

# The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts

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## I. Introduction

Forum non conveniens, the power of a court to decline to hear a case over which it has jurisdiction, has a long history. Its roots have been traced to the laws of admiralty and of Scotland, and state courts have used it for many years.<sup>1</sup> Endorsed broadly by the Supreme Court in 1947 in *Gulf Oil Corp. v. Gilbert*,<sup>2</sup> the doctrine has won widespread acceptance in

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1. See Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 2 (1929) (noting the doctrine's American and Scottish roots); Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 909-18, 920-21 (1947) (explaining the doctrine's Scottish and English roots, its state court roots, and its admiralty roots). That history has been questioned. See David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEXAS L. REV. 937, 948-49 n.68 (1990) (commenting on the articles by Blair and Braucher and questioning their historical accuracy); Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 796-99 (1985) (explaining that the doctrine "is of relatively recent origin"); see also C. Paul Rogers, *Scots Law in Post-Revolutionary and Nineteenth-Century America: The Neglected Jurisprudence*, 8 LAW & HIST. REV. 205, 210-12 (1990) (discussing Scottish influence on the doctrine and noting that this influence has occurred "in relatively recent times, rather than in the post-Revolutionary era or the nineteenth century").

2. 330 U.S. 501, 504 (1947).

America.<sup>3</sup> Today, forum non conveniens transfers *within* the federal system are controlled by statute.<sup>4</sup> A case whose most convenient forum is not another federal court, however, cannot be transferred; it must be dismissed. A decade ago in *Piper Aircraft Co. v. Reyno*<sup>5</sup> the Supreme Court addressed the standards to be used in deciding such a motion to dismiss. The opinion attempted to refine forum non conveniens analysis, commenting on the factors to be used in making that decision and establishing the proper degree of review of a forum non conveniens dismissal.<sup>6</sup>

The decade since *Reyno* has seen an explosion of forum non conveniens litigation. That explosion has been sparked in part by the growth in international commercial activity and in part by the imprimatur *Reyno* placed on forum non conveniens. This Article examines the law that has developed following *Reyno*. That examination will then be used to evaluate the standards established by *Reyno* and the correctness of using forum non conveniens in transnational cases.<sup>7</sup> The related problem of injunctions against suit also will be discussed briefly.

## II. The *Reyno* Test

In 1976, a Piper aircraft crashed in Scotland. The six persons aboard, all Scottish citizens, were killed.<sup>8</sup> A year later a California court appointed Gaynell Reyno to administer the estates of the five passengers.<sup>9</sup> A few days later, Reyno filed a wrongful death action in California state court against Piper and Hartzell, the manufacturer of the plane's propellers.<sup>10</sup> The defendants removed the case to a federal court that transferred the proceedings to the Middle District of Pennsylvania pursuant to 28 U.S.C. Section 1404(a), the intrafederal system forum non conveniens statute.<sup>11</sup> After the transfer, defendants then sought to have the case dismissed on the ground that Scotland provided a more convenient

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3. The acceptance has not been unanimous. See *infra* subpart IV(A).

4. See 28 U.S.C. § 1404(a) (1988).

5. 454 U.S. 235 (1981).

6. *Id.* at 257-60.

7. The inquiry focuses, by no means exclusively, on 50 published opinions written since 1985. Half of the opinions surveyed granted the motion to dismiss on forum non conveniens grounds while half denied the motion. I selected relatively recent decisions to see whether forum non conveniens law had matured following *Reyno*; I thought five years was a sufficient time to permit case law to coalesce. Some effort was made to obtain a diverse sampling of courts and types of cases; the sampling, therefore, is not random.

8. *Reyno*, 454 U.S. at 238-39.

9. *Id.* at 239. Ms. Reyno was the secretary of the lawyer who filed the lawsuit. Although that fact is legally irrelevant, the Court's decision to mention it reveals its concern about making federal courts a haven for litigation best conducted elsewhere.

10. *Id.* at 239-40.

11. *Id.* at 240-41.

forum.<sup>12</sup> Ultimately, the Supreme Court agreed that the case should have been dismissed.<sup>13</sup> In so holding, the Court considered the impact of five factors: the presence of a suitable forum in another country; the plaintiff's nationality; the relevance of what law would control the case; and a balance of "public" and "private" interests.<sup>14</sup> The test sounds simple, but it is deceptively so.

### A. *The Presence of an Alternative Foreign Forum*

"At the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum."<sup>15</sup> That inquiry certainly makes sense. It generally would be unfair for a court to dismiss a case over which it has jurisdiction if the plaintiff were barred by limitations or some other procedural barrier from bringing it elsewhere. The alternative forum analysis suggested by *Reyno* has two prongs.

1. *Amenability to Process.*—First, an alternative forum "ordinarily" will exist if defendant is "amenable to process" there.<sup>16</sup> This part of the analysis has proven relatively trouble-free. Of course, a court "cannot justify dismiss[al] . . . when it is uncertain whether plaintiffs have an alternative forum."<sup>17</sup> Courts, however, routinely condition dismissal on the defendant's waiving the foreign limitations period<sup>18</sup> and agreeing to accept service in the foreign jurisdiction.<sup>19</sup> Those conditions are fair because it is the defendant who seeks the dismissal.<sup>20</sup> Moreover, if the

12. *Id.* at 241.

13. *Id.* at 261.

14. *Id.* at 247-61.

15. *Id.* at 254 n.22. Defendant's failure to identify an alternate forum is fatal. *See, e.g.*, In *Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494, 505 (M.D.N.C. 1987).

16. *Reyno*, 454 U.S. at 254 n.22; *Hanes Printables*, 663 F. Supp. at 505. *But cf.* *Andros Compania Maritima, S.A. v. Intertanker, Ltd.*, 714 F. Supp. 669, 678 (S.D.N.Y. 1989) (proposing that Bermuda might not be a sufficient alternative forum if, because of an outstanding arrest warrant, plaintiff could not travel there).

17. *Gassner v. Stotler & Co.*, 671 F. Supp. 1187, 1190 (N.D. Ill. 1987).

18. *See, e.g.*, *Feenerty v. Swiftdrill, Inc.*, 706 F. Supp. 519, 524 (E.D. Tex. 1989). *Crimson Semiconductor, Inc. v. Electronum*, 629 F. Supp. 903, 908-09 (S.D.N.Y. 1986), contains an inconclusive discussion of whether a forum can be adequate if the foreign limitations period had expired before the claim was filed in this country. In that case, the proper inquiry would ask whether the foreign court would permit waiver of the limitations period. *But see* R.R. Jespersen, *The Bhopal Decision: A Forum Non Conveniens Perspective*, 18 *LINCOLN L. REV.* 73, 98 (1988) (arguing against conditional dismissals).

19. *See, e.g.*, *De Melo v. Lederle Lab.*, 801 F.2d 1058, 1061 (8th Cir. 1986).

20. *See Feenerty*, 706 F. Supp. at 524. The *Feenerty* decision provides an example of a typical conditional order:

The Court will impose the following conditions upon the parties. The plaintiff shall refile her case in a court of competent jurisdiction in the United Kingdom within ninety (90) days of the date of this Order. Upon filing her case within the

defendant does not fulfill the terms of the conditional order, the wrath of the federal government may be visited on it in the form of a contempt action. If the court has any doubt about its ability to enforce its conditional orders via contempt proceedings, it probably should not dismiss the original proceeding. Occasionally, other conditions are imposed: the court may require that the foreign forum act promptly<sup>21</sup> or it may condition a dismissal on the defendant's promise to pay any judgment.<sup>22</sup>

Because the decisions emphasize the need to have all facets of the litigation heard in one place,<sup>23</sup> courts occasionally mention third-party practice in other countries during their alternative forum analysis.<sup>24</sup> It would be senseless, of course, to dismiss the case because the court believes it can be wholly resolved elsewhere, only to find that the assumptions underlying that decision were wrong. Rather than trying to resolve difficult questions of third-party practice in other countries, the courts should condition the dismissal on the willingness of the foreign court to hear the case—including third-party claims—a condition that “assure[s] the availability of the alternative forum.”<sup>25</sup>

2. *Availability of an Adequate Remedy.*—Judges, however, consider a second factor in their alternative forum inquiry: if “the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an

time prescribed, the defendants shall agree to accept service of the proper writs and to submit to the jurisdiction of the courts of the United Kingdom. Furthermore, the defendants shall waive any defense of limitations and shall agree to satisfy any final judgment rendered by a court of competent jurisdiction in the United Kingdom. Finally, within ninety (90) days of the date of this Order, the plaintiff and defendants shall jointly notify this Court that all of the above conditions have been satisfied, and at such time this Court will enter a final judgment, dismissing this action with prejudice.

*Id.*

Foreign notions of standing may create another obstacle to the availability of an alternative foreign forum. Professor Robertson has identified one case in which the foreign court dismissed the matter because the defendant was not permitted to waive limitations. David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 LAW Q. REV. 398, 419-20 (1987).

21. See *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 829 (2d Cir. 1990) (granting a conditional dismissal that would allow the plaintiff to reapply to the federal court for injunctive relief if the Japanese court did not rule on plaintiff's motion to compel arbitration within sixty days), *cert. denied*, 111 S. Ct. 2259 (1991).

22. See *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1450 (9th Cir. 1990).

23. See *infra* subpart II(D).

24. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 259 (1981) (holding that the inability to implead a third-party defendant in United States federal court supported leaving a trial in Scotland); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1398 (8th Cir. 1991) (stating that the defendants' inability to implead a Jamaican citizen in a Missouri court was not sufficient to warrant dismissal on forum non conveniens grounds).

25. *Syndicate 420 at Lloyd's London v. Early Am. Ins. Co.*, 796 F.2d 821, 830 (5th Cir. 1986).

adequate alternative."<sup>26</sup> The Court cautioned that this will happen only in "rare circumstances."<sup>27</sup> For example, dismissal would be inappropriate when the alternative forum "does not permit litigation of the subject matter of the dispute."<sup>28</sup>

This prong of the alternative forum requirement almost always receives substantial attention in those cases in which it is raised, and occasionally it is critical to the decision. Taking their cue from *Reyno* itself, which found Scotland to be an adequate alternative forum despite having laws much less favorable to the plaintiff, courts have found the foreign forum inadequate only in extreme cases. It is not enough that there might be different procedures,<sup>29</sup> lack of the right to a jury trial,<sup>30</sup> delay in trying the case,<sup>31</sup> and differences in the available relief, including damages.<sup>32</sup> Even if the foreign forum will not hear federal statutory claims, courts find the forum adequate if other claims made by plaintiff would provide her with a remedy.<sup>33</sup> As one court said, "Although Brazil may be a less favorable forum for [the plaintiff], we cannot conclude that it is inadequate."<sup>34</sup>

Courts also consider the plaintiff's ability to finance an action in a foreign forum when ruling on motions to dismiss on forum non conveniens grounds. For example, plaintiffs frequently contend that the foreign forum is inadequate because contingency fees are not available there.<sup>35</sup> Courts,

26. *Reyno*, 454 U.S. at 254 n.22.

27. *Id.*

28. *Id.*

29. See *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768 (9th Cir. 1991) (holding that the differences in Japanese pretrial discovery features did not render Japan an inadequate forum).

30. See *id.* (noting that even the complete lack of the right to a jury trial does not render a foreign forum inadequate). Another instructive case is *Jeha v. Arabian American Oil Co.*, 751 F. Supp. 122 (S.D. Tex. 1990), *aff'd*, 936 F.2d 569 (5th Cir. 1991). The court then found Saudi Arabia to be an adequate forum for a medical malpractice action involving a Lebanese employee of an American company who received medical treatment in Saudi Arabia. This holding was made despite the fact that Saudi Arabia handles such claims through a "quasi-judicial special commission" composed of a judge, a legal advisor, a professor, and two physicians, as well as the fact that appeals are handled through a nonadministrative process. *Id.* at 125. The court also found Lebanon to be an adequate forum. *Id.*

31. *Broadcasting Rights Int'l v. Societe du Tour de France, S.A.R.L.*, 708 F. Supp. 83, 85 (S.D.N.Y. 1989) ("Delays in an alternative forum's judicial system are not sufficiently harmful of due process to prevent dismissal on the ground of forum non conveniens.").

32. See *Transunion Corp. v. Pepsico, Inc.*, 811 F.2d 127, 129 (2d Cir. 1987) (finding no merit in the claim that dismissal should be barred because triple damages would be unavailable in the Philippines); *De Melo v. Lederle Lab.*, 801 F.2d 1058, 1061 (8th Cir. 1986) (concluding that Brazil is not an inadequate forum, even though punitive damages are unavailable and contingency fee arrangements are rare).

33. See *Lockman*, 930 F.2d at 768-69 (explaining that even though RICO and Lanham Act claims might be unenforceable in Japan, the plaintiff failed to show that possible recovery on other tort and contract claims would be "no remedy at all").

34. *De Melo*, 801 F.2d at 1061.

35. See, e.g., *id.*

however, are quick to rebut this argument, noting that free legal assistance for indigents can sometimes be obtained abroad,<sup>36</sup> and that, at least in England, a prevailing plaintiff can recover her attorney's fees.<sup>37</sup> (Those opinions often suggest strong judicial dissatisfaction with our prevailing fee system.) On the other hand, a court which finds that the plaintiff has a real connection to the forum, and that there is a legitimate domestic interest in the litigation, will probably find significance in the lack of a contingency fee arrangement abroad.<sup>38</sup> Financial burden alone generally will not be the deciding factor leading to dismissal.<sup>39</sup> In any event, attorney compensation should not be a controlling factor in the adequate alternative forum inquiry; to make the case turn on that factor, given the uniqueness of the American fee system, would eviscerate forum non conveniens. Some might welcome this back-door gutting of the doctrine. I find it difficult to argue, however, that our unique, much-misaligned, contingent-fee arrangements should be given controlling effect in making the forum non conveniens decision.

Professor Baade has pointed out that the bonanza of the American jury award and contingent-fee practices are the real issues in forum non conveniens cases:

None of this has very much to do with substantive law or the conflict of laws. It reflects, in the main, a combination of two factors: a specialised plaintiffs' bar remunerated on a contingent-fee basis, and a consistently high level of damage awards by juries in those parts of the United States favoured by plaintiffs' lawyers.<sup>40</sup>

Thus, by treating contingency fees and jury awards as elements of a rather routine inquiry ostensibly focusing on other factors, courts are able to avoid talking about some of the real issues at hand. That should not be the case; inquiry should always be directed at the real, rather than the paper, factors.

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36. *Id.* The court analogized the contingent fee problem to a change in substantive law. *See id.*

37. *Coakes v. Arabian Am. Oil Co.*, 831 F.2d 572, 575 (5th Cir. 1987).

38. *See, e.g., Rudetsky v. O'Dowd*, 660 F. Supp. 341, 348 (E.D.N.Y. 1987) (saying that "the private interests implicated by [the plaintiff's] American citizenship and her inability to afford this litigation in England outweigh the minor public factors and nominal burdens on the defendant that might make trial overseas seem more convenient").

39. *See Kryvicky v. Scandinavian Airlines Sys.*, 807 F.2d 514, 517 (6th Cir. 1986) (holding that the financial burden on the plaintiff "is only one factor used in the balancing process, and it alone would not bar dismissal based on *forum non conveniens*"). *But see McKrell v. Penta Hotels*, 703 F. Supp. 13, 14 (S.D.N.Y. 1989) (holding that the magistrate's decision that the plaintiff's financial inability to pursue litigation in France warranted denial of a forum non conveniens motion was not clearly erroneous).

40. Hans W. Baade, *Foreign Oil Disaster Litigation Prospects in the United States and the "Mid-Atlantic Settlement Formula"*, 7 J. ENERGY & NAT. RESOURCES L. 125, 126 (1989).

Finally, there is the question of whether the alternative forum has a reliable judicial system that can perform its functions well. This issue was important in the *Bhopal* litigation,<sup>41</sup> but it has been raised infrequently in other cases. The judicial system's ability to function effectively could be a serious problem, however. Whether the courts can function due to civil disorder<sup>42</sup> or whether plaintiffs' lives would be at risk<sup>43</sup> certainly should influence resolution of whether there is an adequate forum. Judges, no doubt, are loath to make public announcements along quasi-foreign-policy lines;<sup>44</sup> in extreme cases, therefore, one suspects that a decision which might turn on policy factors is explained on other grounds.

3. *Dismissal in the Absence of an Adequate Alternative.*—The absence of an alternative forum does not lead to an automatic denial of the motion to dismiss.<sup>45</sup> However, a plaintiff's bad conduct might lead a court to dismiss the case in any event.<sup>46</sup> Even if a plaintiff has not misbehaved a court might consider dismissing the case for prudential reasons—much as it might invoke the prudential branch of the standing requirement.<sup>47</sup> Examples of dismissal based on this ground should be extremely rare.

### B. *The Relevance of Choice of Law*

*Reyno* squarely held that “[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.”<sup>48</sup> The Court explained that if the rule

41. *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 847-52 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir.), *cert. denied*, 404 U.S. 871 (1987).

42. *See Walpex Trading v. Yaciminentos Petroliferos*, 712 F. Supp. 383, 393 (S.D.N.Y. 1989) (suggesting that “civil and political chaos in Bolivia” might make Bolivia an inadequate forum).

43. *See Hatzlachh Supply, Inc. v. Savannah Bank*, 649 F. Supp. 688, 692 (S.D.N.Y. 1986) (acknowledging the plaintiff's argument that the alternate forum was inadequate “due to purported corruption”); *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 860 (S.D.N.Y. 1983) (“[I]f the plaintiffs returned to Iran to prosecute the claim, they would probably be shot.”), *aff'd*, 767 F.2d 980 (2d Cir. 1985).

44. Neither do judges like to make public announcements based on the application of the law of an “uncivilized” tribunal. *See Zschernig v. Miller*, 389 U.S. 429, 461-62 (1968) (Harlan, J., concurring) (“And in the field of choice of law there is a nonstatutory rule that the tort law of a foreign country will not be applied if that country is shown to be ‘uncivilized.’”).

45. *See generally* Ann Alexander, Note, *Forum Non Conveniens in the Absence of an Alternative Forum*, 86 COLUM. L. REV. 1000 (1986) (seeking to define a middle ground between rigid adherence to the alternative forum requirement and its total abandonment by courts which hold that a *forum non conveniens* dismissal is permissible in the absence of any alternative forum).

46. *See id.* at 1005-07 (citing cases where service was by force or fraud). Properly speaking, this is not a *forum non conveniens* problem at all, but really one of a court's ability to control litigants' behavior.

47. *See id.*

48. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981).



were otherwise, forum non conveniens “would become virtually useless.”<sup>49</sup> Given a choice among forums, plaintiffs naturally will choose the one with the most favorable laws;<sup>50</sup> hence, if an unfavorable change in the governing law were to be given “substantial weight . . . dismissal would rarely be proper.”<sup>51</sup> Moreover, inquiry into the laws of other countries could become quite difficult and rob forum non conveniens of one of its goals—“to help courts avoid conducting complex exercises in comparative law.”<sup>52</sup>

The explanation begs the question, of course. The *real* inquiry should be whether the forum non conveniens motion should be granted even if a dismissal will work an unfavorable change in law. If the answer to this harder question is yes, then the Court’s explanation makes sense, but only as a minor premise.<sup>53</sup>

In any event, the choice-of-law analysis simply cannot be omitted. There are two reasons. First, the *Reyno* Court did say that “substantial” weight may be given the unfavorable change in law “if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.”<sup>54</sup> Second, courts often engage in substantial choice-of-law analysis when engaged in considering the “public interest” component of *Reyno*.<sup>55</sup>

49. *Id.* at 250.

50. I wonder how this works in practice: that is, how many attorneys with a viable case at home are really willing to recommend that the case be tried in a place which has laws more favorable to the client? The client may receive more money, but the lawyer loses fees. (In many cases, of course, the choice-of-law possibilities never cross the lawyer’s mind.)

I am not sure how accurate this cynical observation is in international forum non conveniens cases, however. The cases I have read generally break down into three categories: American citizens injured abroad, multinational disputes involving multinational companies, and foreigners injured abroad by American products. The first group is likely to sue in an American court; the second—rich companies with sophisticated lawyers—will try to find the most favorable forum anyway; and many plaintiffs in the third category undoubtedly are solicited abroad by American lawyers.

51. *Reyno*, 454 U.S. at 250.

52. *Id.* at 251. The Court rejected an analogy to transfers made within the federal system under 28 U.S.C. § 1404(a), in which the substantive law of the transferor forum should be applied. See *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) (discussing transfer under § 1404(a) generally and concluding that “the transferee district court must . . . apply the state law that would have been applied if there had been no change of venue”). The *Reyno* Court distinguished *Van Dusen* on the grounds that that case focused on the “construction and application” of § 1404(a) rather than on common-law doctrine. *Reyno*, 454 U.S. at 253-54. This argument is not very convincing; an analogy between § 1404(a) and the choice-of-law inquiry in forum non conveniens dismissals can be drawn. After all, the effect of *Van Dusen* is to permit transfer for convenience without disturbing the plaintiff’s choice of forum (and, therefore, choice of law). By analogy, a forum non conveniens dismissal could only occur if the new forum would apply the same law as the old.

53. I will consider this question in Part VII, *infra*.

54. *Reyno*, 454 U.S. at 254.

55. See *infra* subpart II(D).

### C. *Private Interests*

Once an adequate alternative forum has been identified, *Reyno* requires a balancing of "all relevant public and private interest factors."<sup>56</sup> Private interest factors are those considerations relevant to the parties themselves and to the conduct of the case.

1. *The Parties.*—The convenience of the parties is rarely an important factor. Indeed, the parties often are arguing *against* their own convenience—the foreign plaintiff wishing to litigate in America, and the domestic defendant moving to have the case heard abroad.<sup>57</sup>

The choice-of-law inquiry also invites an analysis of party expectations. However, party expectations, the focus of most of our private law, receive surprisingly little attention in forum non conveniens inquiries.<sup>58</sup> A rare exception is *Reid-Walen v. Hansen*,<sup>59</sup> a suit brought by a vacationing couple against the owners of a Jamaican resort. The majority in that case expressed concern about the defendants' expectations, reflected in their insurance coverage, that they would not be subject to suit in the United States.<sup>60</sup> The court found that those expectations were not quite legitimate, however, noting that defendants' "position is weakened by the fact that they reside and solicit business in the United States."<sup>61</sup> Judicial analysis of party expectations is hardly a novelty in conflicts cases.<sup>62</sup> But the *Reid-Walen* decision is interesting because it places the expectations inquiry in the "private interests" portion of the analysis rather than in the "choice of law" or "jurisdiction" section. This placement is perhaps explained by the courts' unhappiness with the role expectations play in the doctrine in those latter categories. More probably, the opinion just collapsed the expectation analysis demanded by each of the separate *Reyno* factors into a single discussion of the problem. This shortcut is not surprising. The apparent separateness of the *Reyno* categories is illusory; as the problem of party expectations illustrates, the different factors can easily blend into one another. In any event, no matter how categorized,

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56. *Reyno*, 454 U.S. at 257.

57. See *Stewart v. Dow Chem. Co.*, 865 F.2d 103, 106 (6th Cir. 1989) (noting that "[b]oth parties seem almost particularly willing" to "be inconvenienced by having to proceed in a court in a foreign jurisdiction").

58. This is partly due to the relative scarcity of contract cases, an area where expectations might be thought particularly important.

59. 933 F.2d 1390 (8th Cir. 1991).

60. *Id.* at 1399-1400 (acknowledging the defendants' claim that the liability insurance policy for their business, providing for coverage only if they were sued in Jamaica, evidenced their expectations that any suit arising out of their business would be prosecuted in Jamaica).

61. *Id.* at 1400.

62. See, e.g., *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 327 (1981).

party expectations, because they lie at the heart of so much law, often could be a key factor in forum non conveniens analysis. Unfortunately, the *Reyno* analysis does not tell us how to focus on expectations.

2. *Litigation Factors*.—Courts generally have focused on how the place of the trial will affect the course of the litigation. Much of the inquiry is rather obvious and concerns location and language: where are the witnesses and documents;<sup>63</sup> where is the physical evidence;<sup>64</sup> what is the cost of producing the evidence at trial;<sup>65</sup> what is the cost of translating documents and testimony;<sup>66</sup> will extensive travel for trial disrupt one litigant's life or business more than that of another;<sup>67</sup> and are there any important local practices that must be understood to resolve the case.<sup>68</sup> The wise litigant, therefore, will buttress her allegations about inconvenience with credible affidavits<sup>69</sup> if at all possible.<sup>70</sup>

Some litigants can be quite disingenuous when making the required showing that inconvenience would follow a forum non conveniens dismissal. In one case the plaintiff first named ten possible witnesses.<sup>71</sup>

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63. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

64. See *id.* at 254-55; *Jennings v. Boeing Co.*, 660 F. Supp. 796, 805 (E.D. Pa. 1987), *aff'd*, 838 F.2d 1206 (3d Cir. 1988) (finding that the presence of physical evidence in the United Kingdom weighed in favor of dismissal).

65. See *Jeha v. Arabian Am. Oil Co.*, 751 F. Supp. 122, 126 (S.D. Tex. 1990), *aff'd*, 936 F.2d 569 (5th Cir. 1991) (emphasizing that it would be "wasteful" to make physicians travel from Saudi Arabia to Texas to testify at trial).

66. See *De Melo v. Lederle Lab.*, 801 F.2d 1058, 1062-63 (8th Cir. 1986) (noting that documents in the United States would have to be translated into Portuguese for trial in Brazil). The translation problem can work both ways; documents located in America might have to be translated from English if the case is heard elsewhere. Even serious translation problems are not conclusive. See *Update Art, Inc. v. Maariv Isr. Newspaper, Inc.*, 635 F. Supp. 228, 233 (S.D.N.Y. 1986) (holding that the need to translate documents from Hebrew into English does not satisfy dismissal); *Fassi v. L.J.N. Toys, Ltd.*, 753 F. Supp. 486, 489-90 (S.D.N.Y. 1990) (rejecting the plaintiff's argument that trial in Italy would require expensive and burdensome translation), *aff'd*, 948 F.2d 1276 (2d Cir. 1991).

67. See *Hatzlachh Supply, Inc. v. Tradewind Airways*, 659 F. Supp. 112, 116 (S.D.N.Y. 1987). For example, extensive travel will disrupt a small company much more than it will a large one. Similarly, the court in *Rudetsky v. O'Dowd*, 660 F. Supp. 341 (E.D.N.Y. 1987), emphasized that the defendant, singer Boy George, could far more easily bear the cost of transatlantic travel from England to the United States, thus supporting the court's decision to retain jurisdiction in America. *Id.* at 347.

68. See *Syndicate 420 at Lloyd's London v. Early Am. Ins. Co.*, 796 F.2d 821, 831 (5th Cir. 1986) (noting that "an understanding of the operating procedures at Lloyd's will be critical to the resolution of the issues"); see also *Hatzlachh Supply*, 659 F. Supp. at 116.

69. See *Reid-Walen v. Hansen*, 933 F.2d 1390, 1396 n.10 (8th Cir. 1991) (noting that although *Reyno* had not required detailed affidavits, it had not dispensed with the need for them entirely); see also *Herbstein v. Bruetman*, 743 F. Supp. 184, 189 (S.D.N.Y. 1990) (finding that the defendants failed to identify foreign witnesses who would not be willing to testify in the United States).

70. The Court observed in *Reyno* that witnesses "are located beyond the reach of compulsory process, and thus are difficult to identify or interview. Requiring extensive investigation would defeat the purpose of [the defendants'] motion." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 258 (1981).

71. *Feenerty v. Swiftdrill, Inc.*, 706 F. Supp. 519, 521-22 (E.D. Tex. 1989).

When the defendant moved to dismiss on forum non conveniens grounds the plaintiff submitted an almost completely different list of witnesses, which included twelve forum residents.<sup>72</sup> The court had no trouble seeing through this subterfuge, especially when the plaintiff could not explain the relevance of the testimony of those newly discovered twelve.<sup>73</sup>

A second inquiry into relevant litigation factors focuses on civil procedure: do the foreign judicial systems provide adequate discovery and compulsory procedures?<sup>74</sup> Often courts focus on the availability of compulsory process as a means of requiring unwilling witnesses to travel to the forum in which the lawsuit is pending.<sup>75</sup> This inquiry is a two-way street; American witnesses might have to travel to a foreign forum, and foreign witnesses might have to come here. Thus, the availability of compulsory process can be critical, especially if live testimony is important; for example, observation of a witness's demeanor will be especially important in a fraud case in which subjective intent is an element of the tort.<sup>76</sup> One method of dealing with this problem is to condition the dismissal on the defendant's promise that its witnesses will be available in the foreign forum.<sup>77</sup> The court might also retain jurisdiction over the matter for a limited time before dismissing the case in order to supervise discovery in the forum.<sup>78</sup>

A particularly inventive use of the private interest factors can be seen in *Jennings v. Boeing Co.*<sup>79</sup> The defendant there offered to "concede liability for compensatory damages if action is brought against it in the courts of England or Scotland."<sup>80</sup> In granting the motion to dismiss, the court observed with some relish that if that concession were to be made the

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72. *Id.* at 522.

73. *Id.* at 521-22.

74. A reading of forum non conveniens cases confirms that American discovery procedures are obviously far more comprehensive than those found elsewhere. See generally David Boyce, Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno*, 64 TEXAS L. REV. 193, 199-201 (1985) (contrasting the liberal American discovery procedures with those of England and the civil law countries). Whether liberal discovery procedures are a good thing is debatable. See generally John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 841-48 (1985) (arguing that the German discovery process, which vests the fact-gathering function in the judiciary rather than the adversarial parties, decreases the "potential to pollute the sources of truth").

75. See, e.g., *Jeha v. Arabian Am. Oil Co.*, 751 F. Supp. 122, 126 (S.D. Tex. 1990), *aff'd*, 936 F.2d 569 (5th Cir. 1991).

76. *Howe v. Goldcorp Invs.*, 946 F.2d 944, 952 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1172 (1992).

77. See, e.g., *Banco Nominees, Ltd. v. Iroquois Brands, Ltd.*, 748 F. Supp. 1070, 1075 (D. Del. 1990).

78. See, e.g., *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1146 (5th Cir. 1987), *cert. denied*, 493 U.S. 918 (1989).

79. 660 F. Supp. 796 (E.D. Pa. 1987), *aff'd*, 838 F.2d 1206 (3d Cir. 1988).

80. *Id.* at 805. On reconsideration, "concede" was changed to "not contest." *Jennings v. Boeing Co.*, 677 F. Supp. 803, 804 (E.D. Pa. 1987), *aff'd*, 838 F.2d 1206 (3d Cir. 1988).

resulting trial “would be far more limited in scope, duration and complexity . . . . Pretrial discovery would likewise be limited only to damages.”<sup>81</sup> Because the data on damages could only be discovered in Britain, the post-concession private interests analysis clearly pointed to dismissal.<sup>82</sup>

3. *Third Parties*.—A key part of the private interest inquiry focuses on third parties. The cases reflect a strong and sensible desire to have the litigation tried as a whole.<sup>83</sup> The ability to assert jurisdiction over possible third-party defendants, therefore, can be a critical factor, as it was in *Reyno*.<sup>84</sup> The third party can be important either as a source of contribution<sup>85</sup> or as an alternative source of liability.<sup>86</sup> The defendant, however, should be able to present a cogent argument that the absence of the third party would harm its case.<sup>87</sup>

Any difficulty in obtaining jurisdiction over third parties or in obtaining contribution strongly influences the decision to deny the motion to dismiss.<sup>88</sup> In *Jennings*, for example, the court made an elaborate inquiry into whether the prior owner of a helicopter and the company that maintained it could be impleaded as third-party defendants in an action in this country. The court concluded that resolving these issues would require “extensive litigation in the murky waters of ‘alter ego’ theories of personal jurisdiction,”<sup>89</sup> an inquiry it obviously wished to avoid—even after this

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81. *Jennings*, 660 F. Supp. at 805.

82. *Id.*

83. *See, e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 259 (1981) (commenting on the convenience of resolving all claims in one trial); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1398 (8th Cir. 1991) (noting that “the efficiency and convenience of trying all actions arising from the same incident at one time and one place” is often a concern); *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 189 (3d Cir. 1991) (holding that the ability of the alternative forum to resolve the dispute in a single proceeding favored dismissal).

84. 454 U.S. at 259 (noting the district court’s finding that the “inability to implead potential third-party defendants clearly supported holding the trial in Scotland”).

85. *See, e.g.*, *Early v. Travel Leisure Concepts, Inc.*, 674 F. Supp. 1199, 1201 (E.D. Va. 1987) (commenting that the defendants’ possible right of contribution from a third party beyond the reach of the court’s jurisdiction favored dismissal). In *Ball v. Deere & Co.*, 684 F. Supp. 1455, 1459 (C.D. Ill. 1988), the fact that the defendant might not be able to bring third-party actions in the American forum “weigh[ed] heavily” in favor of dismissal.

86. *See, e.g., Early*, 674 F. Supp. at 1201 (noting that the witnesses who could provide testimony about a third party’s liability were beyond the court’s compulsory process).

87. *See Reid-Walen v. Hansen*, 933 F.2d 1390, 1398 (8th Cir. 1991) (reversing a forum non conveniens dismissal partly because the defendants failed to allege that their defense would be “greatly impaired” by their inability to implead the third-party defendant).

88. Unless, of course, the court finds the problems of maintaining two actions of little significance. *See id.* (noting that when the “potential third-party claims were very different from the plaintiff’s claims” and there was little risk of “duplication of proof or risk of inconsistent judgments” dismissal was not required).

89. *Jennings v. Boeing Co.*, 660 F. Supp. 796, 806 (E.D. Pa. 1987), *aff’d*, 838 F.2d 1206 (3d

litigation there was little chance of bringing the parties into the suit. The court was also influenced by its finding that an action for contribution against potential defendants located in Scotland would most likely lie only if the judgment were from a Scottish court.<sup>90</sup> Discussions regarding the ability to implead a third party are found in a number of cases.<sup>91</sup>

The presence of related litigation abroad is another powerful factor favoring dismissal. There are significant advantages in having all the parties interested in apportioning a limited source of recovery assert their claims in one forum, not only to avoid inconsistent factual findings, but also "to spare the litigants the additional costs of duplicate lawsuits."<sup>92</sup> Or, as another court concluded, "[I]f plaintiffs' claims . . . are so related to [pending] bankruptcy proceedings that Italian courts would consolidate or stay them, that very relatedness suggests that Italy is the most appropriate forum for them."<sup>93</sup> Nevertheless, the existence of related litigation abroad is not controlling. Superior American interests and a belief that the plaintiff only filed the action abroad as "a defensive measure" may persuade the court to keep the action at home.<sup>94</sup>

4. *Enforcing the Judgment.*—Few opinions address the problems that may arise from enforcing any eventual judgment: will an American court enforce a judgment rendered in the alternative foreign forum, and will a foreign court enforce one made here?<sup>95</sup> Courts typically solve this second problem with a conditional dismissal.<sup>96</sup> Occasionally courts

Cir. 1988).

90. *See id.* at 807. The *Jennings* court based this observation on the holding of a recent case, *Comex Houlder Diving, Ltd. v. Colone Fishing, Ltd.*, slip op. (H.L. March 19, 1987) (Scot.). *Reyno* had assumed contribution to be available in Scotland. *See Jennings*, 660 F. Supp. at 806-07 (noting that the *Reyno* Court had assumed that contribution would be available to the defendant in Scotland).

91. *See, e.g., De Melo v. Lederle Lab.*, 801 F.2d 1058, 1063 (8th Cir. 1986) (discussing the defendant's inability to implead potential third-party defendants but noting that the defendant could maintain a suit for contribution and indemnity in the alternative forum); *Lehman v. Humpfrey Cayman, Ltd.*, 713 F.2d 339, 343 (8th Cir. 1983) (noting that the defendants could not implead third-party defendants in a claim for contribution or indemnity because of the court's lack of personal jurisdiction), *cert. denied*, 464 U.S. 1042 (1984); *see also In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 199 (2d Cir.), *cert. denied*, 404 U.S. 871 (1987) (noting that Indian law provides for contribution actions against third parties).

92. *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1452 (9th Cir. 1990).

93. *Fassi v. L.J.N. Toys, Ltd.*, 753 F. Supp. 486, 491 (S.D.N.Y. 1990), *aff'd*, 948 F.2d 1276 (2d Cir. 1991).

94. *See, e.g., Department of Economic Dev. v. Arthur Andersen & Co. (U.S.A.)*, 683 F. Supp. 1463, 1485 (S.D.N.Y. 1988) (calling the plaintiff's foreign action a "defensive measure" when it served only to toll the statute of limitations, and when the plaintiff said it would proceed only through the "preliminary stages of litigation" in the foreign action).

95. The recently proposed Conflict of Jurisdiction Model Act suggests one solution to the multiple proceedings and enforcement dilemma. That act proposes the selection of an "adjudicating forum" and the stay of all other proceedings. *See generally Louise Ellen Teitz, Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings*, 26 INT'L LAW. 21 (1992).

96. *See Mercier v. Sheraton Int'l*, 935 F.2d 419, 426 (1st Cir. 1991) (noting that the district court

discuss American enforcement procedures<sup>97</sup> and whether an American decision will be recognized. Inquiry into enforcement possibilities is particularly apt when the defendant has no assets in this country.<sup>98</sup> On the other hand, American “courts are among the most generous in the world in enforcing foreign judgments.”<sup>99</sup> Thus, if the foreign judgment was rendered by a court satisfying due process-like standards (in other words, an adequate alternative forum), there should not be serious difficulty in enforcing a foreign judgment in the United States.

#### D. Public Interests

There are primarily three “public interest” factors. The first involves choice of law, the second the “interests” of the competing jurisdictions, and the third the burden on the domestic forum.

1. *Choice of Law.*—Although *Reyno* explicitly instructs that a choice-of-law inquiry should not be the sole determinant of the outcome of a forum non conveniens motion,<sup>100</sup> almost all opinions discuss choice of law. Sometimes the analysis asks whether a federal statute, such as the Jones Act, precludes a forum non conveniens dismissal.<sup>101</sup> Other opinions consider the choice of substantive or remedial law.<sup>102</sup> The inquiry into what law to choose is fairly elaborate at times—often containing a long explanation of how the court determined what law would be applied at trial.<sup>103</sup> More often, a rather cursory review is made, especially in cases in which the law to be chosen is obvious, given the lack of contacts among the defendant, the forum, and the incident.<sup>104</sup>

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should have conditioned dismissal on the Turkish court’s actually taking cognizance of the substitute action); *Contact Lumber*, 918 F.2d at 1448 (affirming dismissal conditioned on the defendant’s letter of guarantee that a Philippine judgment, if rendered, would be satisfied); *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 851-52 (S.D.N.Y. 1986) (conditioning forum non conveniens dismissal on the defendant’s agreement to be bound by the judgment of the foreign court), *aff’d*, 809 F.2d 195 (2d Cir.), *cert. denied*, 404 U.S. 871 (1987); *see also* *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 n.25 (1981) (approving use of conditional dismissals to ensure plaintiffs access to sources of proof); *Ahmed v. Boeing Co.*, 720 F.2d 224, 225 (1st Cir. 1983) (affirming dismissal conditioned on the defendant’s agreement to pay any judgment rendered for the plaintiff).

97. *See* *Prestige Wine & Spirits v. Martel & Co.*, 680 F. Supp. 743, 745-46 (D. Md. 1988) (discussing the procedures by which the plaintiff could enforce an American judgment against a French defendant when French courts would not enforce the judgment).

98. *See id.*

99. Jay L. Westbrook, *Theories of Parent Company Liability and the Prospects for an International Settlement*, 20 TEX. INT’L L.J. 321, 327 (1985).

100. *See* *Piper Aircraft v. Reyno*, 454 U.S. 235, 249 (1981). *But see id.* at 254 (noting that in limited circumstances, the choice of law may be a pertinent factor to consider).

101. This issue is discussed in Part VI, *infra*.

102. *See* *De Melo v. Lederle Lab.*, 801 F.2d 1058, 1061 (8th Cir. 1986).

103. *See* *Banco Nominees, Ltd. v. Iroquois Brands, Ltd.*, 748 F. Supp. 1070, 1077-78 (D. Del. 1990).

104. *See, e.g.,* *Nolan v. Boeing Co.*, 919 F.2d 1058, 1069 (5th Cir. 1990), *cert. denied*, 111

Sometimes, the court does not seem to care what law would apply; it merely asserts that *Reyno* emphasized that forum non conveniens courts should not become "entangled" in choice-of-law analysis.<sup>105</sup>

This last argument has some force. The *relevance* of the inquiry into choice of law is obscure. After all, *Reyno* itself had said that, for reasons of judicial economy, the choice-of-law decision was not to be given "substantial weight";<sup>106</sup> yet, many decisions since then have "blithely ignored" that helpful guidance.<sup>107</sup> As to what to *do* with choice of law, the *Reyno* Court only noted laconically that the district court in that case had expressed concern over jury confusion and "its own lack of familiarity with Scottish law."<sup>108</sup> In other words, it may be difficult for judge and jury to ascertain or apply foreign law.<sup>109</sup> The cost of obtaining expert testimony on foreign law is also a factor.<sup>110</sup> Nevertheless, the fact that foreign law might apply has not necessarily required dismissal,<sup>111</sup> and some courts appear much more confident than the Supreme Court about their ability to understand foreign law.<sup>112</sup>

S. Ct. 1587 (1991).

105. See *Kryvicky v. Scandinavian Airlines Sys.*, 807 F.2d 514, 517 (6th Cir. 1986).

106. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981).

107. *Robertson*, *supra* note 20, at 407; *see, e.g., Pereira v. Utah Transp., Inc.*, 764 F.2d 686, 688 (9th Cir. 1985) ("We agree with the Fifth, Tenth and Eleventh Circuits that a choice of law determination must be made before a district court dismisses a case under *forum non conveniens.*"), *cert. dismissed*, 475 U.S. 1040 (1986); *Ali v. Offshore Co.*, 753 F.2d 1327, 1331-32 & n.10 (5th Cir. 1985) (analyzing applicable law carefully before noting that *Reyno* renders the issue only tangentially relevant); *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1310 n.10 (11th Cir. 1983) (discussing the applicability of United States maritime law).

108. *Reyno*, 454 U.S. at 260.

109. See *Early v. Travel Leisure Concepts, Inc.*, 674 F. Supp. 1199, 1201 (E.D. Va. 1987) (noting that "the court does not have ready access to the applicable substantive Jamaican law"). Moreover, even if an American court is capable of ascertaining which law should apply, translation problems may preclude an accurate application of the foreign law. See *Ernst v. Ernst*, 722 F. Supp. 61, 65-66 (S.D.N.Y. 1989) ("English translations often are deficient in nuance and subtlety, for which the splendid French language is so justly renowned and universally admired.").

The same solicitude is not shown to foreign courts: "[W]e need not determine whether Philippine law rather than Saudi Arabian or Panamanian law should apply because there is no reason to believe that American courts would be more capable of applying Saudi Arabian or Panamanian law than Philippine courts should it be determined that either law applies." *Villar v. Crowley Maritime Corp.*, 782 F.2d 1478, 1483 (9th Cir. 1986). *But see Robert Bosch Corp. v. Air France*, 712 F. Supp. 688, 692 (N.D. Ill. 1989) (holding that the choice-of-law factor did not favor dismissal, as French law would be foreign to any proposed alternate forum). If the foreign legal system derives from English common law, this factor becomes much less important. *See, e.g., Early*, 674 F. Supp. at 1201.

110. See *Interpane Coatings, Inc. v. Australia & N.Z. Banking Group, Ltd.*, 732 F. Supp. 909, 917 (N.D. Ill. 1990) (observing that the need for an expert on the applicable Australian law would waste judicial resources and increase the private expense of the litigation).

111. See *Crimson Semiconductor, Inc. v. Electronum*, 629 F. Supp. 903, 910 (S.D.N.Y. 1986).

112. See *Gassner v. Stotler & Co.*, 671 F. Supp. 1187, 1191 (N.D. Ill. 1987) (asserting that the court can "easily ascertain" German law).



The presence of a choice-of-law clause in a contract, of course, may help avoid the impact of what might otherwise have been a reference to foreign law: "It certainly would be both more convenient and practical for this Court [the federal forum] to resolve a contract claim governed by the laws of New York [as the contract specified] than it would be for a judge of the [French] Court of Commerce to do so."<sup>113</sup> Yet, choice-of-law clauses provide no guarantees for forum selection; the plaintiff has to be careful in its pleading. An allegation of tortious interference with contract, for example, may not be covered by the contractual choice-of-law clause.<sup>114</sup>

Application of American law points strongly to denial of the forum non conveniens motion, although it is no guarantee. This result is often related to the presence of a significant American interest such as fraud in the sale of the securities of an American corporation,<sup>115</sup> or in "protecting valuable property interests" created by American copyright law.<sup>116</sup> At this point, of course, a linkage to alternative forum analysis becomes apparent: does the foreign forum really provide an adequate remedy for rights created by American law?

2. *The Forum's Interests.*—This branch of the public factors inquiry centers on what the Court in *Gulf Oil Corp. v. Gilbert*<sup>117</sup> identified as "a local interest in having localized controversies decided at home."<sup>118</sup> The term "interests" as used in forum non conveniens cases does not necessarily bear the technical meaning given it by conflicts scholars.<sup>119</sup> Rather, it seems to be used more in the form of asking why a jurisdiction might *want* to decide the issue—or, perhaps, which jurisdiction *should*

113. *American Cyanamid Co. v. Picaso-Anstalt*, 741 F. Supp. 1150, 1158 (D.N.J. 1990). A forum-selection clause might accomplish the same result through the back door because the forum selection carries with it an implicit choice of law. See *Ferruzzi Italia, S.p.A. v. Trade & Transp., Inc.*, 683 F. Supp. 131, 136 (D. Md. 1988) (accepting, for the sake of argument, that the "parties made an implicit choice of English law" by having chosen London as an arbitration site).

114. See *Broadcasting Rights Int'l Corp. v. Societe du Tour de France*, 675 F. Supp. 1439, 1440 (S.D.N.Y. 1987). See also Laurel E. Miller, Comment, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369, 1382 (1991) (distinguishing the effect of choice-of-law clauses in contract and tort cases).

115. See *Department of Economic Dev. v. Arthur Andersen & Co.*, 683 F. Supp. 1463, 1484-85 (S.D.N.Y. 1988) ("[T]he United States has a substantial interest in preventing alleged securities frauds planned and executed in part in this country by U.S. nationals.").

116. See *P&D Int'l v. Halsey Publishing Co.*, 672 F. Supp. 1429, 1434-35 (S.D. Fla. 1987); *Update Art, Inc. v. Maariv Isr. Newspaper, Inc.*, 635 F. Supp. 228, 232-33 (S.D.N.Y. 1986).

117. 330 U.S. 501 (1947).

118. *Id.* at 509.

119. For a discussion of the meaning conflicts scholars give to the term "interests," see Bruce Posnak, *Choice of Law: Interest Analysis and its "New Critics,"* 36 AM. J. COMP. L. 681, 686-89 (1988) (discussing the principles upon which "interest analysis" rests and suggesting that interest analysis is a quest for rationality).

decide the issue. The overwhelming answer given by the courts is a loose form of the "center of gravity" or "most significant relationship" test used in conflicts law.<sup>120</sup> This is not to say that judges are unsophisticated about interests. They are ready to recognize, however, as did the *Reyno* Court, that "interests" are a more complicated matter than even some conflicts scholars recognize.<sup>121</sup> Some cases, at least, clearly have a "home," a fact not necessarily reflected in our free-wheeling jurisdictional and choice-of-law rules. Indeed, some writers have viewed modern forum non conveniens analysis as a kind of end run around the mandate that federal courts apply the choice-of-law rules of the forum state.<sup>122</sup> The result is a kind of back-handed adoption of federal principles of choice of law—principles, however, that can only be used in limited circumstances.

Consider this statement from a case involving a bitter struggle over the estate of the artist Max Ernst in which the court upheld a contractual forum-selection clause choosing France as the appropriate forum: "We note that plaintiff is a Florida citizen suing a New York citizen on two French contracts . . . which contracts are governed by French laws of inheritance controlling the estate of a French citizen."<sup>123</sup> Or, consider this statement from a case dismissing an action brought in Texas by a flight attendant who alleged that she had been assaulted by an employee of the defendants:

The only relationship this case has to the United States is that one of the defendants, Swiftdrill, Inc. has its corporate headquarters in Houston, Texas. All other factors point across the Atlantic to the United Kingdom. . . . The plaintiff in this case is a resident of the United Kingdom. The alleged negligent hiring occurred in the United Kingdom. The alleged negligent supervision began in the United Kingdom and continued aboard an aircraft that was owned and operated by a British air carrier and registered in the United Kingdom. Most, if not all, of the

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120. See WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *UNDERSTANDING THE CONFLICT OF LAWS* 155-61 (1984), for an explanation of those terms.

121. See Joseph W. Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 4 (1989).

122. The "end run" takes place because the alternative forum might well apply a different choice-of-law analysis than the forum; the substantive law ultimately applied, therefore, might well be different in the alternative forum. Cf. Teitz, *supra* note 95, at 29:

The implications of uninhibited dual litigation, barely restrained by the thought of "rarely used" injunctive relief, are a forum-shopper's delight—and a court's nightmare. A party is free to select the best law, best remedy, most pleasing procedural system; obtain a quick judgment; and race to enforce it. Who says you get only one bite of the judicial apple?

See also Paula K. Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul*, 18 J. MAR. L. & COM. 185, 213-14 (1987); Boyce, *supra* note 74, at 218-22. For a recitation of the rule that federal courts must apply the choice-of-law rules of the forum state, see *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

123. *Ernst v. Ernst*, 722 F. Supp. 61, 65-66 (S.D.N.Y. 1989).

material fact witnesses are residents of the United Kingdom.<sup>124</sup>

In both cases the American forum should not hear the case because it is centered in another country. Courts are especially likely to make this decision if no plaintiff is an American citizen, no significant events took place here, and foreign law will control.<sup>125</sup>

The fact that a foreign forum has a strong interest in the outcome of the case may support a decision to dismiss an action. Often the foreign forum has a strong interest in having its own law applied by its own courts. Obviously, this interest is easy to identify when the case involves a foreign law of inheritance and estate administration,<sup>126</sup> or litigation concerning the board of directors of a Scottish corporation.<sup>127</sup> Foreign forums also have a strong interest in an action that arises when their own citizens suffer injuries. For example, in a case involving injuries allegedly caused by a toxic herbicide, one court observed that "the people of New Brunswick have an interest in this controversy; it is their fellow citizens who were allegedly injured."<sup>128</sup> This approach seems widely accepted: "[T]he country where the injury occurred has a greater interest in the ensuing products liability litigation than the country where the product was manufactured."<sup>129</sup> Using place of injury as a guide to the action's proper forum can work to the benefit of American plaintiffs as well; for example, when a fraud is allegedly perpetrated against an American, the federal court is more likely to retain jurisdiction.<sup>130</sup>

The wise plaintiff, of course, tries to identify an American interest. The argument, therefore, is sometimes made that the United States has an interest in a products liability action because the imposition of American-

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124. *Feenerly v. Swift Drill, Inc.*, 706 F. Supp. 519, 523 (E.D. Tex. 1989).

125. *See Nolan v. Boeing Co.*, 919 F.2d 1058, 1068-69 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1587 (1991) (noting that the lawsuit should be dismissed because less deference should be given to a foreign plaintiff's choice of a United States forum, most of the significant events of the cause of action occurred in Great Britain, and English law was to be applied). It is especially inappropriate for a plaintiff to argue that nonforum law should be applied. *See Banco Nominees, Ltd. v. Iroquois Brands, Ltd.*, 748 F. Supp. 1070, 1073 (D. Del. 1990).

126. *See Ernst*, 722 F. Supp. at 65-66 (recognizing "France's fundamental interest is in the correct application of its law of devolution (inheritance)").

127. *Scottish Air Int'l v. British Caledonian Group*, 751 F. Supp. 1129, 1135 (S.D.N.Y. 1990), *rev'd*, 945 F.2d 53 (2d Cir. 1991) (noting that "Great Britain has a substantial interest in determining legal rights to seats on the board of directors of a Scottish corporation").

128. *Stewart v. Dow Chem. Co.*, 865 F.2d 103, 107 (6th Cir. 1989); *see also Poole v. Brown*, 706 F. Supp. 74 (D.D.C. 1989) (deciding that in a tort action arising out of a dog bite occurring in Zaire, the "[p]ublic interest factors point overwhelmingly to Zaire as the proper forum" in part because "the law of Zaire would control").

129. *Kryvicky v. Scandinavian Airlines Sys.*, 807 F.2d 514, 517 (6th Cir. 1986) (citing *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608, 615 (6th Cir. 1984)).

130. *See Herbstein v. Bruetman*, 743 F. Supp. 184, 189 (S.D.N.Y. 1990) (noting that "the United States courts have a definite relation to the litigation, when a fraud allegedly is perpetrated against one of its residents").

style liability on accidents occurring abroad might deter the manufacture of defective products here.<sup>131</sup> Whatever the validity of that argument as a statistical matter, the *Reyno* Court dismissed it; Justice Marshall's opinion argued (without citing any evidence) that such liability would only provide "incremental deterrence" having an "insignificant" impact.<sup>132</sup> Rather than blithely dismissing arguments based on deterrence, the Court should evaluate them in the context of the actual litigation.<sup>133</sup> However, based on the precedent set in *Reyno*, it may not be easy to identify an American interest a court is willing to accept as valid.

3. *The Domestic Burden.*—The federal courts believe they are overworked.<sup>134</sup> That might even be true. One often hears in these cases the collective sigh of the swamped judiciary.<sup>135</sup> The opinions talk of many burdens imposed on the courts, including "onerous jury duty"<sup>136</sup> and court congestion generally,<sup>137</sup> although the latter factor may be discounted if no showing is made that the forum is prohibitively congested and there is a showing concerning congestion at the alternate forum.<sup>138</sup> Courts also do not want to become magnets for litigation, thus crowding dockets even more. In *Jennings v. Boeing Co.*,<sup>139</sup> a helicopter crash case, the opinion noted that there were ten other actions pending involving the same crash and that "if this action is maintained here, this district will become the focus of all other actions arising from the [same] crash."<sup>140</sup> Dismissal comes as no surprise in these circumstances.

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131. The respondent in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), asserted this argument. *Id.* at 260.

132. *Id.* at 260-61.

133. If almost all of the airplanes of the type involved in the *Reyno* crash were owned and operated in the United States, for example, the argument in favor of domestic deterrence would be much greater.

134. See Report of the Federal Courts Study Committee 109 (1990).

135. See, e.g., *Jeha v. Arabian Am. Oil Co.*, 751 F. Supp. 122, 128 (S.D. Tex. 1990), *aff'd*, 936 F.2d 569 (5th Cir. 1991) ("[T]he application of foreign law in an American court, combined with the logistical difficulties . . . would make administration of this suit in an American court next to impossible.").

136. *Id.* Courts have also noted that translation difficulties compound the burden on the jury. See *Ernst v. Ernst*, 722 F. Supp. 61, 65 n.4 (S.D.N.Y. 1989). But see *Reid-Walen v. Hansen*, 933 F.2d 1390, 1400 (8th Cir. 1991) (stating that it was not a burden on the community to serve as jurors in an individual defendant's home forum). On the other hand, if a jury trial is not requested, this factor becomes irrelevant. See *Banco Nominees, Ltd. v. Iroquois Brands, Ltd.*, 748 F. Supp. 1070, 1076 (D. Del. 1990).

137. See *Jeha*, 751 F. Supp. at 128.

138. See *Herbstein v. Bruetman*, 743 F. Supp. 184, 189 (S.D.N.Y. 1990) (weighing public interest factors against the defendants because they failed to show that New York courts are prohibitively congested).

139. 660 F. Supp. 796 (E.D. Pa. 1987), *aff'd*, 838 F.2d 1206 (3d Cir. 1988).

140. *Id.* at 807.

Finally, there is the problem of duplication of judicial effort. Dismissal is more likely if there are related actions pending in the foreign forum.<sup>141</sup> On the other hand, if defendants have initiated related litigation in the American forum their claims of inconvenience will be discounted.<sup>142</sup> The fact that one forum or another has already taken substantive action may also influence the decision.<sup>143</sup> Some courts, however, seem to ignore the presence of related litigation.<sup>144</sup>

### E. *An Observation*

The case law on the public interest factor is less consistent and confident than is the case law on private interests. When, based primarily on private interest factors, the court can discern a forum where the case really should be heard, the decision sounds correct, in part because the nature of the private interests inquiry—relative convenience—is a much easier question to address than some of those raised in the public interest category. The Supreme Court has provided little guidance. *Reyno* itself did not focus on the public interest factors; virtually all of the discussion in that case addressed private interests.<sup>145</sup> More guidance in this area from the Supreme Court and commentators is needed.

The *Reyno* opinion does, however, instruct judges to “balance” the public and private interests.<sup>146</sup> Such a calculation requires, of course, a classic “apples and oranges” act. The two types of interests simply are not comparable. Not surprisingly, therefore, judges rarely make a real effort to do such a balancing. Thus, if the public interest analysis does not compel a result, courts generally weigh private interests to reach a result. Judges do not seem unduly perturbed by this analytical lacuna; after all,

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141. See *Banco Nominees, Ltd. v. Iroquois Brands, Ltd.*, 748 F. Supp. 1070, 1078 (D. Del. 1990) (“It is a waste of judicial resources to require two courts to attend to this matter when there is the chance that the cases could be consolidated in England. This factor weighs in favor of dismissing the case so that it may be pursued in England.”).

142. See *Andros Compania Maritima, S.A. v. Intertanker, Ltd.*, 714 F. Supp. 669, 678 (S.D.N.Y. 1989) (stating that the defendants had not shown real prejudice or inconvenience by being forced to litigate in the forum; in fact, they had initiated other lawsuits in the forum related to the subject matter of the case).

143. See, e.g., *American Cyanamid Co. v. Picaso-Anstalt*, 741 F. Supp. 1150, 1159 (D.N.J. 1990) (refusing dismissal because an American court had already supervised “substantial discovery” and granted preliminary injunctive relief). The court also rejected an argument based on “comity” and an alleged “first-to-file” rule. *Id.* at 1158-59.

144. See *Herbstein v. Bruetman*, 743 F. Supp. 184, 189 (S.D.N.Y. 1990) (commenting that substantial, related litigation in Argentina is not a factor requiring dismissal).

145. See Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CAL. L. REV. 1259, 1268 n.36 (1986) (commenting that the *Reyno* Court “restricted its analysis of the interests served by the doctrine of forum non conveniens to those of ‘convenience,’ [the] ‘private factors’”).

146. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 258 (1981).

they are allowed great discretion when making this calculation—like so many other decisions they are called upon to make.

### III. Discretion, Appellate Review, and Quality

The Supreme Court made quite clear in *Reyno* that the forum non conveniens decision rests primarily with the trial court: when that court “has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.”<sup>147</sup> Nothing about forum non conveniens, apart from the concept itself, has drawn as much ire from the commentators as the deference requirement.<sup>148</sup> This criticism has four basic components: effective appellate review is difficult to obtain; there is too much deference accorded the trial judge’s exercise of “discretion”; the laundry list of factors used to make the forum non conveniens decision does not provide effective guidance to courts or litigants; and the opinions are often of poor quality.

#### A. Procedure<sup>149</sup>

1. *At Trial*.—Defendant must move, in a timely fashion, for a dismissal based on forum non conveniens.<sup>150</sup> The burdens of production and proof rest with the defendant. If, after both the defendant and the plaintiff have presented their cases, the factors for and against dismissal balance equally, deference should be accorded the plaintiff’s choice of forum, and the motion should be denied.<sup>151</sup>

147. *Reyno*, 454 U.S. at 257. Moreover, the district court has “substantial flexibility” in forum non conveniens matters. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988).

148. David Robertson and Paula Speck, for example, attack both the indeterminacy of the forum non conveniens inquiry and the unreviewable nature of the trial court’s decisions. They argue:

An unreviewable judicial discretion that is ostensibly bounded only by a list of relevant factors so lengthy and indeterminate that they provide virtually no guidance is not a legal doctrine at all; forum non conveniens purports to be a doctrine but is no more than a set of habitual practices and attitudes.

Robertson & Speck, *supra* note 1, at 971 n.209.

149. See generally Christine M. Morin, Note, *Review and Appeal of Forum Non Conveniens and Venue Transfer Orders*, 59 GEO. WASH. L. REV. 715 (1991) (describing the procedures for obtaining a forum non conveniens dismissal).

150. *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1165 (5th Cir. 1987) (en banc), *vacated sub nom.* *Pan Am World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), *aff’d in part and vacated in part sub nom.* *In re Air Crash Disaster Near New Orleans, La.*, 883 F.2d 17 (5th Cir. 1989). The *Air Crash* court added that the motion should be made “within a reasonable time after the facts or circumstances which serve as the basis for the motion have developed and become known or reasonably knowable to the defendant.” *Id.* A timely motion saves effort and money. *Id.* All of that gratuitous advice sounds very reasonable.

151. See, e.g., *American Cyanamid Co. v. Picaso-Anstalt*, 741 F. Supp. 1150, 1156 (D.N.J. 1990) (“Where the convenience of the parties is roughly balanced, however, dismissal is unwarranted.”).

2. *Appellate Review*.—A dismissal on forum non conveniens grounds is a final judgment and therefore an immediately appealable order.<sup>152</sup> Denial of a motion to dismiss, in contrast, is not immediately appealable because it is not a final order.<sup>153</sup> Pretrial review of that denial, therefore, can only be done by having the trial court certify an interlocutory appeal<sup>154</sup> or by petitioning the circuit court for a writ of mandamus.<sup>155</sup> Nor is appeal of the denial possible under the collateral order doctrine.<sup>156</sup> It is quite possible, therefore, that “initial appellate review of a denial of a motion to dismiss for forum non conveniens may sometimes follow a trial on the merits.”<sup>157</sup> The fact that a trial on the merits has already occurred obviously will be relevant on appeal; inconvenience will be much harder to demonstrate once the trial has been held. One court ruled that the trial “bolsters” the denial, and that the defendant must show that she was “greatly prejudiced” by having had her day in court in the plaintiff’s forum.<sup>158</sup>

Thus, effective review of a denial of the motion to dismiss is difficult to obtain.<sup>159</sup> Timely review of an order granting the motion to dismiss is easy to obtain. Consequently, most published appellate decisions review the trial court’s decision to grant the motion to dismiss. Expressed differently, the successful plaintiff is extremely likely to prevail on the forum non conveniens issue when it is finally appealed; the defendant who successfully moves for dismissal, in contrast, faces immediate review of that ruling. The effectiveness of that review is an entirely separate matter.

152. 9 JAMES W. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 110.13[6], at 157 (2d ed. 1992).

153. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 530 (1988); *Nalls v. Rolls-Royce*, 702 F.2d 255 (D.C. Cir.) (declining to hear the appeal on the jurisdictional ground of failure to grant forum non conveniens dismissal), *cert. denied*, 461 U.S. 970 (1983).

154. *See* 28 U.S.C. § 1292 (1988) (“[T]he court of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts of the United States.”). A rare example of an interlocutory appeal from a denial of a motion to dismiss on forum non conveniens grounds is *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1415 (1991). The interlocutory appeal route has a number of serious obstacles. *See Morin, supra* note 149, at 724-25.

155. *See* 28 U.S.C. § 1651 (1988) (giving all congressionally created courts the power to issue all writs necessary in the exercise of jurisdiction). Mandamus, of course, is rarely granted.

156. *Van Cauwenberghe*, 486 U.S. at 527 (holding that “the question of the convenience of the forum is not ‘completely separate from the merits of the action’ . . . and thus is not immediately appealable” under the collateral order doctrine set out in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) (quoting *id.* at 468)).

157. *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1167 (5th Cir. 1987) (en banc), *vacated sum nom. Pan Am World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), *aff’d in part and vacated in part sub nom. In re Air Crash Disaster Near New Orleans, La.*, 883 F.2d 17 (5th Cir. 1989).

158. *Id.* at 1168.

159. *See Stein, supra* note 1, at 832 n.220 (saying that “denials of forum non conveniens motions are insulated from appellate review by the final judgment rule”).

### B. *The Reality of Deferential Review*

A forum non conveniens dismissal should be reversed only for a "clear abuse of discretion."<sup>160</sup> On the other hand, the trial court's balance of the public and private interests should be sustained if it is reasonable.<sup>161</sup> Taken together, these instructions create a confusing standard of review. What does the reviewing court do if it finds the trial court's balance of interests unreasonable, but not clearly an abuse of discretion? Moreover, the abuse of discretion standard is not a fixed standard; it can mean many different things. The question, at least in theory, becomes how much deference should be allowed?

The "substantial deference" standard enunciated in *Reyno* sees little real use in the appellate opinions. Very few of them do more than recite the "substantial deference" shibboleth before embarking on a lengthy, apparently de novo analysis of the *Reyno* factors.<sup>162</sup> Occasionally, an appellate court, when affirming the trial court's decision, suggests that it might have reached a different result (in the spirit of "tie goes to the runner"), but I found only one example of expressed deference to the trial court that apparently changed the outcome of the case.<sup>163</sup> Appellate courts rarely express misgivings about undertaking a detailed review of forum non conveniens dismissals:

Although the Supreme Court has emphasized the broad discretion of the district courts in deciding whether to dismiss on the basis of forum non conveniens, there would be little purpose

160. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (emphasis added). A commonly given example of an abuse of discretion is a trial court's failure "to consider one or more of the important private or public interest factors." *Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir. 1991).

161. See *Reyno*, 454 U.S. at 257 ("[W]here the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.").

162. See, e.g., *Reid-Walen v. Hansen*, 933 F.2d 1390, 1393-94 (8th Cir. 1991) (reciting the "substantial deference" standard while finding that the district court failed to give "proper weight" to various factors); *Lony v. E.I. du Pont de Nemours & Co.*, 886 F.2d 628, 631-43 (3d Cir. 1989) (asserting the "substantial deference" standard while finding that the district court failed to give adequate consideration to the plaintiff's forum choice and improperly weighed the private interest factors); *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43-49 (3d Cir. 1988) (approving the "substantial deference" standard while concluding that the district court did not adequately consider and balance the relevant private and public interest factors). *But cf.* *McKrell v. Penta Hotels*, 703 F. Supp. 13, 15 (S.D.N.Y. 1989) (giving substantial deference to a magistrate's forum non conveniens recommendation).

163. See *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 827-29 (2d Cir. 1990). The appellate court deferred to the district court's forum non conveniens determination but conditioned the dismissal, allowing the plaintiff to return to the jurisdiction should the foreign court not proceed with the matter in a timely fashion. *Id.* at 829. See also *Lony*, 886 F.2d at 629 (criticizing the district court for failing to determine and "consider adequately" the proper amount of deference due the plaintiff's choice of forum).



in Congress giving this Court a power of review if it was not a meaningful one. A meaningful power of review is the right to determine whether the district court reached an erroneous conclusion on either the facts or the law.<sup>164</sup>

In other words, the Supreme Court may tell the circuit courts to defer, but it cannot change their attitude; the appellate courts demand a “meaningful” review, and a “clear abuse of discretion” standard does not satisfy that demand.

Ironically, the appellate courts’ willingness to disregard the “clear abuse of discretion” standard and review trial court rulings according to a meaningful, almost de novo, standard eliminates one of the significant advantages of the *Reyno* analysis. The “clear abuse” standard should lead to simple and fast decisionmaking; it should discourage many appeals. And in fact many cases have no reported appellate history. But in a surprising number of “ping-pong” cases the litigation ball keeps getting bounced back and forth between courts. *Lacey v. Cessna Aircraft Co.*,<sup>165</sup> for example, has already generated three published district court opinions and two from the circuit court. Both circuit court opinions are reversals; in the second (which has an opinion by each member of the panel), the dissenting judge criticized the majority for not according proper deference to the trial judge’s decision.<sup>166</sup>

This history highlights the importance of the forum non conveniens decision. In a case with big stakes, the parties naturally and properly will pursue all procedural routes. Cases like *Lacey* seem an inevitable consequence of any real system of appellate review. It is hard to believe that more definite and elaborate rules concerning forum non conveniens would change that litigation reality.<sup>167</sup>

### C. Predictability

The law that has grown up around forum non conveniens will surprise no one. After some time spent reading the cases, the outcome of any one particular motion to dismiss should be predictable. The search for

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164. *Irish Nat’l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 92 (2d Cir. 1984) (citations omitted).

165. 674 F. Supp. 10 (W.D. Pa. 1987), *rev’d*, 862 F.2d 38 (3d Cir. 1988), *on remand*, 717 F. Supp. 365 (1989) and 736 F. Supp. 662 (W.D. Pa. 1990), *rev’d*, 932 F.2d 170 (3d Cir. 1991); *see also* *Scottish Air Int’l v. British Caledonian Group*, 945 F.2d 53, 54 (2d Cir. 1991) (describing the case’s prior history, including a dismissal by the district court, reversal of the dismissal by the circuit court, another dismissal by the district court on remand, and a second appeal).

166. *Lacey*, 932 F.2d at 191.

167. *See* Morin, *supra* note 149, at 720 n.36 (detailing a number of different uses of “discretion” in the forum non conveniens area). For a discussion of the three basic types of discretion, *see* Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 34-37 (1967).

the “home” of the litigation, the weighing of relative costs and convenience, and the tilt of the scales when the plaintiff is an American citizen or when American law applies all seem perfectly proper to the courtroom veteran. There will be some surprise over the limited utility of appellate review, but even that will hardly shock. After all, any experienced litigator will know only too well that many fundamental judicial decisions concerning a case are essentially unreviewable.<sup>168</sup> Our attorney might even favor making appellate review more available—certainly a desirable change.<sup>169</sup>

In certain instances, the ability to predict the outcome of cases may be illusory. Paula Speck has identified several mass disasters where the question of dismissal turned on the circuit in which the action was filed.<sup>170</sup> There does seem to be some disparity among the circuits concerning their receptiveness to *forum non conveniens* motions.<sup>171</sup> Variations among the circuits unfortunately occur, but they seem inevitable in our system.

Even if appellate courts are not as deferential to trial courts as the Supreme Court might wish, they should nevertheless be explicit about the real level of review. In fact, it is hard to understand any basis for deferential review other than to avoid appellate litigation and the attendant costs for the parties and the courts.<sup>172</sup> Because the *forum non conveniens* motion has such a significant impact on the litigation, the standard of review should be nondeferential, and expressly so, despite the costs. The trial court’s ruling below can easily be treated as it normally would be treated—as a question of law subject to *de novo* review.<sup>173</sup> Then the review could proceed smoothly along lines familiar to all.<sup>174</sup>

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168. For example, the denial of a motion to dismiss for failure to state a claim will only be immediately reviewed in extraordinary circumstances, even though that ruling can have an enormous impact on the case. See *Dababneh v. FDIC*, No. 88-1272, 1992 WL 82099, at \*7 n.6 (10th Cir. Apr. 27, 1992); *Schrob v. Catterson*, 948 F.2d 1402, 1407 (3d Cir. 1991). Similarly, “[e]xperience tells us how often the grant or denial of a temporary injunction is the end of the ball game; the parties simply cannot await the result of a full-scale trial.” Henry Friendly, *Indiscretion About Discretion*, 31 *EMORY L.J.* 747, 774 (1982).

169. For a proposed statutory solution, see Morin, *supra* note 149, at 729-46.

170. See Speck, *supra* note 122, at 198. She also discusses the preclusive effect of *forum non conveniens* denials. See *id.* at 200.

171. See *id.*; see also Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 *CORNELL L. REV.* 650, 681-82 (1992) (discussing “stricter” standards in the Second and Fifth Circuits).

172. See Stein, *supra* note 1, at 828.

173. Professor Stein points out that the *Reyno* Court felt competent to review the decision based on the “paper record.” *Id.* at 829.

174. This seems to be the standard that Justices Stevens and Brennan, dissenting in *Reyno*, would have applied. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 261-62 (1981) (Stevens, J., joined by Brennan, J., dissenting) (stating that Stevens would simply remand the case to the Court of Appeals to consider the issue of whether Pennsylvania was a convenient forum for the litigation); see also

### D. *Quality of Analysis*

A forum non conveniens dismissal has significant practical consequences for both parties. Professor Robertson found, for example, that dismissal effectively ends a case, or, at least, a tort case: very few tort actions went to trial in the foreign forum after dismissal here.<sup>175</sup> In only a handful of personal injury cases (and in a greater number of commercial cases) did the plaintiff receive as much as fifty percent of the "estimated value" of the case.<sup>176</sup> This is not to say that a plaintiff's failure to achieve significant compensation necessarily denies justice. Indeed, the "estimated value" is a circular method of valuing a transnational case; a case's "estimated value" abroad might be much lower than it is in an American court. Presumably, the plaintiff filed in America in the first place to take advantage of American courts' tendency to award larger recoveries in personal injury cases. The sharp consequences attendant to the ruling on forum non conveniens highlight the need for a process that works effectively at both the trial and appellate levels.

In an effort to evaluate the quality of the forum non conveniens analysis employed by American courts, I reviewed fifty federal trial and appellate opinions, published between 1986 and 1990,<sup>177</sup> to determine whether they satisfied the minimum standards we expect from judges. All fifty opinions arguably satisfied that test.<sup>178</sup> A few cases came quite close,<sup>179</sup> but each showed that the court<sup>180</sup> had paid at least some

Friendly, *supra* note 168, at 751 (noting that Justices Stevens and Brennan seemed to support a less constrained standard of review in *Reyno*).

175. See Robertson, *supra* note 20, at 419 (reporting the results of a survey showing that only three of 85 cases dismissed by United States courts on forum non conveniens grounds resulted in judgment in a foreign court, and that 10 more were pending).

176. *Id.* at 420. The value was "estimated" by the plaintiff's lawyer.

177. A review of only published decisions can seriously distort the perception of the quality of forum non conveniens analyses. District judges, of course, do not publish much of what they write (and can be expected only to publish their better efforts); the circuit courts also publish only a third of their opinions. See generally William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 575-84 (1981) (discussing the limited publication of circuit court opinions).

178. In a few cases where the opinion as a whole was adequate, however, the forum non conveniens portion did not receive proper attention. See, e.g., *Telco Oilfield Servs., Inc. v. Skandia Ins. Co.*, 656 F. Supp. 753, 759-60 (D. Conn. 1987) (devoting a mere three paragraphs to its forum non conveniens analysis). These cases all affirmed the denial of the motion to dismiss. Scant treatment of forum non conveniens is not surprising in those cases because generally the appeal comes after a trial or dismissal for other reasons.

179. See Reynolds & Richman, *supra* note 177, at 601 (discussing minimum standards in opinion writing). Two examples of bad opinions are *Fuentes v. Sea-Land Servs., Inc.*, 665 F. Supp. 206 (S.D.N.Y. 1987), which contains mostly conclusory statements, and *Update Art, Inc. v. Maariv Isr. Newspaper, Inc.*, 635 F. Supp. 228 (S.D.N.Y. 1986), which basically is limited to quotes and platitudes. In both cases, the motion to dismiss was denied.

180. I use the term "court" deliberately. It is impossible to tell, of course, how much of the opinion the judge—as opposed to her staff—wrote. See generally William M. Richman & William L.

attention to the problem at hand<sup>181</sup> by laying out the applicable law and relating how the facts play out, an observation confirmed by the relatively high frequency of dissenting opinions in forum non conveniens cases. Surprisingly, courts frequently referred to precedent concerning forum non conveniens.<sup>182</sup> Similarly, there is an obvious, although not overriding, concern for consistency.<sup>183</sup> Opinions that granted the motion to dismiss were generally better than those denying it. This circumstance is easy to explain: the consequences of the dismissal for the plaintiff generally will be greater than the consequences for the defendant if the motion is denied; the court, therefore, is likely to take more care in explaining its result. Moreover, courts denying the motion often have to spend considerable effort analyzing such questions as the existence of personal and subject matter jurisdiction. Although this effort tends to make the whole opinion read better, it means that less time can be spent on forum non conveniens.

The circuit court opinions generally are of higher quality than those written by a trial court. This finding is also no surprise given the relative roles and available support staff, especially law clerk time, of the two courts. Unfortunately, circuit courts made a number of affirmances without opinion. This obnoxious practice is not unique to forum non conveniens cases, of course,<sup>184</sup> and the temptation to use this escape route must be especially strong when the only review is for abuse of discretion. Nevertheless, a careful, written opinion is especially important in forum non conveniens cases where the death knell of dismissal will sound even though no trial has been held and no decision rendered on the merits.<sup>185</sup>

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Reynolds, *Appellate Justice, Bureaucracy, and Scholarship*, 21 U. MICH. J.L. REF. 623, 627-29 (1988) (arguing that a judge has now become more of a delegator and editor rather than the principal drafter of opinions).

181. The opinions I read are somewhat better than Professor Stein's description of forum non conveniens opinions as "typically one to two pages . . . primarily of block quotations." Stein, *supra* note 1, at 831. Stein's inclusion of state court opinions may account for this difference in findings. *See id.* Moreover, since his article was published, the development of forum non conveniens (as well as criticisms of poor opinions) has surely increased expectations about the quality of decisions. In any event, the forum non conveniens opinions are generally no worse than the average published federal opinion.

182. *See, e.g.,* *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1248 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1415 (1991).

183. *See, e.g.,* *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 769 n.3 (9th Cir. 1991) ("Federal courts have consistently found that Japan provides an adequate alternative forum. . . . We have found no case holding Japan to be an inadequate forum.").

184. There was only one unpublished, per curiam affirmance of an opinion in my sample, a practice that is almost as obnoxious.

185. The denial of a motion to dismiss for failure to state a claim will be reviewed immediately only in extraordinary circumstances, even though that ruling can have an enormous impact on the conduct of the litigation (including its settlement value). *See supra* notes 153-159 and accompanying text.

The diversity of subject matter addressed in these cases came as a surprise. Although the literature on forum non conveniens dwells on mass tort and admiralty litigation, the forum non conveniens cases surveyed were not limited to these discrete subjects. Distribution agreements, promotion of foreign athletic events, and copyright infringement are all grist for the forum non conveniens mill. Judging from my sample, travel in the Caribbean is particularly hazardous; the group of cases involving foreign travel seems the most troublesome for the judiciary, often spawning conflicting and irreconcilable opinions.

#### IV. The Relevance of Citizenship

##### A. *The Treatment of the Foreign Plaintiff*

Case law and commentary agree that the foreign plaintiff does not fare well in the post-*Reyno* courtroom.<sup>186</sup> The reasons for this disparate treatment are obvious; *Reyno* itself displayed a good deal of distaste for those aliens who seek to take advantage of the American treatment of certain types of litigation.<sup>187</sup> Treating aliens differently raises two questions: is it constitutional, and is it wise?

1. *Constitutional Considerations.*—Two types of constitutional problems might arise. First, denying access to a federal court might be thought to violate notions of procedural due process. That holding is, however, quite unlikely. No decision has recognized a constitutional right to a federal forum in a diversity case; after all, the jurisdictional limit eliminates the availability of the federal forum for all diversity cases where

186. See *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 168 (2d Cir. 1991) (citing *Reyno* and noting that “[w]here, as here, the plaintiff is foreign, the plaintiff’s choice of forum is entitled to less weight”); *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1146 (5th Cir. 1989) (commenting that, after *Reyno*, “[b]oth this court and the Supreme Court have recognized that a foreign plaintiff’s choice of an American forum deserves less deference than an American citizen’s selection of his home forum”); *Michael T. Manzi, Dow Chemical Company v. Castro Alfaro: The Demise of Forum Non Conveniens in Texas and One Less Barrier to International Tort Litigation*, 14 FORDHAM INT’L L.J. 819, 827 (1991) (“[T]he *Reyno* Court found that the plaintiff’s right to choose a forum decreases if the plaintiff is foreign.”); *Allan J. Stevenson, Forum Non Conveniens and Equal Access Under Friendship, Commerce and Navigation Treaties: A Foreign Plaintiff’s Rights*, 13 HASTINGS INT’L & COMP. L. REV. 267, 281-85 (1990) (noting that, after *Reyno*, a foreign plaintiff is given less deference than a United States citizen unless equal access is guaranteed by a Friendship, Commerce, and Navigation Treaty); *Louise Weinberg, Against Comity*, 80 GEO. L.J. 53, 73 (1991) (“Taking [*Reyno*] seriously means allowing American defendants to escape American regulation by dismissing foreigners’—but not Americans’—suits against them for forum non conveniens when the plaintiff’s injury occurs abroad.”).

187. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 & n.18 (1981) (describing American courts as “extremely attractive to foreign plaintiffs” who might “further congest already crowded courts” were dismissal for forum non conveniens made more difficult).

the "amount in controversy" is less than \$50,000.<sup>188</sup> Similarly, even if jurisdiction is based on the presence of a federal question, the constitution does not guarantee access to a federal forum to resolve the federal question.<sup>189</sup>

The disfavored treatment of aliens as a class by federal courts also raises equal protection concerns.<sup>190</sup> These equal protection worries do not seem serious. Alienage, of course, is a classification for equal protection purposes, and an argument perhaps could be made that *state* discrimination against aliens is subject to review under the heightened scrutiny standard.<sup>191</sup> Federal power over aliens, however, is very strong, and generally subject only to rational basis review.<sup>192</sup> If the latter standard is used, the discrimination against foreign plaintiffs in *forum non conveniens* motions is plainly constitutional.

Despite the apparent constitutionality of making access to United States courts more difficult for noncitizens, aliens may be guaranteed access to these tribunals. The United States has entered into treaties with a number of foreign nations that guarantee citizens of those nations access to American courts on the same basis as American citizens.<sup>193</sup> Unfor-

188. 28 U.S.C. § 1332 (1988).

189. Before the passage of the first general federal-question statute in 1876, state courts entertained all federal question cases in the absence of a specific grant of jurisdiction to the federal courts. Whether there must be access to a federal forum for *constitutional* claims has been much debated. *See, e.g.,* CHARLES A. WRIGHT, *THE LAW OF FEDERAL COURTS* 38-39 (4th ed. 1983) (discussing the idea "that if a case arises under the Constitution, laws, or treaties of the United States, jurisdiction to entertain it is in some district court by compulsion of the Constitution itself" (citing *Eisenstrager v. Forrestal*, 174 F.2d 961, 966 (D.C. Cir. 1949))). It would be a rare *forum non conveniens* case, however, in which a defendant could raise a serious constitutional argument.

190. The Supreme Court has held that the Due Process Clause of the Fifth Amendment has an equal protection component. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("The Fifth Amendment . . . does not contain an equal protection clause. . . . But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.").

191. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971) (noting that state "classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny").

192. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 101-02 n.21 (1976) (noting that, absent countervailing considerations, "the power [of the federal government] over aliens is of a political character and therefore subject only to narrow judicial review"). *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 713 (4th ed. 1991) (discussing appropriate standards of review for classifications based on citizenship).

193. *See, e.g.,* Treaty of Friendship, Establishment, and Navigation, Feb. 21, 1961, U.S.-Belg., art. 3, 14 U.S.T. 1284, 1288 ("Nationals . . . shall be accorded full legal and judicial protection for their persons, rights and interests."); Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, U.S.-Iran, art. 3, 8 U.S.T. 900, 902-03 ("Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party. Such access shall be allowed, in any event, upon terms no less favorable than those applicable to nationals and companies of such other High Contracting Party."); Treaty of Friendship, Commerce, and Navigation, Aug. 8, 1938, U.S.-Liber., art. 1, 54 Stat. 1739, 1740 ("The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law."); Treaty of

tunately for the foreign plaintiff, a treaty is unlikely to give her *more* rights than those held by American citizens. Hence:

[T]o the extent that the court may consider and dismiss a case for forum non conveniens as to an American nonresident of Pennsylvania who files an action in Pennsylvania, so may it dismiss an action as to an Irish citizen. The Treaty [between Ireland and the United States] provides for similar treatment in like situations; clearly it affords Irish citizens no greater rights than those afforded to United States citizens.<sup>194</sup>

2. *Should Aliens Be Treated Differently?*—In one sense this is an easy question. Choice of law and jurisdiction often turn on citizenship (or some proxy for it).<sup>195</sup> Treating the foreign plaintiff differently, therefore, is an inevitable consequence of our normal legal rules. Conflicts scholars write at length about this problem,<sup>196</sup> often critically,<sup>197</sup> but, for the judiciary at least, it is accepted doctrine.<sup>198</sup> Thus, in *Reyno*, the Court observed: “When the home forum has been chosen, it is reasonable to assume that the choice is convenient. When the plaintiff is foreign, however, this assumption is made less reasonable.”<sup>199</sup>

The plight of the foreign plaintiff may be more distressing, however. A good bit of judicial forum non conveniens discussion focuses on issues such as court congestion and the burden of jury duty.<sup>200</sup> It seems that

Friendship, Commerce, and Consular Rights, June 19, 1928, U.S.—Aus., art. 1, 47 Stat. 1876, 1878 (“The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.”).

194. *Jennings v. Boeing Co.*, 660 F. Supp. 796, 800 (E.D. Pa. 1987), *aff’d*, 838 F.2d 1206 (3d Cir. 1988) (emphasis added); *see also Irish Nat’l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 91-92 (2d Cir. 1984).

195. *See Rudetsky v. O’Dowd*, 660 F. Supp. 341, 345 (E.D.N.Y. 1987) (recognizing that, although not dispositive, citizenship is “a fact of high significance” in the forum non conveniens balancing). Domicile is frequently a proxy for citizenship. The state where a citizen is domiciled, for example, always has personal jurisdiction over her. *Miliken v. Meyer*, 311 U.S. 457, 462 (1940).

196. *See, e.g., Allan J. Stevenson, Forum Non Conveniens and Equal Access Under Friendship, Commerce, and Navigation Treaties: A Foreign Plaintiff’s Rights*, 13 HASTINGS INT’L & COMP. L. REV. 267 (1990).

197. *See Duval-Major, supra* note 171, at 651 (arguing that dismissals often leave foreign plaintiffs with little recourse). *See generally* Kathi L. Hartman, Note, *Forum Non Conveniens and Foreign Plaintiffs in the Federal Courts*, 69 GEO. L.J. 1257 (1981).

198. *See R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 168 (2d Cir. 1991); *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1146 (5th Cir. 1989); *see also supra* text accompanying note 186.

199. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981).

200. *See, e.g., Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947) (saying that in a forum non conveniens inquiry, it is in the public interest to prevent the burden of jury duty being imposed on a community that has no relation to the litigation as well as to avoid administrative difficulties that may arise for courts when litigation is filed at congested centers instead of being handled at its place

scarce judicial resources, to put it baldly, should not be wasted on foreigners—especially when the private interest calculus points toward dismissal, as so often will be the case with foreign plaintiffs.<sup>201</sup> Moreover, actions brought here by foreign plaintiffs may “entangl[e] the forums in suits with which the forums have at best a tangential connection.”<sup>202</sup> As a result of such differential treatment, some might feel uneasy. This is natural; we do not like to admit that we are rationing fundamental resources. On the other hand, the need to do so cannot be ignored, and we should, therefore, encourage courts to focus on the real concerns animating the forum non conveniens decision.

### B. *The Treatment of the Domestic Plaintiff*

“[A] defendant must meet an almost impossible burden in order to deny a citizen access to the courts of this country.”<sup>203</sup> Reality is to the contrary, however: “the cases demonstrate that defendants frequently rise to that challenge.”<sup>204</sup> One court has attempted to reconcile those two statements by contrasting large, international companies conducting foreign operations with an individual whose case arose while abroad on a short vacation.<sup>205</sup> The argument for deferring to the plaintiff’s choice to sue in her home forum is much stronger in the latter case.<sup>206</sup> Similarly, another judge attempted to distinguish an earlier Supreme Court case upholding a forum non conveniens dismissal on the ground that it “involved an insurance policyholder’s derivative action rather than a suit an individual plaintiff has brought at home.”<sup>207</sup> Not surprisingly, the plaintiffs in the great majority of dismissals involving Americans are corporations involved in commercial disputes. In contrast, the individual plaintiff who sues at home in “good faith” rather than to “vex” has a real advantage when the motion to dismiss is heard.<sup>208</sup>

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of origin).

201. See Sheila L. Birnbaum & Douglas W. Dunham, *Foreign Plaintiffs and Forum Non Conveniens*, 16 BROOK. J. INT’L L. 241, 256 (1990).

202. *Id.* at 262.

203. *Mizokami Bros. of Ariz. v. Baychem Corp.*, 556 F.2d 975, 977 (9th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978). The emphasis is on whether the plaintiff is an American citizen, not on whether she is a forum resident. See *Interpane Coatings, Inc. v. Australia & N.Z. Banking Group*, 732 F. Supp. 909, 915 (N.D. Ill. 1990).

204. *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1449 (9th Cir. 1991).

205. See *Reid-Walen v. Hansen*, 933 F.2d 1390, 1395 (8th Cir. 1991).

206. See *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 346-47 (8th Cir. 1983) (comparing the expectations of a plaintiff on vacation with those of foreign defendants who solicited business in the United States); cf. *Reid-Walen*, 933 F.2d at 1395 (observing that, although “[j]udicial concern for allowing citizens of the United States access to American courts has been tempered by the expansion and realities of international commerce,” the plaintiff in this case was merely on vacation).

207. *Carter v. Trafalgar Tours, Ltd.*, 704 F. Supp. 673, 679 (W.D. Va. 1989).

208. See, e.g., *id.*; *Rudetsky v. O’Dowd*, 660 F. Supp. 341, 349 (E.D.N.Y. 1987).



The Court, in *Gulf Oil Corp. v. Gilbert*,<sup>209</sup> required that the plaintiff receive a special advantage in a forum non conveniens motion; dismissal is warranted only if the balance is “strongly in favor of the defendant.”<sup>210</sup> The cases I looked at follow *Gilbert*’s directive. Very few of the dismissals were questionable; in contrast, I had trouble with the outcome of a fair number of decisions where jurisdiction was retained. The decisions, however, probably can be explained by the *Gilbert* court’s directive to defer, in close cases, to the plaintiff’s choice of forum. According to the case law the plaintiff has an advantage if she is American. Even though favoring American plaintiffs partially undermines the *Gilbert* advantage, when the plaintiff is foreign this makes sense. There is little reason to defer to an alien plaintiff’s choice of forum<sup>211</sup> but good reason to defer to an American’s choice.

### C. *The Treatment of the Domestic Defendant*

Some commentators have found it incongruous that a defendant would ever find it inconvenient to be sued in its “home” forum:<sup>212</sup> “It lieth not in a defendant’s mouth,” Professor Weinberg writes, “to argue that it is vexatious, harassing, and inconvenient to be sued at home.”<sup>213</sup> What may at first glance appear to be the defendant’s home may upon closer inspection have no close connection with the defendant’s business operations. Modern economic life demands that “home” be broadly defined. As Robertson and Speck observe, a tanker flying a Liberian “flag of convenience” should be treated as American if “ultimate ownership” of the tanker “rest[s] in American hands.”<sup>214</sup> The reality of modern economic life is that multinationals have multiple “homes.” Is this country, for example, really the home of Union Carbide’s Indian subsidiary? The cases reflect this reality. Over half of the dismissals in my sample involved American defendants, all of whom were corporate, sometimes joined with foreign defendants. These results should not surprise anyone. Both private and public interests analysis can easily point to a proper forum abroad for an American company. Thus, the “prevailing judicial attitude is that the injuries done by American business to foreign nationals abroad are not America’s problem.”<sup>215</sup>

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209. 330 U.S. 501 (1947).

210. *Id.* at 508.

211. See Peter G. McAllen, *Deference to the Plaintiff in Forum Non Conveniens*, 13 S. ILL. U. L.J. 191, 278-79 (1989).

212. See, e.g., Robertson & Speck, *supra* note 1, at 752-53.

213. Louise Weinberg, *Insights and Ironies: The American Bhopal Case*, 20 TEX. INT’L L.J. 307, 315 (1985).

214. Robertson & Speck, *supra* note 1, at 939.

215. Robertson, *supra* note 20, at 405. That statement, as written, carries an implicit criticism.

#### D. *The Treatment of the Foreign Defendant*

Case law rarely makes explicit reference to the foreign defendant's citizenship as a factor. Certainly, the defendant's citizenship is relevant in evaluating private interests (travel, translation, and so on) and in choosing which law to apply. But it rarely becomes an open factor in the decision.

#### V. *The Erie Question*

A number of state courts have refused to follow the *Reyno* analysis.<sup>216</sup> The Texas Supreme Court, for example, has held that a legislative mandate prevents the use of forum non conveniens in wrongful death and personal injury cases.<sup>217</sup> California courts, on the other hand, will dismiss on forum non conveniens grounds, but the decision whether to do so may be influenced by the result of the choice-of-law analysis.<sup>218</sup> Because those differences can lead to different results,<sup>219</sup> an *Erie* problem inevitably arises whenever a diversity case filed in one of those states ends up in federal court.<sup>220</sup> This problem has two components: must federal courts follow state forum non conveniens law, and does a federal forum non conveniens decision preclude a contrary (later) finding by a state court?

#### A. *The Choice-of-Law Analysis*

Professor Robert Braucher, writing shortly after the decision in *Gulf Oil*,<sup>221</sup> noted that the Supreme Court's recent forum non conveniens

I would not join that criticism. *See infra* subpart VII(C).

216. Thirty-two states closely follow the federal version of the forum non conveniens doctrine in transnational personal injury cases; four states follow the federal standard less closely. Robertson & Speck, *supra* note 1, at 950-51. Four other states have adopted a limited forum non conveniens doctrine, whereas forum non conveniens has been partially rejected in three states, and completely rejected in two states. Five states have not addressed the issue. One consequence of the varied practice has been that states that do not follow federal procedure have seen an increase in their transnational tort litigation. *Id.*

217. *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 679 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991).

218. *See Holmes v. Syntex Lab., Inc.*, 202 Cal. Rptr. 773, 778-79 (Ct. App. 1984) ("[T]he California standard for consideration of a change in applicable law is much more liberal than that announced in *Piper*. The 'suitability' of the alternative forum, encompassing such factors as differing conflict of law rules and 'substantive disadvantage' from litigation in the alternative forum, must be considered."); *see also* Janet S. Washington, Comment, *The Impact of Piper Aircraft v. Reyno on the Foreign Plaintiff in Forum Non Conveniens Analysis*, 55 J. AIR L. & COM. 303, 328-38 (1989) (discussing California's rejection of *Reyno* and distinguishing between California's forum non conveniens law and the federal law).

219. *Compare Holmes*, 202 Cal. Rptr. at 785, with *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608, 615 (6th Cir. 1984) (yielding different results on the same facts, involving actions by foreign nationals against American drug companies when Britain was the alternate forum).

220. The wise (and reasonably lucky) plaintiff can always defeat removal of a case originally filed in state court by suing nondiverse defendants. *See* Robertson & Speck, *supra* note 1, at 943.

221. 330 U.S. 501 (1947).

opinions had “carefully left open the question” of whether the decision in *Erie Railroad v. Tompkins*<sup>222</sup> required federal courts sitting in diversity to follow state law in deciding whether a forum non conveniens motion should be granted.<sup>223</sup> His examination led him to conclude that “[t]he only candid summary of the law on this question is that nobody knows what it is.”<sup>224</sup>

The answer to this question has not become any clearer in the intervening forty-five years since *Gulf Oil. Reyno* itself expressly reserved decision on the *Erie* question.<sup>225</sup> Lower courts<sup>226</sup> and commentators<sup>227</sup> have generally taken the position that under the now-standard “twin aims” *Erie* test, the federal courts need not apply state forum non conveniens law.

The leading judicial discussion of the problem comes from a mass tort case—the crash of a Pan Am plane at the New Orleans airport.<sup>228</sup> The plaintiffs, heirs of passengers killed in the crash, were Uruguayan citizens.<sup>229</sup> The majority found the case involved a conflict between the two aims of *Erie*.<sup>230</sup> First, the court determined that the application of federal law to forum non conveniens questions would “give some (arbitrary) set of *defendants* the ability to ‘forum shop’ . . . . The enormous difference between the outcomes of federal proceedings points forcefully toward applying state law under the first aim of *Erie*.”<sup>231</sup> The court concluded, however, that the “internal administrative and equitable

222. 304 U.S. 64 (1938).

223. See Braucher, *supra* note 1, at 927.

224. *Id.* at 930.

225. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 n.13 (1981).

226. See Speck, *supra* note 122, at 196 & n.62 (collecting cases). But cf. Weiss v. Routh, 149 F.2d 193, 195 (2d Cir. 1945) (L. Hand, J.) (holding, in a case not involving forum non conveniens, that *Erie* requires state laws to be followed when deciding whether to accept or refuse jurisdiction).

227. See, e.g., 15 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3828 (2d ed. 1986) (arguing that state notions of forum non conveniens cannot be binding on federal courts in diversity cases because they are matters of administration of the federal courts, not rules of decision); Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 153 (stating that a rule that does not require federal courts to apply state forum non conveniens rules “may be proper because of its importance to the efficiency and integrity of the administration of justice”). But see Miller, *supra* note 114, at 1377-92 (arguing that state forum non conveniens rules should be followed by federal courts sitting in diversity because those rules seek substantive ends).

228. *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987) (en banc), vacated *sub nom.* Pan Am World Airways, Inc. v. Lopez, 490 U.S. 1032 (1989), *aff'd in part and vacated in part sub nom.* *In re Air Crash Disaster Near New Orleans, La.*, 883 F.2d 17 (5th Cir. 1989).

229. *Id.* at 1151.

230. Describing the evolution of the *Erie* doctrine, the court noted that it was not until the case *Hanna v. Plumer* that the “twin aims” of *Erie* were fully stated. See *id.* at 1157 (“In *Hanna v. Plumer*, the Court stated *Erie* policy encompassed ‘the twin aims of . . . discouragement of forum-shopping and avoidance of the inequitable administration of the laws.’” (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965))).

231. *Id.* at 1158 (emphasis in original).

powers” of federal courts outweigh the interest in preventing forum shopping.<sup>232</sup> Those powers are inherent in an Article III court.<sup>233</sup> Hence, “the interests of the federal forum in self-regulation, in administrative independence, and in self-management are more important than the disruption of uniformity” arising from the refusal to follow state law.<sup>234</sup>

Judge Higginbotham also addressed the *Erie* question in a separate concurring opinion. He argued that the majority had miscalculated the “twin aims” calculus. First, the majority had undervalued the state interest in denying forum non conveniens to residents of Louisiana who sue foreign actors there.<sup>235</sup> By rejecting that interest and permitting forum non conveniens dismissal, the majority was discriminating against citizens of Louisiana (who would not be able to remove cases filed against them to federal court)—the very evil *Erie* sought to avoid.<sup>236</sup> Similarly, he believed that the majority had overemphasized the federal forum’s interest in self-administration. The majority had relied on the “inherent power”<sup>237</sup> of courts to regulate their own affairs; in contrast, Judge Higginbotham argued that federal courts only have a “secondary power of self-management.”<sup>238</sup> In the end, however, Judge Higginbotham wrote that whether “Louisiana’s rejection of a doctrine of forum non conveniens is such an exercise of the state’s primary power to define the substantive rights of the tortfeasors that it ought not be displaced by federal judges remains a close question.”<sup>239</sup> While ultimately concurring in the judgment, Judge Higginbotham’s opinion is an instructive exploration of the policy justifications and ramifications of the choice-of-law dilemma presented in the forum non conveniens context.

Several commentators disagree with the outcome of *Air Crash*, as well as its underlying rationale. Professor Stein maintains the position that in most cases *Erie* compels the application of the forum state’s law of forum non conveniens.<sup>240</sup> He argues cogently that forum non conveniens often will undercut state regulatory objectives. If so, then the basic federalism goals of the *Erie* doctrine should lead the federal courts to respect the state’s “open-door” policies.<sup>241</sup> Alternatively, Professor

232. *Id.* at 1159.

233. *Id.* at 1158.

234. *Id.* at 1159.

235. *Id.* at 1180 (Higginbotham, J., concurring).

236. *Id.* at 1183. In saying so, Judge Higginbotham read *Erie* and its progeny as teaching a different lesson than that learned by the majority.

237. *Id.* at 1159.

238. *Id.* at 1183 (emphasis in original).

239. *Id.* at 1186.

240. See Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935, 1938 (1991); see also McAllen, *supra* note 211, at 267-69 (arguing that federal courts should not give less protection to substantive rights than state courts offer).

241. See Stein, *supra* note 240, at 1968-71. Stein notes that there may be occasions when a

Maltz observes, forum non conveniens should be analyzed like every other *Erie* problem because it "is an important element in some jurisdictional schemes and serves a useful role in state court allocations of decision making authority between state and federal courts."<sup>242</sup>

The argument for applying state law is considerably strengthened by the absence of either a federal statute or rule dealing with transnational forum non conveniens.<sup>243</sup> Judge Breyer recently found such a congressional policy favoring forum non conveniens in section 1404(a), the federal *intrasystem* transfer statute.<sup>244</sup> In *Howe v. Goldcorp Investments*, Judge Breyer explained that section 1404(a) "reflects a congressional policy strongly favoring transfers" which should indicate that Congress never "intended to take from the courts their long-established power to transfer a case when considerations of fairness and convenience so required."<sup>245</sup> Perhaps the answer to which side is right turns on what you think of Breyer's use of the equity of section 1404(a) to establish a federal policy in favor of forum non conveniens. Judge Breyer's argument seems unlikely to sway the current Supreme Court, although the housekeeping argument advanced by the *Air Crash* court might.<sup>246</sup>

Finally, the whole *Erie* question can be finessed by pretending that the state and federal law of forum non conveniens are the same, although there is good evidence to the contrary. The value of the finesse lies in making unnecessary the resolution of the *Erie* question.<sup>247</sup> As Judge

federal interest is at stake, a situation that would require that the state law of forum non conveniens be displaced. See *id.* at 2003 & n.320 (using foreign relations as an example).

242. Earl M. Maltz, *Choice of Forum and Choice of Law in the Federal Courts*, 79 KY. L.J. 231, 250 (1991).

243. The presence of either type of authority, of course, makes the choice of federal law very easy. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988) ("[A] district court sitting in diversity must apply a federal statute that controls the issue before the court and that represents a valid exercise of Congress' constitutional powers.").

244. See *Howe v. Goldcorp Invs.*, 946 F.2d 944, 949 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1172 (1992).

245. See *id.* (discussing 28 U.S.C. § 1404(a)).

246. The Supreme Court is increasingly inclined to interpret statutes in a crabbed and literal manner, thus making arguments like Breyer's difficult to maintain. See generally William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990) (arguing that "for decades" the Court has used the same method of statutory interpretation, that is, determining whether a statute is ambiguous on its face or has a "plain meaning" and whether the legislative history confirms or rebuts either the plain or apparent meaning). On the other hand, the Court gives every indication that it is sympathetic to changes that may lead to large reductions in the federal caseload. Perhaps the best example of this trend is the marked hostility toward federal habeas corpus actions. See, e.g., *Coleman v. Thompson*, 111 S. Ct. 2546 (1991).

247. This is what conflicts people call a "false conflict." See Maltz, *supra* note 242, at 237-38. The same tendency to pretend that foreign and domestic law are the same is also present in decisions and scholarship on choice of law. See Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, IOWA L. REV. 53, 57 (1984).

Weinstein wrote a few years ago:

The Second Circuit has recently reiterated that the similarity between New York law and federal law on forum non conveniens doctrine obviates the need to resolve the *Erie* question. *Schertenleib v. Traum*, 589 F.2d 1156, 1162 n. 13 (2d Cir. 1978). See also *Olympic Corp. v. Societe Generale*, 462 F.2d 376, 378 (2d Cir. 1972). But cf. *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 484 (1984) (diverging from federal doctrine on whether alternative forum must be available to consider forum non conveniens claims), cert. denied, 469 U.S. 1108. For simplicity, federal law will be applied.<sup>248</sup>

Ease of resolution, one hopes, is not yet the same as justice.

### B. *Can a State Court Reach a Different Result?*

Several inventive plaintiffs faced with a dismissal for forum non conveniens have asked the federal court to remand a case over which it only has pendent jurisdiction to the state court where it had originally been filed.<sup>249</sup> These efforts have been rejected. One court explained:

If this case were remanded to Louisiana state court, the defendants would be required to commence separate actions in the United Kingdom against British companies over whom the Louisiana courts would not have personal jurisdiction. Because the "entire case and all parties" would not be before it, the state court clearly is not a suitable and convenient forum. It would be anomalous to conclude that while a district court may properly invoke the federal law of *forum non conveniens* to decline jurisdiction over a properly removed case, it must order the case to be reinstated in an equally if not more inconvenient forum.<sup>250</sup>

Thus, the court treated the request for remand as raising the question whether the British or Louisiana state courts presented the more appropriate forum.<sup>251</sup>

That result follows the logic of removal procedure: certain defendants have a statutory right to remove cases from state to federal court. That right carries with it the advantage of federal forum non conveniens practice (assuming, of course, that *Erie* does not compel that

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248. *Rudetsky v. O'Dowd*, 660 F. Supp. 341, 343 (E.D.N.Y. 1987) (some citations omitted).

249. See, e.g., *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), cert. denied, 111 S. Ct. 1587 (1991).

250. *Nolan*, 919 F.2d at 1070.

251. *Id.* at 1069-70.

state procedures be followed).<sup>252</sup> A remand to state court, therefore, would deprive the defendant of that statutory advantage.

Finally, there is the "reverse *Erie*" problem. Generally, state courts are not bound to follow the federal forum non conveniens practice. The Fifth Circuit has held, however, that *state* courts hearing admiralty cases under the "saving to suitors"<sup>253</sup> clause must follow *federal* forum non conveniens law.<sup>254</sup> That result has been roundly criticized<sup>255</sup> and is not followed elsewhere.<sup>256</sup>

## VI. Federal Question Cases

In federal courts, the application of the doctrine of forum non conveniens need not be limited to diversity cases; it can also be applied to cases in which jurisdiction is predicated on the presence of a federal question. The *Erie* analysis in these cases, because of the stronger federal interest, should be much easier to apply than it is in the diversity cases applying the *Reyno* test.

Judge Breyer's recent opinion in *Howe v. Goldcorp Investments*<sup>257</sup> illustrates the problem. In *Howe*, an American stockholder sued a Canadian company and a number of Canadian citizens affiliated with the company for securities violations.<sup>258</sup> The defendants moved to dismiss on forum non conveniens grounds.<sup>259</sup> Plaintiff resisted that motion by arguing that the application of forum non conveniens can be limited by a specific venue statute, such as the one authorizing a securities law plaintiff to sue where the "offer or sale took place"<sup>260</sup> or where the violation occurred.<sup>261</sup> The Supreme Court had previously accepted just such an argument in a case involving the antitrust venue statute, *United States v. National City Lines*.<sup>262</sup>

Judge Breyer had no trouble getting around that argument. First, *National City Lines* relied heavily on the legislative history of the antitrust venue statute; other venue statutes probably will not have a legislative history reflecting forum non conveniens concerns, a problem unlikely to

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252. See McAllen, *supra* note 211, at 269-71.

253. 28 U.S.C. § 1333 (1988).

254. Exxon Corp. v. Chick Kam Choo, 817 F.2d 307, 324-25 (5th Cir. 1987), *rev'd on other grounds*, 480 U.S. 140 (1988).

255. See Robertson & Speck, *supra* note 1, at 958-68.

256. See *id.* at 965 ("Judge Gee's *Choo III* opinion is the only published work arguing that federal forum non conveniens preempts state law in saving-clause cases.")

257. 946 F.2d 944 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1172 (1992).

258. *Id.* at 945.

259. *Id.*

260. *Id.* at 948 (referring to the Securities Act of 1933, § 22(a), 15 U.S.C. § 77v(a) (1988)).

261. *Id.* (referring to the Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1988)).

262. 334 U.S. 573 (1948).

cross the mind of Congress when considering a venue statute.<sup>263</sup> In addition, there is no good reason to believe that in adopting a specific venue statute for a certain type of domestic case Congress meant to foreclose the application of forum non conveniens in international cases.<sup>264</sup> Indeed, Breyer wrote, “[C]ongressional adoption of § 1404(a) for intra-system transfers reflects a general policy favoring forum non conveniens. Section 1404(a) at the least reflects a congressional policy strongly favoring transfers.”<sup>265</sup>

The issue has also arisen in Jones Act<sup>266</sup> and maritime cases.<sup>267</sup> The Fifth Circuit has applied forum non conveniens in those areas only after conducting a choice-of-law analysis and concluding that American law did not apply.<sup>268</sup> In the *Air Crash* case, however, the Fifth Circuit rejected that analysis, holding that forum non conveniens analysis should be the same in diversity cases and in Jones Act cases.<sup>269</sup> The court argued that, although *Reyno* had been a diversity case, “the Supreme Court recognized no exceptions”; thus, “the principles enunciated in *Reyno* apply in *all* cases regardless of their jurisdictional bases or subject matter.”<sup>270</sup> Other courts, however, have refused to apply *Reyno* to Jones Act cases.<sup>271</sup>

263. *Howe*, 946 F.2d at 948-49 (finding “no such unusual legislative history relevant to the Securities Acts’ special venue statutes . . . [t]hat difference is significant”).

264. *See id.* at 949. The court questioned why a specific venue statute should be treated any differently than a general venue statute. *See id.* (“If a general venue statute opening federal court doors . . . is compatible with an international *forum non conveniens* transfer . . . why does a special venue statute which simply opens another court’s doors suddenly make the same international transfer unlawful?” (emphasis in original)).

265. *Id.* at 949-50. Judge Breyer found the fact that the Supreme Court overruled *National City Lines* shortly after the adoption of § 1404(a), *see* *United States v. National City Lines, Inc.*, 337 U.S. 78 (1949), of great importance to his analysis of the forum non conveniens claim. *See Howe*, 946 F.2d at 949. In contrast, one court took the position that the mere adoption of § 1404(a) should not control the question of a forum non conveniens dismissal in an antitrust case; dismissal is not proper if the alternative forum would not hear the antitrust claim. *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 890 (5th Cir. 1982), *vacated and remanded on other grounds*, 460 U.S. 1007 (1983). That argument is further discussed *infra* in Part VII.

266. Merchant Marine (Jones) Act, ch. 250, 41 Stat. 1007, § 33 (1920) (codified as amended at 46 U.S.C. § 688 (1988)).

267. *See, e.g.*, *Travelers Indem. Co. v. S.S. Alca*, 710 F. Supp. 497, 500 (S.D.N.Y. 1989) (holding that the Carriage of Goods by Sea Act does not preclude dismissal by forum non conveniens).

268. *See, e.g.*, *McClelland Eng’rs, Inc. v. Munusamy*, 784 F.2d 1313, 1316-17 (5th Cir. 1986); *James v. Gulf Int’l Marine Corp.*, 777 F.2d 193, 194 (5th Cir. 1985); *Cuevas v. Reading & Bates Corp.*, 770 F.2d 1371, 1377-78 (5th Cir. 1985).

269. *See In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1163 (5th Cir. 1987) (en banc), *vacated sub nom. Pan Am World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), *aff’d in part and vacated in part sub nom. In re Air Crash Disaster Near New Orleans, La.*, 883 F.2d 17 (5th Cir. 1989).

270. *Id.* (emphasis in original). Although this statement is made in the form of a holding, the case involved neither the Jones Act nor maritime law.

271. *See, e.g.*, *Needham v. Phillips Petroleum Co.*, 719 F.2d 1481, 1483 (10th Cir. 1983); *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983). The court in *Air*



The general reluctance to extend *Reyno* blindly seems justified. The *Reyno* Court only addressed the common problems presented by forum non conveniens motions in diversity cases. Those cases do not involve federally established goals. Federal question cases, in contrast, involve issues of substantive federal policies. It may well be that the policies underlying a federal statute would be thwarted or frustrated by dismissing the case. In that situation, the federal question would only be heard in a foreign tribunal, a forum that may not be very sympathetic to the federal (American) right. The correct approach, therefore, would be to examine the statute or case setting up the federal right to see if it is likely to be protected adequately in the foreign forum.<sup>272</sup> If the answer to that question is that the federal right will not be adequately protected, then it would be wrong for the court to dismiss on forum non conveniens grounds. In short, neither rote application of *Reyno* (as the *Air Crash* case held) nor rote retention of the case if American law is to be applied (as the cases repudiated by *Air Crash* held) is appropriate. Rather, the key lies in examining the effect of forum non conveniens on the implementation of federal policy. That inquiry explains, for example, why antitrust claims have been held exempt from forum non conveniens dismissal:<sup>273</sup> “[T]he antitrust laws of the United States embody a specific congressional purpose to encourage the bringing of private claims in the American courts in order that the national policy against monopoly may be vindicated.”<sup>274</sup> Examination of the relevant federal policy in other situations may, however, lead to a different result.<sup>275</sup>

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*Crash* relied on the trial court's disposition of *Sherrill v. Brinkerhoff Maritime Drilling*, 615 F. Supp. 1021 (N.D. Cal. 1985), *rev'd in part and vacated in part sub nom.* *Zipfel v. Halliburton Co.*, 861 F.2d 565 (9th Cir. 1988), for the proposition that *Reyno* applies to Jones Act cases. *Air Crash*, 821 F.2d at 1163 n.25. On appeal, however, the Ninth Circuit held that *Reyno* did not apply to Jones Act cases. *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1486-87 & n.9 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988), *reh'g denied*, 487 U.S. 1245 (1988), *mandate recalled, opinion amended*, 861 F.2d 565 (9th Cir. 1988) (adopting “the decisions of the Fifth, Tenth and Eleventh Circuits which preclude dismissal” for forum non conveniens of any case to which the Jones Act applies, and noting, but failing to adopt, the Fifth Circuit's reading of *Reyno* in *Air Crash*).

272. Of course, the inquiry might be thought to fall within the “suitable alternative forum” factor. *See Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1145 (5th Cir. 1989) (concluding that dismissal of a RICO claim on forum non conveniens grounds was proper because Bermuda, the alternative forum, recognizes analogous torts such as fraud). Moreover, the presumption against applying federal statutes extraterritorially, *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227 (1991), might influence the forum non conveniens decision. *See* Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 674 (1992) (discussing the presumption against extraterritoriality).

273. *See Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 890 (5th Cir. 1982), *vacated and remanded on other grounds*, 460 U.S. 1007 (1983).

274. *Laker Airways v. Pan Am. World Airways*, 568 F. Supp. 811, 818 (D.D.C. 1983), *aff'd sub nom.* *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

275. *See Verlinden B.V. v. Central Bank*, 461 U.S. 480, 490 n.15 (1983) (suggesting, in dictum, that the Foreign Sovereign Immunities Act “does not appear to affect the traditional doctrine of forum

## VII. The Wisdom of Forum Non Conveniens

*Reyno* itself generated relatively little controversy when it was decided. Some commentators argued that forum non conveniens was the obvious (and wrong) method of addressing the problems created by the Court's expansion of long-arm jurisdiction.<sup>276</sup> The effect of that expansion has been to make it possible to bring litigation in a forum that has significantly less connection with the cause of action than other forums where it might have been brought;<sup>277</sup> as Lord Denning said with his usual flair, "As a moth is drawn to the light, so is a litigant drawn to the United States."<sup>278</sup> Naturally, resistance to that trend developed, resulting in the common use of forum non conveniens dismissals.<sup>279</sup>

Controversy erupted with the Bhopal litigation, however, and there has been much critical commentary since. The academic community has given a grudging reception, at best, to forum non conveniens. The remainder of this Article will examine why scholars are wary of forum non conveniens. The focus will be on the three main areas of criticism—the incoherence of forum non conveniens doctrine, the substantive quality of the results it achieves, and the felt need never to decline jurisdiction. The proper role of forum non conveniens in conflicts law will then be briefly examined.

### A. Criticisms of the *Reyno* Test

Academics characterize transnational forum non conveniens as "[a] crazy quilt of ad hoc, capricious, and inconsistent decisions."<sup>280</sup> This

*non conveniens*"). One wonders how the alternative forum analysis would play out in a foreign sovereign immunity case if the alternative forum is also the home court of the foreign sovereign.

276. See Stein, *supra* note 1, at 841-46 (arguing that the doctrine of forum non conveniens should be transformed into a jurisdictional inquiry); Stewart, *supra* note 145, at 1294, 1324 (arguing that the factors and policies that courts consider in relation to forum non conveniens are best considered in the jurisdictional analysis).

277. See Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 554-79 (1989).

278. *SmithKline, Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 733 (Eng. C.A. 1982).

279. Other countries have experienced the growth of a forum non conveniens jurisprudence. "[T]he English law of forum non conveniens is now quite closely aligned with United States law." Robertson, *supra* note 20, at 413. Forum non conveniens is also alive and well in Scotland, where it, too, resembles the American model. See A.E. ANTON & P.R. BEAUMONT, *PRIVATE INTERNATIONAL LAW* 212-18 (2d ed. 1990). The uncertain state of Australian law is discussed in a wonderfully sarcastic article. See Brian O'Brien, *Stays of Proceedings and Transnational Injunctions*, 12 ADEL. L. REV. 201, 217 (1989) (stating that because Australia is not a "focal point" for foreign litigation, there is not "a necessity for the courts, in Australia, to develop such a doctrine"). New Zealand apparently follows the English practice. See R.J. Paterson, *Forum Non Conveniens in New Zealand*, 13 N.Z.U. L. REV. 337, 337 (1989) (noting New Zealand's acceptance of the doctrine from English law). See generally Raymond T. Abbott, Note, *The Emerging Doctrine of Forum Non Conveniens: A Comparison of the Scottish, English and United States Applications*, 18 VAND. J. TRANSNAT'L L. 111, 113-14 (1985).

280. Stein, *supra* note 1, at 785.

Article argues that such is not the state of current forum non conveniens case law. Even if I overstate the case for forum non conveniens, however, the attack based on doctrinal incoherence seems wrong. The critics focus unnecessarily on the need for rules to control the judiciary, rather than on factors to guide the judges.

The *Reyno* analysis of forum non conveniens establishes a balancing test to be employed once the threshold of an adequate alternative forum has been crossed. Scholars (and occasionally judges) do not like balancing tests because balancing gives the judge too much discretion in deciding cases, leading to a reduction of both accountability and predictability. Conflicts scholars seem particularly sensitive to the charge of discretion, no doubt because it is a charge generally leveled against them by opponents of interest analysis in choice of law.<sup>281</sup> Thus, conflicts scholars disagree with the wide acceptance of the "most significant relationship" test of the second *Restatement of Conflict of Laws*<sup>282</sup> even though that test usually gives judges only a list of factors to consider along with some useful (and rebuttable) presumptions.<sup>283</sup> Judges like the Second *Restatement* for the very reason that so many scholars dislike it: the factors and presumptions guide decisionmaking but do not control it.

The contest between "rules" and "justice" is an ancient one, of course.<sup>284</sup> Some, like the Legal Realists, prefer generalities,<sup>285</sup> others, like Judge Bork<sup>286</sup> and the Critical Legal Studies movement (very strange soulmates), prefer rules.<sup>287</sup> Obviously, this dispute is not easily resolved, nor is this the proper forum for an in-depth analysis of the conflict. The persistence of judicial preference for balancing factors over rules should

281. Similarly, as interest analysis became accepted, its followers charged their predecessors of the vested rights school with manipulations and incoherence. See Terry S. Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity*, 62 N.Y.U. L. REV. 651, 660 n.35 (1987) ("Commentators . . . demonstrated that any claim to predictability and uniformity of the [vested rights] system was undermined in practice by judges who employed manipulative tactics to avoid unpalatable consequences of the vested rights approach.").

282. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

283. For a description of Second *Restatement* methodology, see RICHMAN & REYNOLDS, *supra* note 120, at 158-174. Professor von Mehren authored the most widely quoted criticism of the "most significant relationship test": "[T]he Restatement does not significantly refine and discipline theory and analysis." Arthur T. von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 964 (1975). Nevertheless, more than half of the states purport to use Second *Restatement* methodology. Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1170 (1987).

284. See generally Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615, 615-20 (1991).

285. See Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 475 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)) (saying that Legal Realists prefer analysis of "policy, morality, and institutional concerns").

286. See Barnett, *supra* note 284, at 623.

287. Cf. J.M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133, 1139-45 (1991) (reviewing ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990)) (discussing the existence of different positions among Critical Legal Studies scholars regarding rules).

give critics some pause, however. The source of that persistence is judicial determination to see justice done, something that rules tend to interfere with.<sup>288</sup> Conflicts scholars, of all people, should be familiar with the judicial preference for avoiding the straitjacket of rules from the American experience with the choice-of-law "rules" of the vested rights period.<sup>289</sup>

The law that has developed since *Reyno* has made forum non conveniens motions into what Judge Wilkey has called "exercises of structured discretion."<sup>290</sup> *Reyno* and its progeny require courts to list the factors announced by the Supreme Court, and to explain how those factors influenced the outcome of the forum non conveniens decision. I prefer judges who explain what they are doing and why they think their decisions are correct. These cases are too complicated to confine judicial decision-making to a Procrustean bed of rules. "Structured discretion" will not satisfy all critics, of course, because it lacks mathematical precision. Nevertheless, judges do know what they are supposed to be thinking about when they make their forum non conveniens decision, and they must explain their result. That, after all, is the essence of common-law decisionmaking.

### B. *Substantive Results*

Some critics of forum non conveniens also are unhappy with the substantive results of the doctrine. This criticism no doubt is due in part to professorial preference for plaintiffs;<sup>291</sup> the issue, however, may be more significant than that.

The *Reyno* Court identified five factors that draw litigation to this country: strict liability in tort, the choice of fifty jurisdictions in which to sue, the right to a jury trial, the extensive discovery process, and the availability of contingency fees.<sup>292</sup> Obviously, those advantages of American courts vanish when the case is dismissed: suits will be harder to bring (due to the absence of contingency fees), recovery will be more difficult (without strict liability and discovery), and the award will be for

288. I am using "justice" in a nontechnical, lay sense. A useful synonym might be "right result."

289. The vested rights school, exemplified by the *Restatement (First) of Conflicts*, favored a rigid set of rules. In practice those rules were often evaded so that justice might be done. This history is well known. See Richman & Reynolds, *supra* note 120, at 131-55.

290. *Pain v. United Technologies Corp.*, 637 F.2d 775, 781 (D.C. Cir. 1980). Legal Process devotees will immediately recognize a strong echo of the Hart and Sacks phrase "reasoned elaboration." See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 160-61 (tent. ed. 1958) (defining "reasoned elaboration" as a process of judgment employed in official decisionmaking and involving the resolution of a question of law and a respect for legislative determinations).

291. Cf. Lea Brilmayer, *Interstate Federalism*, 1987 B.Y.U. L. REV. 949, 956-63 (criticizing modern choice-of-law scholars who see plaintiffs as presumptively entitled to receive compensation).

292. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 n.18 (1981).

a lesser amount (no jury trial). An evaluation of forum non conveniens, therefore, must address those changes.

1. *Expectations.*—Expectations, of course, are the key to most private law. Consider Professor Baade's observation:

A Scotsman injured on the Scottish continental shelf is (or was until recently) likely to have estimated his net worth in terms of the Scottish economy and of Scots law. Conversely, a Texas employee of "Red" Adair injured on "Piper Alpha" surely expects Texas compensation standards to apply to him in the event of injury.<sup>293</sup>

When viewed in light of party expectations, much that makes most of us uncomfortable about forum non conveniens disappears. Favoring domestic parties and disfavoring foreign ones, for example, is merely one way of thinking about expectations; searching for the true home of the litigation is another.

The problem is that "expectations" have no explicit role in the *Reyno* calculus, except perhaps as an ingredient of the choice-of-law section of the public interest inquiry. Because all proper law professors want courts to spell out specifically the grounds of their decisionmaking, an underground inquiry into expectations does not make us happy.<sup>294</sup> Nevertheless, an evaluation of the propriety of the substantive results requires us to think about comments like Professor Baade's.

2. *Economic Imperialism.*<sup>295</sup>—Another theme of forum non conveniens criticism is limited to the products liability and mass torts cases: there is talk in the literature of the need to deter American manufacturers—such as Union Carbide—from wrongful conduct in the United States by imposing on them huge damages for foreign accidents—like the one at Bhopal.<sup>296</sup> This criticism has two major weaknesses.

First, it is hard to believe that the mere threat of massive damages arising out of an "American" incident does not deter (as much as deterrence is ever possible) bad conduct.<sup>297</sup> Certainly, after the foreign

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293. Baade, *supra* note 41, at 129.

294. I include myself in this category. See WILLIAM L. REYNOLDS, *JUDICIAL PROCESS IN A NUTSHELL* 159 (2d ed. 1991) (lamenting that a judge is "under no formal compulsion to explain [a] decision," making review of the decision—that is, whether the judge abused his discretion—difficult).

295. The term is borrowed from Jespersen, *supra* note 18, at 119.

296. Cf. Thomas O. McGarity, *Bhopal and the Export of Hazardous Technologies*, 20 *TEX. INT'L L.J.* 333, 338-39 (1985) (noting the similarity between Union Carbide plants in India and this country, and concluding that "the most effective thing the United States can do to prevent future Bhopals is simply to open our courts to the Third World victims of hazardous technologies that our companies export").

297. More specifically, each company will balance the risk of liability and quantum of damages

incident occurs, the company is on notice of the problem, thereby dramatically expanding the scope of liability if a similar accident should later occur in the United States.

A more fundamental problem, however, lies in the export of our ideas about social policy that necessarily would accompany the curtailment of *forum non conveniens*. All law represents a compromise among many policy objectives; if an American court, even one applying Indian "substantive" law, were to award damages many times higher than would an Indian court, Indian policy necessarily would be disrupted. The relatively low risk of an award of significant damages probably plays a role in India's ability to attract foreign business. The Indian government (including its courts) might find that risk an acceptable price to pay for attracting an American company to build a plant there and stimulate a depressed economy. Similarly, the government of New Brunswick might decide that the American version of product liability should not be applied to an accident involving an alleged toxic herbicide,<sup>298</sup> otherwise, too punitive a law might drive an effective farm product off the market. Or a Brazilian court should be able to determine whether a medicine made there by an American-owned company should be tested by our law;<sup>299</sup> that law, after all, has driven many useful drugs off the market. Judge Weimer made this point in discussing the proper forum for a product liability action against the manufacturer of a pharmaceutical drug:

The United States should not impose its own view of the safety, warning, and duty of care required of drugs sold in the United States upon a foreign country when those same drugs are sold in that country. . . .

[I]f the foreign country involved was . . . a country with a vastly different standard of living, wealth, resources, level of health care and services, values, morals and beliefs than our own, [it] must deal with entirely different and highly complex problems of population growth and control. Faced with different needs, problems and resources [the foreign country] may, in

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against the cost of prevention. If Union Carbide has identical plants in India and West Virginia, it should already have performed that balance for the domestic plant. A Bhopal-style accident in this country obviously would deter, to some extent, any wrongful conduct by Union Carbide (at least if you believe in the deterrent effect of products liability law).

298. Cf. *Stewart v. Dow Chem. Co.*, 865 F.2d 103 (6th Cir. 1989) (dismissing the case because New Brunswick was the proper forum and because Canadian law should be applied).

299. Cf. *De Melo v. Lederle Lab.*, 801 F.2d 1058 (8th Cir. 1986). Dissenting, Judge Swygert wrote:

De Melo ingested the drug in Brazil. But the decision to warn of only temporary blindness occurred in the United States, and was made by United States citizens in the employ of a United States corporation. These facts suggest that the United States is the most appropriate forum to hear Ms. De Melo's complaint.

*Id.* at 1065.

balancing the pros and cons of a drug's use, give different weight to various factors than would our society, and more easily conclude that any risks associated with the use of a particular drug are far outweighed by its overall benefits to [the country] and its people. Should we impose our standards upon them *in spite of such differences?* We think not.<sup>300</sup>

Finally, we should have a little humility. Professor Weintraub writes: "It is past time for us to get it through our heads that it is not everyone but us who is out of step."<sup>301</sup> Others agree; German courts, for example, will not enforce punitive damage awards made by American courts in products liability cases.<sup>302</sup> Some critics are reviewing our own law.<sup>303</sup> American law, we are constantly reminded by conflicts scholars, is not made with the extraterritorial case in mind.<sup>304</sup> Perhaps others *can* do it better. We should at least hesitate before imposing "our" solutions on "their" problems.

### C. *Should We Always Provide a Forum?*

Critics of forum non conveniens have wonderful quotations to use. Often invoked is the common-law maxim, *judex tenetur imperii judicium suum* (a court must decide a case over which it has jurisdiction). Also a favorite is Lord Denning's remark that "[n]o one who comes to these courts asking for justice should come in vain. . . . This right to come here is not confined to Englishmen. It extends to any friendly foreigner."<sup>305</sup> Chief Justice Marshall also provides support for the critic's position: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution."<sup>306</sup> Quotations like those make us all feel uncomfortable with the concept of forum non conveniens, for we do

300. *Harrison v. Wyeth Lab.*, 510 F. Supp. 1, 4-5 (E.D. Pa. 1980) (emphasis added), *aff'd*, 676 F.2d 685 (3d Cir. 1982).

301. Weintraub, *supra* note 227, at 155.

302. Joachim Zekoll, *Recognition and Enforcement of American Products Liability Awards in the Federal Republic of Germany*, 37 AM. J. COMP. L. 301, 323-30 (1989).

303. *See, e.g.*, Deborah A. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89 (arguing that the traditional tort approach used in American courts is a factious view of legal reality).

304. *See, e.g.*, Thomas W. Dunfee & Aryeh S. Friedman, *The Extra-Territorial Application of United States Antitrust Laws: A Proposal for an Interim Solution*, 45 OHIO ST. L.J. 883, 891 (1984) ("There is but little question that American antitrust law contains little, if any generally accepted principles of law recognized by the international community of civilized nations.").

305. *The Atlantic Star*, 1973 Q.B. 364, 381-82 (Eng. C.A.). The House of Lords was not as hospitable as Lord Denning and reversed the decision. 1974 App. Cas. 436 (appeal taken from Eng.).

306. *Cohen v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (referring to subject matter jurisdiction).

cherish an image of our courts as the refuge of all those seeking succor. On the other hand, the myth of free access to the judicial system of the United States has some misleading history; reality has long since left it behind. In the allocation of scarce resources, the home front comes first.

American courts sitting in equity have always exercised a discretionary power to decline jurisdiction, and our federal courts have long had the authority to abstain from deciding cases over which they had jurisdiction.<sup>307</sup> More important, however, a far more complex world has come into being since Marshall's day, and our expansive notions of jurisdiction and choice of law might well shock him. Those notions certainly make it possible (along with a global economy) for our courts to exercise effective control over events occurring far beyond our borders. That power brings with it the need to exercise responsibility in its use. "Judicial chauvinism" should be replaced by "judicial comity."<sup>308</sup>

#### D. *Is There an Alternative?*

The underlying purpose of the doctrine of *forum non conveniens* is not whether American law is better or worse than any other forum's law. It is not even whether American law or foreign law controls. Indeed, as Professor Baade has pointed out, the choice-of-law decision is not as important to most plaintiffs as the ability to maintain their action in an American court.<sup>309</sup> Instead, the question is whether the nation that is the "forum conveniens" in the litigation should decide these questions. *Forum non conveniens* doctrine, as presently understood, does not necessarily accomplish that result. But it significantly reduces the economic imperialism permitted by our free-wheeling (and idiosyncratic) ideas about jurisdiction and choice of law.

Professors McAllen, Stein, and Stewart argue that *forum non conveniens* is a misplaced reaction to the recent judicial and scholarly excesses in jurisdiction and choice of law. All three recommend significant change or abolition of the doctrine.<sup>310</sup> Stewart, for example, believes

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307. See Braucher, *supra* note 1, at 925 (noting that the discretionary power of dismissal is derived from the traditionally discretionary nature of equity jurisdiction, such as that in admiralty and bankruptcy); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 547 (1985) (noting that a court's refusal to adjudicate, despite statutory authority to do so, may be based on traditional principles of equity, federalism, or separation of powers). See generally McAllen, *supra* note 211, at 215-33 (discussing the discretionary power of federal courts to decline jurisdiction in appropriate cases).

308. Professor Robertson used these phrases to describe England's rationale for adopting an American-style *forum non conveniens* doctrine. See Robertson, *supra* note 20, at 409-10 ("The only apparent explanation for the House of Lords' recent adoption of essentially the same *forum non conveniens* doctrine as the American is a determination to replace 'judicial chauvinism [with] judicial comity.'" (quoting *The Abidin Daver*, [1984] A.C. 398, 411)).

309. See Baade, *supra* note 41, at 125.

310. See also Speck, *supra* note 122, at 206-08 (recommending limiting *forum non conveniens*



that courts should consider forum non conveniens factors, but that those factors should be analyzed during a jurisdictional analysis. Further, she believes that forum non conveniens is a redundant doctrine, encouraging "sloppy jurisdictional analyses."<sup>311</sup> Similarly, Stein argues for a doctrine of "forum conveniens" based on restricted jurisdictional notions.<sup>312</sup> These arguments suffer from two major defects.

First, it is hard to be optimistic that significant cutbacks will occur in the constitutionally permitted scope of jurisdiction and choice-of-law analysis. A reduction in scope certainly is not the lesson of the Court's most recent forays into each area.<sup>313</sup> Instead of hoping for a change in the law, we must deal with these doctrines as they now exist. Forum non conveniens plays a useful role in our judicial structure. We should recognize that the three doctrines of jurisdiction, choice of law, and forum non conveniens complement each other and provide a framework for dealing with multistate problems in the modern world.<sup>314</sup> A broad jurisdictional doctrine helps ensure that defendants will be held liable somewhere, a result also aided by expansive notions of legislative jurisdiction; at the same time, forum non conveniens ameliorates the harsher consequences of those sweeping American doctrines and permits the court to search for a better home for the litigation. It is more than a mere "safety valve,"<sup>315</sup> for it helps place the case where it really belongs. Forum non conveniens, in other words, should not be viewed as a cynical effort by federal judges to dump cases they do not wish to hear. Rather, forum non conveniens should be recognized as having a significant role in the way in which our courts deal with multinational litigation.

### VIII. Counter-Suit Injunctions

In the famous *Laker Airways* case,<sup>316</sup> several foreign airlines, suing in an English court, sought an injunction barring litigation of an antitrust suit *Laker Airways* brought against them in America.<sup>317</sup> *Laker Airways* countersued in America and obtained an injunction prohibiting the English court from granting relief.<sup>318</sup> That order created an international

to the "rare" occasion when private interests alone require dismissal).

311. See Stewart, *supra* note 145, at 1324.

312. Stein, *supra* note 1, at 843 (advocating the use of formal jurisdictional doctrines to address what is now covered through forum non conveniens).

313. Two recent Supreme Court opinions, one involving personal jurisdiction and the other involving choice of law, are retrograde, wooden, and expansionist in nature. See *Burnham v. Superior Court*, 495 U.S. 604 (1990); *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988).

314. See Maltz, *supra* note 242, at 250.

315. *Id.*

316. *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

317. *Id.* at 915.

318. *Id.*

uproar because, at the time it was issued, Laker was under an injunction issued by an English judge not to pursue its American action.<sup>319</sup> Worse, that order had been issued at the request of the same foreign airlines subject to the order of the American court.<sup>320</sup> The stalemate, and the furor it created, ended only when the House of Lords vacated the English injunction.<sup>321</sup>

The transnational antisuit injunction ordered by the American court in *Laker Airways* represents the other side of the *forum non conveniens* coin. Complete consideration of this issue, with its attendant concerns about comity and foreign relations, is beyond the scope of this Article.<sup>322</sup> Notably, however, through the evolving jurisprudence of both transnational antisuit injunctions and *forum non conveniens*, the federal courts today recognize the interests the rest of the world may have in litigation initiated in this country.

The rather sparse American case law reveals a marked reluctance to issue a countersuit injunction, at least if the foreign proceedings occur in an impartial tribunal.<sup>323</sup> Thus, Judge Wilkey wrote in *Laker Airways* that an injunction should be granted only for vexatious conduct by the defendant which requires equitable relief, to protect the forum's jurisdiction, or to protect an important forum policy.<sup>324</sup> A recent Second Circuit decision emphasized the "usual rule tolerating concurrent proceedings," and noted two exceptions to that rule: an injunction is permissible if the proceedings are in *rem* or quasi in *rem*, or if the foreign court "is attempting to carve out exclusive jurisdiction over the action."<sup>325</sup> Finally, an injunction might be proper "when a party seeks to evade important policies of the forum by litigating before a foreign court."<sup>326</sup>

319. *British Airways Bd. v. Laker Airways*, 1984 Q.B. 142, 203 (Eng. C.A.).

320. *Id.* at 148.

321. *British Airways Bd. v. Laker Airways*, 1985 App. Cas. 58, 96 (appeal taken from Eng.).

322. See generally George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589 (1990); Trevor C. Hartley, *Comity and the Use of Antisuit Injunctions in International Litigation*, 35 AM. J. COMP. L. 487 (1987). For a discussion of one proposed solution, see generally Teitz, *supra* note 95, at 25.

323. See Hartley, *supra* note 322, at 509 (concluding that cases suggest antisuit injunctions should not be issued unless there is a reason to believe that the party requesting the injunction will not get a fair hearing in the foreign court).

324. *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 928-33 (D.C. Cir. 1984). In contrast, English law provides injunctive relief if England is the "natural forum," Hartley, *supra* note 322, at 492 (citing *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1986] 3 W.L.R. 972, 987), if there has been vexatious conduct, see *id.* at 505 (noting that vexatious conduct increases the willingness of English courts to grant antisuit injunctions), and if it would not be unjust to "deprive the plaintiff of an advantage of the foreign forum." *Id.* at 493. Actually, "the difference [in approaches] is not as great as might be suggested by comparing the judgments in the *Laker Airways* cases." *Id.* at 501.

325. *China Trade and Dev. Corp. v. M.V. Choony Yong*, 837 F.2d 33, 36 (2d Cir. 1987). This is merely another way of saying a court may issue an injunction to protect its own jurisdiction.

326. *Id.* at 37.

These exceptions to the "usual rule" make sense, of course; but as Professor Bermann has recently counseled, we must be wary of imposing our views on others: "When acting on international public policy grounds, American courts as a rule should confine themselves to decisions about their own procedures and policies . . . unless persuaded either that the defeat of American law is the foreign proceeding's very purpose or that vital American interests are otherwise in jeopardy."<sup>327</sup>

An injunction barring litigation in another country can have a significant impact on the interests of that nation. If the injunction is successful, the courts of that nation will never get to hear matters that may be of significant concern to them. The antisuit injunction, therefore, can have a more profound impact on national interest than will the parallel proceedings seen in the more normal forum non conveniens litigation. Our government has recognized the need not to interfere with judicial proceedings of other sovereigns in the domestic setting,<sup>328</sup> surely no less respect is due proceedings in another civilized nation. As a result, a court should be extremely careful in its use of the weapon. Not surprisingly, the use of the injunction in international litigation is most likely to occur in areas where judges feel most confident of American policy.<sup>329</sup>

The importance of evaluating the American policy of forum non conveniens is illustrated by our experiences in international antitrust.<sup>330</sup> American attempts to export our version of competition law reached their high point with widespread application of Judge Hand's broad "effects" test.<sup>331</sup> In 1976, however, Judge Choy adopted a balancing test emphasizing comity in *Timberlane Lumber*,<sup>332</sup> and the tide of American efforts to impose our antitrust laws on others receded. This ebb occurred concurrently with a similar retreat in domestic antitrust law.<sup>333</sup> *Laker*

327. Bermann, *supra* note 322, at 629.

328. The Anti-Injunction Act, which severely limits the authority of federal courts to enjoin state proceedings, provides the best example of this trend. 28 U.S.C. § 2283 (1988). Much of abstention doctrine provides another. *See, e.g., Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) ("Abstention from the exercise of federal jurisdiction is the exception, not the rule.")

329. *See Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 928-33 (D.C. Cir. 1984) (stating that an injunction in international litigation should be granted only for vexatious conduct, to protect the forum's jurisdiction, or to protect an important policy of the forum); Bermann, *supra* note 321, at 628.

330. *See generally* James J. Friedberg, *The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine*, 52 U. PITT. L. REV. 289, 296-308 (1991).

331. *See United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (holding that it is settled law that liability may be imposed for conduct that is "outside [a country's] borders [but] that has consequences within its borders").

332. *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 615 (9th Cir. 1976) (articulating a three-part test that includes the restraint's effect on the foreign commerce of the United States, whether the restraint violates the Sherman Act, and whether, as a matter of international comity and fairness, extraterritorial jurisdiction of the United States should be asserted).

333. The sea change usually is traced to *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S.

*Airways*, as well as other cases,<sup>334</sup> have demonstrated that the international application of American antitrust law is by no means dead, but those cases also reveal reluctance to issue transnational countersuit injunctions.<sup>335</sup> The American courts' willingness to defer to the exercise of foreign jurisdiction not only shows the respect due other sovereigns, but is increasingly necessary in an ever-shrinking world.<sup>336</sup>

## IX. Conclusion

Federal judicial policy toward transnational litigation has matured significantly in the past few years. The law of both forum non conveniens and injunctions against suit has come to recognize the legitimate interests of other nations as well as the interests of those who work and play abroad. The stated doctrine of forum non conveniens, however, should be revised to reflect the true nature of judicial practice. Most notably, the standard of review should be explicitly changed to make clear that the trial judge's decision is subject to full review. The *Reyno* test should also be clarified to eliminate overlap between the stated factors, and to make clear the role that overlooked factors, such as expectations, play in the analysis. But the search for the "proper forum"—at least where there is one—is a welcome effort to replace judicial chauvinism with judicial comity.

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36 (1977).

334. See, e.g., *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1255-56 (7th Cir. 1980) (affirming the district court's grant of injunction); see also RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 415 (1986) (allowing the United States to assert jurisdiction to regulate anticompetitive activities or agreements made outside the nation if: (1) a principal purpose of such an agreement is to interfere with United States commerce and the agreement has some effect on that commerce; and (2) if the agreement has a substantial effect on United States commerce and the assertion of jurisdiction is not unreasonable).

335. See *Uranium Antitrust Litig.*, 617 F.2d at 1258-61 (noting that it is proper to issue an injunction only after a judgment has been entered, not before).

336. Ironically, the European Community seems to be moving in the opposite direction. See Friedburg, *supra* note 330, at 308-24 (examining trends in the extraterritorial application of competition laws in the European Economic Community). The Justice Department has recently met with European and Japanese officials to try to establish guidelines for corporations.