FORUM NON CONVENIENS AND THE REDUNDANCY OF COURT-ACCESS DOCTRINE

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INTRODUCTION

It must have seemed like a bizarre good news/bad news joke to the plaintiff. Imagine the lawyer's explanation:

Well, we served the defendant with a summons at its place of business in the forum. We sued the defendant in one of the places in which Congress in the venue statute said a defendant may be sued. We were even able to persuade the court that our choice of forum was a reasonable one under the due process clause of the Constitution since the defendant could reasonably anticipate being haled into court here. Best of all, we convinced the court that it should apply the forum's pro-plaintiff law because the forum state has the most significant relationship to the controversy. However, I must tell you that the case was dismissed because the judge didn't think this was an appropriate forum.

In response to the client's astonished question—"Can't we appeal?"—the lawyer somewhat sheepishly explains that they have already lost in the Supreme Court of the United States. In *Piper Aircraft Co. v. Reyno*,¹ foreign plaintiffs had come to the United States seeking redress against American manufacturers for injuries suffered in a plane crash in Scotland. Their claim may or may not have belonged in Pennsylvania. But in *Reyno*, as well as in most forum non conveniens dis-

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¹ 454 U.S. 235 (1981). Some literary license has been taken here: in *Reyno*, it was the court of appeals and not the trial court that found the forum law to be controlling. The Supreme Court nevertheless sustained the district court's dismissal. Moreover, there was no express challenge to jurisdiction in *Reyno*. Had there been one, there is no question that jurisdiction would have been sustained; the defendants clearly had sufficient contacts with the forum. See *Reyno*, 454 U.S. at 239.

missals, the plaintiffs' claim was dismissed after all formal rules governing forum access were satisfied: personal jurisdiction, subject-matter jurisdiction, and venue. It was even determined that the forum's law would govern the liability issue.²

The courts' response to this curious state of affairs has simply been to restate the rule that "the doctrine of forum non conveniens can never apply if there is absence of jurisdiction or mistake of venue."³ No further explanation is offered why a court in its discretion may negate the effect of formal rules establishing the existence of jurisdiction. This procedural system that takes away with one hand what it gives with the other has, for the most part, escaped serious scrutiny.⁴ This Article considers the implications of this redundancy of court-access doctrine in a reevaluation⁵ of the evolution and use of the doctrine of forum non

² The court of appeals determined that the forum law would apply at least to the conduct of one defendant. Apparently, it felt that Ohio law would govern the liability of a second defendant. See *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 167-71 & 171 n.95 (3d Cir. 1980), *rev'd on other grounds*, 454 U.S. 235 (1981). In overturning the court of appeals' reversal of the trial court's forum non conveniens dismissal, the Supreme Court did not question the court of appeals' choice-of-law determination. See 454 U.S. at 260.

³ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947).

⁴ Most critical scrutiny of the doctrine came at the time of its adoption by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). In particular, Alexander Bickel's 1949 study of the use of forum non conveniens in admiralty concluded that limits on forum shopping should be addressed through formal venue rules, rather than by permitting the discretionary circumvention of venue rules by trial judges applying the forum non conveniens doctrine. See Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q. 12, 16-19, 26 (1949). Bickel observed that the use of the doctrine in admiralty had been capricious as far back as 1801. See *id.* at 13. In accord with the conclusions reached herein, he urged the adoption of clear rules for the handling of discrete classes of cases. See *id.* at 47; see also Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 930 (1947) (doctrine is "amorphous" and serves inconsistent ends); Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 416 (1955) (doctrine is "notoriously complex and uncertain," resulting in "appalling" delays in selecting the appropriate forum). More recently, Judge Henry Friendly attacked the result in *Reyno* for vesting completely in the discretion of trial judges decisions that could appropriately be reviewed by appellate courts. See Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982).

⁵ There have been a number of other studies of the topic. See Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947); Bickel, *supra* note 4; Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); Braucher, *supra* note 4; Currie, *supra* note 4; Dainow, *The Inappropriate Forum*, 29 ILL. L. REV. 867 (1935); Friendly, *supra* note 4; Inglis, *Jurisdiction, The Doctrine of Forum Conveniens, and Choice of Law in Conflict of Laws*, 81 L.Q. REV. 380 (1965); Morley, *Forum Non Conveniens: Restraining Long-Arm Jurisdiction*, 68 NW. U.L. REV. 24 (1973); Note, *Forum Non Conveniens and the "Internal Affairs" of a Foreign Corporation*, 33 COLUM. L. REV. 492 (1933); Note, *Forum Non Conveniens and Foreign Plaintiffs: Addressing the Unanswered Questions of Reyno*, 6 FORDHAM INT'L L.J. 577 (1983); Note, *Forum Non Conveniens and Foreign Plaintiffs in the Federal Courts*, 69 GEO. L.J. 1257 (1983); Note, *The Con-*

conveniens in the United States.

In the last forty years, an upheaval in the procedural law of private international and interstate disputes has occurred. Every doctrine used to mediate between jurisdictions competing to resolve lawsuits having interstate connections—jurisdiction, venue, and choice of law—has undergone dramatic change.⁶ Both jurisdiction and venue have been greatly expanded, and the conflicts rules have become more diverse and manipulable. A litigant today has a greater chance of getting into a more desirable court and a better chance that the court will apply different law than would be applied by an alternative forum.⁷ The net effect of these changes has been to increase the opportunities and incentives for parties to forum shop—to attempt to have their cases resolved in a forum with laws or judges most hospitable to them. The choice of forum has thus become a key strategic battle fought to increase the chances of prevailing on the merits.⁸

Most courts reviewing choice-of-law decisions, particularly the federal courts, in which many interstate cases are heard, have not responded to this forum shopping by prohibiting forum courts from applying their own law when the forum's connection with the controversy is tenuous.⁹ Similarly, while there has been some retrenchment in the

venient Forum Abroad, 20 STAN. L. REV. 57 (1967); Note, *The Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts*, 17 VA. J. OF INT'L L. 755 (1977); Comment, *Forum Non Conveniens, A New Federal Doctrine*, 56 YALE L.J. 1234 (1947). The doctrine has for the most part been enthusiastically embraced in the literature, with the notable exception of Alexander Bickel's 1949 study. See Bickel, *supra* note 4.

⁶ See generally Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983) (providing an exhaustive history of the development of choice of law and personal jurisdiction in the last fifty years).

⁷ See *id.* at 778-81.

⁸ See, for example, *Irish Nat'l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90 (2d Cir. 1984), in which the court stated,

In some instances . . . invocation of the [forum non conveniens] doctrine will send the case to a jurisdiction which has imposed such severe monetary limitations on recovery as to eliminate the likelihood that the case will be tried. When it is obvious that this will occur, discussion of convenience of witnesses takes on a Kafkaesque quality—everyone knows that no witnesses ever will be called to testify.

Id. at 91. See also Coddington & Hicks, *The Arena: Defendant's Choice of Forum*, 46 J. OF AIR L. & COM. 941 (1981); Kennelly, *Choice of Laws, Jurisdiction and Forum Non Conveniens*, 26 TRIAL LAW. GUIDE 260 (1982).

⁹ See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). In *Allstate*, the Court upheld Minnesota's choice of its own law in a case in which the state had tenuous connections with the controversy. The litigation's principal contact with the state was that the plaintiff had moved there after the cause of action arose. See generally *Symposium: Supreme Court Intervention in Jurisdiction and Choice of Law: From Shaffer to Allstate*, 14 U.C.D. L. REV. 837 (1981) (a collection of four articles covering a spec-

area of jurisdiction,¹⁰ courts continue to assert jurisdiction over cases in which the only reason that the forum was chosen was to take advantage of the applicable law.¹¹ The judicial tendency has increasingly been to employ the doctrine of forum non conveniens,¹² the principle that a court may decline to exercise jurisdiction properly belonging to it when trial elsewhere would be more "appropriate." Although frequently associated with "convenience,"¹³ the doctrine has not been limited in application to insuring a convenient trial. Rather, courts invoking the doctrine have taken into consideration the very question purportedly addressed by jurisdiction, venue, and choice of law: which government has the appropriate relationship to the parties and the controversy to justify resolving the dispute in its courts or under its law. A forum non conveniens "interest analysis" has thus been employed to resolve the interstate dilemma left undecided by the doctrines designed to mediate

trum of views on the proper role of the Constitution in choice of law); *Symposium: Choice-of-Laws Theory After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 1 (1981) (exploring the impact of *Allstate* on choice-of-law doctrine).

¹⁰ See, e.g., *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 104 S. Ct. 1868, 1874 (1984) (company that purchased 80% of its helicopter fleet, trained most of its personnel, and received payments for over \$5,000,000 in the forum was not subject to jurisdiction for an accident arising out of a transport contract negotiated in the forum); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (the state in which foreign plaintiffs brought a products-liability suit involving a car accident occurring in the state could not exercise personal jurisdiction over a foreign retailer and wholesaler that did no business in the state or with its citizens); *Rush v. Savchuk*, 444 U.S. 320 (1980) (a state cannot exercise quasi in rem jurisdiction over a defendant who personally has no forum contacts by attaching the contractual obligation of his insurer, who does business in the state, to indemnify the defendant in connection with the suit); *Kulko v. California Superior Court*, 436 U.S. 84 (1978) (the state in which the plaintiff resided could not exercise in personam jurisdiction over her former husband, a domiciliary of another state, in an action to increase child support; the fact that the former husband sent his daughter to live with the plaintiff was not sufficient to establish minimum contacts with the forum state); see also Korn, *supra* note 6, at 785.

¹¹ For instance, in *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984), the Court held that the defendant corporation could be sued in New Hampshire for nationwide damages in a libel action when the plaintiff was not from the forum state and the litigation's sole connection with the forum was the distribution of the defendant's magazine in the forum. The plaintiff's choice of forum was apparently based exclusively on the fact that any other state's statute of limitations would have barred her action. See *id.* at 1477. The Court dismissed the plaintiff's motive for choosing the forum as irrelevant, concluding that which statute of limitations could be constitutionally applied was a choice-of-law issue not yet ripe for review. See *id.* at 1480.

¹² The number of reported forum non conveniens decisions in the federal courts appears to have risen dramatically in the last five to ten years. See *infra* notes 216-20 and accompanying text. This is especially odd because, as a number of courts and commentators have noted, the focus on convenience ought to be of less concern as the technology of communication and transportation advances. See, e.g., Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 103, 116 (1981). Yet the number of forum non conveniens decisions has increased with the relative mobility of proof.

¹³ See, e.g., Friendly, *supra* note 4, at 753.

between conflicting laws and jurisdictions. So used, the forum non conveniens doctrine has come to accommodate the collective shortcomings and excesses of modern rules governing jurisdiction, venue, and choice of law.

This buck passing has created an anomaly: a court of proper statutory venue, possessing jurisdictional power, and having sufficient connection with the controversy to justify applying its own law, may still dismiss the case because it is an "inappropriate" forum. But the effects are more profound than the simple operation of a sleight-of-hand shell game. The courts have not only moved the relevant limits on a court's power from the jurisdiction or conflict-of-laws shell to a shell with a Latin name. More significantly, they have delegated those decisions to the trial judges' discretion without providing any meaningful guidance or appellate review. Unlike jurisdictional or choice-of-law rulings, forum non conveniens decisions are vested in the "sound discretion of the trial court."¹⁴ Furthermore, the standards governing forum non conveniens dismissals are composed of a vague assortment of general policy considerations having perhaps even less substance and clarity than the minimum-contacts analysis employed in personal-jurisdiction decisions. Consequently, forum non conveniens decisions tend to be a mechanical litany of the seminal Supreme Court language¹⁵ followed by a summary conclusion. The result has been a crazy quilt of ad hoc, capricious, and inconsistent decisions.

This Article explores the implications of the use of the doctrine of forum non conveniens. Part I considers the theoretical relationship between the various standards used to control access to courts, concluding that the distinctions between subject-matter jurisdiction, personal jurisdiction, venue, and forum non conveniens are not sufficiently clear to justify the difference in procedural treatment accorded each doctrine. The second part traces the development of forum non conveniens doctrine in the United States in an attempt to understand how and why this doctrinal redundancy has evolved. I suggest that the doctrine was a direct response to changing conceptions of jurisdiction and venue in midcentury and was employed to address problems generated by those changes. The two major Supreme Court discussions of the doctrine are critically evaluated, and I conclude that the Court's justifications for permitting the informal circumvention of formal rules through the forum non conveniens doctrine are not persuasive. The last section

¹⁴ *Reyno*, 454 U.S. at 257.

¹⁵ The Supreme Court first articulated the relevant factors in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). The decision in *Gulf Oil* is discussed at length in Part II-B of this Article. See *infra* text accompanying notes 134-75.

surveys the use of the doctrine in the lower federal and state courts and demonstrates how the doctrine has resulted in an arbitrary and inconsistent resolution of important substantive issues. The Article in conclusion urges decreased reliance on forum non conveniens as a means of allocating political authority and proposes a return to jurisdictional rules that reflect the policy choices currently made in the guise of forum non conveniens dismissals.

I. THE REDUNDANCY OF COURT-ACCESS DOCTRINE: WHY FIRST-YEAR CIVIL PROCEDURE WAS SO CONFUSING

American procedure has developed a four-part hierarchy to describe limitations on a court's ability to resolve a lawsuit: subject-matter jurisdiction, personal jurisdiction, venue, and forum non conveniens. A particular doctrine's position in the hierarchy will determine when and whether a party can raise the limitation as an objection to the proceeding,¹⁶ the degree of appellate scrutiny over the trial court's ruling,¹⁷ the res judicata effect of the judgment,¹⁸ and, in certain cases, even the de-

¹⁶ An objection to venue or personal jurisdiction must be raised as the defendant's first action or waived. 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1361, at 642-43 (1969). A subject-matter defect may be raised at any time, even on appeal. *Id.* at 644. The timing for forum non conveniens motions is less clear. Such motions are not considered objections to venue under Federal Rule of Civil Procedure 12(b)(3), and thus may be filed either before or after the answer to the complaint. *See* FED. R. CIV. P. 12(b)(3); 5 C. WRIGHT & A. MILLER, *supra*, § 1361, at 237 (Supp. 1983). Some litigants have even succeeded in raising forum non conveniens objections after trial. 15 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3828, at 180 (1976); *see, e.g.,* Snam Progetti S.P.A. v. Lauro Lines, 387 F. Supp. 322, 323 (S.D.N.Y. 1974) (holding that a motion to dismiss on forum non conveniens grounds may be addressed at any time); Fifth and Walnut, Inc. v. Loew's, Inc. 76 F. Supp. 64, 67 (S.D.N.Y. 1948) ("The objection of forum non conveniens . . . may be addressed to the discretion of the court at any time.").

¹⁷ Subject-matter jurisdiction, personal jurisdiction, and venue rulings are all subject to normal appellate review. 15 C. WRIGHT & A. MILLER, *supra* note 16, § 3914; C. WRIGHT, *LAW OF FEDERAL COURTS* § 44, at 264 (4th ed. 1983). While denials of motions to dismiss are not normally appealable final orders, the objection is preserved even after trial on the merits. *See* 5 C. WRIGHT & A. MILLER, *supra* note 16, § 1351, at 567-69. Forum non conveniens rulings, in contrast, are reversible only on a finding of an abuse of the trial court's discretion. *Reyno*, 454 U.S. at 257. Moreover, when a forum non conveniens motion has been denied and the case has proceeded to trial, the ruling is practically, if not technically, insulated from appellate review; a defendant would be hard-pressed to show that the balance of public and private convenience weighs in favor of relitigation in another forum after there has been a trial on the merits.

¹⁸ When a court proceeds to judgment in a case in which venue or jurisdiction was improper, the validity of the judgment depends upon the exact nature of the defect. Whether a judgment rendered by a court that was without proper subject-matter jurisdiction may be collaterally challenged depends on a variety of factors, such as whether an objection was made, how clear the lack of jurisdiction was, and whether the court was one of limited jurisdiction. *RESTATEMENT (SECOND) OF JUDGMENTS* § 10 (1982).

gree of constitutional scrutiny over the decision.¹⁹

At the top of the hierarchy is subject-matter jurisdiction: the scope of a court's "competency" to adjudicate given "types" of lawsuits. This "competency" is seen as somehow distinct from the particular controversy or litigants; it implicates the very integrity of the court. Objections to subject-matter defects cannot be waived, and subject-matter jurisdiction cannot be conferred on the court by the parties.²⁰ Subject-matter jurisdiction is perceived as fundamentally different from the other doctrines insofar as it addresses institutional policies—the allocation of power between state and federal governments in the case of federal subject-matter jurisdiction, or the allocation of authority within a

Judgments predicated on faulty personal jurisdiction may never be collaterally attacked if the defendant made a general appearance in the first action. *Id.* § 11. However, a default judgment may be collaterally challenged for lack of personal jurisdiction. *Id.* § 13. Improper venue, or the inappropriateness of the forum under forum non conveniens principles, cannot be the basis of a collateral attack. 18 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 4436, at 346 (1981).

Moreover, there may be some differences in the finality of an express ruling on these procedural objections. Federal Rule of Civil Procedure 41(b) does not consider dismissals for lack of jurisdiction and for improper venue as decisions upon the merits. Nevertheless, those rulings do receive varying degrees of respect from other courts. A ruling that there is no subject-matter jurisdiction in a given court system should preclude an attempt to reassert the same claim anywhere else in the system. *See* 18 C. WRIGHT & A. MILLER, *supra*, § 4403, at 11. An action dismissed because the defendant had insufficient contacts with the forum to withstand constitutional scrutiny should be binding on all other courts within the jurisdiction—both state and federal. However, if the objection is based on a claim of forum non conveniens, a federal court's disposition will not be binding on state courts even in the same state, and vice versa. *See* *Bewers v. American Home Prods. Corp.*, 99 A.D.2d 949, 950, 472 N.Y.S.2d 637, 639 (dismissal of actions based on same facts in federal courts in New York was "not in any way critical" to the court's decision), *aff'd*, 64 N.Y.2d 630, 474 N.E.2d 247, 485 N.Y.S.2d 39 (1984).

¹⁹ *Compare* *FTC v. Jim Walter Corp.*, 651 F.2d 251, 257 (5th Cir. 1981) (no due process right to dismissal on grounds of forum non conveniens where minimum contacts sufficient to support personal jurisdiction) *with* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (action may be dismissed absent sufficient minimum contacts even if forum would be convenient).

²⁰ *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702 (1982); *see also* 5 C. WRIGHT & A. MILLER, *supra* note 16, § 1393, at 863-67. This black-letter rule is something of an overstatement: if neither the court nor the parties object to the court's subject-matter jurisdiction, either at trial or on appeal, the judgment will usually withstand collateral attack. *See, e.g.,* *Durfee v. Duke*, 375 U.S. 106, 112, 116 (1963) (holding that the issue of subject-matter jurisdiction could not be relitigated in a federal district court in Missouri when the Nebraska Supreme Court had already decided the issue); *Des Moines Navigation & R.R. Co. v. Iowa Homestead Co.*, 123 U.S. 552, 558-59 (1877) (holding that, if an action is removed to a federal court and all defendants appear without making an objection to jurisdiction, any final judgment of the federal court remains in effect unless vacated, even though it appears from the record that complete diversity of citizenship did not exist); *see also* *RESTATEMENT (SECOND) OF JUDGMENTS* § 12 (1982) (except in limited circumstances, "[w]hen a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction").

unitary system in the case of state or federal courts of limited competence.

Next in line is personal jurisdiction, which determines the "territorial reach" of the court's "power." Like subject-matter jurisdiction, personal jurisdiction is viewed as intrinsic to the court, but it is not an inviolable limitation. A party can "come into" the "territory" of the court, but she cannot submit a controversy to a court lacking subject-matter jurisdiction over that type of controversy.²¹ Unlike objections to subject-matter jurisdiction, objections based on lack of personal jurisdiction will be waived if they are not raised early in the litigation.²² Personal jurisdiction is distinguished from subject-matter jurisdiction by its focus on the present or past location of the defendant and its purported indifference to the character of the controversy.

Third is venue, the "appropriate" place for trial within a given jurisdiction. Whereas personal jurisdiction represents an allocation of judicial power among different sovereign jurisdictions, venue allocates judicial authority within a single sovereign jurisdiction. Accordingly, state venue rules allocate judicial authority only within the state, and federal venue rules allocate judicial authority among the different federal districts within the United States. Unlike personal or subject-matter jurisdiction, venue is not seen as going to the "power" of the court but rather represents some extrinsic "right" or privilege vested in the parties themselves.²³ Thus, venue privileges are easily waived.

Last in the hierarchy is *forum non conveniens*. A *forum non conveniens* dismissal is predicated on jurisdiction and venue being properly established and represents an "escape valve" to insure that rigid application of those rules will not result in unfairness in an unusual fact situation. The trial judge provides some "play in the joints" that partially offsets the indeterminism of formal rules.²⁴ *Forum non conveniens* is a hybrid combining both institutional and private-party interests. While it is ostensibly available to protect a defendant from a burdensome or otherwise inconvenient choice of forum by the plaintiff, it may be employed to give effect to the policies underlying the other

²¹ See *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702 (1982).

²² See FED. R. CIV. P. 12(h).

²³ See *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167-68 (1939); see also 1 J. MOORE, J. LUCAS, H. FINK, D. WECKSTEIN & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 0.140[1.-2], at 1310-12 (2d ed. 1984) [hereinafter cited as 1 J. MOORE].

²⁴ A number of commentators have urged increased reliance on the doctrine expressly because it gives the courts more flexibility to adjust the equities of cases eluding fair resolution through jurisdiction or venue rules. See, e.g., *Dainow*, *supra* note 5, at 869-70, 886-87; *Morley*, *supra* note 5, at 37; *Silberman*, *supra* note 12, at 116.

doctrines in the hierarchy.²⁵

Any first-year law student can attest that however well ingrained these distinctions are in the legal mind, the commonsense differences are far from obvious.²⁶ Commentators tend to define the doctrines by describing the differences in procedural treatment each is accorded: personal jurisdiction may be waived, subject-matter jurisdiction may not; a judgment may be voided for lack of personal jurisdiction but not for improper venue, and so on.²⁷ Such differences in procedural treatment

²⁵ See, e.g., *Harrison v. Wyeth Laboratories*, 510 F. Supp. 1, 2, 4, 9 (E.D. Pa. 1980) (product-liability action against pharmaceutical manufacturer by British plaintiffs should be dismissed subject to specified conditions that give effect to British regulatory interests), *aff'd*, 676 F.2d 685 (3d Cir. 1982).

²⁶ The confusion is apparently not limited to first-year law students. In a recent federal district court opinion, the court analyzed whether the plaintiff had brought a cause of action "arising out of . . . [defendant's] business" in the state in order to determine whether the court had "subject matter jurisdiction" under the state long-arm statute. See *Apolinario v. Avco Corp.*, 561 F. Supp. 608, 611 (D. Conn. 1982). The characterization was apparently deliberate; the court emphasized that "[t]he concepts of subject matter and personal jurisdiction . . . serve different purposes." *Id.* (quoting *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 701 (1982)). A foreign corporation's amenability to suit would normally be considered a matter of personal rather than subject-matter jurisdiction, but, as discussed below, see *infra* text accompanying notes 31-37, and as demonstrated by this case, the distinction is not a necessary one.

²⁷ See *supra* notes 16-19 and accompanying text. Consider Professor Moore's explanation of the distinction between the various doctrines. He first sets out totally tautological definitions:

[T]he concepts underlying jurisdiction and venue are quite different and should not be confused with each other. . . . [F]ederal jurisdiction of the subject matter relates to the power of the court to hear and determine the matter in litigation. In personam, in rem and quasi in rem jurisdiction relate to the court's power over the person or the property of the defendant. Venue, on the other hand, relates to the locality of a lawsuit, the forum where judicial power may be set in motion, but it does not limit the jurisdiction of the court.

1 J. MOORE, *supra* note 23, ¶ 0.140[1-2] at 1310-11 (footnotes omitted). It is questionable whether anyone not steeped in procedural formalism would perceive the distinctions between whether a court has "power . . . to hear and determine the matter in litigation," whether it has "power over . . . the defendant," and whether it is a "forum where judicial power may be set in motion." All three questions ask the same thing: does this court have the authority to resolve this controversy?

In attempting to clarify the distinction, Professor Moore relies exclusively on the different procedural characteristics assigned to the doctrines and not on any underlying conceptual distinctions:

A vital distinction is apparent when we consider the doctrine of waiver. Federal jurisdictional requirements can not be waived by the parties. Lack of jurisdiction over the subject matter will even be raised by the courts, including the appellate courts, on their own motion. But venue is a privilege personal to each defendant which he can and does waive unless he makes proper and timely objection; and this rule applies to the United States. Lack of federal jurisdiction will always lead to dismissal of the action whereas improper venue may lead to dismissal, but usually it

presumably reflect differences in the political or social values underlying each doctrine. Subject-matter jurisdiction may not be waived because it advances a policy more important than, or at least significantly different from, the policy furthered by personal jurisdiction or venue.²⁸ Once the differences in procedural treatment of each doctrine are set aside, however, the qualitative differences that remain are surprisingly subtle; the differences in procedural treatment then become much more difficult to justify.

Subject-matter jurisdiction is a particularly elusive concept. It refers to the authority to adjudicate certain "types" of controversies, yet "type" does not necessarily mean the nature of the cause of action. It may refer to the amount in controversy or the identity or citizenship of the litigants. Under such a broad construction, "type" simply means some characteristic of the litigation that will determine whether the court has authority to hear the case, a definition that could well encompass those characteristics on which personal jurisdiction and venue are based.²⁹

For instance, consider the personal-jurisdiction requirement that the defendant either must be served within the state or must have certain minimum contacts with the state. Assuming the sufficiency of those contacts, we would normally say in such a case that the court has jurisdiction "over the person," not over the subject matter of the case. In one respect that is a sensible distinction: the plaintiff still must satisfy statutory "subject matter" requirements in order to establish that the court has authority to proceed—for example, that the amount in controversy falls within the court's jurisdictional threshold, that the cause of action is of a type the court has authority to resolve, or perhaps that the lawsuit is between diverse parties. In another sense, however, the classification is quite artificial. The requirement of minimum contacts with the defendant is not different in kind from the requirement that the parties

should result in a transfer to the proper district. Another relationship is that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by statute and the selected forum is proper under the venue statutes. Such resistance is recognized by the doctrine of *forum non conveniens*

1 J. MOORE, *supra* note 23, ¶ 0.140[1.-2], at 1311-12 (footnotes omitted).

²⁸ The Supreme Court, in *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702 (1982), explained why personal jurisdiction can be waived, but subject-matter jurisdiction cannot, as follows: subject-matter jurisdiction "functions as a restriction on federal power, and contributes to the characterization of the federal sovereign," whereas personal jurisdiction "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."

²⁹ Indeed, the same contacts provide the court with both subject-matter and personal jurisdiction in custody cases and sovereign-immunity cases. See Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 121 (1983).

come from different states. Both are characteristics of the litigation that authorize resolution of a particular lawsuit in a particular court.

The different "types" of subject-matter jurisdiction do share a common purpose: each "type" represents a reason to have one court or set of courts hear the case rather than another. Certain judges may have more expertise in a particular area of law; certain cases may not be important enough to justify expending a given court's resources; one court may be more impartial than another. A set of institutional concerns, above and beyond the interests of the parties in a fair and just adjudication, is thus addressed through subject-matter jurisdiction.³⁰

Yet even in this sense there is no reason why the location of the relevant contacts, the residence of the parties, or the place of service of process, traditionally characteristics of personal jurisdiction and venue, could not also be considered to address such institutional concerns. Both personal jurisdiction and venue reflect notions of the proper division of power between courts. The "minimum contacts" test employed after *International Shoe Co. v. Washington*³¹ to determine whether an assertion of personal jurisdiction is constitutional does not simply evaluate whether it would be "inconvenient" for the defendant to litigate in the forum. Rather, the doctrine calls for considering whether the forum's relationship to the particular controversy in question justifies assertion of the forum's judicial power beyond its border,³² that is, whether the state has a sufficient regulatory stake in the activity in question to justify the extraterritorial reach of its judicial power.³³ Implicit in that

³⁰ Note, however, that in the case of diversity jurisdiction the justification for the existence of the federal court's competency is coincidental with the private interests of the litigants in receiving a fair adjudication. The same might also be said for the "expertise" justification for a court's assertion of subject-matter jurisdiction: the parties get a higher-quality adjudication.

³¹ 326 U.S. 310 (1945).

³² Cf. *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473, 1479 (1984) ("the 'fairness' of haling respondent into a New Hampshire court depends to some extent on whether respondent's activities relating to New Hampshire . . . give that State a legitimate interest in holding respondent answerable on a claim related to those activities"); *Calder v. Jones*, 104 S. Ct. 1482, 1487 (1984) (jurisdiction may properly be based on an injury within the state that is caused by the defendants' out-of-state conduct).

³³ See Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77; Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C.L. REV. 407 (1980); McDougal, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 VAND. L. REV. 1 (1982). But see Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015 (1983). Professor Drobak argues that the proper focus of jurisdiction is on fairness to the individual, not on the relationship between sovereign powers. This, he contends, explains why objections to defects in personal jurisdiction may be waived by the parties, as was done in *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694 (1982). See Drobak, *supra*, at 1015-16. However, in so arguing, he does not in any sense contend that state

consideration is a theory of how sovereign power is properly allocated among the states.³⁴ The due process clause is a relevant consideration even when the defendant would experience no hardship in coming into the jurisdiction³⁵ and has no application to assertions of jurisdiction over defendants within the forum even when it would be unfair and inconvenient to drag a defendant across a large state.³⁶ Personal jurisdiction thus reflects institutional concerns about the proper allocation of authority among sovereigns in much the same way that subject-matter jurisdiction addresses the proper allocation of authority among courts.³⁷

borders are irrelevant, nor does he assert that the only consideration in personal jurisdiction is convenience to the parties. Rather, he acknowledges that policies of federalism and state sovereignty are advanced by vesting in individuals the "personal right to be free from the judicial authority of states lacking minimum contacts." *Id.* at 1065. Thus, Professor Drobak does not take issue with my premise that the law of personal jurisdiction reflects institutional concerns about the proper division of authority between sovereigns, albeit as an indirect result of enforcing personal rights. The point here is that this personal right is not different in kind from the right to object to the subject-matter jurisdiction, venue, or inappropriateness of the forum.

³⁴ *Cf.* Brilmayer, *supra* note 33, at 112; McDougal, *supra* note 33, at 8-10.

³⁵ The Supreme Court has stated that

[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980) (citing *Hanson v. Denckla*, 357 U.S. 235, 254 (1958)).

³⁶ See *Buckley v. New York Post Corp.*, 373 F.2d 175, 184 (2d Cir. 1967) (stating in dictum that a New York City newspaper must respond to actions in all other cities in the state).

³⁷ The Supreme Court's decision in *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694 (1982), while demonstrating the circularity of the distinctions between personal and subject-matter jurisdiction, does not affect this analysis. In order to explain why personal jurisdiction could be conferred on the court by the parties when subject-matter jurisdiction could not, the Court, as discussed *supra* note 28, decided that limits on personal jurisdiction were "ultimately a function of the individual liberty interest" rather than a function of federalism. See 456 U.S. at 702, 703 n.10. Accordingly, individuals could surrender those rights without affecting political relationships between sovereigns. In order to support that conclusion, the Court, closing the circle, observed that "if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement." *Id.* at 703 n.10. As demonstrated by Professor Drobak, see *supra* note 33, and as discussed above, the Court's characterization does not mean that institutional relationships between states are irrelevant to limits on personal jurisdiction. One could not explain the current law governing personal jurisdiction without reference to limits on the states' sovereign power and legitimate regulatory interests. Few seem to be suggesting that what the Court meant in *Compagnie des Bauxites* was that due process is merely a function of convenience and that state lines are otherwise irrelevant. Rather, the debate centers on the rather metaphysical, if not wholly semantic, question whether the "federalism" interest is an individual, waivable right, or whether it independently constrains a court's power if not asserted as an individual defense.

Although not as clearly political, the venue rules also involve legislative choices about which courts have the authority to resolve a given lawsuit. Focused perhaps more on the private interests of the litigants than on the distribution of sovereign authority, venue rules nevertheless reflect decisions about how to allocate judicial resources as well as how to adjust the relative power of the parties to select the forum. A given venue rule may be intended to deal with the problem of crowded court dockets or to provide certain economic benefits for the bar, not simply to serve the convenience of the parties.³⁸ It is difficult to reconcile such purposes with the characterization of venue as a matter of private privilege not implicating broader institutional concerns. Again, is the decision whether to resolve a dispute in one county rather than another significantly different from the decision to hear the case in a small-claims court rather than a court of general jurisdiction?

This is not to say that significant policies, distinct from those supporting specific forms of personal jurisdiction or venue, do not underlie the rules concerning subject-matter jurisdiction. The same, however, could be said for different types of subject-matter jurisdiction; the policies animating a jurisdictional-amount rule are significantly different from the policies behind federal-question jurisdiction.³⁹ What this does say is that the hierarchy of procedural limitations on courts' authority is composed of crude categories and that the social and political values they reflect overlap considerably. It is unreasonable, therefore, that the procedural characteristics and ramifications of the various doctrines should differ so drastically; the procedural effects of a given doctrine should be proportionate to the importance of the policies behind it.⁴⁰

The significance of this overlap is that most of the policies addressed in decisions about jurisdiction and venue are also addressed in the context of *forum non conveniens*, a doctrine practically devoid of hard rules, vested in the discretion of the trial court, and beyond effec-

³⁸ For instance, in 1946 Congress considered amending the venue rules for suits under the Federal Employer Liability Act (FELA) to eliminate the plaintiff's right to pursue a claim in any forum in which the defendant happened to do business. *See* H.R. 1639, 80th Cong., 1st Sess. § 7, 93 CONG. REC. 9180 (1947) (Jennings Bill). The debate in Congress focused on how solicitation of lawsuits by unscrupulous attorneys had diverted FELA litigation to several large cities. *See* 93 CONG. REC. 9180-83 (1947).

³⁹ *See* 28 U.S.C. § 1331 (1982) (federal-question jurisdiction); 28 U.S.C. § 1332 (1982) (requiring a minimum amount in controversy when jurisdiction is based on diversity of citizenship).

⁴⁰ *Cf.* Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 449-50 (1981) ("Instead of pigeonholing, we should directly face these questions of procedure, *res judicata*, waiver, and default, recognizing that the answers may vary with the nature and importance of the particular venue rule under examination.").

tive appellate review. As with decisions governing subject-matter jurisdiction and personal jurisdiction, forum non conveniens decisions may quite explicitly turn on determining which sovereign has the most significant relationship to the controversy—a question no less institutional or political than any inquiry based on personal or subject-matter jurisdiction. To the extent that the doctrine does not implicate institutional concerns, it focuses on fairness and inconvenience to the parties, matters also purportedly dealt with by venue rules and addressed by due process review of assertions of personal jurisdiction.⁴¹

The net effect is that policies advanced under a jurisdictional doctrine can be nullified by a subsequent forum non conveniens ruling. The forum non conveniens decision will not be subject to the constraints of precedent and appellate review that defined those policies in the jurisdictional context.

Acceptance of this doctrinal redundancy seems to be predicated on a model that portrays the four court-access doctrines as four layers of refinement, like an increasingly fine series of filters. Only cases that get by the preliminary jurisdictional filters pass through to the forum non conveniens filter. Because the preliminary filters are based on rules rather than on pure judicial discretion, the impression of maintaining a rule-based system for court access is preserved. Moreover, it appears that operation of the forum non conveniens doctrine will at worst reject a case that ought to be retained; even an irrational forum non conveniens doctrine cannot result in the assertion of jurisdiction over a case rejected by the jurisdictional filters.

This model is flawed. While it is certainly true that numerous cases fall outside of the courts' personal or subject-matter jurisdiction, numerous other cases are dismissed on forum non conveniens grounds because, while satisfying vague notions of "minimum contacts" or "fundamental fairness," they nevertheless lack sufficient connection with the forum to justify assertion of jurisdiction or application of the forum's

⁴¹ See *Time, Inc. v. Manning*, 366 F.2d 690, 696 (5th Cir. 1966) (both jurisdiction and venue are designed to ensure fairness and limit inconvenience to the defendant). Indeed, a number of commentators propose substituting a pure convenience analysis for jurisdictional rules. See, e.g., Seidelson, *Recasting World-Wide Volkswagen As a Source of Longer Jurisdictional Reach*, 19 TULSA L.J. 1, 2-3 (1983); cf. Silberman, *supra* note 12, at 116 (arguing that jurisdictional determinations should be made under the forum non conveniens rubric according to the convenience of litigating in a particular forum; only limitations placed on choice of law should involve balancing the interests of plaintiffs and defendants); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1166-67 (1966) (whether jurisdiction is appropriate should depend on considerations of convenience and jurisdictional bias in favor of the defendant, rather than on the court's power over persons and things).

law. In short, the very qualities presumably considered under jurisdictional rules are again considered under forum non conveniens because the jurisdictional rules were underinclusive: the rules were not effective in selecting those cases that were appropriate or inappropriate for resolution in the forum. In other words, someone has cut a hole in the jurisdictional filter.⁴²

Thus, while forum non conveniens technically cannot authorize jurisdiction greater than that permitted by jurisdictional rules, it in fact assumes the function of separating cases according to the forum's stake in resolving the dispute. Cases with the requisite formal territorial contacts bypass jurisdictional testing only to be carefully scrutinized under forum non conveniens "analysis." The net effect of this is that rather weighty "jurisdictional" issues are resolved in an informal forum non conveniens context. Furthermore, such an application of the forum non conveniens doctrine has the additional, untoward effect of retarding the development of formal court-access doctrine. A body of arbitrary and inconsistent decisions regarding court access is hidden behind a doctrine that has as its only formal standard the discretion of the trial court in determining whether retention of the cases is "appropriate." The inconsistency of results is accommodated by the imprecision of the doctrine.

The result of this procedural structure is that policies established pursuant to formal precedent and developed under one set of procedural rules can be reevaluated pursuant to a different set of procedural rules without the restraints of the same precedent. Difficult and important choices about court access and governmental interests are thus made in an informal, arbitrary, and inconsistent fashion. The next part of this Article suggests how such a seemingly illogical construct for controlling court access emerged.

II. DEVELOPMENT OF THE FORUM NON CONVENIENS DOCTRINE IN THE UNITED STATES

The doctrinal redundancy of the various court-access doctrines and the differences in the procedural ramifications of each doctrine appear

⁴² The venue filter in federal court has apparently been purposely cut so that cases slipping through the personal-jurisdiction filter will not be excluded because of improper venue. As notions of personal jurisdiction expanded in the wake of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), both the courts and Congress took steps to insure that definitions of venue would keep up with broadened notions of personal jurisdiction. Congress amended the venue statute to provide proper venue in any place where the defendant was "doing business," and the courts interpreted the venue provisions to be coincidental with amenability to service of process under jurisdictional rules. *See, e.g., Fraley v. Chesapeake & O. Ry.*, 397 F.2d 1 (3d Cir. 1968).

to be in significant measure the result of historical accident. As jurisdiction and venue evolved and adapted to the American judicial system, the doctrines were employed to serve diverse and changing social and political policies. Jurisdiction and venue both changed in substance, but they retained formal characteristics tied to archaic conceptions of them. The doctrine of *forum non conveniens* developed in the United States in direct response to the evolution of jurisdiction and venue and helped fill the growing gap between the form and substance of those doctrines.

Although bearing a Latin name, the *forum non conveniens* doctrine is of relatively recent origin. Not until 1948 was the doctrine accepted for general application in the federal courts, and it received little or no attention in the state courts until after the federal adoption.⁴³

Both courts and commentators have sought common-law precedent for the *forum non conveniens* doctrine in Scottish and British case law.⁴⁴ Such reliance is not well placed. Even in England and Scotland, the doctrine is a relatively new invention. The leading British decision came in 1906 in *Logan v. Bank of Scotland*⁴⁵ and represented a dramatic exception to the cardinal rule at common law of "*judex tenetur impertiri judicium suum*": a judge must exercise jurisdiction in every case in which he is seized of it.⁴⁶ The Scottish precedents are slightly

⁴³ At least two commentators have asserted that the doctrine has been employed in state courts since 1817. See Blair, *supra* note 5, at 3 n.15; Note, *Forum Non Conveniens and Foreign Plaintiffs: Addressing the Unanswered Questions of Reyno*, *supra* note 5, at 577 n.1. This conclusion, however, seems questionable. Many of the state cases cited by these studies involved rules that absolutely denied jurisdiction to claims brought by out-of-state plaintiffs or were decided under venue provisions that absolutely barred the action. Braucher, *supra* note 4, at 912-14; see, e.g., *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105 (1895); *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8411). Such provisions, unlike *forum non conveniens*, did not provide the trial courts with discretion; rather, they absolutely precluded assertion of jurisdiction. See Braucher, *supra* note 4, at 912-13. Moreover, until 1929 it was thought that the doctrine was a violation of the privileges and immunities clause of the Constitution because it tended to have the effect of permitting actions by citizens and foreclosing actions by noncitizens. See *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230) (holding that the privileges and immunities clause protects those privileges and immunities that are "fundamental," including the ability "to institute and maintain actions of any kind in the courts of the state"). The Supreme Court's decision in *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377 (1929), was seen as a significant opening of the door for use of the *forum non conveniens* doctrine in federal court because it found no privileges and immunities violation in the application of the doctrine. See Barrett, *supra* note 5, at 389-93; Comment, *Forum Non Conveniens, A New Federal Doctrine*, *supra* note 5, at 1235. Presumably, the privileges and immunities clause would have imposed a similar restraint on state courts.

⁴⁴ See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947); Blair, *supra* note 5, at 20.

⁴⁵ [1906] 1 K.B. 141.

⁴⁶ See A. GIBB, *THE INTERNATIONAL LAW OF JURISDICTION IN ENGLAND AND SCOTLAND* 220 (1926). There is some controversy over whether in fact the English have adopted a general doctrine of *forum non conveniens*. Some have asserted that the

older, dating from 1866⁴⁷ (still well after the establishment of the American judicial system), and like the British cases were acknowledged to be at odds with the established duty of courts to exercise jurisdiction.⁴⁸

Moreover, significant differences between the British and American conceptions of jurisdiction and venue rendered the British and Scottish forum non conveniens doctrines ill-fitting models for the federal system; there is not the same degree of doctrinal redundancy of jurisdic-

Scottish and British doctrines are functionally identical. *See id.* at 212. Others have pointed out that the defendant's burden of proof when making a forum non conveniens motion in England is considerably heavier than the corresponding burden of a Scottish defendant. The English defendant must demonstrate "that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way," *St. Pierre v. South Am. Stores, Ltd.*, [1936] 1 K.B. 382, 398, whereas the Scottish defendant may simply establish that "the interests of the parties would more appropriately be served and the ends of justice would more appropriately be secured" elsewhere. *Credit Chimique v. James Scott Eng'g Group*, 1979 Sess. Cas. 406, 406. *See also* Boden, *Forum Non Conveniens: An English Reality?*, 13 KINGSTON L. REV. 65, 72 (1983) ("Under Scottish law, the doctrine . . . will be applied and an action stayed when there is a court other than the domestic (Scottish) one which is more suitable for the ends of justice. By comparison, . . . an English court may stay an action whenever it is necessary to prevent injustice."); Briggs, *Forum Non Conveniens—Now We Are Ten?*, 3 LEGAL STUD. 74, 78 (1983) (the traditional English approach requires an "abuse of process," while the Scottish courts look for the appropriate forum to serve the "ends of justice"); *cf.* Note, *The Convenient Forum Abroad Revisited*, *supra* note 5, at 764 (some federal circuit courts follow the British model requiring a showing of "injustice" while others focus on the "convenience factors" inherent in the Scottish standard).

The doctrine has not been as popular with British as with Scottish or American courts, possibly because of a different British attitude toward forum shopping. While the British courts have resented, and have even restrained, British citizens seeking remedies in United States courts, *see, e.g.*, *Smith Kline & French Laboratories, Ltd. v. Bloch*, [1983] 1 W.L.R. 730 (C.A. 1982), they have been more tolerant of foreign plaintiffs seeking the protection of "enlightened" British law in British courts, *see* Silberman, *Shaffer v. Heitner: The End of An Era*, 53 N.Y.U. L. REV. 33, 89 n.288 (1978) ("English courts will apply English law to a contract where, although it has no relationship to England, the parties have chosen English law.").

⁴⁷ *See* *Clements v. Macaulay*, 1866 Sess. Cas. M. 583. Earlier dismissals under a doctrine of *forum non competens* seem to have been limited to specific cases of attempts to administer foreign estates in Scotland and disputes involving foreign partnerships. *See id.* at 592-93. The leading Scottish precedent in the twentieth century is *La Société du Gaz v. La Société Anonyme de Navigation "Les Armateurs Français"*, 1926 Sess. Cas. 13, 14 (holding that "in the interests of the parties and for the ends of justice" the case at hand would more suitably be tried in France than in Scotland).

⁴⁸ In *Clements v. Macaulay*, 1866 Sess. Cas. M. 583, Lord Justice-Clerk Inglis stated,

[I]n cases in which jurisdiction is competently founded, a Court has no discretion whether it shall exercise its jurisdiction or not, but is bound to award the justice which a suitor comes to ask. . . . [T]he plea [of forum non conveniens] must not be stretched so as to interfere with this general principle of jurisprudence.

Id. at 593.

tion, venue, and forum non conveniens doctrine in the United Kingdom as there is in the United States. Indeed, the distorted American emulation of the British court system in general seems to be a principal cause of the lack of coherence in American court-access doctrine. Whereas American law has employed two doctrines to determine the situs of trial—jurisdiction and venue—the distinction at common law was less clear. Personal jurisdiction, in the American sense of a limitation on the territorial reach of a court's power, was not really an issue in England; the king's arm reached around the world.⁴⁹ Although a default judgment could not be entered against an absent defendant, the British courts maintained the power to compel an absent defendant's attendance through distraint of property, or even a declaration of "outlawry" if the defendant owned no property capable of confiscation.⁵⁰ Thus, a defendant was considered within the power or authority of the king's court even when outside the territorial limits of the country.⁵¹

The British courts, nevertheless, evolved a set of rules to determine where within the kingdom a case should be heard. Prior to the separation of king and courts, the answer was simple: trial would be held wherever the king was sitting.⁵² Not until the reign of Edward III (1327-1377) did the courts cease following the king in all cases.⁵³

After the resolution of lawsuits was delegated to the courts, venue became slightly more complicated. The earliest venue rules grew out of the jury system. A specific venue was required in certain "local" actions thought to require jury members familiar with the facts in controversy.⁵⁴ Until 1705, in fact, all actions had to be brought in the county where the cause of action arose or in the county where the evidence was located.⁵⁵ Although the function of the jury eventually changed so that it was no longer appropriate for jury members to use their own knowl-

⁴⁹ See Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 297-98 (1956).

⁵⁰ See Blume, *Place of Trial of Civil Cases*, 48 MICH. L. REV. 1, 11-12 (1949).

⁵¹ See, e.g., Ehrenzweig, *supra* note 49, at 299.

⁵² See Blume, *supra* note 50, at 5.

⁵³ See Blume, *supra* note 50, at 4. By as early as 1172, the records and equipment of the Court of the Exchequer had become too bulky to be transported around the country. The Court thus settled in one place for its own convenience and not that of the parties involved. See Blume, *supra* note 50, at 3. The other courts gradually followed suit. See Blume, *supra* note 50, at 4-5. One of the achievements of the Magna Carta in 1215 was to provide that "[c]ommon pleas shall not follow [the king's] court, but shall be held in some fixed place." See Blume, *supra* note 50, at 4.

⁵⁴ See, e.g., J. GOULD, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS § 103, at 101-03 (Boston 1832); see also 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 384 (Oxford 1770).

⁵⁵ See R. BOOTE, AN HISTORICAL TREATISE OF AN ACTION OR SUIT AT LAW 97 (London 1766), cited in A. EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS 104 n.11 (1962).

edge to resolve a controversy, the concept of local venue remained, albeit as an anachronism.⁵⁶ Eventually, all transitory actions could be brought wherever the defendant was found, but the defendant as a matter of course could move for transfer to the county where the cause of action arose, presumably the place where evidence would be most accessible.⁵⁷

The application of these British procedural concepts to the American judicial system proved confusing. Limits on the authority of state courts were not simply a function of the location of evidence. Rather, state boundaries represented territorial limits on the power of the sovereign, a problem encountered less frequently at common law.⁵⁸ English venue rules could specify places throughout the country where trial should be held; in America, state venue choices were limited to forums within the state. If trial outside the state was more appropriate, the state's courts could only decline jurisdiction: they could not dictate the appropriate forum. Only a governmental unit with interstate authority could intercede in disputes between potential forums in different states.⁵⁹ This interstate mediation was found in the limits on state jurisdiction imposed by the due process clause.⁶⁰ Thus, for the state courts, jurisdiction replaced venue as the primary determinant of the place of trial on an interstate level. Venue remained in use at the state level to determine the location of trial within the state.

In the federal system, the power of the courts was not limited by state boundaries, but the courts did not assume the role of national adjudicators. Although Congress may have possessed the power to create trial courts with nationwide personal jurisdiction,⁶¹ it chose instead to limit the reach of the federal trial courts to that of the state courts.⁶² The Judiciary Act of 1789 limited the "venue" of actions filed in the federal trial courts to the district in which the defendant was served.⁶³

⁵⁶ See Blume, *supra* note 50, at 16-18.

⁵⁷ 4 & 5 Ann., ch. 16, § 6 (1705) (transitory actions may be brought in any country), cited in A. EHRENZWEIG, *supra* note 55, at 105.

⁵⁸ State boundaries were apparently relevant in limiting the assertion of jurisdiction over foreign defendants. See A. GIBB, *supra* note 46, at 23-26, 193.

⁵⁹ See Currie, *supra* note 4, at 422-24.

⁶⁰ See *Pennoy v. Neff*, 95 U.S. 714 (1877).

⁶¹ See Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 1-2 (1982); Clermont, *supra* note 40, at 427; see also *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 286 n.3 (3d Cir.) (where service of process is accomplished by "wholly federal means," it may be appropriate to look to the defendant's contacts with the United States rather than with the particular forum state), *cert. denied*, 454 U.S. 1085 (1981); Lilly, *supra* note 29, at 122-23.

⁶² See Clermont, *supra* note 40, at 427-28.

⁶³ See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79 (codified as amended

Because each state was assigned a district, and no district crossed state lines, the jurisdiction of the federal trial courts was coincidental with that of the states.⁶⁴ Furthermore, once the defendant was served, the federal statute imposed no further limitations on the plaintiff's choice of forum. Although this statute has been characterized as a rule of venue,⁶⁵ it appears to be conceptually identical to a jurisdictional rule: it did not specify where a given action should be tried, but rather defined the reach of trial-court process.⁶⁶

Although the federal government did have the power to specify the appropriate district for trial, it did not exercise that authority until 1858. The first true venue rule forced the plaintiff to sue in the district of the defendant's residence.⁶⁷ The only exception was for "local" actions concerning land, which were considered appropriately resolved only by a court of the district in which the land was situated.⁶⁸ This rule was amended in 1875, and it once again provided for suit wherever the defendant "shall be found."⁶⁹ In 1888, plaintiffs in diversity cases were given the option of suing in the district of either the plaintiff's or the defendant's place of residence.⁷⁰ In 1966, the last major amendment was added, providing venue in the judicial district "in which the claim arose."⁷¹

The requirements of venue in the federal courts thus have not remained constant, and the function of venue has never been clearly defined. In theory, venue differs from jurisdiction in that it specifies where trial should be held, rather than simply where it could be held.

at 28 U.S.C. § 1391 (1982)). The statute provided that

no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. . . . And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ

Id.

⁶⁴ 1 J. MOORE, *supra* note 23, ¶ 0.140[3], at 1322-24.

⁶⁵ See Blume, *supra* note 50, at 38-39.

⁶⁶ See Clermont, *supra* note 40, at 430.

⁶⁷ See Act of May 4, 1858, ch. 27, § 1, 11 Stat. 272 (codified as amended at 28 U.S.C. § 1391 (1982)).

⁶⁸ See *id.* The statute did not define the distinction between local and transitory actions but was deemed to incorporate the common-law doctrine. See 1 J. MOORE, *supra* note 23, ¶ 0.142[2.-1], at 1360-70.

⁶⁹ Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1391 (1982)).

⁷⁰ See Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433, 434 (codified as amended at 28 U.S.C. § 1391 (1982)).

⁷¹ Act of Nov. 2, 1966, Pub. L. No. 89-714, 80 Stat. 1111 (codified as amended at 28 U.S.C. § 1391 (1982)).

However, venue never effectively did that. Until 1858 it simply mirrored the jurisdictional limits of the courts, and after 1888 it provided a range of options to the plaintiff without ever indicating where a suit ought to be brought. It certainly did not promote trial in the fairest, most efficient, or most convenient forum. As drafted, venue guidelines had little impact on the place of trial beyond that accomplished by the limitations imposed by personal jurisdiction.⁷² This redundancy was exacerbated as courts reinterpreted statutory venue requirements in the wake of *International Shoe Co. v. Washington*⁷³ to account for expanded conceptions of permissible personal jurisdiction. The definition of "residence" in the venue statute⁷⁴ was interpreted to be consistent with amenability to process under long-arm statutes, so that venue was rarely an independent limitation on a plaintiff's choice of forum.⁷⁵

While the absence of any meaningful venue limitations on a plaintiff's choice of forum may appear to have been conducive to forum shopping, thereby creating a need for further limits on choices of forum, the doctrine of forum non conveniens was virtually unheard of, outside of the admiralty context, prior to 1929.⁷⁶ This apparent anomaly can be explained not only by a presumably smaller number of interstate and international transactions, but also by the existence of jurisdictional limits far more rigid than those that exist today. At least after 1877 and *Pennoyer v. Neff*,⁷⁷ jurisdiction was very much tied to a "power theory" and strict territorialism.⁷⁸ A court's power was linked to the geographic limits of the state boundaries; the court possessed jurisdiction over persons and property within those boundaries and was otherwise without jurisdiction. The "two well-established principles of

⁷² See Currie, *supra* note 4, at 431; cf. Foster, *Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217, 1217 (1930) (arbitrary American venue and jurisdiction rules were taken from England and were never well adapted to the federal system). See generally Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 MICH. L. REV. 307, 307-15 (1951) (analyzing the policy choices reflected in various venue provisions).

⁷³ 326 U.S. 310 (1945).

⁷⁴ 28 U.S.C. § 1391(c) (1982).

⁷⁵ See, e.g., *Fraleigh v. Chesapeake & O. Ry.*, 397 F.2d 1, 4 (3d Cir. 1968); *Houston Fearless Corp. v. Teter*, 318 F.2d 822, 825 (10th Cir. 1963); C. WRIGHT, *supra* note 17, § 42, at 242-44; cf. Abrams, *supra* note 61, at 7-9 (arguing that venue should not operate as a limitation on choice of forum separate from that imposed by personal jurisdiction).

⁷⁶ Paxton Blair, writing in 1929, could find only a handful of court cases in which the doctrine was even mentioned. See Blair, *supra* note 5, at 21-30. It was, however, Blair's contention that the courts had in effect been applying the doctrine in different contexts without being aware of it, like "Molière's M. Jourdain, who found he had been speaking prose all his life without knowing it." Blair, *supra* note 5, at 21-22.

⁷⁷ 95 U.S. 714 (1877).

⁷⁸ See Silberman, *supra* note 46, at 45-46.

public law"⁷⁹ articulated in *Pennoyer*—a court's exclusive jurisdiction over persons and property within state borders and its lack of jurisdiction over persons and property beyond state borders—created a system in which there was little or no concurrent jurisdiction between states, and a plaintiff's choice of forum was severely limited. It is therefore not surprising that the *forum non conveniens* doctrine was rarely invoked prior to *International Shoe*. The doctrine seems to have developed in response to the enlargement of jurisdictional limits after *International Shoe*, as well as to the social and political forces behind this expansion.⁸⁰

The same forces of industrialization and modernization that led the courts to reconceptualize personal jurisdiction⁸¹ resulted in an increase in the business of the courts. By the late 1920's, residents of the major urban centers, which had undergone rapid industrial expansion,⁸² found their courts extremely crowded.⁸³ Although the causes were no doubt complex, one of the reasons for the congestion was perceived to be the solicitation of lawsuits properly belonging in other districts.⁸⁴ It was believed that the courts were in need of a tool to close

⁷⁹ *Pennoyer*, 95 U.S. at 722.

⁸⁰ Cf. Comment, *Forum Non Conveniens, A New Federal Doctrine*, 56 YALE L.J. 1234, 1234 (1947) (expansion of personal jurisdiction has been countered by development of the *forum non conveniens* doctrine).

⁸¹ See *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), in which the court said,

Advanced means of distribution and other commercial activity have made possible these modern methods of doing business, and have largely effaced the economic significance of State lines. By the same token, today's facilities for transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other States.

Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality

Id. at 442-43, 176 N.E.2d at 766. *Accord* *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958). See generally Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1162-82 (discussing the development of the corporation and its effect on American jurisdictional principles).

⁸² See, e.g., R. SILVERMAN, *LAW AND URBAN GROWTH: CIVIL LITIGATION IN THE BOSTON TRIAL COURTS, 1880-1900*, at 11-13 (1981).

⁸³ See Blair, *supra* note 5, at 1 (citing Report of the Special Calendar Committee, N.Y. App. Div., 1st Dep't (June 20, 1927)); cf. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 234 n.91 (1948) (number of civil nonbankruptcy cases in federal court almost doubled between 1940 and 1947).

⁸⁴ See Blair, *supra* note 5, at 34 ("[L]itigation instituted in an inappropriate forum . . . proceeds deliberately from a desire to sue where verdicts are largest Calendars become congested, and local taxpayers suffer unjustly"); see also J.

the courthouse doors.⁸⁵

Moreover, a number of judicial and legislative actions from 1938 through 1948 put pressure on the Court to develop a doctrine to limit access to the federal courts. The first such development was the restriction of federal common law in *Erie Railroad v. Tompkins*⁸⁶ in 1938. The regime of *Swift v. Tyson*,⁸⁷ whatever its defects, created uniformity in the law applied in federal courts and thereby limited any incentive for forum shopping at the federal level. While *Erie* limited the incentive to shop between state and federal forums, it renewed the incentives for parties to choose strategically among federal courts. Thus the federal courts had a new-found need for a procedural defense against a flood of litigation.

The second development generating a need for the adoption of a forum non conveniens doctrine was the expansion of personal jurisdiction and the demise of *Pennoyer v. Neff*. In the 1946 decision in *International Shoe*, the territorialist theory of jurisdiction gave way to a far more complex amalgam of jurisdictional theories.⁸⁸ Jurisdiction was not simply an expression of geographic boundaries; it represented a balance of the state's regulatory interest in the conduct at issue, the relative convenience of holding trial in the jurisdiction, the foreseeability of trial within the jurisdiction, and the *quid pro quo* notion that if a defendant availed herself of the forum's laws it was equitable to subject her to its jurisdiction. The minimum-contacts test developed in *International Shoe* was in some sense based on all of these policies.⁸⁹ Because juris-

AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 48-49 (1976) (describing problems with contingent fees and ambulance chasing); *infra* note 101 (quoting a Congressman's description of one attorney's practices).

⁸⁵ Cf. Dainow, *supra* note 5, at 871 (commerce clause employed in 1920's as a means of controlling "flood of imported litigation").

⁸⁶ 304 U.S. 64 (1938).

⁸⁷ 41 U.S. (16 Pet.) 1 (1842). *Swift* held that in matters of "general" common law, where the state had not enacted specific statutory provisions, the federal courts were free to decide for themselves what "the law" was, independent of what the state courts had said. See generally C. WRIGHT, *supra* note 17, § 54, at 347-52 (describing the pre-*Erie* regime).

⁸⁸ See Lilly, *supra* note 29, at 88-90.

⁸⁹ Three separate strands of due process—convenience, state regulatory interest, and *quid pro quo*—can be discerned in three paragraphs of the opinion:

[Due process] demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An "estimate of the inconveniences" which would result to the corporation from a trial away from its "home" . . . is relevant in this connection.

. . . .
[A]lthough the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability

diction no longer depended on the physical presence of a defendant within the jurisdiction, a number of states could assert jurisdiction over the same controversy, particularly when a corporate defendant was involved. Thus plaintiffs were given a whole new set of options to consider in selecting forums.

The Court's decision in *International Shoe* was presaged in 1939 by the demise of limitations on the venue of suits against corporations. In *Neirbo Co. v. Bethlehem Shipbuilding Corp.*,⁹⁰ the Court held that corporations that consented to be sued in a state pursuant to state law also waived their privilege under the Judiciary Act of 1875, as amended in 1887, not to be sued except where they "resided." The opinion of Justice Frankfurter furnished the analytic prerequisite to *International Shoe*: the limitations imposed on the place of trial, in contrast to the "power" of the court to adjudicate, represent a "privilege" vested in the defendant and not a limit on the authority of the tribunal. Thus, the "privilege" may be waived without frustrating the congressional intent reflected in the venue statute. This analysis mirrors the shifting of the focus in *International Shoe* from the public issue of which states could assert their sovereignty without impairing the sovereignty of another state to the private issue of whether a defendant is being treated fairly.⁹¹

By conceptualizing the issue of the place of trial as something pri-

on the corporation has not been thought to confer upon the state authority to enforce it, . . . other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit. . . .

. . . [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

International Shoe, 326 U.S. at 317-19 (citations omitted) (quoting *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930)).

⁹⁰ 308 U.S. 165 (1939).

⁹¹ See Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U.L. REV. 1112 (1981), in which Professor Redish argues that any federalism component of personal jurisdiction must be derived from the full faith and credit clause, not the fourteenth amendment, which is concerned with protecting individual rights rather than limiting states' powers. He accordingly views *Pennoy* as an aberration, and *International Shoe* as a return to a historically sounder view of due process. *See id.* at 1112-21; *see also* *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473, 1482 (1984) (Brennan, J., concurring) (state interests are not properly part of the due process equation; the only function of the due process clause is to protect individual liberty interests); Drobak, *supra* note 33.

vate to the litigants and not embracing broader political issues involving the claims of conflicting sovereigns to adjudicate and regulate the conduct at issue, the *Neirbo* Court smoothed the way for an ad hoc and discretionary resolution of the venue issue. However much choice of venue might determine substantive rights, resolve the choice of law, or implicate the public interest, only private privileges were being altered, and the treatment of these privileges was a task properly vested in the sound discretion of the trial court.

Both *International Shoe* and *Neirbo* heralded the development of the forum non conveniens doctrine not only because of the forum shopping they induced, but also because of the doctrinal muddle they engendered. When Justice Stone acknowledged in *International Shoe* that personal jurisdiction had evolved beyond a power theory into a more complex amalgam of policies,⁹² the conceptual distinctions between venue, jurisdiction, and forum non conveniens were hopelessly blurred. While this expansive conception of jurisdiction in one sense created a need for a further limitation on a plaintiff's choice of forum, in another sense it made the employment of any other doctrine totally redundant. The personal-jurisdiction doctrine now accounted for the sufficiency of the state's interest in the controversy as well as the relative burdens on the parties.⁹³ The development of a second doctrine, the application of which was vested in the sound discretion of the trial court, and which tested for the very same factors as personal jurisdiction, necessarily diluted the importance of personal jurisdiction and promoted judicial tolerance of its vagueness, ambiguity, and excesses. If the new conception of jurisdiction was unworkable, or resulted in anomalous applications, it hardly mattered when everything could be straightened out with the forum non conveniens doctrine.⁹⁴

⁹² See generally Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 577-86 (1958) (examining in personam jurisdiction over corporations before *International Shoe* and discerning three separate doctrines: "consent," "presence," and "doing business").

⁹³ Both the regulatory-interest and convenience components of *International Shoe* were somewhat eclipsed in later years. The Court in *Hanson v. Denckla*, 357 U.S. 235 (1958), held unconstitutional Florida's assertion of jurisdiction over an out-of-state bank, despite Florida's apparent regulatory interest in settling an estate and, as Justice Black pointed out in dissent, despite the absence of any demonstrated inconvenience of the forum. See *id.* at 258-59 (Black, J., dissenting); cf. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (jurisdiction may not be asserted if the defendant has not purposefully availed itself of the benefits of the forum, even if the litigation would involve the forum's interest in the safety of its roads and would not be inconvenient for the defendant).

⁹⁴ Cf. Abrams, *supra* note 61, at 47-49 (arguing that forum non conveniens should be used to weed out those cases that pass jurisdictional tests but are "so little affiliated with the United States that they should not be heard in the federal court

Ironically, the third judicial development acting as a catalyst for the development of forum non conveniens doctrine was one that elevated the importance of venue. *Baltimore & Ohio Railroad v. Kepner*⁹⁵ involved an action under the Federal Employers Liability Act (FELA)⁹⁶ in federal court in a state having no connection with the controversy other than being one of several places where the defendant railroad was "doing business." The Court in *Kepner* prohibited a court in the state where the plaintiff resided and where the cause of action arose from enjoining the FELA action.⁹⁷ Instead of viewing venue as a protection for the defendant against suit in an inconvenient location—the conception of venue articulated by Justice Frankfurter in *Neirbo*—the Court in *Kepner* saw venue as a legislative judgment about where plaintiffs had the privilege of suing, and any abrogation of that privilege would be at odds with a legislative directive: "A privilege of venue, granted by the legislative body which created this right of action, cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative"⁹⁸

Although the rationale of the *Kepner* decision was bottomed on deference to legislative intent, the decision met with extreme congressional disapproval. The following year, the House of Representatives passed the Jennings Bill,⁹⁹ which would have redefined venue in FELA actions against railroads to eliminate the defendant's residence and places of business as appropriate venues. The bill would have required instead that suit be brought either where the plaintiff resided or where the cause of action arose.¹⁰⁰ Extensive debate on the floor of the House revealed that a number of Congressmen were disturbed by a perceived increase in forum shopping by attorneys in the Chicago and New York areas who were diverting business from the rural bar and overloading the courts in the metropolitan areas.¹⁰¹

system").

⁹⁵ 314 U.S. 44 (1941).

⁹⁶ 45 U.S.C. §§ 51-69 (1982).

⁹⁷ Cf. *Miles v. Illinois Cent. R.R.*, 315 U.S. 698 (1942) (holding that a state court may not enjoin a citizen from pursuing a FELA action in another state court).

⁹⁸ *Kepner*, 314 U.S. at 54.

⁹⁹ H.R. 1639, 80th Cong., 1st Sess. (1947).

¹⁰⁰ For a general discussion of venue in FELA actions and the Jennings Bill, see Barrett, *supra* note 5.

¹⁰¹ Congressman Jennings, sponsor of the bill, was particularly exercised by the activities of one immigrant attorney:

One man in Chicago, Sol Andrews, Russian-born, who got a license to practice law, has a quarter of a million dollars invested in this racket.

. . .

. . . [T]his man Andrews, . . . this Russian, has organized a side-

Why the Jennings Bill never got through the Senate is unclear, but it appears that its subject matter intersected with a larger project: the codification of federal statutory law in the United States Judicial Code.¹⁰² Included in that codification were two provisions that would have an important impact in development of the forum non conveniens doctrine. First, Congress expressly responded to the *Kepner* case by passing 28 U.S.C. § 1404,¹⁰³ the transfer provision for federal courts. Although the new code was not enacted until several months after the Supreme Court's adoption of the forum non conveniens doctrine in *Gulf Oil Corp. v. Gilbert*,¹⁰⁴ the transfer provision had been proposed several years before.¹⁰⁵ In a creative bit of retroactive legislative history, annotations to section 1404 refer to it as a codification of the forum non conveniens doctrine.¹⁰⁶ The annotation more accurately suggests a congressional purpose of overruling the *Kepner* decision,¹⁰⁷ thus making clear to the Court that judicial adjustment of the place of trial would not be inconsistent with the congressional intent to establish interstate venue.

Ironically, the second relevant provision of the 1948 Code was one

kick corporation, the stockholders of which are his wife and his brother.

. . . Andrews would send runners out; he hired a yard foreman out in California, and he would send his runners out to the injured man or to the family of a deceased and they would show them a big check that he claimed he had gotten as a recovery, and then when the person solicited would sign a contract, in order to fence against trouble, if Andrews should be hauled into court his runners would antedate a letter and have the victim sign a letter reciting that they had heard of a big recovery that Andrews had obtained for some person and they wondered if they could induce him to take his lawsuit and do something for him.

93 CONG. REC. 9180-81 (1947).

¹⁰² See generally J. MOORE, MOORE'S JUDICIAL CODE: COMMENTARY ¶ 0.03(29), at 202-03 (1949).

¹⁰³ 28 U.S.C. § 1404 (1982).

¹⁰⁴ 330 U.S. 501 (1947).

¹⁰⁵ Indeed, the proposed provision was cited as support for the court of appeals' assertion in *Gulf Oil Corp. v. Gilbert*, 153 F.2d 883 (2d Cir. 1946), *rev'd*, 330 U.S. 501 (1947), that the remedy for inconvenient venue should be legislation rather than judicial adoption of forum non conveniens. See 153 F.2d at 886.

¹⁰⁶ See 28 U.S.C. § 1404(a) annot. (1982) (Historical and Revision Notes); cf. Currie, *supra* note 4, at 416.

¹⁰⁷ See 28 U.S.C. § 1404(a) annot. (1982) (Historical and Revision Notes):

Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see [*Kepner*], which was prosecuted under the [FELA] in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so.

that made forum shopping easier: the expansion of corporate venue under 28 U.S.C. § 1391.¹⁰⁸ The new provision finished the work started by the *Neirbo* case and provided venue against corporate defendants in any district in which they were doing business, regardless of any formal appointment of agent as in *Neirbo*. This provision is an odd counterpoint to both the Jennings Bill—which would have, in effect, partially overruled *Neirbo*—and section 1404, which expressed a similar concern about the overbreadth of existing venue provisions. Legislative history sheds no light on this apparent inconsistency.

In one sense, however, sections 1404 and 1391 are consistent. Taken together, the two provisions represent a legislative abdication of control over the place of trial. The 1948 Code first expanded plaintiffs' choice of forums, then hedged that choice by allowing the courts to frustrate it wherever they thought it appropriate. The Code got Congress out of the business of specifying the appropriate place of trial and delegated that task to the courts.

A. *Judicial Power to Dismiss Prior to 1947*

The delegation from Congress of the power to dismiss unwanted lawsuits was eagerly accepted by the courts. Judicial abstention was the order of the day. Beginning in the midthirties, and continuing through the late forties, the Supreme Court developed a series of doctrines that divested the federal courts of authority to adjudicate.¹⁰⁹ In 1936, the Court cut back on federal-question jurisdiction in *Gully v. First National Bank*,¹¹⁰ holding that the case did not "arise under" federal law simply because a federal statute authorized the state law on which the plaintiff's claim was based. *Erie Railroad v. Tompkins*,¹¹¹ decided in 1938, eliminated the general federal common law. In 1941, a series of limiting doctrines emerged that precluded federal-court injunction of criminal proceedings,¹¹² prohibited the injunction of relitigation of federal judgments in state courts,¹¹³ and diminished federal-question jurisdiction in order to allow the state courts to answer state-law questions that could resolve the lawsuit and obviate the need to consider federal constitutional questions.¹¹⁴ Although these decisions were responses to

¹⁰⁸ 28 U.S.C. § 1391 (1982).

¹⁰⁹ See generally J. MOORE, *supra* note 102, ¶ 0.03(6), at 53-58.

¹¹⁰ 299 U.S. 109 (1936).

¹¹¹ 304 U.S. 64 (1938).

¹¹² See, e.g., *Beal v. Missouri Pac. R.R.*, 312 U.S. 45 (1941).

¹¹³ See *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941). *Toucey* was expressly overruled by the 1948 revision of the Anti-Injunction Act, 28 U.S.C. § 2283 (1982).

¹¹⁴ See *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

specific concerns about federalism and states' rights, they laid the ground for a broader principle of abstention and a sensitivity to the potential overbreadth of a court's formal jurisdiction.

In addition to the abstention doctrines motivated by federalism, the law developed a series of corollaries to the pre—*International Shoe* limitations on personal jurisdiction. The most frequently employed was the doctrine that a court should not accept jurisdiction where it would be forced to interfere in the internal affairs of a foreign corporation. Under the pre—*International Shoe* conception of personal jurisdiction, a corporation could not be present outside of its state of incorporation. Thus, in theory, a court was powerless to compel action by a foreign corporation.¹¹⁵ Surprisingly, as the fiction of corporate presence was abandoned, and states became empowered to subject foreign corporations to their judicial authority, the noninterference doctrine was relied on as precedent for the employment of the forum non conveniens doctrine.¹¹⁶ Yet it was the very abandonment of the narrower conception of personal jurisdiction over corporations that necessitated the invocation of the forum non conveniens doctrine to limit the reach of personal jurisdiction.

Perhaps the closest pre-1948 analogues to the modern principle of forum non conveniens were the equitable power of a court to enjoin its own citizens from pursuing vexatious out-of-state proceedings,¹¹⁷ an admiralty doctrine of forum non conveniens,¹¹⁸ and a short-lived commerce clause doctrine that precluded state courts from asserting jurisdiction over defendants engaged in interstate commerce when that action would "unreasonably obstruct, and unduly burden interstate commerce."¹¹⁹ Use of the commerce clause as an instrument to limit a plaintiff's choice of forum was substantially curtailed within eleven

¹¹⁵ See generally Note, *Forum Non Conveniens and the "Internal Affairs" of a Foreign Corporation*, *supra* note 5 (analyzing internal-affairs cases).

¹¹⁶ See, e.g., *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 130 (1933).

¹¹⁷ See, e.g., *Greenberg v. Greenberg*, 218 A.D. 104, 218 N.Y.S. 87 (1926) ("[A] court has the power to enjoin and restrain residents within its jurisdiction from prosecuting an action commenced in a foreign jurisdiction."); *Gwathmey v. Gwathmey*, 116 Misc. 85, 190 N.Y.S. 199 (Sup. Ct. 1921) (court has power to enjoin a husband's suit for divorce in another state if he has not acquired the necessary residence there), *aff'd*, 201 A.D. 843, 193 N.Y.S. 935 (1922); see also Note, *Injunctions Against Foreign Suits—A Survey of the New York Policy in Interstate Matrimonial Litigation*, 13 BROOKLYN L. REV. 148 (1947) (examining the injunction policy of New York courts with respect to interstate matrimonial litigation).

¹¹⁸ For general descriptions of this doctrine, see Bickel, *supra* note 4, at 13; Ehrenzweig, *supra* note 49, at 303-04.

¹¹⁹ *Davis v. Farmers Coop. Equity Co.*, 262 U.S. 312, 317 (1923). See generally Dainow, *supra* note 5, at 868-72; Foster, *supra* note 72, at 1232-39; Comment, *Conflict of Laws—Jurisdiction over Nonresident Carriers as Limited by Doctrine of Unreasonable Burden on Interstate Commerce*, 34 MICH. L. REV. 979 (1936).

years of the doctrine's adoption.¹²⁰ The absence of any clear standards for the doctrine's application yielded inconsistent results in the cases in which it was employed.¹²¹

Neither of the other two precursors was appropriate authority for a general doctrine of forum non conveniens. The admiralty device evolved in response to the absence of any venue provisions in admiralty.¹²² The formal jurisdiction of the admiralty courts was intentionally overinclusive to assure that seamen frequently working abroad were provided with an adequate remedy.¹²³ The forum non conveniens doctrine was the only tool available to limit the jurisdiction of the courts and was carefully molded to insure that there would be some remedy in every case while maintaining the comity of nations whose ships and subjects might be involved.¹²⁴ The doctrine was not designed to assure trial in the most convenient location.

¹²⁰ In *International Milling Co. v. Columbia Co.*, 292 U.S. 511 (1934), the Supreme Court declared *Davis v. Farmers Coop. Equity Co.*, 262 U.S. 312 (1923), which had been the primary authority for viewing excessive assertion of jurisdiction as violative of the commerce clause, to be "confined narrowly within the bounds of its own facts." 292 U.S. at 517. The Court permitted Minnesota to assert jurisdiction over a controversy between two Delaware corporations over a breach of contract occurring outside of Minnesota. The plaintiff's principal place of business was in Minnesota, and the defendant regularly conducted business in the state. Justice Cardozo, writing for the Court, held that the suit "may be a burden, but oppressive and unreasonable it is not." *Id.* at 521.

After *International Milling*, the doctrine was infrequently invoked when the defendant was otherwise subject to jurisdiction, particularly when the defendant was a resident of the forum. Compare *Ketch v. Atlantic Coast Line R.R.*, 51 F. Supp. 243 (D. Tenn. 1943) (suit by a Maine resident against an out-of-state corporation that conducted business in the forum state for injuries suffered in Georgia was not an unreasonable burden on interstate commerce); *Wynne v. Queen City Coach Co.*, 49 F. Supp. 103 (D.N.J. 1943) (New Jersey resident's suit against North Carolina defendant for injuries sustained in Tennessee did not unduly burden interstate commerce); *Karius v. All States Freight, Inc.*, 176 Misc. 155, 26 N.Y.S.2d 738 (Sup. Ct. 1941) (resident's suit based on accident in Pennsylvania against out-of-state corporation licensed to do business in the forum was not an unreasonable burden on commerce) with *Bohn v. Norfolk & W. Ry.*, 22 F. Supp. 481 (S.D.N.Y. 1937) (resident's action against a Virginia corporation not "doing business" in the forum for injuries sustained in Virginia violated the commerce clause); *Livingston v. Chesapeake & O. Ry.*, 18 F. Supp. 863 (N.D. Okla. 1937) (resident's suit against railroad having only a ticket agent in the state would unduly burden commerce).

The subsequent substitution of the forum non conveniens doctrine for an approach rooted in the commerce clause can be seen as consistent with the conceptual shift, *see supra* note 37, from viewing the place of trial in terms of the relationships between sovereigns to viewing it in terms of issues personal to the litigants.

¹²¹ See Farrier, *Suits Against Foreign Corporations as a Burden on Interstate Commerce*, 17 MINN. L. REV. 381, 386-90 (1933).

¹²² See Bickel, *supra* note 4, at 16 n.24.

¹²³ See Ehrenzweig, *supra* note 49, at 303-04; *cf.* Braucher, *supra* note 4, at 919 (discussing in the context of admiralty cases the federal courts' development of discretionary power to decline jurisdiction).

¹²⁴ See Bickel, *supra* note 4, at 20-22.

The power of courts to enjoin citizens from pursuing vexatious litigation in out-of-state forums resembled *forum non conveniens* in that the courts took many of the same considerations into account and that issuance of the injunction was vested in the broad discretion of the trial judge.¹²⁵ However, the doctrine was the inverse of a *forum non conveniens* doctrine; it was employed to protect the jurisdiction of the court issuing the injunction against usurpation by a foreign court,¹²⁶ not to rid the domestic court of suits that ought to have been brought elsewhere. Again, as in the admiralty cases, the practice was not at odds with other formal court-access doctrines.

In 1929, Paxton Blair, a Wall Street lawyer,¹²⁷ published an article in the *Columbia Law Review* in which he combined these threads under a single principle of *forum non conveniens*, which he described as "the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere."¹²⁸ Blair invoked the Scottish doctrine as common-law authority for the "inherent powers possessed by every court" to dismiss lawsuits when "necessary to the effective performance of judicial functions."¹²⁹ While acknowledging the formal absence of the *forum non conveniens* doctrine in American cases, Blair argued that the courts had in effect applied the doctrine in a number of cases by declining to assert jurisdiction for reasons of comity, absence of remedy, or convenience. For the first time, all of the jurisdiction-declining doctrines were contemplated as part of the same principle,¹³⁰ a principle that Blair insisted was well ingrained in Anglo-American law.

Blair's article was met with the kind of judicial reception that law professors dream of. Four Supreme Court decisions between 1929 and 1946 defined the parameters of a *forum non conveniens* doctrine that was virtually without reference prior to the Blair article.¹³¹ All but one

¹²⁵ See Note, *supra* note 117, at 157.

¹²⁶ See Note, *supra* note 117, at 149.

¹²⁷ See WHO'S WHO IN LAW 86 (J. Schwarz ed. 1937). Blair was an associate at Cadwalader, Wickersham & Taft at the time he wrote his seminal article on *forum non conveniens*. See *id.*

¹²⁸ Blair, *supra* note 5, at 1.

¹²⁹ *Id.* As discussed above, see *supra* text accompanying notes 44-48, reliance on Scottish precedent was of questionable propriety.

¹³⁰ Cf. Barrett, *supra* note 5, at 388; Currie, *supra* note 4, at 417.

¹³¹ See *Williams v. Green Bay & W.R.R.*, 326 U.S. 549 (1946); *Rogers v. Guaranty Trust Co.*, 288 U.S. 123 (1933); *Canada Malting Co. v. Paterson S.Ss., Ltd.*, 285 U.S. 413 (1932); *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377 (1929).

These decisions removed a number of legal obstacles to the widespread adoption of the broad *forum non conveniens* doctrine envisioned by Blair. See generally Barrett, *supra* note 5, at 389-99 (discussing the development of the doctrine of *forum non conveniens* in the state and federal courts); Braucher, *supra* note 4, at 914-22 (analyzing

cited Blair.¹³² By 1941, Justice Frankfurter was referring to "the familiar doctrine of *forum non conveniens*," which was "firmly imbedded in our law."¹³³

B. Gulf Oil Corp. v. Gilbert: *Federal Adoption of the Forum Non Conveniens Doctrine*

The *forum non conveniens* doctrine increased in popularity in the decade following the Blair article, but full-fledged acceptance by federal courts did not come until 1947, with the Supreme Court's decisions in *Gulf Oil Corp. v. Gilbert*¹³⁴ and *Koster v. (American) Lumbermens*

the state and federal limitations on courts' discretionary power to dismiss actions). The first was the argument that dismissing the claims of foreign plaintiffs represented an impermissible form of discrimination under either the full faith and credit clause or the privileges and immunities clause. The Court disposed of this problem in *Douglas*, reasoning that it was permissible to favor domestic plaintiffs because they paid for the operation of the courts in the forum state. Moreover, any discrimination was not *per se* against noncitizens, but rather against nonresidents. See *Douglas*, 279 U.S. at 387.

The second obstacle was the principle established in *Kepner*: that the legislature's provision of venue and jurisdiction in a given forum imposed a duty upon the court to exercise that jurisdiction. See *Kepner*, 314 U.S. at 44. In declining the exercise of its formal jurisdiction, a court was denying the plaintiff a right and abdicating its responsibility: "[T]he 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." *Hyde v. Stone*, 61 U.S. (20 How.) 170, 175 (1857). Removal of this obstacle was a gradual process. In *Canada Malting v. Paterson S.S., Ltd.*, 285 U.S. 413 (1932), the Court created an exception to the rule stated in *Hyde* for admiralty disputes between foreign parties. Justice Brandeis, writing for the Court, reasoned that a court's admiralty jurisdiction was by its very nature discretionary. See *id.* at 422-23 (citing Blair, *supra* note 5). He then opened the door for a more expansive power of dismissal by baldly asserting that "[o]bviously, the proposition that a court having jurisdiction must exercise it, is not universally true." *Id.* at 422.

This assertion was picked up the following year by *Rogers v. Guaranty Trust Co.*, 288 U.S. 123 (1933), in which the Court authorized dismissal on the grounds that a court could not be asked to interfere with the internal affairs of a foreign corporation. Such dismissals had been authorized in the past, but on the grounds that a court was without power to compel specific performance by an out-of-state corporation. See Note, *Forum Non Conveniens and the "Internal Affairs" of a Foreign Corporation*, *supra* note 5, at 493-94. The *Rogers* Court expanded the rationale for dismissal, holding that a court could consider "convenience, efficiency and justice" in determining whether to retain jurisdiction in "internal affairs" cases. See *Rogers*, 288 U.S. at 131. In *Williams v. Green Bay & W.R.R.*, 326 U.S. 549 (1946), the Court stated in dictum that the rule in *Rogers* was not limited to "internal affairs" cases, but could be used as an "instrument of justice" in any case in which it could be shown that the plaintiff's choice of forum was "vexatious or oppressive." *Id.* at 554-57.

¹³² See *Williams v. Green Bay & W.R.R.*, 326 U.S. 549, 555 n.4 (1946); *Canada Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413, 423 n.6 (1932); *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377, 382 (1929) (describing argument for respondent).

¹³³ *Kepner*, 314 U.S. at 55-56 (Frankfurter, J., dissenting).

¹³⁴ 330 U.S. 501 (1947).

*Mutual Casualty Co.*¹³⁵ The decisions in those cases were far from predetermined.

In *Gulf Oil*, the United States Court of Appeals for the Second Circuit reversed a New York district court's dismissal of an action brought by the owner of a warehouse in Virginia.¹³⁶ The plaintiff alleged that the warehouse was damaged by a fire caused by the defendant's negligent delivery of gasoline. The court determined that, as in *Kepner*, the legislature had bestowed a "privilege" on the plaintiff in enacting jurisdiction and venue rules that permitted suit to be brought in New York, and the courts had no business abrogating that privilege.¹³⁷ The Supreme Court reversed.

While Justice Black, in dissent, was troubled by the apparent frustration of legislative purpose inherent in the forum non conveniens doctrine,¹³⁸ the majority all but ignored the issue and sanctioned the forum non conveniens dismissal.¹³⁹ In a retreat from both *Neirbo* and *Kepner*,¹⁴⁰ Justice Jackson, writing for the majority, announced that the existence of proper jurisdiction and venue¹⁴¹ does not vest the plaintiff with a privilege to sue in the forum but merely *permits* the court to entertain the action if otherwise appropriate.¹⁴² Relying on a particularly formalized distinction, Justice Jackson reasoned that jurisdiction over "the person" merely subjects a party to the court's power to apply the applicable law, which includes the power to dismiss a proceeding on forum non conveniens grounds.¹⁴³

While this tenuous reasoning was virtually ignored in subsequent cases, the Court's definition of the broad parameters of the doctrine, encompassing every conceivably relevant public and private consideration, became a litany that would be quoted in many subsequent federal and state forum non conveniens decisions:

Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of

¹³⁵ 330 U.S. 518 (1947).

¹³⁶ See *Gilbert v. Gulf Oil Corp.*, 153 F.2d 883 (2d Cir. 1946), *rev'd*, 330 U.S. 501 (1947).

¹³⁷ See *id.* at 885.

¹³⁸ See *Gulf Oil*, 330 U.S. at 515 (Black, J., dissenting).

¹³⁹ See *id.* at 507-09.

¹⁴⁰ The Court distinguished the holding in *Kepner* by characterizing the venue statute there as a "special" manifestation of congressional intent to vest in plaintiffs an unequivocal right to bring suit in specified forums. See *id.* at 505-06.

¹⁴¹ In fact, venue in *Gulf Oil* was apparently improper, but the objection was waived by the defendant. See Braucher, *supra* note 4, at 927.

¹⁴² See *Gulf Oil*, 330 U.S. at 506-07.

¹⁴³ See *id.*

the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses.

If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.¹⁴⁴

A number of points call for comment. First is the Court's conclusion that it "wisely" did not attempt to articulate more precise guidelines and that application of the amorphous doctrine must be left to the

¹⁴⁴ *Gulf Oil*, 330 U.S. at 508-09 (footnotes omitted).

discretion of the trial court. With that remarkable assumption, the Court delegated to trial courts the judgment about when, how, and why a case should be dismissed or retained, and insulated that judgment from effective appellate review. The Court offered no further explanation why more specific guidance was not feasible or why full appellate review was inappropriate. While it is tempting to attribute those rules to a judgment that dismissal decisions are inherently fact-dependent, the public factors enumerated by the Court would seem primarily to involve legal questions about which jurisdiction has the most significant relation to the controversy, questions well within the competency of appellate courts.¹⁴⁵ Moreover, even to the extent that the forum non conveniens issue turned on facts, the trial court's decision in *Gulf Oil* was based on the paper record of affidavits, pleadings, and briefs¹⁴⁶ typical in forum non conveniens cases and thus would have been amenable to appellate review.¹⁴⁷

A more persuasive explanation for the extraordinary deference given to trial courts was suggested by Justice Black in dissent: to the extent that any precedent existed for a general doctrine of forum non conveniens, the majority relied on the equity doctrine permitting dismissal when a court would be required to interfere in the internal af-

¹⁴⁵ Although that issue was not prominent in *Gulf Oil*, a substantial percentage of subsequent forum non conveniens decisions have turned on such an informal "interest analysis." See, e.g., *Lake v. Richardson-Merrell, Inc.*, 538 F. Supp. 262, 274 (N.D. Ohio 1982) (Ohio has the greatest governmental interest in regulating the conduct of an Ohio pharmaceutical manufacturer whose decision in Ohio regarding Canadian distribution allegedly injured a Canadian citizen), *motion for dismissal denied sub nom. Haddad v. Richardson-Merrell, Inc.*, 588 F. Supp. 1158 (N.D. Ohio 1984); *Harrison v. Wyeth Laboratories*, 510 F. Supp. 1, 4-5 (E.D. Pa. 1980) (United Kingdom has the paramount interest in regulating distribution and labeling of pharmaceuticals in that country), *aff'd*, 676 F.2d 685 (3d Cir. 1982); *Michell v. General Motors Corp.*, 439 F. Supp. 24, 26 (N.D. Ohio 1977) (Canada has greatest interest in hearing claim brought by Canadian resident against American manufacturer of defective car seat); *Noto v. Cia Secula di Armanento*, 310 F. Supp. 639, 647-51 (S.D.N.Y. 1970) (New York has no interest in dispute between Dutch and Italian parties arising in Iranian port); *Islamic Republic v. Pahlavi*, 94 A.D.2d 374, 377-79, 464 N.Y.S.2d 487, 490-91 (1983) (New York has no interest in adjudicating dispute between the people of Iran and the former Shah; Iran has the paramount interest).

¹⁴⁶ See *Gulf Oil*, 330 U.S. at 509-10.

¹⁴⁷ See *SEC v. Coffey*, 493 F.2d 1304, 1311 (6th Cir. 1974); *Dempster Bros., Inc. v. Buffalo Metal Container Corp.*, 352 F.2d 420, 423 (2d Cir. 1965); *United States ex rel. Binion v. O'Brien*, 273 F.2d 495, 497 (3d Cir. 1959); *Chas. D. Briddell, Inc. v. Alglobe Trading Corp.*, 194 F.2d 416, 420 (2d Cir. 1952); see also *Bowles v. Beatrice Creamery Co.*, 146 F.2d 774, 780 (10th Cir. 1944) (clearly erroneous standard of review inappropriate when lower court made factual determinations on the basis of affidavits and pleadings; appellate court equally capable of examining evidence and drawing conclusions from it). See generally 5A J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE*, ¶ 52.04 (2d ed. 1984) (describing the effect of findings with respect to documentary evidence, uncontradicted testimony, and evidence by deposition).

fairs of a foreign corporation. In equity, the discretionary nature of the court's jurisdiction was part and parcel of the very notion of the court's power; there was no vested entitlement to equitable relief.¹⁴⁸ This precedent was inapposite authority for discretionary jurisdiction in courts of law, however, and provided inappropriate support for the standard of review established by the *Gulf Oil* Court.¹⁴⁹

Another key—and equally questionable—premise of the majority's position was the notion that, “unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.”¹⁵⁰ While this presumption in favor of a plaintiff's choice of forum apparently was fairly well established, it does not seem historically to have been based on any deliberate policy decision to bestow significant forum-shopping advantages on plaintiffs. Indeed, at common law, just the opposite principle, that suit must be brought where the plaintiff finds the defendant, was enshrined in a Latin maxim: *actor sequitur forum rei*.¹⁵¹ Moreover, the “evil” of forum shopping was a central focus of the Court's decision in *Erie Railroad v. Tompkins*, decided just nine years earlier.

Although the origins of the presumption cited by the Court are unclear, the process of historical accident again seems to be a plausible explanation. In an era in which conceptions of a court's personal jurisdiction were narrow—limited to immediate presence of the defendant's person or property—a rule that gave deference to the plaintiff's “choice” of forum was a modest bequest. The “choice” was in reality a burden of traveling to the defendant's home forum. When the scope of personal jurisdiction was subsequently expanded so that a defendant became subject to suit in numerous jurisdictions, a rule that once operated at a practical level to the disadvantage of plaintiffs eventually¹⁵²

¹⁴⁸ See *Gulf Oil*, 330 U.S. at 514 (Black, J., dissenting); accord, Braucher, *supra* note 4, at 925.

¹⁴⁹ In fact, in the Scottish decision cited by the Court in support of the existence of a power to dismiss for forum non conveniens, *Logan v. Bank of Scot.*, [1906] 1 K.B. 141, there is no mention of an abuse-of-discretion standard, and the court in *Logan* seems to engage in a *de novo* review of the lower court's findings. See *id.* at 153-54; see also *Clements v. Macaulay*, 1866 Sess. Cas. M. 583, 593-94 (delineating the factors that might influence a court to exercise its discretion and dismiss on “forum non competens” grounds despite proper jurisdiction). Note, however, that Professor Dainow, writing twelve years before the *Gulf Oil* decision, urged the adoption of a discretionary standard, citing British and Scottish practice in support. See Dainow, *supra* note 5, at 870.

¹⁵⁰ *Gulf Oil*, 330 U.S. at 508; see also J. GOULD, *supra* note 54, at 12; Dainow, *supra* note 5, at 883 (discussing the British rule that a plaintiff's choice of forum should not be disturbed unless it is found to be “vexatious”).

¹⁵¹ See A. GIBB, *supra* note 46, at 28.

¹⁵² It should be noted that the full forum-shopping impact of the presumption in favor of the plaintiff's choice of forum was not felt until some time after *Gulf Oil* was

gave them enormous control over both choice of forum and choice of law.¹⁵³

It is possible to make arguments for preferring the plaintiff's choice of forum.¹⁵⁴ The Court might have felt that the injured party should have easy access to judicial redress or that, in general, defendants have better resources to litigate in any given forum than plaintiffs. However, the Court gave no indication that the preference for the plaintiff's choice of forum was based on any rational policy choice. In giving trial courts the discretion to dismiss the proceeding, the *Gulf Oil* Court indicated that there were limits on the preference for plaintiffs' choices. But in failing to articulate either the reasons behind the preference, or the limits on its use, the Court left the law in a state of confusion. Trial courts were instructed to defer to a plaintiff's choice of forum, except when for unspecified reasons they should not.¹⁵⁵ Moreover, the trial court's resolution of the issue was placed beyond effective review; further appellate clarification was virtually foreclosed. Indeed, the Supreme Court did not speak on the matter for another thirty-five years.¹⁵⁶

decided. At the time of the *Gulf Oil* decision, the *lex loci* approach was dominant in the conflicts-of-laws doctrine throughout the country. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.11 (1981); RESTATEMENT OF THE LAW OF CONFLICT OF LAWS §§ 332, 378 (1934). Thus, a plaintiff had only a limited advantage in being able to choose one forum over another because, in either one, the same substantive law would govern the controversy. This uniformity broke down with the advent of "interest analysis" in the 1950's; some states rejected interest analysis as a conflicts tool, and states that adopted it differed as to how to weigh the respective state interests. See A. EHRENZWEIG, *supra* note 55, § 104. This allowed a plaintiff to manipulate the applicable law through choice of forum. That power was enhanced as more states moved toward a *lex fori* approach. See generally Korn, *supra* note 6, at 776, 789-91 (discussing a trend to abandon or modify the once universally accepted rule of *lex loci delicti*, which refers all conflicts with respect to substantive issues in a tort case to the law of the place of injury, and to adopt "flexible modern approaches").

¹⁵³ If, as a number of commentators have suggested, it is myopic for a court to consider only fairness to a defendant in evaluating the constitutional propriety of its jurisdiction, see, e.g., Lewis, *The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts*, 33 MERCER L. REV. 769, 816-17 & n.269 (1982); von Mehren & Trautman, *supra* note 41, at 1127-28, that myopia can be traced, at least in part, to the curious presumption that the plaintiff may choose freely from a range of potential forums. Once the defendant is thus placed at the plaintiff's mercy, limiting the number of potential forums through consideration of "fairness" to the defendant becomes the only way to even up the score.

¹⁵⁴ See, e.g., Seidelson, *Jurisdiction of Federal Courts Hearing Federal Cases: An Examination of the Propriety of the Limitations Imposed by Venue Restrictions*, 37 GEO. WASH. L. REV. 82, 85-86 (1968) (presumption *in limine* that the plaintiff has been wronged by the defendant justifies inconveniencing the defendant rather than the plaintiff).

¹⁵⁵ See *Gulf Oil*, 330 U.S. at 506-08.

¹⁵⁶ The Court next addressed the doctrine of forum non conveniens in *Piper Aircraft Corp. v. Reyno*, 454 U.S. 235 (1981). See *infra* text accompanying notes 176-213.

The last element of the *Gulf Oil* decision requiring scrutiny is the enumeration of the factors to be balanced by the trial court in deciding whether to dismiss a proceeding. The dual focus on private and public factors subsumes, in different language, the very same considerations the Court thought were relevant in determining whether jurisdiction was permissible under the minimum-contacts test of *International Shoe*: whether assertion of jurisdiction over the defendant would be inconvenient and whether the nature of the cause of action alleged is such that the state has an interest that justifies its assertion of jurisdiction.¹⁵⁷ In directing trial courts to consider whether the litigation is being "handled at its origin," whether the litigation bears a sufficient "relation" to the "community" to justify the "burden" being imposed, whether the case "touch[es] the affairs" of the community, and whether the case is "a localized controvers[y]" that ought to be "decided at home,"¹⁵⁸ the Court in effect delegated to trial courts substantive decisions about the allocation of judicial power. Such an inquiry necessarily requires trial courts to evaluate the forum's and the alternative forums' governmental stakes in the controversy and to make crucial choice-of-law determinations.¹⁵⁹ This has resulted in numerous forum non conveniens decisions turning, not on a balance of conveniences, but on an informal "interest analysis" that would have done Brainerd Currie proud.

By basing jurisdictional decisions on an analysis of the relative strengths of the various possible forums' interests in the controversy, the

¹⁵⁷ Although the latter consideration was not stated as such in *International Shoe*, it is the logical corollary of the Court's holding that even the commission of "single or occasional acts" can be sufficient to support personal jurisdiction "because of their nature and quality and the circumstances of their commission." *International Shoe*, 326 U.S. at 318. This could only mean that a state has a stronger claim to asserting jurisdiction where its regulatory interests have been implicated by the commission of tortious acts within its boundaries.

¹⁵⁸ *Gulf Oil*, 330 U.S. at 508-09.

¹⁵⁹ See, e.g., *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608 (6th Cir. 1984); *Esfahani v. Citibank*, 587 F. Supp. 841 (S.D.N.Y. 1984); *Cruz v. Maritime Co.*, 549 F. Supp. 285 (S.D.N.Y. 1982), *aff'd*, 702 F.2d 47 (2d Cir. 1983); *Lake v. Richardson-Merrell, Inc.*, 538 F. Supp. 262 (N.D. Ohio 1982), *motion for dismissal denied sub nom.* *Haddad v. Richardson-Merrell, Inc.*, 588 F. Supp. 1158 (N.D. Ohio 1984); *Great N. Ry. v. Superior Court*, 12 Cal. App.3d 105, 90 Cal. Rptr. 461 (1970). The choice-of-law determination implicates two related considerations under the *Gulf Oil* decision. First, as the Court noted in *Gulf Oil*, the burden of applying foreign law adds to the inconvenience of trial in the forum. See 330 U.S. at 509. Second, many courts view the fact that the forum's choice-of-law rules direct them to apply foreign rather than local law as some indication that the foreign forum has the paramount interest in resolving the controversy. See, e.g., *Lake v. Richardson-Merrell, Inc.*, 538 F. Supp. 262, 272-74 (N.D. Ohio 1982) (applicability of Ohio law indicates Ohio interest in retaining jurisdiction), *motion for dismissal denied sub nom.* *Haddad v. Richardson-Merrell, Inc.*, 588 F. Supp. 1158 (N.D. Ohio 1984).

Court in effect subjected these decisions to a level of federal scrutiny that it has refused to apply to choice-of-law rules.¹⁶⁰ Many commentators have argued that choice-of-law decisions should be subjected to the same level of scrutiny that is exercised over personal-jurisdiction decisions.¹⁶¹ The objection frequently voiced is that if "fairness" is the object of the fourteenth amendment, choice-of-law rulings should also be subjected to the requirement that minimum contacts exist between the controversy and the forum state.¹⁶² Deciding which substantive law will be applied in an action, the argument continues, has at least as great an impact on the parties as the location of trial.¹⁶³ By refusing to scrutinize a forum's decision that its own law should control in a given case,¹⁶⁴ the Court tolerates greater injustice than would be inflicted by permitting excessive assertions of personal jurisdiction.

At least in the case of federal courts sitting in diversity, the critique fails to take adequate account of the operation of forum non conveniens.¹⁶⁵ While not couched in constitutional terms, limits on parochial choice-of-law rules can be, and in fact are, imposed by the decision of the federal court not to accept jurisdiction in the first place. Thus a federal district court faced with the prospect of trial of a foreign cause of action need not accept the forum state's choice-of-law rules. It

¹⁶⁰ See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (plurality opinion) (concluding that, so long as the forum state has some "significant contact or significant aggregation of contacts . . . with the parties and the occurrence," application of forum law does not violate the due process clause).

¹⁶¹ See, e.g., Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 873 (1980); Silberman, *supra* note 12 at 116; Trautman & von Mehren, *Constitutional Control of Choice of Law: Reflections on Hague*, 10 HOFSTRA L. REV. 35, 45 (1981).

¹⁶² It should be noted, however, that in the analysis urged by these commentators any contacts between a defendant and the forum state may be taken into account when determining whether sufficient "minimum contacts" exist to support assertion of personal jurisdiction, but only contacts related to the subject matter of the lawsuit could be relied upon to establish contacts sufficient to support application of forum law. See, e.g., Martin, *supra* note 161, at 872 & n.1.

¹⁶³ See, e.g., Silberman, *supra* note 46, at 88 ("To believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether.").

¹⁶⁴ See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981) (plurality opinion) (determining that Minnesota's choice-of-law statute does not violate the due process clause).

¹⁶⁵ It is interesting to note that in *Allstate* the state supreme court declined to use forum non conveniens to avoid applying forum law. The defendant's initial attempt to circumvent the application of Minnesota law at trial was a motion to dismiss on forum non conveniens grounds. The lower court held that the choice-of-law issue was not an appropriate reason to dismiss. See *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 46 (Minn. 1978) ("The mere fact that Wisconsin law may be different from Minnesota law is not sufficient reason to decline jurisdiction."), *aff'd*, 449 U.S. 302 (1981).

can instead determine that the alternative forum has the paramount interest in resolution of the lawsuit and dismiss the case.

While criticism of the inadequate scrutiny of choice-of-law decisions may be well founded, the use of the forum non conveniens doctrine to ameliorate the problem is inappropriate on a number of grounds.¹⁶⁶ First, there may be considerable tension between this approach and the holding in *Erie Railroad v. Tompkins*.¹⁶⁷ The Supreme Court has dodged the question whether state or federal law governs forum non conveniens motions every time the question has been raised, usually on the grounds that the state and federal doctrines in the cases before it are functionally identical.¹⁶⁸ If the forum non conveniens doctrine is in fact a vehicle for making substantive decisions about predominant governmental interests, and both the intent and effect of those decisions is to override state choice-of-law rules, then state law ought to govern whether dismissal is appropriate; under any interpretation of *Erie*, this is a "substantive" decision.¹⁶⁹ The effects of a federal doctrine of forum non conveniens in a given case could well be to encourage choice of a state forum rather than a federal forum and to create "inequitable administration of laws," the prohibition of which constituted the "twin aims of the *Erie* rule."¹⁷⁰ For this very reason the Court held in

¹⁶⁶ Use of an interest analysis in forum non conveniens decisions is also subject to the cogent criticisms voiced against that technique in the choice-of-laws context. Interest analysis has been found unsatisfactory because of the difficulty of accurately identifying governmental interests, see Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 U. MICH. L. REV. 392, 399-402 (1980); the impossibility of resolving conflicts between interested jurisdictions in any rational way, see Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 176 (1981); Hill, *Governmental Interests and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 473-81 (1960); Korn, *supra* note 6, at 833-36; and the questionable constitutionality of distinguishing between parties on the basis of a state's preference for its own citizens, see Ely, *supra*.

¹⁶⁷ 304 U.S. 64 (1938).

¹⁶⁸ See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 n.13 (1981); *Gulf Oil*, 330 U.S. at 503.

¹⁶⁹ Indeed, in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), and again in *Day & Zimmermann v. Challoner*, 423 U.S. 3, 4 (1975), the Supreme Court held that, under *Erie*, state choice-of-law rules must be applied in a diversity action in federal court. For similar reasons, Brainerd Currie concluded in 1955 that, when federal courts sitting in diversity transfer cases pursuant to 28 U.S.C. § 1404(a), the state law of the transferor court should, in all but unusual circumstances, be controlling as a matter of federal common law. See Currie, *supra* note 4, at 455-65. Otherwise, he noted, the ability to decline jurisdiction would carry with it the right to select the applicable law. See Currie, *supra* note 4, at 455-56. Currie subsequently retracted this position, however, concluding that it was appropriate for federal district courts sitting in diversity to develop a federal common law of conflicts. See Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341, 343-44 (1960). Nonetheless, his first-announced approach was adopted by the Supreme Court in *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964).

¹⁷⁰ *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

*Van Dusen v. Barrack*¹⁷¹ that, in a transfer pursuant to 28 U.S.C. § 1404(a),¹⁷² the law of the state in which the transferor court sits in diversity must govern the proceedings in the transferee court:

[W]e should ensure that the "accident" of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed. This purpose would be defeated in cases such as the present if nonresident defendants, properly subjected to suit in the transferor State . . . , could invoke § 1404(a) to gain the benefits of the laws of another jurisdiction¹⁷³

Since the effect, if not the intent, of a forum non conveniens dismissal is often to alter the applicable substantive law, it would be inconsistent with *Van Dusen* to allow a federal diversity court to dismiss a case that a state court, acting under state law, would retain. If the Court is unwilling to allow direct circumvention of state choice-of-law decisions through transfer tactics, it should not permit their indirect circumvention through application of a federal law of forum non conveniens. A diversity court should therefore be required to apply the forum non conveniens law of the state in which it sits.¹⁷⁴

More importantly, to the extent that the evaluation of public fac-

¹⁷¹ 376 U.S. 612 (1964).

¹⁷² 28 U.S.C. § 1404(a) (1982).

¹⁷³ *Van Dusen*, 376 U.S. at 638. The Court also held that such a result would be inconsistent with the legislative intent behind the statute. *See id.* at 636.

¹⁷⁴ The converse argument could be made: if forum non conveniens doctrine is to be used to allow federal courts to circumvent application of the forum's choice of laws and substantive law when they feel another forum has a stronger interest in a controversy because of some perceived federal interest in mediating between the jurisdictional claims of competing sovereigns, that federal interest should carry equal weight in state courts. A reasonable case could be made for the adoption of a federal common law in this area. International forum non conveniens dismissals implicate the same kind of concerns about intersovereign comity that the Court found relevant in developing the act-of-state doctrine. *See, e.g.,* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-09 (1964) (the plaintiff, an instrumentality of the Cuban government, was permitted to sue in federal court based on principles of comity); *Underhill v. Hernandez*, 168 U.S. 250, 254 (1897) (upholding conclusion that "the acts of the defendant were the acts of the government of Venezuela [in Venezuela], and as such [were] not properly the subject of adjudication in the courts of another government"); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 616 (9th Cir. 1976) (district court dismissal of case in which the defendant had strong ties to the Honduran government upheld on forum non conveniens ground); *see also* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (Proposed Official Draft 1962) (providing situation in which acts of foreign states will not be "examined" by a jurisdiction despite its ability to exercise such control); Martin, *Constitutional Limits on Choice of Law*, 61 CORNELL L. REV. 185, 196-200 (1976) (federal limits on choice of law in an international context may be derived from interest in international comity).

tors under *Gulf Oil* does constitute a substantive judgment about the extent of the respective forums' stakes in the controversy, that judgment should be formalized and subjected to full appellate review, whether as a matter of state or federal law. It is antithetical to fundamental tenets of legal process to treat similar cases differently,¹⁷⁵ and that is the inevitable result of the procedural treatment of forum non conveniens motions. As demonstrated in Part III, it is also in fact what has happened.

C. Piper Aircraft Corp. v. Reyno—*Expansion of the Doctrine*

The final stage in the evolution of the doctrine came in 1981 with the Supreme Court's decision in *Piper Aircraft Corp. v. Reyno*.¹⁷⁶ *Reyno* was the Court's first word on the subject since *Gulf Oil*. In some ways, the case represents the culmination of thirty-four years of judicial dependence on the forum non conveniens doctrine to cure inadequacies in other procedural doctrines. The Court in *Reyno* formally acknowledged that the forum non conveniens doctrine could be used to dismiss actions from federal courts even when dismissal would relegate the plaintiff to a forum with laws less hospitable to her cause of action.¹⁷⁷ Thus, even though there were sufficient minimum contacts with the defendant to support jurisdiction and sufficient state contacts with the controversy to justify application of the forum's law, the trial court could nevertheless decline to assert jurisdiction over the case if, after weighing the *Gulf Oil* factors, it viewed retention of jurisdiction as "inappropriate."

Reyno involved an air crash in Scotland. The six-passenger plane and allegedly defective propeller were manufactured in the United States: the plane in Pennsylvania and the propeller in Ohio. At the time of the crash, the plane was owned and operated by a small Scottish airline. There were no eyewitnesses, but subsequent investigation by Scottish authorities indicated that pilot error and improper maintenance were probable causes of the accident.¹⁷⁸

The action was originally brought in a California state court by the secretary of the plaintiffs' counsel as representative of the victims of the crash, all of whom were Scottish. The plaintiffs asserted negligence and strict-liability claims against the American manufacturers. The

¹⁷⁵ See Friendly, *supra* note 4, at 758 n.32 ("It will not do to decide the same question one way between one set of litigants and the opposite way between another.") (quoting B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 33 (1921)).

¹⁷⁶ 454 U.S. 235 (1981).

¹⁷⁷ See *id.* at 254.

¹⁷⁸ See *id.* at 239.

Scottish airline and pilot were not named as defendants.¹⁷⁹

The forum non conveniens motion was the third successful change-of-venue measure taken by the defendants: the case was first removed to federal court, then transferred to a Pennsylvania district court pursuant to 28 U.S.C. § 1404(a),¹⁸⁰ and finally dismissed in favor of a Scottish forum pursuant to a forum non conveniens motion. The trial court found that the plaintiffs' choice of forum was not entitled to the normal degree of deference because of the flagrant forum shopping by "foreign citizens seek[ing] to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States."¹⁸¹ Applying the *Gulf Oil* factors, it then determined that both the private and public factors weighed in favor of dismissal: most of the relevant evidence was located in Scotland; only there could all of the defendants be joined; and finally, although Pennsylvania law would have controlled the issue of the manufacturer's liability, Scotland had "a very strong interest in [the] litigation."¹⁸²

The United States Court of Appeals for the Third Circuit reversed on the grounds that the trial court had misapplied the *Gulf Oil* standards¹⁸³ and that dismissal would have resulted in a change in the governing substantive law to the detriment of the plaintiffs,¹⁸⁴ strict liability being unavailable to the plaintiffs in Scotland. The court specifically found that under both California and Pennsylvania conflicts law the states in which the aircraft was manufactured had the paramount interest in the dispute, and that the public interest factor also weighed in favor of trial in the United States.¹⁸⁵

Reyno thus brought into sharp focus each of the three questions implicated by *Gulf Oil*: Why should the plaintiff's choice of forum be entitled to any deference? Why should dismissal be within the discretion of the trial court? And why should a court be able to circumvent the dictates of jurisdictional and choice-of-law rules through a forum non conveniens dismissal? The Court thus had an excellent opportunity to rework the set of dubious assumptions that had given rise to the doctrine. It was an opportunity lost.

¹⁷⁹ A separate action against the pilot and airline was commenced in Scotland. *See id.* at 240.

¹⁸⁰ *See id.* at 240-41. Defendant Hartzell Corporation, manufacturer of the propeller, was not subject to personal jurisdiction in California. *See id.* at 240 n.5.

¹⁸¹ *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727, 731 (M.D. Pa. 1979), *rev'd*, 630 F.2d 149 (3d Cir. 1980), *rev'd*, 454 U.S. 235 (1981), *quoted in* 454 U.S. at 242.

¹⁸² *Id.*, *quoted in* 454 U.S. at 260.

¹⁸³ *See Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 161, 163 (3d Cir. 1980), *rev'd*, 454 U.S. 235 (1981).

¹⁸⁴ *See id.* at 170-71.

¹⁸⁵ *See id.* at 168, 170-71.

In sustaining the district court's dismissal, the Court relied heavily on both the public-interest factors and the deference accorded trial courts' decisions. After stating that "the central purpose of any forum non conveniens inquiry is to insure that the trial is convenient,"¹⁸⁶ the Court went on to acknowledge that, "[p]articularly with respect to the question of relative ease of access to sources of proof, the private interests point in both directions."¹⁸⁷ That acknowledgement brought two of the three questions into play. After finding the conveniences in relatively equal balance,¹⁸⁸ the Court could reverse the court of appeals only by relying on the public-interest factors and the deferential standard of review to be accorded the district court's decision.¹⁸⁹

Despite the fact that the Court of Appeals for the Third Circuit found Pennsylvania and Ohio law to be applicable to the liability issue under conflict-of-laws principles that require various forms of interest analysis,¹⁹⁰ the Supreme Court sustained the trial court's dismissal because "Scotland has a very strong interest in this litigation"¹⁹¹ and because "[t]he American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here."¹⁹² The Court made this determination while assuming *arguendo* the correctness of the court of appeals' conflicts analysis.¹⁹³ The Court held, in

¹⁸⁶ *Reyno*, 454 U.S. at 256.

¹⁸⁷ *Id.* at 257.

¹⁸⁸ *See id.* at 257. The Court did find, however, that "the District Court did not act unreasonably in concluding that fewer evidentiary problems would be posed if the trial were held in Scotland." *Id.* at 257-58.

¹⁸⁹ *Cf. Friendly, supra* note 4, at 752-53 ("This was not the ordinary case of the inconvenient forum where [a] dominant consideration[] [is] the counting of the noses of witnesses [T]he real fight in *Piper* had become centered on the issue whether plaintiff was to have the benefit of rules of strict liability."). I take issue only with Judge Friendly's implication that "ordinary" forum non conveniens decisions are less concerned with the choice of the applicable law than was *Reyno*. *See supra* text accompanying notes 156-61.

¹⁹⁰ *See Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 168, 170-71 (3d Cir. 1980), *rev'd*, 454 U.S. 235 (1981). Both Pennsylvania and California have adopted a "governmental interests" approach to conflicts questions, in which the courts examine whether the policies behind the applicable state law would be impaired by the application of another state's law. *See id.* at 166, 169; *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *Griffith v. United Air Lines*, 416 Pa. 1, 203 A.2d 796 (1964). In fact, in California the factors that the courts consider in determining whether to apply their own state's law are essentially the same as those they consider in determining whether the case should be dismissed under the forum non conveniens doctrine. *Cf. International Harvester Co. v. Superior Court*, 95 Cal. App. 3d 652, 660, 157 Cal. Rptr. 324, 328 (1979) (California has "substantial interest" in retaining action to advance policies behind its substantive law).

¹⁹¹ *Reyno*, 454 U.S. at 260.

¹⁹² *Id.* at 261.

¹⁹³ *See id.* at 260.

other words, that even if Pennsylvania asserts a paramount interest in applying its law to this controversy, that does not preclude a federal trial court from dismissing the case if it believes that Scotland has the paramount interest in adjudicating the controversy.

The Court avoided confronting this conflict directly by considering the American interest in the litigation rather than the Pennsylvanian interest that the court of appeals had found paramount for choice-of-law purposes.¹⁹⁴ This approach, however, made clear the Court's conclusion that the interests expressed in Pennsylvania's conflicts law were not binding on the trial court for forum non conveniens purposes.

Despite the fact that certiorari was granted specifically to consider whether dismissal was appropriate when the forum would apply its own law and the alternative forum would not, the Supreme Court recognized no tension between the choice-of-law and choice-of-forum determinations.¹⁹⁵ The Court limited its consideration of the question to the clearly correct observation that forum non conveniens doctrine would be emasculated if courts were prohibited from using it whenever laws less favorable to the plaintiff would be applied. As the Court noted, a plaintiff will rarely have selected a forum other than the one with the laws most favorable to her case.¹⁹⁶ Therefore, if courts were precluded from dismissing a case whenever a resulting change of law would disfavor the plaintiff, dismissal would rarely be an available option, and the courts would be powerless to check forum shopping by plaintiffs.

The lower courts had split over whether *Gulf Oil's* requirement that there be an "adequate alternative forum" with jurisdiction over the case¹⁹⁷ meant that a forum non conveniens dismissal was foreclosed whenever a plaintiff would be relatively disadvantaged by the application of foreign law in the alternative forum.¹⁹⁸ If not, forum non con-

¹⁹⁴ See *id.* at 260-61.

¹⁹⁵ The Court granted certiorari to consider the following questions: (1) "[w]hether, in an action in federal district court brought by foreign plaintiffs against American defendants, the plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied if the case were litigated in the district court is more favorable to them than the law that would be applied by the courts of their own nation"; and (2) "whether a motion to dismiss on grounds of *forum non conveniens* [should] be denied whenever the law of the alternate forum is less favorable to recovery than that which would be applied by the district court." *Reyno*, 454 U.S. at 246 n.12.

¹⁹⁶ See *id.* at 250.

¹⁹⁷ See *Gulf Oil*, 330 U.S. at 506-07.

¹⁹⁸ The issue of when an alternative forum was to be considered "inadequate" had been divided into two separate issues: inadequacy due to "deficiencies" in the forum's substantive law; and inadequacy of trial procedures, such as discovery, contingent fee arrangements, and the right to a jury trial. The United States Court of Appeals for

veniens could be made available to defendants for what some courts had called "reverse forum shopping."¹⁸⁹ The *Reyno* Court concluded that,

the Third Circuit was apparently alone in holding that dismissal may not be granted if the alternative forum would apply a substantive law less favorable to the plaintiff's claim than the forum would. *Compare* *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 164 (3d Cir. 1980) (fact that alternative forum would apply less favorable law bars dismissal), *rev'd*, 454 U.S. 235 (1981) and *De Mateos v. Texaco*, 562 F.2d 895, 899 (3d Cir. 1977) (a forum non conveniens dismissal, like a venue transfer, should not result in a change in the applicable law), *cert. denied*, 435 U.S. 904 (1978) with *Pain v. United Technologies Corp.*, 637 F.2d 775, 794-95 (D.C. Cir. 1980) (difference in amount of recovery available in alternative forum is not a factor relevant to forum non conveniens inquiry), *cert. denied*, 454 U.S. 1128 (1981); *Fitzgerald v. Texaco*, 521 F.2d 448, 453 (2d Cir. 1975) (district court can dismiss under forum non conveniens even if alternative forum's law is less favorable to plaintiff), *cert. denied*, 423 U.S. 1052 (1976); and *Anastasiadis v. Steamship Little John*, 346 F.2d 281, 283 (5th Cir. 1965) (district court did not abuse its discretion in declining jurisdiction when there was no suggestion in the record that Greece was an inconvenient forum or that Greek law provided an inadequate remedy), *cert. denied*, 384 U.S. 930 (1966).

Findings of procedural inadequacy in the alternative forum were relatively infrequent. Most courts found that the absence of the availability of broad discovery rules, contingent fee arrangements, and the right to a jury trial did not suffice to render the alternative forum inadequate. *See, e.g.*, *Shields v. Mi Ryung Constr. Co.*, 508 F. Supp. 891, 895, 897 (S.D.N.Y. 1981) (finding an adequate forum in Saudi Arabia and stating that "some inconvenience or the unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate"); *Grodinsky v. Fairchild Indus.*, 507 F. Supp. 1245, 1250-51 (D. Md. 1981) (Canada is adequate alternative forum, providing "fair and just compensation for its citizens" despite absence of jury trials and punitive damages); *Panama Processes, S.A. v. Cities Serv. Co.*, 500 F. Supp. 787, 800 (S.D.N.Y. 1980) (absence of adversarial jury trial and pretrial discovery in Brazilian forum does not constitute such "a complete denial of due process" as to preclude forum non conveniens dismissal), *aff'd*, 650 F.2d 408 (2d Cir. 1981); *Shepard Niles Crane & Hoist Corp. v. Fiat, S.p.A.*, 84 F.R.D. 299, 306 (W.D.N.Y. 1979) (absence of pretrial discovery, antitrust claims, punitive damages, and declaratory judgments does not render Italian courts inadequate alternative forums; "[s]ome differences in procedures between American and foreign courts are inevitable, and the plaintiff has not shown that any substantial rights are jeopardized"). *But see* *Mobil Tankers Co. v. Mene Grande Oil Co.*, 363 F.2d 611, 614 (3d Cir.) (inadequate discovery procedures and unacceptable limits on use of expert testimony in the alternative forum bar dismissal), *cert. denied*, 385 U.S. 945 (1966); *Fiorenza v. United States Steel Int'l*, 311 F. Supp. 117, 120-21 (S.D.N.Y. 1969) (among other factors, absence of contingent fee arrangements in Bahamas renders alternative forum inadequate when plaintiff is impecunious); *Odita v. Elder Dempster Lines*, 286 F. Supp. 547, 551 (S.D.N.Y. 1968) (United Kingdom was an inadequate alternative forum for an impecunious plaintiff because of the unlawfulness of contingent fee agreements and because the plaintiff might not be allowed to enter England because of his inability to support himself); *Bagarozzy v. Menegheni*, 8 Ill. App. 2d 285, 292-93, 131 N.E.2d 792, 796 (1955) (lack of adversarial proceedings in Italy renders that forum inadequate).

¹⁸⁹ *Pain v. United Technologies Corp.*, 637 F.2d 775, 793-94 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981); *Burrington v. Ashland Oil Co.*, 134 Vt. 211, 216, 356 A.2d 506, 510 (1976). The use of the phrase "reverse forum shopping" is not an entirely fair characterization. Although a defendant moving to dismiss on forum non conveniens grounds may be motivated by a desire to have foreign law apply to the controversy, unless that motivation is combined with some presumption in favor of the defendant's choice of forums, it does not have the same effect as forum shopping by

unless "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all,"²⁰⁰ the trial court may dismiss the case without feeling constrained by the anticipated change in law. The Court thus authorized the use of the forum non conveniens doctrine to reduce plaintiffs' forum shopping.²⁰¹

While the limitation on plaintiffs' forum shopping resulting from the *Reyno* decision represents a rational development in the law, the employment of the forum non conveniens doctrine to achieve that end is problematical. The Court's analysis fails to consider the fact that the forum shopping in question is possible because of jurisdictional and choice-of-law decisions that the Court believed were beyond federal scrutiny. Under *Erie*, state choice-of-law and jurisdictional rules must be applied in federal court unless they violate the Constitution.²⁰² A state's lack of interest in the controversy will not invalidate its assertion of jurisdiction if minimum contacts with the defendant are established;²⁰³ the district court in *Reyno* would not have been permitted to

plaintiffs. The "evil" of forum shopping is not that it is motivated by a desire to manipulate the applicable law. Rather, it is that there is a disproportionate advantage bestowed on the plaintiff by both giving the plaintiff the choice of forums and assigning a presumption in favor of that choice. As the Court in *Reyno* made clear, the fact that the plaintiff is permitted to choose the forum does not mean that she should also have her choice of the applicable law. See *Reyno*, 454 U.S. at 256-57 n.24. In contrast, when defendants "reverse forum shop" through the forum non conveniens doctrine, the parties are on an equal footing, and the court can assess the relative advantages of the forums free from the strictures of any presumption. To condemn the forum non conveniens doctrine because it permits "reverse forum shopping" is to say that plaintiffs should have an unfettered right to select the applicable law—a proposition that would be difficult to defend.

²⁰⁰ *Reyno*, 454 U.S. at 254.

²⁰¹ It is not clear why the court should refrain from dismissal even when the plaintiff's claim would be absolutely barred in the alternative forum. If, according to the law of the "appropriate" forum, the defendant wins because the plaintiff has no cause of action, why should the plaintiff be able to manipulate that outcome by suing in a different forum? If forum non conveniens doctrine is a legitimate check on forum shopping, why should it be abandoned in the most flagrant instance?

²⁰² *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 226-27 (2d Cir. 1963).

²⁰³ See *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984), in which the Court dismissed the contention that, since the plaintiff was not a New Hampshire resident, New Hampshire's connection with the controversy was too tenuous to support jurisdiction. See *id.* at 1480-81. Justice Rehnquist stated,

[W]e have not to date required a plaintiff to have "minimum contacts" with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant. On the contrary, we have upheld the assertion of jurisdiction where such contacts were entirely lacking. . . .

. . . [P]laintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts.

disregard Pennsylvania's interest analysis for choice-of-law purposes simply because it believed that Scottish interests in the controversy were paramount. Nonetheless, the very same result—application of Scottish law in a Scottish court—was achieved in the guise of a *forum non conveniens* dismissal for the very same reason—paramount Scottish interests.

Why the Court endorsed circumvention of jurisdictional and conflicts rules through use of *forum non conveniens* is unclear. It may have considered the question of when federal resources should be expended on a given case to be appropriately tested by a federal rather than a state standard. It is also possible that the Court viewed the forum's interest in applying its law to be distinct from its interest in adjudicating the controversy.²⁰⁴ It is even conceivable that the Court was attempting to provide an escape from parochial state choice-of-law rules without saying so. Given the Court's disposition of the other two anomalies of the doctrine,²⁰⁵ further explanation from the Supreme Court does not appear imminent.

The court of appeals' rare reversal²⁰⁶ of a trial court's *forum non conveniens* dismissal provided the Supreme Court with the opportunity to review the abuse-of-discretion standard created in *Gulf Oil*. The Court endorsed the abuse-of-discretion standard, thereby insulating *forum non conveniens* decisions from extensive appellate review. Despite the fact that the court of appeals had determined that the trial court committed errors of law and fact,²⁰⁷ the Supreme Court sustained the

²⁰⁴ The Court in the past has apparently assumed that a state can have an "interest" in applying its law, without having a sufficient "interest" to retain jurisdiction. See *Shaffer v. Heitner*, 433 U.S. 186, 215 (1977) ("[W]e have rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute."); *Hanson v. Denckla*, 357 U.S. 235, 254 (1958)("[The State] . . . does not acquire that jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law."). However, those decisions dealt with an issue different from the one involved here and are not appropriate precedents for the Court's action in *Reyno*. The state interests in those cases were being tested for constitutional sufficiency. The Court found that simply because application of a state's substantive law to a controversy would be constitutional does not mean that the state's assertion of personal jurisdiction over the defendant is also constitutional. The Court has not held that a state has different interests in applying its law than in asserting jurisdiction, merely that those decisions may be subjected to different degrees of constitutional scrutiny under the fourteenth amendment. Here, the issue is not whether application of Pennsylvania law or the assertion of jurisdiction by a Pennsylvania court would violate the Constitution. Rather, the question is whether, assuming the constitutionality of both the application of Pennsylvania law and the court's assertion of jurisdiction, the federal courts may nonetheless circumvent the state's asserted interest by dismissing the case.

²⁰⁵ See *supra* text accompanying notes 188-89.

²⁰⁶ See *infra* notes 216-20 and accompanying text.

²⁰⁷ See *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 161, 163 (3d Cir. 1980), *rev'd*,

district court's action on the grounds that any mistakes made by the trial court did not rise to the level of an abuse of discretion and that the court of appeals' reversal therefore represented impermissible second-guessing of the trial court's judgment:

The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference. . . . In examining the District Court's analysis of the public and private interests, however, the Court of Appeals seems to have lost sight of this rule, and substituted its own judgment for that of the District Court.²⁰⁸

As in *Gulf Oil*, the need for deference to the trial court's ruling is far from self-evident. As in that case, the forum non conveniens motion in *Reyno* was based on a paper record, one that the Supreme Court apparently found sufficient for purposes of review. The court of appeals' finding that the trial court predicated its dismissal on an erroneous choice-of-law determination was not reversed by the Supreme Court. In sustaining the forum non conveniens dismissal, rather than remanding the case to allow the trial court to reconsider its determination in light of the proper choice-of-law standard, the *Reyno* Court necessarily made an independent evaluation of the *Gulf Oil* factors on the basis of the record.

The third *Gulf Oil* anomaly, deference to the plaintiff's choice of forum, did come under scrutiny in *Reyno*. While the Court cut back on the presumptive weight given foreign plaintiffs' choices of forum, it did not address the underlying principle that a plaintiff's choice of forum generally should be accorded great deference. The district court's decision not to give normal deference to the plaintiff's choice of forum was endorsed by the Supreme Court on the grounds that, when a foreign plaintiff sues outside of her home forum, the choice of forum is suspect. In contrast, "when the home forum has been chosen, it is reasonable to assume that this choice is convenient."²⁰⁹ The Court emphasized that "the deference accorded a plaintiff's choice of forum has never been intended to guarantee that the plaintiff will be able to select the law

454 U.S. 235 (1981).

²⁰⁸ *Reyno*, 454 U.S. at 257.

²⁰⁹ *Id.* at 255-56.

that will govern the case."²¹⁰

The Court's analysis does not adequately explain the general rule that a defendant seeking dismissal must establish "oppressiveness and vexation . . . out of all proportion to plaintiff's convenience."²¹¹ The imposition of such a heavy burden of proof operates not simply as a rebuttable inference that a plaintiff's choice of forum is a "reasonable" one—the rationale for the rule stated by the Court—but also implies the existence of much more substantive reasons for placing a thumb on the scales in a plaintiff's favor. If the normal presumption in favor of the plaintiff's choice of forum is not intended to bestow an advantage in selecting the most favorable law, it is hard to understand what its purpose is. If indeed the concern is only that the choice of forum be a reasonable one, examination of the record would provide a sufficient basis for determination.

The explanation may lie in a desire to cut down on the number and complexity of pretrial procedural motions,²¹² but such a concern has never been made explicit. Instead, the Court left trial courts with the seeming contradiction that, although a plaintiff is not entitled to forum shop, her choice of forum is normally entitled to enormous deference.

The decision in *Reyno* is in one sense inconsequential. Only in rare cases will a forum have sufficient contacts with the controversy to apply its own law, yet lack sufficient connection to withstand the forum non conveniens motion.²¹³ Moreover, the *Erie* problem of circumventing state jurisdictional and choice-of-law rules can be avoided if the Court acknowledges that forum non conveniens reflects substantive choices properly governed by state law. On another level, however, the holding in *Reyno* expands the opportunities provided by the forum non conveniens doctrine for the informal resolution of important, substantive dilemmas about the allocation of governmental authority. The decision strongly reaffirms the wide discretion that trial courts have in disposing of forum non conveniens motions, implicitly endorses the use of

²¹⁰ *Id.* at 257 n.24.

²¹¹ *Koster*, 330 U.S. at 524.

²¹² This, in fact, was a basis for Currie's and Braucher's concerns about allowing forum non conveniens dismissals in federal courts. See Braucher, *supra* note 4, at 930-31; Currie, *supra* note 4, at 416.

²¹³ Indeed, in the admiralty area, the inapplicability of U.S. law seems to be the *sine qua non* of forum non conveniens; once U.S. admiralty law is deemed applicable, dismissal is effectively foreclosed, since the courts apply the same test for forum non conveniens as for choice of law. See, e.g., *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983); *Fisher v. Agios Nicolaos V.*, 628 F.2d 308, 315 (5th Cir. 1980), *cert. denied*, 454 U.S. 816 (1981). See generally, Note, *The Convenient Forum Abroad Revisited*, *supra* note 5, at 770.

the doctrine to correct anomalous choice-of-law rules, and encourages employment of the doctrine by cutting back on the presumption in favor of a plaintiff's choice of forum. The result will inevitably be an increasing number of arbitrary and inconsistent decisions that are effectively immune from appellate review.

III. THE FLAWED DOCTRINE IN ACTION

The Supreme Court's decisions in *Gulf Oil Corp. v. Gilbert*²¹⁴ and *Piper Aircraft Co. v. Reyno*²¹⁵ described a doctrine of forum non conveniens that entails a discretionary balancing of factors and prescribes an extremely deferential standard of review. One would expect that the cases decided under such a doctrine would be unpredictable and inconsistent in outcome and virtually immune from appellate review. A canvassing of lower court cases demonstrates these flaws.

The most striking pattern that emerges from the case law is the dramatic increase in the use of forum non conveniens in the last twenty years. The volume of reported federal forum non conveniens decisions in the district courts has more than tripled in the last ten years, from a total of twenty-five between the years 1965 and 1974 to 111 cases in the past decade.²¹⁶

The style of federal and state court forum non conveniens decisions is also notable: they are typically one to two pages in length²¹⁷ and consist primarily of block quotations of the public and private factors listed in *Gulf Oil*. The "analysis" frequently is limited to a statement that in applying these factors the court found the balance of public and private interests to weigh in favor of retention or dismissal.²¹⁸ Indeed, given the standard of review established by the Supreme Court, a trial court wishing to avoid reversal on appeal is best off not tipping

²¹⁴ 330 U.S. 501 (1947).

²¹⁵ 454 U.S. 235 (1980).

²¹⁶ These numbers are based on a Westlaw search in April 1985 using federal courts key 45 (*forum non conveniens*). Although the numbers may be inaccurate to the extent that there are inconsistencies in the classification of cases under the West key system, they tend to indicate a significant trend toward more frequent invocation of forum non conveniens.

²¹⁷ See, e.g., *A & M Records, Inc. v. Hellman*, 75 Cal. App. 3d 554, 142 Cal. Rptr. 390 (1977); *Cowles v. Cowles*, 263 A.2d 658 (D.C. 1970); *Field Indus. v. Bransrose Realty*, 470 A.2d 1266 (Me. 1984); *Martin v. Educational Testing Servs.*, 179 N.J. Super. 317, 431 A.2d 868 (1981).

²¹⁸ See, e.g., *People ex rel. Campagne Nationale v. Giliberto*, 74 Ill. 2d 90, 383 N.E.2d 977 (1978), cert. denied, 441 U.S. 932 (1979); *Silversmith v. Kenosha Auto Transp.*, 301 N.W.2d 725 (Iowa 1981); *Eaton v. Second Judicial Dist. Court*, 96 Nev. 773, 616 P.2d 400 (1980); *Litton Indus. Sys. v. Kennedy Van Corp.*, 117 N.J. Super. 52, 283 A.2d 55 (1971).

its hand. A court of appeals would be hard pressed to find that a trial court "abused its discretion" when it has dutifully recited the *Gulf Oil* factors and stated a conclusion.

Appellate review of forum non conveniens rulings is erratic. Because the federal courts of appeals use the abuse-of-discretion standard adopted in *Gulf Oil*, reversals of forum non conveniens rulings are infrequent. There 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.²¹⁹ Only fifteen cases in which the district court retained jurisdiction under forum non conveniens reached the courts of appeals,²²⁰ and, of these, all but two were affirmed.

These trends suggest that district courts faced with increasingly common motions for dismissal on grounds of forum non conveniens have precious little guidance from the courts of appeals on how they should balance the *Gulf Oil* factors. Moreover, such decisions by the trial courts are subject to only cursory appellate scrutiny.

The New York courts' treatment of forum non conveniens appeals provides an intriguing comparison. Although the New York Court of Appeals purports to have adopted the same doctrinal approach used by the federal courts,²²¹ forum non conveniens rulings by New York trial courts, including decisions to retain jurisdiction, are regularly reversed on appeal.²²² The New York appellate courts have apparently found

²¹⁹ A Lexis search in February 1985 using the search command "conveniens" revealed 338 cases in the federal courts of appeals since 1947. Only 93 of these, however, were decisions specifically reviewing forum non conveniens rulings. Since this figure does not include judgment order affirmances or other summary opinions not discussing forum non conveniens, the ratio of reversals to reported appellate decisions is very likely even lower. Use of the judgment order affirmance could well be an attractive vehicle to dispose of these complicated, fact-dependent decisions reviewed under an abuse-of-discretion standard. See, e.g., *Abiaad v. C.T. Corp. Sys.*, 696 F.2d 980 (3d Cir. 1982); *Harrison v. Wyeth Laboratories*, 676 F.2d 685 (3d Cir. 1982); *Malka v. E.F. Hutton & Co.*, 636 F.2d 1202 (2d Cir. 1980).

²²⁰ This is undoubtedly due to the fact that denials of forum non conveniens motions are insulated from appellate review by the final judgment rule. See 28 U.S.C. § 1291 (1982). Since denial of the motion simply results in retention of the case for trial, there is no appealable ruling except where interlocutory appeal is permitted, or when the case has been reduced to judgment against the defendant after trial on the merits, or when summary judgment has been granted. Moreover, an appellate court would have a difficult time concluding that the "balance of public and private" convenience would be served by nullifying the lower court judgment and requiring relitigation in an alternative forum.

²²¹ See, e.g., *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 360-61, 278 N.E.2d 619, 621-22, 328 N.Y.S.2d 398, 402 (1972) (citing *Gulf Oil*).

²²² A May 1985 Westlaw search of New York cases, using the West key number for discretion to decline jurisdiction, 106 key 28, and "conveniens" and Court (N.Y.) but not Court (Sup. or Mun.), located 116 cases. 107 of these were appellate decisions reviewing lower courts' forum non conveniens decisions. Of those 107 cases, there were 62 reversals, 42 affirmances, and 3 remands. 37 of the reversals were of lower court

that forum non conveniens decisions can be subjected to meaningful appellate review and need not be vested wholly in the discretion of the trial courts.²²³

Nonetheless, most courts continue to decide forum non conveniens cases without the benefit of appellate courts' guidance and with little idea which *Gulf Oil* factors should be weighed most heavily in the balancing of conveniences. Two classes of cases that are brought by foreign plaintiffs demonstrate the inconsistencies of the forum non conveniens doctrine in particularly striking fashion—aircraft-collision cases and product-liability cases involving pharmaceuticals. The fact patterns ad-

denials of forum non conveniens motions. See, e.g., *Blais v. Deyo*, 97 A.D.2d 613, 468 N.Y.S.2d 91 (App. Div. 1983); *Meritum Corp. v. Lawyers Title Ins. Corp.*, 88 A.D.2d 828, 451 N.Y.S.2d 134 (App. Div. 1982); *Adriana Dev. Corp. N.V. v. Gaspar*, 81 A.D.2d 235, 439 N.Y.S.2d 927 (1981). Such denials would not even constitute appealable final orders in federal court. See *supra* note 220. Pursuant to New York appellate procedure, the parties may appeal to the appellate division any trial court ruling that "affects a substantial right." See N.Y. CIV. PRAC. LAW § 5701(a)(2)(v) (McKinney 1978). Both grants and denials of forum non conveniens rulings are thereby easily reviewable.

²²³ The relatively high proportion of reversals can be attributed in part to a lower standard of review than is exercised by federal appellate courts. At least when reviewed by the appellate division, the trial court's judgment does not seem to be accorded any special deference; the appellate division may exercise its own discretion in disposing of the motion. See *Slaughter v. Waters*, 41 A.D.2d 810, 810-11, 342 N.Y.S.2d 180, 182 (App. Div. 1973) ("[A]fter weighing all of the circumstances involved herein and balancing the conveniences and interests of the parties, we cannot conclude [contrary to the trial court] that New York is a clearly inconvenient forum . . ."); accord *N.Y. Civ. PRAC. LAW* § 5501(c) (McKinney 1978) ("The appellate division shall review questions of law and questions of fact on an appeal . . ."). Thereafter, however, the court of appeals will use an abuse-of-discretion standard to review the appellate division's ruling. See *Mollendo Equip. Co. v. Sekisan Trading Co.*, 43 N.Y.2d 916, 374 N.E.2d 623, 403 N.Y.S.2d 729 (1978) (appellate division did not abuse its discretion in reversing trial court's denial of forum non conveniens motion).

In contrast to the three United States Supreme Court decisions addressing forum non conveniens in the last 38 years, the New York Court of Appeals has produced numerous such opinions since 1968. See *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 467 N.E.2d 245, 478 N.Y.S.2d 597 (1984); *Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust Ltd.*, 62 N.Y.2d 65, 464 N.E.2d 432, 476 N.Y.S.2d 64 (1984); *Blais v. Deyo*, 60 N.Y.2d 679, 455 N.E.2d 662, 468 N.Y.S.2d 103 (1983) (memorandum opinion); *Belachew v. Michael*, 59 N.Y.2d 1004, 453 N.E.2d 1243, 466 N.Y.S.2d 954 (1983); *Westwood Assocs. v. Deluxe Gen., Inc.*, 53 N.Y.2d 618, 420 N.E.2d 966, 438 N.Y.S.2d 774 (1981) (memorandum opinion); *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 404 N.E.2d 726, 427 N.Y.S.2d 604 (1980); *Epstein v. Sirivejkul*, 48 N.Y.2d 738, 397 N.E.2d 1326, 422 N.Y.S.2d 658 (1979) (memorandum opinion); *Mollendo Equip. Co. v. Sekisan Trading Co.*, 43 N.Y.2d 916, 374 N.E.2d 623, 403 N.Y.S.2d 729 (1978) (memorandum opinion); *Hadjoannou v. Avramides*, 40 N.Y.2d 929, 358 N.E.2d 516, 389 N.Y.S.2d 833 (1976); *Irrigation & Indus. Dev. Corp. v. Indag, S.A.*, 37 N.Y.2d 522, 337 N.E.2d 749, 375 N.Y.S.2d 296 (1975); *Martin v. Mieth*, 35 N.Y.2d 414, 321 N.E.2d 777, 362 N.Y.S.2d 853 (1974); *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972); *Varkonyi v. S.A. Empresa De Viacao Aerea Rio Grandense*, 22 N.Y.2d 333, 239 N.E.2d 542, 292 N.Y.S.2d 670 (1968).

dressed by the courts in these cases are identical in all relevant details, yet the results are inconsistent.²²⁴

The typical airplane-accident case brought by foreign plaintiffs is instituted against an American manufacturer either in the defendant's state of incorporation or at its principal place of business. The aircraft crashed abroad, but defective manufacture and design is alleged to have occurred in the United States. The plaintiffs have come to the United States to avail themselves of more liberal damage awards or strict-liability rules. In virtually every case, the parties assert that relevant evidence and witnesses are to be found in both the domestic and foreign forums, and each case presents the anomaly of foreign plaintiffs and domestic defendants both asserting that it would be more "convenient" for them to litigate thousands of miles from their own homes. Defendants inevitably offer to submit to the jurisdiction of the foreign forum, transport all American evidence there, and waive any statute-of-limitations defense,²²⁵ or agree to do the same as a condition of the court's dismissing the case, thereby undercutting the plaintiffs' argument that there is no adequate alternative forum, a prerequisite to dismissal under *Gulf Oil* and *Reyno*.²²⁶ Defendants also assert that the witnesses in the foreign forums are beyond the court's subpoena power, thereby rendering the foreign forum preferable.

Courts confronted with aircraft-collision cases respond to the balance-of-conveniences argument differently, depending on whether they perceive a forum interest in the litigation.²²⁷ When a forum interest is

²²⁴ Nothing is wrong, of course, with different states having different attitudes about which cases they wish their courts to hear, as long as unconstitutional classifications are not employed to allocate access to their courts. If in fact disparate treatment of similar cases is attributable to legitimate policy differences among jurisdictions, that is an inevitable result of a federal system. On the other hand, disparate results that simply reflect variations in the subjective predilections of judges exercising discretion are less acceptable, especially insofar as these results represent judges' tacit value judgments about the respective strengths of the relevant governmental interests.

²²⁵ This offer or agreement by defendants has become a standard feature of most forum non conveniens motions. See, e.g., *Fiacco v. United Technologies Corp.*, 524 F. Supp. 858, 860 (S.D.N.Y. 1981) (defendant offered to concede liability and submit to the jurisdiction of a Norwegian court if the domestic court would dismiss on forum non conveniens grounds); *Emerton v. Canal Barge Co.*, 70 Ill. App. 2d 49, 52, 216 N.E.2d 457, 458-59 (1966) (defendant offered, if forum non conveniens dismissal was granted, to file a general appearance and not to contest the jurisdiction of federal or state courts in Tennessee); *Bewers v. American Home Prods. Corp.*, 99 A.D.2d 949, 949, 472 N.Y.S.2d 637, 638 (forum non conveniens dismissal granted on condition that defendants waive objections to the jurisdiction of the United Kingdom, accept service of process there, and waive any statute-of-limitations defense), *aff'd*, 64 N.Y.2d 630, 474 N.E.2d 247, 485 N.Y.S.2d 39 (1984).

²²⁶ See *Reyno*, 454 U.S. at 254 & n.22; *Gulf Oil*, 330 U.S. at 506-07.

²²⁷ See generally *supra* note 224 (suggesting possible problems with the disparate treatment of similar forum non conveniens motions).

found to exist, usually on the basis of deterring tortious manufacturing activity within the forum,²²⁸ the courts note that it is as easy to bring proof from the foreign forum as it is to carry evidence to that location,²²⁹ and that any difficulties in acquiring proof will disadvantage the plaintiffs as much as or more than the defendants.²³⁰ When no significant forum interest is found, the availability of foreign witnesses is elevated in importance²³¹ (usually without any indication whether their attendance could in fact be compelled in the foreign forum or whether subpoena power would in fact be necessary were jurisdiction retained), and a paramount interest in the litigation is ascribed to the foreign forum, despite the fact that its laws are less favorable to the injured plaintiffs.²³²

Given the factual similarity between the cases, the inconsistency of results is startling.²³³ In the scope of two weeks, the Court of Appeals for the Third Circuit dismissed a Norwegian helicopter-collision case²³⁴ and retained the Scottish airline-accident litigation that was the subject of the Supreme Court's review in *Reyno*,²³⁵ despite the fact that both cases were brought against United States manufacturers by or on behalf of foreign victims.

The residency of the parties seems to make an enormous difference in aircraft-collision litigation. When even one or two plaintiffs are American citizens—not even citizens of the forum—the courts are much more likely to retain jurisdiction than when all plaintiffs are foreign citizens.²³⁶ Although the Supreme Court in *Reyno* did, in some sense,

²²⁸ See, e.g., *Kahn v. United Technologies Corp.*, 16 Av. Cas. (CCH) 17,651, 17,653 (Conn. Super. Ct. 1981).

²²⁹ See, e.g., *Grimandi v. Beech Aircraft Corp.*, 512 F. Supp. 764, 778-79 (D. Kan. 1981).

²³⁰ See, e.g., *Ciprari v. Sevicos Aereos Cruzeiro do Sul*, 232 F. Supp. 433, 443 (S.D.N.Y. 1964).

²³¹ See, e.g., *Pain v. United Technologies Corp.*, 637 F.2d 775, 787-90 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128 (1981).

²³² See, e.g., *Fosen v. United Technologies Corp.*, 484 F. Supp. 490, 504, 507 (S.D.N.Y.), aff'd mem., 633 F.2d 203 (2d Cir. 1980); *Orion Ins. Co. v. United Technologies Corp.*, 15 Av. Cas. (CCH) 18,061, 18,061-62 (S.D.N.Y. 1980).

²³³ See generally Fitzpatrick, *Reyno: Its Progeny and Its Effects on Aviation Litigation*, 48 J. AIR L. & COM. 539, 548-57 (1983) (reviewing the varying outcomes of six post-*Reyno* cases involving foreign air crashes). See generally Note, *Forum Non Conveniens and Foreign Plaintiffs: Addressing the Unanswered Questions of Reyno*, supra note 5, at 582 (judicial resistance to dismissal on forum non conveniens grounds has led to less stringent application of *Reyno* principles).

²³⁴ *Dahl v. United Technologies Corp.*, 632 F.2d 1027, 1033 (3d Cir. 1980).

²³⁵ *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 171 (3d Cir. 1980), rev'd, 454 U.S. 235, 261 (1981).

²³⁶ Compare *Fiacco v. United Technologies Corp.*, 524 F. Supp. 858, 859-60 (S.D.N.Y. 1981) (action brought by one American citizen and eight foreign plaintiffs retained) with *Dahl v. United Technologies Corp.*, 632 F.2d 1027, 1028 (3d Cir. 1980)

authorize a different standard for claims brought by nonresidents of the forum, it did so on the basis of the reasonableness of the plaintiff's choice of forum, not because of a lesser governmental interest in providing a remedy to foreign citizens.²³⁷ Once again, courts have invoked convenience and reasonableness to mask a substantive choice about governmental interests. Some commentators have challenged the propriety of this discrimination against foreign citizens, particularly where the United States has entered into treaty provisions granting equal court access to foreign nationals.²³⁸ Whether or not such discrimination is thus illegal, or even improper,²³⁹ such distinctions do not seem appro-

(action brought by four Norwegian citizens dismissed). Some jurisdictions have, in fact, acknowledged that they will not dismiss any claim brought by a domestic plaintiff. *See, e.g.,* *Houston v. Caldwell*, 359 So. 2d 858, 861 (Fla. 1978); *cf. Bechtel Corp. v. Industrial Indem. Co.*, 86 Cal. App. 3d 45, 50, 150 Cal. Rptr. 29, 32 (1978) (claims brought by domestic plaintiffs will rarely be dismissed).

New York, at one point, had adopted such a hard and fast rule, but abandoned it in 1972 for a more flexible approach. *See Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 362, 278 N.E.2d 619, 622, 328 N.Y.S.2d 398, 402 (1972) (applicability of forum non conveniens doctrine depends on considerations of justice, fairness, and convenience). Even thereafter, however, its courts continued to treat claims brought by residents differently from claims asserted against residents. A graphic example is New York's treatment of out-of-state automobile accidents. In *Sullivan v. J.V. McNicholas Transfer Co.*, 93 A.D.2d 527, 462 N.Y.S.2d 934 (1983), a resident plaintiff was permitted to bring suit against an Ohio driver for an accident that occurred in Ohio and had virtually no other connection with New York. *See id.* at 532-34, 462 N.Y.S.2d at 937-39; *cf. Boxer v. Paige*, 66 A.D.2d 664, 664, 410 N.Y.S.2d 831, 831 (1978) (memorandum opinion) (resident plaintiff permitted to bring suit on New Jersey auto accident); *Slaughter v. Waters*, 41 A.D.2d 810, 810-11, 342 N.Y.S.2d 180, 182 (1973) (*per curiam*) (resident plaintiff permitted to bring suit on North Carolina auto accident). The *Sullivan* court noted that the defendant had not met its burden of establishing that New York was an inconvenient forum and that trial in Ohio would better serve the interests of justice or convenience of the parties. *See* 93 A.D.2d at 532, 462 N.Y.S.2d at 938. In the same year, another appellate division court dismissed a factually similar case brought by a Canadian plaintiff against a New York defendant on the basis of an accident in Canada. Here, the court stated the rule that plaintiffs bringing suit on transitory torts arising outside the state must demonstrate "special circumstances" to warrant retention of jurisdiction. *See Blais v. Deyo*, 92 A.D.2d 998, 999, 461 N.Y.S.2d 471, 472 (memorandum opinion), *aff'd*, 60 N.Y.2d 679, 455 N.E.2d 662, 468 N.Y.S.2d 103 (1983) (memorandum opinion).

²³⁷ *See Reyno*, 454 U.S. at 255-56.

²³⁸ *See Wilson, Access-to-Courts Provisions in United States Commercial Treaties*, 47 AM. J. INT'L L. 20, 47 (1953); Note, *Forum Non Conveniens and Foreign Plaintiffs: Addressing the Unanswered Questions of Reyno*, *supra* note 5, at 604; Recent Developments, *Federal Courts: Forum Non Conveniens*, 20 HARV. INT'L L.J. 404, 410-11 (1979).

²³⁹ States' preferences for their own citizens may well be legitimate. Indeed, the central assumption behind interest analysis in a choice-of-law setting is that states have a legitimate interest only in protecting persons within their borders; to the extent that application of a state's law to a case would not advance that interest, the state is deemed "disinterested" and will defer to the application of another state's law. *See generally* A. EHRENZWEIG, *TREATISE ON THE CONFLICTS OF LAWS* 131-33 (1962); E. STIMSON, *CONFLICT OF LAWS*, 348-52 (1963). For an interesting attack on the consti-

propriately made under the doctrine of forum non conveniens, which purports to focus upon the convenience of the forum and which is so flexible that appellate courts cannot effectively monitor its application.

Similarly erratic results were produced in the "British Pill Litigation."²⁴⁰ A California attorney representing a group of British women claiming injury due to ingestion of oral contraceptives brought several hundred actions throughout the United States, in both federal and state courts, against American manufacturers. The manufacturers succeeded in establishing that all but one of the forums selected were inappropriate under the forum non conveniens doctrine. Only California ultimately determined that it should hear the cases; federal and state actions in Pennsylvania, New Jersey, New York, Illinois, and Ohio were dismissed.²⁴¹

As in the aircraft-collision litigation, convenience was not really

tutional validity of this preference, see Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981).

For the most part, this preference has not been directly reflected in formal jurisdictional doctrine. The Supreme Court has emphasized that it is the relationship between the defendant and the forum that is to be scrutinized in due process analysis. See, e.g., *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473, 1480-81 (1984); *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). However, the courts have assumed that contacts "related" to the cause of action have more jurisdictional significance than unrelated contacts. See, e.g., *Keeton*, 104 S. Ct. at 1480; *Calder v. Jones*, 104 S. Ct. 1482, 1486 (1984); cf. von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966) (isolated contacts may justify the assertion of specific jurisdiction to adjudicate claims arising out of those contacts). Although the Court in these cases has disclaimed the requirement that the plaintiff have certain contacts with the forum, it seems that the significance of the distinction between related and unrelated contacts is ultimately based on a recognition of a state's legitimate interest in protecting its own residents. To the extent that a contact is deemed related to the cause of action, the state is deemed to have a constitutionally legitimate interest in its adjudication because some wrong has occurred within the state's borders that threatened the safety or well-being of the state's residents.

²⁴⁰ In the interest of fairness, it should be noted that the author represented American Home Products Corporation in a number of the British actions in Pennsylvania and New York.

²⁴¹ See, e.g., *Purser v. American Home Prods. Corp.*, No. 80 Civ. 710 (S.D.N.Y. Jan. 30, 1981); *Harrison v. Wyeth Laboratories*, 510 F. Supp. 1, 2-3 (E.D. Pa. 1980), *aff'd mem.*, 676 F.2d 685 (3d Cir. 1982); *Jones v. Searle Laboratories*, 93 Ill. 2d 366, 378, 444 N.E.2d 157, 163 (1982); *In re British Oral Contraceptives Cases*, No. L-44473-78 (Morris County Sup. Ct. July 20, 1981), *aff'd*, No. A-348-81T3 (N.J. Super. Ct. App. Div. Dec. 23, 1982), *cert. denied*, 93 N.J. 320, 460 A.2d 710 (1983). Similar results were obtained by American drug manufacturers who were sued by foreign plaintiffs claiming injuries sustained as a result of taking Bendectin. *Compare In re Richardson-Merrell, Inc.*, 545 F. Supp. 1130, 1136-37 (S.D. Ohio 1982) (dismissing suit brought by British plaintiffs), *aff'd sub nom.* *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608, 616 (6th Cir. 1984) and *McCracken v. Eli Lilly & Co.*, No. 34,463 (Ind. Cir. Ct. June 5, 1984) (dismissing suit brought by British plaintiffs) with *Lake v. Richardson-Merrell, Inc.*, 538 F. Supp. 262, 264 (N.D. Ohio 1982) (retaining jurisdiction over suit brought by Canadian plaintiffs), *motion for dismissal denied sub nom.* *Haddad v. Richardson-Merrell, Inc.*, 588 F. Supp. 1158, 1159 (N.D. Ohio 1984).

the dispositive issue in the pharmaceuticals cases. Both parties pointed to evidence located in the forum they preferred.²⁴² Plaintiffs asserted that corporate decisions were made in the United States to distribute inadequately labeled and tested drugs in the United Kingdom and that proof of that conduct was to be found in the United States.²⁴³ Defendants countered that all evidence concerning causation and damages, as well as proof that the drugs were distributed in accordance with the informed approval of the British government,²⁴⁴ was to be found in the United Kingdom. While the various courts that addressed the forum non conveniens issue differed as to how the balance of conveniences should be resolved, the decisive fact both with the courts that declined jurisdiction and with those that retained the cases was the perceived importance of the forums' interests in regulating the conduct of American defendants abroad and extending the protection of United States law to foreign plaintiffs.

The attitude of the courts that dismissed the actions was typified by that of Judge Weiner of the Eastern District of Pennsylvania, who concluded in *Harrison v. Wyeth Laboratories*²⁴⁵ that

Pennsylvania's interest in the regulation of the *conduct* of drug manufacturers and the safety of drugs produced and distributed *within* its borders does not extend so far as to include such regulation of conduct on drugs produced or distributed in foreign countries. Questions as to the *safety* of drugs marketed in a foreign country are properly the concern

²⁴² See *Purser v. American Home Prods. Corp.*, No. 80 Civ. 710, slip op. at 5-6 (S.D.N.Y. Jan. 30, 1981); *Harrison v. Wyeth Laboratories*, 510 F. Supp. 1, 2-3 (E.D. Pa. 1980), *aff'd mem.*, 676 F.2d 685 (3d Cir. 1982); *Jones v. Searle Laboratories*, 100 Ill. App. 3d 165, 166-67, 426 N.E.2d 917, 919 (1981), *rev'd*, 93 Ill. 2d 366, 444 N.E.2d 157 (1982); *In re British Oral Contraceptives Cases*, No. A-348-81T3, slip op. at 10-12 (N.J. Super. Ct. App. Div. Dec. 23, 1982), *cert. denied*, 93 N.J. 320, 460 A.2d 710 (1983); *Bewers v. American Home Prods. Corp.*, 99 A.D.2d 949, 950, 472 N.Y.S.2d 637, 638-39, *aff'd*, 64 N.Y.2d 630, 474 N.E.2d 247, 485 N.Y.S.2d 39 (1984).

²⁴³ See *Purser v. American Home Prods. Corp.*, No. 80 Civ. 710, slip op. at 6-7 (S.D.N.Y. Jan. 30, 1981); *Harrison v. Wyeth Laboratories*, 510 F. Supp. 1, 3 (E.D. Pa. 1980), *aff'd mem.*, 676 F.2d 685 (3d Cir. 1982); *Jones v. Searle Laboratories*, 100 Ill. App. 3d 165, 167, 426 N.E.2d 917, 919 (1981), *rev'd*, 93 Ill. 2d 366, 444 N.E.2d 157 (1982); *Bewers v. American Home Prods. Corp.*, 99 A.D.2d 949, 950, 472 N.Y.S.2d 637, 639, *aff'd*, 64 N.Y.2d 630, 474 N.E.2d 247, 485 N.Y.S.2d 39 (1984).

²⁴⁴ See *Purser v. American Home Prods. Corp.*, No. 80 Civ. 710, slip op. at 5-6 (S.D.N.Y. Jan. 30, 1981); *Harrison v. Wyeth Laboratories*, 510 F. Supp. 1, 3 (E.D. Pa. 1980), *aff'd mem.*, 676 F.2d 685 (3d Cir. 1982); *Jones v. Searle Laboratories*, 100 Ill. App. 3d 165, 166-67, 426 N.E.2d 917, 919 (1981), *rev'd*, 93 Ill. 2d 366, 444 N.E.2d 157 (1982); *Bewers v. American Home Prods. Corp.*, 99 A.D.2d 949, 950, 472 N.Y.S.2d 637, 638, *aff'd*, 64 N.Y.2d 630, 474 N.E.2d 247, 485 N.Y.S.2d 39 (1984).

²⁴⁵ 510 F. Supp. 1 (E.D. Pa. 1980), *aff'd mem.*, 676 F.2d 685 (3d Cir. 1982).

of that country; the courts of the United States are ill-equipped to set a standard of product safety for drugs sold in other countries. . . . Each government must weigh the merits of permitting the drug's use and the necessity of requiring a warning. Each makes its own determination as to the standards of degree of safety and duty of care. This balancing of the overall benefits to be derived from a product's use with the risk of harm associated with that use is peculiarly suited to a forum of the country in which the product is to be used. Each country has its own legitimate concerns and its own unique needs which must be factored into its process of weighing the drug's merits, and which will tip the balance for it one way or the other. The United States should not impose its own view of the safety, warning, and duty of care required of drugs sold in the United States upon a foreign country when those same drugs are sold in that country.²⁴⁶

In contrast, the California Court of Appeals, in finding an abuse of discretion in the trial court's dismissal, held in *Holmes v. Syntex Laboratories*²⁴⁷ that trial in the United Kingdom was not a suitable alternative primarily because of the absence of strict liability there. Without even determining that California law would definitely apply if the action were retained, the California court found that this "deficiency" in the British substantive law of products liability demonstrated that the "British courts [were] not a *suitable* alternative."²⁴⁸ The court also rejected the suggestion of *Reyno* that a foreign plaintiff's choice of forum is entitled to less deference than a domestic plaintiff's choice, declaring that, under California's law of forum non conveniens, "'since it is for the plaintiff to choose the place of suit, his choice of a forum should not be disturbed except for weighty reasons.'"²⁴⁹

²⁴⁶ *Harrison*, 510 F. Supp. at 4.

²⁴⁷ 156 Cal. App. 3d 372, 202 Cal. Rptr. 773 (1984).

²⁴⁸ *Id.* at 383, 202 Cal. Rptr. at 780. The court relied heavily on British criticism of British products-liability law in denying that its preference for California law indicated provincialism:

Justice Cardozo once observed, "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home." . . . But if the present litigation occurs in Britain, appellants will not simply lose their cause of action for strict liability, they will be forced to litigate under a system of negligence law that the British themselves have condemned as inadequate in the field of defective products.

Id. at 387, 202 Cal. Rptr. at 782 (quoting *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 201 (1918)).

²⁴⁹ *Id.* at 379, 202 Cal. Rptr. at 776-77 (quoting CAL. CIV. PROC. CODE §

Although the *Holmes* court did not examine the policy choices underlying its holding, its grant of substantial deference to the plaintiff's choice of forum and its preclusion of dismissal when foreign law would disadvantage the plaintiff reflect a fundamental substantive disagreement with the other British Pill decisions. Implicit in Judge Weiner's decision in *Harrison* was a judgment that the legitimate regulatory interests of the forum state do not extend to governing the conduct of its citizens outside of the jurisdiction. The *Holmes* decision, in contrast, represents a willingness to export California law. Far from condemning forum shopping, California has invited foreign plaintiffs into its courts to avail themselves of less stringent requirements for demonstrating liability.²⁵⁰ If the law of the plaintiff's home forum is disadvantageous to the plaintiff, as it inevitably will be any time the plaintiff has engaged in forum shopping, dismissal from a California court will be virtually foreclosed.²⁵¹ Although in theory the court might still apply foreign law after jurisdiction was retained, such a choice of law would be an odd counterpoint to the court's retention of jurisdiction based on the inadequacy of foreign law.

The British Pill litigation in general and the *Holmes* decision in particular present a number of troublesome issues. The Pill cases as a whole demonstrate the underlying premise of this Article: the decision whether or not to retain jurisdiction can frequently turn on a particular court's judgment about the appropriate scope of the forum's regulatory interest in the conduct in question and its relationship to other sovereigns' stakes in the controversy. The court may or may not make that judgment explicit, and discussion of such concerns is even less likely to appear in the cursory appellate review that the decision will receive if the forum non conveniens motion is granted.²⁵² If the trial court denies the motion, its view of the weight of respective governmental interests usually will not be reviewed at all. Arbitrary and inconsistent decisions are the inevitable result.²⁵³

410.30 judicial council comment (West 1973)).

²⁵⁰ The *Holmes* decision, indeed, comes very near to sanctioning "defendant shopping" as well as forum shopping. The court noted that the British manufacturing subsidiary of the American parent corporation was probably a more appropriate defendant but asserted that there is no doctrine of "defendant non conveniens" in California. *Id.* at 388, 202 Cal. Rptr. at 783. Suit against the California defendant, in California's courts and under the liberal products-liability law available there, was thus allowed.

²⁵¹ "[T]he difference in applicable substantive law *virtually dictates trial in California.*" *Id.* at 382, 202 Cal. Rptr. at 779 (quoting International Harvester Co. v. Superior Court, 95 Cal. App. 3d 652, 660, 157 Cal. Rptr. 324, 328 (1979)) (emphasis added by the *Holmes* court).

²⁵² See, e.g., *Harrison v. Wyeth Laboratories*, 676 F.2d 685 (3d Cir. 1982) (mem.), *aff'd* 510 F. Supp. 1 (E.D. Pa. 1980).

²⁵³ There is also a related process concern. In *Holmes*, the plaintiff was able to

IV. CONCLUSION: TOWARD A UNIFIED THEORY OF JUDICIAL AUTHORITY

If recent history is any indication, the doctrine of forum non conveniens will increasingly be relied upon to determine the right to court access.²⁶⁴ This is a troubling development. It represents a disintegration of the rule of law and its replacement with informal and tacit decisionmaking.

The emergence of forum non conveniens doctrine was facilitated by a set of formal court-access principles that unduly compartmentalized and irrationally classified the various considerations determining when and why courts have authority to hear cases. The limitations on judicial authority reflected in the forum non conveniens doctrine are not significantly different from the kinds of limitations reflected in rules governing subject-matter jurisdiction, personal jurisdiction, and venue. Yet resolution of forum non conveniens motions is relegated to an informal and inconsistent process. Because we conceive of the decision whether to reject the jurisdiction that the court formally possesses as purely discretionary, and the product of some intangible balance of innumerable factors, the substantive implications of the doctrine are obscured.

avoid dismissal by alleging that tortious decisions were made in California. These allegations were accepted as true for the purpose of the forum non conveniens motion. *See Holmes*, 156 Cal. App. 3d at 388, 202 Cal. Rptr. at 783. Although the defendant might have contested those factual allegations, it would thereby have been forced to litigate at least that issue in the very forum from which it sought dismissal. If, after discovery, the defendant had succeeded in establishing that all of the decisions on the marketing of the pharmaceuticals had been made in the United Kingdom, or even that some of them had, it is unclear whether a forum non conveniens dismissal would still be available.

A similar, though distinguishable, situation arose in *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694 (1982). The defendant argued that the district court could not compel it to engage in discovery procedures to ascertain whether sufficient minimum contacts existed between the defendant and the forum to support the court's assertion of personal jurisdiction. *See id.* at 695-96. Absent a determination at the outset that personal jurisdiction existed, the defendant continued, it could not be made to participate in proceedings in that forum. *See id.* at 701, 706. The Supreme Court rejected this argument, holding that when a party fails to comply with a discovery order under these circumstances the district court may sanction the party by proceeding as if personal jurisdiction has been established. *See id.* at 708-09. In effect, therefore, the defendant, by challenging jurisdiction, was forced to submit to it. However, this situation differs from that of a defendant pressing a motion to dismiss on forum non conveniens grounds because a defendant who denies the existence of personal jurisdiction can default, and thereby preserve her objection, which can be raised as a defense in subsequent attempts by the plaintiff to enforce the judgment. *See id.* at 706. Because forum non conveniens objections are not a valid basis for collateral attack on a judgment, a defendant objecting to an inconvenient forum has no option other than to urge dismissal in the first action. *See supra* note 18.

²⁶⁴ *See supra* note 216 and accompanying text.

The solution is not necessarily the elimination of the forum non conveniens doctrine. Many of the limitations on judicial authority reflected in the cases represent sound reasons for declining the exercise of jurisdiction. It is appropriate, for instance, to insure that the court with the paramount interest in a controversy adjudicates the case. This preference reflects a belief that has in the past been embodied in jurisdictional decisions; an inappropriate assertion of jurisdiction not only unduly burdens the forum state's courts but also infringes on the regulatory prerogatives of the more appropriate forum.²⁵⁵ Such infringement in a given case might be tempered by the application of the other forum's laws, but this will not always cure the problem. For instance, in the British Pill cases,²⁵⁶ the application of British negligence doctrine by American courts would still have required American judges to weigh the benefits and burdens of more extensive labeling of pharmaceutical products in the United Kingdom. The question is not simply what law to apply, but also who ought properly to apply it.

The limitations derived from private-convenience components of the doctrine also seem to be sensible elements of court-access doctrine, although they are less important than the forum non conveniens cases seem to indicate. It may be appropriate, in the extreme case, to select the venue based on the accessibility of evidence. However, as discussed above,²⁵⁷ reliance on this factor in forum non conveniens decisions seems as often as not to be a makeweight. In most cases involving interstate transactions there will be some evidence that is relatively difficult to obtain no matter which forum is selected. In an age of modern technology and transportation, such inconveniences should be of less concern than they once may have been. Particularly when each party is

²⁵⁵ See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (states' status as "coequal sovereigns in a federal system" limits their power to assert jurisdiction); *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877). A number of commentators have read the decision in *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694 (1982), as a judicial retreat from viewing limits on personal jurisdiction as a means of protecting federalist values implicated by the allocation of sovereign authority. See, e.g., Drobak, *supra* note 33, at 1046-50. The Supreme Court held in *Compagnie des Bauxites* that due process scrutiny of assertions of personal jurisdiction were "ultimately a function of the individual liberty interest." *Compagnie des Bauxites*, 456 U.S. at 703 n.10. Whether or not the *Compagnie des Bauxites* decision represents a retreat from viewing due process limitations on personal jurisdiction as required by notions of federalism, the question of what limitations on personal jurisdiction are required by the Constitution is different from the question whether allocating authority between sovereigns is an appropriate function of jurisdictional rules. Thus, even if it would be inappropriate to limit the scope of state sovereignty based on the due process clause, such limitations might still be appropriate as a matter of state self-restraint, as a limit on the reach of each state's jurisdiction, or as a matter of federal statute or common law.

²⁵⁶ See *supra* notes 240-53 and accompanying text.

²⁵⁷ See *supra* notes 242-44 and accompanying text.

attempting to litigate away from its home forum, the focus on convenience is disingenuous. If the problems are forum shopping and how to allocate decisionmaking authority among courts, those problems should be addressed directly and explicitly.

If courts should indeed refuse to entertain suits for the reasons reflected in the *forum non conveniens* cases, those choices can be appropriately recognized in formal jurisdictional doctrine. For instance, if we do not want a court to hear a case involving an out-of-state tort brought by an out-of-state plaintiff against a domestic defendant because the forum appears to have no legitimate regulatory stake in the controversy, then we should say that the court does not have jurisdiction to resolve the dispute or that the court does not have jurisdiction if the alternative forum does.²⁵⁸ Such a statement may be jarring, given the formal conception of jurisdiction as an expression of power over the defendant. In fact, personal jurisdiction has come to mean power over the defendant for the purpose of a particular lawsuit, a meaning divorced from mere physical power over the defendant or her property.²⁵⁹ However, if there is utility in preserving the formal conception of personal jurisdiction, the rules can be labeled limitations on subject-matter jurisdiction. The particular labels do not matter as long as the rules developed are embodied in formal doctrine, and are assertable in a lawsuit and subject to appellate scrutiny to the same extent as other court-access doctrines.

²⁵⁸ A particularly difficult choice must be made in the situation where the forum has been selected because the action would be time-barred in any alternative forum. *See, e.g., Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473, 1480 (1984) (fact that statute of limitations has run in every other state does not affect issue of court's jurisdiction). I have suggested, *supra* note 201, that it was inconsistent for the Supreme Court in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), to preclude dismissal of causes of action for which no remedy would be provided in the alternative forum. If forum shopping is unacceptable when it gives a slight advantage to the plaintiff, surely it is even less acceptable when it is completely outcome-determinative. It may nevertheless be appropriate to draw a distinction between procedural and substantive law in cases in which there is no remedy in the alternative forum. When the absence of a remedy in the alternative forum is due to its statute of limitations or the court's inability to obtain personal jurisdiction over the defendant, I would not preclude dismissal but would instead condition it on the defendant's waiver of these procedural objections to the alternative forum if the defenses are not available in the plaintiff's chosen forum. I would not require a similar waiver with respect to the defendant's substantive defenses under the law applied by the alternative forum.

I suggest this approach with some trepidation, knowing full well that the substance/procedure distinction in other areas has proved elusive. Moreover, such a rule would violate the principle that choice of an inappropriate forum should not confer upon the plaintiff the ability to manipulate the applicable law. However, a waiver of procedural defenses seems to interfere only minimally with the alternative forum's regulatory prerogatives and seems to be a fair accommodation of the forum state's interest in providing a forum, as reflected in its decision to apply a more liberal statute of limitations to the case.

²⁵⁹ *See* Clermont, *supra* note 40, at 444-46.

Determining the number and specific content of such rules must await judicial or legislative development and doctrinal refinement. The resulting doctrine will be nothing less than the sum of the choices currently made explicitly or implicitly in forum non conveniens rulings about the appropriate allocation of decisionmaking authority among different jurisdictions. Such decisions have no place in a doctrine vested largely in the unfettered discretion of trial judges. There may still be an appropriate place for discretionary dismissals based on the location of evidence, but once jurisdictional rules address more explicitly how to allocate authority among jurisdictions, discretionary dismissals based on private convenience should be far less frequent.

A logical corollary to this reformulation of jurisdiction is the elimination of the deference accorded a plaintiff's choice of forum. That deference seems part and parcel of an archaic power theory of personal jurisdiction: if the defendant can be found there, she is subject to the jurisdiction of the court, and therefore the plaintiff may sue wherever the defendant can be found. One would have thought that such a rule was discredited with the rejection of quasi in rem jurisdiction in *Shaffer v. Heitner*,²⁶⁰ the presence of the defendant's person in the jurisdiction is only a slightly greater justification for hearing the lawsuit than the presence of the defendant's property. While a resident defendant is not likely to be surprised by her amenability to suit in the forum, there may be other reasons why a court's assertion of jurisdiction would be inappropriate, as demonstrated by the forum non conveniens cases. At the time of *Shaffer*, commentators suggested that transient service on a defendant merely passing through the jurisdiction was undermined by the Court's decision.²⁶¹ The logical extension of that insight is that even a more permanent physical connection between the defendant and the forum will not necessarily vest the court with jurisdiction over all controversies involving that defendant. Accordingly, once formal jurisdiction is reformulated to take account of the choice currently made in the context of forum non conveniens decisions, it will be incumbent on the plaintiff to establish not merely that proper service of process was accomplished, but also that trial in the chosen forum is appropriate for more persuasive reasons.

Although such a reformulation would represent a fairly radical departure from American conceptions of jurisdiction,²⁶² it is in fact quite

²⁶⁰ 433 U.S. 186 (1977).

²⁶¹ See Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction?* 25 VILL. L. REV. 38, 60-68 (1979); Silberman, *supra* note 46, at 75.

²⁶² But cf. Clermont, *supra* note 40, at 449-50 (venue rules based on convenience

similar to the current state of personal jurisdiction in the United Kingdom. Pursuant to the British long-arm statute,²⁶³ a plaintiff wishing to invoke the jurisdiction of British courts over a foreign defendant must establish the propriety of the British forum, taking into consideration most of the factors identified in *Gulf Oil Corp. v. Gilbert*.²⁶⁴ Such a showing is a prerequisite to the existence of jurisdiction under the British doctrine of forum conveniens,²⁶⁵ which requires that the invocation of jurisdiction in British courts be justified by some reason for hearing the case in a British, as opposed to some other, forum. Accordingly, a plaintiff's choice of forum is accorded no special deference, and resolution of the issue is not considered a matter of trial-court discretion.²⁶⁶ The proposal here would simply impose such a burden on a plaintiff even when there has been service within the jurisdiction.²⁶⁷ Such a rule would take the decision out of the unfettered discretion of the trial judge and would bring about greater uniformity and coherence in the decisions.²⁶⁸ In short, a transformation of the doctrine of forum non

should replace jurisdiction as the primary determinant of place of trial on an interstate level); Ehrenzweig, *supra* note 49, at 312 (service of process should not be sufficient to create jurisdiction; the doctrine of forum conveniens should replace personal jurisdiction); Redish, *supra* note 91, at 1137-41 (due process limitations on personal jurisdiction should focus on the convenience and burdens of litigating in a particular forum). The primary distinction between these writers and me is their general abandonment of sovereignty as a relevant component of forum-access rules; they propose instead that convenience be the central focus. See, e.g., Clermont, *supra* note 40, at 443 (the "goal of a coherent national court system" should be the "convenient administration of justice"); Redish, *supra* note 91, at 1114-15. I share their premise that the current categories for court access are redundant, and should be collapsed into a unified approach, but am not prepared to discount the importance of limits on sovereignty. As demonstrated by the forum non conveniens decisions, perceived limits on sovereign interests and authority are an important component of court-access doctrine on both an international and interstate level. The consequent judgments about how to allocate sovereign power ought to be made explicit.

²⁶³ See R.S.C. 1965, Order 11 ("Service of Process, Etc., Out of the Jurisdiction"), reprinted in 1 THE SUPREME COURT PRACTICE 1982 91 (I. Jacob ed. 1981).

²⁶⁴ 330 U.S. 501 (1947); see Inglis, *Forum Conveniens—Basis of Jurisdiction in the Commonwealth*, 13 AM. J. COMP. L. 583, 584-87 (1964).

²⁶⁵ See Inglis, *supra* note 264, at 586-87.

²⁶⁶ See Inglis, *supra* note 264, at 584 (citing *Oppenheimer v. Louis Rosenthal & Co.*, [1937] 1 All E.R. 23, 26).

²⁶⁷ Inglis asserts that British law imposes an "onus of adducing evidence" both on defendants urging the court to refuse jurisdiction and on plaintiffs urging the court to assert jurisdiction. See *id.* at 591.

²⁶⁸ Two potential objections to such a proposal should be addressed. The first is a concern as old as the forum non conveniens doctrine itself: there is a high process cost in providing parties with complex pretrial defenses not related to the merits. As was well illustrated in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the raising of such defenses can significantly delay trial of the case on the merits and can be used by defendants with greater resources to wear down plaintiffs. See, e.g., Currie, *The Federal Courts and the American Law Institute—Part II*, 36 U. CHI. L. REV. 268, 307 (1969) ("[D]eciding where [the most convenient] forum is costs altogether too much

conveniens into a doctrine of forum conveniens would cure many of the defects in the current doctrine and would represent a rational development of the law.

time and money."'). This is certainly a legitimate concern. However, the problem would not seem to be worsened by formalizing forum non conveniens and merging it into jurisdictional rules. Defendants currently have the same range of possible pretrial motions as would be available to them under a more structured forum conveniens doctrine. In general, it would seem that if there were more appellate guidance and more formal rules to guide the trial court, resolution of the issue could be expedited and the law made more predictable. See Friendly, *supra* note 4, at 783-84.

The second objection is more troublesome but again is probably not peculiar to my proposal. It could be argued that providing full appellate review of jurisdictional decisions made after an inquiry into the factors now weighed under forum non conveniens would not produce greater consistency or rationality in the law of jurisdiction. Indeed, the law of personal jurisdiction is replete with appellate decisions, and one could hardly claim that there is consistency or predictability in that area. Ultimately, it appears that the minimum-contacts test boils down to the individual trial court's assessment of "fundamental fairness." Thus, the argument concludes, by "jurisdictionalizing" the forum non conveniens considerations we are simply moving the problem back to a different shell in the shell game. See Clermont, *supra* note 40, at 454 (jurisdictional "rules" have not reduced uncertainty; "[p]erhaps we should learn to accept [it]").

The implications of such an attack go far beyond the issue of court access to the nature of the judicial process in general and the question whether rules and doctrine can ever determine the appropriate outcome in individual cases. The minimum-contacts test does, however, seem to be a particularly egregious case of doctrinal indeterminacy. One explanation is that personal-jurisdiction doctrine is simply poor doctrine, developed without reference to the underlying policies purportedly addressed by the doctrine. Courts accordingly do not know how or why to count contacts. See Brilmayer, *supra* note 33, at 112-13. Inconsistency is thus inevitable. Earlier, I suggested that such imprecision is a result, at least in part, of the availability of a catch-all forum non conveniens doctrine. The elimination of the forum non conveniens option would put some pressure on the courts to develop more coherent jurisdictional doctrine. Moreover, implicit in my proposal is a systematic overhauling of court-access doctrine and the development of a set of rules that attempt to articulate which cases a forum cares about enough to retain and why.