

ARTICLES

FORUM NON CONVENIENS AS A JURISDICTIONAL DOCTRINE

Simona Grossi

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ARTICLES

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Simona Grossi*

To my Sister

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INTRODUCTION

In *American Dredging Co. v. Miller*, Justice Scalia, writing for the Court, observed (with characteristic confidence): “At bottom, the doctrine of *forum non conveniens* is nothing more or less than a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that *jurisdiction* ought to be declined.”¹ Justice Scalia was wrong. While *forum non conveniens* incorporates certain venue-transfer techniques, the doctrine itself does more than displace the ordinary rules of venue. In fact, it displaces the ordinary rules of jurisdiction, because the case is not transferred to another proper venue, but is instead dismissed and filed in a different judicial system. Moreover, as a consequence of the dismissal, the case will be subject to a different set of procedures and different standards of substantive law. None of these effects occur on a § 1404(a) motion to transfer venue.² There, if the motion is granted, the case is transferred from one proper venue to another within the same judicial system and the applicable procedural and substantive rules remain the same. Thus, the effects of a dismissal on *forum non conveniens* grounds are different and much more dramatic than the effects of a § 1404(a) motion to transfer venue.

Beginning with the earliest examples of *forum non conveniens*, and working through more recent applications of the doctrine within the federal judicial system,³ this article offers an alternative to the venue-premised and relatively untethered approach to *forum non conveniens* now in vogue. In it, I argue that some of the problems in the contemporary approach to *forum non conveniens* are a consequence of the improper classification of the doctrine as primarily pertaining to venue. The result of this classification is the importation of an open-textured, venue-based test that calls for nothing more than a balancing of conveniences. That invitation to balance vests district courts with a wide range of discretion to decline the exercise of jurisdiction otherwise properly invoked. The consequence of this somewhat boundless approach to *forum non conveniens* is that often, as a practical matter, the district court’s decision to dismiss represents the death knell of the litigation. By repositioning *forum non conveniens* as a jurisdictional doctrine, I attempt to cabin district court discretion within the confines of jurisdictionally

¹ 510 U.S. 443, 453 (1993) (emphasis added).

² See 28 U.S.C. § 1404(a) (2012).

³ See John R. Wilson, Note, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 OHIO ST. L.J. 659 (2004).

relevant considerations and eventually make the *forum non conveniens* analysis more consistent with due process.

Part I of this article provides a brief survey of the due process model of jurisdiction and venue; the purpose here is to set a rule-of-law framework from which to understand the due process and jurisdictional significance of *forum non conveniens*. Part II describes the origins of *forum non conveniens* and its introduction into United States jurisprudence. This part is both descriptive and critical. Its primary purpose is to demonstrate that the earliest versions of the doctrine were premised on jurisdictional considerations and that the doctrine operated largely as an antidote to jurisdictional excess. Part III provides a critical analysis of Supreme Court precedent and lower federal court decisions. It focuses on the manner in which *forum non conveniens*, as developed by the Supreme Court and as currently applied by lower federal courts, has strayed from its jurisdictional roots and become an open-ended, discretionary doctrine, driven by policy concerns that are inconsistent with the statutory obligation of federal courts to exercise jurisdiction in accordance with the rule of law. Part IV seeks to reposition *forum non conveniens* as a jurisdictional doctrine, thereby limiting its scope to the protection of the due process rights of the litigants. Part V proposes a succinct codification of the suggested jurisdictional model. Part VI offers concluding remarks.

I. THE DUE PROCESS MODEL OF JURISDICTION AND VENUE

To more clearly understand the proper scope and operation of *forum non conveniens*, it will be useful to review briefly some of the fundamentals of due process, jurisdiction, and venue. The purpose here is not to provide a detailed account of those topics, but to offer a context from which to view and critique the modern usages of *forum non conveniens* and on which to build a more carefully and jurisdictionally circumscribed doctrine.

A. Defining Due Process

Defining procedural due process is necessary for a proper understanding of the doctrines of jurisdiction and venue, since each of these doctrines represent particular articulations of due process, namely, the power of the court over the person of the defendant and the convenient geographical location of the lawsuit. Each of these concepts and its related formula are intended to identify the forum that will better meet the litigants' expectations and the ends of justice, which are, in essence, the precise goals due process is intended to achieve.

Due process requires a rule-based system through which adverse parties may resolve their disputes efficiently and fairly. Its chief characteristics may be described as follows: fair and predictable access to a neutral forum created by law and operated under rules and standards that are uniformly interpreted and applied

by a neutral magistrate. In *Logan v. Zimmerman Brush Co.*, the Supreme Court explained,

The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. . . . [T]he Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]." *Boddie v. Connecticut*, 401 U.S. 371 (1971).⁴

Due process thus entails a correlative right of each party to be heard, i.e., to assert a claim and/or to defend against one, under the established rules of the forum. A plaintiff's right to assert a claim is the converse of the defendant's right to resist that claim. In this sense, due process protects both sides in a lawsuit. Hence, due process entails the right of access to courts by plaintiffs and defendants,⁵ and its overarching principle is one of predictable fairness. Predictable fairness is a product of the neutrality of the established rules under which the system operates, including those pertaining to access to the forum, the consistency with which those rules are applied, and the effectiveness of the system in efficiently approximating the truth and in delivering justice. Conversely, a system that is not predictable, that is less rule-based than it is fact-based, i.e., one that operates on an *ad hoc* basis, and is characterized by open-ended balancing or the investiture of broad discretion in the magistrate, is not fair in the predictable sense, and cannot be described as fully comporting with the due process of law.

In this sense, the principle of due process is acontextual. It transcends the particular facts or contexts in which the principle may come into play. Rather, due process begins with the specific articulated principles described above, which must then be applied to particular facts and contexts. The contexts reflect the various applications of the principles of due process, but they are not substitutes for the principles themselves. It is true that a particular context may reveal something about the principle's application that requires alteration, but that perception is

⁴ 455 U.S. 422, 429 (1982).

⁵ *Id.* at 430 n.5.

merely a manner of shedding new light on the fundamental principle at stake, which should itself be unchanging.⁶

B. *Personal Jurisdiction*

The standards of personal jurisdiction measure the scope of a court's power to issue a judgment binding on a party to a lawsuit. The law of personal jurisdiction has both a statutory and a constitutional dimension. As to the statutory component, Federal Rule of Civil Procedure 4(k)(1)(A) allows a federal district court to borrow the long-arm statute of the state in which it sits. This borrowing provision applies in the vast majority of cases filed in federal courts. From a constitutional perspective, the scope of a district court's authority to issue a binding judgment is limited (in most cases) by the due process guarantees of the Fourteenth Amendment. This combination of Rule 4(k)(1)(A) and the limits imposed by the Fourteenth Amendment places a district court on the same footing as the courts of the state in which that district court sits. In other words, district courts have been instructed to comply with the jurisdictional standards of state law and the Fourteenth Amendment.

A federal court's exercise of personal jurisdiction over a party is consistent with due process if it complies with either "traditional" jurisdictional standards or with the "minimum contacts" test as formulated in *International Shoe Co. v. Washington*.⁷ The traditional grounds for asserting jurisdiction include transient or tag jurisdiction, voluntary appearance or waiver, consent, and domicile. In addition, even if no traditional ground of jurisdiction is satisfied, a federal court may exercise personal jurisdiction over a party whose purposeful contacts with the state are either so related to the claim or so extensive, both quantitatively and qualitatively, as to make the exercise of jurisdiction over that party presumptively reasonable.⁸ A party objecting to the exercise of jurisdiction under the minimum contacts test may rebut this presumption of reasonableness, but he must present a "compelling case" to do so.⁹

⁶ See Simona Grossi, *Personal Jurisdiction: A Doctrinal Labyrinth with No Exit*, 47 AKRON L. REV. ____ (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2155121 [hereinafter Grossi, *Personal Jurisdiction*].

⁷ 326 U.S. 310, 316 (1945).

⁸ See generally *Nowak v. Tak How Inv. Ltd.*, 899 F. Supp. 25 (D. Mass. 1995), *aff'd*, 94 F.3d 708 (1st Cir. 1996).

⁹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

The traditional bases of personal jurisdiction and the minimum contacts test can be sensibly reduced to two essential concepts: “connecting factors” and “reasonable expectations” arising from those connecting factors. These concepts fully embody the complex bundle of due process rights because together they capture the necessary affiliation with the state and the expectations that reasonably arise out of that affiliation. A forum in which these standards are satisfied can be considered the “natural forum” for the case. One of those expectations is the plaintiff’s expectation that a court of competent jurisdiction will exercise power in accord with statutory and due process standards. There are no apparent exceptions to this rule, at least not within the discipline of personal jurisdiction. In other words, while a defendant has a right to resist the exercise of personal jurisdiction when either statutory or constitutional standards have not been satisfied, a plaintiff has a correlative right to insist that jurisdiction be exercised over the defendant when those standards have been met.

Notice that there is no aspect of personal jurisdiction doctrine that allows a court to decline the exercise of jurisdiction based on something other than the standard formula. True, a non-resident defendant may seek to rebut the presumption of reasonableness under the minimum contacts test, but that rebuttal, if successful, identifies a violation of due process, not an invitation to decline an otherwise properly invoked jurisdiction. Either the standards are satisfied and jurisdiction is compelled or they are not and the case must be dismissed. Declining to exercise personal jurisdiction when it would otherwise be proper is, therefore, potentially arbitrary and in violation of due process because it takes from the plaintiff the court to which he or she is entitled.

C. Venue

Venue is a statutorily based, non-jurisdictional doctrine that identifies the proper geographic location or locations for a lawsuit within an identified jurisdictional system.¹⁰ While the overall concept of venue may be premised on the balance of conveniences among the parties and the judicial system, that convenience determination is not typically *ad hoc*. Rather the “convenient” forum is defined by way of statutes (e.g., 28 U.S.C. §§ 1391, 1394, 1395, 1396, 1400, 1402) that, on the basis of meaningful connecting factors, identify the proper venue for each and every case.

¹⁰ See 28 U.S.C. § 1390(a) (2012) (“the term ‘venue’ refers to the geographic specification of the proper court or courts”).

If the venue selection is statutorily proper and subject matter and personal jurisdiction standards have been satisfied, the plaintiff's choice of venue will be given significant weight. A transfer to another proper venue will be allowed under 28 U.S.C. § 1404(a) only if the alternative federal forum is substantially more convenient than the chosen forum.¹¹ This is the only instance where Congress has authorized district courts to make an *ad hoc* determination as to the relative convenience of alternative venues. Moreover, a transfer of venue under § 1404(a) does not involve a loss of federal jurisdiction. Rather, jurisdiction is retained within the federal system, and only the geographic location of the lawsuit—the venue—is changed. Hence, the balance of conveniences analysis mandated by § 1404(a) pertains only to location within the federal system, and the related fact that the system retains jurisdiction over the case makes it clear that such transfers present classic venue-premised questions and not power-based jurisdictional questions. In addition, in a diversity case, if a transfer motion is granted, the substantive law that would have been applied by the transferring court must travel with the case. In other words, such a change of venue will not alter the substantive law to be applied to the case.¹²

Finally, if venue is proper in plaintiff's chosen forum, there is no statute or formal federal rule that allows a federal court to dismiss the lawsuit based on the inconvenience of the forum. Like personal jurisdiction, a statutorily proper venue vests the plaintiff with a rule-of-law-based expectation that the case will proceed in that venue or some other statutorily proper venue to which the case may be transferred. Thus, once a plaintiff's choice of venue is determined to be proper, the only statutory option is to retain or transfer within the federal system.

The doctrines of personal jurisdiction and venue are intimately related. In fact, starting from the same due process premise, they both use meaningful connecting factors linking the controversy and the defendant to the forum, thus identifying the forum or forums that would be suitable for the parties and the judicial system as a whole. Still, the two concepts of personal jurisdiction and venue are distinct and demand different analyses. While the doctrine of venue is

¹¹ 28 U.S.C. § 1404(a) (2012).

¹² See generally *Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Ferens v. John Deere Co.*, 494 U.S. 516 (1990).

rule-based, the jurisdiction doctrine is not so,¹³ thus requiring a careful case-by-case approach to find whether its exercise is consistent with due process.

II. THE ORIGINS OF THE DOCTRINE OF *FORUM NON CONVENIENS*

Forum non conveniens, in its modern form, operates as a trump on the due process system of personal jurisdiction and venue. It is a judge-made doctrine that may upset the legitimate constitutional and statutory expectations of the parties and operates under a standard that vests district courts with a relatively broad discretion to dismiss a case under principles pertaining more to case management than to any constitutional principle or policy. The origins of *forum non conveniens* reveal that the doctrine was not always so broadly conceived.

A. *Scotland and England*

It is generally accepted that the modern doctrine of *forum non conveniens* traces its roots to the Scottish doctrine of *forum non competens*, which was developed by Scottish courts as early as the seventeenth century to decline the exercise of otherwise proper jurisdiction.¹⁴ This doctrine was initially used to ameliorate potential abuses of process in the context of *arrestment ad fundandam jurisdictionem*, a form of jurisdiction that allowed Scottish courts to assert jurisdiction over foreigners by attaching and seizing their moveable assets.¹⁵ Hence, at least in this earliest form, the doctrine was plainly jurisdictional in that it was used to limit the exercise of seemingly proper, but potentially exorbitant, exercises of jurisdiction.¹⁶

¹³ See Grossi, *Personal Jurisdiction*, *supra* note 6, text accompanying notes 146–56 (suggesting the adoption of a statute governing personal jurisdiction).

¹⁴ RONALD A. BRAND & SCOTT R. JABLONSKI, *FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS* 7 n.2 (2007); ALAN DASHWOOD ET AL., *A GUIDE TO THE CIVIL JURISDICTION AND JUDGMENTS CONVENTION* 425 n.76 (1987). *But see* Allan Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 796–97 (1985) (casting doubts on the Scottish origins of the doctrine).

¹⁵ VERONICA RUIZ ABOU-NIGM, *THE ARREST OF SHIPS IN PRIVATE INTERNATIONAL LAW* 40–42 (2011).

¹⁶ See Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, 16 LOY. L.A. INT'L & COMP. L. REV. 455, 459 (1994); *see also* ANDREW D. GIBB, *THE INTERNATIONAL LAW OF JURISDICTION IN ENGLAND AND SCOTLAND* 213 (1926).

By the late nineteenth century the Scottish doctrine had evolved from an “abuse of process” concept toward one that permitted a stay of proceedings in deference to the “more suitable” forum. Consistent with that evolution, the nomenclature of “*forum non conveniens*” replaced the earlier usage of “*forum non competens*.”¹⁷ However, the renamed doctrine remained narrow in scope. It required a showing by the defendant that there was an alternate forum most suitable to promote the ends of justice, and a demonstration by the defendant that the plaintiff would gain an “unfair advantage” were the case to remain in the Scottish forum.¹⁸ In addition, the doctrine was not applied in cases involving domestic defendants until 1978.¹⁹ In other words, until very recently, the defendant’s home forum was deemed per se to be a convenient forum.

Forum non conveniens was embraced by English courts in 1906 with the decision in *Logan v. Bank of Scotland*.²⁰ There, a Scottish plaintiff sued a Scottish bank in an English court for false representations in the prospectus of a Scottish company. Jurisdiction was established in England on the basis of the defendant’s London branch bank. The court granted the defendant’s motion to stay the proceedings in deference to a Scottish forum, citing what the court deemed as a “serious injustice” to the defendant in trying the suit in London.²¹

The English version of *forum non conveniens* was applied only under exceptional circumstances, typically where allowing the lawsuit to proceed in England would be extremely vexatious or oppressive for the litigants and the court itself. Moreover, the doctrine was used mainly to correct a gross unfairness that a rigid application of the jurisdictional doctrines or rules might otherwise produce. That happened, most often, when the litigants were both from foreign countries, or when only the defendant was. In *Société du Gaz de Paris v. Société Anonyme de Navigation “Les Armateurs Français,”* decided by the House of Lords on appeal from the Scottish Court of Session, a French shipper sued a French ship owner in a

¹⁷ Reus, *supra* note 16, at 459–60. See also Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 2 n.7 (1929).

¹⁸ *Sim v. Robinow*, 19 R. 665, 667–68 (Scot.); *Longworth v. Hope*, 3 M. 1049, 1052–59 (Scot.).

¹⁹ See *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795 (H.L.) (appeal taken from Eng.). See also Reus, *supra* note 16, at 460.

²⁰ *Logan v. Bank of Scotland*, [1906] 1 K.B. 141 (Eng.).

²¹ *Id.* at 151–52.

Scottish court, obtaining jurisdiction by attaching the defendant's property.²² The plaintiff claimed damages for the loss of its cargo due to the unseaworthiness of one of the defendant's vessels, which had foundered on a voyage from Scotland to France. The defendant filed a *forum non conveniens* motion, which was initially denied by the trial court, but then granted by the Court of Session and, eventually, by the House of Lords. The judges based their decision on a Scottish opinion, *Clements v. Macaulay*,²³ drawing the following principle from it:

If in the whole circumstances of the case it be discovered that there is a real unfairness to one of the suitors in permitting the choice of a forum which is not the natural or proper forum, either on the ground of convenience of trial or the residence or domicile of parties, or of its being either the *locus contractus*, or the *locus solutionis*, then the doctrine of *forum non conveniens* is properly applied.²⁴

Each of the elements cited by the court in the above quotation has a counterpart in the modern doctrines of personal jurisdiction: defendant's domicile as a "natural" forum; place of contract or contract performance as a connecting factor with the forum; and "real unfairness," suggestive of the unreasonableness prong of the minimum contacts test. Thus, even as it evolved, *forum non conveniens* remained closely tied to jurisdictional principles and concerns.

Another leading and instructive English precedent is *Egbert v. Short*.²⁵ There, the plaintiff was an alien domiciled in India and the defendant was an Indian solicitor. The suit was one for breach of a trust agreement made in India and governed by Indian law. The suit was filed in England. The court applied the *forum non conveniens* doctrine, finding that the casual presence of the defendant in England and the service upon him there were not enough to justify the exercise of jurisdiction given that the litigation in England would have been extremely vexatious for the defendant since all the relevant evidence was located in India. In other words, the *forum non conveniens* doctrine operated to correct the unfairness

²² *Société du Gaz de Paris v. Société Anonyme de Navigation "Les Armateurs Français,"* [1926] S.C. 13 (H.L.) (Appeal taken from Scot.).

²³ *Clements v. Macaulay*, 4 M. 583 (Scot.).

²⁴ *Société du Gaz de Paris*, [1926] S.C. at 20.

²⁵ *Egbert v. Short*, [1907] 2 ch. 205.

that arose from an exorbitant application of transient or tag jurisdiction, much like the earlier *forum non competens* cases.²⁶

Similarly, in *Williamson v. Northeastern Ry. Co.*, the court sustained a plea of *forum non conveniens* to correct the unfairness to which an exercise of *quasi in rem* jurisdiction would have led.²⁷ There, the widow of a man domiciled in Scotland sued an English company in Scotland for having negligently caused her spouse's death at a private grade crossing in England. She established *quasi in rem* jurisdiction over the defendant in Scotland by attaching its property there. Despite the fact that the plaintiff was from Scotland, and despite the attachment of defendant's property there, the court sustained the plea of *forum non conveniens*:

The event occurred in England; the witnesses to prove it are in England; the law which apparently rules it is English; and there is said to be involved in it a question of right of way which English law must decide. It is true that the pursuer is in Scotland, but the general rule is *actor sequitur forum rei*, and the appropriate and suitable forum in this case seems to me to be English, not necessarily because it is the *forum delicti*, but because it is also the most convenient for the trial of this case.²⁸

One might think of *Williamson* as a precursor to the decision in *Shaffer v. Heitner*, in which the Supreme Court imposed a modern due process standard on the exercise of the *quasi in rem* jurisdiction, thus undercutting the need to rely on *forum non conveniens* in such cases.²⁹

The leading Scottish and English cases discussed above demonstrate that *forum non conveniens* was used primarily to correct extreme excesses to which the application of jurisdictional rules would give rise, thus avoiding potentially unfair proceedings. In each of these cases, jurisdictional considerations and, more specifically, due process considerations, played a significant role. Where there were no factors connecting the case to the forum, that is where the forum was technically proper but not the natural forum, the court would examine the potential

²⁶ See Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 292 (1956) (describing *forum non conveniens* as the antidote for the inconvenience case by transient jurisdiction).

²⁷ *Williamson v. Ne. Ry. Co.*, 11 R. 596 (Scot.).

²⁸ *Id.* at 598.

²⁹ 433 U.S. 186 (1977).

unfairness of the proceeding in that forum and eventually dismiss the case. The considerations that the courts made in each case closely resemble those that American courts currently make under the unreasonableness prong of the minimum contacts test—i.e., when deciding that the exercise of jurisdiction would be unreasonable despite the satisfaction of the minimum contacts test.³⁰

B. Forum Non Conveniens Arrives in the United States

In the United States, the term *forum non conveniens* made one of its earliest appearances in 1929, in an influential article by Professor Paxton Blair.³¹ While Blair's endorsement of *forum non conveniens* was conceptually broad, his specific aim seems to have been to solve a problem of calendar congestion then facing the New York state court system. In this regard, Blair viewed *forum non conveniens* as an effective case-management tool that was "incontestably necessary to the effective performance of judicial functions."³² In Blair's view, courts had "inherent powers" to dismiss or stay on grounds of *forum non conveniens*,³³ and even to raise the issue *sua sponte*.³⁴ Hence, all that was needed to provide proper relief to court congestion in New York (and elsewhere) was a greater judicial willingness to use this handy doctrine.³⁵

In his article, Blair noted that it was "apparent that the courts of this country have been for years applying the doctrine."³⁶ American courts were using the

³⁰ See generally *Asahi Metal Indus. Co., Ltd. v. Super. Ct.*, 480 U.S. 102 (1987); see also *Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102 (1987); *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708 (1st Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

³¹ See Blair, *supra* note 17.

³² *Id.* at 1.

³³ *Id.*

³⁴ See *Collard v. Beach*, 81 N.Y.S. 619, 622 (N.Y. App. Div. 1903), *rev'd*, 87 N.Y.S. 884 (N.Y. App. Div. 1904). See also *Great W. Ry. Co. v. Miller*, 19 Mich. 305, 315–16 (Mich. 1869).

³⁵ See Wilson, *supra* note 3, at 673.

³⁶ See Blair, *supra* note 17, at 21. According to John Wilson:

Blair's thesis was that *forum non conveniens* should be more widely used to "reliev[e] calendar congestion by partially diverting at its source the flood of litigation by which our courts are being overwhelmed." The cause of the flood, Blair said, was forum shopping, which "merits the unequivocal condemnation of bench and bar."

Wilson, *supra* note 3, at 673 (quoting Blair, *supra* note 17, at 1).

doctrine without always identifying it by name.³⁷ Blair explained that American courts applying the doctrine looked to factors such as the availability of witnesses, the burden on the state's citizens, the possible differences among tribunals in terms of rights and remedies, the ability to enforce a judgment when foreign law governs the dispute and, most of all, the complexity of the governing foreign law.³⁸

To appreciate fully the precise nature of Blair's vision and the doctrine he endorsed, it is important to note that in his view, the classic case inviting an application of *forum non conveniens* was one in which neither party was a resident of the forum state and in which there were no factors connecting the forum with the activities out of which the suit arose. Under such circumstances, the state's interest in providing a forum was, at the very least, substantially diminished. Hence, while the factors described in the preceding paragraph outline a type of *forum non conveniens* methodology, it is clear that the focal point of Blair's article was the congestion caused by lawsuits that had no natural connection with the forum.

While Blair did not equate *forum non conveniens* with jurisdiction, he did at least recognize a critical relationship between the two. Essentially, he viewed a *forum non conveniens* motion as an invitation to decline the otherwise proper exercise of jurisdiction:

[S]ince the basis of the [*forum non conveniens*] objection is the impropriety of the court's exercising *jurisdiction* over the subject matter rather than an absolute lack of such *jurisdiction*, the usual rule that want of *jurisdiction* of the subject matter cannot be waived by a failure to raise the objection *in limine*, or at any particular stage of the proceedings, is not strictly applicable.³⁹

Blair was not the only one who saw that *forum non conveniens* doctrine was rooted in jurisdictional considerations. In 1947, shortly after Blair's piece, Robert Braucher noted:

Early Scottish cases dealing with a plea of "*forum non competens*" suggest that the question litigated was one of power or jurisdiction rather than discretion; but

³⁷ Blair observed that "while the doctrine has but rarely been referred to by name in American cases, yet decisions showing applications of it are numerous." Blair, *supra* note 17, at 2.

³⁸ *Id.* at 23.

³⁹ *Id.* at 3 (emphasis added).

as early as 1845 it was recognized that the question was one “on the merits” rather than one of jurisdiction, and the English words “inconvenient forum” were used to point out the inaccuracy of the traditional Latin form.⁴⁰

In brief, *forum non conveniens* was seen by Blair and others as a method for achieving what are essentially jurisdictional ends, specifically, responding to the abusive invocation of jurisdiction at a time when there was no other doctrinal method for doing so. The filing of a case in a forum other than a natural forum triggered the application of the doctrine because of the potential for jurisdictional abuse. According to Blair, under such circumstances, it might then be appropriate for a court to decline the exercise of jurisdiction after considering such matters as witness availability, the burden on forum citizens, the complexity of the governing foreign law, and, most significantly, the potential impact on rights, remedies and enforceability. Blair had a different understanding of the doctrine of *forum non conveniens*, in that he viewed it as a valid and legitimate case-management tool to be used only under the aforementioned circumstances.

III. DEVELOPMENTS OF THE DOCTRINE OF *FORUM NON CONVENIENS*

In examining Supreme Court *forum non conveniens* precedent and lower court applications of that precedent, we must keep in mind the critical elements of that doctrine as it took root in the United States, namely, the absence of meaningful connecting factors establishing a natural forum, the presence of considerations suggestive of the unfairness of the forum choice, and countervailing concerns regarding potential unfairness to the plaintiff should the case be dismissed.

A. Supreme Court Precedent

The Supreme Court first addressed the doctrine of *forum non conveniens* in *Gulf Oil Corp. v. Gilbert*.⁴¹ There, the plaintiff, a resident of Virginia, sued a Pennsylvania corporation in a New York federal court on a non-federal cause of action that had arisen entirely in Virginia. Jurisdiction over the defendant was apparently proper in New York since the defendant was qualified to do business there. Aside from that qualification to do business, the lawsuit had no other connections with the forum state. In other words, although the forum choice was

⁴⁰ Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 909 (1947).

⁴¹ 330 U.S. 501 (1947), *superseded by statute*, 28 U.S.C. § 1404 (2006), *as recognized in* Am. Dredging Co. v. Miller, 510 U.S. 443 (1994).

technically proper, that forum was not a natural forum for the action. The defendant filed a motion to dismiss on *forum non conveniens* grounds, the more convenient forum being in Virginia where the plaintiff resided, where most of the witnesses were to be found, where the claim arose, and where jurisdiction over the defendant could readily be established. The district court granted the motion. The court of appeals reversed. The Supreme Court upheld the decision of the district court. In the Court's view, given the lack of connections with New York and the obvious connections with Virginia, this was one of those "rather rare" cases where the doctrine of *forum non conveniens* could be applied despite the technical propriety of jurisdiction and venue in New York.⁴² In so ruling, the Court emphasized the absence of natural connecting factors with New York and the absence of any plausible explanation for the plaintiff's choice of a New York forum.⁴³ In short, the forum was not a natural forum.

The Court in *Gilbert* also described the public and private interest factors that should be considered in determining whether to apply *forum non conveniens*. These interests include, but are not limited to: the relative ease of access to sources of proof; the availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses (private factors); the administrative difficulties that follow for courts when litigation is piled up in congested centers instead of being handled at its origin; jury duty—which should not be imposed upon the people of a community with no relation to the litigation; and a local interest in having localized controversies decided at home (public factors).⁴⁴ In addition, implicit in the Court's description and application of these factors was the unquestioned availability of a suitable alternate forum.

The application of *forum non conveniens* in *Gilbert* did not operate as a denial of jurisdiction within the federal system since the case could be re-filed in a federal court sitting in Virginia. In this sense, *Gilbert* was, in essence, a venue-transfer case, and the standards there developed with those appropriate to a change of venue motion. Indeed, today *Gilbert* would be treated as a transfer case under § 1404(a).⁴⁵

⁴² *Gilbert*, 330 U.S. at 509.

⁴³ *Id.* at 509–10.

⁴⁴ *Id.* at 508–09.

⁴⁵ Section 1404(a) was adopted in 1948 as a response to and partial affirmation of *Gilbert*. 62 Stat. 937 (1948). See also Joel H. Samuels, *When is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis?*, 85 IND. L.J. 1059, 1065–66 (2010) ("The transfer statute's enactment had a dramatic impact on *forum non conveniens*, limiting its scope in federal court to cases involving

The *Gilbert* “transfer” analysis cannot be considered sufficient for *forum non conveniens* purposes, because there the alternate forum is outside of the federal system. In the *forum non conveniens* context, an otherwise legitimate invocation of jurisdiction is not deflected to another more convenient court within the system, but is denied altogether. In other words, *forum non conveniens* doctrine does not represent a change of venue, but a change of sovereign jurisdictions.

Koster v. Lumbermens Mutual Casualty Co., which was decided on the same day as *Gilbert*, also involved an intra-system determination as to whether one federal forum was substantially more convenient than another.⁴⁶ The plaintiff in *Koster* also failed to explain why he chose a forum where no events giving rise to the claim occurred and where the defendant did not reside. Hence, *Koster* qualified as another of those rare cases where the plaintiff’s chosen forum would not be honored. Moreover, both *Gilbert* and *Koster* can be seen as representing circumstances where the plaintiff, taking advantage of overly generous jurisdictional and venue provisions, used its choice of forum as a form of harassment to seek a vexatious advantage over the defendant. In this sense, *forum non conveniens* operated as an antidote to the exorbitance to which the jurisdictional and venue rules had given rise. This use of *forum non conveniens* was consistent with the doctrine’s original idea and rationale, as Paxton Blair had endorsed.

The *Koster* Court also added a new wrinkle to the doctrine by describing the scope of *forum non conveniens* as involving a disjunctive test. Thus, the doctrine could be applied on

a clear showing of facts which *either* (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff’s convenience, which may be shown to be slight or nonexistent, *or* (2) make trial in the chosen forum inappropriate because of considerations affecting the court’s own administrative and legal problems.⁴⁷

dismissal to a foreign forum, otherwise the new domestic transfer statute would apply. To be clear, § 1404 would have had a direct impact on the parties in *Gulf Oil*. A case with identical facts arising after the enactment of § 1404 would necessarily mean that, faced with two domestic parties seeking transfer from a federal court in New York to a federal court in Virginia, *forum non conveniens* could not be invoked—§ 1404 alone would govern such a case”).

⁴⁶ 330 U.S. 518 (1947).

⁴⁷ *Id.* at 524 (emphasis added).

The Court cited no authority for splitting the doctrine into a disjunctive form, but by doing so the Court elevated the case-management aspect of the doctrine thus inviting applications of *forum non conveniens* premised solely on a standard pertaining to the convenience of the court. The Court continues to cite this disjunctive form of the doctrine authoritatively.⁴⁸

Justice Black dissented in both *Gilbert* and *Koster*. His objection to the decision in *Gilbert* rested on the obligation of a district court to exercise the jurisdiction conferred by Congress:

Neither the venue statute nor the statute which has governed jurisdiction since 1789 contains any indication or implication that a federal district court, once satisfied that jurisdiction and venue requirements have been met, may decline to exercise its jurisdiction. Except in relation to the exercise of the extraordinary admiralty and equity powers of district courts, this Court has never before held contrary to the general principle that “the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.” . . . Never until today has this Court held, in actions for money damages for violations of common law or statutory rights, that a district court can abdicate its statutory duty to exercise its jurisdiction for the alleged convenience of the defendant to a lawsuit.⁴⁹

Justice Black thus rejected the notion that a judicially created balance of conveniences could trump the statutory scheme of jurisdictional power and identified conveniences created by Congress. He argued convincingly that when Congress confers jurisdiction and venue in a case at law, courts have no discretion to decline to exercise this power:

It may be that a statute should be passed authorizing the federal district courts to decline to try so-called common law cases according to the convenience of the parties. But whether there should be such a statute, and determination of its

⁴⁸ See, e.g., *Am. Dredging Co.*, 510 U.S. at 448; *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981).

⁴⁹ *Gilbert*, 330 U.S. at 513 (Black, J., dissenting) (quoting *Hyde v. Stone*, 61 U.S. 170, 175 (1857)).

scope and the safeguards which should surround it, are, in my judgment, questions of policy which Congress should decide.⁵⁰

Thus, for Black, the difference between the obligatory exercise of jurisdiction in a case at law and the discretionary exercise of jurisdiction of an equitable abstention doctrine was critical. In the majority opinion, Justice Jackson never explained why a federal court may decline the exercise of granted jurisdiction, and instead treated that point as non-controversial without fully confronting the dissent's critique.

The *forum non conveniens* doctrine was expanded significantly in *Piper Aircraft Co. v. Reyno*, a case that arose out of an airplane crash in Scotland.⁵¹ A representative of the estate of the deceased Scottish passengers brought a suit in a California state court against the manufacturer of the plane (Piper) and the manufacturer of the propeller (Hartzell). The defendants successfully removed the case to the appropriate California federal district court, which, on defendants' motion, ordered the case transferred to a district court in Pennsylvania, Piper's state of incorporation⁵² and the location of the airplane's manufacture. The defendants then filed *forum non conveniens* motions to dismiss, the more convenient forum allegedly being one in Scotland. The district court granted the motion and the Supreme Court ultimately affirmed that decision.

As noted above, *Gilbert* and *Koster* were essentially transfer of venue cases and would be so treated under today's standards. *Piper* was initially a transfer case as well—the transfer from California to Pennsylvania—and the absence of connecting factors with California bears a striking similarity to the facts in *Gilbert* and *Koster*. But once Piper sought, in the Pennsylvania district court, to dismiss on *forum non conveniens* grounds, the case became markedly different from *Gilbert* and *Koster* since the question was no longer one of transfer but one of dismissal from the federal system altogether. The *Piper* Court, however, failed to recognize this critical distinction and simply assumed that the standards of *Gilbert* should apply. Thus, without any due consideration, venue standards became a means to defeat jurisdiction.

⁵⁰ *Id.* at 515.

⁵¹ 454 U.S. 235 (1981).

⁵² Brief for Respondent, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (Nos. 80-883, 80-848) 1981 WL 390479 (Piper Aircraft Co. was incorporated in Pennsylvania).

There are several other noteworthy aspects of the *Piper* decision. First, the Court held that a foreign plaintiff's choice of forum, when merely dictated by the desire to benefit from a more favorable law or outcome, is not entitled to the same level of deference as a domestic plaintiff's choice of forum. Essentially, the non-resident foreigner's choice of a United States forum was given no presumptive weight whatsoever.

Second, the Court ruled that a change of law unfavorable to the plaintiff should rarely justify a denial of a *forum non conveniens* motion.⁵³ As to this point, the Court explained that an extensive choice of law analysis as to the relative favorableness of the alternate forum's law would be inconsistent with the policy behind *forum non conveniens* since such an analysis would unnecessarily complicate the *forum non conveniens* inquiry.⁵⁴ Hence, unlike the motions to transfer under § 1404(a), which effect no change in the law, a *forum non conveniens* dismissal can be accompanied by a very unfavorable change in the law. Indeed, it is not unreasonable to assume that the motion is often filed to advance that goal. The Court did make it clear that there must be an alternate available forum, but the Court provided little guidance as to what might constitute such a forum other than to observe that, "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all," the forum would not be adequate.⁵⁵

Next, and significantly, the Court granted substantial deference to the district court's application of the *Gilbert* factors and chastised the appellate court for giving too little deference in this regard. It is also important to note that the district court identified no particular unfairness to the defendants should the case proceed in Pennsylvania—certainly nothing amounting to a due process violation; rather the district court focused solely on the relative convenience of the forums (which the Supreme Court recognized as presenting a close question) and on the difficulties the district court would face in managing a case involving foreign law. The fact that *Piper* was being sued in its state of domicile—typically considered a

⁵³ 454 U.S. at 247.

⁵⁴ *Id.* at 253–54. In fact, as noted *infra*, transferring a case from one forum to another under § 1404(a) does not produce any change in the applicable substantive law; however, there is such a change when a case is dismissed on *forum non conveniens* grounds and then filed in another forum.

⁵⁵ *Id.* at 254.

significant connecting factor—appeared to play no role in the district court’s calculus.⁵⁶

Oddly enough, the Supreme Court’s majority opinion actually references the ease of obtaining jurisdiction and venue as a reason for needing a flexible *forum non conveniens* doctrine.⁵⁷ In other words, the *Piper* Court saw *forum non conveniens* as a potential check on, and antidote for, the untoward consequences of liberal jurisdiction and venue standards. Yet, the antidote appears to have been unnecessary in the case when one considers that the lawsuit was pending in Piper’s home state and in the location where the airplane was manufactured, hence, in a natural forum. Surely, this was not a case of vexatious or exorbitant jurisdiction.

Piper is thus responsible for a dramatic expansion of the classic range of *forum non conveniens* cases, where the absence of connecting factors was a critical threshold consideration. Essentially, *Piper* endorsed and invited a much more robust application of the doctrine of *forum non conveniens*, placing primary responsibility for the doctrine’s application in the district courts, and leaving very little room for appellate review.⁵⁸

After *Piper*, the Court has continued to add wrinkles to the *forum non conveniens* doctrine. In *American Dredging Co. v. Miller*, for example, the Court held that a state court exercising concurrent jurisdiction over an admiralty claim was not required to adhere to the federal doctrine of *forum non conveniens* when state law would have banned application of the doctrine in that case.⁵⁹ And in *Sinochem International Co. v. Malaysia International Shipping Corp.*, the Court ruled that a federal court could dismiss a case under the *forum non conveniens* doctrine before definitively ascertaining its own jurisdiction “when considerations of convenience, fairness, and judicial economy so warrant.”⁶⁰ Finally, in

⁵⁶ The *Piper* Court’s vesting of broad discretion in the district court has led to a doctrine that is open-textured, subject to unpredictable outcomes and seemingly beyond the law. For an illuminating discussion of this phenomenon, see Cassandra Burke Robertson, *Forum Non Conveniens on Appeal: The Case for Interlocutory Review*, 18 SW. J. INT’L L. 445 (2012).

⁵⁷ 454 U.S. at 250.

⁵⁸ See *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) (“The forum non conveniens determination . . . is committed to the sound discretion of the trial court.”) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981)).

⁵⁹ *Id.*

⁶⁰ 549 U.S. 422, 432 (2007). The approach endorsed in *Sinochem* is troubling since it permits a court, that may not have jurisdiction, to enter an order that may end up altering the plaintiff’s substantive

Quackenbush v. Allstate Insurance Co., the Court compared *forum non conveniens* to various abstention doctrines and suggested, somewhat ironically, that the constitutionally driven abstention doctrines were more circumscribed in application than the relatively unconstrained *forum non conveniens* doctrine.⁶¹

In sum, the doctrine of *forum non conveniens*, as elaborated by the Supreme Court, is significantly more open-textured than the original doctrine as envisioned and applied in Scotland and England, and equally so with respect to the doctrine described and endorsed by Paxton Blair in his article. In these early forms of the doctrine, the threshold consideration involved a lack of connecting factors with the chosen forum, i.e., the absence of a natural forum, sometimes described as constituting an abuse of process, and what certainly could be described as an exorbitant and unfair invocation of jurisdiction. These factors kept the doctrine within reasonable bounds even when the doctrine's primary purpose might be perceived as pertaining to house-keeping matters such as docket reduction or case management.

The decision in *Piper* and the Supreme Court cases decided in its wake treat *forum non conveniens* as a venue doctrine that vests broad discretion in district courts to decline the exercise of jurisdiction based on an *ad hoc* balancing formula that is appropriate to change of venue situations (as in *Gilbert* and *Koster*), but inadequate to justify the denial of constitutionally valid and statutorily vested jurisdiction, where jurisdiction may be defeated only under compelling circumstances.⁶² These decisions ignore the doctrine's jurisdictional roots in service to an open-textured balancing of conveniences. Moreover, the doctrine today may even be applied in cases, such as *Piper*, where there are significant connecting factors with the forum and where jurisdiction over the defendant is both fair and premised on traditional grounds.

B. *Current Practices within the Federal Judicial System*

With *Piper* as their guide, lower federal courts have taken widely disparate approaches to *forum non conveniens*.⁶³ There is confusion over the types of cases to

rights, sometimes resulting in the death knell of the plaintiff's claim. See Robertson, *supra* note 56, at 449.

⁶¹ 517 U.S. 706, 722–23 (1996).

⁶² *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

⁶³ See Robertson, *supra* note 56, at 455–64 (describing and critiquing variable standards); Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1156–59 (2006) (documenting a wide range of conflicting

which the doctrine applies, over how the various elements of the doctrine are to be applied, over which party bears the ultimate burden of persuasion, and over the scope of appellate review. Indeed, there is no agreement as to whether the doctrine is meant to protect defendants from a truly inconvenient forum or whether the doctrine is simply meant to identify the most suitable forum.⁶⁴ As one commentator has observed:

As typically happens when trial courts of varying predilections are directed to “exercise discretion” in weighing a large number of incommensurate factors, the result has been a welter of decisions that are difficult if not impossible to harmonize. More disturbing, many *forum non conveniens* dismissals have plainly been granted on the basis of factors not endorsed in *Gilbert*, not fairly disclosed by the deciding court, and not, on closer examination, rationally supportive of dismissal.⁶⁵

Of course, much of this confusion and uncertainty is a product of the fact that *forum non conveniens* is a judge-made doctrine, unbounded by constitutional constraint and unguided by statute or rule.

C. *Variability as to Types of Cases to Which the Doctrine Applies*

The indeterminacy of *forum non conveniens* allows courts to favor certain types of claims over others, even though all such claims are statutorily vested within a federal court’s jurisdiction. For instance, the Alien Torts Claim Act (ATCA) vests federal courts with jurisdiction over tort claims by aliens for a narrow range of violations of international law.⁶⁶ As such, ATCA represents a congressional exercise of its power to enforce the “law of nations” and to recognize

approaches); Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309 (2002) (same).

⁶⁴ Robertson, *supra* note 56, at 460 (citing conflicting authorities).

⁶⁵ Peter G. McAllen, *Deference to the Plaintiffs in Forum Non Conveniens*, 13 S. ILL. U. L.J. 191, 194 (1989).

⁶⁶ 28 U.S.C. § 1350 provides, “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” See *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013) (narrowing the scope of ATCA based on a presumption against the extraterritorial application of U.S. law); *but see id.* at 1669 (Kennedy, J., concurring) (supplying the critical fifth vote and suggesting that extraterritorial activity in violation of the Torture Victims Protection Act might fall within the scope of the ATCA).

the juridical obligations of the United States in this regard.⁶⁷ Yet, despite this specific congressional investiture of jurisdiction, ATCA claims often fall victim to *forum non conveniens* dismissals. Thus, in *Mastafa v. Australian Wheat Bd. Ltd.*,⁶⁸ the plaintiffs, Kurdish women whose husbands were allegedly imprisoned, tortured, and killed by the Saddam Hussein regime in Iraq, brought a class action on behalf of themselves and others similarly situated against defendants Australian Wheat Board Limited aka AWB Limited (“AWB”), AWB (U.S.A.) Limited, and Banque Nationale De Paris Paribas. They alleged violations of the law of nations and the Torture Victims Protection Act (“TVPA”) and asserted jurisdiction pursuant to ATCA. The defendants moved to dismiss on *forum non conveniens* grounds, the more convenient forum being the defendants’ home forum of Australia. The court granted a conditional dismissal and noted:

ATCA and the TVPA permit adjudication of foreigners’ claims for certain violations of international law. However, they have not “nullified, or even significantly diminished, the doctrine of *forum non conveniens*.” Adjudication of foreign claims under ATCA is certainly appropriate where an adequate foreign forum is unavailable or there is reason to think that the foreign forum lacks an interest in pursuing such an adjudication or that litigation in the United States would be more convenient for the parties. But where, as here, there is an adequate foreign forum with a profound interest in adjudicating the dispute and litigation here would be significantly less convenient, the abstract interest of the United States in enforcing international law does not compel an assertion of jurisdiction. Accordingly, the interests of the parties, of judicial economy, and of Australia and the United States are better served by adjudication of this dispute in Australia.⁶⁹

The presumed congressional judgment that the courts of the United States should be open to such claims apparently played no role in the district court’s *forum non conveniens* analysis. Such ATCA dismissals are frequently entered despite the specific jurisdictional mandate from Congress, often sending litigants back to the forum where the violations of international law are alleged to have

⁶⁷ U.S. CONST. art. I, § 8, cl. 10 (granting Congress power “[t]o define and punish . . . Offences against the Law of Nations”).

⁶⁸ No. 07 Civ. 7955 (GEL), 2008 WL 4378443 (S.D.N.Y. Sept. 25, 2008).

⁶⁹ *Id.* at 9.

occurred⁷⁰ or ringing the death knell of the litigation.⁷¹ Yet, not all federal courts are equally inhospitable to ATCA claims.⁷² Thus, *forum non conveniens* permits a district court broad discretion to dismiss ATCA claims despite a clear congressional mandate that federal courts be available to vindicate international law claims arising under that statute.

On the other hand, the Supreme Court has suggested that federal courts generally may not dismiss federal anti-trust suits on the basis of *forum non conveniens*,⁷³ though, as can be expected with such an open-ended doctrine, there are a few cases to the contrary.⁷⁴ This decidedly less aggressive use of *forum non conveniens* remains the case even when the lawsuit involves activities that take place on foreign soil. The reason for this reluctance is sound. Congress has specifically vested federal courts adjudicating such cases with the broadest possible scope of personal jurisdiction (minimum contacts with the United States) and with the most generous venue options for the plaintiffs.⁷⁵ In essence, the express will of Congress to vest broad jurisdictional and venue authority in district courts has been deemed to trump or, at the very least, substantially diminish the judge-made doctrine of *forum non conveniens*.

The jurisprudential distinction between ATCA suits, where *forum non conveniens* is often considered part of the parcel of defendant's rights, and antitrust suits, where it is generally not, is not clear. Certainly, there is nothing inherent in

⁷⁰ See *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283 (11th Cir. 2009); *but see Bigio v. Coca-Cola Co.*, 448 F.3d 176 (2d Cir. 2006).

⁷¹ Robertson, *supra* note 56, at 449.

⁷² See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 99–108 (2d Cir. 2000) (reversing a *forum non conveniens* dismissal in favor of a British forum and stating that “[i]f in cases of torture in violation of international law our courts exercise their jurisdiction conferred by the 1789 Act only for as long as it takes to dismiss the case for *forum non conveniens*, we will have done little to enforce the standards of the law of nations”).

⁷³ See *United States v. Nat'l City Lines*, 334 U.S. 573, 596–97 (1948) (holding that *forum non conveniens* could not be used to transfer an antitrust suit to a more convenient forum within the United States); *Indus. Inv. Dev. Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876, 890 (5th Cir. 1982) (common law doctrine of *forum non conveniens* not applicable to suits brought under the United States antitrust laws).

⁷⁴ See, e.g., *Capital Currency Exchange, N.V. v. National Westminster Bank, PLC*, 155 F.3d 603 (2d Cir. 1998) (Sherman Act claim dismissed on *forum non conveniens* grounds).

⁷⁵ 15 U.S.C. § 22 (“Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.”).

forum non conveniens that requires this differential treatment. Nor is there anything about ATCA that supports this approach. Both types of cases (ATCA and federal anti-trust) may involve activities taking place on foreign soil and both come with an express and specific grant of jurisdiction over the “foreign” activities at issue. The reasons for the differential treatment could be political, that is, it might be because the State Department often asks courts to dismiss ATCA cases. Or it could simply depend on the fact that human rights cases are fraught with jurisprudential and political challenges beyond those confronted in international anti-trust cases. Or it could be based on a judgment about the economic importance of anti-trust litigation. Or it could be based on the courts’ greater sympathy for one class of plaintiffs over another. In any event, in both types of cases, Congress was very clear about granting federal jurisdiction to federal courts over the respective claims arising outside the U.S. The fact that *forum non conveniens* is flexible enough to allow variances from one subject matter to another is itself a sign of the arbitrariness of the underlying doctrine.

D. Doctrinal Indeterminacy

To prevail on a *forum non conveniens* motion, the defendant must establish the availability of an adequate alternate forum, and must demonstrate that the balance of the private and public factors (the *Gilbert* factors) weigh strongly in favor of dismissal.⁷⁶ This simple description opens the door to a complex web of results, for the factors that inform a district court’s decision to grant or deny a *forum non conveniens* motion are more or less unconstrained and thus vary widely from court to court and case to case.⁷⁷ As Justice Scalia observed for the Court in

⁷⁶ 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3828 (3d 2013).

⁷⁷ In 2010, Joel Samuels published a study drawing on a review of every published federal court decision since 1982 that had considered the doctrine of *forum non conveniens*. The study considered 1,500 decisions and was intended to see how federal courts were applying the doctrine. The data collected revealed that:

far too often courts conflate the two prongs [alternate forum and convenience]—treating both as discretionary, bypassing the first prong altogether, or considering AAF [available alternate forum] without meaningful review and analysis. Lower courts struggle to apply the two-part *Piper* inquiry. However, by its very nature, that second prong is ad hoc and not susceptible to closer scrutiny. This capricious process is unfair to plaintiffs and defendants alike and undermines the authority of the judiciary—at least when ruling on *forum non conveniens* motions.

Samuels, *supra* note 45, at 1061. See also Robertson, *supra* note 56, at 448–56; but see Christopher Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011).

American Dredging Co. v. Miller, “The discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application . . . make uniformity and predictability of outcome almost impossible.”⁷⁸

As to the burden of establishing *forum non conveniens*, courts generally hold that the defendant bears the burden of proving both prongs of the *Piper* test, i.e., that there is an adequate alternate forum, and that the balance of private and public interests weigh strongly in favor of dismissal.⁷⁹ In practice, the actual allocation of the burden is more elusive. For example, if the defendant shows that it is amenable to suit in the alternate forum, some courts hold that the burden shifts to the plaintiff to demonstrate the inadequacy of the presumptively adequate forum.⁸⁰ While it remains the case that the defendant bears the ultimate burden of persuasion, somehow the plaintiff’s failure to provide affirmative evidence of inadequacy legitimates a finding of adequacy, suggesting that, in fact, the plaintiff bears the burden of proof on the question of adequacy once the defendant satisfies a relatively low threshold.⁸¹

⁷⁸ 510 U.S. at 455 (citation omitted).

⁷⁹ See, e.g., *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2d Cir. 2009); see also WRIGHT ET AL., *supra* note 76, § 3828.2 (“Federal courts are unanimous in concluding that the defendant bears the burden of persuasion on all elements of the *forum non conveniens* analysis.”).

⁸⁰ See, e.g., *Jackson v. Am. Univ.*, 52 F. App’x 518, 519 (D.C. Cir. 2002) (rejecting plaintiffs’ argument that Egypt was not an appropriate forum because the plaintiffs offered no evidence in the district court “to rebut the [defendant’s] affidavit from an Egyptian attorney regarding the adequacy of the forum”); *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 244 F. Supp. 2d 289, 337–38 (S.D.N.Y. 2003) (assuming the adequacy of the alternate forum based on plaintiff’s failure to show otherwise); *State St. Bank & Trust Co. v. Inversiones Errazuriz, Limitada*, 230 F. Supp. 2d 313, 319–20 (S.D.N.Y. 2002) (treating plaintiff’s failure to challenge the adequacy of the proposed alternative forum as somehow dispositive of the question of adequacy).

⁸¹ In *Abdullahi v. Pfizer, Inc.*, the court the elusive burden as follows:

The defendant bears the burden of establishing that a presently available and adequate alternative forum exists, and that the balance of private and public interest factors tilts heavily in favor of the alternative forum. Absent a showing of inadequacy by a plaintiff, “considerations of comity preclude a court from adversely judging the quality of a foreign justice system.” Accordingly, while the plaintiff bears the initial burden of producing evidence of corruption, delay or lack of due process in the foreign forum, the defendant bears the ultimate burden of persuasion as to the adequacy of the forum.

562 F.3d at 189 (internal citations omitted). See WRIGHT ET AL., *supra* note 76, § 3828.3 (describing trial court opinion in *Abdullahi* as implicitly shifting the burden of proof to the plaintiff).

Concerning the courts' overall approach to the existence of an available alternative forum, Professor Joel Samuel's empirical study of post-1982 federal cases deciding *forum non conveniens* motions found that courts conducted an available alternative forum analysis only 69% of the time.⁸² But much more shocking is Samuel's finding that in 24% of the *forum non conveniens* dismissals, the court's opinion included no alternative forum analysis.⁸³ In addition, according to Samuels, the *Piper* Court contributed to the lower courts' confused approach to the available-alternative-forum by inviting those courts to blur the line between available alternative forum analysis and the balancing of public and private conveniences:

Instead of articulating a doctrine that should be invoked to dismiss cases in federal courts only in "rare cases," the *Piper* AAF [Available Alternative Forum] inquiry creates an opposite presumption (amenability to service of process is sufficient): an alternative forum is presumed to be available, except in rare circumstances. Second, the exception to the presumption of availability involves a single inquiry into whether "the remedy offered by the other forum is clearly unsatisfactory." Courts have been left wide ambit to interpret that condition narrowly or broadly as they see fit. Moreover, factors that actually involve the availability of [an alternative forum] but that do not fit into the exception to AAF carved out in *Piper* are simply thrown into the mix of public factors considered under the second prong of the *forum non conveniens* analysis.⁸⁴

For those courts that do conduct an alternative forum analysis, the inquiry is often "cursory" and "limited," vesting the defendants with a tool that effectively puts the plaintiff out of court.⁸⁵ One leading commentator has even expressed doubts as to whether district courts are capable of appraising "the competence or character of a foreign tribunal."⁸⁶ Not surprisingly, the extent of the inquiry into the

⁸² Samuels, *supra* note 45, at 1077. Samuels offers examples of federal courts' opinions that do not give adequate consideration, or do not consider at all, the adequate alternative forum. *See, e.g., In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec., 1984, 634 F. Supp. 842, 844 (S.D.N.Y. 1986), *aff'd as modified*, 809 F.2d 195 (2d Cir. 1987).

⁸³ Samuels, *supra* note 45, at 1077.

⁸⁴ *Id.* at 1070.

⁸⁵ WRIGHT ET AL., *supra* note 76, § 3828.3.

⁸⁶ *Id.*

“availability” and “adequacy” of the alternate forum is ill-defined, though it generally appears to impose a very low threshold, requiring only that the defendant be subject to service of process and that the courts of the forum provide some remedy.⁸⁷ Beyond that it is unclear whether courts should take into account the substantive law that the foreign court would apply to the case;⁸⁸ and equally unclear is the extent to which the alternate forum must offer procedural guarantees that comport with due process.⁸⁹ In other words, there is no accepted definition as to what constitutes an adequate alternate forum.

There is a similar dispersal of doctrine with respect to how one values a plaintiff’s choice of forum. A large number of decisions defer to the plaintiff’s choice where he has chosen his own district or state of residence as the forum. However, where the plaintiff is not a resident of the forum—in many ATCA cases, for example, the plaintiff will be an alien non-resident—this deference, under *Piper*, will not come into play. Some courts will give added weight to the plaintiff’s choice of forum if that is the forum where the defendant resides or does substantial business. Yet it is now often the case that corporate defendants object to their corporate residence as a proper forum, seeking instead to place the litigation in a foreign nation, where there is the likelihood of a more favorable result.⁹⁰

Next, while the *Gilbert* factors outline the public and private considerations to be weighed in the balance of conveniences, nothing in the *Gilbert* opinion or in any subsequent Supreme Court opinion explains how to weigh and apply those factors. Not surprisingly, there is no consistency of approach in the lower federal courts.⁹¹ Nor has the Supreme Court provided any guidance as to how modern litigation

⁸⁷ *Id.*

⁸⁸ See, e.g., *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 335–37 (closely examining both the substantive and procedural rights available in the alternate forum).

⁸⁹ See generally *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*, 634 F. Supp. 842, 844 (S.D.N.Y. 1986) (district court reviewed the complaint and dismissed on *forum non conveniens* grounds condition on defendants compliance with the federal discovery rules), *aff’d and modified*, 809 F.2d 195 (2d Cir. 1987). But see *Mercier v. Sheraton Int’l, Inc.*, 981 F.2d 1345, 1352–53 (1st Cir. 1992); *Zermeno v. McDonnell Douglas Corp.*, 246 F. Supp. 2d 646, 659 (S.D. Tex. 2003); *Carney v. Sing. Airlines*, 232, 940 F. Supp. 1496, 1505 n.6 (D. Ariz. 1996) (showing that case law is clear that an alternative forum ordinarily is not considered “inadequate” merely because its courts afford different or less generous discovery procedures or different procedures than those that would available under American rules).

⁹⁰ See *Whytock*, *supra* note 77, at 527–28 (citing a potential bias against foreign plaintiffs).

⁹¹ For a description of the inter- and intra-circuit splits on the *Gilbert* balancing formula, see *Davies*, *supra* note 63, at 352–53 (citing authorities).

practices, enhanced by technology and the global legal marketplace, might alter *Gilbert's* antique matrix.⁹²

Ultimately, it is hard to fully capture the reasoning behind each *forum non conveniens* decision at any detailed level, since most such decisions are quite brief and do little more than recite the legal standards, followed by a holding that the balance tips in favor of dismissal or not. If appealed, most are affirmed under an “abuse of discretion” standard,⁹³ though even that standard varies from circuit to circuit in the intensity of its application.⁹⁴

* * *

We are left with a doctrine unbounded by rules or standards and ungrounded in any clearly stated policy.⁹⁵ Most observers find that the results are unpredictable and unfair in both practice and perception.⁹⁶

⁹² Considering that well over 90% of all cases are disposed of prior to trial, one wonders what weight should be given to the “trial-based” *forum non conveniens* private interest factors, such as the location of physical evidence, existence of a compulsory process, ability to view the scene, etc. After all, if the case is unlikely to go to trial, why care about this? Also, given modern technology, how real are these concerns? Shouldn't things like Skype or video conferencing, videos of an accident scene, computer recreations, etc., eliminate most of these concerns even for those few cases that do go to trial? The obvious answers to these questions seem to suggest that *forum non conveniens* is simply another procedural tool in the hands of courts used to avoid adjudicating cases on their merits. *See also* Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 TEX. INT'L L.J. 467, 485 (2002).

⁹³ *Gilbert*, 330 U.S. at 502.

⁹⁴ *See* *Iragorri v. United Tech. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001) (district court decision on *forum non conveniens* may be reversed only if discretion is “clearly abused”); *Bank of Credit and Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 246 (2d Cir. 2001) (appellate review of *forum non conveniens* decision “severely cabined”). However, some appellate courts recognize the “abuse” and reverse trial courts' opinions when they clearly depart from the essential requirements of the doctrine. *See, e.g.*, *Carijano v. Occidental Petroleum Corp.*, 626 F.3d 1137 (9th Cir. 2010), *opinion withdrawn and superseded on reh'g sub nom. Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216 (9th Cir. 2011) (reversing trial court's order granting a motion to dismiss on *forum non conveniens* grounds due to district court's failure to consider full range of factors); *see also* Robertson, *supra* note 56, at 462–63 (citing variable applications of the standard, from strict to highly deferential).

⁹⁵ *See* Stein, *supra* note 14, at 832 (noting that, “[t]here have been ninety-three reported *forum non conveniens* decisions by federal courts of appeals since the *Gulf Oil* decision, only twenty-seven of which were reversals. Only fifteen cases in which the district court retained jurisdiction under *forum non conveniens* reached the courts of appeals, and, of these, all but two were affirmed”); *see also* Robertson, *supra* note 56, at 455–64.

⁹⁶ *See* David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 971, 75 (1990)

This confusion regarding the proper scope and limits of the *forum non conveniens* doctrine, coupled with its growing complexity and apparent attractiveness, add significant costs to litigation. The determination of jurisdiction (and proper venue), however, should not be so costly. Rather, a lawyer should be able to predict with a high degree of accuracy whether the proper standards of jurisdiction and venue are satisfied in a particular forum. This is where the absence of a statute or rule is particularly telling. A common law, judge-made rule, when not reduced to a statute, tends to evolve and grow ever more complicated with conflicting doctrinal tentacles. In any event, as matters now stand, litigants will not know in advance or, at least will not be certain, as to which factors the court will consider in deciding whether the case should proceed or be dismissed in deference to an alternate forum. This relatively boundless approach to jurisdiction and venue creates the opposite of due process. It creates a system of discretionary jurisdiction that is unbounded by the rule of law and, hence, often arbitrary in application.

The general confusion on the doctrine confirms that *forum non conveniens* has indeed become an arbitrary doctrine, often used as a case-management tool, intended to dismiss cases presenting complex conflict of laws issues, or, more generally, complex issues of law in which the chosen forum is not interested in investing its resources. The *forum non conveniens* doctrine, as it exists today, hardly resembles the original quasi-jurisdictional doctrine developed by Scottish and English courts between the seventeenth and twentieth centuries and later introduced to the United States. The contemporary federal doctrine is neither one of jurisdiction nor one of venue. It is not venue, because it does not pertain to a geographic location within a judicial system, but to a change from one judicial system to another. Yet, it is not truly jurisdictional since it employs a form of *ad hoc* balancing of convenience factors that can defeat jurisdiction on much less than a compelling case. What, then, is it? It is simply a judge-made doctrine that gives a district court arbitrary power to dismiss a case if the court concludes that the case can proceed elsewhere for any one of a number of reasons or for no reason at all other than that the judge deems the alternate forum superior.

(describing *forum non conveniens* as “vague and amorphous, yielding little predictability and virtually guaranteeing against clear explanation of the outcomes”); Stein, *supra* note 14, at 785 (describing a “crazy quilt of ad hoc, capricious, and inconsistent [*forum non conveniens*] decisions”); Robertson, *supra* note 56, at 454–55 (noting the perception and reality of injustice).

IV. REPOSITIONING *FORUM NON CONVENIENS* AS A JURISDICTIONAL DOCTRINE

Stated at its most general level, the doctrine of *forum non conveniens*, as enforced by federal courts, vests district courts with broad and virtually unfettered discretion to decline the exercise of otherwise properly asserted jurisdiction and venue if, in the judgment of the district court, there is an available alternate forum where the case can be more conveniently litigated. The district court's judgment in this regard will not be reversed unless that judgment reflects an abuse of discretion (and in some circuits that abuse must be "clear" to warrant reversal). Given that 28 U.S.C. § 1404(a) permits a district court to transfer a case to another district under a similar balance-of-conveniences analysis, the doctrine of *forum non conveniens* will only come into play when the alternative forum is in a foreign nation. Hence, *forum non conveniens* in federal courts is a dismissal doctrine.

As I have shown, *forum non conveniens* cannot be properly characterized as a supervening venue provision. It neither provides for a transfer of venue within the federal judicial system, as does § 1404(a), nor does it establish the propriety of venue in the alternate foreign forum, a virtual impossibility. The only "venue" characteristic of *forum non conveniens* is that it uses the same type of *ad hoc* balancing that applies (with congressional sanction) in the context of venue transfers under § 1404(a). However, this commonality of technique (without congressional sanction) does not transform *forum non conveniens* into a venue provision. Rather, this jot-for-jot borrowing raises a suspicion that something is amiss with *forum non conveniens*. For unlike a venue transfer, which is both intra-system and congressionally sanctioned, *forum non conveniens* involves a denial of congressionally conferred and constitutionally sanctioned jurisdiction, and removes the case completely from the federal judicial system. In addition, given the Supreme Court's decision in *Piper*, a *forum non conveniens* dismissal can, unlike a § 1404(a) transfer, lead to a significant change in the law and remedies available to the plaintiff, including the distinct possibility that the case will not be re-filed in the alternative forum.

If we instead view *forum non conveniens* realistically for what it is and what it does, we must conclude that it is, or ought to be, part of the jurisdictional calculus. *Forum non conveniens* was born and nurtured in the context of exorbitant exercises of jurisdiction and used as an antidote for that exorbitance. That foundation can serve as a significant limiting factor on the application of the doctrine, while at the same time preserving its utility for those cases where the plaintiff's choice of forum represents an abuse of process or places the defendant at a distinct disadvantage.

An appropriate constitutional standard might be found in the law of personal jurisdiction. The basic minimum contacts test is premised on meaningful connections that link the forum, the defendant, and the asserted claim. These

connecting factors create a reasonable expectation of amenability to being sued in the forum and thereby create a strong presumption of reasonableness. The defendant can rebut that presumption only by presenting a compelling case. This means that the defendant must show that the exercise of jurisdiction would be objectively unfair under the circumstances presented. This same standard would give constitutional weight to *forum non conveniens* and thus provide a narrowly circumscribed basis for the occasional refusal to exercise jurisdiction that was otherwise properly invoked. Thus, instead of continuing to employ the “soft focus” balancing formula taken from the law of venue, which undermines the obligation to exercise conferred jurisdiction, *forum non conveniens* would borrow the sharply focused due process reasonableness inquiry to validate a court’s refusal to exercise jurisdiction. In fact, in the interests of clarity, *forum non conveniens*, as so circumscribed, could replace the unreasonableness prong of the minimum contacts test and permit that test to focus exclusively on minimum contacts analysis.⁹⁷

Since its origin, *forum non conveniens* has been used in response to exorbitant exercises of jurisdiction. It was designed to remedy situations where the exercise of jurisdiction would have worked a serious disadvantage to the defendant by imposing a real unfairness on her ability to defend a lawsuit. By contrast, the contemporary *forum non conveniens* doctrine—at least its federal version—has the effect of denying an otherwise proper assertion of jurisdiction and of significantly altering the rights and remedies at stake in the proceedings, without a defendant’s having to demonstrate any real unfairness. The contemporary doctrine’s balancing of conveniences, often unarticulated, thus serves as the talisman of a broad discretion to dismiss, providing additional evidence that federal judges are less and less judges than they are managers of their docket.

Professor Judith Resnik long ago noted, with alarm, the growth of managerial judges, prompted by “changes initiated by judges themselves in response to work load pressures.”⁹⁸ As she has correctly noted, such alterations in the judicial function toward a more managerial role are made “privately, informally, off the record, and beyond the reach of appellate review,”⁹⁹ and hence provide a threat to the core judicial function, which is the delivery of justice.

⁹⁷ See Grossi, *Personal Jurisdiction*, *supra* note 6.

⁹⁸ Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication Managerial Judges*, 96 HARV. L. REV. 374, 391 (1982).

⁹⁹ *Id.* at 426.

V. A PROPOSED CODIFICATION OF *FORUM NON CONVENIENS*

Several states have codified the doctrine of *forum non conveniens*.¹⁰⁰ After reviewing numerous of these provisions and considering the factors that ought to inform the scope of the federal doctrine, this article proposes the following codification. This codification seeks to transform the current amorphous common-law doctrine into a much narrower tool that judges would employ only rarely, and whose invocation would be subject to a more meaningful review on appeal.

A. Proposed Codification

1. In any civil action of which a district court has original jurisdiction, the district court may stay or dismiss the action under the doctrine of *forum non conveniens* only if:
 - a. The defendant files a timely motion to dismiss on grounds of *forum non conveniens*, such timeliness to be measured under the standards applicable to a motion under Federal Rule of Civil Procedure 12(b)(2), but for good cause shown, the court may extend the period set forth in this Section for the filing of a *forum non conveniens* motion; and
 - b. The moving party demonstrates, and the district court finds, that there is an available alternate forum with jurisdiction over the action and the defendants, that, as a practical matter, the plaintiff will have access to that forum, that such forum provides a suitable substantive remedy for the claim or claims asserted by the plaintiff, and that such forum adheres to the fundamental standards of due process; and
 - c. The district court finds that the available alternate forum provides a substantially more suitable forum for the adjudication of the claim or action, and that the maintenance of the claim or action in the district court would impose substantial injustice on the moving party.

¹⁰⁰ See, e.g., ALA. CODE § 6-5-430 (2013); CAL. CODE CIV. PROC. § 410.30 (2012); COLO. REV. STAT. 13-20-1004 (2013); FLA. R. CIV. P. 1.061; MASS. GEN. LAWS ANN. ch. 223A, § 5 (West 2013); N.Y. C.P.L.R. § 327(a) (McKinney 1984); 12 OKLA. STAT. ANN. tit. 12, § 140 (West 2012); 42 PA. CONS. STAT. ANN. § 5322 (West 2013); TENN. CODE ANN. § 20-15-104 (West 2012); TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 2011); W. VA. CODE § 56-1-1a (2012); WIS. STAT. ANN. § 801.52 (West 2013).

2. If the district court finds that the standards in Section 1 have been satisfied, it may stay or dismiss the claim or action on any condition it may deem just. Such conditions may include the defendant's waiver of any statute of limitation or lack of jurisdiction defense that the defendant might otherwise have in the alternate forum.
3. When granting a motion to dismiss an action on *forum non conveniens* grounds, the district court shall retain jurisdiction to enforce its dismissal order and any related stipulations or conditions attached thereto.
4. A court that grants or denies a motion to stay or dismiss an action pursuant to this statute shall set forth specific findings of fact and conclusions of law supporting the court's order.
5. An order granting or denying a motion to dismiss on *forum non conveniens* grounds is immediately appealable. The findings of fact shall be reviewed under the clearly erroneous standard. The conclusions of law shall be reviewed under the *de novo* standard.

VI. COMMENTARY AND CONCLUDING REMARKS

Section 1 requires a district court to determine whether it has jurisdiction over the case prior to any consideration of a *forum non conveniens* motion. The purpose of this provision is to position the *forum non conveniens* inquiry within the contours of the district court's obligation to exercise jurisdiction. In addition, this sequencing requirement prevents a court without power over the controversy from resolving, in effect, substantive rights of the parties. This provision would overrule *Sinochem* to the extent that *Sinochem* permits a district court to decide a *forum non conveniens* motion without first resolving the question of jurisdiction.

Subsection 1a imposes a timeliness requirement that is keyed to the federal rules. Hence, in most cases, the defendant would be required to file a motion to dismiss on *forum non conveniens* grounds within 21 days of having been served with the complaint.¹⁰¹ This Section also vests the district court with discretion to extend the time within which to file the motion for good cause shown. For example, good cause might permit a tardy *forum non conveniens* motion to be filed when materials gathered during discovery establish firm grounds on which to file such a motion and where no such grounds were apparent at the outset of the litigation.

¹⁰¹ FED. R. CIV. P. 12(a)(1)(A)(i).

Subsection 1b makes it clear that it is the moving party's burden to establish the existence and practical availability of an alternative forum. This subsection also defines what constitutes an available alternative forum. It includes a requirement that the court consider the practical consequences of the dismissal on the plaintiff and that those consequences be central to the determination of whether there is an alternative adequate forum.

Subsection 1c narrows the scope of the district court's discretion to dismiss on *forum non conveniens* grounds. While the "substantially more suitable alternative forum" language does permit the district court to take into account the practical interests of the judicial system, the "substantial injustice" requirement precludes the court from dismissing a case on mere case-management considerations. In addition, this subsection requires that the district court find that the alternative forum is "substantially" more suitable and that retention of jurisdiction would impose "substantial injustice" on the moving party. The first requirement makes it clear that the doctrine may not be enforced based simply on a finding that an alternative forum is "more" convenient, but only on a finding that such a forum is "substantially" more suitable. The "substantial injustice" requirement is meant to meld *forum non conveniens* with the unreasonableness prong of the minimum contacts test, thus limiting the application of *forum non conveniens* to circumstances where the moving party will suffer an injustice commensurate to a violation of due process.¹⁰²

Section 2 permits the district court to impose conditions on a *forum non conveniens* stay or dismissal and specifies two non-exclusive examples of such conditions.

Section 3 requires that the district court retain jurisdiction to enforce any of the conditions or stipulations in any order of dismissal. This is a useful procedural tool to make sure the alternate forum is in fact really "adequate" and "available," which gives the dismissing court an opportunity to monitor the proceeding in the foreign court to make sure the remedy provided is not clearly inadequate.¹⁰³ Of

¹⁰² See Grossi, *Personal Jurisdiction*, *supra* note 6, text accompanying notes 151–52 (endorsing such an intersection between the law of personal jurisdiction and the law of *forum non conveniens*).

¹⁰³ See *Mastafa v. Australian Wheat Bd. Ltd.*, No. 07 Civ. 7955 (GEL), 2008 WL 4378443, at *1 (S.D.N.Y. Sept. 25, 2008) (holding that "[a]s a safeguard, however, the dismissal of claims against AWB will be conditioned to provide that if a court of last review in Australia affirms a dismissal of plaintiffs' action against AWB for lack of jurisdiction over any of the claims here at issue, or if AWB does not waive any and all statute of limitations defenses available to it, this Court, upon motion made within 60 days, will resume jurisdiction over that action. A conditional dismissal such as this is

course, federal courts are free to do this, but there is no rule that requires them to do so.

Section 4 requires a district court to make specific findings of fact and conclusions of law when ruling on a *forum non conveniens* motion. The purpose here is threefold: 1) avoid the open-textured approach to *forum non conveniens* that has come to characterize district court practice; 2) provide appellate courts with a clear statement of the district court's decision, thereby making appellate review more meaningful and less speculative; and 3) provide a foundation from which appellate courts can create a coherent doctrine that lends itself to predictability of application.

Section 5 works together with Section 4 to ensure robust appellate review of district court decisions.

* * *

The federal doctrine of *forum non conveniens* has drifted far from its jurisdictional beginnings. It has now morphed into a device that allows district courts to decline jurisdiction on policy choices that range well beyond the legitimate sphere of the judicial function. In part, this state of affairs is a product of the facile treatment of *forum non conveniens* as a “superseding” venue doctrine, freighted with an *ad hoc* balancing of conveniences appropriate to venue transfer motions, but quite out of place in a motion that calls for a jurisdictional dismissal and the attendant substantive consequences of such a dismissal. By repositioning *forum non conveniens* as a jurisdictional doctrine, this article hopes to return *forum non conveniens* to its legitimate scope and usage.

‘standard in the Second Circuit’ because it helps to ensure that an adequate alternative forum is truly available.” (quoting *Do Rosario Veiga v. World Meteorological Org.*, 486 F. Supp. 2d at 308 n.1. (2007))). This option is also provided by some state code provisions. *See, e.g.*, CAL. CIV. PROC. CODE § 410.30 (West 2012) (providing that “[w]hen a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall *stay* or dismiss the action in whole or in part on any conditions that may be just.”) (emphasis added).