

## Transnational Class Actions in the Shadow of Preclusion

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*The American class action is a procedural tool that advances substantive law values such as deterrence, compensation, and fairness. Opt-out class actions in particular achieve these goals by aggregating claims not only of active participants but also passive plaintiffs. Full faith and credit then extends the preclusive effect of class judgments to other U.S. courts. But there is no international full faith and credit obligation, and many foreign courts will not treat U.S. class judgments as binding on passive plaintiffs. Therefore, some plaintiffs may be able to wait until the U.S. class action is resolved before either joining the U.S. suit (and reaping its rewards) or relitigating the case abroad. Transnational class actions thus give some plaintiffs “litigation options.”*

*The few courts and scholars that have recognized this phenomenon have proposed methods to identify litigation option holders and exclude them from opt-out treatment. Some U.S. judges, for example, have refused to certify classes that include citizens of foreign countries that may not recognize U.S. class judgments. This Article shows that this conventional wisdom is misdirected: citizenship is the wrong measure, courts are poorly positioned to identify relitigation risks, and the social costs of excluding option holders may well outweigh the benefits. Instead, courts should certify classes of foreign and domestic plaintiffs in service of policy goals such as deterrence and intraclass fairness regardless of foreign preclusion law. At the same time, this Article suggests innovative approaches to achieve some preclusion previously unremarked upon in transnational cases. Prior approaches are insufficient, in part, because they rely on courts without acknowledging the informational asymmetries between courts and parties or the limited tools available for judicial resolution. This Article explains how private incentives and private information may fill the gap in interjurisdictional preclusion law. Parties should be encouraged to negotiate private preclusion agreements in cases in which preclusion matters. In addition, courts can coordinate informally to curb costly relitigation.*

*In summary, this Article uses values derived from lawmaking choices and a practical assessment of the litigation environment to respond to litigation options in transnational class actions not by excluding option holders but instead by permitting aggregation and seeking alternatives to preclusion law. This Article applies these lessons to transnational class actions filed in a single jurisdiction (e.g., a U.S. court), as well as to dueling class actions filed in two countries simultaneously and to U.S. recognition of foreign aggregate judgments whatever their form.*

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### INTRODUCTION

Transnational class actions are class actions, likely involving plaintiffs from multiple nations, that may be filed in the courts of more than one country.<sup>1</sup> Transnational class actions address topics from human rights to consumer protection to securities law.<sup>2</sup> To give one example, in *Anwar v. Fairfield Greenwich Ltd.*, a New York federal court considered a putative class action arising out of the Bernard Madoff scandal that comprised investors from more than thirty countries.<sup>3</sup>

At first glance, the party structure of *Anwar* would seem unremarkable. The Madoff scandal touched investors across the globe, American courts are open to foreign litigants, and nothing inherent in the class action should limit it to U.S. citizens. Transnational class actions, if not routine, are at least not unexpected in a global economy. But the court in *Anwar* was dubious. Relying on a line of cases stretching back to Judge Henry Friendly,<sup>4</sup> the court expressed concern about some of the foreign class members. The judge noted that U.S. class judgments are not uniformly enforceable around the world—there is no international law of preclusion,<sup>5</sup> and many foreign courts will not treat class judgments as binding on passive plaintiffs.<sup>6</sup> The result is an asymmetry between defendants bound by a

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1. For the implications of this definition, see *infra* Part II.A.

2. See *infra* Part I.

3. 289 F.R.D. 105 (S.D.N.Y. 2013), *vacated and remanded on other grounds by* St. Stephen's Sch. v. PricewaterhouseCoopers Accountants N.V., 570 F. App'x 37 (2d Cir. 2014). For a helpful catalog of Madoff litigation *in medias res*, see James R. Carroll, Matthew M.K. Stein & Abra C. Bron, *A March 2011 Update on the Madoff Litigation*, 2011 ALI-ABA COURSE STUDY CONF. ON INS. & FIN. SERVICES LITIG. 91.

4. See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975), *abrogated as stated in* *Cornwell v. Credit Suisse Grp.*, 729 F. Supp. 2d 620 (S.D.N.Y. 2010).

5. Preclusion refers to the effect of prior adjudication in future proceedings. It includes the concepts of claim preclusion (merger and bar) and issue preclusion (collateral estoppel). See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS, ch. 3 (1982).

6. "Passive plaintiffs" refers to plaintiffs in opt-out class actions who neither affirmatively opt out nor affirmatively opt in. The Appendix to this Article provides summaries of foreign-aggregation procedures and foreign-court recognition of U.S. class judgments, derived from scholarly treatments and court decisions. It also catalogs sources for further study. See Zachary D. Clopton, *Transnational Class Actions in the Shadow of Preclusion: Appendix Only*, SOC. SCI. RES. NETWORK, <http://ssrn.com/abstract=2609339> (last

judgment versus some passive plaintiffs with the option to bring a new suit in a foreign forum if they are unsatisfied with the first result. Some passive plaintiffs in transnational class actions thus possess “litigation options.”<sup>7</sup>

Uncomfortable with the asymmetry of litigation options, the *Anwar* court received testimony about which foreign courts were likely to give preclusive effect to a U.S. class judgment and then sorted plaintiffs on this basis. The court certified a class of plaintiffs from the United States, Italy, Portugal, Greece, Malta, Denmark, Norway, Sweden, and Finland, but excluded from class treatment putative class members from Germany, Israel, Kuwait, Korea, North Korea, Pitcairn,<sup>8</sup> Tokelau,<sup>9</sup> Mongolia, China, Liechtenstein, Japan, Oman, Taiwan, United Arab Emirates, Qatar, Saudi Arabia, Bosnia, Andorra, San Marino, Namibia, Monaco, and South Africa.<sup>10</sup>

The conventional wisdom, to the extent it exists, rejects litigation options and the asymmetric risk of relitigation they represent. The *Anwar* decision is one example of this thinking. Judge Friendly, in *Bersch v. Drexel Firestone, Inc.*, offered perhaps the earliest version of this approach to transnational class actions, declaring that “if defendants prevail against a class they are entitled to a victory no less broad than a defeat would have been.”<sup>11</sup> In *Anwar*, *Bersch*, and many cases in between,<sup>12</sup> courts have sought to identify foreign plaintiffs with litigation options and deny them opt-out class treatment. The scholarly consensus in this area, though perhaps more nuanced, accepts this general approach.<sup>13</sup>

The aim of this Article is to show that the judicial and scholarly consensus is wrong. It is wrong because it does not account for certain important features of transnational litigation. And it is wrong because the costs of litigation options are

updated June 2, 2015).

7. This Article uses “litigation options” both to reflect the everyday meaning of “option” as well as to make an analogy to financial options. For further explanation, see *infra* Part I. As noted below, Professors Ratliff and Nagareda identified related options in U.S. civil procedure. See *infra* note 16 and accompanying text.

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The Pitcairn Islands group is a British Overseas Territory. It comprises the islands of Pitcairn, Henderson, Ducie and Oeno. Pitcairn, the only inhabited island, is a small volcanic outcrop situated in the South Pacific . . . . With a population of only around fifty, the people of Pitcairn are descended from the mutineers of HMAV *Bounty* and their Tahitian companions. Pitcairn Island is approximately 3.2km (2 miles) long and 1.6km (1 mile) wide with the capital Adamstown located above Bounty Bay and accessed by the aptly named road, “The Hill of Difficulty.”

GOV’T PITCAIRN ISLANDS, <http://www.government.pn>.

9. Tokelau consists of three atolls in the South Pacific and has a population of fewer than two thousand. See *About Us*, GOV’T TOKELAU, <http://www.tokelau.org.nz/About+Us.html>.

10. *Anwar v. Fairfield Greenwich Ltd.*, 289 F.R.D. 105, 121 (S.D.N.Y. 2013), *vacated and remanded on other grounds by* St. Stephen’s Sch. v. PricewaterhouseCoopers Accountants N.V., 570 F. App’x 37 (2d Cir. 2014).

11. 519 F.2d 974, 996 (2d Cir. 1975), *abrogated as stated in* *Cornwell v. Credit Suisse Grp.*, 729 F. Supp. 2d 620 (S.D.N.Y. 2010).

12. See *infra* notes 49–62 and accompanying text.

13. See *infra* notes 63–70 and accompanying text.

overstated and the benefits of keeping transnational classes together are underappreciated.

Litigation options present inherent and instrumental problems—inherently, fairness seems to require equal stakes, and instrumentally, equal stakes promote accurate outcomes. But these problems must be viewed against a clear-eyed assessment of the litigation environment: crude measures like citizenship do not explain when relitigation is permissible or likely, courts may have poor information about when relitigation may happen, the threat of foreign relitigation is likely overstated, and the costs of excluding option holders (e.g., to deterrence) may be significant. For these reasons, the mere presence of litigation options should not be a bar to class certification.

Importantly, though, certifying option holders means that relitigation may be possible. By focusing on the certification decision, current approaches have overlooked other opportunities to curb relitigation. Private approaches may achieve additional preclusion by channeling private information and incentives, without sacrificing the policy objectives furthered by aggregation. Interjurisdictional judicial coordination can harness private incentives to turn the challenge of dueling class actions into a response to litigation options.<sup>14</sup>

This Article proceeds as follows. Part I expands on the concept of litigation options with a focus on transnational class actions. This Part also highlights the limited scholarly and judicial attention paid to this concept to date, showing a consensus that asks courts to deny certification to certain foreign citizens. Part II offers a new strategy for aggregation in transnational class actions. Subpart A explains why the exclusion of option holders is misguided, both in its execution and its reliance on judicial competence. With this assessment in mind, Subpart B considers the costs of excluding litigation option holders in terms of deterrence, compensation, and fairness. This analysis connects with scholars' conceptions of the class action as a tool of regulatory policy as much as, if not more than, merely a mass joinder device.<sup>15</sup> The conclusion of Part II is that litigation options in transnational class actions should not bar class certification.

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14. Professor Wasserman, describing class actions in different domestic jurisdictions, adopted the term “dueling class actions.” See generally Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461 (2000).

15. See generally, e.g., DEBORAH R. HENSLER, NICHOLAS M. PACE, BONITA DOMBEY-MOORE, BETH GIDDENS, JENNIFER GROSS & ERIK K. MOLLER, *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN* (2000); John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534 (2006); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975); Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965 (1993); Reinier Kraakman, Hyun Park & Steven Shavell, *When Are Shareholder Suits in Shareholder Interests?*, 82 GEO. L.J. 1733 (1994); Lawrence E. Mitchell, *The “Innocent Shareholder”: An Essay on Compensation and Deterrence in Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 243; George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521 (1997); David Rosenberg, *Class Actions for Mass Torts: Doing Individualized Justice by Collective Means*, 62 IND. L.J. 561 (1987); David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871 (2002); William B. Rubenstein, *On What a “Private Attorney General” Is—and Why It*

Against a background of certified transnational class actions, Part III considers alternative strategies to respond to the threat of asymmetric relitigation. Taking a cue from scholars who understand class actions as litigation transactions,<sup>16</sup> this Part proposes a transactional approach to preclusion uncertainty—tapping into private information and private incentives to induce preclusion through bargaining. In addition, this Part suggests innovative approaches to achieve interjurisdictional preclusion in dueling class actions and other circumstances.

Part IV turns briefly to a different vantage. Once a foreign court enters a judgment in a class action or other aggregate proceeding, how should U.S. courts treat that judgment? This Part demonstrates that the insights of this Article support and elaborate existing U.S. rules for foreign judgment recognition and domestic class action preclusion. In short, this approach values legislative preferences about aggregation and preclusion, but is sensitive to due process interests as well.

In sum, this Article approaches litigation options in transnational class actions from a position that links procedural forms to substantive law values. The class action is not an end in itself but a tool to effectuate deterrence and compensation, to mitigate conflicts among putative class members, and to manage complex disputes. In responding to the transnational litigation environment, this Article attempts to tap into the strengths of legislatures, courts, and private parties to create default welfare-enhancing rules while also harnessing private information and incentives in service of these policy goals. For both aggregation and preclusion, good policy must account for substantive choices, informational asymmetries, and differing institutional capabilities and incentives.

The analysis undertaken in this Article primarily employs the perspective of a U.S. court hearing a transnational class action. The United States is a natural example because, although not alone among jurisdictions with class action procedures, it is by far the most significant in terms of magnitude of cases and commentary. Further, readers likely are most familiar with the background rules of U.S. law and the substantive values that motivate U.S. procedural choices, which are important in responding to litigation options. But the lessons of this Article would be relevant to any court hearing a transnational case—and, indeed, the Appendix collects many

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*Matters*, 57 VAND. L. REV. 2129 (2004).

16. See, e.g., Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1269 (2006) (“Lawsuits and investment projects have much in common.”); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 164 (2003) [hereinafter Nagareda, *Preexistence Principle*] (“Rule 23 is as much a regulatory regime as it is a procedural rule for the conduct of litigation in aggregate. The regulated market here is the market for legal representation of would-be class members.”). See generally Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053 (2013); Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367 (2009); William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371 (2001). Indeed, at least one author applied an options analogy to class settlements. See Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747 (2002) [hereinafter Nagareda, *Autonomy, Peace, and Put Options*]. Another considered options with respect to nonmutual offensive collateral estoppel. See Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 TEX. L. REV. 63 (1988).

examples of foreign aggregate litigation mechanisms.<sup>17</sup> This collection of foreign approaches is also significant for what it says about the importance of these questions. If litigation options are created when multiple forums allow for cost-effective litigation of the same claim, then the rise of foreign aggregate litigation means that transnational litigation options will only become more prevalent.<sup>18</sup> In other words, courts should expect to see more and more cases like those addressed in this Article, thereby amplifying the consequences of policy responses to transnational litigation options.

### I. LITIGATION OPTIONS AND TRANSNATIONAL CLASS ACTIONS

The class action is a procedural tool that advances substantive law values such as deterrence, compensation, fairness, and efficiency.<sup>19</sup> Opt-out class actions in particular achieve these goals by aggregating claims not only of active participants but also of passive plaintiffs.<sup>20</sup> In so doing, the opt-out class action can increase

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17. See Clopton, *supra* note 6. The insights here also may be extended to litigation optionality in purely domestic cases. See *infra* Parts II.B, III (discussing domestic litigation options).

18. The relative immaturity of foreign aggregate litigation is one of the reasons that U.S. courts have not seen more defendants objecting to transnational class actions on this basis. For other reasons, see *infra* note 62.

19. See *supra* note 15 (collecting sources).

20. See FED. R. CIV. P. 23(b)(3) (defining opt-out class actions); FED. R. CIV. P. 23(c)(3) (providing their scope). See generally Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998). This feature of the class action is in tension with the day-in-court ideal. See *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (referring to “our ‘deep-rooted historic tradition that everyone have his own day in court’” (citation omitted)); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (“It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”). For a selection of the many excellent discussions of this tension, see generally, for example, MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* (2009); Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992); Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651 (2014); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); Fiss, *supra* note 15; Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337 [hereinafter Issacharoff, *Governance and Legitimacy*]; Samuel Issacharoff, *When Substance Mandates Procedure: Martin v. Wilks and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189 (1992); Douglas Laycock, *Due Process of Law in Trilateral Disputes*, 78 IOWA L. REV. 1011 (1993); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998); Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981 (1993); Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571 (1997). The United States is not alone in foregoing the individual day in court in some cases. In *Wendenburg v. Germany*, for example, the European Court of Human Rights explained that “in proceedings involving a decision for a collective number of individuals, it is not always required or even possible that every individual is heard before a court.” 3 Eur. Ct. H.R. 28 (2003).

deterrence and compensation while reducing potential collective-action problems among putative class members.<sup>21</sup>

When some class members are not bound by the outcome and can litigate their case again, “litigation options” result. The term “litigation options” has both a conventional and technical meaning. Conventionally, passive plaintiffs can choose between accepting the first outcome and waiting for a future case. Technically, in finance an option is the right of the option holder to buy or sell an asset at a set price. The option holder can choose, based on all available information, when to exercise the option. If the option holder has the right to buy an asset for fifty dollars, for example, then her option would be “in the money” when the market price of the asset is more than fifty dollars.<sup>22</sup> In the class action, passive plaintiffs who are not bound by the first adjudication hold litigation options.<sup>23</sup> The litigation option is the right to become a party to litigation and capture any settlement or judgment that results. An option holder in a class action could exercise her option to join the class and be bound by its outcome. Or, she could wait until the first case was resolved, and if she were unsatisfied with the outcome, she could retain the option and join a new suit (e.g., in a foreign court). Indeed, if the second suit were an opt-out class action as well,<sup>24</sup> the option holder could wait until both class actions were resolved before deciding how to exercise the option.<sup>25</sup> Like owners of financial options, the litigation option holder exercises her option when it is in the money.<sup>26</sup>

Granting litigation options (at no charge) creates a facial imbalance between plaintiffs and defendants that “immediately strikes us as unfair.”<sup>27</sup> If the defendant loses, passive plaintiffs will exercise their options and reap the rewards. But if the defendant wins, passive plaintiffs can bring another suit and try again in a second suit. Heads I win; tails you lose.

Litigation options also have potentially injurious social-welfare consequences. Public- and private-law litigation serves important social goals such as compensation

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21. See *infra* Part II.B.1.

22. See WILLIAM W. BRATTON, CORPORATE FINANCE 183–98 (7th ed. 2012). If the option holder has the right to buy an asset, she holds a “call option”; if she has the right to sell, it is a “put option.” *Id.* at 183.

23. One might characterize the litigation option as a call. See *supra* note 22. The call option holder has the right to buy a share in the litigation. In theory, the strike price for litigation call options is zero. In practice, it may be that the strike price is right to relitigate. Exercising a litigation option by claiming on a settlement fund likely requires a release, see *infra* note 168, and it is more difficult to relitigate after claiming on a successful judgment, see *infra* note 139 and accompanying text.

24. See Clopton, *supra* note 6 (collecting examples of foreign jurisdictions with opt-out style mass litigation).

25. Option holders likely could claim the benefit of a case during litigation, during the claim period following settlement or judgment, or as long as they have causes of action to which nonmutual offensive collateral estoppel applies. See *infra* note 137 and accompanying text (discussing nonmutual estoppel).

26. The claim here is not that everything that is true about financial options would be true about litigation options. The goal of the comparison is to signify which passive plaintiffs may be able to relitigate abroad, see *infra* Part II.A; to suggest that options may be priced, see *infra* note 211; and to highlight the dynamic among plaintiffs and defendants across multiple forums.

27. Ratliff, *supra* note 16, at 77.

and deterrence.<sup>28</sup> If litigation produces systematically inaccurate results, it distorts the underlying substantive law.<sup>29</sup> Litigation options threaten to do just that because they asymmetrically increase plaintiffs' expected recovery and settlement leverage against defendants.<sup>30</sup> Defendants worried about the asymmetric risk of relitigation would be more interested in buying global peace than would be socially optimal (assuming that the one-shot litigation is calibrated to the socially optimal level).<sup>31</sup> Unless the class action is binding on all class members, therefore, there exists an asymmetry that may have costs to defendants and to social welfare.

In the United States, Federal Rule of Civil Procedure 23 (since 1966) and subsequent cases respond to litigation options.<sup>32</sup> Although courts have been willing to draw exceptions, U.S. courts treat opt-out class judgments as binding on all class members who do not opt out, provided due process was protected.<sup>33</sup> This means that parties in class actions should have symmetric stakes. And because of

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28. For further discussion of these values, see *infra* Part II.B.

29. See *infra* Part II.B.

30. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (expressing concern with "'in terrorem' settlements"); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 678 (7th Cir. 2009) ("When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good . . . ."); HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973) (discussing class-action "blackmail settlements"); Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 *NOTRE DAME L. REV.* 1377, 1377 (2000).

31. This is not the forum to explain in great detail the effects of litigation asymmetries. For modeling of these effects, see generally, for example, Bruce L. Hay, *Some Settlement Effects of Preclusion*, 1993 *U. ILL. L. REV.* 21; Stephen J. Spurr, *An Economic Analysis of Collateral Estoppel*, 11 *INT'L REV. L. & ECON.* 47 (1991); Note, *Exposing the Extortion Gap: An Economic Analysis of the Rules of Collateral Estoppel*, 105 *HARV. L. REV.* 1940 (1992). Nor is this the forum to adjudicate the value of redundant litigation. See generally Zachary D. Clopton, *Redundant Public-Private Enforcement*, 68 *VAND. L. REV.* (forthcoming 2016).

32. I add the caveat "and subsequent cases" because the drafters of the federal rules recognized a tension between their procedural jurisdiction and preclusion law's substantive effect. See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 *HARV. L. REV.* 356, 393 (1967) (noting that Rule 23 did not attempt to prescribe the rules of preclusion); see also Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 *U. PA. L. REV.* 17, 53–58 (2010) (discussing Rule 23 and the Enabling Act). Here, as elsewhere, the Supreme Court was willing to affect substantive rights in ways that the Advisory Committee, conscious of Rules Enabling Act's constraints, was not. See, e.g., Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 *U. PA. L. REV.* 1543, 1603–14 (2014).

33. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985). But see Hazard et al., *supra* note 20 (cataloging a history of exceptions and equivocation). Admittedly, relying on *Shutts* for this proposition may reflect what Professor Wolff called the "Shutts fallacy"—reading *Shutts* to cover procedural due process generally rather than limiting it to personal jurisdiction. Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 *U. PA. L. REV.* 2035, 2076–80, 2116 (2008). Yet this is a fallacy that courts (including the Supreme Court) have indulged, *id.*, and no doubt some due process is required for any judgment to be binding (with or without *Shutts*).



full-faith-and-credit obligations,<sup>34</sup> class judgments may bind class members in other U.S. courts whether they were active or passive participants in the first suit.

Binding all class members not only equalizes stakes between plaintiffs and defendants but also responds to potential conflicts of interest within the class. Mass claims present classic collective-action problems in which each potential plaintiff would prefer to free ride on other plaintiffs' litigation efforts.<sup>35</sup> At the same time, agency problems within the class (and with respect to class counsel) create costs of their own.<sup>36</sup> In U.S. courts, class judgments may be preclusive against all class members, thus responding to the collective-action problem, while requiring notice,<sup>37</sup> opt out,<sup>38</sup> and judicial supervision<sup>39</sup> to deal with agency costs. Indeed, U.S. courts have found such due process protections *necessary* to make opt-out class actions binding on passive plaintiffs.<sup>40</sup>

The foregoing description shows how U.S. courts achieve symmetric preclusion in opt-out class actions. But there is at least one notable exception to this stylized story: transnational class actions.<sup>41</sup> While U.S. courts grant full faith and credit to sister court judgments, there is no international legal obligation for foreign courts to do the same. As it turns out, many foreign legal systems are reluctant to give preclusive effect to class judgments as applied to passive plaintiffs.<sup>42</sup> It may be that foreign jurisdictions do not accept notice, opt out, and court supervision as sufficient protections for passive plaintiffs, or simply that they reject class actions as a method of dispute resolution.<sup>43</sup> In any event, if it is true that foreign courts may not enforce class judgments against passive plaintiffs, then those plaintiffs possess litigation options. Any passive class member with access to a foreign forum gets the benefit of

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34. U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (2012). *See generally* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986); Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53 (1984).

35. For example, it would be cheaper for plaintiffs to sit out the first suit and then use nonmutual offensive issue preclusion to sue defendant or extract a settlement. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326–33 (1979).

36. *See* Samuel Issacharoff, *Assembling Class Actions*, 90 WASH. U. L. REV. 699, 702–09 (2013) [hereinafter Issacharoff, *Assembling Class Actions*]; Issacharoff, *Governance and Legitimacy*, *supra* note 20, at 353–66.

37. *See* FED. R. CIV. P. 23(c)(2) (notice).

38. *See id.*

39. *See* FED. R. CIV. P. 23(a)(4) (adequacy); FED. R. CIV. P. 23(b)(3) (requirements for Rule 23(b)(3) actions); FED. R. CIV. P. 23(d) (conducting the action); FED. R. CIV. P. 23(e) (settlement, voluntary dismissal, or compromise); FED. R. CIV. P. 23(g) (class counsel).

40. *See supra* note 33.

41. For the definition of “transnational class actions,” see *supra* text accompanying note 1. And for domestic examples of litigation options, see *infra* Parts II.B

42. *See* Clopton, *supra* note 6.

43. A more cynical interpretation is that these states promote their citizens' interests by permitting them to sue noncitizen defendants serially. I find this interpretation dubious, especially given the nature of the foreign doctrines at issue. *See generally* Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313 (2011) (collecting and reviewing relevant European-law examples).

a U.S. adjudication and the benefit of a second bite at the apple, including the ability to threaten that second bite during settlement negotiations in the first case.<sup>44</sup>

This problem is more than theoretical. American courts have faced numerous class actions with these alignments: securities cases, even after *Morrison v. National Australia Bank, Ltd.*, may involve U.S. and foreign investors in a purported class;<sup>45</sup> Alien Tort Statute litigation necessarily involves alien plaintiffs and often takes the form of a class action;<sup>46</sup> and transnational classes could exist in consumer, environmental, antitrust, employment, tort, or civil-rights cases. And, as noted above, foreign courts open to these cases will not always treat prior U.S. adjudications as binding on passive plaintiffs.<sup>47</sup>

To their credit, some U.S. judges have recognized litigation options in transnational class actions, although for reasons explained below, their analysis has been incomplete.<sup>48</sup> As noted above, Judge Henry Friendly was an early critic of these dynamics in *Bersch v. Drexel Firestone, Inc.*<sup>49</sup> Howard Bersch, a U.S. citizen, sued for securities fraud on behalf of himself and thousands of similarly situated individuals.<sup>50</sup> Judge Friendly described the putative plaintiffs as “preponderantly citizens and residents of Canada, Australia, England, France, Germany, Switzerland, and many other countries in Europe, Asia, Africa, and South America.”<sup>51</sup> Among the issues on appeal was whether class certification was appropriate when foreign courts may not grant preclusive effect to the U.S. class judgment.<sup>52</sup> Judge Friendly asserted that “if defendants prevail against a class they are entitled to a victory no less broad than a defeat would have been.”<sup>53</sup> Because Judge Friendly found that nonrecognition of the U.S. judgment in many of the relevant jurisdictions was a “near certainty,” he excluded all foreign class members from the case.<sup>54</sup> To Judge Friendly in *Bersch*, litigation options were unacceptable.

Since *Bersch*, some lower courts have worried about the preclusion available to U.S. class judgments.<sup>55</sup> These courts typically channeled *Bersch*'s concern into Rule

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44. Of course, the same litigation option may exist in other legal systems with opt-out rules. See Clopton, *supra* note 6.

45. 130 S. Ct. 2869 (2010); see *infra* note 58 (explaining *Morrison*'s role in this context).

46. 28 U.S.C. § 1350 (2012); see, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011).

47. See Clopton, *supra* note 6.

48. For further explanation, see *infra* Part II.

49. 519 F.2d 974 (2d Cir. 1975), *abrogated as stated in* *Cornwell v. Credit Suisse Grp.*, 729 F. Supp. 2d 620 (S.D.N.Y. 2010).

50. *Id.* at 981.

51. *Id.* at 977–78.

52. *Id.* at 996–97.

53. *Id.* at 996.

54. *Id.* at 996–97.

55. E.g., *Kern v. Siemens Corp.*, 393 F.3d 120, 129 n.8 (2d Cir. 2004) (noting “significant doubts” about Austrian plaintiffs); *Anwar v. Fairfield Greenwich Ltd.*, 289 F.R.D. 105, 114–21 (S.D.N.Y. 2013) (following *Vivendi*), *vacated and remanded on other grounds by* *St. Stephen's Sch. v. PricewaterhouseCoopers Accountants N.V.*, 570 F. App'x 37 (2d Cir. 2014); *In re Infineon Techs. AG Sec. Litig.*, 266 F.R.D. 386 (N.D. Cal. 2009) (acknowledging these concerns); *Buettgen v. Harless*, 263 F.R.D. 378, 382 (N.D. Tex. 2009) (acknowledging

23's "superiority" requirement, which provides that a class may be maintained if "the court finds that . . . a class action is superior to other available methods for fairly and

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*Bersch's* concerns); *In re Alstom SA Sec. Litig.*, 253 F.R.D. 266, 282 (S.D.N.Y. 2008) (following *Vivendi*); *Mohanty v. Bigband Networks, Inc.*, No. C 07-5101 SBA, 2008 WL 426250, at \*7-8 (N.D. Cal. 2008) (acknowledging *Bersch's* concerns); *Marsden v. Select Med. Corp.*, 246 F.R.D. 480, 486 (E.D. Pa. 2007) (following *Vivendi*); *Borochoff v. Glaxosmithkline PLC*, 246 F.R.D. 201, 204 (S.D.N.Y. 2007) (acknowledging *Bersch's* concerns); *In re Vivendi Universal SA Sec. Litig.*, 242 F.R.D. 76 (S.D.N.Y. 2007) (discussed *infra* text accompanying notes 58-62); *In re Royal Ahold NV Sec. and ERISA Litig.*, 219 F.R.D. 343, 352 (D. Md. 2003) (expressing concern about enforceability); *In re DaimlerChrysler AG Sec. Litig.*, 216 F.R.D. 291, 301 (D. Del. 2003) (excluding foreign class members); *In re Turkcell Iletisim Hizmetler AS Sec. Litig.*, 209 F.R.D. 353, 360-61 (S.D.N.Y. 2002) (acknowledging *Bersch's* concerns); *Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 134-35 (S.D.N.Y. 2001) (discussing *Bersch*); *Ansari v. N.Y. Univ.*, 179 F.R.D. 112, 116-17 (S.D.N.Y. 1998) (denying certification of foreign class); *Del Fierro v. Pepsico Int'l*, 897 F. Supp. 59, 64 (E.D.N.Y. 1995) (acknowledging *Bersch's* concerns); *Frietsch v. Refco, Inc.*, No. 92 C 6844, 1994 WL 10014, at \*11 (N.D. Ill. 1994) (acknowledging *Bersch's* concerns); *CL-Alexanders Laing & Cruickshank v. Goldfeld*, 127 F.R.D. 454, 459-60 (S.D.N.Y. 1989) (refusing to certify British claimants); *In re U.S. Fin. Sec. Litig.*, 69 F.R.D. 24, 48-51 (S.D. Cal. 1975) (acknowledging *Bersch's* concerns); *see also* Clopton, *supra* note 6 (cataloging decisions). In addition, these issues have been discussed in briefing in, *inter alia*, Lead Plaintiffs' Memorandum of Law in Support of Their Motion for Class Certification and Appointment of Class Representatives and Class Counsel, *In re Optimal U.S. Litig.*, 865 F. Supp. 2d 451 (S.D.N.Y. 2012) (No. 10-CV-4095), 2012 WL 1574445; Declaration of Professor Jonathan Harris in Support of Plaintiffs' Opposition to BP's Motion to Dismiss the Ordinary Share Claims in the Consolidated Class Action Complaint of Dr. Jonathan M. Harris, B.C.L., M.A., Ph.D., *In re BP PLC Sec. Litig.*, 843 F. Supp. 2d 712 (S.D. Tex. 2012) (No. 10-MD-2185), 2011 WL 6961188; Notice of Motion and Motion to Dismiss Plaintiffs' Consolidated Class Action Complaint; Memorandum of Points and Authorities in Support Thereof, *In re Toyota Motor Corp. Sec. Litig.*, 2012 WL 3791716 (C.D. Cal. Mar. 12, 2012) (No. CV-10-0922 DSF), 2011 WL 270118; Defendant's Memorandum of Law in Support Of Their Rule 12(b)(1) Motion to Dismiss Foreign Lead Plaintiffs' Claims, *In re UBS AG Sec. Litig.*, Fed. Sec. L. Rep. P 97, 037 (S.D.N.Y. 2012) (No. 07-CV-11225), 2008 WL 4959645; Memorandum of Law in Opposition to Lead Plaintiffs' Motion for Class Certification, *In re Converium Holding AG Sec. Litig.*, 2007 WL 1041480 (S.D.N.Y. Apr. 9, 2007) (No. 04-CV-7897), 2007 WL 3194368; Bridgestone Corporation's Combined Memorandum in Support of Its Motion to Dismiss, in Part, for Lack of Subject Matter Jurisdiction and in Opposition to Plaintiffs' Motion for Class Certification, *In re Bridgestone Sec. Litig.*, 430 F. Supp. 2d 728 (M.D. Tenn. 2006) (No. 3:01-0017), 2006 WL 6005492; Memorandum of Law of Deloitte & Touche LLP, Deloitte Touche Tohmatsu and James E. Copeland In Opposition to Lead Plaintiffs' Renewed Motion for Class Certification, *In re Parmalat Sec. Litig.*, 258 F.R.D. 236 (S.D.N.Y. 2009) (No. 04-CV-0030), 2006 WL 6011431; Declaration of Alexis Mourre, Brockamp v. N.V. Koninklijke Nederlandsche Petroleum Maatschappij, 2005 WL 6337193 (D.N.J. May 11, 2005) (No. 3:04CV00374); and in the context of *forum non conveniens* in, *inter alia*, *In re Banco Santander Secs.-Optimal Litig.*, 732 F. Supp. 2d 1305 (S.D. Fla. 2010); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2008 WL 5958061 (E.D.N.Y. Sept. 26, 2008) (No. MD 06-1775). On rare occasion, a court may consider the practicalities of foreign relitigation as part of this inquiry. *See, e.g., In re U.S. Fin. Sec. Litig.*, 69 F.R.D. 24, 48-49 (S.D. Cal. 1975).

efficiently adjudicating the controversy.”<sup>56</sup> The Madoff litigation described in the Introduction provides one example.<sup>57</sup> Another illustrative treatment is *In re Vivendi Universal*.<sup>58</sup> In addressing superiority, the *Vivendi* court acknowledged the logic of *Bersch* and its progeny, though it asked whether foreign nonrecognition was “more likely than not” rather than applying *Bersch*’s “near certainty” test.<sup>59</sup> After surveying the recognition law of France, England, Germany, Austria, and the Netherlands,<sup>60</sup> the court concluded that French, English, and Dutch plaintiffs would remain in the class because the courts of those nations more likely than not would give preclusive effect to the U.S. judgment.<sup>61</sup> German and Austrian plaintiffs were excluded because their courts, more likely than not, would not treat a U.S. class judgment as preclusive.<sup>62</sup>

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56. FED. R. CIV. P. 23(b)(3).

57. See *supra* text accompanying notes 3–10. Recall that the *Anwar* court excluded plaintiffs from Germany, Israel, Kuwait, Korea, North Korea, Pitcairn, Tokelau, Mongolia, China, Liechtenstein, Japan, Oman, Taiwan, United Arab Emirates, Qatar, Saudi Arabia, Bosnia, Andorra, San Marino, Namibia, Monaco, and South Africa. See *supra* notes 8–10 and accompanying text.

58. 242 F.R.D. 76 (S.D.N.Y. 2007). *Morrison* ultimately mooted this issue in *Vivendi* because most of the foreign plaintiffs purchased shares on foreign exchanges. See *Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2884 (2010) (holding that the Securities Exchange Act of 1934 provided a cause of action only for shares sold on domestic exchanges). However, foreign citizens may purchase shares on U.S. exchanges, and indeed that scenario led to the transnational class action in *Marsden v. Select Med. Corp.*, 246 F.R.D. 480 (E.D. Pa. 2007). In *Marsden*, foreign plaintiff Capital Invest purchased defendant Select Medical’s stock on the New York Stock Exchange. See Plaintiffs’ Reply Memorandum of Law in Further Support of Their Motion for Class Certification at 19, *Marsden v. Select Med. Corp.*, 246 F.R.D. 480 (E.D. Pa. 2007) (No. 2:04-CV-4020), 2007 WL 4765821. Such a case would skirt *Morrison* but not *Bersch* and *Vivendi*.

59. See *In re Vivendi Universal*, 242 F.R.D. at 95.

60. See *id.* at 95–105.

61. *Id.* at 105.

62. *Id.* at 105–06. In addition to those reported cases cited above, other transnational class actions could have created litigation options if permitted to run their course. Some of these may have been resolved in favor of defendants before certification. See Linda S. Mullenix, *Dropping the Spear: The Case for Enhanced Summary Judgment Prior to Class Certification*, 43 AKRON L. REV. 1197, 1207–12 (2010) (surveying decisions on precertification dispositive motions). In others, defendants may have preferred settlement to fighting this issue. See *infra* text accompanying note 132; see also *infra* note 179 and accompanying text. Or, it may be that all parties acknowledged that relitigation abroad posed nearly zero risk, see *infra* Part II.A, or that statutes of limitations or laches defenses were available in the putative foreign suit, see *Angel v. Bullington*, 330 U.S. 183, 202 n.3 (1947) (noting the similarity among *res judicata*, laches, and statutes of limitations). But the rise of foreign aggregate litigation, including venues for foreign human-rights litigation after *Kiobel* and foreign securities litigation after *Morrison*, may make these issues more pressing. See, e.g., Caroline Kaeb & David Scheffer, *The Paradox of Kiobel in Europe*, 107 AM. J. INT’L L. 852 (2013) (discussing European human-rights litigation after *Kiobel*); Michael Palmisciano, Note, *Going Dutch: The Effects of Domestic Restriction and Foreign Acceptance of Class Litigation on American Securities Fraud Plaintiffs*, 53 B.C. L. REV. 1847 (2012) (suggesting European alternatives for securities plaintiffs); see also Commission Recommendation of 11 June 2013 on Common Principles for

The few scholarly commentaries to address these issues tend to track this logic. At least two articles directly advocated the *Bersch-Vivendi* model—that is, to exclude some or all foreign plaintiffs from U.S. classes if they seem to possess asymmetric opportunities for relitigation.<sup>63</sup> Professor Rhonda Wasserman also seemed to suggest that an exclusionary approach is appropriate for these foreign plaintiffs.<sup>64</sup> Professor Tanya Monestier agreed that asymmetric relitigation is problematic, though her response allowed foreign plaintiffs to participate if they affirmatively opted in.<sup>65</sup> Thus, rather than completely excluding foreign plaintiffs, Monestier relegated them to a separate, opt-in group. Finally, Professors Simard and Tidmarsh offered a more nuanced approach.<sup>66</sup> They proposed a series of presumptions designed to identify which plaintiffs in which cases are most likely to relitigate<sup>67</sup>—a topic this Article picks up below.<sup>68</sup> Simard and Tidmarsh then excluded those foreign plaintiffs likely to relitigate while allowing those that are not likely to relitigate to remain in the class.<sup>69</sup>

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Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law 2013/396/EU, 2013 O.J. (L 201) 60 (calling for Europe-wide implementation of injunctive and compensatory aggregate dispute resolution by July 26, 2015).

63. See generally Michael P. Murtagh, *The Rule 23(b)(3) Superiority Requirement and Transnational Class Actions: Excluding Foreign Class Members in Favor of European Remedies*, 34 HASTINGS INT'L & COMP. L. REV. 1 (2011); Gary W. Johnson, Note, *Rule 23 and the Exclusion of Foreign Citizens as Class Members in U.S. Class Actions*, 52 VA. J. INT'L L. 963 (2012). Unlike these treatments, Ilana T. Buschkin argued for inclusion of foreign claimants on deterrence grounds alone. See generally Ilana T. Buschkin, Note, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants To Be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563 (2005). Professor Walker reached a similar conclusion from the perspective of Canadian law. See generally Janet Walker, *Crossborder Class Actions: A View from Across the Border*, 2004 MICH. ST. L. REV. 755.

64. Wasserman, *supra* note 43, at 316. Professor Wasserman's article also helpfully explained why U.S. judgments fare worse in Europe than expected. See *id.* at 335–78.

65. Tanya J. Monestier, *Transnational Class Actions and the Illusory Search for Res Judicata*, 86 TUL. L. REV. 1, 5–6, 8–14 (2011). Monestier also suggested that U.S. courts lack the capacity to assure themselves of the preclusive effect of their judgments. *Id.* at 20–60.

66. Linda Sandstrom Simard & Jay Tidmarsh, *Foreign Citizens in Transnational Class Actions*, 97 CORNELL L. REV. 87 (2011). The work of Simard and Tidmarsh was exceptionally helpful in thinking through the issues in this Article. This Article deviates from their approach on a few levels. See *infra* notes 98, 107, 125, 138, 164. Differences between this Article's approach and Simard and Tidmarsh's include the following: (i) parties have better information than courts about relitigation risk; (ii) opt-in mechanisms improve upon exclusionary approaches, but do not eliminate underdeterrence (and undercompensation); (iii) including all potential class members (including option holders) maximizes substantive law values; and (iv) private information and incentives can help to reduce overdeterrence. The proposals in Parts III and IV also materially differ from that of Simard and Tidmarsh, which fails to discuss private mechanisms or foreign judgments.

67. Simard & Tidmarsh, *supra* note 66, at 124–25.

68. See *infra* Parts II.A and III.A.

69. Simard & Tidmarsh, *supra* note 66, at 124–28.

And, like Monestier, Simard and Tidmarsh propose that excluded foreign plaintiffs may rejoin the class through an opt-in mechanism.<sup>70</sup>

What unifies these scholarly approaches, and the judicial opinions cited above, is that they ask courts to identify relevant foreign plaintiffs and exclude them from opt-out class actions. These courts and scholars are right to recognize that litigation options create asymmetries. But, as described below, these approaches fail to identify relevant option holders and understate the consequences of excluding some or all foreign plaintiffs. A better approach is sensitive to the transnational litigation environment and to the substantive law values that motivate these cases.

## II. AGGREGATING OPTION HOLDERS

As explained in the previous Part, litigation options in transnational class actions produce asymmetries between plaintiffs and defendants, which may create social costs from skewed results and may be unfair to defendants and other plaintiffs. The law of preclusion is designed to solve these problems. Among U.S. jurisdictions, full faith and credit provides that sister-state judgments are given the preclusive effect assigned by the rendering jurisdiction,<sup>71</sup> and the Supreme Court has (more or less) suggested that class resolutions are binding on absentees to the same extent as traditional judgments.<sup>72</sup>

The first-best approach, therefore, aligns preclusion rules across international jurisdictions using a full-faith-and-credit model.<sup>73</sup> If foreign jurisdictions gave class judgments the same preclusive effect as would the rendering court, then the interjurisdictional nature of a suit would not create new option holders. An international treaty on judgment preclusion would be an obvious and simple response to litigation options, and indeed international law is an oft-mentioned solution to the challenges of transnational litigation.<sup>74</sup> But international efforts to deal with

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70. *Id.* In addition to the sources just described, a number of excellent treatments of transnational securities class actions prior to *Morrison* addressed some of the challenges of concurrent jurisdiction that *Morrison* addressed. See, e.g., George A. Bermann, *U.S. Class Actions and the "Global Class,"* 19 KAN. J.L. & PUB. POL'Y 91 (2009); Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14 (2007); Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465; see also *supra* note 58 (discussing *Morrison*). Indeed, Professor Buxbaum concluded that foreign citizens should remain in U.S. class actions, though this recommendation was made against the backdrop of her proposal to limit the scope of the underlying causes of action. Buxbaum, *supra*, at 69.

71. See U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (2012). See generally Burbank, *supra* note 34. Professor Casad recommended a similar approach for U.S. courts considering foreign judgments. Casad, *supra* note 34, at 70–76.

72. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985).

73. See *supra* note 71. Another first-best approach would eliminate concurrent jurisdiction. But this too seems unlikely. Modern choice of law, not to mention modern regulation and modern life, make it so that overlapping prescriptive jurisdiction is a feature of the system. *But see* Buxbaum, *supra* note 70 (arguing for this approach with respect to one slice of the law).

74. There has been some progress in this field, including an international arbitration

jurisdiction and judgments have stalled,<sup>75</sup> and it is hard to believe that class-action judgments would produce international consensus any time soon.<sup>76</sup>

In the absence of an international law of preclusion, second-best alternatives prioritize preclusion symmetry *or* aggregation.<sup>77</sup> The courts mentioned above have chosen preclusion over aggregation. While opt-in proposals sound like they avoid the aggregation-preclusion tradeoff, they too choose preclusion over aggregation.<sup>78</sup> Framers of Rule 23 understood that for low-value claims, opting in was not realistic.<sup>79</sup> More recent scholarly treatments have described opt-out regimes as responding to opt-in's shortcomings with respect to collective-action problems within the putative class, costs to social values such as deterrence, and finality problems.<sup>80</sup> At

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treaty, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (1958), and various Hague Conventions on private international law. *See generally, e.g.*, Samuel P. Baumgartner, *The Proposed Hague Convention on Jurisdiction and Foreign Judgments: Where We Are and the Road Ahead*, 4 EUR. J.L. REFORM 219 (2002); Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203 (2001); Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, LAW & CONTEMP. PROBS., Summer 1994, at 271.

75. *See generally* A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE (John J. Barceló III & Kevin M. Clermont, eds., 2002) (describing many basic difficulties that must be resolved in creating a global law of jurisdiction and judgments). *But see* Ronald A. Brand, *Jurisdictional Developments and the New Hague Judgments Project*, in A COMMITMENT TO PRIVATE INTERNATIONAL LAW—ESSAYS IN HONOUR OF HANS VAN LOON (2013) (suggesting renewed optimism).

76. *See* Clopton, *supra* note 6. A unilateral declaration of reciprocity would be another approach. For reasons to doubt its efficacy, *see infra* note 190.

77. *See supra* notes 49–62 and accompanying text.

78. Professor Monestier proposed opt-in for foreign class members, Monestier, *supra* note 65, at 60–78, and Professors Simard and Tidmarsh treated opt-in as a sufficient condition for foreign participation in any U.S. class action, Simard & Tidmarsh, *supra* note 66, at 126–27. For a failed attempt at opt-in under these circumstances, *see* Kern v. Siemens Corp., 393 F.3d 120, 124–29 (2d Cir. 2004) (reversing district court's opt-in-like class definition).

79. *See* 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1787, at 521–22 (3d ed. 2005) (“The ability of a member to secure the benefits of a successful termination of the action without affirmatively pressing an individual claim is particularly important because it assures that small claimants who would be unable to protect their rights through separate suits can take advantage of the judgment in the class action without the burden of actually participating. It was for this reason that the 1966 Advisory Committee specifically rejected the notion of requiring absent class members to opt into the action to secure its benefits.” (footnote omitted)); *see also* Kaplan, *supra* note 32, at 397–98.

80. *See, e.g.*, Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179 (2009) (reviewing these arguments); *see also* Issacharoff, *Governance and Legitimacy*, *supra* note 20, at 367–68; David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19. *But see* John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288 (2010) (questioning critics of opt-in mechanisms). For behavioral-economics insights that may, in some circumstances, justify opt-out default rules, *see generally* Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826, 1879–89 (2013). For the underwhelming effects of opt-in under the Fair Labor Standards Act,

a minimum, opt-in reduces the number of plaintiffs, which necessarily reduces the number of individuals receiving compensation and (perhaps more importantly in many low-value cases) reduces the deterrence of wrongful behavior directly through the threat of damage awards or indirectly through the insurance market.<sup>81</sup>

Exclusion or opt-in remedies have dominated the discourse on transnational class actions, but these approaches are misguided and not entirely justified. First, Subpart A will explain that these approaches misapprehend the risk of foreign relitigation. Citizenship misses the mark, and courts may lack the information necessary to identify relevant option holders. This informational problem is important because, as Subpart A further explains, the likelihood of relitigation is uneven and probably lower than many assume. Subpart B then turns to those countervailing considerations that justify including option holders in U.S. class actions. Not only do exclusionary approaches fail, but they also create costs to deterrence and fairness that can be avoided by including all plaintiffs with valid claims. For these reasons, courts should reject exclusionary remedies and allow foreign option holders to remain in transnational class actions.

Before exploring these topics more fully, it is important to identify a few issues that are not relevant but occasionally seep into the debate. First, this Part is not about the merits of class actions generally.<sup>82</sup> Nor does it explore the optimal class size<sup>83</sup> or the optimal number of adjudications.<sup>84</sup> These are worthy inquiries, but their answers have no special bearing on the cases in this Article. In addition, this Part assumes that the putative class would meet other class-action requirements.<sup>85</sup> For example, opt-out class actions require notice to potential plaintiffs,<sup>86</sup> and in theory it could be more difficult to effect proper notice to overseas plaintiffs. This Article assumes that such problems can be overcome.<sup>87</sup> In a similar vein, the putative foreign class members discussed here are assumed to have properly stated claims.<sup>88</sup> There is no question that the United States has prescriptive jurisdiction as a matter of statutory

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see generally Charlotte S. Alexander, *Would an Opt In Requirement Fix the Class Action Settlement? Evidence from the Fair Labor Standards Act*, 80 MISS. L.J. 443 (2010). And for a European perspective, see generally Rachael Mulheron, *The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis*, 15 COLUM. J. EUR. L. 409 (2009).

81. This Article later returns to opt-in, see *infra* Part III.A, and discusses positive-value claims, see *infra* note 138.

82. I would not even begin to note the mammoth literature for and against class actions. I leave it to the reader (and Westlaw) to find these sources. For a starting point, see *supra* note 15.

83. Proposals to optimize class size do not tell us whether the inclusion or exclusion of foreign class members is preferable in all cases. See, e.g., David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and "Indivisible" Remedies*, 79 GEO. WASH. L. REV. 542, 566–68 (2011).

84. See, e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995); Clopton, *supra* note 31.

85. See FED. R. CIV. P. 23.

86. FED. R. CIV. P. 23(c)(2)(B).

87. See *infra* Part III.C (discussing notice under foreign law).

88. Note also that although the excluded class members are foreign citizens, one need not resolve the apparent tension between national and global welfare because these foreign plaintiffs have domestic causes of action and thus the relevant conduct is within the scope of intended deterrence.



interpretation,<sup>89</sup> constitutional law,<sup>90</sup> international law,<sup>91</sup> and comity.<sup>92</sup> Finally, I refer throughout to the source of the substantive law, rights, and remedial scheme, by which I mean the substantive law under which plaintiffs bring their causes of action.<sup>93</sup> For reasons discussed below, there are substantive and structural reasons to link procedural mechanisms with the source of substantive rights.<sup>94</sup> For this Part, therefore, I assume that the source of the substantive law provides for class actions—for example, a U.S. federal-law claim to which the Federal Rules of Civil Procedure apply.

#### *A. Assessing Relitigation Risk*

As one article put it, “The principal concern driving the exclusion of foreign citizens is the fear of relitigation.”<sup>95</sup> But the judicial approaches described above are not well suited to identify when that fear is justified, and indeed there are reasons to doubt that courts would be capable of doing so.

To begin with, the exclusion remedy is fundamentally flawed in its focus on citizenship. Current judicial and scholarly approaches seek to identify foreign jurisdictions that will not recognize U.S. judgments and then exclude their citizens from class treatment. But many court systems are open to domestic and foreign plaintiffs. Concluding that a German court will not recognize a U.S. class judgment means that all plaintiffs with causes of action in Germany—not just German citizens—could be option holders.<sup>96</sup> Indeed, U.S. citizen class members may join

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89. See, e.g., *Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2884 (2010) (holding that the Securities Exchange Act of 1934 provided a cause of action only for shares sold on domestic exchanges).

90. See, e.g., *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990); see also Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1103 n.432 (2011) (collecting due-process challenges in transnational cases). See generally Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992); A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT’L L. 379 (1997).

91. U.S. courts construe ambiguous statutes in keeping with international law. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). See generally Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1997).

92. See, e.g., *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (articulating a rule, derived from principles of prescriptive comity, to “construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations”); *United States v. Flores*, 289 U.S. 137, 158 (1933) (relying on comity to limit maritime law); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 612–13 (9th Cir. 1976) (relying on comity to limit antitrust law).

93. For example, U.S. courts hear claims arising under domestic and foreign laws, so merely identifying the forum does not predict the source of substantive rights.

94. See *infra* Part II.B.

95. Simard & Tidmarsh, *supra* note 66, at 125.

96. It also does not mean that every German-citizen plaintiff would have a cause of action in German courts, let alone a cost-effective one.

foreign proceedings as active or passive participants,<sup>97</sup> so a policy to eliminate litigation optionality must tolerate excluding some Americans as well.<sup>98</sup>

This insight has two important implications. First, courts relying on citizenship are not properly targeting option holders. (This Subpart returns to the challenge of identifying option holders shortly.) Second, were courts to take seriously an approach that excluded option holders, then the existence of *any* nonrecognizing foreign forum with a plausible connection to the litigation could turn *all* plaintiffs into option holders and thus subject them to exclusion.<sup>99</sup> Although some judges and scholars might cheer for the demise of the opt-out class action, it would be odd to permit a foreign court's preclusion choices to strike the death knell.

One potential response to this critique is that citizenship is proxy for litigation convenience—it would be easier for French litigants to sue in Paris than in Berlin or New York. But gone are the days when a party physically files her case at the courthouse, and, in any event, one would expect an enterprising plaintiffs' attorney to match up a suitable plaintiff with an amenable forum.<sup>100</sup>

Replacing citizenship with a cause-of-action test would be an improvement but it would not account for the likelihood of relitigation. The mere availability of foreign causes of action is insufficient to lead to relitigation unless such suits are cost effective for plaintiffs—and, perhaps more importantly, plaintiffs' counsel.<sup>101</sup> For

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97. For example, many Americans were included in the Canadian class in the IMAX securities litigation. *See infra* notes 200–06 and accompanying text. And, at least two Dutch settlements have purported to bind absentee U.S. plaintiffs. *See* Hof's-Amsterdam 15 juli 2009, JOR 2009, 325 m.nt. Scholten en Van Achterberg, (In de zaak van Randstand Holding, N.V.) (Neth.); Hof's-Amsterdam 29 april 2009, JOR 2009, 196 m.nt. AFJA Leijten (Vie d'Or) (Neth.); *see also* HÉLÈNE VAN LITH, THE DUTCH COLLECTIVE SETTLEMENTS ACT AND PRIVATE INTERNATIONAL LAW: ASPECTEN VAN INTERNATIONAAL PRIVAATRECHT IN DE WCAM 70–74 (2010).

98. Simard and Tidmarsh also acknowledged that foreign courts are open to noncitizen plaintiffs, but they excluded American plaintiffs from this insight. Simard & Tidmarsh, *supra* note 66, at 91 n.12. Although U.S. courts may have more flexibility to enjoin an American plaintiff abroad, there are reasons to doubt this limitation in practice, including limits on personal jurisdiction and antisuit-injunction authority. *See, e.g.*, Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1179 (1998). More to the point, the U.S. court has no power to enjoin the foreign court. If a foreign court were willing to allow relitigation by foreign passive plaintiffs, could it not reach the same conclusion for American passive plaintiffs regardless of U.S. law?

99. Perhaps foreign courts would not be open to all potential U.S.-court plaintiffs. For example, the foreign state may not recognize a cause of action for securities fraud on a foreign exchange. *Cf. Morrison v. Nat'l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2888 (2010). But it is doubtful that substantive law limits will resolve all cases, though it may create further distinctions among potential class members. And, in any event, this does not resolve the question of cost-effectiveness. *See infra* notes 101–06 and accompanying text.

100. Indeed, at least one American law firm has developed a cottage industry in foreign-court securities suits on behalf of purchasers dismissed from U.S. cases based on the *Morrison* decision. Grant & Eisenhofer has collaborated on suits in the Netherlands against Fortis, in Germany against Porsche and Volkswagen, in France against Vivendi Universal, in Japan against Olympus, and in the United Kingdom against the Royal Bank of Scotland. *Practice Areas: Securities Litigation*, GRANT & EISENHOFER, <http://www.gelaw.com/practice-areas/securities-litigation>.

101. This assumption applies to anyone with stakes in the litigation: all plaintiffs, the subset

example, for a small-claim class action, relitigation in a foreign jurisdiction may be unlikely unless that court had an effective aggregation mechanism sufficient to overcome collective-action problems. Similarly, the ability to bring a cost-effective suit abroad may depend on the foreign jurisdiction's approaches to attorney compensation,<sup>102</sup> filing fees,<sup>103</sup> or damages.<sup>104</sup> A U.S. court trying to determine the reasonable likelihood of relitigation thus would need more information about foreign litigation procedure and practice. Moreover, a switch from citizenship to causes of action would not relieve the courts of the notoriously difficult task of assessing foreign preclusion law—that is, whether the foreign court would treat a U.S. class judgment as preclusive.<sup>105</sup> Indeed, courts addressing this question in transnational class actions have come to opposite conclusions about the same foreign courts.<sup>106</sup> Finally, courts seeking to answer any of these questions would need to rely on motivated party presentations.<sup>107</sup> At best, therefore, courts have imperfect information about foreign alternatives and they may struggle to remedy that deficiency.

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of plaintiffs footing the bill, class counsel (on contingency or through credit), alternative litigation financiers, or providers of “after the event” litigation insurance. *See, e.g.*, David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075, 1078 n.10 (2013); Jasminka Kalajdzic, Peter Cashman, & Alana Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. COMP. L. 93, 133–34 (2013); Jonathan T. Molot, *Fee Shifting and the Free Market*, 66 VAND. L. REV. 1807, 1808–09 (2013).

102. The viability of a foreign cause of action may depend on whether the foreign jurisdiction permits contingency-fee arrangements or whether it uses the American or English rule. *See, e.g.*, Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 673–76.

103. *See, e.g.*, Otto Sandrock, *The Choice Between Forum Selection, Mediation and Arbitration Clauses: European Perspectives*, 20 AM. REV. INT'L ARB. 7, 13–14, 24 (2009) (discussing filing fees and noting that, in some German cases, filing fees can exceed 200,000 euros).

104. The viability of a foreign claim may depend on the availability of punitive or extra-compensatory damages, *see, e.g.*, Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383, 1420–22 (2009), or on the foreign court's rules for setoff, *see* Simard & Tidmarsh, *supra* note 66, at 103 n.52.

105. For example, Professor Rotem explained the difficulty in determining whether a foreign court is rejecting judgments selectively or sporadically. Yaad Rotem, *The Problem of Selective or Sporadic Recognition: A New Economic Rationale for the Law of Foreign Country Judgments*, 10 CHI. J. INT'L L. 505, 516–19 (2010). Professor Wasserman reminded readers that foreign preclusion decisions derive from the complex interaction among the various rules of claim preclusion, issue preclusion, and choice of law. Wasserman, *supra* note 43, at 316.

106. *See* Clopton, *supra* note 6; *see also* Simard & Tidmarsh, *supra* note 66, at 90 n.9 (collecting examples).

107. *See* Clopton, *supra* note 6 (noting some conflicting expert declarations); *see also infra* Part III.A (discussing private preclusion's response to this dynamic). In a sense the same critique could be leveled at all fact finding in which courts depend on party presentations. At least three responses are relevant here. First, prior approaches to preclusion asymmetry assume (or at least seem to assume) that courts can do reasonably well at identifying threats of relitigation. This assumption seems unwarranted. Second, for the reasons described here, this particular task is difficult. Third, as explained shortly, because the risk of relitigation is likely low, we should be particularly wary of courts over-claiming with respect to option holders.

So far this Subpart has explained that exclusion remedies tied to citizenship are misguided and that courts are poorly positioned to identify realistic threats of relitigation. These conclusions do not depend on the empirical question regarding the size of the problem—that is, how many plaintiffs in how many cases will relitigate a transnational class action? That said, there are reasons to believe that relitigation risk is lower than the courts imply.<sup>108</sup> To begin with, it would be rational to file first in the jurisdiction offering the best cost-benefit result.<sup>109</sup> American class actions are attractive, for example, because the combination of class procedures, punitive damages, juries, and other features of U.S. law make the expected return higher than foreign alternatives.

Furthermore, the outcome of the first litigation may have an effect on the cost-benefit calculation in the second forum. The first judgment also could affect the second adjudication if it receives something less than preclusive value—for example, persuasive or evidentiary weight.<sup>110</sup> A defendant's victory in the first case also might change a plaintiff's assessment of her case's strength, or it might send this signal to potential litigation funders or providers of litigation insurance.<sup>111</sup> And as long as some plaintiffs are bound by the first result, the per capita value of the second litigation likely will be reduced.<sup>112</sup>

Finally, it is reasonable to assume that second-best alternatives to U.S. class actions would be other forums with class-action-like mechanisms. But those jurisdictions with class-like procedures are likely to be more willing to recognize class judgments, as presumably these jurisdictions have overcome some of the due process concerns with binding absentees.<sup>113</sup>

For all of these reasons, therefore, the likelihood of cost-effective relitigation in a foreign forum may not be high and certainly will not be distributed evenly across cases and option holders.

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108. The low probability of relitigation is significant in two respects: it suggests courts may be at greater risk to overstate (rather than understate) relevant option holders, and it further augurs for skepticism of exclusion.

109. Again, the relevant actor here may be a plaintiffs' attorney. *See supra* note 101.

110. *See, e.g., In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262 (RWS), 1998 WL 50211, at \*1–2 (S.D.N.Y. Feb. 6, 1998) (noting this phenomenon).

111. *See Molot, supra* note 101, at 1822 (noting the United Kingdom has “two additional sets of eyes critically evaluating a claim's merits”); *supra* note 101 (discussing class counsel and other funders). A prior adverse judgment also could increase the likelihood that a foreign court would deem the second suit frivolous or worthy of sanctions.

112. Total recovery in the second litigation will be lower because the overall claim is smaller due to a smaller class and potential setoff, *see Simard & Tidmarsh, supra* note 66, at 103 n.52 (discussing setoffs), while litigation costs will be spread across fewer plaintiffs.

113. *See, e.g., In re Vivendi Universal*, 242 F.R.D. 76, 105 (S.D.N.Y. 2007) (speculating about the Netherlands in this context). Indeed, in a decision postdating the new Dutch collective-settlement law, a Dutch court recognized a U.S. opt-out settlement and judgment as preclusive on passive Dutch plaintiffs. *See Monestier, supra* note 65, at 52 n.178 (discussing *Rechtbank Amsterdam*, 23 juni 2010, No. 398833/HA ZA 08-1465 (*Stichting Onderzoek Bedrijfs Informatie Sobi/Deloitte Accountants B.V.*) (Neth.)).

*B. Costs of Exclusion*

The previous Subpart suggested that current approaches are poorly attuned to litigation options, and the risk of relitigation they seek to address is unclear, uneven, and may be quite low. This Subpart furthers that case by exploring the costs of excluding option holders.

Courts and scholars calling for exclusion treat litigation options as intolerable but preclusion asymmetries are not unique to transnational class actions, and in other circumstances, courts tolerate such asymmetries in service of other goals. Most prominent is the doctrine of nonmutual offensive issue preclusion. In *Parklane Hosiery Co. v. Shore*,<sup>114</sup> stockholders sued Parklane based on an allegedly false and misleading proxy statement. Before the class action reached final judgment, the Securities and Exchange Commission (SEC) separately sued Parklane on essentially the same basis and obtained a declaratory judgment.<sup>115</sup> The stockholders sought to apply the prior judgment as preclusive against Parklane.<sup>116</sup> Parklane contended that this was unfair because a judgment against the SEC (and in favor of Parklane) would not have been preclusive against the stockholders.<sup>117</sup> Permitting preclusion in this situation, therefore, would be asymmetric.<sup>118</sup> The Supreme Court acknowledged this asymmetry but concluded that judicial economy and litigant interests outweighed asymmetric preclusion.<sup>119</sup> Similarly, in the last few years, the Supreme Court countenanced litigation asymmetries with respect to class certification,<sup>120</sup> “virtual representation” in Freedom of Information Act cases,<sup>121</sup>

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114. 439 U.S. 322 (1979).

115. *See id.* at 24–25.

116. *See id.* at 25.

117. *See id.* at 327 n.7.

118. Professor Currie anticipated this concern. *See* Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 299–300 (1957).

119. *Parklane*, 439 U.S. at 322–33. The *Parklane* Court acknowledged that these values would not be implicated in every potential case, thus the doctrine has exceptions. *Id.* at 330–31. Although the prior judgment in *Parklane* arose from a suit by the SEC, nonmutual collateral estoppel also may apply to judgments rendered in litigation between private parties. *See, e.g., Meredith v. Beech Aircraft Corp.*, 18 F.3d 890, 895 (10th Cir. 1994).

120. In *Smith v. Bayer*, 131 S. Ct. 2368 (2011), the Court permitted a West Virginia state class action to proceed even after a Minnesota federal court denied class certification in a parallel case. The Court reached this conclusion despite asymmetric preclusion:

Bayer warns that under our approach class counsel can repeatedly try to certify the same class ‘by the simple expedient of changing the named plaintiff in the caption of the complaint.’ And in this world of ‘serial relitigation of class certification,’ Bayer contends, defendants ‘would be forced in effect to buy litigation peace by settling.’

*Id.* at 2381 (citation omitted).

121. In *Taylor v. Sturgell*, 553 U.S. 880 (2008), the Court rejected the government’s position that claim preclusion should bar relitigation by “virtually represented” parties, even if that meant subjecting the government to serial asymmetric relitigation in FOIA cases. *Id.* at 904; *see also* Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 611–14 (2011) (challenging *Taylor*).

and *parens patriae* suits.<sup>122</sup>

Although tolerating asymmetric preclusion is not universal, these examples demonstrate that other values matter too. Importantly, the relevant values derive from the substantive law,<sup>123</sup> not the class-action device itself.<sup>124</sup> This Subpart considers the consequences of excluding option holders for deterrence, compensation, and fairness.<sup>125</sup> And, in light of the risk of relitigation and the ability of courts to identify

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122. In *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014), the Court held that state-government actions could not be removed to federal court and consolidated with private class actions, even though this would give the state a litigation option. *Id.* at 745–46. As the Chief Justice asked at oral argument: “What prevents attorneys general from around the country sitting back and waiting . . . as private class actions proceed, and as soon as one settles or the plaintiffs’ class prevails, taking the same complaint, maybe even hiring the same lawyers . . . .” Transcript of Oral Argument at 17, *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014) (No. 12-1036).

123. Professor Wolff discussed the connection between procedural choices and substantive law in his exceedingly helpful article on preclusion and aggregation. Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 789–802 (2005); see also Catherine M. Sharkey, *The Future of Classwide Punitive Damages*, 46 U. MICH. J.L. REFORM 1127, 1128–29 (2013) (discussing the interrelationship between punitive damages and aggregation); Verity Winship, *Aligning Law and Forum: The Home Court Advantage*, 81 TENN. L. REV. 1, 15–22 (2013) (discussing other justifications of bundling substantive and jurisdictional choices).

At the same time, judicially created procedural rules should not distort choices about substantive law enforcement. See Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 655 (2013) (“[T]he use of class actions for ‘truly small claims’ is troublesome . . . [if] it results in a level of enforcement that is substantially different from that contemplated by those responsible for regulatory policy.”); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1877–78 (2006) (“The affording or withholding of aggregate treatment is most problematic from an institutional standpoint when it operates as a backdoor vehicle to restructure the remedial scheme in applicable substantive law.”). It is exactly this distortion that troubled critics of *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010), in which the Supreme Court applied Rule 23 to maintain a class action under New York substantive law despite a New York statute prohibiting class certification in such a case filed in state court. *Id.* at 1444. For a thorough explication of the problems with this decision, see Burbank & Wolff, *supra* note 32.

124. Of course, legislatures could specify procedural rules reflecting preferences about the intensity or scope of private enforcement. See, e.g., Burbank et al., *supra* note 123. Here, given the salience of class actions in U.S. law and given the fact that preclusion asymmetry is not a new phenomenon, it would not be unreasonable to treat aggregation as the U.S. background rule even in light of litigation options. See Wolff, *supra* note 123 (suggesting related circumstances in which courts may infer legislative intent). This assumption would be weaker in states that require mutuality of estoppel. See *id.*; Joshua M. D. Segal, Note, *Rebalancing Fairness and Efficiency: The Offensive Use of Collateral Estoppel in § 1983 Actions*, 89 B.U. L. REV. 1305, app. b (2009) (collecting citations for thirty-three states and the District of Columbia permitting offensive nonmutual collateral estoppel and seventeen states that do not).

125. Professors Simard and Tidmarsh considered deterrence, compensation, and judicial efficiency, see Simard & Tidmarsh, *supra* note 66, at 128, and Walker and Buschkin also addressed deterrence as a rationale for including foreign plaintiffs, see Walker, *supra* note 63, at 781; Buschkin, *supra* note 63, at 1594–99. Which values matter will depend on the relevant substantive law. For ease of explanation, this Subpart will use U.S. law and policy to provide

it, these countervailing considerations further support including foreign citizens in U.S. class actions.

### 1. Deterrence (and Compensation)

The concern with litigation options is that they will result in overdeterrence and overcompensation, but the exclusion of option holders risks the opposite effect.<sup>126</sup> In addition to compensating victims, litigation should compel internalization of costs and deter inefficient conduct.<sup>127</sup> In repeated individual litigation, defendants can take advantage of economies of scale not available to plaintiffs; only when plaintiffs can pool their cases do they approach equal footing with defendants.<sup>128</sup> In service of deterrence, therefore, class actions reduce asymmetries between defendants and plaintiffs with mass claims.<sup>129</sup> The opt-out class action does one better: to eliminate transaction costs of getting each claimant to sign up, Rule 23 starts from the position of inclusion within a defined, certified class.<sup>130</sup>

Remedying litigation asymmetries thus counteracts the endemic underdeterrence problem of small-value cases.<sup>131</sup> But the exclusion of option holders with valid claims reduces this deterrent effect by reducing the size of the plaintiff class. Furthermore, if courts are willing to exclude option holders, defendants might use the threat of exclusion to negotiate suboptimal settlements. Defendants could threaten to seek exclusion of option holders in pursuit of a lower settlement, and

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these background considerations. *Cf.* Simard & Tidmarsh, *supra* note 66, at 124–25 (expressing a preference for the court offering the highest expected value irrespective of the substantive law’s values).

126. This Subpart primarily discusses deterrence, but deterrence and compensation should move together—though in low-value class actions, the deterrent effect may swallow individual compensation. *See generally* Shapiro, *supra* note 20 (conceptualizing class-action recoveries as compensation to the class, not to individuals).

127. Class actions, at least negative-expected-value class actions, are justified on this deterrence rationale. *See, e.g.,* Dam, *supra* note 15, at 54–56; Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Actions and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, at 30–31 (1991).

128. *See, e.g.,* Hay & Rosenberg, *supra* note 30, at 1384. Interparty symmetry may be valuable as a matter of equality and as a matter of accuracy. Allowing the plaintiffs to join forces will equalize stakes and resources, and (in theory) improve accuracy of outcomes. *See id.* at 1406–07.

129. *See generally* Hay & Rosenberg, *supra* note 30; Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494 (2013); Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119 (2000).

130. FED. R. CIV. P. 23(b)(3) provides for opt out, while FED. R. CIV. P. 23(b)(1)–(2) allows for mandatory classes.

131. Professor Rosenberg (among others) has argued this point for decades. *See, e.g.,* Hay & Rosenberg, *supra* note 30, at 1389; David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 832 (2002); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 849, 902–05 (1984).

courts would approve such settlements because neither defendants' nor plaintiffs' counsel would have the incentive to tell courts about the litigation options.<sup>132</sup>

The magnitude of underdeterrence (or overdeterrence) is an empirical question beyond the scope of this project. At a minimum, though, underdeterrence must be acknowledged as a countervailing consideration in dealing with litigation options, and it is notable that the courts adopting the exclusion remedy fail to grapple with it.<sup>133</sup> Moreover, there are reasons to think underdeterrence may be more of a problem in these cases. As explained earlier, the risk of relitigation—and thus the risk of overdeterrence—has been exaggerated.<sup>134</sup> Courts in the United States remain friendly venues for litigation, and recoveries abroad seemingly do not reach the heights of U.S. recoveries.<sup>135</sup> The outcome of the first proceeding may affect (if not preclude) relitigation, and relitigating plaintiffs will be seeking smaller expected returns while sharing costs over a narrower base.<sup>136</sup> Even for claims for which relitigation abroad is plausible, there are reasons to worry about underdeterrence. Removing viable claims may defeat the original class, either because of some formal requirement<sup>137</sup> or because litigation is not viable without the excluded class members.<sup>138</sup> And, just because cases are cost justified in foreign courts does not mean that foreign jurisdictions offer equivalent levels of deterrence to U.S. substantive law.<sup>139</sup>

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132. This situation parallels Professor Lahav's observation that settlements may be reduced because courts have loosened restrictions on certification of settlement classes as compared with litigation classes. *See* Lahav, *supra* note 129, at 1498–99. For a discussion of opportunities to reduce this problem in transnational class actions, see *infra* Part III.

133. *See supra* notes 49–62.

134. *See supra* notes 108–13 and accompanying text (discussing reasons that relitigation risk may be lower than it appears).

135. *See, e.g.*, ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* 475 (3d ed. 2005).

136. This effect adds to the existing risk of underdeterrence resulting from systematic underclaiming in class actions. *See, e.g.*, James D. Cox & Randall S. Thomas, *Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions To Participate in Securities Class Action Settlements*, 58 *STAN. L. REV.* 411, 413 (2005).

137. *E.g.*, FED. R. CIV. P. 23(a)(1) (numerosity).

138. Perhaps all putative claims are required to justify litigation costs, or option holders possess particularly valuable claims. Admittedly, for positive-expected-value cases, deterrence and compensation justifications are weaker (because these cases could proceed individually), and governance problems are worse (because individual autonomy interests are stronger). These arguments suggest caution generally in positive-value cases and, in practice, U.S. courts have been fairly hostile to positive-value class actions. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748–49 (5th Cir. 1996). Still, even if claims are positive value in U.S. and foreign courts, a U.S. court seeking to achieve U.S.-levels of deterrence, *see infra* note 139, or intent on vindicating related smaller claims may include positive-value option holders in U.S. class actions.

139. Even if claims were viable in the foreign jurisdiction, a decision to exclude option holders would result in underdeterrence if expected recoveries abroad are lower than in the United States. In the unlikely event that expected recoveries are higher in the second forum, *see supra* note 135, excluding class members could result in overdeterrence as measured against U.S. recoveries. By binding even a subset of claimants, inclusion could help to minimize this overdeterrence problem—that is, it could reduce the number and scope of viable



## 2. Plaintiff Dynamics

Class actions also respond to collective-action problems among potential plaintiffs.<sup>140</sup> In a putative class action, each plaintiff would prefer to free ride on other plaintiffs—each one wants a litigation option. Solving this collective-action problem among plaintiffs is important for deterrence and compensation, and to ensure fairness *within* the putative class.

Although it may seem that including option holders would be unfair to other plaintiffs,<sup>141</sup> the exclusion of otherwise plausible class members would create a class of free riders. If option holders are included in the class, they share the costs of litigation with other class members.<sup>142</sup> But if option holders are excluded, they may receive some benefits from a successful suit without contributing to litigation expenses—the option holders could benefit from nonmutual offensive issue preclusion<sup>143</sup> or simply reuse the work done in the first case. In this respect, litigation options in transnational class actions are less costly (and more fair) than options in nonmutual estoppel cases like *Parklane* because litigation option holders share costs while estoppel option holders do not.<sup>144</sup> Nor is inclusion unfair to the option holders. The class should operate in service of all U.S. claims,<sup>145</sup> and all class members (including option holders) retain their “voice” and “exit” rights.<sup>146</sup> And, because they retain the option to relitigate unless they affirmatively give it up, inclusion should

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foreign cases (through preclusion or setoff) even if it does not eliminate relitigation completely. *See infra* note 181 and accompanying text.

140. *See supra* notes 35–40 and accompanying text.

141. *See infra* note 187 and accompanying text (discussing intraclass inequities).

142. In successful cases, option holders cash in, and attorney fees are paid out of the joint recovery. In unsuccessful cases, the contingent-fee arrangement means that no class member pays the costs of litigation. One might say that all plaintiffs are paying this cost in higher contingency fees, but again those costs are shared among all plaintiffs—option holders and non-option holders alike. *See generally* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043 (2010).

143. *See, e.g., Parklane Hosiery, Co. v. Shore*, 439 U.S. 322 (1979). Excluded plaintiffs could bring a new suit in a U.S. court and rely on a prior favorable judgment, or a foreign court could treat the judgment as preclusive against the defendant (or as persuasive evidence against the defendant’s case). *See supra* note 110 and accompanying text.

144. One could replicate this estoppel effect in class actions by opting out, and for this reason, many courts will not allow opt-out plaintiffs to use estoppel in future cases. *See* 7AA WRIGHT ET AL., *supra* note 79, § 1789 (“The better view thus is that one who opts out of a class action cannot claim [issue preclusion] benefits from the judgment.”). *But see* Antonio Gidi, *Loneliness in the Crowd: Why Nobody Wants Opt-Out Class Members To Assert Offensive Issue Preclusion Against Class Defendants*, 66 SMU L. REV. 1, 57 (2013) (challenging this view).

145. An outcome should not be deemed inadequate because it does not compensate the option holders for waiving relitigation. Similarly, Professor Woolley has explained that adequacy of representation should be evaluated in light of the substantive remedial scheme. Woolley, *supra* note 20, at 604–07.

146. *See* Coffee, *supra* note 20, at 376 (defining “exit” and “voice” mechanisms in class actions).

leave option holders no worse off than before.<sup>147</sup>

The foregoing discussion touches on issues of autonomy.<sup>148</sup> Many scholarly debates about class actions are understood as pitting those who are concerned with litigant autonomy against those who are concerned with social values such as deterrence.<sup>149</sup> The fact that most of the attention in this Article is given to social welfare should not be understood as relegating autonomy to second class. Instead, this Article focuses on social values because choices about class definitions have potentially profound effects on social outcomes, but whether German passive plaintiffs are included or excluded has no effect on the due-process protections afforded to *all* plaintiffs.<sup>150</sup> Instead, the point here is that plaintiff interests, in addition to social interests in deterrence, may support the inclusion of foreign option holders in U.S. class actions.<sup>151</sup>

Current approaches that exclude option holders are ineffective at identifying the class of plaintiffs likely to relitigate their cases in foreign courts. Courts rely on citizenship when they should ask which plaintiffs may have cost-effective causes of action, taking into account a host of judgments about foreign litigation opportunities. Even if courts asked the right questions, their information and incentives to answer these questions accurately are weak. At the same time, the exclusion of option holders creates real costs to deterrence, compensation, and intraclass fairness. This Article explained why relitigation in foreign courts may be unlikely (and uneven), but disruptions to deterrence from excluding option holders *are* likely—putative plaintiffs who lack individual incentives to sue abroad will not contribute to the social deterrence function of law. Similarly, litigation costs are only shared among participating class members.

For the reasons explained in this Part, a judge facing a transnational class action should start from a default inclusionary rule. Of course, the court will make all sorts of assessments about the viability of the class action and the process due its members, but it should not simply exclude class members with litigation options. Again, this approach is second-best, possibly sacrificing some preclusion as compared to a

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147. This “do no harm” approach is common in this area. *See, e.g.*, Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1177 (2009).

148. Exclusion of foreign plaintiffs also potentially touches on an equality norm because it treats litigants differently based on citizenship. Courts would point to a neutral criterion—litigation options—though this Article demonstrated that citizenship is not a perfect match for optionality. *See supra* notes 97–98 and accompanying text.

149. *See, e.g.*, Nagareda, *Autonomy, Peace, and Put Options*, *supra* note 16, at 752–55 (discussing one such debate).

150. *See* Issacharoff, *Assembling Class Actions*, *supra* note 36, at 702–09; Issacharoff, *Governance and Legitimacy*, *supra* note 20, at 353–66.

151. One interest not discussed here is judicial economy, which is often invoked as a justification for preclusion. *See, e.g.*, *Parklane Hosiery, Co. v. Shore*, 439 U.S. 322, 326 (1979) (noting that preclusion law “promot[es] judicial economy by preventing needless litigation”). The case for judicial economy is complicated by the class action mechanism, *see* Dam, *supra* note 15, at 48, and it is not clear what effect excluding option holders would have on U.S. or global judicial costs. And although excluding option holders will make some U.S. classes nonviable, this would represent bare exchanges of judicial resources for deterrence and compensation. Finally, the administrative costs of ascertaining which class members to exclude are not trivial. *See supra* Part II.A. (discussing the challenges of identifying option holders).

full-faith-and-credit regime. To that end, once transnational classes are certified, the next step is to identify other ways to achieve interjurisdictional preclusion. In the next Part, this Article shows that private information and incentives can do this work while remaining faithful to substantive remedial choices.

### III. RESPONDING TO LITIGATION OPTIONS

The previous Part explained why courts should certify classes including foreign plaintiffs despite the risk that some of them possess litigation options. This is not to suggest, however, that litigation options are preferred. The challenge is identifying valuable litigation options and responding without losing the social benefits of aggregation. This Part describes approaches that respond to litigation options by harnessing the incentives and information of private parties and targeting those efforts toward preclusion (rather than toward aggregation). These approaches are not perfect—as noted above, without interjurisdictional preclusion law, responses are at most second best<sup>152</sup>—but they improve on judicial and scholarly proposals to date. Subpart A reviews the core recommendation of a private-preclusion model.<sup>153</sup> Subpart B discusses alternative approaches for concurrent proceedings, and Subpart C addresses a few other permutations arising from particular features of interjurisdictional litigation. These suggestions are framed as responses to litigation asymmetries. Another way to view these suggestions, though, is as a continued defense of including foreign option holders in transnational class actions. If parties have mechanisms to limit the negative effects of relitigation risk, then we should be even less willing to accept exclusion.<sup>154</sup>

The approaches described in this Part are post-dispute, meaning that they involve party and court action after a cause of action accrues (and often after a case is filed). Pre-dispute approaches also may be available in some cases. For example, with respect to securities litigation, issuers may be able to include exclusive forum selection provisions in corporate bylaws, avoiding litigation options by eliminating the second forum (assuming that the second forum enforces the forum selection agreement).<sup>155</sup> A

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152. See *supra* note 77 and accompanying text.

153. Subpart A offers what Cass Sunstein, drawing on Ronald Coase, has called “privately adaptable rules.” Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 1020 (1995) (citing R.H. Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. 1, 25–35 (1959)). These rules set initial entitlements, but they allow private flexibility to harness market forces and counteract *ex ante* information asymmetries. Sunstein talked mostly about substantive rules, but this concept is useful for procedural questions as well. For a discussion of party-directed procedure, see generally Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329 (2012).

154. Yet another way to view these approaches is as sources of information—if private preclusion routinely appears in litigation involving Dutch parties, perhaps American and Dutch policymakers should consider alternative responses such as regulatory coordination or bilateral treaties. See *supra* notes 73–74 and accompanying text (discussing treaties and concurrent jurisdiction); see also Vaughan Black, *A Canada-United States Full Faith and Credit Clause?*, 18 SW. J. INT’L LAW 595, 618–23 (2012) (proposing a bilateral U.S.-Canada judgment recognition treaty).

155. See George S. Geis, *Shareholder Derivative Litigation and the Preclusion Problem*, 100 VA. L. REV. 261, 297–303 (2014). Importantly, in some contexts a post-dispute agreement

similar approach could exist in other areas in which plaintiffs and defendants have pre-dispute relationships.<sup>156</sup> Nothing in this Article should be read to undermine these approaches. Indeed, they are welcomed both as responses to litigation options and as further evidence that the risk of relitigation may be overstated.

#### A. Private Preclusion

A private response to litigation optionality relies on what this Subpart calls “private preclusion.”<sup>157</sup> Before discussing the merits and mechanics of private preclusion, it is helpful to begin with a stylized version of this approach. This story is illustrative: it necessarily blurs some details, and it is but one example of how private preclusion might take shape.

Imagine a class action filed in a U.S. court in which some subset of plaintiffs may have causes of action in Canada, Austria, or Germany. For the reasons described in the previous Part, the U.S. judge certifies the class even though foreign courts may not treat the U.S. judgment as binding on passive plaintiffs. At the time of certification,<sup>158</sup> defendant approaches plaintiffs’ counsel to negotiate a private preclusion agreement. In this particular (hypothetical) case, defendant concludes that

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will fare better than a pre-dispute one. *See infra* note 170 and accompanying text (discussing European approaches).

156. For just one example, consider the cell phone contract and its corresponding (enforceable) arbitration agreement. *See generally* Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011).

157. This Subpart’s treatment of class-action practice as a market transaction is not novel. As Professor Rubenstein put it:

The core premise of the transactional model is that complex multiparty litigation resembles a transaction more than it resembles a conventional adversarial lawsuit. What is bought and sold are rights-to-sue. . . . A second reason that class actions are profitably conceptualized as ‘deals’ is that this best describes what the attorneys do in such cases. Most of the action in the class action is in the transactional aspects of the deal—what is offered, what is accepted, on what terms, for what consideration. . . . The primary function that complex class action attorneys undertake is structuring large financial transactions.

Rubenstein, *supra* note 16, at 419–20 (internal citations omitted); *see also supra* note 15 (collecting transactional scholarship).

Some readers might object to this commodification of litigation, and such objections have been leveled against other authors writing in this vein. A common response is that transactional approaches are descriptive, not normative. *E.g.*, Rubenstein, *supra* note 16, at 431 (“The transactional model [of class actions] is an explanatory device and pedagogical tool, not a normative proposal. The model does not suggest that this is what lawyers and judges should be doing, so much as it characterizes what they are doing in certain large, important cases.”). But advocating for a private approach to preclusion law, I must concede that I am adding some normative content to this descriptive baseline. In part, this emphasis is justified—the market is one institution that can solve public policy problems, and it should be used when appropriate. I would hasten to add that I have not advocated a market solution for market’s sake. Indeed, I have suggested above that a public approach (i.e., an international treaty) might be preferable.

158. As explained below, private preclusion also may be proposed at settlement or judgment. *See infra* notes 168–69.

the risk of relitigation in an Austrian court is high, so the agreement provides Austrian option holders<sup>159</sup> with a promise of a thirty percent premium on top of the U.S. recovery in exchange for a release of their claims in Austrian courts.<sup>160</sup> Because defendant believes the risk of relitigation in German courts is lower, defendant offers only a ten percent premium to German option holders. And because defendant is confident that Canadian courts will recognize the U.S. judgment, no private preclusion offer is extended to Canadian option holders.

Attorneys for both parties agree on the wording of these offers, and then the court notifies option holders of the private preclusion offer using the normal procedure for sending opt-out notices.<sup>161</sup> Although the offers are negotiated on a subclass-wide basis, individualized consent would be required to release the foreign claims and qualify for the premium recovery.<sup>162</sup> Plaintiffs' counsel (whose fee may be increased if the total recovery is increased) and defendant (who seeks to avoid costly relitigation) work together to identify option holders and encourage them to take the deal.

After the period for accepting the offer closes, the case proceeds along the standard path. If defendant wins a dismissal, then any option holder who signed the release will be bound by that judgment. If plaintiffs win (or settle), then those plaintiffs who signed the private preclusion agreements will receive additional compensation on top of the baseline recovery. Again, any plaintiff who signed a release will not be able to relitigate their case abroad, even if the U.S. recovery is lower than they hoped. And importantly, any plaintiff who signed a release also could not be a passive member of a foreign opt-out class action, which may present the most serious risk of cost-effective relitigation.<sup>163</sup>

This stylized version of private preclusion reveals potential advantages of a private approach to litigation options. Unlike the exclusion remedy described above, private preclusion relies on parties rather than judges to identify which option holders matter. The parties may have private information about relitigation risk unavailable to courts, and they have incentives to acquire that information.<sup>164</sup> Thus, defendants can make a case-by-case assessment of the risk of relitigation and only then approach plaintiffs with a private preclusion proposal.<sup>165</sup>

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159. "Austrian option holders" refers to plaintiffs with causes of action in Austria, not Austrian-citizen plaintiffs. *See supra* Part II.A.

160. The release also could be worded to release all claims in any court (not only Austrian courts).

161. If the agreement occurs at disposition, then presumably the court would use the analogous notification method. *See infra* notes 168–69. And, as described below, the parties may supplement the notice as needed. *See infra* Part III.C.

162. *See infra* note 170 and accompanying text (discussing individualized consent).

163. *See infra* note 168.

164. *See supra* Part III.A (discussing this issue). Recall that current judicial and scholarly approaches rely on judges to identify option holders. *See supra* Part II (collecting judicial and scholarly sources). Simard and Tidmarsh most directly focus on the informational challenge, but they too rely on courts. Simard & Tidmarsh, *supra* note 66, at 124–28.

165. One potential caution with respect to private preclusion is a concern with negative signaling—that is, the notion that defendants might worry that *any* offer would signal a weak case or a willingness to settle. *See, e.g.,* Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 661 (2006) (explaining how negative signaling results in sticky defaults). The fact that offers can be a multiplier of future recovery

Private preclusion is also more flexible than exclusion. Courts have only crude tools to respond to option holders—they can certify or not certify classes with foreign option holders, and they can approve or reject proposed settlements. But private parties have continuous rather than discrete choices. As a result, not only can parties price preclusion more accurately, but they can also act on that information with calibrated offers, such as the proposal to offer thirty percent to Austrian option holders and ten percent to German option holders.<sup>166</sup>

The role of consent is also important for the efficacy of this approach. Individual consent blunts some foreign objections to the opt-out class action. Whether made at the time of certification,<sup>167</sup> settlement,<sup>168</sup> or judgment,<sup>169</sup> private preclusion agreements are consensual, postdispute contracts, which should fare much better in foreign courts.<sup>170</sup> At the same time, this proposal presumptively includes option

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means that a preclusion offer need not come with a negative signal about the underlying merits, nor is it obvious that a defendant willing to make such a contingent offer would be more or less likely to settle the entire case. It is true that a private preclusion offer sends a signal that some plaintiffs may have causes of action in other courts, but it should hardly surprise an Austrian plaintiff (or an Austrian plaintiffs' attorney) that she may be able to sue in her home court. Finally, private preclusion offers are voluntary, and if a defendant believes that the signal value trumps the savings from avoiding relitigation, so be it.

166. Prior scholarship has highlighted efforts by defendants to discourage opt outs—in other words, negotiating for preclusion. Professor Nagareda helpfully categorized methods by which defendants seek to reduce opt outs in class settlements. Nagareda, *Preexistence Principle*, *supra* note 16, at 205–19. Professor Rave also noted at least one case, *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d 184 (S.D.N.Y. 2011), in which a defendant included “bonus payments,” increasing the per capita settlement value if certain thresholds of participation were met. D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1196 (2013).

167. This Part began with a certification example. *See supra* notes 158–63 and accompanying text. Notably, agreements at certification are effective if the outcome is a settlement, judgment for plaintiffs, or judgment for defendant.

168. Class-action settlements may not be sufficient to bar relitigation because they do not require individualized consent and not all passive plaintiffs will claim on the settlement fund. *See supra* note 136 (describing underclaiming). Thus, defendants could offer private preclusion on top of the baseline settlement amount to induce additional consent. Although one might think that passive plaintiffs who do not claim on the settlement fund are also not likely to relitigate abroad, passive plaintiffs who do not file claims remain setoff-free candidates for opt-out class actions in foreign forums.

169. Courts could impose preclusion terms on judgment claims, requiring that plaintiffs sign releases consonant with that jurisdiction's preclusion law in order to claim on the judgment fund. *Cf. Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 333 (1980) (“[T]he court may reasonably require any individual who claims under its judgment [for the government] to relinquish his right to bring a separate private action.”). These judicial releases should track the full-faith-and-credit approach described above. *See supra* notes 71–73 and accompanying text. Defendants also could propose private preclusion offers to effect notice to plaintiffs of final judgments.

170. Private preclusion agreements are not contracts of adhesion; they are negotiated after the claim arises; and they necessarily allow for vindication of rights because they permit the U.S. class action to proceed. *Cf. Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2014–20 (2013) (Kagan, J., dissenting); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740,

holders in the class. Thus, unlike opt-in mechanisms,<sup>171</sup> private preclusion agreements allow courts to capture the benefits of aggregation while separately working to reduce costly relitigation.<sup>172</sup>

Of course, this private approach to preclusion will work only if agreements create value for both sides and if plaintiffs actively consent. First, it is important to acknowledge the transaction costs of negotiating private-preclusion offers, though these costs will be reduced because defendants will make subclass-wide offers,<sup>173</sup> rather than negotiating individualized contracts with every class member.<sup>174</sup> Moreover, private-preclusion agreements need not reduce transaction costs to zero to create value for the parties.<sup>175</sup> Instead, if the costs of negotiation are less than the cost of litigation in the second court, there should be a zone of agreement that allows both sides to benefit.<sup>176</sup> And, if fees for class counsel in the first case could be linked

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1760–61 (2011) (Breyer, J., dissenting). In this sense, private-preclusion agreements appear more like post-filing forum selection (or arbitration) agreements, and this type of consent is typically respected in U.S. and foreign jurisdictions. For example, the limitations on forum selection clauses in employment, insurance, and consumer contracts in E.U. law are subject to an exception for post-dispute agreements. *See* Council Regulation 44/2001, of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters arts. 13, 17, 21, 2000 O.J. (L 12) (EC). More generally, with sufficient time and incentive, attorneys would likely be able to craft agreements, signed by both parties after the dispute arose, that would be binding in foreign courts. Indeed, this is the business of settlements and releases.

171. In this way, private preclusion agreements do not undermine the viability of a U.S. class, unlike settlements that “buy off” named plaintiffs in order to moot the case, *see, e.g.*, *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 340 (1980), or settlements with high-value claimants that unravel the class, *see, e.g.*, Bone, *supra* note 121, at 599–600 (discussing this possibility). But these techniques could target foreign relitigation.

172. Note also that because litigants retain control of their cases, this proposal does not run afoul of rules that prohibit selling claims. *See generally* Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48 (1935); Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RES. J. INT’L L. 159 (2011).

173. *See* FED. R. CIV. P. 23(c)(4)–(5) (issue classes and subclasses). Whether we call them subclasses or not, a settlement with a transnational class could involve different payouts depending on the likelihood of relitigation.

174. This is not to suggest that defendants may only offer one deal per case. But in no case would defendants negotiate individualized offers with individual plaintiffs. *See supra* note 171. Of course, when transaction costs are too high, defendants can elect to proceed under current preclusion law. *See supra* note 147 and accompanying text.

175. The economic justification for preclusion law over private preclusion is that negotiating private agreements is too expensive. *See, e.g.*, ROBERT G. BONE, *THE ECONOMICS OF CIVIL PROCEDURE* 239 (2002); Hay, *supra* note 31, at 24. But here, preclusion law is not available.

176. *See* Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257, 1267 (1995) (“[W]hen litigation costs and outcome risks are high, the zone of settlement is correspondingly larger.”). In this way, private preclusion may transfer value from unique players in the second court—attorneys and courts in future cases—to the parties in the first proceeding. For a discussion of the social utility of litigation waivers and arbitration agreements, *see generally* Keith N. Hylton, *Agreements To Waive or To Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209 (2000).

to class recovery,<sup>177</sup> then those attorneys will have incentives to work with defendants to identify value-enhancing agreements, negotiate their terms, and market them to option holders.<sup>178</sup> Private-preclusion agreements also may tap into party preferences. In other contexts, defendants have been known to offer “peace premiums” to buy the certainty and efficiency of global settlement, and there may be some defendants that prefer a certain outcome in these cases.<sup>179</sup> And unlike opt-in regimes, defendants here have incentives to make the notices effective.

Another advantage of private preclusion is that it may reduce the value of future foreign litigation. Every plaintiff that signs a private preclusion agreement is one fewer member of a foreign class action or other aggregate litigation.<sup>180</sup> This reduces the value of foreign relitigation, which encourages more plaintiffs to join private preclusion. And eventually, enough plaintiffs could agree to make foreign relitigation untenable. Indeed, defendants could price preclusion offers just high enough to achieve this outcome—creating separation among plaintiffs based on their claim size, attention to the case, risk aversion, or other criteria.<sup>181</sup>

Two additional concerns should be dealt with here: agency costs and intraclass inequity. First, readers may be concerned that a proposal that enlists class counsel to help defendants buy preclusion exacerbates the agency problem between attorney and class. Agency costs are endemic to class proceedings<sup>182</sup> but they are costs that lawmakers have been willing to bear, and steps have been taken to ameliorate these costs through judicial supervision of representation<sup>183</sup> and settlement.<sup>184</sup> Further work on agency costs in class actions is needed, but it would not single out litigation options. With respect to private preclusion in particular, class counsel should profit only if she increases plaintiff recovery—principal and agent incentives should be

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177. As the Ninth Circuit recently said, “Courts try to ensure faithful representation by . . . tether[ing] the value of an attorneys’ fees award to the value of the class recovery.” *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013). Indeed, the size of the recovery fund is the best predictor of attorney fees regardless of the fee formula used. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 76 (2004).

178. This suggestion might raise concerns that class counsel and defendants will collude at the expense of class interests. This issue is discussed later in this Subpart. *See infra* notes 182–86 and accompanying text.

179. *See Rave, supra* note 166, at 1193–95 (discussing these reasons and others).

180. *See supra* note 112 and accompanying text.

181. For example, it may be that a certain number of foreign claimants (or a certain total claim value) are necessary to qualify for aggregation. *Cf.* FED. R. CIV. P. 23(a)(1) (numerosity). Or, it may be that a certain number of active plaintiffs are necessary to make the case cost-effective. *See supra* note 171. Even if the foreign jurisdiction has opt-out mechanisms, the effective value of the foreign judgment will depend on the number of actual claims on the judgment fund. But these divide-and-conquer strategies operate against a background in which all plaintiffs retain their causes of action in U.S. courts. *See supra* note 170.

182. *See Macey & Miller, supra* note 127, at 19–27. *See generally* Hay & Rosenberg, *supra* note 30; Issacharoff, *Governance and Legitimacy, supra* note 20; Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004).

183. FED. R. CIV. P. 23(a)(4).

184. FED. R. CIV. P. 23(e).



aligned.<sup>185</sup> And if class counsel is unwilling to expend the effort to increase class recovery, courts could assign separate representation to option holders for purposes of private preclusion.<sup>186</sup>

Second, readers also might worry that private preclusion is unfair because some option holders may do better than other plaintiffs. As a descriptive matter, this is of course correct—even if private preclusion is uncommon, in certain cases defendants may compensate some plaintiffs more than others. Notably, these intraclass differences are the product of substantive law. Legislative choices, not procedural ones, produce any unequal treatment.<sup>187</sup> Further, these inequities would exist whether or not private preclusion were available, and if preclusion is priced right, option holders obtain no greater return (and defendants pay no greater amount) than possible under current law. More mechanically, private-preclusion offers should not give option holders larger stakes in common-fund judgments,<sup>188</sup> but instead should obligate defendants to pay on top of baseline recoveries. Finally, and connected with the previous discussion of representation, if class counsel cannot adequately represent the interests of *all* plaintiffs,<sup>189</sup> then courts may assign separate representation for negotiating private preclusion.<sup>190</sup>

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185. *See supra* notes 177–78 and accompanying text.

186. The threat of separate representation may encourage original class counsel to pursue more cost-justified participants. Class counsel also could help avoid future foreign relitigation by contracting with potential foreign counsel to handle option-holder contact.

187. For example, it is the Securities Exchange Act, not a Federal Rule of Civil Procedure, that determines whether investors on foreign exchanges have viable causes of action in U.S. courts. *See Morrison v. Nat'l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2884 (2010).

188. Common-fund judgments involve a court awarding a fixed amount of damages to a pool of claimants. *See* John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1601 (1974).

189. *See supra* notes 141–47.

190. Another potential objection looks to foreign law. If foreign parties fare better when their home country refuses to enforce U.S. judgments, then perhaps it would be in foreign states' interest not to recognize U.S. judgments. In this way, an exclusionary approach operates as a modified reciprocity rule. *See generally* *Hilton v. Guyot*, 159 U.S. 113 (1895); ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984). However, it is doubtful that an exclusionary approach would be particularly effective in changing foreign-state behavior. As Professor Coyle's political-economy analysis suggests, reciprocity affects behavior if it targets concentrated interests, but exclusion here would target diffuse, unorganized option holders. *See* John F. Coyle, *Rethinking Judgments Reciprocity*, 92 N.C. L. REV. 1109, 1131–43 (2014). At the same time, potential defendants also may be foreign citizens, and likely would lobby against such a rule. *See, e.g., Kern v. Siemens Corp.*, 393 F.3d 120 (2d Cir. 2004) (German defendant); *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76 (S.D.N.Y. 2007) (French defendant); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 219 F.R.D. 343 (D. Md. 2003) (Dutch defendant).

Domestically, the same political-economy argument could augur in favor of aggregating option holders because defendants would have better luck overturning a pro-aggregation rule than disaggregated plaintiffs would have in establishing one. *See, e.g.,* EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* 168–87 (2008); NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 53–97 (1997); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L.

To summarize briefly, private preclusion may be a viable response to some litigation options. At a minimum, it shifts responsibility for identifying option holders to parties with better information, and the responses to options can be continuous rather than discrete. Private preclusion aligns the incentives of defendants, plaintiffs, and class counsel, and it allows the parties with the best information to value preclusion in each suit. Contrary to traditional notions of opt-in, which make participation (and deterrence) contingent on consent, private preclusion preserves the social benefits of aggregation in every case and makes preclusion available when most valuable to the parties. For many cases, asking defendants to put a price on preclusion will reveal that it is of little or no value—relitigation may not be a true threat.<sup>191</sup> But for those cases in which relitigation matters, private preclusion can respond proportionally, pricing preclusion to the case at hand.<sup>192</sup>

### *B. Concurrent Proceedings*

Concurrent proceedings also may present avenues for increased preclusion. Most of the discussion so far has addressed a class action filed in a single jurisdiction. But if enterprising plaintiffs' attorneys in different jurisdictions see the same promising case, each might choose to file an overlapping class action in a different court.

"Duelling class actions"<sup>193</sup> have drawn attention in the domestic setting, particularly with respect to the reverse-auction problem. As Professors Coffee and Wasserman, among others, have explained, if different class counsel file concurrent cases representing the same class, defendants can bid them against each other with the carrot of an attorney-fee award.<sup>194</sup> Individual plaintiffs may lack incentives to monitor counsel effectively, and courts only hear about settlement after it is negotiated.<sup>195</sup>

The reverse-auction problem exists in transnational duelling class actions as well, but the presence of litigation options may actually mitigate this problem and allow courts to increase the preclusive effect of judgments. Domestic duelling class actions create significant reverse-auction problems because full faith and credit permits a judicially enforced settlement in one state to be preclusive in other states' courts.<sup>196</sup>

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REV. 593, 631 (1992); Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1 N.Y.U. J. LEGIS. & PUB. POL'Y 105, 131 (1997).

191. For a discussion of some of the reasons (beyond transaction costs) that these agreements may have not materialized to date, see *supra* note 62. And for further discussion of transactions costs, see *supra* note 175 and accompanying text.

192. Private preclusion also may be available in domestic cases in which preclusion is uncertain. For example, if defendants worry about collateral attack in domestic class actions, preclusion agreements could be worth the cost of negotiation. See *supra* Part II.B (discussing other domestic litigation options). For an alternative discussion of preclusion bargaining, see Alan M. Trammell, *Transactionalism Costs*, 100 VA. L. REV. 1211, 1245–68 (2014).

193. See Wasserman, *supra* note 14. Wasserman deals with duelling *domestic* class actions: federal-state, federal-federal, and state-state. *Id.* Her article does not address transnational duelling class actions, though many of its insights are relevant to these cases as well.

194. *Id.*; see also, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1354 (1995); John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 853–54 (1995).

195. See *supra* Part II.A (discussing judicial information problems).

196. See *supra* note 34.

But because there is no international full-faith-and-credit rule, both courts would need to review the settlement before enforcing it. And importantly, the second judge may have access to better information about the merits of the settlement than the first judge who endorsed it. In the first case, defendant and class counsel have an interest in getting the settlement approved with the least possible effort. Thus, they will present the first judge with information slanted toward approval.<sup>197</sup> But in a second (foreign) court, the judge will hear from an expert objector—class counsel from the second case—with incentives to highlight shortcomings in the settlement.<sup>198</sup> Litigation options, therefore, help judicial review of class settlements to be an adversarial process rather than a collusive one. The mere presence of this second-order review also could deter particularly egregious, collusive settlements.<sup>199</sup>

The recent IMAX securities litigation provides a useful example of how these dynamics could be used to increase preclusion.<sup>200</sup> Canadian and American investors in IMAX sued the company for securities fraud in U.S. and Canadian courts.<sup>201</sup> Both the U.S. and Canadian proceedings involved classes of U.S. and Canadian purchasers who purchased securities on U.S. and Canadian exchanges.<sup>202</sup> Motions practice, discovery, and settlement negotiations proceeded in parallel until parties to the U.S.-side of the litigation reached a settlement. Instead of entering judgment right away, however, the U.S. court made its endorsement contingent on preapproval by the Canadian court.<sup>203</sup> The Canadian court approved the U.S. settlement after hearing objections from Canadian class counsel.<sup>204</sup> Only then did the U.S. court enter judgment.<sup>205</sup> In this way, the preclusive effect of the U.S. ruling was known before it was finalized,<sup>206</sup> and private incentives facilitated a twice-reviewed outcome binding in both the United States and Canada.

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197. See *supra* note 107 and accompanying text (discussing this dynamic).

198. See Wasserman, *supra* note 14, at 482–83 (making a similar informational point for domestic dueling class actions).

199. See also *infra* Part IV (discussing due-process review). Again, because of the absence of full-faith-and-credit obligations, transnational class actions may respond better to the reverse-auction problem than domestic counterparts. And because relitigation is perhaps most likely in jurisdictions with opt-out class actions, this approach may be available in cases creating the most serious threats.

200. See *In re IMAX Sec. Litig.*, 283 F.R.D. 178 (S.D.N.Y. 2012); *In re IMAX Sec. Litig.*, 272 F.R.D. 138, 142–44 (S.D.N.Y. 2010); *In re IMAX Sec. Litig.*, 587 F. Supp. 2d 471, 474–78 (S.D.N.Y. 2008); *Silver v. IMAX Corp.*, 2013 ONSC 1667 (Can.); *Silver v. IMAX Corp.*, (2012) 110 O.R. 3d 425 (Can. Ont. Sup. Ct. J.); *Silver v. IMAX Corp.*, (2011) 105 O.R. 3d 212 (Can. Ont. Sup. Ct. J.); *Silver v. IMAX Corp.*, [2009] O.J. No. 5585 (Can. Ont. Sup. Ct. J.) (QL).

201. *In re IMAX Sec. Litig.*, 283 F.R.D. at 181.

202. The classes were overlapping but not coextensive. See, e.g., *Silver v. IMAX Corp.*, 2013 ONSC 1667 (Can.).

203. Technically, the U.S. court made its settlement approval contingent on amendment of the Canadian class definition to exclude all plaintiffs purportedly bound by the U.S. decision. See *In re IMAX Sec. Litig.*, 283 F.R.D. at 184.

204. See *Silver*, 2013 ONSC at 1667.

205. *In re IMAX Sec. Litig.*, 283 F.R.D. at 188–93.

206. Cf. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 396 (1996) (Ginsburg, J., concurring in part and dissenting in part) (“A court conducting an action cannot predetermine the res judicata effect of the judgment; that effect can be tested only in a subsequent action.”).

*C. Other Approaches*

Private-preclusion and dueling-class resolutions are just two ways courts may use private incentives and information to supplement preclusion law. But they are not alone, and courts and parties should be encouraged to innovate new techniques where possible.

For example, parties have incentives not only to identify foreign courts that create the threat of relitigation,<sup>207</sup> but also to learn the specific requirements for recognition in those jurisdictions. Courts should explore with parties those procedural steps that could increase the likelihood of preclusion abroad and allow defendants to fund such protections if they choose to do so. It may be, for example, that a relevant foreign court would recognize a U.S. judgment if notice of opt-out rights were effected in a particular manner.<sup>208</sup> Defendants should be permitted to fund this notice, subject to court supervision.<sup>209</sup> Alternatively, if a foreign court permits representative litigation only for certain classes of claims or organizations, defendants could investigate how those regimes could integrate with judgment-recognition procedures.<sup>210</sup>

More generally, parties should be creative in thinking through responses to litigation options, and courts should entertain those responses rather than simply rejecting option holders out of hand.<sup>211</sup> Exclusion is not the only way to preserve the preclusive effect of U.S. judgments abroad.

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207. This assessment involves judgments about both foreign law and the particulars of the case.

208. *See, e.g.,* Currie v. McDonald's Rests. of Can. Ltd., (2005) 74 O.R. 3d 321 (Can. Ont. C.A.) (rejecting U.S. class judgment on the basis of notice). Or, the method of service may be the issue. In many civil-law countries, service of process is a public act to be completed by public officials, while signatory states to the Hague Service Convention have consented only to certain forms of international service. *See* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS ch. 10 (5th ed. 2011).

209. *See* FED. R. CIV. P. 23(c)(2) (regarding notice). Similarly, if the form of settlement or judgment notice is relevant to foreign recognition, defendants should be permitted to pay for those notices as well.

210. *See* Clopton, *supra* note 6 (citing examples of representative litigation). Many European states allow consumer associations to bring claims on behalf of consumers. *See generally* Rachael Mulheron, *The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis*, 15 COLUM. J. EUR. L. 409 (2009). Perhaps defendants could induce such consumer associations to agree to private preclusion or to participate in parallel recognition proceedings.

211. Perhaps courts should look to litigation-funding contracts (in jurisdictions that permit them). These contracts create binding obligations on funders and class members, and those obligations could be leveraged into private preclusion. *See supra* note 101 and accompanying text. Or perhaps arbitration mechanisms—and concomitant international obligations to enforce arbitral awards—could play a role in bolstering judicial resolutions or private preclusion. The New York Convention establishes international obligations to enforce arbitral awards, and many arbitral proceedings permit settlement-like awards. *See supra* note 74; *see, e.g.,* U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION art. 30, U.N. Sales No. E.08.V.4 (2008) (describing “arbitral award on agreed terms”).

## IV. RECOGNIZING TRANSNATIONAL JUDGMENTS

So far this Article has explored methods to link procedure to substantive-law values by aggregating foreign class members and working to achieve additional preclusion in the absence of international law. This Part considers briefly the other side of the coin: defendants requesting recognition of a foreign court's aggregate judgment in a U.S. court.<sup>212</sup> It is only a matter of time before U.S. courts will need to make decisions about the preclusive effects of aggregate judgments that are literally and figuratively foreign to U.S. courts.<sup>213</sup> Earlier discussions have explored many of the issues at stake in these cases but here they must be wedded with domestic approaches to judgment recognition.<sup>214</sup>

In responding to foreign aggregate judgments, two paradigms of preclusion policy in U.S. courts may be implicated: recognition of foreign judgments and recognition of domestic class judgments. American foreign-judgment recognition practice is fairly liberal, and U.S. courts will enforce foreign judgments provided minimal due-process requirements were met.<sup>215</sup> Although most judgment recognition is a matter of state law, these rules have coalesced around the federal rule announced in *Hilton v. Guyot* in 1895.<sup>216</sup> Foreign judgments must meet due-process standards,

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212. The Netherlands, for example, has adopted an approach that is opt-out and open to foreign and domestic plaintiffs, but strikingly permits opt-out settlement without providing for opt-out litigation. Thus, Dutch courts purport to preclude domestic and foreign plaintiffs from relitigating cases based on opt-out settlements even though the class could not have gone to trial in Dutch courts. See *Wet Collectieve Afwikkeling Massaschade* [WCAM 2005] [Collective Settlement of Mass Damage Act], codified at *BURGERLIJK WETBOEK* [BW] [CIVIL CODE], art. 7:907–10 (Neth.), and *WETBOEK VAN BURGERLIJKE RECHTSVORDERING* [RV] [CODE OF CIVIL PROCEDURE], art. 1013; see also HENSLER ET AL., *supra* note 15; VAN LITH, *supra* note 97. On the other hand, many Latin American courts allow class-like litigation that binds passive plaintiffs only if they win. See Antonio Gidi, *The Recognition of U.S. Class Action Judgments Abroad: The Case of Latin America*, 37 *BROOK. J. INT'L L.* 893, 910–22 (2012) (collecting examples).

213. One such foreign judgment nearly appeared in the *Shell* securities litigation: the U.S. court avoided passing on the Dutch judgment because it dismissed foreign claimants for failing to state a claim. *In re Royal Dutch/Shell Transp. Sec. Litig.* (“Shell II”), 522 F. Supp. 2d 712 (D.N.J. 2007); *In re Royal Dutch/Shell Transp. Sec. Litig.* (“Shell I”), 380 F. Supp. 2d 509 (D.N.J. 2005); see Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 *GEO. WASH. L. REV.* 306, 313–20 (2011); Palmisciano, *supra* note 62, at 1875–76; see also Clopton, *supra* note 6 (describing foreign procedures for aggregate litigation and collecting sources).

214. This Part relies on U.S. law, but a similar analysis could apply to foreign legal systems.

215. BORN & RUTLEDGE, *supra* note 208. Importantly, U.S. courts will enforce foreign default judgments, meaning that appearance in a foreign court is not a prerequisite for recognition. See *RESTATEMENT (THIRD) FOREIGN RELATIONS LAW* § 481, cmt. i & rep. n.4 (1987); see also *RESTATEMENT (SECOND) CONFLICT OF LAWS* § 98, cmt. d (1971).

216. According to *Hilton*:

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial

along with satisfying the public-policy exception<sup>217</sup> and systemic fairness review.<sup>218</sup> But U.S. courts do not require foreign procedures to mirror U.S. ones exactly,<sup>219</sup> and the due-process review requires less than in domestic cases—sometimes called an “international concept of due process.”<sup>220</sup> This approach protects due process while also realizing other values such as efficiency, economy, and comity.

The second judgment-recognition paradigm is the domestic class action. At the highest level of generality, class action judgments are binding to the same extent as traditional judgments.<sup>221</sup> And just as traditional judgments must meet the requirements of due process,<sup>222</sup> so too must class judgments.<sup>223</sup> In *Phillips Petroleum Co. v. Shutts*, the Supreme Court explained that passive plaintiffs in class actions are not entitled to the same protections as defendants, but passive plaintiffs are entitled to more protection than active plaintiffs.<sup>224</sup> In addition to *Shutts*’s “minimal due

administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

*Hilton v. Guyot*, 159 U.S. 113, 202–03 (1895).

217. RESTATEMENT (SECOND) CONFLICT OF LAWS § 117 & cmt. c (1971); UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (UFMJRA) § 4(b)(3) (1962).

218. See *Hilton*, 159 U.S. at 202; see also UFMJRA § 4(a)(1).

219. As Judge Cardozo observed, “We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.” *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201 (N.Y. 1918).

220. *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000) (suggesting that foreign judgments would be enforced if they satisfied an “international concept of due process,” even if the foreign court system “has not adopted every jot and tittle of American due process”).

221. See *supra* notes 32–40 and accompanying text. As the Supreme Court stated in *Cooper*, “There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation.” *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984).

222. See *Griffin v. Griffin*, 327 U.S. 220, 228–29 (1946) (“A [sister-state] judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction.”).

223. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–14 (1985).

224. According to *Shutts*, for personal jurisdiction to obtain for a non-resident passive plaintiff:

[He or she] must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” The notice should describe the action and the plaintiffs’ rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by

process,” case law has limited the preclusive effect of class resolutions on absentees through what one scholar called the “class action gloss.”<sup>225</sup> The exact contours of this gloss are not relevant here. Instead, the general point is that courts have found various doctrinal pathways to respond to the differences between individual and class resolution.<sup>226</sup> In sum, class actions are preclusive with respect to passive plaintiffs provided they were afforded “minimal due process” and as limited by the “class action gloss.”<sup>227</sup> Again, this preclusion policy combines due-process concerns with other values implicated by prior adjudication.

These two approaches point toward a set of principles for foreign aggregate judgments. A natural synthesis of *Hilton* and class-preclusion law suggests that foreign aggregate judgments should be recognized as binding on passive plaintiffs, provided that due-process requirements are satisfied. Those due-process requirements, as in *Hilton* and *Shutts*, are not identical to the due process required for domestic two-party litigation, but instead reflect the fundamental requirements of notice, opportunity to be heard, and adequate representation: “international” or “minimal” due process.<sup>228</sup>

This synthesis is supported and elaborated by the approach of this Article. Earlier discussion highlighted the importance of looking to the source of substantive rights when thinking about preclusion and aggregation.<sup>229</sup> Here, courts should be more deferential to foreign procedural choices for claims brought under foreign substantive law, since those procedural doctrines represent background or implementing principles of the foreign state’s substantive policy choices.<sup>230</sup>

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executing and returning an “opt out” or “request for exclusion” form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

*Id.* at 812 (internal citations omitted); *see also* Wolff, *supra* note 33, at 2072–117 (discussing *Shutts*, jurisdiction, and due process). Prior to *Shutts*, future-Judge Diane Wood explained that, at least with respect to “representational” class actions (e.g., low-value, public-law claims), personal jurisdiction over named plaintiffs should be sufficient to issue a judgment binding all class members. Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 620 (1987). For joinder-style class actions (e.g., high-value claims joined for efficiency), consent or minimum contacts would be required for all plaintiffs. *Id.*; *see also supra* note 138 (discussing positive-value claims).

225. Wasserman, *supra* note 14, at 490–92; Wasserman, *supra* note 43, at 322–30. Professor Wasserman, of course, is not the only scholar to have noted this phenomenon. *See generally* 18A WRIGHT ET AL., *supra* note 79, § 4455; Hazard et al., *supra* note 20; Wolff, *supra* note 123.

226. *See* 18A WRIGHT ET AL., *supra* note 79, § 4455. Professor Wasserman suggested that practicality and due process justify the gloss. *See* Wasserman, *supra* note 43, at 323–25.

227. Notably, this conception of due process has some characteristics of a personal-jurisdiction analysis and some characteristics of other due-process concerns. *See, e.g.,* Monaghan, *supra* note 98, at 1166–75 (observing this dual character in *Shutts*). One could say the same thing about the “international concept of due process” applied to foreign judgments. *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000).

228. *See, e.g., Shutts*, 472 U.S. at 797–842; *Ashenden*, 233 F.3d at 476–82.

229. *See supra* Part II.B.

230. This approach accords with the view of Casad, Burbank, and others, that foreign

The “class action gloss” provides an important point of comparison. In *Cooper v. Federal Reserve Bank of Richmond*, the Supreme Court held that Title VII plaintiffs could bring individual discrimination suits despite a prior adjudication of a “pattern or practice” class action.<sup>231</sup> As Professor Wolff persuasively explained, the *Cooper* decision is in many respects a decision about Title VII—it is a case addressing a federal-law claim in federal court, subject to the federal preclusion law, and resolved with direct reference to federal substantive policies involved in that statute.<sup>232</sup> In other words, preclusion and aggregation are inextricably intertwined with the source of substantive law and the policy judgments that underlie it. To link substance and procedure in transnational cases, foreign procedures should be treated more deferentially in cases applying foreign substantive law. And U.S. courts should be more willing to question foreign procedural choices for U.S.-law claims.<sup>233</sup>

Despite these presumptions, plaintiffs may bring due-process challenges against foreign two-party judgments and against domestic class judgments, and such challenges should be permitted against foreign class actions as well.<sup>234</sup> Earlier discussions shed further light on this view. First, it is important to recall that the denial of interjurisdictional preclusion is not terminal for the original aggregate litigation. This Article explained that U.S. class actions could proceed despite uncertain preclusion abroad, and, similarly, U.S. courts should not shy away from collateral attacks merely because they may have consequences for foreign aggregate proceedings. Even if the U.S. court is evaluating a foreign-court judgment applying foreign law, it should not feel obligated to sacrifice due process in order to eliminate litigation options from foreign proceedings.<sup>235</sup> In addition, judgment recognition may link up with private preclusion. Private agreements involve individualized consent, so parties to foreign-court preclusion agreements should receive fewer benefits from collateral review than passive plaintiffs. A private-preclusion gloss to recognition

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judgments should be given the preclusive effect entitled under the law of the rendering state—no more and no less. *See supra* note 71.

231. 467 U.S. 867, 881 (1984).

232. Wolff, *supra* note 123, at 726–31. As Professor Wolff put it, “*Cooper*, in short, is a Title VII opinion, not an opinion about the preclusive effects of class action judgments.” *Id.* at 730.

233. In other words, U.S. courts should be more willing to allow relitigation of U.S.-law claims when in service of U.S. substantive law’s goals.

234. Following *Shutts*, Professor Monaghan rightly worried about the rendering court’s ability, through preclusion or injunction, to prohibit passive plaintiffs from bringing due-process challenges in the second court. Monaghan, *supra* note 98, at 1179–87.

235. In *Matsushita*, the Supreme Court held that, pursuant to Delaware law, a Delaware opt-out settlement precluded passive plaintiffs’ securities claims that were within the exclusive jurisdiction of the federal courts (i.e., outside the jurisdiction of the Delaware state court). *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 386–87 (1996). Two points from *Matsushita* are relevant here. First, *Matsushita* acknowledged that Delaware preclusion law governed the preclusive effect of a Delaware judgment. *Id.* at 373. The same approach makes sense in international litigation. *See supra* notes 71, 230. Second, preclusion of passive plaintiffs depends on a finding of due process, which includes a finding of adequacy. *Matsushita*, 516 U.S. at 378–79. Justice Ginsburg’s separate opinion in *Matsushita* explained that such an inquiry may happen on collateral attack in the putative recognizing court. *Id.* at 395–99 (Ginsburg, J., concurring in part and dissenting in part). That is exactly the inquiry described here.



also gives parties in foreign litigation incentives to determine the price of relitigation in a U.S. court and negotiate accordingly.

#### CONCLUSION

A perennial question in the study of international litigation is what, if anything, is different about international cases.<sup>236</sup> This Article contributes to that debate in two respects. First, this Article identifies an important aspect of international litigation that may be different: the lack of an international law of preclusion means that there is a risk of litigation options in transnational litigation. Litigation options create asymmetries between parties and within putative classes and thus may upset legislative choices. Because these options may be more prevalent in international litigation, they unsurprisingly have led courts and commentators to propose internationally focused solutions—that is, excluding foreign citizens from class actions in U.S. courts.

The second contribution of this Article cuts back against these claims. Although transnational litigation may be different in the frequency with which it presents litigation options, the responses to those options should draw on the same values as presented in domestic cases. To begin with, aggregation and preclusion do not stand apart. Instead, they must be integrated with substantive law choices on issues such as deterrence, compensation, and fairness. The mere presence of litigation options should not, as some have implied, throw those choices out the window.

When seeking to supplement the preclusion applicable to option holders, transnational litigation also can take advantage of litigation dynamics not unique to international cases. In litigation, transnational or otherwise, parties may have the best information about the strength of the case, the likely course of litigation (or relitigation), and the value of preclusion. Aligning their incentives should have the effect of identifying the market price for preclusion, which can manifest in private agreements that achieve what international law cannot (at least to date). Judges, meanwhile, lack the information and incentives to price preclusion right, not to mention the fact that their tools to respond to litigation options are blunt and imprecise. Not only should transnational class actions look to the same systemic values in order to weigh aggregation and preclusion, but they also may use the same sets of private and public tools to fill gaps in international law.

Indeed, because litigation options are not unique to transnational cases (though they are saliently presented in them), the lessons for responding to transnational litigation options may be valuable for domestic cases as well. Domestic litigation options may arise from nonmutual preclusion doctrine, collateral attacks on domestic class judgments, serial class certification motions, or unpredictable judgments about

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236. For a discussion about this question in connection with Born and Rutledge's INTERNATIONAL LITIGATION IN UNITED STATES COURTS, *supra* note 208, see generally Samuel P. Baumgartner, *Transnational Litigation in the United States: The Emergence of a New Field of Law*, 55 AM. J. COMP. L. 793 (2007) (reviewing GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN THE UNITED STATES (4th ed. 2007)); Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456 (1991); Linda Silberman, *Transnational Litigation: Is There a "Field"? A Tribute to Hal Maier*, 39 VAND. J. TRANSNAT'L L. 1427 (2006).

the scope of prior litigation.<sup>237</sup> No matter the source, litigation optionality implicates substantive law values that may justify preclusion asymmetry, and courts must consider these values when deciding how to respond to litigation options of any kind. Furthermore, this Article's attempt to supplement weak preclusion law with private action also might be relevant to these other litigation options. Agreements to treat an adjudication as binding present an alternative when preclusion law is unavailable or unreliable, or when courts have imperfect information and limited tools.<sup>238</sup> Here, as elsewhere, procedural rules that recognize the realities of litigation and the different capacities of courts and parties can better serve the underlying substantive law.

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237. *See supra* Part II (collecting examples).

238. While transnational class actions typically involve plaintiff-side options, preclusion uncertainty could exist on both sides of the "V." In those cases, rather than one side paying the other to exercise options, the parties could agree to mutual exercise—agreeing to be bound by the first adjudication once and for all. *Cf.* Trammell, *supra* note 192, at 1245–68.