in transnational disputes and, specifically, an increase in transnational litigation. As one scholar puts it, "Part of the cause for the trend is globalization: as travel, business, trade, and commerce across borders have become common, so too have cross-border disputes" (Parrish, 2019, p. 103). As another puts it, "the increase in transnational litigation" is linked to "the contemporary trend toward globalization" (Miller, 2013a, § 3828). Similarly, it is said that "[g]lobalization has turned transnational civil litigation—once a niche topic—into a burgeoning field that has become an integral part of the practice of U.S. lawyers" (Zekoll et al., 2013, p. v).[11]

The second premise is that the U.S. legal system has procedural and substantive law features that are favorable to plaintiffs but not available in most other legal systems.[12]

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[10]For other examples, see Oquendo (2017, p. 72) ("Ever more often, the U.S. judiciary has had to adjudicate claims staked by foreigners, who may or may not reside in the United States ...."); Ostrander (2004, p. 582) (claiming "increasing presence of foreign plaintiffs in U.S. courts"); and Weiner (2009, p. 260) ("U.S. courts are increasingly sought out by foreign plaintiffs in connection with foreign accidents.").

[11]Other examples include *Radeljak v. Daimlerchrysler Corp.* (2006, p. 50, Footnote 1) (Markman, J., concurring) (linking "the expanding realm of international free trade" to increase in transnational litigation in U.S. courts); Martinez (2003, p. 432) ("[I]n a world of global commerce and communications, national courts cannot avoid interactions with the larger world, and lawyers and scholars cannot ignore the transnational aspects of modern litigation."); Lento (2014, p. 516) (linking "the world['s] move[] toward a more global economy" to the "rise in transnational litigation"); and Parrish (2006, pp. 42–43) (arguing that increasing amount of transnational litigation "is an inevitable 'feature of the modern global economy'" and that "[t]he tremendous expansion of the Internet has also contributed to the proliferation of transnational litigation, as U.S. citizens and aliens are able to easily interact even when the alien has no physical connection to the United States").

[12]For example, this premise has been expressed by Silberman (1993, p. 502) ("Courts in the United States attract plaintiffs, both foreign and resident, because they offer procedural advantages beyond those of foreign forums: the existence of civil juries, the availability of broad discovery, easier access to courts and lawyers, contingent fee arrangements, and the absence of 'loser-pay-all' cost-shifting rules.") and Weintraub (1994, p. 323) (arguing that the United States is a "light for foreign litigant moths" because "compared with foreign courts, United States forums offer a plaintiff both lower costs and higher recovery. Factors reducing the plaintiff's costs are the contingent fee for the plaintiff's attorney and, if the plaintiff loses, no liability for the defendant's attorney's fee. Factors likely to provide the plaintiff with a larger recovery are: (1) more extensive pretrial discovery than is available

If this is correct, one might expect a disproportionately large share of the growing volume of transnational litigation to be brought to U.S. courts. Procedurally, these attractions are said to include permissive personal jurisdiction rules and liberal discovery, as well as the availability of contingent fee arrangements, class actions, and civil jury trials.[13] Substantively, the premise is that strict liability and the availability of punitive damages are among the features that make the United States a distinctively desirable forum for plaintiffs.[14] On these grounds, the U.S. Supreme Court has called U.S. courts "extremely attractive to foreign plaintiffs" (*Piper Aircraft Co. v. Reyno*, 1981, p. 252),[15] or, as others have put it, the United States is a "magnet forum" (Weintraub, 2010, pp. 294–295).[16]

C. The Claim's Significance

As documented above, scholars of transnational litigation have for decades assumed the validity of the transnational forum shopping claim, and for the most part continue to do so. But as also pointed out, some scholars are beginning to raise doubts about it (Bonomi & Nadakavukaren Schefer, 2018; Bookman, 2015; Burbank, 2012; Quintanilla & Whytock, 2011). Which perspective is closer to reality? It goes without saying that the value of this field of scholarship depends largely on how accurately it depicts transnational litigation as it actually exists. For this reason alone, it would seem important to assess the conventional wisdom.

But beyond scholarship, the transnational forum shopping claim is frequently invoked as a reason to adopt measures to limit forum shopping into U.S. courts. Litigants invoke the claim for this purpose when moving for dismissal of transnational

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anyplace else in the world; (2) liability law that is more likely than foreign law to allow recovery and allow it for more elements of harm; (3) choice-of-law rules that are more likely than foreign rules to select the United States law that is favorable to the plaintiff, and (4) trial by jury.").

[13]For example, these procedural attractions have been noted in *Piper Aircraft Co. v. Reyno* (1981, p. 252, Footnote 18); Parrish (2006, p. 44) ("'Courts in the United States attract plaintiffs, both foreign and resident, because they offer procedural advantages beyond those of foreign forums ….'"); and Wurmnest (2005, p. 205) (claiming that "plaintiff-friendly liberal discovery procedures … and jury trials, make U.S. courts extremely attractive for foreign plaintiffs").

[14]For statements of this substantive premise, see, for example, *Piper Aircraft Co. v. Reyno* (1981, p. 252, Footnote 18) (claiming that the attractions of U.S. courts include strict liability) and Gómez (2012, pp. 481–482) ("The filing of claims by foreign plaintiffs in United States courts has been reported to be on the rise…. Several reasons have been given to explain the rising numbers of foreign claimants in United States courts, including the possibility of obtaining larger awards that contain punitive damages.").

[15]To support this characterization, the Court pointed to (1) strict liability, (2) the potential to choose a forum from among 50 states, (3) the availability of civil jury trials, (4) the permissibility of contingent fee arrangements, (5) the so-called "American rule" of attorneys' fees, and (6) extensive discovery (*Piper Aircraft Co. v. Reyno*, 1981, p. 252, Footnote 18).

[16]Similarly, Little (2018) refers to "the magnetic appeal of the United States court system for foreign plaintiffs" for reasons including high compensatory damages, the possibility of punitive damages, the contingent fee system, liberal discovery rules, and class actions (p. 116).

litigation,[17] and judges do so when granting or affirming those dismissals.[18] In addition to using the transnational forum shopping claim to argue for case-specific outcomes, some litigants use it to argue for doctrinal changes intended to discourage plaintiffs from bringing transnational claims to U.S. courts and protect business defendants from such claims. Although it would be difficult to demonstrate a cause-and-effect relationship between advocacy efforts based on this claim and anti-forum shopping measures adopted by the U.S. Supreme Court, litigants using this strategy have a track record of success.[19] Moreover, in *Piper Aircraft Co. v. Reyno* (1981, pp. 250–252), the Court expressly relied on

[17]Examples of litigants invoking this claim include Brief of Defendant-Appellee, *Imamura v. General Electric Co.* (2019, p. *35) (arguing successfully that Court of Appeals should affirm lower court's forum non conveniens dismissal; asserting that "[t]he American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts") and Brief for Defendants-Appellees, 2013, 2019, *Giglio Sub s.n.c. v. Carnival Corp.* (2013, pp. *19–20) (same).

[18]Examples of judges invoking the claim include *Rolls-Royce Commercial Marine, Inc. v. New Hampshire Ins. Co.* (2010, p. *7) (granting motion to dismiss on forum non conveniens grounds; stating that "[w]ithout the doctrine of forum non conveniens, 'American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.'"); *Auxer v. Alcoa, Inc.* (2010, p. *4) (granting motion to dismiss on forum non conveniens grounds and stating that "[c]ourts are suspicious that a foreign plaintiff's decision to bring suit in the United States is motivated by a search for a jurisdiction with laws that would be the most favorable for the claim"); *Hasakis v. Trade Bulkers, Inc.* (1988, pp. 262–263) (granting motion to dismiss on forum non conveniens grounds; stating that "our courts 'are already extremely attractive to foreign plaintiffs [and] would become even more attractive' if they did not decline to adjudicate essentially foreign litigation"); and *Bhatnagar v. Surrendra Overseas Ltd.* (1995, p. 1235) ("We recognize that the possibility of securing a trial before an American jury, under American law, provides a strong draw to foreigners. Indeed, the Supreme Court itself has recognized that our courts are 'extremely attractive to foreign plaintiffs.'").

[19]Examples include Brief for Petitioners, 2010, *Goodyear Luxembourg Tires, S.A. v. Brown*, (2010, p. *44) (arguing successfully the Supreme Court should hold that claim against foreign subsidiaries of U.S. corporation should narrow the scope of general jurisdiction over corporations; asserting that "[m]any foreign corporations view the potential for liability in the American legal system as a considerable deterrent, taking the view that '[a]s a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune'"); Brief for Petitioner, *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.* (2006, p. *32) (arguing successfully that the Supreme Court should hold that district courts may grant forum non conveniens dismissals without first determining whether it has jurisdiction; arguing that "allowing forum non conveniens to be decided at the outset will ensure that the doctrine does not become an illusory protection for foreign litigants. Compared with the jurisdictional rules that prevail in most other countries, the bases for jurisdiction in United States courts are exceedingly generous to plaintiffs. Forum non conveniens has thus properly been regarded in the international arena as a flexible tool for limiting the risk that essentially foreign disputes would nonetheless be drawn to United States courts"); and Brief for Petitioners, 2004, 2006, *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.* (2004, p. *26) (arguing successfully that the Supreme Court should dismiss Sherman Act claims based on harm suffered abroad by price-fixing conduct that allegedly raised prices in the United States and foreign countries; arguing that "[t]he interpretation adopted by the court of appeals would flood the federal courts with foreign claims by all persons who can allege injury from conduct that also injured 'someone' in U.S. commerce. With the globalization of economic activity, foreign harms can almost always be linked to some domestic harm. There is every reason to expect that foreign claimants will attempt to assert claims under U.S. law in federal court to obtain the treble damages, liberal discovery rules, jury trials and class action procedures not available in many of their own jurisdictions…. As the Solicitor General has noted, foreign plaintiffs are bringing antitrust claims to recover for injuries arising from purely foreign transactions with 'increasing frequency'").

the transnational forum shopping claim to justify its endorsement of the forum non conveniens doctrine as a measure to reduce transnational litigation in U.S. courts.[20]

In addition, business-oriented interest groups—perhaps most prominently, the U.S. Chamber Institute for Legal Reform (ILR)—have extensively promoted the transnational forum shopping claim as a justification for legal change. In 2004, the ILR announced the launch of "a new coalition to curb global forum shopping, a rising litigation trend in which foreign plaintiffs file lawsuits in U.S. courts to take advantage of the more permissive features of the American judicial system," asserting that "[t]he U.S. is increasingly becoming the jurisdiction of choice for opportunistic foreign plaintiffs looking to take advantage of our class action system and liberal discovery rules" (U.S. Chamber of Commerce, 2004). A 2010 report for the ILR, *Think Globally, Sue Locally*, claimed that "[o]ver the past several decades, American companies have faced a tidal wave of lawsuits attempting to import foreign controversies into U.S. courts. Overseas plaintiffs seek out U.S. courts to take advantage of distinctively permissive features of the American judicial system, including liberal discovery rules, punitive damages, class action contingency fee arrangements, jury trials, and the absence of 'loser pays' fee-shifting" (U.S. Chamber Institute for Legal Reform, 2014).

Those making the transnational forum shopping claim—whether they are scholars, judges, lawyers, or interest groups—have not provided systematic empirical evidence to support the claim.[21] Nevertheless, as this section has suggested, its premises seem plausible on their face. This may help explain why the transnational forum shopping claim reflects what has long been the conventional wisdom. But because of the claim's implications for law and policy, it would be unwise to assume its accuracy merely because it has

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[20]As the *Piper* Court explained: "[I]f conclusive or substantial weight were given to the possibility of a change in law, the forum non conveniens doctrine would become virtually useless. Jurisdiction and venue requirements [in U.S. courts] are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous…. The American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts" (*Piper Aircraft Co. v. Reyno*, 1981, pp. 250–252).

[21]However, several studies have attempted to gather data on a particular type of claim—namely, claims over which the U.S. federal courts have subject matter jurisdiction based on the Alien Tort Statute (ATS), 28 U.S.C. § 1350, which provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The ATS became a subject of considerable interest after the U.S. Court of Appeals for the Second Circuit used it to establish subject matter jurisdiction over a human rights claim (*Filártiga v. Peña-Irala*, 1980). These studies have revealed that few such cases have been filed. See, for example, Davis (2006, pp. 73–74) (finding that federal courts of appeals decided 14 ATS cases between 2000 and 2004 but decided only 31 cases between 1976 and 1999 and that federal district courts have decided 36 ATS cases between 2000 and 2004 but only 40 before then); Stephens (2008, pp. 810–811) (noting that since 1980, approximately 185 cases have been litigated under the ATS, about 105 of which have been filed since 2004, and about 123 of which were dismissed); Kenney (2015, pp. 1068–1069) (empirical study finding "approximately 325 nonfrivolous, non pro se cases that rely on one or both statutes [the ATS or the Torture Victims Protection Act] for their causes of action were resolved from 1980 to 2015, with twenty-seven suits still pending" and that "[o]ut of the approximately 325 cases that were resolved, approximately 220 were dismissed at the pleading stage (around 68 percent), with only thirty-one of these approximately 220 (around 14 percent) dismissed without prejudice").

been stated and restated so many times. Insofar as the claim is inaccurate or exaggerated, the legal changes motivated by it may be disproportionate or even altogether unnecessary. As one skeptical judge put it when confronted with the claim: "Without a disease, there is no need for a cure" (*Radeljak v. Daimlerchrysler Corp.*, 2006, p. 70 [J. Cavanaugh, dissenting]).[22] Therefore, the transnational forum shopping claim deserves reassessment. That is the task of Sections III and IV.

III. Theoretical Assessment

This section documents and critically evaluates the premises of the transnational forum shopping claim. Section III.A presents data indicating that globalization has steadily increased over the last several decades; but such data alone cannot, of course, confirm, or disconfirm the premise that this increase has led to more transnational litigation in U.S. courts. Section III.B argues that legal changes in the U.S. legal system have made it less attractive to plaintiffs than it supposedly once was, and Section III.C argues that legal systems outside the United States are increasingly adopting some of the same features that are said to make the U.S. legal system so attractive. Section III.D discusses another reason to question the theory behind the transnational forum shopping claim: the rise of arbitration as an alternative to transnational litigation. Together, these developments suggest—contrary to the conventional wisdom—that despite increasing globalization, transnational litigation in U.S. courts might not be increasing after all.

A. Globalization

One premise of the transnational forum shopping claim is that globalization is causing an increase in transnational litigation (see Section II.B. above). As Figure 1 shows, according to a leading indicator—the Swiss Economic Institute's KOF Globalization Index—globalization has indeed increased quite steadily over the last three decades.[23] Although a relationship between globalization and transnational litigation rates would seem intuitively plausible, it would be very difficult to evaluate empirically whether a cause-and-effect relationship exists, and this article makes no attempt to do

[22]As Justice Cavanaugh explained: "Despite the authority discussing the attractiveness of American courts, there is little to demonstrate that Michigan has become an especially attractive forum. There is no evidence that foreign nationals are rushing to file products-liability or other tort cases in Michigan. When specifically asked about the number of such cases in Michigan, defendant's attorney could point to only a handful, and he could specifically name just two. There is simply no evidence that Michigan's courts are flooded with cases brought by foreign nationals. And there is no indication that a sudden influx will occur if the law is not immediately altered" (*Radeljak v. Daimlerchrysler Corp.*, 2006, p. 70).

[23]As Gygli et al. (2019) explain: "The KOF Globalisation Index … measures globalization along the economic, social and political dimension for almost every country in the world since 1970. It has become the most widely used globalization index in the academic literature" (p. 544). The decline in global economic activity following the outbreak of the COVID-19 pandemic may, of course, have led to a decline in globalization in 2020.

Figure 1: Swiss Economic Institute KOF Globalization Index (1988–2018).

so. However, even if this first premise of the transnational forum shopping claim is correct, there are—as argued in the remainder of this section—reasons to doubt the claim.

B. Changes in the U.S. Legal System

The transnational forum shopping claim's second premise is that the U.S. legal system has procedural and substantive features that are favorable to plaintiffs but not widely available in most other legal systems (see Section II.B. above). This premise can be traced to the U.S. Supreme Court's widely cited 1981 opinion in *Piper Aircraft Co. v. Reyno*, which asserted that U.S. courts are "extremely attractive to foreign plaintiffs" (p. 252). This section catalogs the features that are typically said to make the United States a magnet forum and it assesses them as they stand today. It offers evidence suggesting that due to wide-ranging changes to American procedural and substantive law, U.S. courts are likely less favorable to plaintiffs than they supposedly once were.

1. Procedural Law

The procedural features that are said to make the United States especially attractive to foreign plaintiffs include minimal limits on personal jurisdiction, the availability of a jury trial in civil actions, class actions, liberal discovery rules, and the so-called American rule of attorney's fees.[24] Due to a variety of changes to these aspects of the U.S. legal system, these procedural attractions are unlikely to be as salient as they may have once been.

a. Greater Restrictions on Court Access: The transnational forum shopping claim often begins with the assertion that the expansive personal jurisdiction of U.S. courts over defendants gives plaintiffs extensive opportunities to forum shop into the United States. According to the U.S. Supreme Court in *Piper Aircraft Co. v. Reyno* (1981), "the tort plaintiff may choose, at least potentially, from among 50 jurisdictions if he decides to file suit in the United States" (p. 252, Footnote 18). As Lord Denning put it in *Smith Kline and French Laboratories Ltd v. Bloch* (1983): "The plaintiff holds all the cards" (p. 72).

However, beginning in the 1980s and continuing into the 2010s, the U.S. Supreme Court has progressively narrowed the scope of personal jurisdiction, particularly in transnational cases—so much so that one expert has commented that today "[p]ersonal jurisdiction doctrine seems tilted against plaintiffs" (Spencer, 2010, p. 365). This retrenchment has affected both the general jurisdiction and specific jurisdiction branches of personal jurisdiction. As early as its 1984 decision in *Helicopteros Nacionales de Colombia, S.A. v. Hall* (1984), the Court signaled that it would narrowly construe general jurisdiction in what it treated as a transnational dispute (p. 418; see also Knudsen, 1985, pp. 824–831). In two later cases—*Goodyear Dunlop Tires Operations v. Brown* (2011) and *Daimler AG v. Bauman* (2014)—the Court went further, resulting in "the dramatic diminution of general jurisdiction" (Silberman & Simowitz, 2016, p. 351) by announcing a "new standard—that in the absence of extraordinary circumstances, a foreign corporation must be sued 'at home,' i.e. at its place of incorporation or principal place of business" (Silberman & Simowitz, 2016, p. 347).[25] In *Daimler* (2014), the Court emphasized the "transnational context" of the dispute, expressing concern about "risks to international comity" that an "expansive view of general jurisdiction" would pose and concluding that "[c]onsiderations of international rapport thus reinforce" its determination that the District Court lacked personal jurisdiction over the defendant (pp. 140–142). Professor Bookman (2015) argues that this new standard "will exclude

[24]These factors were enumerated by the U.S. Supreme Court in *Piper Aircraft Co. v. Reyno* (1981, p. 252, Footnote 18) and Weintraub (1994, p. 323).

[25]As Silberman and Simowitz (2016) further explain: "[I]nstead of emphasizing the traditional general jurisdiction standard of substantial, systematic, and continuous activities, the Supreme Court went much further to state that such jurisdiction required that a corporation's affiliations with a forum be 'so "continuous and systematic" as to render it essentially at home in the forum state'" (Footnote 6).

a significant amount of transnational litigation arising from foreign conduct by foreign defendants" (p. 1092).[26]

Specific jurisdiction in transnational litigation also has been restricted. The Supreme Court's 1987 decision in *Asahi Metal Industry Co. v. Superior Court* (1987) was "important because it emphasize[d] the Court's apparent trend toward narrowing [specific] jurisdiction over foreign defendants" (Leigh, 1987, p. 658) and the potential "foreign relations" implications of "extending our notions of personal jurisdiction into the international field" (*Asahi*, 1987, p. 115). In *J. McIntyre Machinery v. Nicastro* (2011), the Court held that personal jurisdiction was lacking over a non-U.S. manufacturer whose machine injured a U.S. plaintiff in New Jersey. Although the Court failed to produce a majority opinion, Professor Parry (2012) argues that "Nicastro produced a majority result that easily generalizes: non-U.S. manufacturers who entrust their product to a distributor with the goal of serving the entire U.S. market will not be subject to personal jurisdiction in every state in which their products are sold. There is no doubt that foreign defendants will make vigorous use of that result wherever possible" (p. 850).[27]

The Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California* (2017) did not involve a transnational dispute, but nevertheless further narrowed the scope of specific jurisdiction in a manner that also applies to transnational litigation. The Court rejected the California Supreme Court's more permissive "sliding scale" approach to specific jurisdiction, and emphasized that "[w]hat is needed … is a connection between the forum and the specific claims at issue" (*Bristol-Myers Squibb*, 2017, p. 1781).[28] The defense bar welcomed the decision as "another blow to litigation tourism" that "continued [the Court's] trend limiting states' exercise of personal jurisdiction over nonresident defendants" (Mellow et al., 2018, p. 4). In *Ford Motor Co. v. Montana Eighth Judicial District Court* (2021), the Supreme Court rejected the argument that specific jurisdiction requires a causal connection between a defendant's forum contacts and the plaintiff's claims, and clarified that it is sufficient that the claims "relate to" those contacts (p. 1026). Although the *Ford* decision did not further narrow the scope of personal jurisdiction, the overall trend has been in a restrictive direction, as this review of the Court's decisions indicates.

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[26]Similarly, Bonomi and Nadakavukaren Schefer (2018) link the curtailed transnational reach of U.S. courts to these growing limits on personal jurisdiction (p. 8).

[27]The three dissenting justices in *Nicatro* argued that the Court's holding "turned back the clock" on specific jurisdiction doctrine, and noted that "[t]he Court's judgment also puts United States plaintiffs at a disadvantage in comparison to similarly situated complainants elsewhere in the world. Of particular note, within the European Union, in which the United Kingdom is a participant, the jurisdiction New Jersey would have exercised is not at all exceptional" (*J. McIntyre Machinery v. Nicastro*, 2011, pp. 893–894, 899) (Ginsburg, J., dissenting).

[28]As Professors Bradt and Rave (2018) have argued, the Court's decision in *Bristol-Myers* is likely to have a profound impact on nationwide (and presumably transnational) class actions: "[M]ultistate or nationwide class actions based on state tort law are likely off the table in almost any state or federal court that does not have general jurisdiction over the defendant"; "if the plaintiffs want to aggregate after Bristol-Myers, they will have to do so on the defendant's terms—either on the defendant's home turf or in an MDL" (p. 1256).

Even if a U.S. court has personal jurisdiction over the defendant, the forum non conveniens doctrine gives it the discretion to dismiss a suit in favor of a more appropriate forum. *Piper Aircraft Co. v. Reyno*, decided in 1981, invigorated the forum non conveniens doctrine in transnational litigation, and explicitly endorsed the doctrine as an anti-forum shopping tool.[29] In 2007, the Court expanded the availability of the forum non conveniens doctrine in *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.* (2007) by holding that courts may dismiss suits on forum non conveniens grounds without having to first determine whether they have subject matter jurisdiction over the claim and personal jurisdiction over the defendant.[30] As such, the forum non conveniens doctrine is a significant tool for reducing transnational litigation in U.S. courts.[31] As Professor Bookman (2015) puts it, "Such a robust forum non conveniens regime, protecting domestic defendants from the inconvenience of litigation in cases brought by foreign plaintiffs, is unusual. Few other nations recognize forum non conveniens, and those that do tend to permit it more sparingly" (p. 1096).

While it would be difficult to establish a causal link between the progressive narrowing of the scope of personal jurisdiction and the expansion of the forum non conveniens doctrine in the United States, on the one hand, and the number of transnational cases filed in U.S. courts, on the other hand, such a link is plausible. After all, a rational plaintiff deciding whether to file a lawsuit in a U.S. court will estimate the probability that the complaint would survive a motion to dismiss for lack of personal jurisdiction or a motion to dismiss on forum non conveniens grounds. Other

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[29]The Court in *Piper Aircraft Co. v. Reyno* (1981) reasoned as follows: "Upholding the decision of the Court of Appeals would result in other practical problems. At least where the foreign plaintiff named an American manufacturer as defendant, a court could not dismiss the case on grounds of forum non conveniens where dismissal might lead to an unfavorable change in law. The American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts" (pp. 251–252).

[30]As the Court in *Sinochem* (2007) explained: "We hold that a district court has discretion to respond at once to a defendant's forum non conveniens plea, and need not take up first any other threshold objection. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case" (p. 425).

[31]Two empirical studies suggest that forum non conveniens dismissals are not uncommon. Lii (2009) identified 403 forum non conveniens dismissals in U.S. District Court decisions between 1982 and 2006 and estimated a 52% dismissal rate (Table 4). Whytock (2011) identified 99 forum non conveniens dismissals in U.S. District Court decisions between 1990 and 2005 and estimated a 47.1% dismissal rate (Table 1). However, these studies have several important limitations. First, because both relied on opinions available for full-text searches in the Lexis electronic database (which contains officially reported decisions but only portion of unreported opinions), they almost certainly underestimate the total number of forum non conveniens dismissals. Moreover, they do not reveal what percentage of transnational cases filed in U.S. District Courts are dismissed on forum non conveniens grounds. Finally, because the reported and unreported decisions available in Lexis are not necessarily representative of unreported decisions not available in Lexis, the dismissal rates in decisions not available in Lexis may be higher or lower than indicated by these studies. Even if one assumes the estimated rates are reliable, one should not attribute too much meaning to them without first considering potential selection effects that may, under certain circumstances, result in a tendency toward 50% litigation "win rates" (Priest & Klein, 1984); but see Shavell (1996, pp. 499–501) (arguing that the 50% plaintiff win rate is not a "central tendency, either in theory or in fact").

things being equal, the higher the probability of dismissal, the less likely a plaintiff will be to file in a U.S. court. It would be unsurprising to expect litigants to perceive this probability as being lower now than it was before the personal jurisdiction and forum non conveniens decisions discussed above.[32] Causation aside, at the very least, these decisions raise doubts about the premise that the United States has expansive personal jurisdiction that offers plaintiffs extensive forum shopping opportunities, and they offer a reason why transnational litigation in U.S. courts might not be increasing, despite globalization.

b. Other Procedural Changes: Beyond the premise of broad access to U.S. courts for transnational litigants, the transnational forum shopping claim relies on assumptions about a variety of other features of U.S. civil procedure that are said to attract plaintiffs. One of these is that "discovery is more extensive in American than in foreign courts" (*Piper Aircraft Co. v. Reyno*, 1981, p. 252, n.18).[33] Procedural reforms, however, have diluted this procedural attraction, at least on the margins (Spencer, 2010, p. 364).[34] In 1983, proportionality limits were added to Rule 26; in 2000, the language in Rule 26 allowing discovery of any information "relevant to the subject matter involved in the pending action" was changed to information "relevant to any party's claim or defense"; and the 2015 amendments deleted language providing for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence" (Marcus, 2010, §§ 2007–2008).

Likely more important than changes to the discovery rules themselves is the stricter plausibility pleading standard announced by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009), which signals to plaintiffs that their claims are less likely than before to survive the pleading stage and advance to the discovery stage of litigation in the first place. Although not limited to transnational disputes, these stricter standards act as "[a]nother filter for transnational litigation" in U.S. courts (Stengel & Trautmann, 2016, p. 40).

The availability of civil jury trials in the United States is also said to be a major attraction to plaintiffs in transnational disputes.[35] But three developments suggest the

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[32]Whytock (2011) (explains this rationality as part of a theory of transnational forum shopping (p. 485 et seq.).

[33]For similar assertions, see Sykes (2008, p. 342) ("Procedurally, U.S. law may allow plaintiffs greater opportunities to build their case through more liberal discovery rules ….") and Weintraub (1994, p. 323) (stating that U.S. courts offer "more extensive pretrial discovery than is available anyplace else in the world").

[34]As Spencer (2010) elaborates: "Certainly, efforts to constrain discovery, most notably through amending Rule 26 to limit the scope of discovery to material related to claims or defenses in the action rather than the subject matter of the action, reflect a desire to discourage 'fishing expeditions' that might yield additional claims and to protect litigants—mainly defendants—against the high costs associated with complex discovery" (p. 364). But see Steinman (2016) (arguing that the amendments do not significantly limit discovery).

[35]For examples of this claim, see *Piper Aircraft Co. v. Reyno* (1981, p. 252, Footnote 18) (noting that "jury trials are almost always available in the United States, while they are never provided in civil law jurisdictions"); *Smith Kline &*

dilution of this attraction as well. *Twombly* and *Iqbal* raise doubts about the likelihood of reaching the trial stage of litigation because of the barrier they pose at the pleading stage (Spencer, 2013, p. 1737). The so-called "summary judgment trilogy" of Supreme Court cases decided in 1986 signaled that plaintiff's claims are more likely to be disposed of by summary judgment and less likely to reach trial.[36] And tightened constitutional limits on damage awards[37] have reduced the extent to which juries can offer plaintiffs the "fabulous damages" that impressed Lord Denning (*Smith Kline & French Laboratories Ltd and others v Bloch*, 1983, p. 74).[38]

Finally, class actions are said to be a draw for plaintiffs in transnational disputes.[39] The Class Action Fairness Act of 2005, which expanded federal subject matter jurisdiction over (and hence the removability of) class actions, combined with the increasingly strict federal requirements for certifying classes under federal law, have led to the "demise of the mass-tort class action" (Bradt & Rave, 2018, p. 1266).[40] The Supreme Court's more recent decisions in *Wal-Mart Stores, Inc. v. Dukes* (2011) and *Comcast Corp. v. Behrend* (2013) have made it even more difficult for plaintiffs to satisfy the commonality and predominance requirements for class actions (Bradt &

French Laboratories Ltd and others v Bloch (1983, p. 72) ("There is also in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic and know that the lawyers will take their 40% before the plaintiff gets anything. All this means that the defendant can be readily forced into a settlement."); and Weintraub (1994, p. 323) ("Of all the attractions of a United States forum, the most important is … trial by jury.").

[36]The "summary judgment trilogy" includes *Celotex Corp. v. Catrett* (1986), *Anderson v. Liberty Lobby* (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* (1986). Scholars exploring the impact of the summary judgment trilogy on the likelihood of trial include Spencer (2010, p. 362) ("Those claimants making it to the summary judgment stage face significant hurdles as well, particularly in light of the ease with which defendants may raise such challenges in the wake of the *Celotex* trilogy of cases.") and Thomas (2012, p. 501) ("The trilogy of summary judgment cases is often said to have had a profound effect on the use of summary judgment and thus, a significant effect on civil litigation, decreasing the number of trials and also thus decreasing the use of juries.").

[37]One case tightening those limits was *BMW of North America, Inc. v. Gore* (1996). Commentators noting this trend include Hubbard (2006, pp. 499–500) (describing expansion of due process limits on jury awards) and Bonomi and Nadakavukaren Schefer (2018, p. 8) (linking curtailed transnational reach of U.S. courts to increasingly strict limits on punitive damages).

[38]Regarding punitive damages, a Department of Justice study by Cohen and Harbacek (2011) suggests that punitive damages are not as important a feature of the U.S. legal landscape as the transnational forum shopping claim's premises might suggest. According to the study, litigants sought punitive damages in only 12% of the estimated 25,000 state court civil trials concluded in 2005; plaintiffs received punitive damages in 30% of the 1761 civil trials in which these damages were requested and the plaintiff prevailed; and the median punitive damage award was $64,000, and 13% of cases with punitive awards had damages of $1 million or more.

[39]See, for example, Sykes (2008, p. 342) ("Procedurally, U.S. law may … allow the consolidation of claims in class actions that are impermissible abroad.").

[40]Klonoff (2013) catalogs the growing barriers to class actions, such as heightened evidentiary burdens, stringent class definition requirements, and heightened scrutiny of numerosity, commonality and predominance.

Rave, 2018, p. 1266).[41] These difficulties are especially acute for classes with foreign members.[42]

As Professor Spencer (2013) summarizes: "*Twombly* and *Iqbal* are part of a series of cases moving civil procedure in a restrictive direction. From summary judgment, to pleading, to personal jurisdiction, to class action doctrine, the [U.S. Supreme] Court has reinterpreted procedural rules in ways that protect corporate or government defendants against suits by individual plaintiffs" (p. 1737). Putting these developments in transnational context, Professor Bookman (2015) argues that the United States has entered a period of "litigation isolationism" characterized by the avoidance of transnational litigation (p. 1085).[43]

2. Substantive Law

Another frequently cited reason why U.S. courts are said to be distinctively attractive to plaintiffs is favorable substantive U.S. law. For tort plaintiffs, it is said, first, that tort law offers advantages to plaintiffs such as strict liability, punitive damages, and large damages awards[44] and,

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[41]Scholars explaining the increasing restrictions on class actions include Burbank and Farhang (2017a, 2017b) (documenting the roles of Congress, the rulemaking process and, especially, the Supreme Court in the "counter-revolution" against class actions); Spencer (2010, p. 364) ("Ultimately, [the Supreme Court's] restrictive interpretation of class-certification standards tends to preclude classes from proceeding to a resolution of their claims on the merits."); and Bonomi and Nadakavukaren Schefer (2018, p. 8) (linking curtailed transnational reach of U.S. courts to these growing restrictions on class actions).

[42]For example, Burbank (2012) documents the "assault on class actions" and discusses the implications for transnational litigation in U.S. courts (p. 664) and Clopton (2015) focuses on barriers to class actions due to reluctance to certify classes including non-U.S. citizens.

[43]The so-called "American rule" of attorney's fees is also said to make U.S. courts attractive to plaintiffs in transnational litigation. This factor has been mentioned in *Piper Aircraft Co. v. Reyno* (1981, p. 252 n. 18) (stating that "unlike most foreign jurisdictions, American courts … do not tax losing parties with their opponents' attorney's fees"); *Smith Kline & French Laboratories Ltd and others v Bloch* (1983, 74) ("If [the plaintiff] lose[s], the litigant will have nothing to pay to the other side. The courts in the United States have no such costs deterrent as we have."); and Weintraub (1994, p. 323) ("[C]ompared with foreign courts, United States forums offer a plaintiff … lower costs … . Factors reducing the plaintiff's costs [include], if the plaintiff loses, no liability for the defendant's attorney's fee."). However, both theoretical and empirical research casts doubt on this presumed effect of the American rule, and in fact suggests that the so-called "English rule" may be more likely to increase litigation. As Hylton (1993) has argued: "[T]he British rule is unambiguously inferior on administrative cost grounds. Litigation rates were consistently higher under the British than any of the other cost allocation rules. The reason is that the British rule discourages settlement by increasing the perceived stakes of litigation more than any other rule" (p. 468); "[T]he only important difference is that the British rule leads to more litigation" (p. 473). Similarly, Eisenberg and Miller (2013) have concluded that "[t]aken as a whole, the theoretical literature is indeterminate as to the practical effects and social utility of attorney-fee regimes" (p. 329).

[44]For statements of this substantive law premise, see *Piper Aircraft Co. v. Reyno* (1981, p. 252, Footnote 18) (noting that "all but 6 of the 50 American States—Delaware, Massachusetts, Michigan, North Carolina, Virginia, and Wyoming—offer strict liability" and, although "[r]ules roughly equivalent to American strict liability are effective in France, Belgium, and Luxembourg" and "West Germany and Japan have a strict liability statute for pharmaceuticals … strict liability remains primarily an American innovation."); Weintraub (1994, p. 323) (U.S. courts apply "liability law that is more likely than foreign law to allow recovery and allow it for more elements of harm"); and Sykes (2008, pp. 341–342) ("On substantive tort issues, U.S. law is frequently more favorable to plaintiffs than is

second, that U.S. choice-of-law rules are biased in favor of the application of U.S. law in transnational tort cases.[45] There are reasons to be skeptical about both elements of this premise.

The first element neglects the impact of the so-called "tort reform" movement.[46] Changes making tort law less favorable to plaintiffs have included limitations on damages,[47] as well as limits on joint and several liability (Hubbard, 2006, pp. 486–490) and a variety of pro-defendant changes to the law governing product liability and medical malpractice claims (Hubbard, 2006, pp. 510–520). To illustrate the overall trend in pro-defendant tort reform measures, I used data from the Database of State Law Tort Reforms (DSTLR) to construct a yearly index of the cumulative number of restrictive changes to tort law adopted by U.S. states and the District of Columbia, with higher values indicating more restrictions on tort recovery.[48] Figure 2 plots the nationwide average value of the tort reform index over time.

As Figure 2 shows, the average cumulative number of restrictive changes to tort law adopted by states increased steadily from the 1980s through the late 2000s, and thereafter appears to have stabilized. However, as one expert on the tort reform movement has concluded, the push for further changes is likely to continue (Hubbard, 2006).[49]

As for the second element of the substantive law premise of the transnational forum shopping claim, pro-plaintiff U.S. tort law would not be attractive if, in transna-

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foreign tort law. U.S. precedent may impose strict liability or allow for punitive damages when foreign law does not. Compensatory damages awards in the United States may be higher on average, in part because of the jury system.").

[45]For example, Weintraub (1994) argues that U.S. courts apply "choice-of-law rules that are more likely than foreign rules to select the United States law that is favorable to the plaintiff" (p. 323).

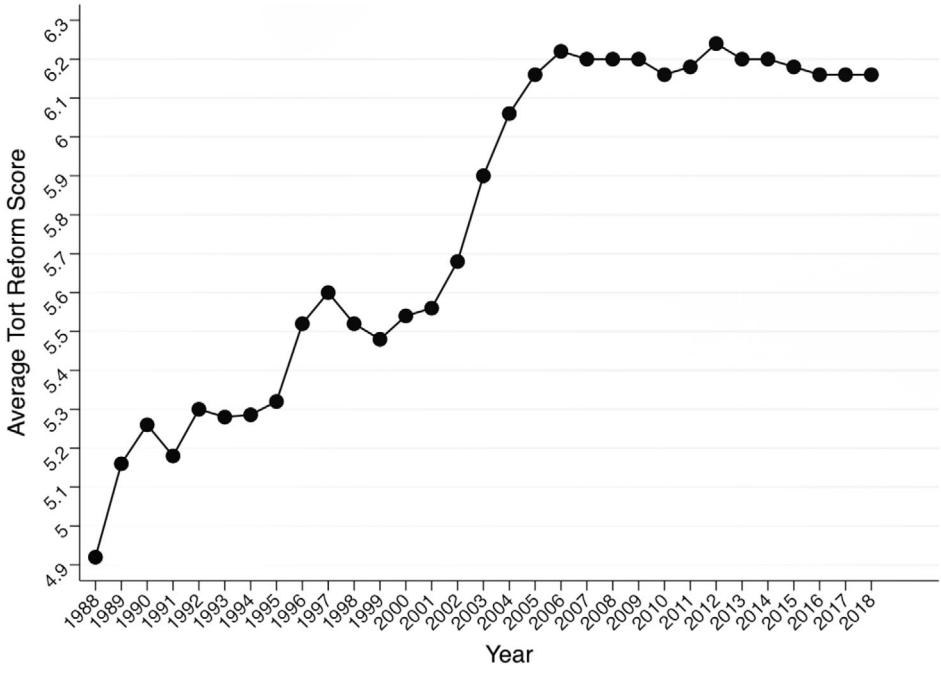
[46]As Hubbard (2006) argues: "For over thirty years, repeat players on the defense side of tort litigation have undertaken to 'reform' tort doctrine in their favor. Initially, these efforts consisted of ad hoc efforts to address a series of 'crises,' primarily in terms of the cost and availability of liability insurance. In the 1980s, the tort reform movement began to develop a more permanent institutionalized approach to the push for 'reform'" (p. 437).

[47]Limitations on damages include increasingly widespread elimination or limitation of the collateral source rule (Hubbard, 2006, pp. 484–485), limitations on non-economic damages (Hubbard, 2006, pp. 495–497), and federal due process limits and state limits and prohibitions on punitive damages (Hubbard, 2006, pp. 504–507).

[48]Figure 2 uses data from the Database of State Law Tort Reforms (6th edition) (Avraham, 2019a; Avraham, 2019b). For each state, the database tracks 10 specific tort reforms, including caps on noneconomic damages, caps on punitive damages, caps on total damages, split recovery reform, collateral source reform, punitive evidence reform, periodic payments reform, contingency fee reform, joint and several liability reform, patient compensation fund reform, and comparative fault reform. For each year, I summed the number of tort reforms in effect in each state, then calculated the average for each year to create a nationwide tort reform index.

[49]Hubbard (2006) offers three reasons for this outlook: "First, the ideology of the movement provides a sense of intense moral commitment to get the United States on the right track and keep it there. Second, changing the tort system in favor of the defense side is in the self-interest of the movement's members because reducing payouts to claimants reduces their costs. Third, the professionals seeking these 'reforms' have a personal stake in continuing their employment" (pp. 534–535).

Figure 2: Tort Reform Index (nationwide average, 1988–2018).



tional cases, U.S. courts would apply foreign tort law instead.[50] But the conventional wisdom is that modern U.S. choice-of-law methods are systematically biased in favor of the application of U.S. law, thus amplifying the attractions of U.S. substantive law for transnational tort claims.[51] Accordingly, Professor Weintraub (1997) argued for changes in choice-of-law analysis that would make "U.S. law … less likely to apply to foreigners injured abroad" and thus "make the United States a less attractive forum" (p. 221).

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[50]For example, Weintraub (1994) argues that "[f]avorable liability rules and favorable choice-of-law rules obviously go together. It would do the plaintiff no good to sue in a forum with favorable domestic law if a court there would apply the law of some other jurisdiction" (p. 323).

[51]For expressions of this conventional wisdom, see, for example, Goldsmith and Sykes (2007, p. 1137) ("[T]he modern rules have one unmistakable consequence: they make it more likely that the forum court will apply local tort law to wrongs that occurred in another jurisdiction. For this reason, modern choice-of-law approaches give plaintiffs an incentive to sue in a forum that has more generous tort laws than the place of injury. This incentive is most powerful when plaintiffs are injured outside the United States by defendants amenable to suit within the United States. The substantive tort law and related procedural mechanisms available in U.S. courts are generally much more favorable to plaintiffs, and produce much larger recoveries, than the law and procedures available in foreign courts."); Weintraub (1994, p. 323) (arguing that U.S. courts apply "choice-of-law rules that are more likely than foreign rules to select the United States law that is favorable to the plaintiff."); and *Piper Aircraft Co. v. Reyno*, (1981, p. 252, Footnote 18) (noting U.S. legal system's "malleable choice-of-law rules").

So far, those asserting that pro-U.S. law bias exists in choice-of-law decisionmaking in transnational tort cases have not offered systematic empirical evidence to support that assertion. Moreover, the one empirical analysis to date that has examined this question suggests that U.S. District Court judges are not biased in favor of domestic law in transnational tort cases, and if they are, the bias is not strong (Whytock, 2009, p. 765). Using multivariate analysis, the study also found that courts applying the most common of the modern methods—the Restatement (Second) of Conflict of Laws—are significantly less likely to apply U.S. law in transnational tort cases than courts applying other methods (Whytock, 2009, pp. 770–771).

In summary, the substantive law premise of the transnational forum shopping claim appears somewhat shaky. Tort reform is increasingly diluting the attractions of U.S. law for tort plaintiffs, and the available evidence suggests that U.S. courts are not biased in favor of applying U.S. law in transnational tort cases in the first place.

C. Changes in Other Legal Systems

There is also evidence suggesting that at the same time the United States has trended in the direction of "litigation isolationism" and "tort reform," other countries are increasingly open to transnational litigation, and in some cases actively engaging in "forum selling" to attract it. This trend casts further doubt on the premises underlying the transnational forum shopping claim.

To support its assertion that U.S. courts are "extremely attractive" to plaintiffs in transnational disputes compared to foreign courts, the U.S. Supreme Court in *Piper Aircraft Co. v. Reyno* (1981) relied on comparative legal research from the 1950s, 1960s, and 1970s (p. 252, Footnote 18). But much appears to have changed since then. For example, according to a study by Professor Hensler (2017), "[i]n recent years, as the U.S. Supreme Court has steadily closed the courthouse doors to class actions in the United States, an increasing number of foreign jurisdictions have adopted some form of representative group proceeding along the lines of a modern class action" (p. 965).[52] Scholars and lawyers have observed that other supposed comparative attractions of U.S. courts are also spreading to other countries, such as large damages awards, sometimes including punitive damages;[53] more expansive personal jurisdiction and extraterritorial application of domestic law;[54]

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[52]For example, Lein (2018) notes the spread of aggregate litigation procedures in Europe (p. 137).

[53]For example, see Behrens et al. (2009, pp. 193–194) (2009) (noting global spread of punitive damages); Bookman (2015, p. 1110) ("[D]amages awards abroad are not yet reaching (and may never reach) U.S.-style levels, but they are growing and will likely continue to grow."); Childress (2015, p. 1001) ("There are also increasing damages awards in foreign courts that similarly show at least some export of traditionally American robust systems for recovery."); and Irigoyen-Testa (2015, pp. 79–81) (identifying Argentina, Australia, China, India, New Zealand, the Philippines, and South Africaas countries that have adopted punitive damages).

[54]For example, see Bookman (2015, p. 1113) ("[M]any foreign courts recognize jurisdiction over foreign defendants in ways that are as expansive as or even more so than American courts."); Parrish (2017, p. 224) ("We are in the odd circumstances where just when the United States is modestly pulling back … from broad extraterritorial assertions, other

increasingly liberal discovery;[55] and growing acceptance of contingent fee arrangements.[56] More generally, Professor R. Daniel Kelemen and lawyer Eric Sibbitt have presented evidence that the American legal style is spreading globally (Kelemen & Sibbitt, 2004). Specifically, they document the "Americanization" of securities regulation and product liability law in the European Union and Japan (Kelemen & Sibbitt, 2004, pp. 111–131).[57] Although systematic cross-national data on the spread of specific U.S.-style features remain very limited, the evidence discussed here at the very least suggests that even if U.S. courts remain attractive to plaintiffs in transnational disputes compared to the courts of other countries, that comparative attraction may be significantly diminished.[58]

Moreover, some foreign countries are actively competing for transnational litigation, in what Professors Stefan Bechtold, Jens Frankenreiter, and Daniel Klerman have called "forum selling." These countries do so in a variety of ways, including increasing speed and improving the quality of proceedings, often with a focus on making the forum more attractive to plaintiffs (Bechtold et al., 2019, p. 490).[59] A related trend is the increase in the number of new international commercial courts around the world, including in Asia, Europe, and the Middle East.[60] As Professor Bookman (2020) explains, international commercial courts are:

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countries have begun to push in the opposite direction."); Parrish (2019, p. 105) ("[O]ther non-U.S. courts have expanded their jurisdictional reaches—perhaps mirroring the once-broad ambitions of U.S. doctrine … .").

[55]For example, see Brake and Katzenstein (2013, pp. 740–743) (discussing spread of pretrial discovery); Mochizuki (1999, p. 299) (arguing Japan has expanded pretrial document discovery following reforms enacted in 1996, making all relevant documents presumptively discoverable).

[56]For example, see Behrens et al. (2009, pp. 193–194) (noting increased acceptance of contingent fee arrangements in foreign legal systems); Kritzer (2002) (arguing that the idea that contingency fees are a uniquely American phenomenon is a myth; parts of Canada, Scotland, Ireland, New Zealand, Australia, France, Japan, England, Greece, the Dominican Republic and other countries permit some form of a contingency fee); Baptista and Baptista (2018, p. 29) (noting reversal of long-held position against contingency fee arrangements to allow lawyers to receive "a fixed percentage of the final amount collected by their clients … ."); Werlen (2018, p. 21) (noting that although once contingency fee arrangements were strictly forbidden in Europe, now "market pressure has led some countries to allow conditional fees"); Yuille (2004, p. 910) (stating the "conditional fee," that serves the same purpose as the contingency fee in the U.S., has gained such popularity that "the Lord Chancellor proposed eliminating civil legal aid in cases seeking monetary damages in favor of conditional fees").

[57]However, the authors conclude: "Despite all of these pressures, neither in Japan nor in the EU has the shift toward American legal style led to the extremes of American-style litigiousness. Entrenched institutional impediments to litigation—such as restrictive rules of standing, the absence of class actions, and limited damage awards—discourage litigation in many areas" (Kelemen & Sibbitt, 2004, p. 132).

[58]Similarly, as Lehmann (2018) argues: "From the viewpoint of transnational dispute resolution, the US and the EU have traded places. While traditionally the US provided opportunities for private enforcement of its regulatory standards, it now increasingly relies on public enforcement through regulatory agencies. In turn, the EU has introduced new private causes of action … and opened its courts for their transnational enforcement" (p. 221).

[59]Similarly, Childress (2015) argues that "[f]oreign courts are developing their law, both procedural and substantive, to encourage forum shopping into their courts" (p. 1001).

[60]For further background on international commercial courts, see Bookman (2020, p. 230) (documenting the "the proliferation of international commercial courts"); Erie (2020, p. 119) (defining the emergence of "new legal

> domestic courts whose subject matter jurisdiction is limited to, or focuses on, international commercial disputes…. These courts present themselves as innovative, cost effective, and responsive to typical criticisms of courts. For example, they often have experienced foreign jurists or other experts as judges, incorporate ADR, and allow parties to opt-out of regular domestic law procedures, resulting in courts that offer something of a hybrid of litigation and arbitration. (p. 229)

The rise of international commercial courts appears less focused on attracting plaintiffs as such and more on becoming transnational litigation or transnational dispute resolution destinations or attracting foreign investment (Requejo Isidro, 2019, pp. 22–23).

The conventional wisdom's U.S.-centric account focuses on supposedly extensive and increasing forum shopping into U.S. courts, premised on the twin assumptions that the U.S. legal system has procedural and substantive law features that make it attractive to plaintiffs in transnational disputes, and that those features distinguish the United States from other legal systems. Regarding the first assumption, Section III.B argued that the attractions of the U.S. legal system have been fading. This section challenged the second assumption by providing evidence that those attractions are increasingly appearing in other legal systems. Together, this depicts "an era of ever increasing multipolarity" characterized by "the growing relative importance of non-U.S. forums for transnational litigation" (Quintanilla & Whytock, 2011, p. 32). Although U.S. courts surely continue to be attractive to many litigants and play an important role in transnational dispute resolution, this emerging picture is quite different from the one painted by the transnational forum shopping claim.

D. Changes in Transnational Dispute Resolution

There is another reason to doubt the conventional wisdom that the number of transnational claims filed in U.S. courts is high and increasing: transnational arbitration, which is understood as an increasingly widespread alternative to litigating transnational disputes in national courts (Strong, 2013, p. 524). To get a sense of transnational arbitration trends, Figure 3 plots an estimate of the number of arbitrations in 11 leading international commercial arbitral institutions.[61]

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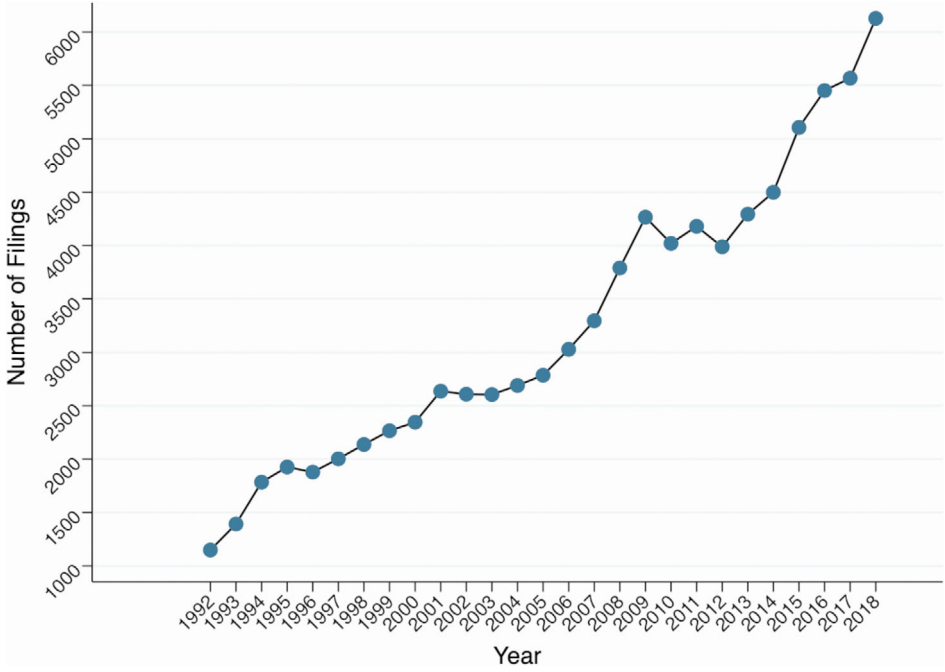
hubs," which he defines as "'one-stop shop[s]' for cross-border commercial dispute resolution, often located in financial centers, and promoted as an official policy by nondemocratic or hybrid states"); and Requejo Isidro (2019, p. 4) ("The expression 'international commercial courts' refers to judicial bodies set up in several jurisdictions throughout the world in the last fifteen years to properly address the particularities of international commercial litigation. In comparison to other national public courts, international commercial courts have unique features often imported from the arbitration world. The 'international' qualifier refers to the type of issues dealt with by the courts, and (sometimes) also to their composition, but not to their origin or their nature: on the contrary, international commercial courts are created by national laws and integrated into their local justice systems.").

[61]I thank Jessica Pierucci, Research Law Librarian for Foreign, Comparative, and International Law at the UC Irvine Law Library, for gathering this data. The institutions covered are the British Columbia International Commercial Arbitration Center, China International Economic and Trade Arbitration Commission, Hong Kong International Arbitration Centre, International Chamber of Commerce, International Center for Dispute Resolution (part of the American Arbitration Association), Japan Commercial Arbitration Association, Korean Commercial Arbitration Board, Kuala Lumpur Regional Centre for Arbitration, London Court of International Arbitration, Singapore International Arbitration Centre, and the Arbitration Institute of the Stockholm Chamber of

Figure 3: Caseload of leading international commercial arbitral institutions (1992–2018). [Color figure can be viewed at wileyonlinelibrary.com]



As Figure 3 indicates, the number of disputes submitted to arbitration in these international arbitral institutions has been steadily increasing since the 1990s. Some scholars have interpreted these trends as showing that arbitration has replaced, or is increasingly replacing, litigation as a method of transnational dispute resolution.[62] However, the rise of transnational arbitration does not necessarily mean that it is causing a decline in transnational

Commerce. Due to the absence of data for many of these arbitral institutions for years before 1992 and after 2018, I only used data for years 1992 through 2018. Data were missing for the Kuala Lumpur Regional Centre for Arbitration for the following years: 2002, 2003, 2009, 2010, 2011, 2013, and 2014. For this reason, data for these years likely undercounts the total number of arbitrations. The arbitration data are intended only to illustrate overall trends. For several reasons, it should not be relied upon as a precise measure. Different arbitral institutions report data differently. For example, some report cases filed in a year, while others report the number of open cases. In addition, some report both domestic and international filings (Drazohal & Naimark, 2005, p. 6). The overall trends revealed by this data are consistent with those identified in Mattli and Dietz (2014, p. 2).

[62]For example, see Carbonneau (1998) ("The status of arbitration as the procedure of choice in transnational commerce can no longer be seriously challenged.") and Lalive (1987, p. 293) (referring to arbitration as "'the' ordinary and normal method of settling disputes of international trade").

litigation in the United States (or elsewhere) (Whytock, 2008, p. 80). Moreover, this substitution claim would seem somewhat implausible outside the realm of contract disputes involving preexisting relationships and ex ante agreements to arbitrate.[63]

Nevertheless, the rise of transnational arbitration complicates the conventional wisdom. The growing number of transnational disputes arising from globalization—which is one of the premises of the transnational forum shopping claim—does not necessarily imply an increase in transnational litigation in U.S. courts (or transnational litigation in general) if transnational disputes are increasingly submitted to arbitration instead of litigation (for example, if parties to transnational contracts are increasingly including agreements to arbitrate and decreasingly including forum selection clauses indicating U.S. courts). In fact, if transnational disputes that would once have been filed in U.S. courts are increasingly being resolved through arbitration instead, one might expect a "substitution effect"—at least for contract disputes—that could dampen or even contribute to a decline in transnational litigation in U.S. courts.

This section has provided evidence suggesting that even if globalization is increasing, one might nevertheless *not* expect levels of transnational litigation in U.S. courts to be increasing, and might even expect those levels to be decreasing. First, this section argued that due to changes in procedural and substantive law, the U.S. legal system is unlikely to be as attractive to plaintiffs as it may once have been. Second, it provided evidence that legal systems outside the United States may be increasingly attractive as they adopt features that are said to be favorable to plaintiffs, and that at the same time the U.S. legal system is increasingly turning away from transnational disputes, other countries are engaged in a variety of international "forum selling" activities aimed at attracting transnational litigation. Third, it suggested that transnational disputes that might previously have been litigated in U.S. courts may be increasingly submitted to arbitration instead. These are all reasons why one might share Professor Burbank's (2012) suspicion that "the underlying premise [of the conventional wisdom about transnational litigation in U.S. courts] may be on the cutting edge of obsolescence" (p. 664)—if it has not already been obsolete for some time.

IV. Empirical Assessment

This section moves from a theoretical to an empirical assessment of the transnational forum shopping claim. Specifically, it empirically evaluates the assertion that transnational litigation in U.S. courts is extensive and increasing, and that this is due primarily to forum shopping by foreign plaintiffs. To do so, it focuses primarily on cases filed in the U.S. District Courts in which there is a foreign plaintiff or foreign defendant and

[63]As Whytock (2008) explains: "[T]he likelihood of arbitration is higher in disputes arising from preexisting relationships such as contracts, because the disputants have an opportunity to enter an ex ante arbitration agreement. Disputants can also agree to arbitration after disputes arise, but this is less common. The likelihood of arbitration is thus lower in disputes, such as many tort disputes, that arise outside the context of a preexisting relationship" (p. 50).

subject matter jurisdiction is based on diversity of citizenship (which I will refer to as "transnational diversity cases").[64] Although the available data are more limited, it also examines transnational federal question filings. Section IV.A describes the data and its limitations; Section IV.B presents the transnational diversity litigation results; and Section IV.C presents the transnational federal question litigation results.

A. Data and Limitations

To estimate the number of transnational diversity cases filed in the U.S. District Courts, this section uses data assembled by the Administrative Office of the U.S. Courts (AO), processed by the Federal Judicial Center (FJC) into a unified Integrated Data Base (IDB), and published on the FJC's website (Federal Judicial Center, n.d.-b).[65] The IDB includes information about every case filed in the U.S. District Courts (Eisenberg & Schlanger, 2003, p. 1456).[66] The information is gathered primarily from a civil cover sheet that plaintiffs' lawyers are required to complete when filing a case (Eisenberg & Schlanger, 2003, p. 1463). Trained court personnel then enter the data and apply a variety of quality assurance methods (Eisenberg & Schlanger, 2003, p. 1462).[67] The FJC then post-processes the data, including by applying further quality assurance methods.[68]

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[64]Diversity-of-citizenship jurisdiction is authorized by 28 U.S.C. § 1332 (a). The more common terminology for what I am calling "transnational diversity cases" is "alienage litigation." See, for example, *Sosa v. Alvarez-Machain*, (2004, p. 717) ("The Judiciary Act … created alienage jurisdiction … ."); *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, (2002, p. 89) ("The state courts' penchant before and after the Revolution to disrupt international relations and discourage foreign investment led directly to the alienage jurisdiction provided by Article III of the Constitution."). However, as Johnson (1996) has commented: "For a variety of reasons …, I find the term 'alien' as used to refer to noncitizens to be unsatisfactory…. The alienage jurisdiction terminology is, in my view, similarly problematic" (Footnote 4). With these concerns in mind, I instead use the term "transnational diversity."

[65]Note that I do not attempt in this analysis to measure the significance of transnational diversity suits in terms of amounts claimed or awarded, both because the focus of the transnational forum shopping claim is on forum shopping and the number of lawsuits filed, and because the AO Data on awards is known to be unreliable (Eisenberg & Schlanger, 2003, pp. 1473–1488).

[66]As Eisenberg and Schlanger (2003) explain: "[O]ne strength of the AO data set is its completeness. Unlike any other data set covering the federal courts, it purports to cover every case filed. And it seems more than likely that this is indeed its coverage. Cases get entered into the database on filing, and there is a built-in check because they get entered again, on termination" (pp. 1462–1463).

[67]Among other things, these personnel are instructed to check the coversheet for accuracy against "the supporting documentation it summarizes" (Technology Training and Support Division, Administrative Office of the United States Courts, 1999, p. 3:3).

[68]For more information about post-processing and quality assurance of the data, see Eisenberg and Schlanger (2003, pp. 1462–1463) ("Court personnel who input the data are trained centrally by the AO; various quality assurance techniques are used to increase consistency and decrease certain kinds of errors.") and Federal Judicial Center (n.d.-b) ("The FJC receives quarterly updates of the case-related data that are routinely reported by the courts to the [AO] and published in the Judicial Business Reports. The FJC then post-processes the data … into a unified longitudinal database, the IDB. The post-process of the data takes several forms…. [For example,] data values that are out of range for the variable are recoded as missing.").

Although the IDB does not include information about many case characteristics that may be of interest to researchers, it does include information that allows estimation of the number of transnational diversity cases filed in the U.S. District Courts each year. First, it includes the date on which each case is filed.[69] Second, it includes a variable that indicates whether the basis for the U.S. District Court's subject matter jurisdiction is diversity of citizenship under 28 U.S.C. § 1332.[70] Third, effective in 1986, the AO changed the coding rules for the variable indicating the citizenship of the principal parties in cases in which subject matter jurisdiction is based on diversity of citizenship, by adding new codes for citizens of foreign countries and for foreign nations.[71] Using these data, I created a new variable, *Transnational Diversity Case*, and coded it as "yes" (1) if there is a foreign plaintiff or foreign defendant and subject matter is based on diversity of citizenship, and "no" (0) otherwise.[72] This allows me to estimate the number of transnational diversity cases filed each year.[73] Due to a possible lag in consistent and reliable implementation of the variable after it was introduced, I

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[69]This is the FILEDATE variable (Federal Judicial Center, n.d.-a).

[70]This is the JURIS variable (Federal Judicial Center, n.d.-a).

[71]This is the RESIDENC variable (Federal Judicial Center, n.d.-a). Specifically, the variable is a two-digit code, for which the first digit indicates the citizenship of the plaintiff and the second digit indicates the citizenship of the defendant. Each digit equals 1 (for "Citizen of this State"), 2 (for "Citizen of another State"), 3 (for "Citizen or Subject of a Foreign Country"), 4 (for "Incorporated or principal place of business in this State"), 5 (for "Incorporated or principal place of business in another State") or 6 (for "Foreign Nation"). Unfortunately, the IDB does not include citizenship information for cases for which subject matter jurisdiction is not based on diversity of citizenship.

[72]This approach closely follows the methodology used in two earlier studies to identify non-U.S. parties in the AO Data in a study of win rates of U.S. versus non-U.S. parties (Clermont & Eisenberg, 1996; Clermont & Eisenberg, 2007). However, unlike those studies, which excluded cases in which the plaintiff or defendant was a foreign nation and cases in which both the plaintiff and the defendant were citizens of a foreign country (Clermont & Eisenberg, 2007, Footnote 39), I included them to avoid undercounting cases that are transnational in the sense of having a non-U.S. party.

[73]Because of the possibility of multiple grounds for subject matter jurisdiction and multiple plaintiffs (and/or multiple defendants), there is a risk of undercounting transnational diversity cases. The possible jurisdictional bases are U.S. plaintiff (1), U.S. defendant (2), federal question (3), diversity (4), and local question (5). The instructions for systems staff and data quality analysts provide as follows: "For those civil actions where more than one of the jurisdictional codes specified below can be applied, the preference should be in the order listed (i.e., United States Plaintiff as highest priority and Local Question as lowest)" (Technology Training and Support Division, Administrative Office of the United States Courts, 1999, p. 3:6). These instructions mean that the *Transnational Diversity Case* variable is likely to produce false negatives when the requirements for federal question jurisdiction and diversity jurisdiction are both satisfied and, in the aggregate, lead to undercounting of cases in which there is a foreign plaintiff or foreign defendant and subject matter jurisdiction is based on diversity of citizenship. Regarding parties, however, the instructions for systems staff and data quality analysts provide as follows: "For those diversity actions where more than one citizenship code can be applied, preference should be given to non-resident businesses and non-citizens of the state" (Technology Training and Support Division, Administrative Office of the United States Courts, 1999, p. 3:8). These instructions mean that when there are multiple plaintiffs (or multiple defendants) and some of them are citizens of the forum state and some of them are citizens of a foreign country, the variable should be coded for citizen of a foreign country. This should help reduce the number of false negatives for the *Transnational Diversity Case* variable and limit the extent of undercounting.

do not include data for 1986 and 1987.[74] I count cases originally filed in the U.S. District Courts (including direct filings in multidistrict litigation) and cases removed from state courts to the U.S. District Courts. Because the IDB counts cases transferred to another judicial district and cases reopened both when they are originally filed and when they are transferred or reopened, I exclude them to avoid double-counting.[75] The Appendix presents the annual number of transnational diversity cases filed in the U.S. District Courts each year.

Researchers have relied on the AO Data for many years (Eisenberg & Schlanger, 2003, p. 1458). The Administrative Office of the U.S. Courts extensively relies on the AO Data for its official statistical reports and for the management of the federal courts (Boyd & Hoffman, 2017, p. 1003). In addition, the Judicial Conference of the United States, which is the policymaking body for the federal courts, relies on these data, including for its recommendations for additional judgeships (Boyd & Hoffman, 2017, pp. 1004–1005). As Professors Eisenberg and Schlanger (2003) have concluded based on a thorough review of research on the AO Data's reliability: "Overall, both field studies and other data sets confirm the general picture of district court litigation suggested by the AO data" (p. 1464). Nevertheless, the AO Data are not perfectly accurate.[76] There are specifically known reliability problems for some variables.[77] However, I am not aware of prior findings indicating systematic problems for the filing date, jurisdictional basis, or citizenship variables that this section uses to estimate the number of transnational diversity cases, and my use of these variables to identify foreign parties is consistent with their use in other studies (Clermont & Eisenberg, 1996, p. 1123; Clermont & Eisenberg, 2007, p. 452).

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[74]Similarly, Clermont and Eisenberg (2007) did not include data for fiscal year 1986 "[b]ecause there is a lag in implementing new codes" (Footnote 38). According to the old coding, 3 = business corporation incorporated in another state, and according to the new coding introduced in SY 1986 3 = citizen of foreign country. A lag in implementing the change could mean that some parties coded as having foreign country citizenship could actually be domestic out-of-state corporate parties. To err on the side of caution, this Article's primary analyses use only data for 1988 and later in order to allow more time for coding to have adapted to this change.

[75]To accomplish this, I used the ORIGIN variable to exclude the following, which the AO Data counts as separate cases for statistical purposes: (a) cases remanded to a District Court for further action (ORIGIN = 3); (b) cases reopened or reinstated for further action (ORIGIN = 4, 8, 9, 10, 11 or 12); (c) cases transferred from another district (ORIGIN = 5); (d) cases transferred from another district by order of the Judicial Panel on Multidistrict Litigation (ORIGIN = 6); and (e) magistrate judge decisions appealed to a District Court (ORIGIN = 7). Because these cases are excluded, case counts presented in this Article may differ from those published by the Administrative Office of the U.S. Courts in their periodic reports. I include cases originally filed in a District Court (ORIGIN = 1), including cases directly filed in a District Court as part of consolidated Multidistrict Litigation proceedings (as opposed to transferred to that court from another district by order of the Judicial Panel on Multidistrict Litigation) (ORIGIN = 13). I also include cases originally filed in a state court and then removed to a District Court (ORIGIN = 2), as this will not result in double-counting (since the AO Data includes only federal court proceedings). For a similar approach to avoiding double counting, see Lee and Willging (2008, p. 1746) (in study of class actions, not counting class actions again when they are transferred, including transferred for consolidation in multidistrict litigation proceedings under 28 U.S.C. § 1407).

[76]As Eisenberg and Schlanger (2003) note, "Like many large data sets, the AO data are not completely accurate" (p. 1458).

[77]For example, Boyd and Hoffman (2017) find problems with certain nature-of-suit codes, and Eisenberg and Schlanger (2003) find problems with the class action and the award amount variables (p. 1464).

B. Transnational Diversity Litigation

1. High Levels of Transnational Diversity Litigation?

As explained in Section II.A, one element of the transnational forum shopping claim is that there are high levels of transnational litigation in U.S. courts. Those making this claim do not specify how high those levels supposedly are. This makes this element of the claim difficult to assess empirically. Nevertheless, data on transnational diversity filings in the U.S. District Courts provide useful empirical context.

According to the data, plaintiffs filed 100,356 transnational diversity cases between 1988 and 2020. During this period, the average number of transnational diversity suits filed annually was 3041 and the median was 2660. As these basic results show, there is a significant amount of transnational diversity litigation in the U.S. District Courts. Because these data do not include diversity litigation between domestic parties involving activity outside the United States, lawsuits over which the federal courts have federal question jurisdiction, or lawsuits filed in U.S. state courts, overall levels of transnational litigation in the United States are surely higher.[78]

How significant a portion of the overall federal caseload is made up of transnational diversity cases? One way to assess this is to compare the number of transnational diversity suits to other types of litigation. Figure 4 plots the number of transnational diversity filings against the number of domestic diversity filings, federal question filings, and total filings in the U.S. District Courts each year from 1988 through 2020.[79] Unsurprisingly, it shows that each year the number of transnational diversity suits filed is much lower than the number of domestic diversity suits and federal question suits. Between 1988 and 2020, transnational diversity cases represented an average of 1.3% of the total civil cases filed in the U.S. District Courts each year, with a minimum of 0.5% (in 2020), a maximum of 3.1% (in 1988), and a median of 1.1%.

Another way of assessing the overall significance of transnational diversity litigation is to examine the percentage of total diversity filings each year that are transnational diversity filings. Between 1988 and 2020, they represented an average of 5.6% of the total number of diversity cases filed each year, with a minimum of 0.8% (in 2020), a maximum of 10.7% (in 1988), and a median of 5.6%. In each year since 2001, transnational diversity filings represented under 6% of total diversity filings, with the exception of 2017 (9.3%). These trends are illustrated graphically in Figure 5.

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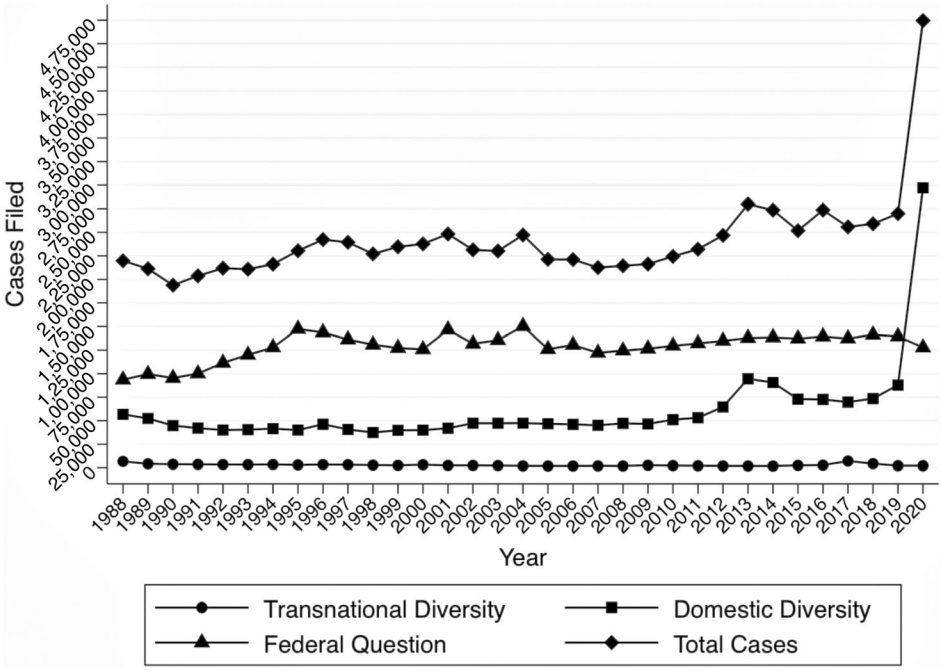
[78]As noted above (Footnote 21), lawsuits based on the Alien Tort Statute have received much attention, but prior studies indicate that comparatively few such cases have been filed.

[79]The Administrative Office of the U.S. Courts has taken note of the dramatic increase (172%) in the number of diversity filings in 2020, attributing it to "more than 200,000 multidistrict litigation (MDL) cases directly filed in a single district alleging that the 3M Company sold its Combat Arms earplugs to the U.S. military without disclosing defects that reduced hearing protection." It added that "[e]xcluding these cases, civil filings would have fallen 10 percent this year, mainly in response to the effects of the COVID-19 pandemic" (Administrative Office of the U.S. Courts, 2020).

Figure 4: Transnational diversity cases and other types of cases (1988–2020).



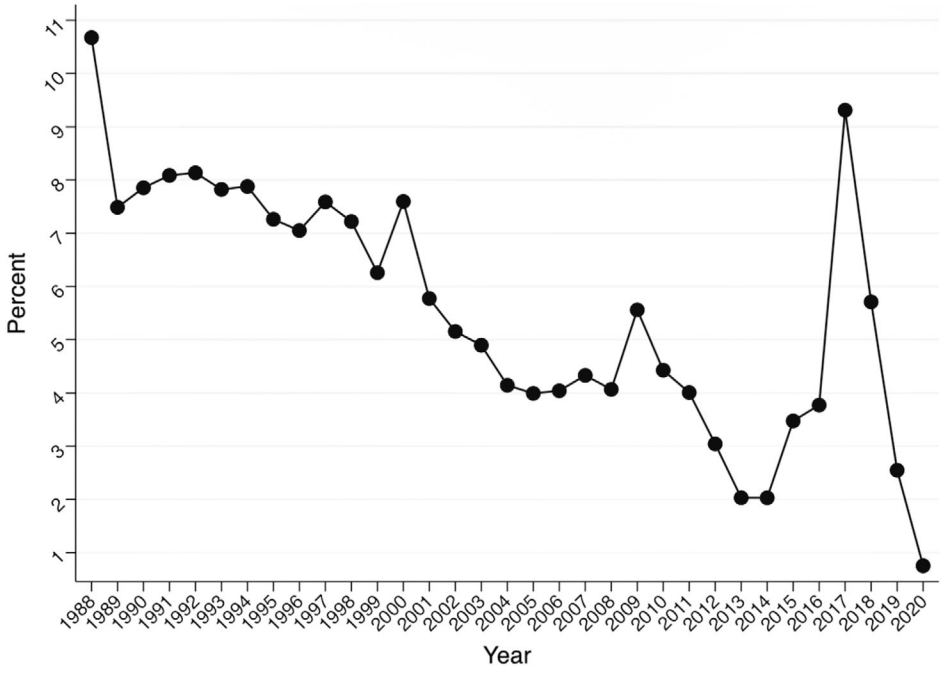
As Figure 5 shows, transnational diversity filings as a percentage of total diversity filings have declined since 1988. The graph has some interesting features. First, there was a particularly large decline in in 1989 (−3.2%). It is unclear whether the sharp 1988–1989 drop in the percentage of transnational diversity filings represents a decline from an earlier spike or, alternatively, a decline from sustained higher percentages prior to 1988.[80]

Another interesting feature is the presence of four particularly large spikes in 2000 (+1.3%), 2009 (+1.5%), 2015 (+1.4%), and 2017 (+5.5%).[81] To understand absolute levels of transnational diversity filings each year, these spikes must be taken into account. However, to highlight overall trends, it is helpful to examine them separately to determine whether they are due to isolated circumstances. To accomplish this, I used the IDB's nature-of-suit variable and data on the names and citizenship of the parties and the judicial district to identify particular types of cases that may account for a given spike.

[80]This feature of the data is further explored, and results based on potentially less reliable 1986–1987 data are reported, in Footnote 88 below.

[81]In absolute numbers, the increases were 629 filings in 2000, 742 in 2009, 746 in 2015, and 4,320 in 2017.

Figure 5: Transnational diversity filings as percent of total diversity filings (1988–2020).



Each of these spikes appears to be due to specific isolated disputes. Analysis of the IDB data indicate that the 2000 spike is due to the filing of 790 asbestos product liability claims by foreign plaintiffs against a U.S. company in the Northern District of Texas.[82] Two groups of claims appear to have contributed to the 2009 spike: (1) 221 personal injury and property damage product liability claims involving defective Chinese-manufactured drywall filed by U.S. plaintiffs against foreign firms, including direct filings in multidistrict litigation in the Eastern District of Louisiana[83] and (2) 85 airplane personal injury claims against a foreign airline, apparently arising out of a 2008 accident.[84]

[82]The IDB indicates that the company is AP Greene Industries.

[83]The IDB indicates that most of these claims were brought against the foreign firm Knauf GIPS KG and related entities. The IDB indicates that in addition to 120 direct filings in the Eastern District of Louisiana multidistrict litigation (MDL 2047), there were 98 additional filings, primarily in the Southern District of Florida.

[84]The IDB indicates that the defendant was Lloyd Aéreo Boliviano. The IDB nature-of-suit code for this litigation is 310 (airplane personal injury claims). The drywall product liability claims and the airplane personal injury claims

Figure 6: Transnational diversity filings as percent of total diversity filings (1988–2020, without spikes).

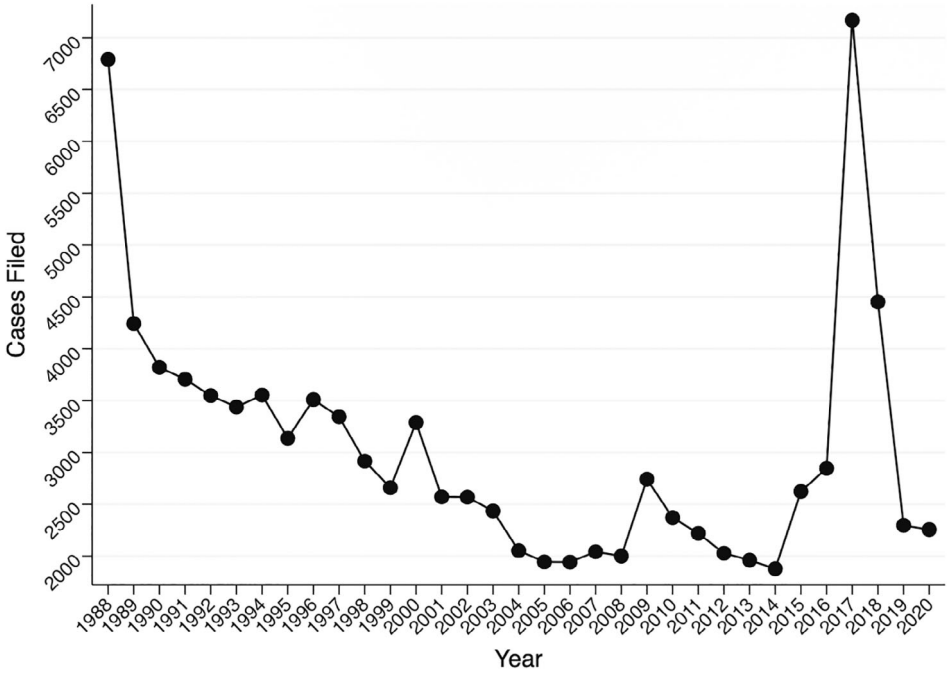
Analysis of the IDB data indicates that the 2015 spike and a portion of the 2017 spike[85] are due to 1072 foreclosure actions filed in the District of Puerto Rico by a foreign affiliate of a U.S. investment management firm against Puerto Rican property owners in the aftermath of Hurricane Maria.[86] It indicates that most of the 2017 spike is due to 7927

account for only 306 filings. I was unable to identify additional isolated groups of claims contributing to the 2009 spike.

[85]The number of transnational diversity filings increased by 744 in 2015, 224 in 2016, and 4319 in 2017, before tapering in 2018.

[86]The IDB indicates that 659 of these foreclosures were filed in 2015, 235 in 2016, 70 in 2017, 47 in 2018, and 61 in 2019. It indicates that the plaintiff was Roosevelt Cayman Asset Company, which appears to be an entity related to the New York-based investment firm Roosevelt Management Company. For more information, see *In re Cubillos* (2015, p. *2) (referring to Roosevelt Management Company as the "agent" of Roosevelt Cayman Asset Company) and Hedge Clippers (2017) (explaining relationship between Roosevelt Management Company, Roosevelt Cayman Asset Company, and other related entities, and discussing the impact of their post-hurricane foreclosure actions on Puerto Rican society). The IDB indicates that the nature-of-suit code for this litigation is 220 (foreclosure actions).

Figure 7: Transnational diversity filings (1988–2020).



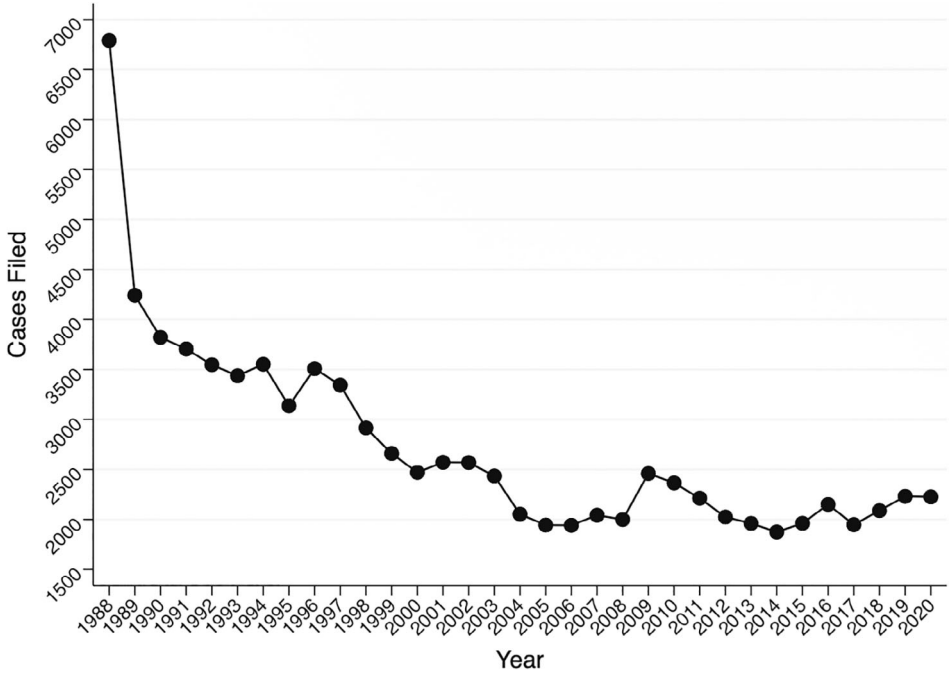
pharmaceutical product liability suits directly filed by U.S. plaintiffs against a foreign company in multidistrict litigation in the Eastern District of Louisiana, involving the cancer medication Taxotere.[87]

In order to highlight overall trends in transnational diversity filings over time, I created a *Spike* variable and coded it as "yes" for cases identified by the foregoing analysis of the IDB data and "no" otherwise. This allows me to present graphical results with these spike cases to show absolute levels of transnational diversity filings and without them to better visualize overall trends over time. To illustrate, Figure 6 shows annual transnational diversity filings as a percentage of overall diversity filings by year, without the spike cases. To make it obvious which graphs do not include the spike cases, they are clearly labeled "Without Spikes."

Whether the absolute numbers and percentages presented above are undesirably high is in the eye of the beholder. Nevertheless, by showing that transnational diversity

[87]The IDB indicates that 461 were filed in 2016 (thus contributing to the 2015–2016 spike), 5146 in 2017, 2316 in 2018, and 4 in 2019. The multidistrict litigation is MDL 2740. The IDB indicates that the defendant is the French pharmaceutical company Sanofi S.A. See *In re Taxotere (Docetaxel) Products Liability Litigation* (2016).

Figure 8: Transnational diversity filings (1988–2020, without spikes).

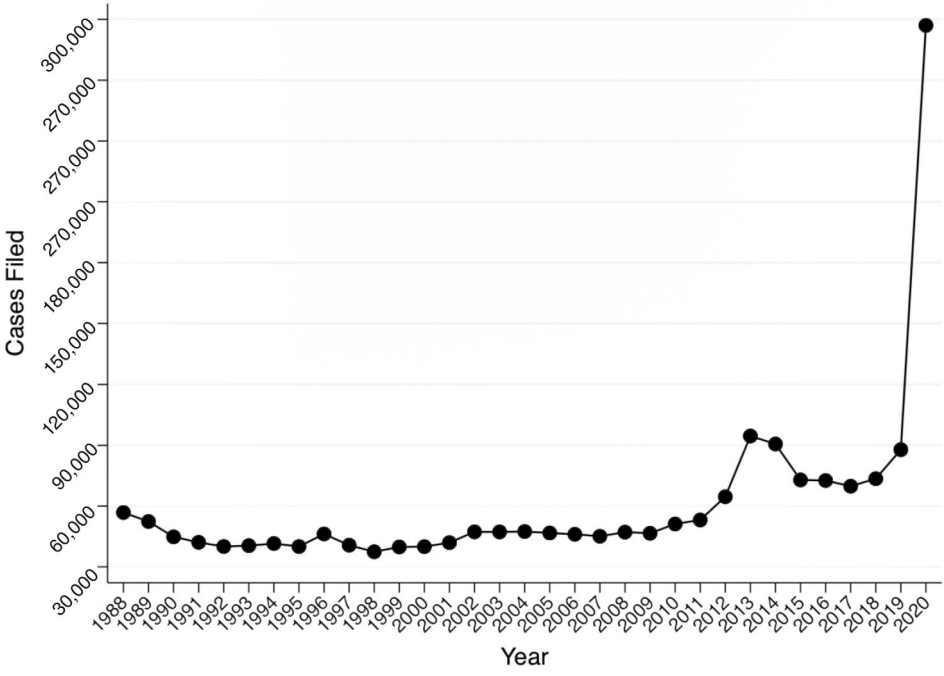


filings constitute only a very small fraction of the total caseload and of the total number of diversity filings in the U.S. District Courts, the analysis provides a previously missing empirical perspective.

C. Increasing Transnational Diversity Litigation?

As Section II.A documented, beyond claims about high levels of transnational litigation, the conventional wisdom is that the number of transnational claims filed in U.S. courts has been increasing—that there has been a "tidal wave" (U.S. Chamber Institute for Legal Reform, 2014, p. 1), an "explosion" (Bies, 2000, p. 489), and a "growing torrent" (Koh, 2008, p. v) of transnational litigation in U.S. courts. The overall decline of transnational diversity filings as a percentage of total diversity filings highlighted above offers preliminary evidence against this aspect of the transnational forum shopping claim. However, because levels of transnational diversity litigation are so low compared to other types of civil litigation in the U.S. District Courts, trends in the absolute levels of transnational diversity litigation over time are almost indiscernible in Figure 4. To reveal these trends, Figure 7 (with spikes) and Figure 8 (without spikes) separately plot the number of transnational diversity cases filed in the U.S. District Courts each year from 1988 through 2020.

Figure 9: Domestic diversity filings (1988–2020).

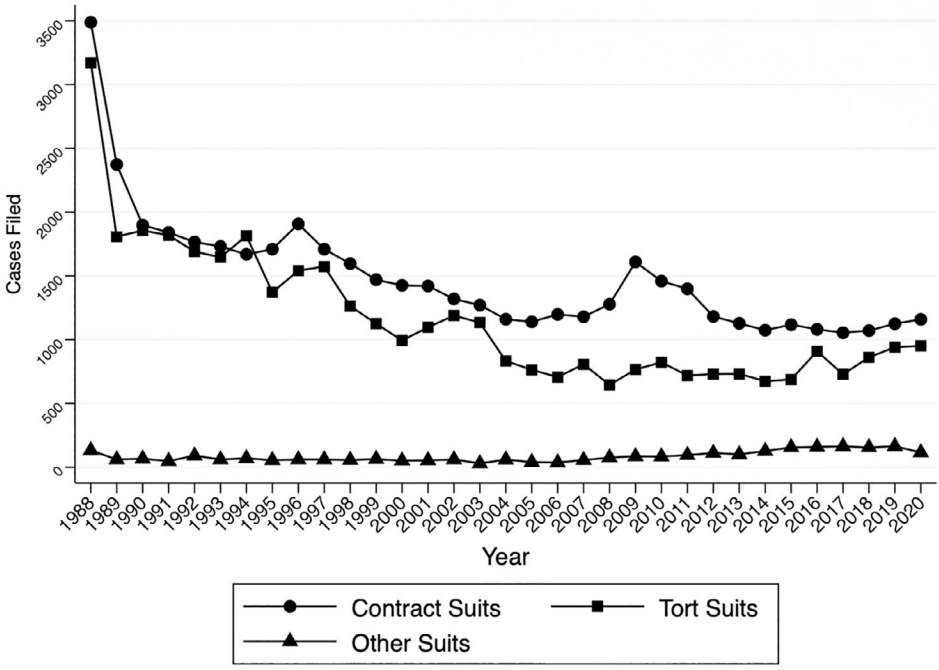


The results do not support the transnational forum shopping claim. As Figures 7 and 8 indicate, the annual number of transnational diversity filings has not increased over the last several decades. To the contrary, it has decreased since 1988, through the 1990s, and into the mid-2000s, and then leveled off overall, with occasional fluctuations (including the spikes discussed above).

As the figures show, the number of transnational diversity filings dropped dramatically in 1989. It is unclear whether the drop suggests that 1988 was a spike, or represents a "correction" after an earlier spike, or a decline from sustained higher numbers of transnational diversity filings prior to 1988.[88] In addition, the drop is so large that the developments documented in Section III would not seem to provide an adequate explanation. Other possible explanations might include amendments to 28 U.S.C. §1332 that went into effect in 1988 to increase the amount-in-controversy requirement from $10,000 to $50,000

[88]For the reasons given in Section IV.A. above, I do not use pre-1988 data in my primary analyses. However, the 1986 and 1987 data would suggest that the drop in Figures 7 and 8 is not merely a correction from an earlier spike (unless the spike began prior to 1986, that is, before the AO Data began tracking foreign parties in diversity suits). To the contrary, the earlier data suggest a longer term downward trend in transnational diversity filings. The number of transnational diversity filings was 15,601 in 1986 and 9,178 in 1987 (and then 6791 in 1988 and 4242 in 1989, as Figures 7 and 8 indicate), suggesting a more sustained decline.

Figure 10: Types of transnational diversity filings (1988–2020, without spikes).



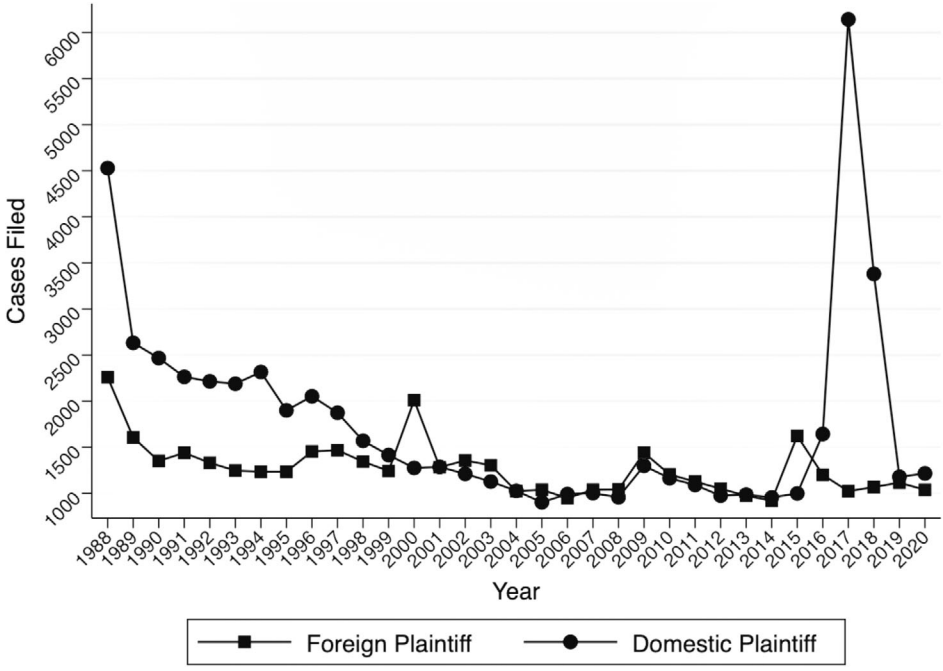
and treat permanent resident noncitizens as state citizens for diversity purposes.[89] My conjecture is that the trends discussed in Section III contributed to the decline, but that these additional factors, along with others, are also likely to be part of the explanation.[90]

Might trends in transnational diversity litigation be part of a broader trend in diversity cases generally? To assess that possibility, Figure 9 plots the annual number of domestic diversity cases by year. Like transnational diversity filings, the number of domestic diversity filings

[89]In suggesting that these factors may help explain the initially very steep drop in the number of transnational diversity filings, I adopt the explanations offered by Clermont and Eisenberg (1996) for the sharp drop in the number of diversity and transnational diversity judgments that they observed during fiscal years 1987–1994: "The domestic drop largely relates to the increase in the jurisdictional amount-in-controversy requirement for cases commenced or removed in 1989 or later … . But the foreign decrease is steadier and greater, owing in part to the classification of permanent resident aliens as state citizens by the [1988 amendment to 28 U.S.C. §1332(a)]" (Footnote 15). The amount-in-controversy requirement was again increased, to $75,000, in 1996 (Friedenthal et al., 2015, p. 45, § 2.8).

[90]Although it would be somewhat surprising if the lag in implementation of the foreign country citizen and foreign nation codes continued to be a significant problem in 1988, it is a possibility, and may also help explain the exceptionally steep decline.

Figure 11: Transnational diversity filings by citizenship of plaintiff (1988–2020).



declined overall through the mid-1990s. However, whereas the decline in transnational diversity filings continued into the mid-2000s, domestic diversity filings began increasing in 1998; and whereas transnational diversity filings declined again after a 2009 spike, domestic diversity filings began further increases after 2009. Transnational diversity filings briefly regained their 1988 levels during a 2017 spike before declining again, whereas domestic diversity litigation has remained above its 1988 levels since 2012.[91] These comparisons suggest that the overall downward trend in transnational diversity filings is not simply part of broader diversity filing trends.

To further explore trends in transnational diversity filings, Figure 10 separates those filings by type of suit.[92] It shows that contract and tort suits predominate over other types of suits, and that these two main types of suits have exhibited similar overall trends. It also suggests that the annual number of transnational contract suits has

[91]As noted above (Footnote 79), the AO has taken note of and provided an explanation for the very large spike in domestic diversity filings in 2020.

[92]To identify contract, tort and other types of suits, I used the IDB's nature-of-suit (NOS) variable. I coded a case as a contract case if NOS was between 110 and 196, inclusive. I coded a case as a tort case if NOS was between 310 and 385 inclusive, 240 or 345. Otherwise, cases were coded as "other" (including various types of property claims).

Table 1: U.S. Plaintiff and Foreign Plaintiff Transnational Diversity Filings (1988–2020)

	U.S. plaintiff filings	*Foreign plaintiff filings*
Average	1766	1275
Median	1288	1236
Maximum	6143	2261
Minimum	904	922
% of total	58.1	41.9

generally been greater than the annual number of transnational tort suits. However, due to known problems with the reliability of the nature-of-suit data in the IDB, it is not possible to make comparisons between absolute levels of contract suits and tort suits with confidence.[93]

1. Forum Shopping by Foreign Plaintiffs?

Section II.A also documented a third common element of the transnational forum shopping claim: that the supposedly high and increasing levels of transnational litigation in U.S. courts are due primarily to forum shopping by foreign plaintiffs. For example, commentators have claimed that "U.S. courts are seeing a dramatic increase in litigation involving foreign plaintiffs" (Diaz, 2005, p. 1647), that the "very clear trend" is "an increase in litigation brought by overseas plaintiffs" (Easton, 2006, p. 9), and that there has been a "flood of foreign plaintiffs" seeking to take advantage of a "generous forum" in the United States (Lewis, 2013, p. 337).[94] To assess this aspect of the transnational forum shopping claim, Figure 11 separately plots transnational diversity suits brought by U.S. plaintiffs and those brought by foreign plaintiffs.

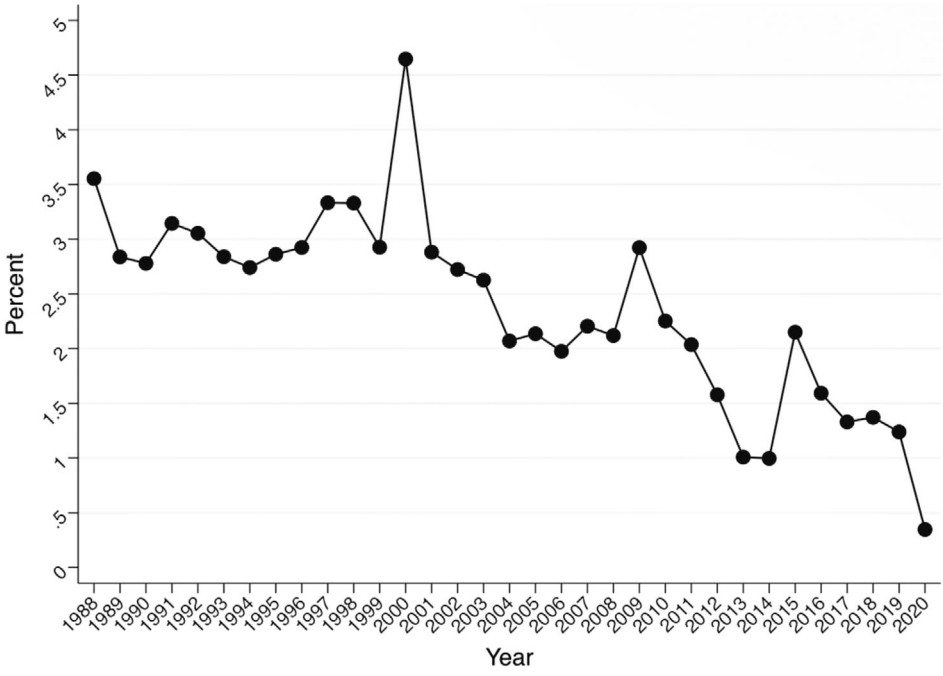
Contrary to the conventional wisdom, Figure 11 does not reveal an overall increase in the number of transnational diversity cases filed by foreign plaintiffs during the last three decades—not to mention a "dramatic increase" or "flood of foreign plaintiffs." Moreover, the number of transnational diversity cases filed by foreign plaintiffs has in almost every year been either lower than or very close to the number filed by U.S. plaintiffs.[95] As Table 1 shows, since 1988 U.S. plaintiffs have been responsible for a higher percentage (58.1%) of

[93]Boyd and Hoffman (2017) find that the contract NOS category suffers from significant reliability issues; for example, while the existence of a contract claim is strongly predictive of being coded with a contract NOS code, other types of claims also are predictive of that coding (pp. 1020–1021).

[94]For similar claims, see Oquendo (2017, p. 72) ("Ever more often, the U.S. judiciary has had to adjudicate claims staked by foreigners, who may or may not reside in the United States …."); Ostrander (2004, p. 582) (claiming "increasing presence of foreign plaintiffs in U.S. courts"); and Weiner (2009, p. 260) ("U.S. courts are increasingly sought out by foreign plaintiffs in connection with foreign accidents.").

[95]The data may overcount foreign plaintiffs and undercount U.S. plaintiffs. This is due to the instructions given to the AO's systems staff and data quality analysts. According to the Technology Training and Support Division, Administrative Office of the United States Courts (1999), "[f]or those diversity actions where more than one citizenship code can be applied, preference should be given to non-resident businesses and non-citizens of the state" (p. 3:8).

Figure 12: Foreign plaintiff transnational diversity filings as percent of total diversity filings (1988–2020).



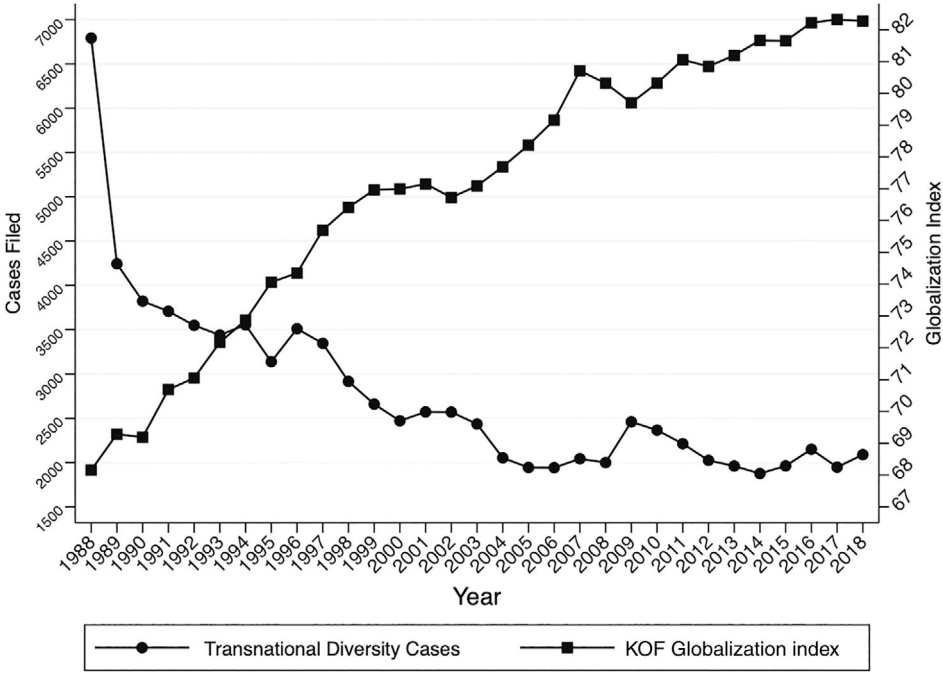
transnational diversity filings than foreign plaintiffs (41.9%), and the average, median, and maximum number of annual filings are all higher for U.S. plaintiffs than foreign plaintiffs.

For further perspective, Figure 12 plots the percentage of total diversity filings in the U.S. District Courts that are filed by foreign plaintiffs. As that figure indicates, this percentage has been below 4% in all but 1 year (2000) and has declined overall over the last several decades.

Any party's choice to file a lawsuit in one forum rather than another potentially available forum might be labeled "forum shopping." In that sense, these results might be interpreted as indicating that there is significant forum shopping by foreign plaintiffs into U.S. courts. However, the results presented in Table 1 and Figures 11 and 12 are difficult to reconcile with the transnational forum shopping claim's focus on forum shopping by foreign plaintiffs in particular.[96] Overall, the data indicate that foreign plaintiffs have not been responsible for more transnational diversity filings than U.S. plaintiffs.

[96]Moreover, in some (perhaps many) cases, a foreign plaintiff might not be able to bring a claim against a U.S. defendant in their home country because courts there might not have jurisdiction over the U.S. defendant. In such circumstances, a foreign plaintiff's decision to file a claim against a U.S. defendant in a U.S. court arguably is not an instance of "forum shopping." For concepts of forum shopping that are premised on at least two available forums, see, for example, Bell (2003,

Figure 13: Transnational diversity filings (without spikes) and KOF Globalization Index (1988–2018).



2. Globalization, Tort Reform, and Transnational Arbitration

Part of the transnational forum shopping claim's underlying logic is that increasing globalization has led to increasing transnational disputes, which in turn has led to increasing transnational litigation in U.S. courts due to procedural and substantive law that is more favorable to plaintiffs compared to other legal systems. Section III argued that the spread of tort reform in U.S. states and the growth of transnational commercial arbitration as an alternative to litigation might lead one to question this logic. To put this section's findings in perspective, and as a very preliminary probe of the plausibility of the conjectures developed in Section III, this section returns to the globalization, tort reform, and transnational commercial arbitration data presented in Section III to compare it to trends in transnational diversity litigation.

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p. 5) ("The existence of concurrent jurisdiction is the sine qua non for [forum shopping].") and Juenger (1989, p. 554) ("[F]orum shopping connotes the exercise of the plaintiff's option to bring a lawsuit in one of several different courts.").

Figure 14: Transnational tort filings (without spikes) and tort reform index (nationwide average) (1988–2018).

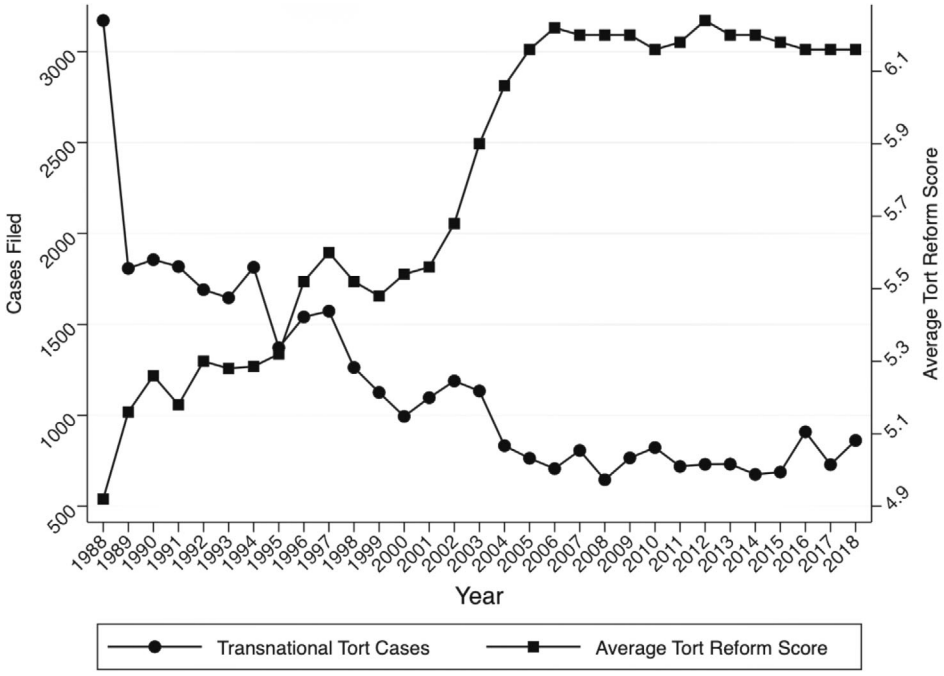


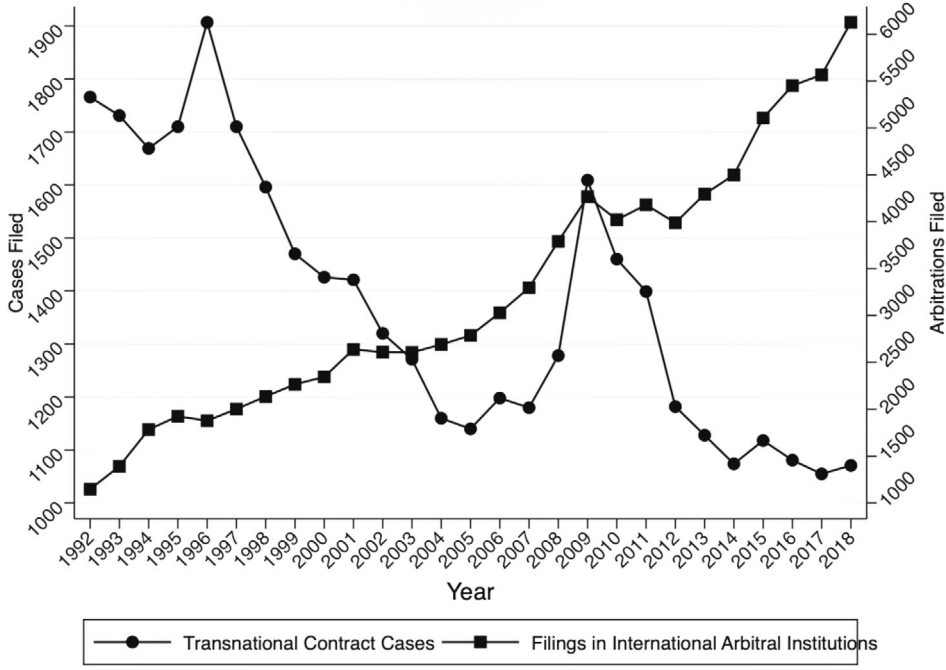
Figure 13 plots the number of transnational diversity suits against the Swiss Economic Institute's KOF Globalization Index.[97] Contrary to the transnational forum shopping claim, it highlights that transnational diversity filings have not increased in the last several decades despite a steady increase of globalization during that same period.

Section III.B.2 provided evidence that the substantive law attraction of U.S. courts—at least for tort claims—may be waning with the spread of so-called "tort reform" in the United States. Figure 14 plots the tort reform index used in Section III.B.2 against transnational diversity tort claim filings.[98] It indicates that as tort reform has spread across the United States, transnational diversity tort suit filings have decreased. This negative correlation is quite stark, and it is consistent with Section III's critique of the transnational forum shopping claim's underlying logic. This correlation does not, of

[97]This globalization index is described above in Footnote 23.

[98]This tort reform index is described in Footnote 48. To identify transnational diversity tort claims in the IDB, I used the IDB's "nature of suit" (NOS) code. A study of the NOS codes indicates that some of them are unreliable; however, the study finds that the tort NOS category performs relatively well (Boyd & Hoffman, 2017, p. 1020).

Figure 15: Transnational contract suits and caseload of international arbitral institutions (1992–2018).



course, demonstrate causation. However, it does suggest that such a relationship might be plausible, and that further theoretical and empirical investigation may be promising.

In addition, Section III.D noted the rise of arbitration as a leading method for resolving transnational disputes and conjectured that transnational disputes that might once have been filed in U.S. courts may be increasingly submitted to arbitration instead, thus dampening any increase in transnational litigation in U.S. courts that might otherwise have occurred due to globalization. Any such "substitution effect" would seem somewhat implausible outside the realm of contract disputes involving pre-existing relationships and an ex ante agreements to arbitration.[99] Therefore, Figure 15 combines the same plot of arbitrations in the world's leading international arbitral institutions presented in Section III.D with a plot of transnational diversity contract claims filed in the U.S. District Courts. The results show a negative correlation that is

[99]As Whytock (2008) explains: "[T]he likelihood of arbitration is higher in disputes arising from preexisting relationships such as contracts, because the disputants have an opportunity to enter an ex ante arbitration agreement. Disputants can also agree to arbitration after disputes arise, but this is less common. The likelihood of arbitration is thus lower in disputes, such as many tort disputes, that arise outside the context of a preexisting relationship" (p. 50).

consistent with Section III's critique of the transnational forum shopping claim.[100] Again, however, no causal claim can be made without further theoretical and empirical investigation.[101] Figure 15 merely suggests that the substitution hypothesis might have some plausibility as an explanation for some portion of the decline in transnational contract filings, and thus might be deserving of further theoretical and empirical evaluation.

D. Transnational Federal Question Litigation

In addition to transnational diversity litigation, there are transnational cases over which the U.S. District Courts have federal question jurisdiction.[102] If transnational federal question litigation is increasing, the overall significance of transnational litigation in the United States may be greater than Section IV.B's analysis of transnational diversity litigation would suggest.

There are several reasons not to expect increasing levels of transnational federal question litigation. First, one of the principal reasons to question the transnational forum shopping claim applies not only to diversity cases, but also federal question cases—namely, changes in procedural law in the United States and around the world that are making the U.S. legal system less attractive to plaintiffs than it supposedly once was compared to other legal systems. Second, the extraterritorial reach of U.S. federal statutes is limited (*Equal Employment Opportunity Comm'n v. Arabian American Oil Co.*, 1991), and the U.S. Supreme Court has recently tightened those limitations by reinvigorating the presumption against extraterritoriality, including in *Morrison v. National Australia Bank Ltd.* (2010) and *RJR Nabisco, Inc. v. European Community* (2016).[103] Third, although claims based on the Alien Tort Statute (ATS)[104] have attracted considerable attention, they have long faced considerable procedural barriers

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[100]Analysis of the IDB data indicates that a major portion of the 2009 spike appearing in Figure 15 consists of 165 cases (and an additional 73 in 2010 and 148 in 2011) filed in the Middle District of Florida by foreign plaintiffs against a single U.S. company in a dispute over condominium purchases. As explained in *In re Lake Austin Properties I, Ltd. Litigation* (2009): "Plaintiffs in these related cases seek revocation and/or rescission of their condominium purchase contracts and awards of money damages for violations of federal and state law allegedly committed by Lake Austin Properties …" (p. *1).

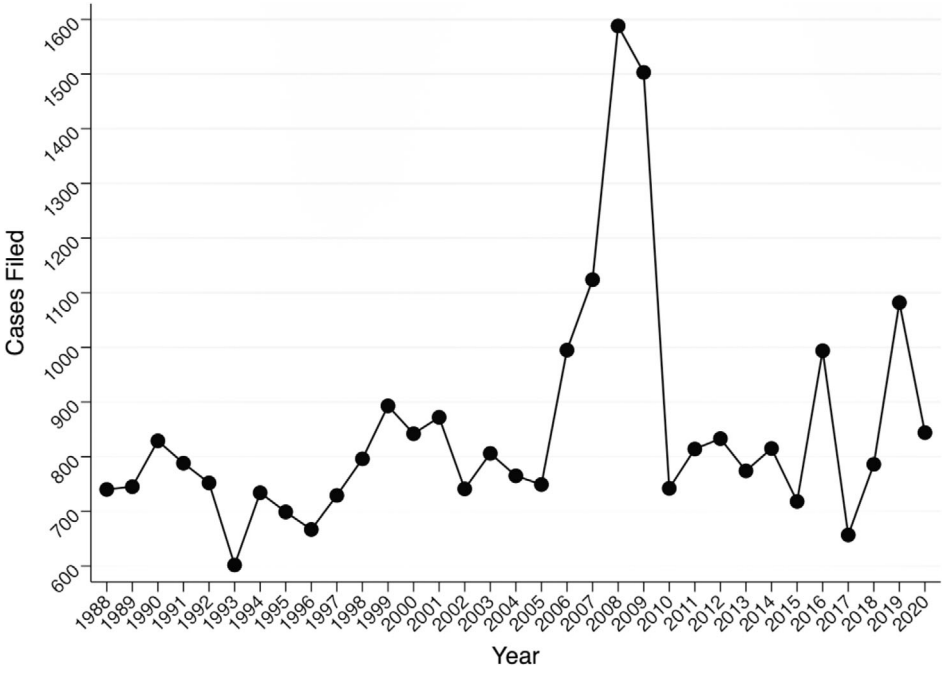
[101]To identify transnational diversity contract claims in the IDB, I again used the IDB's "nature of suit" (NOS) code. However, the Boyd and Hoffman study noted above finds that the contract NOS category suffers from significant reliability issues. For example, while the existence of a contract claim is strongly predictive of begin coded with a contract NOS code, other types of claims also are predictive of that coding (Boyd & Hoffman, 2017, pp. 1020–1021). This is another reason to be cautious about inferring any cause-and-effect relationship from this figure.

[102]28 U.S.C. § 1331 authorizes this basis of subject matter jurisdiction. If there is federal question jurisdiction, there may also be supplemental jurisdiction over related non-federal question claims under 28 U.S.C. § 1367.

[103]Bonomi and Nadakavukaren Schefer (2018) link these cases to the curtailed transnational reach of U.S. courts (p. 8).

[104]Under 28 U.S.C. §1350, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

Figure 16: Federal question filings by foreign resident plaintiffs (1988–2020).

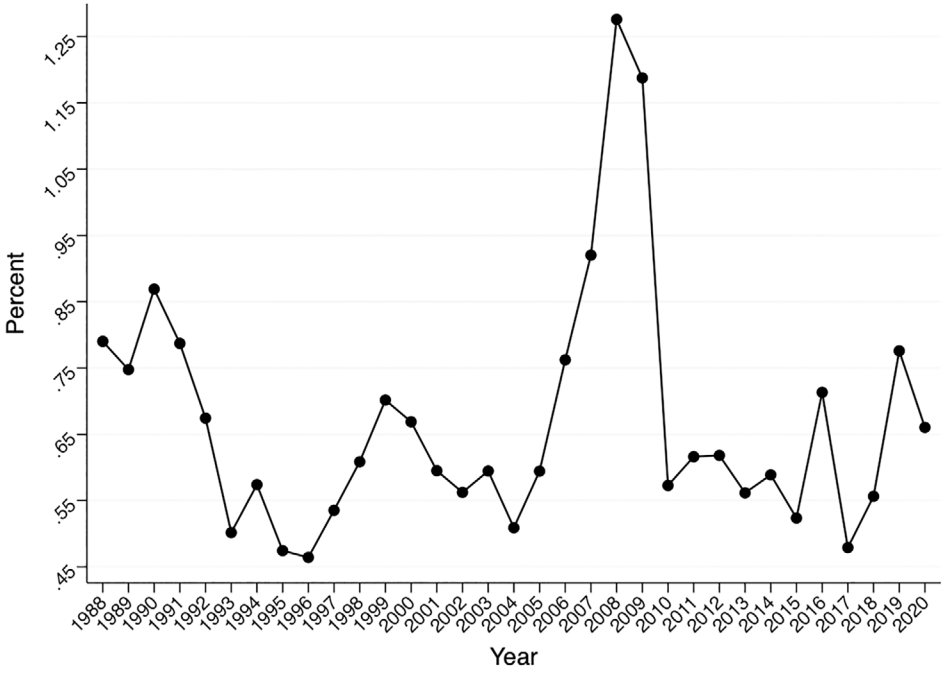


(Whytock et al., 2013) and the statute's reach has recently been dramatically curtailed (*Kiobel v. Royal Dutch Petroleum Co.*, 2013; *Jesner v. Arab Bank PLC*, 2018). It would be surprising to find increasing numbers of transnational federal question filings at the same time these developments have been unfolding.

The limited available data appear to be consistent with these intuitions. There is no information in the IDB about the citizenship of the parties in federal question cases, but the IDB does include a variable that indicates the plaintiff's county of residence at the time of filing, and it includes a code indicating whether that place of residence is outside the United States.[105] Unfortunately, there are no such data for defendants. As a result, the IDB makes it possible to estimate the number of federal question claims brought by plaintiffs residing outside the United States, but not the number brought by U.S. residents. For this reason, and because it appears that the IDB's county data have not been relied upon or carefully examined by scholars,

[105]The variable is "COUNTY." If the county is located outside the United States, the COUNTY variable is coded as 99999.

Figure 17: Percent of federal question filings by foreign resident plaintiffs (1988–2020).



inferences about transnational litigation based on this data should be considered tentative.[106]

Subject to these caveats, the annual number of federal question cases filed by foreign resident plaintiffs has ranged from a minimum of 602 (in 1993) to a maximum of 1588 (in 2008), with an annual average of 849 and a median of 788. This is considerably lower than the annual average of 1275 and median of 1236 transnational diversity filings by foreign plaintiffs.[107] The data also offer some insights into the nature of these cases. It

[106]For an exception, see Eisenberg and Wells (2002, p. 1848) (brief reference to and use of the IDB's county variable, but not to 99999 code for county outside the United States).

[107]See Table 1. The AO's statistical reporting guide instructs a case to be coded as federal question jurisdiction if it could be coded as either federal question jurisdiction or diversity jurisdiction (Technology Training and Support Division, Administrative Office of the United States Courts, 1999, p. 3:6) ("For those civil actions where more than one of the jurisdictional codes specified below can be applied, the preference should be in the order listed…."; federal question jurisdiction is listed before diversity jurisdiction); Instructions for attorneys completing civil cover sheet Form JS 44 (2021) ("federal question actions take precedence over diversity cases" when entering information). This may lead to over-counting federal question claims filed by foreign resident plaintiffs and

indicates that two types of suits predominate federal question filings by foreign resident plaintiffs. Intellectual property suits make up 31.3% of these filings.[108] Marine contract actions (admiralty or maritime suits "based on service, employment, insurance or other contracts relating to maritime vessels and other maritime contractual matters") make up another 26.5%.[109] The Appendix presents the annual number of federal question cases filed by foreign resident plaintiffs in the U.S. District Courts.

To reveal trends over time, Figure 16 plots the annual number of federal question cases filed in the U.S. District Courts by foreign resident plaintiffs. The annual number of filings has fluctuated considerably. There are significant spikes in 3 years, each of which can be attributed to a particular dispute or a temporary increase in a particular type of suit: 2008,[110] 2016,[111] and 2019.[112] Aside from these spikes, the annual number of filings has generally ranged between 700 and 900. Figure 16 reveals no sustained overall upward trend in federal question filings by plaintiffs residing outside the United States. The annual average number of filings was 748 in 1988–1999 (median 743), then increased to 999 (median 857) in 2000–2009, before declining to 824 (median 814) in 2010–2020.

For additional perspective, Figure 17 plots federal question filings by foreign resident plaintiffs as a percentage of total federal question filings. The average annual percentage of federal question cases filed by foreign resident plaintiffs ranged between 0.5% and 1.3% for an average of 0.7% and a median of 0.6%. This percentage has in most years been less than three quarters of 1%, and it exceeded 1% in only 2 years

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undercounting diversity claims filed by foreign citizens. This should be kept in mind when comparing levels and percentages of these two types of transnational cases.

[108]The IDB's nature-of-suit code for intellectual property suits are 820 (copyright), 830 (patent) and 840 (trademark) (Federal Judicial Center, n.d.-a).

[109]Administrative Office of the United States Courts (2021). The IDB's nature-of-suit code for marine contract actions is 120.

[110]The number increased from 749 to 995 in 2006 (+246 cases), to 1123 in 2007 (+128 cases), and to 1588 in 2008 (+465 cases). Then 1502 cases were filed in 2009. The spike reflects a surge in the number of maritime contract claims filed in the Southern District of New York (+164 in 2006, +187 in 2007, and +486 in 2008, before dropping by 172 in 2009 and by 729 in 2010). The IDB's maritime contract claims code stands for "Action (Admiralty or Maritime) based on service, employment, insurance or other contracts relating to maritime vessels and other maritime contractual matters" (Administrative Office of the United States Courts, 2021). My analysis of the IDB data did not identify any commonalities between these cases or the cause of this rapid rise and fall of maritime contract filings.

[111]The number of federal question cases filed by foreign resident plaintiffs increased from 718 to 994 in 2016 (+276). My analysis of the IDB data indicates that this surge is due to 314 cases filed against BP P.L.C. in the Eastern District of Louisiana, apparently in the aftermath of the 2010 Deepwater Horizon oil spill (*In re Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mexico, on April 20, 2010*, 2020).

[112]The number of federal question cases filed by foreign resident plaintiffs increased from 783 to 1078 in 2019 (+295). Analysis of the IDB data indicates that this spike is due largely to 162 bankruptcy appeals filed by the debtor Fairfield Sentry Limited, a British Virgin Islands entity, against various creditors under 28 U.S.C. § 158 in the Southern District of New York (*In re Fairfield Sentry Ltd.*, 2020). Fairfield was among the foreign "feeder funds" into "the Ponzi scheme perpetrated by Bernard L. Madoff through the investment advisory division of Bernard L. Madoff Investment Securities LLC" (p. *1).

(2008 and 2009). For comparison, the annual percentage of diversity cases filed by foreign plaintiffs ranged from 0.4% to 4.7% (average 2.4%, median 2.6%). Overall, these results indicate that federal question filings by foreign resident plaintiffs represent a very small percentage of federal question filings overall, and although there are fluctuations (including the aforementioned spikes), there is no indication of a sustained increase.

Transnational diversity filings, unlike foreign county resident plaintiff federal question filings, have decreased overall since 1988. Yet many of Section III's conjectures would seem to apply similarly to both types of filings. What, then, might explain this difference? One possibility might be the changes increasing the amount-in-controversy requirement for diversity jurisdiction in 1988 and 1996, which do not apply to federal question cases. Another is that some of the factors that might help explain the decline in transnational diversity filings—such as tort reform and the rise of arbitration—might not apply to, or might not have the same influence on, federal question filings. Further investigation would be needed to shed light on this question.

In summary, both legal developments and available data suggest that the number of federal question cases filed by foreign resident plaintiffs has not been increasing. Although the available data do not allow a similar analysis of transnational federal question filings by U.S. plaintiffs, these findings raise further doubts about the conventional wisdom that there are high and increasing levels of transnational litigation in U.S. courts due largely to forum shopping by foreign plaintiffs.

V. Conclusion: Implications for Law, Policy, and Transnational Litigation Scholarship

This article has documented the transnational forum shopping claim—the conventional wisdom that transnational litigation in U.S. courts is extensive and increasing, largely due to forum shopping by foreign plaintiffs—and it has challenged that claim theoretically and empirically. At the same time some of the attractions of the U.S. legal system have been fading, other legal systems are increasingly adopting procedural and substantive features similar to those that were said to have made the United States a "magnet forum." As the United States has entered a period of "litigation isolationism" (Bookman, 2015), other countries have been "forum selling" (Bechtold et al., 2019) and arbitration has become an increasingly important method for resolving transnational disputes (Strong, 2013). These trends raise significant doubts about the transnational forum shopping claim's underlying premises.

Empirically, the article's analysis shows that transnational diversity filings constitute a significant but small portion of overall diversity filings; that they have decreased overall since at least the mid-1980s and then stabilized, with occasional fluctuations; and that foreign plaintiffs are not primarily responsible for transnational diversity litigation in the U.S. District Courts. The analysis also shows that transnational federal question filings by foreign resident plaintiffs are not extensive or increasing either.

This article's analysis is, however, only a first step in the empirical investigation of transnational litigation in U.S. courts. For example, it remains unclear what trends exist in transnational federal question litigation brought by U.S. plaintiffs, transnational litigation in U.S. state courts,[113] and transnational class actions in U.S. courts.[114] If any of these are extensive or increasing, the overall significance of transnational litigation in U.S. courts may be greater than this article's analysis suggests.[115] But given the virtual absence of data provided by proponents of the transnational forum shopping claim, even the partial empirical picture provided by this article is an improvement.

This article's findings have significant implications for law and policy. The transnational forum shopping claim has been used by lawyers to argue for dismissing lawsuits from U.S. courts and it is a centerpiece of business-oriented interest group efforts to advocate for legal changes aimed at deterring transnational claims in U.S. courts. But this article's findings challenge the theoretical and empirical validity of this justification for dismissals and law reform. This does not mean that reforms are necessarily unwarranted,[116] but it does suggest that extensive and increasing forum shopping by

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[113]Some scholars argue that there may be reasons to expect plaintiffs to increasingly prefer U.S. state courts over federal courts for transnational litigation (Childress, 2012; Clark, 2014; Davis & Whytock, 2018). Unfortunately, comprehensive data on transnational litigation in state courts is not currently available.

[114]There are doctrinal reasons to doubt that transnational class actions would be increasing, such as those given by Bradt and Rave (2018, p. 1266) (noting the "demise of the mass tort class action"); Burbank (2012, p. 664) (documenting the "assault on class actions" and discussing implications for transnational litigation in U.S. courts); Clopton (2015) (noting barriers to class actions due to reluctance to certify classes including non-U.S. citizens); Hensler (2017, p. 965) ("In recent years, as the U.S. Supreme Court has steadily closed the courthouse doors to class actions in the United States, an increasing number of foreign jurisdictions have adopted some form of representative group proceeding along the lines of a modern class action."); Klonoff (2013) (cataloging growing barriers to class actions, such as heightened evidentiary burdens, stringent class definition requirements, and heightened scrutiny of numerosity, commonality and predominance); and Lein (2018, p. 144) (explaining why the United States has become "less attractive for cross-border [class actions] involving European claimants"). Preliminary analysis of the IDB data suggests that the number of transnational diversity and foreign plaintiff federal question filings with class action allegations has been increasing, but that they have recently decreased as a percentage of total diversity and federal question filings with class action allegations, and it reveals no steady increase in the number for which courts have granted class action status. Because the transnational diversity data are difficult to interpret due to the shift of class actions from state courts to federal courts after the Class Action Fairness Act's entry into effect in 2005, and because the IDB data on class actions is known to be unreliable, a more extensive analysis is not presented here. As a Federal Judicial Center study concludes, "there are no reliable national data on class action activity in the federal courts" (Willging et al., 1995, p. 1).

[115]In addition, it is possible that even if the number of transnational cases filed in U.S. courts is not increasing, the significance of those cases—for example, in terms of the amount of damages sought or awarded—may be increasing (see, for example, Zambrano, 2019, p. 2131) (arguing that "federal [judicial] expansion has been mostly about the composition of docket loads, not the sheer number of cases"). It is unclear whether the pattern described by Professor Zambrano extends to transnational litigation particularly. Further theoretical and empirical investigation would be desirable to explore this possibility.

[116]Even if the transnational forum shopping claim is exaggerated as an empirical matter, there may still be legitimate normative concerns about transnational forum shopping. For critics of forum shopping, this Article's empirical analysis will not address those concerns. After all, a small and decreasing or stable amount of a bad thing may still be a bad thing.

foreign plaintiffs is not a sound justification for them and that limits on court access for transnational cases may affect U.S. plaintiffs as much as—or even more than—foreign plaintiffs. Given the lack of evidence supporting the transnational forum shopping claim, it would seem to be an improper basis for legal decisionmaking and policymaking.

Why has the transnational forum shopping claim persisted despite the lack of supporting evidence? This article does not aim to answer that question, but several plausible answers suggest themselves. First, as in other areas of law,[117] interest groups surely have played a significant role in promoting the claim, stating and restating it as if it were a given, typically without supporting evidence (other than occasional anecdotal cases).[118] Indeed, perhaps the changes in U.S. procedural and substantive law discussed in Section III.B tell a success story for proponents of the transnational forum shopping claim who have used it to advocate for those changes. Alternatively, given the changes in foreign legal systems discussed in Section III.C that may be making foreign courts more attractive, perhaps the story is about opening a transnational forum shopping Pandora's box that business oriented interest groups may come to regret. For their part, scholars of transnational litigation have not been immune from the tendency to repeat the conventional wisdom, citing as authority earlier sources that themselves made the claim without supporting evidence—perhaps in an effort to validate the field's importance.

This article's findings should not, however, raise doubts about the importance of transnational litigation scholarship. To the contrary, the empirical results confirm that there is indeed a significant amount of transnational litigation in U.S. courts. The field's significance need not rely on the shaky claim that transnational litigation in U.S. courts is extensive and increasing due to forum shopping by foreign plaintiffs. This article's analysis implies new directions for transnational litigation scholarship that might invigorate it and perhaps convince skeptics that it is indeed a genuine and distinct field.[119] Even if the United States continues to be attractive to many litigants, this article paints a picture of transnational litigation that is very different from the U.S.-centric perspective

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[117]For studies exploring interest group influence in law reform, see, for example, Burbank and Farhang (2017a, 2017b, p. 25) ("By the late 1970s and early 1980s, a deregulatory movement was afoot, primarily catalyzed by businesses, trade associations, state and local officials, and newly emergent conservative public interest groups.") and Engel (2016, p. 11) ("In the 1980s, tort reformers took on what they characterized as an 'explosion' of tort litigation, asserting a direct link between injury lawsuits and skyrocketing insurance rates, although there is compelling evidence that such a link simply doesn't exist.").

[118]For examples, see U.S. Chamber Institute for Legal Reform (2014) ("[I]n recent years, … the United States has begun attracting … litigants. In ever increasing numbers, foreign plaintiffs and their lawyers (normally U.S. lawyers) are declaring U.S. courts to be their forum of choice for suing companies regarding alleged actions and events that have little or no connection to the United States.") and U.S. Chamber Institute for Legal Reform (2010) ("Over the past several decades, American companies have faced a tidal wave of lawsuits attempting to import foreign controversies into U.S. courts. Overseas plaintiffs seek out U.S. courts to take advantage of distinctively permissive features of the American judicial system, including liberal discovery rules, punitive damages, class action contingency fee arrangements, jury trials, and the absence of 'loser pays' fee-shifting.").

[119]On the debate about whether transnational litigation is a field, see, for example, Baumgartner (2007), Burbank (1991), Dubinsky (2008), and Silberman (2006).

propagated by the transnational forum shopping claim. It suggests "an era of ever increasing multipolarity" in transnational litigation characterized by "the growing relative importance of non-U.S. forums" (Quintanilla & Whytock, 2011, p. 32). This outlook is consistent with Professor Childress' call for a reconceptualization of transnational litigation in which "litigant choice operates within a transnational law market where U.S. and foreign courts compete through their substantive and procedural laws for transnational cases" (Childress, 2015, p. 1002).

The first U.S.-focused wave of transnational litigation teaching and scholarship provides valuable foundations[120] for a potentially even more ambitious path for the field toward understanding transnational litigation in global context. Theoretically, one challenge will be to understand transnational forum selection in this more complex global environment, in which litigants do not simply fight to be in or out of the U.S. legal system but instead engage in more complex multinational analysis and strategic behavior to determine how and where they will resolve their disputes. A second challenge will be incorporating not just the "demand" side (represented by forum shopping plaintiffs or reverse-forum shopping defendants), but also the "supply" side (represented by "forum selling" legal systems that compete for litigation) of the global law market (Childress, 2015, p. 1008). A third is to develop a more sophisticated theory of the factors that influence the forum selection decisions of transnational disputants—including, but not limited to, the sorts of procedural and substantive law features outlined in Section-III.[121] New approaches to the normative analysis of forum shopping that look beyond forum shopping into U.S. courts to more systematically consider the implications of forum shopping in global context offer a fourth promising avenue for further research (Bassett, 2006; Bookman, 2016).

There also is an empirical side to the research agenda implied by this article's analysis. Beyond the desirability of improved and more complete data on transnational litigation in U.S. courts, robust cross-national data on transnational litigation trends and theoretically relevant features of domestic legal systems will be an important complement to theory building about transnational litigation in global context. To ensure comparability of data, it would be fruitful for this research to be undertaken collaboratively by scholars with expertise in different legal systems.

Finally, scholars might consider what a less U.S.-centric transnational litigation environment means for the global influence of U.S. courts and, more generally, U.S. law. Is that influence waning? Lehmann (2018) argues that the United States' reduced receptiveness to transnational litigation "will…reduce US influence throughout the world" (p. 221). And would that be a good thing or a bad thing? As another observer speculated: "On the one hand, from a U.S. perspective, one might lament a decline in the influence of U.S. courts and U.S. law in global governance. On the other hand, this may be seen as

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[120]For one of the foundational works, see Born and Rutledge (2018).

[121]Bigger questions about the field may also be raised. In a world in which international arbitral tribunals and international and regional courts are playing important roles, is "transnational dispute resolution" a more apt description of what is being studied than "transnational litigation"?

good news for other states that previously exerted relatively little influence in the governance of transnational activity" (Whytock, 2012, pp. 67–68).

This article has not argued that the United States was never a "magnet forum," but it has offered theoretical and empirical reasons to question whether the United States is still as favorable to plaintiffs and as attractive a forum shopping destination compared to other legal systems as it supposedly once was. In the interest of evidence-based law reform, and in the interest of a better understanding of transnational litigation in global context, the wise approach is to no longer use the "magnet forum" label to describe the U.S. legal system. And it would be best to retire Lord Denning's quip—as memorable as it is—about plaintiffs, like moths, being drawn to the United States. The evidence suggests that the light of the U.S. legal system no longer shines as brightly as it once did.

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Appendix A: Cases Filed in U.S. District Courts (1988–2020)

Years	*Total cases*	*Federal question*	*Diversity*	*Domestic diversity*	*Transnational diversity*	*Transnational as % of total diversity*	*Foreign plaintiff federal question*	*Foreign plaintiff federal question as % of total federal question*
1988	219,774	93,648	63,623	56,830	6791	10.7	740	0.8
1989	211,301	99,637	56,657	52,410	4242	7.5	745	0.7
1990	193,823	95,397	48,652	44,825	3821	7.9	829	0.9
1991	203,731	100,110	45,829	42,121	3706	8.1	788	0.8
1992	211,926	111,505	43,612	40,064	3548	8.1	752	0.7
1993	210,824	120,014	43,943	40,505	3438	7.8	602	0.5
1994	216,147	127,865	45,097	41,544	3553	7.9	734	0.6
1995	230,464	147,350	43,191	40,054	3137	7.3	699	0.5
1996	242,259	143,698	49,759	46,250	3509	7.1	667	0.5
1997	239,452	136,179	44,065	40,721	3344	7.6	729	0.5
1998	227,111	130,795	40,389	37,473	2916	7.2	796	0.6
1999	234,605	127,252	42,506	39,846	2660	6.3	893	0.7
2000	237,693	125,867	43,300	40,011	3289	7.6	842	0.7
2001	248,254	146,538	44,561	41,989	2572	5.8	872	0.6
2002	231,395	131,762	49,879	47,309	2570	5.2	741	0.6
2003	230,222	135,549	49,731	47,296	2435	4.9	806	0.6
2004	247,180	150,293	49,519	47,466	2053	4.1	765	0.5
2005	221,312	126,008	48,688	46,744	1944	4.0	749	0.6
2006	221,064	130,500	48,045	46,103	1942	4.0	995	0.8
2007	212,585	122,147	47,168	45,125	2043	4.3	1124	0.9
2008	214,449	124,463	49,167	47,167	2000	4.1	1588	1.3
2009	216,318	126,561	49,335	46,593	2742	5.6	1503	1.2
2010	224,467	129,544	53,542	51,171	2371	4.4	742	0.6
2011	232,100	132,096	55,380	53,160	2220	4.0	814	0.6
2012	246,818	134,749	66,653	64,625	2028	3.0	833	0.6
2013	279,902	137,815	96,536	94,575	1961	2.0	774	0.6
2014	273,537	138,411	92,511	90,633	1878	2.0	815	0.6
2015	251,806	137,120	75,530	72,906	2624	3.5	718	0.5
2016	273,640	139,336	75,467	72,620	2847	3.8	994	0.7
2017	255,761	137,164	76,980	69,813	7167	9.3	657	0.5
2018	259,109	141,266	77,981	73,529	4452	5.7	786	0.6
2019	269,858	139,431	90,150	87,853	2297	2.5	1082	0.8
2020	474,585	127,793	299,308	297,052	2256	0.8	844	0.7
MAX	474,585	150,293	299,308	297,052	7167	10.7	1588	1.3
MIN	193,823	93,648	40,389	37,473	1878	0.8	602	0.5
AVERAGE	241,317	128,723	63,841	60,799	3041	5.6	849	0.7
MEDIAN	231,395	130,795	49,519	47,167	2660	5.6	788	0.6

Source: Federal Judicial Center, Integrated Database.