

# TRANSNATIONAL LITIGATION AND INSTITUTIONAL CHOICE

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**Abstract:** When U.S. corporations cause harm abroad, should foreign plaintiffs be allowed to sue in the United States? Federal courts are increasingly saying no. The courts have expanded the doctrines of forum non conveniens and prudential standing to dismiss a growing number of transnational cases. This restriction of court access has sparked considerable tension in international relations, as a number of other nations view such dismissals as an attempt to insulate U.S. corporations from liability. A growing number of countries have responded by enacting retaliatory legislation that may ultimately harm U.S. interests. This Article argues that the judiciary's restriction of access to federal courts ignores important foreign relations, trade, and regulatory considerations. The Article applies institutional choice theory to recommend a process by which the three branches of government can work together to establish a more coherent court-access policy for transnational cases.

## INTRODUCTION

In the summer of 2009, Chevron squarely faced the old adage “be careful what you wish for.”<sup>1</sup> Texaco, a company that would later merge with Chevron, had successfully argued for dismissal of a large environmental case in 2001.<sup>2</sup> Texaco argued that Ecuador was a more conven-

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<sup>1</sup> See Daniel Fisher, *Careful What You Ask For*, FORBES, July 13, 2009, at 92. See generally W.W. JACOBS, *THE MONKEY'S PAW* (Books of Wonder 1997) (1902) (illustrating, through a fictional horror story, the consequences of wishes coming true).

<sup>2</sup> See *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001); see also Cortelyou Kenney, *Disaster in the Amazon: Dodging “Boomerang Suits” in Transnational Human Rights Litigation*, 97 CAL. L. REV. 857, 858–63 (2009); Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and Aguinda v. Texaco*, 38 N.Y.U. J. INT'L L. & POL. 413, 474–84 (2006) (analyzing the facts giving rise to the environmental litigation).

ient forum and better suited to hear the case, which had arisen from actions taken in Ecuadorian territory.<sup>3</sup> By moving for dismissal under the doctrine of forum non conveniens, Texaco seemed to make a wise strategic choice: plaintiffs rarely re-filed cases dismissed under forum non conveniens,<sup>4</sup> and even when they did, damages in courts outside the United States tended to be significantly lower.<sup>5</sup>

In this case, however, a series of events converged to make the choice less strategically sound than it appeared at the outset.<sup>6</sup> First, in 2003, the plaintiffs did re-file the suit in Ecuador,<sup>7</sup> armed with the defendant's agreement to accede to jurisdiction in Ecuador and bolstered by the defendant's own court filings praising the Ecuadorian court system.<sup>8</sup>

Second, Ecuador, like many Latin American countries, objected to the U.S. practice of discretionarily dismissing cases in the absence of any jurisdictional barrier.<sup>9</sup> Ecuador follows a civil law tradition that al-

<sup>3</sup> *Aguinda*, 142 F. Supp. 2d at 546.

<sup>4</sup> David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 L.Q. REV. 398, 418–20 (1987) (concluding after empirical study that only eighteen percent of personal injury plaintiffs and twenty percent of commercial plaintiffs re-filed cases abroad after forum non conveniens dismissals). Defendants in other cases have also engaged in strategies that make sense only by assuming that a dismissal for forum non conveniens would end the case. See, e.g., *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 720 (1st Cir. 1996). In *Nowak*, the defendant sought dismissal by arguing that the plaintiff could better enforce the judgment in Hong Kong. See *id.* As one scholar has noted, "Saying, 'No, please sue me where you have some chance of collecting my money if you win,' only makes sense if you know that your bluff is unlikely to be called." Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 351 (2002).

<sup>5</sup> See Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 31 (2002).

<sup>6</sup> See *infra* notes 7–18 and accompanying text.

<sup>7</sup> Kimerling, *supra* note 2, at 629.

<sup>8</sup> Ben Casselman, *Chevron Expects to Fight Ecuador Lawsuit in U.S.: As Largest Environmental Judgment on Record Looms, the Oil Company Reassures Shareholders It Won't Pay*, WALL ST. J., July 21, 2009, at B3.

<sup>9</sup> RONALD A. BRAND & SCOTT R. JABLONSKI, *FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS* 128, 133–34 (2007) (discussing the effort in Latin America to create laws that will make U.S. courts less willing to dismiss suits by Latin American plaintiffs). Although Latin American countries have been especially vocal in their opposition to forum non conveniens, others, including attorneys in the United States, have also criticized the doctrine for allowing a trial judge's discretion to overrule the will of Congress. See, e.g., Hu Zhenjie, *Forum Non Conveniens: An Unjustified Doctrine*, 48 N. IR. L. REP. 143, 159–60 (2001); Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 781 (1985) (describing a hypothetical situation in which a lawyer explains to a client that "we served the defendant with a summons at its place of business . . . [and sued] in one of the places in which Congress in the venue statute said a defendant may be sued, [and] persuad[ed] the court that our choice of forum was reasonable under

lows plaintiffs to bring suit in the defendant's home forum.<sup>10</sup> Allowing U.S. judges to discretionarily dismiss cases against U.S. corporations contravenes this strong sociolegal tradition and gives rise to the criticism that the forum non conveniens doctrine operates as a "tool to escape liability," denying foreign plaintiffs the advantages of the U.S. federal court system.<sup>11</sup>

Third, as a result of frustration with the U.S. courts' failure to respond to these concerns about the forum non conveniens doctrine, the Latin American Parliament (Parlatino)<sup>12</sup> drafted a "Model Law on International Jurisdiction and Applicable Law to Tort Liability."<sup>13</sup> The model law, which was widely accepted by Latin American countries, permits national courts to award damages comparable to what a U.S. court would award in an international tort case, specifying that "the national court may, at the plaintiff's request, apply to damages and to the pecuniary sanctions related to such damages, the relevant standards and amounts of the pertinent foreign law."<sup>14</sup>

These three factors combined to produce a bad result for Chevron when the case was tried in Ecuador.<sup>15</sup> An expert retained by the trial court recommended a judgment of twenty-seven billion dollars—an amount that, if accepted by the judge, would be the largest award for environmental damage ever awarded against an oil company.<sup>16</sup> Chevron is challenging the Ecuadorian court's action in U.S. courts, but its ability to do so is hampered by its earlier argument that Ecuador, not the

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the due process clause of the Constitution," but the judge nevertheless decided that that the forum was not appropriate).

<sup>10</sup> BRAND & JABLONSKI, *supra* note 9, at 128.

<sup>11</sup> *See id.* at 129. Ecuadorians may have found the denial of court access to be particularly galling, as Ecuador had signed on to the Peace, Friendship, Navigation, and Commerce Treaty with the United States, which provides for "open and free" access to U.S. courts. *Id.* at 129–30 (specifying that such advantages include: "liberal discovery rules; proximity to the assets of U.S. corporate defendants; perceived higher damage awards; punitive damages; jury trials; favorable products liability laws; the contingent fee system; and the lack of a loser-pays rule for attorney fees").

<sup>12</sup> Parlatino is an organization comprising members of Latin American legislatures. Michael Wallace Gordon, *Forum Non Conveniens Misconstrued: A Response to Henry Saint Dahl*, 38 U. MIAMI INTER-AM. L. REV. 141, 176 (2006).

<sup>13</sup> BRAND & JABLONSKI, *supra* note 8, at 132–33.

<sup>14</sup> *Id.* Professor Russell Weintraub, professor emeritus at the University of Texas Law School, describes such statutes as telling defendants: "You want to try the case here. Welcome. You will be sorry." Fisher, *supra* note 1, at 93.

<sup>15</sup> *See* Casselman, *supra* note 8, at B3.

<sup>16</sup> *60 Minutes: Amazon Crude* (CBS News television broadcast May 3, 2009) (transcript available at cbsnews.com).

United States, was the appropriate forum in which to resolve the case.<sup>17</sup> In order to prevail in the United States, Chevron would have to demonstrate that the Ecuadorian justice system was incompatible with due process requirements—a difficult argument to make after asking a U.S. court to dismiss the case in favor of an Ecuadorian forum in 2001.<sup>18</sup>

Although Chevron's difficulty may indeed be a "self-inflicted injury,"<sup>19</sup> it showcases larger issues that heretofore have only been addressed in a piecemeal and contradictory fashion.<sup>20</sup> U.S. courts draw litigants worldwide, but to what extent should those courts be open to foreign plaintiffs? Academic scholarship has long noted the "magnet effect" of U.S. courts, and scholars have debated whether efforts should be taken to demagnetize U.S. courts.<sup>21</sup> In recent years, federal judges have been taking a lead in limiting access to U.S. courts by aggressively enforcing and expanding the doctrine of *forum non conveniens*.<sup>22</sup> The effort to limit access was recently taken to the logical extreme in 2009, in *Doe v. Exxon Mobil Corp.*, in which the United States District Court for the District of Columbia simply held that foreign plaintiffs lack prudential standing to sue in U.S. courts for harms suffered abroad.<sup>23</sup>

What happens, however, when an effort to push transnational litigation out of U.S. courts meets retaliatory legislation aimed at making

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<sup>17</sup> See Ben Casselman & Chad Bray, *Ecuador Seeks To Block Chevron*, WALL ST. J., Dec. 5–6, 2009, at B6.

<sup>18</sup> See Fisher, *supra* note 1, at 93. The enforcement of foreign judgments is largely governed by state law. *Soc'y of Lloyd's v. Reinhart*, 402 F.3d 982, 993 (10th Cir. 2005). The Uniform Foreign Money-Judgment Recognition Act, which has been widely adopted, provides that a foreign judgment need not be enforced if "the judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law" or is otherwise "repugnant to the public policy of [the enforcing] state." *Id.* (citing the Act as adopted by New Mexico). For a discussion of the possible application of collateral estoppel or judicial estoppel to prevent a defendant who successfully moved for *forum non conveniens* from later objecting to the enforcement of the resulting judgment, see Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609, 641–42 (2008).

<sup>19</sup> See Fisher, *supra* note 1, at 92.

<sup>20</sup> See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 368–73, 377–80 (4th ed. 2007) ("[T]he *forum non conveniens* doctrine rests on unarticulated and unexamined substantive assumptions.").

<sup>21</sup> Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 352 (1994) [hereinafter Weintraub, *International Litigation*] ("The United States is a magnet forum for the afflicted of the world."); Russell J. Weintraub, *The United States as a Magnet Forum and What, if Anything, to Do About It*, in *INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION* 213 (Jack L. Goldsmith ed., 1997) [hereinafter Weintraub, *DISPUTE RESOLUTION*].

<sup>22</sup> Weintraub, *DISPUTE RESOLUTION*, *supra* note 21, at 225–31.

<sup>23</sup> 658 F. Supp. 2d 131, 135 (D.D.C. 2009).

foreign courts more hospitable for claims against U.S. corporate defendants? This Article argues that ad hoc judicial efforts to limit court access may backfire as foreign courts begin to award large judgments against U.S. defendants.<sup>24</sup> A more coherent court-access policy is sorely needed.

Determining what that court-access policy should look like, however, requires examining the question of who should decide. Which court-access questions are best resolved by Congress or the executive, and which should remain with the judiciary?<sup>25</sup> Despite the criticism leveled against current court-access doctrine, many have assumed that judges will remain the architects of future court-access policies.<sup>26</sup> This focus on the judiciary as the agent of change, however, is at odds with the larger academic move toward comparative institutional analysis.<sup>27</sup> Comparative institutional choice requires analyzing not only the legal rules themselves, but also who should make them: which institution is the most appropriate vehicle for legal reform?<sup>28</sup> Although a few scholars have recommended extrajudicial changes, this Article is the first to undertake a comparative institutional choice analysis of the court-access doctrines.<sup>29</sup>

Part I examines the magnetic effect of U.S. courts, which draw foreign plaintiffs through generous discovery, higher damages, and contingent fee representation.<sup>30</sup> This Part analyzes the growing judicial reaction to this magnetic effect.<sup>31</sup> At the extreme, judges may deny pru-

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<sup>24</sup> See *infra* notes 88–101 and accompanying text.

<sup>25</sup> See *infra* notes 212–278 and accompanying text.

<sup>26</sup> See, e.g., Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 602–03 (2007); Note, *Cross-Jurisdictional Forum Non Conveniens Preclusion*, 121 HARV. L. REV. 2178, 2195–99 (2008); Emily J. Derr, Note, *Striking a Better Public-Private Balance in Forum Non Conveniens*, 93 CORNELL L. REV. 819, 841–48 (2008); Finity E. Jernigan, Note, *Forum Non Conveniens: Whose Convenience and Justice?*, 86 TEX. L. REV. 1079, 1120–21 (2008); Leah Nico, Note, *From Local to Global: Reform of Forum Non Conveniens Needed to Ensure Justice in the Era of Globalization*, 11 SW. J. L. & TRADE AM. 345, 360–62 (2005).

<sup>27</sup> See *infra* notes 212–278 and accompanying text.

<sup>28</sup> See *infra* notes 212–278 and accompanying text.

<sup>29</sup> See, e.g., E.E. Daschbach, *Where There's a Will, There's a Way: The Cause for a Cure and Remedial Prescriptions for Forum Non Conveniens as Applied in Latin American Plaintiffs' Actions Against U.S. Multinationals*, 13 LAW & BUS. REV. AM. 11, 65 (2007) (recommending the creation of a new international tribunal to hear transnational tort cases); Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 518, 524–28 (1993) (recommending a federal statute that would limit foreign plaintiff access to U.S. courts in cases where claims arise outside of the United States).

<sup>30</sup> See *infra* notes 46–78 and accompanying text.

<sup>31</sup> See *infra* notes 56–78 and accompanying text.

dential standing to foreign plaintiffs; more commonly, however, judges will invoke their discretionary power to dismiss foreign plaintiffs' cases through the doctrine of *forum non conveniens*.<sup>32</sup> In light of these access restrictions, this Part then examines the emerging international backlash against the dismissal of cases involving U.S. defendants, as other nations—particularly in Latin America—adopt strategies intended to deter such dismissals by making their own courts appear to be a less attractive option for U.S. defendants.<sup>33</sup>

Part II argues that the judge-made court-access doctrines have expanded beyond their initial prudential focus, as they implicate substantive economic, regulatory, and foreign relations policy interests.<sup>34</sup> In this Part, I argue that the competing components of these access doctrines must be openly acknowledged and evaluated.<sup>35</sup> The prudential component serves the goals of fair and efficient adjudication, while the policy strand promotes substantive economic and political goals.<sup>36</sup> The judiciary has been inconsistent, and often contradictory, about what the court-access doctrines are intended to accomplish, frequently conflating the various policy and prudential goals.<sup>37</sup> This inconsistency has led to doctrinal confusion over questions such as whether the trial judge's discretion allows for retention of cases, whether a foreign plaintiff may choose to foreclose a formerly available foreign forum, and whether there is a state or national interest in regulating the conduct of U.S. corporations abroad.<sup>38</sup> Until the separate underpinnings of these court-access doctrines are acknowledged, the doctrines will serve neither the prudential goals nor the policy goals successfully.<sup>39</sup>

Part III applies institutional choice theory to analyze the relative institutional competence of each of the three branches in developing a more coherent court-access policy.<sup>40</sup> Section A articulates both prudential and policy goals for a court access doctrine.<sup>41</sup> On the prudential side, I suggest that the doctrine should promote predictability and uniformity of application.<sup>42</sup> On the policy side, I argue that the doctrine

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<sup>32</sup> See *infra* notes 56–78 and accompanying text.

<sup>33</sup> See *infra* notes 79–101 and accompanying text.

<sup>34</sup> See *infra* notes 102–211 and accompanying text.

<sup>35</sup> See *infra* notes 102–211 and accompanying text.

<sup>36</sup> See *infra* notes 102–211 and accompanying text.

<sup>37</sup> See *infra* notes 102–211 and accompanying text.

<sup>38</sup> See *infra* notes 102–211 and accompanying text.

<sup>39</sup> See *infra* notes 102–211 and accompanying text.

<sup>40</sup> See *infra* notes 212–278 and accompanying text.

<sup>41</sup> See *infra* notes 217–225 and accompanying text.

<sup>42</sup> See *infra* note 217 and accompanying text.

should be sensitive to the foreign relations impact of dismissals, regulate U.S. defendants' conduct abroad, take advantage of the opportunity to export American due process values, and provide an effective mechanism for corrective justice.<sup>43</sup> Section B examines how the three branches of government can work to realize these goals.<sup>44</sup> Finally, Section C recommends that reform begin with Congress, which should articulate an initial court-access policy, then turn to the executive branch to negotiate bilateral treaties and multilateral court-access conventions, and conclude with the judiciary having a more limited role in applying these policies to individual cases.<sup>45</sup>

The time has come for U.S. institutions to coordinate a more effective court-access policy. The doctrines regulating foreign plaintiffs' access to U.S. courts have long been confused, contradictory, and ineffective. As long as dismissal represented a "win" for U.S. corporate defendants, there was previously little incentive for them to support reform of court-access doctrines. Now, that may change: with other countries beginning to impose draconian remedies against U.S. defendants in transnational cases, the moment is right for marshalling support within the United States to enact a more coherent court-access policy.

## I. THE UNITED STATES AS A MAGNET FORUM

U.S. courts are highly attractive to foreign plaintiffs for several reasons. First, compensatory damages tend to be higher in the United States than abroad, and many cases also carry the possibility of recovering punitive damages.<sup>46</sup> Second, the United States allows lawyers to bring cases on a contingent fee basis, so that plaintiffs do not risk having to pay significant attorneys' fees if they lose the case.<sup>47</sup> Discovery is also more widely available than in foreign courts, offering plaintiffs ac-

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<sup>43</sup> See *infra* notes 218–225 and accompanying text.

<sup>44</sup> See *infra* notes 226–268 and accompanying text.

<sup>45</sup> See *infra* notes 270–278 and accompanying text.

<sup>46</sup> *Smith Kline & French Labs. Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 733 (C.A. 1982) ("As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune."); Stephens, *supra* note 5, at 31 ("Comparative studies of damage awards find not only that U.S. awards are much higher than those in any other country, but also find great disparities even within Europe and 'a pattern of low awards' in jurisdictions where 'the standard of living is low and the economy underdeveloped.' Moreover, amounts are much lower even in the more prosperous countries outside of Europe, such as Japan.").

<sup>47</sup> MODEL RULES OF PROF'L CONDUCT R. 1.5(c)–(d) (2009) (prohibiting lawyers from collecting contingent fees only when they represent a defendant in a criminal case or in certain domestic relations matters).

cess to the evidence they need to prove their case.<sup>48</sup> Finally, class action litigation is also widely available, encouraging litigation even in cases where individual damages are likely to be small.<sup>49</sup>

The “magnet effect”<sup>50</sup> of the U.S. courts is enhanced by a socio-legal expectation, present especially in Latin American civil law countries, that a defendant can reliably be sued in its home forum.<sup>51</sup> Discretionary dismissal is virtually unknown in civil law systems; instead, jurisdiction in civil law countries is based on the “belief in the predictability of comprehensive procedure codes created by the legislature and the absence of all but minimal discretion in the role of the judge.”<sup>52</sup> Thus, the civil law countries largely require the first court seised with jurisdiction to hear the case.<sup>53</sup> This process is combined with a strict rule of *lis pendens*, which provides that once a case has been filed in a competent court, no other court can have jurisdiction over it.<sup>54</sup>

Accustomed to justice systems with a long tradition of basing jurisdiction on the defendant’s residence, foreign plaintiffs may be surprised and dismayed to learn that U.S. courts can dismiss cases against U.S. corporate defendants under the assumption that the plaintiff’s home forum is a more convenient choice.<sup>55</sup>

### A. Common Law Court-Access Doctrines

Although foreign plaintiffs desire—and expect—to be able to sue U.S. defendants in U.S. courts, the courts themselves are increasingly resisting such suits and limiting foreign plaintiffs’ access to the federal courts.<sup>56</sup> At the extreme, one court has recently held that foreign plain-

<sup>48</sup> Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.18 (1981) (“[D]iscovery is more extensive in American than in foreign courts.”); Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 678 (1997) (“Both inside and outside the United States, American pretrial has been criticized for encouraging ‘easy’ pleadings (i.e., statements of claim and defense) and ‘broad’ discovery . . .”).

<sup>49</sup> See Fed. R. Civ. P. 23 (detailing class action procedure).

<sup>50</sup> Weintraub, DISPUTE RESOLUTION, *supra* note 21, at 213.

<sup>51</sup> BRAND & JABLONSKI, *supra* note 9, at 128.

<sup>52</sup> *Id.* at 121.

<sup>53</sup> *Id.*

<sup>54</sup> Martine Stückelberg, *Lis Pendens and Forum Non Conveniens at the Hague Conference*, 26 BROOK. J. INT’L L. 949, 950–51, 958–59 (2001).

<sup>55</sup> Zhenjie, *supra* note 9, at 159–60. Foreign plaintiffs may also view such dismissals as a tool to insulate U.S. corporations from liability. *Id.* at 159 (“US courts have in fact been manipulating the doctrine to . . . prevent the application of the plaintiff-favouring rules to foreign plaintiffs . . . . ‘[P]laintiff-favoring rules of liability and damages’ are applied exclusively to the local plaintiffs.”).

<sup>56</sup> *Id.* at 159–60.

tiffs simply lack standing to sue for harms occurring outside the country unless there is a specific exception granted by Congress or the Constitution.<sup>57</sup> Under this view, U.S. courts are a scarce resource that the judiciary must jealously guard.<sup>58</sup> Non-resident aliens presumably have recourse to their home courts and should be expected to sue there.<sup>59</sup>

At this point, only one U.S. district court has expanded the prudential standing doctrine to categorically deny foreign plaintiffs access to U.S. courts, and the U.S. Court of Appeals for the District of Columbia Circuit may yet reverse the decision.<sup>60</sup> Yet judges commonly apply the doctrine of *forum non conveniens* to dismiss such cases. The doctrine of *forum non conveniens* operates on a case-by-case basis, rather than categorically requiring dismissal.<sup>61</sup> It allows a district judge to dismiss a case “when an alternative forum has jurisdiction to hear [the] case, and . . . trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience, or . . . the chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems.”<sup>62</sup>

When the U.S. Supreme Court adopted the doctrine of *forum non conveniens*,<sup>63</sup> it set forth a number of “private interest” and “public in-

<sup>57</sup> *Doe v. Exxon Mobil Corp.*, 658 F. Supp. 2d 131, 134–35 (D.D.C. 2009).

<sup>58</sup> *See id.* (“[W]here a non-resident alien ‘is harmed in his own country, he cannot and should not expect entitlement to the advantages of a United States court.’”) (quoting *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 152 (D.D.C. 1976)).

<sup>59</sup> *Berlin Democratic Club*, 410 F. Supp. at 152 (“[T]he rationale for permitting a resident alien access to United States courts is ‘an implied assurance of safe conduct’ in this country. No similar assurance is or need be given to a citizen of a foreign country, who is not subjected to the laws of this country and who can utilize the laws of his own country to protect himself.”).

<sup>60</sup> *See* Julian Ku, *A Completely New Standing Argument Against the Alien Tort Statute*, OPINIO JURIS (Oct. 18, 2009, 22:26 EST), <http://opiniojuris.org/2009/10/18/a-completely-new-standing-argument-against-the-alien-tort-statute/> (predicting reversal of *Doe*). Interestingly, Judge Royce Lamberth was the judge in *Doe* and the defense attorney seeking dismissal in *Berlin Democratic Club*. *See Doe*, 658 F. Supp. 2d at 132; *Berlin Democratic Club*, 410 F. Supp. at 147.

<sup>61</sup> Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380, 387–88 (1947); John Bies, *Conditioning Forum Non Conveniens*, 67 U. CHI. L. REV. 489, 497–98 (2000); Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 912 (1947); Douglas W. Dunham & Eric F. Gladbach, *Forum Non Conveniens and Foreign Plaintiffs in the 1990s*, 24 BROOK. J. INT’L L. 665, 667 (1999).

<sup>62</sup> *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 429 (2007) (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 447–48 (1994)). As discussed in Part II, however, district courts have sometimes dismissed cases even when these requirements are not met.

<sup>63</sup> Dunham & Gladbach, *supra* note 61, at 668–69. The Court initially adopted the doctrine in the context of domestic litigation (allowing dismissal in favor of another federal court). *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 510–12 (1947) (finding New York to be an inconvenient forum compared to Virginia); *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S.

terest” factors that courts should consider in deciding whether to dismiss. On the private side, it included the availability of evidence and witnesses, the costs of trial, the enforceability of the ultimate judgment, and the plaintiffs’ motivation in choosing the forum.<sup>64</sup> On the public side, it mentioned the crowdedness of the docket, the potential need to call jurors from a community with little relationship to the litigation, and the familiarity of the court with governing law.<sup>65</sup>

At the outset, the Court did not trouble itself too much with how, exactly, these factors should be evaluated.<sup>66</sup> As a result, the motivating policy behind a *forum non conveniens* dismissal depends very much on the worldview of the judge deciding the motion.<sup>67</sup> Truly easy cases rarely require a *forum non conveniens* analysis, as a federal court lacks subject matter jurisdiction when all the factors point to dismissal: if no party is a U.S. citizen, and if the case does not arise under federal law, then there is no subject matter jurisdiction in federal court.<sup>68</sup> Thus, cases that turn on *forum non conveniens* are necessarily cases in which these factors point in different directions.<sup>69</sup> Perhaps the case may be unrelated to the forum, but the forum court’s docket may nevertheless be less crowded than most, allowing the case to be heard quickly.<sup>70</sup> Or witnesses may be difficult to obtain, but U.S. law may govern the case and any judgment may be easily enforceable in the United States.<sup>71</sup> Thus, ruling on a *forum non conveniens* motion requires the judge to not only balance competing facts, but also to balance competing policies: is docket control more important than the plaintiffs’ convenience?<sup>72</sup> Does the risk of offending another country’s government by

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518, 531-32 (1947) (finding New York to be an inconvenient forum compared to Illinois). The current venue statute, however, allows transfer among federal district courts for convenience and therefore renders the doctrine unnecessary in domestic federal litigation. 28 U.S.C. § 1404 (2006); *Sinochem Int’l Co.*, 549 U.S. at 430 (“The common-law doctrine of *forum non conveniens* ‘has continuing application [in federal courts] only in cases where the alternative forum is abroad,’ and perhaps in rare instances where a state or territorial court serves litigational convenience best.”).

<sup>64</sup> *Gulf Oil*, 330 U.S. at 508.

<sup>65</sup> *Id.*

<sup>66</sup> *See id.* at 507–09 (describing the history and workings of the doctrine).

<sup>67</sup> *See id.*

<sup>68</sup> 28 U.S.C. §§ 1331, 1332 (2006). Of course, a case with only foreign parties may still be heard if the case arises under federal law, including cases arising under statutes such as the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2006), or the Class Action Fairness Act, 28 U.S.C. §§ 1, 1332(d), 1453, 1711–1715 (2006).

<sup>69</sup> *See Gulf Oil*, 330 U.S. at 508–09.

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

<sup>72</sup> *See id.*

dismissing a case brought by its citizens outweigh the inconvenience imposed on local citizens who must sit on a jury for a case with no connection to their community?<sup>73</sup> And, although not officially part of the analysis, the judge's thoughts about contingent-fee cases, American damage awards, and the tort system in general will influence how the judge weighs those competing policies.<sup>74</sup>

Thus, the forum non conveniens doctrine leaves the difficult decision to the trial judge, who must decide for him- or herself how to weigh the competing considerations and decide whether to retain the case or dismiss it.<sup>75</sup> The Supreme Court acknowledged the high level of discretion given to the trial judge, noting that "it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy," and that "[t]he doctrine leaves much to the discretion of the court to which plaintiff resorts."<sup>76</sup> The Court did suggest that close cases should be resolved in favor of the plaintiff: "[U]nless the balance [of private interest factors] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."<sup>77</sup> But ultimately, the Court offered a fairly vague standard, suggesting that trial judges should choose the forum "where trial will best serve the convenience of the parties and the ends of justice."<sup>78</sup>

### B. "Demagnetizing" Policies and International Retaliation

Given the magnetic effect of U.S. courts and the discretion given to trial judges to dismiss cases, scholars like Professor Russell Weintraub have identified a need to "demagnetize" U.S. courts.<sup>79</sup> Weintraub, a well-known expert in international litigation, suggests that magnet forums may have a responsibility to "examine their rules and procedures and

<sup>73</sup> See *id.*

<sup>74</sup> See David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L.J. 353, 360–62 (1994); Louise Weinberg, *Insight and Ironies: The American Bhopal Cases,* 20 TEX. INT'L L.J. 307, 316–17 (1985).

<sup>75</sup> *Gulf Oil*, 330 U.S. at 508.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Koster*, 330 U.S. at 527.

<sup>79</sup> See RUSSELL J. WEINTRAUB, INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICE AND PLANNING 224 (5th ed. 2006). But see Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. (forthcoming 2010) (presenting empirical evidence "suggesting that there actually has been less, not more, transnational forum shopping into U.S. courts over the last two decades," and concluding that "new anti-forum-shopping measures may not be as appropriate or urgent as their advocates suggest—particularly in light of the potential costs of such measures"), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1596280](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1596280).

modify those that are luring claimants from forums that are more appropriate for adjudicating the matters in dispute[.]”<sup>80</sup> Professor Weintraub has recommended changing choice-of-law rules to demagnetize U.S. courts, so that foreign tort victims’ compensation would be calculated by reference to the prevailing standard in their home country.<sup>81</sup>

In the absence of such a choice-of-law regime, however, it is not surprising that judges turn to the tools more immediately at hand to repel foreign lawsuits—in particular, the judicial doctrines of prudential standing and forum non conveniens.<sup>82</sup> Although categorical exclusion through the doctrine of prudential standing is an extreme demagnetizing policy, expansion of the forum non conveniens doctrines is a much more common one.<sup>83</sup> Two decades ago, a scholar reported that the federal courts were experiencing a “dramatic increase in the use of forum non conveniens in the last twenty years,” going from approximately 25 published decisions per decade to or over 100 per decade, or approximately 10 per year.<sup>84</sup> Transnational forum non conveniens cases have continued that dramatic increase, going up to approximately forty-three published decisions per year<sup>85</sup>—a 400% increase over a time period in which civil filings as a category rose only 22%.<sup>86</sup> The courts have dismissed in approximately half of the most recent cases.<sup>87</sup>

<sup>80</sup> See WEINTRAUB, *supra* note 79.

<sup>81</sup> Russell J. Weintraub, *Choice of Law for Products Liability: Demagnetizing the United States Forum*, 52 ARK. L. REV. 157, 163 (1999).

<sup>82</sup> See *Sinochem Int’l Co.*, 549 U.S. at 429–30; *Doe*, 658 F. Supp. 2d at 135.

<sup>83</sup> Weintraub, *International Litigation*, *supra* note 21, at 352 (“The United States is a magnet forum for the afflicted of the world. The costs of litigating here are lower and the recovery is higher. Subjecting United States defendants to suit here by foreigners injured abroad places our companies at a world-wide competitive disadvantage. . . . Forum non conveniens furthers efficient and fair use of our judicial resources.”).

<sup>84</sup> Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 831 (1985).

<sup>85</sup> Christopher A. Whytock, *Politics and the Rule of Law in Transnational Judicial Governance: The Case of Forum Non Conveniens* 15–16, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=969033](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=969033).

<sup>86</sup> *Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2009: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 111th Cong. (2009) (testimony by George Singal, J., U.S. District Court for the District of Maine).

<sup>87</sup> See Whytock, *supra* note 85, at 16 (reporting a forty-seven percent dismissal rate). A review of reported district court cases in 2009 confirmed that just over forty percent of the cases were dismissed. See *id.* at 17, 31. Of these cases, courts dismissed cases involving foreign plaintiffs suing U.S. defendants at a notably higher rate than cases involving U.S. plaintiffs suing foreign defendants. See *id.* at 23.

Because a growing number of foreign nations object to the growth of such dismissals, they have begun adopting retaliatory blocking statutes.<sup>88</sup> Many of these statutes, enacted primarily in Latin American countries with civil law systems, attempt to prevent forum non conveniens dismissals in the United States.<sup>89</sup> The statutes generally provide that, once a plaintiff has filed suit in a foreign court with jurisdiction, the home country's court loses jurisdiction.<sup>90</sup> Although this is a restatement of the general principle of *lis pendens* followed in civil law countries, countries enacted the statutes to make clear that their courts should not be considered an alternative forum supporting dismissal under forum non conveniens.<sup>91</sup> Thus, a foreign plaintiff who files first in a U.S. court may, by this choice, foreclose jurisdiction in his or her home forum—a forum that would have been available had the plaintiff sued there initially, but is no longer available once suit is filed in a U.S. court possessing jurisdiction over the case.<sup>92</sup> This aspect of the statute is designed to discourage dismissal from U.S. courts by sending the message that “if transnational cases are dismissed [from the U.S.], the foreign national-plaintiff may never have relief.”<sup>93</sup>

Defendants themselves may not care if the foreign plaintiff obtains relief. Of presumably greater concern to U.S. defendants, however, is that some blocking statutes add a provision that acts as a poison pill: such provisions allow the national courts to take jurisdiction over cases dismissed from U.S. courts, but impose additional disadvantages on defendants that “tilt the scales of justice in the plaintiffs’ favor.”<sup>94</sup> These statutes may, like the one described in the introduction, allow courts to assess damages at U.S. levels—and, like the twenty-seven billion dollar recommendation in Ecuador, may estimate U.S. damage law more generously than U.S. courts would.<sup>95</sup> Statutes may also require U.S. defen-

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<sup>88</sup> Bernard H. Oxman, *Comments on Forum Non Conveniens Issues in International Cases*, 35 U. MIAMI INTER-AM. L. REV. 123, 128 (2004); see also Winston Anderson, *Forum Non Conveniens Checkmated?—The Emergence of Retaliatory Legislation*, 10 J. TRANSNAT’L L. & POL’Y 183, 184 (2001); Paul Santoyo, Comment, *Bananas of Wrath: How Nicaragua May Have Dealt Forum Non Conveniens a Fatal Blow Removing the Doctrine as an Obstacle to Achieving Corporate Accountability*, 27 HOUS. J. INT’L L. 703, 724–26, 735–36 (2005).

<sup>89</sup> Heiser, *supra* note 18, at 621–34; Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 22–24 (2003).

<sup>90</sup> See Santoyo, *supra* note 88, at 725.

<sup>91</sup> Saint Dahl, *supra* note 89, at 25–31.

<sup>92</sup> See Santoyo, *supra* note 88, at 725.

<sup>93</sup> M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Convenient Is Forum Non Conveniens in Transnational Litigation?*, 4 BYU INT’L L. & MGMT. REV. 21, 29 (2007).

<sup>94</sup> *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1324 (S.D. Fla. 2009).

<sup>95</sup> See *supra* notes 14–16 and accompanying text.

dants to post a significant bond, such as 140% of the damages awarded in similar cases, or may presume causation in tort cases, requiring the defendant to prove that its action did not cause the alleged harm.<sup>96</sup>

Federal courts react to blocking statutes in different ways; some will accept them at face value and retain a case, while others will ignore them.<sup>97</sup> Thus, the use of forum non conveniens dismissals to “demagnetize” U.S. courts raises a number of unresolved issues: it is not clear whether such a policy will actually be effective at pushing litigation into other countries’ courts and whether, in the long run, U.S. defendants might find themselves facing greater hardships in defending cases outside the U.S. than at home. As such, the benefits of a demagnetizing policy may outweigh its detriments.<sup>98</sup>

Given the domestic confusion and international reaction to the forum non conveniens doctrine, it seems apparent that, although forum non conveniens plays a growing role in controlling court access, it is not serving well as a primary court-access determinant.<sup>99</sup> Nevertheless, few academics have examined the doctrine’s role in the larger question of access to federal court.<sup>100</sup> The next Part analyzes court-access doctrines more generally, separating the prudential and policy goals that animate the doctrines and arguing that these conflicting goals create chaos, unpredictable rulings, and inefficient judicial administration.<sup>101</sup>

## II. PROBLEMATIC JUDICIAL COURT-ACCESS DOCTRINES

Most court-access restrictions stem from constitutional or legislative sources: the Constitution sets the outer boundaries of both personal jurisdiction and subject matter jurisdiction,<sup>102</sup> and Congress has created additional limitations on subject matter jurisdiction and venue, while deferring to additional state-made limitations on personal juris-

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<sup>96</sup> Heiser, *supra* note 18, at 656–57.

<sup>97</sup> Casey & Ristroph, *supra* note 93, at 30–31.

<sup>98</sup> *See id.*

<sup>99</sup> *See id.* at 26–31.

<sup>100</sup> For two notable exceptions that do address forum non conveniens as part of the larger issue of court access, see Jeffrey A. Van Detta, *Justice Restored: Using a Preservation-of-Court-Access Approach to Replace Forum Non Conveniens in Five International Product-Injury Case Studies*, 24 Nw. J. INT’L L. & BUS. 53, 60 (2003) (citing the “shared underpinnings” of forum non conveniens with legislative jurisdiction and the modern theory of personal jurisdiction), and Stein, *supra* note 84, at 831.

<sup>101</sup> *See infra* notes 102–211 and accompanying text.

<sup>102</sup> U.S. CONST., art. III; *Pennoyer v. Neff*, 95 U.S. 714, 741–47 (1877).

diction.<sup>103</sup> But judge-made court-access limitations are not uncommon.<sup>104</sup> The judiciary developed the doctrine of prudential standing, for example, to avoid wasting court time on cases where no individual rights would be vindicated and to ensure that “those litigants best suited to assert a particular claim” would be the ones heard in court.<sup>105</sup>

These judicial restrictions on court access are typically instrumentalist in that they seek to ensure the smooth functioning of the courts. Specifically, they are intended to promote better decision making, conserve judicial resources, and minimize conflicts between the branches of government.<sup>106</sup> Thus, for example, prudential doctrines prohibit a litigant from “raising another person’s legal rights,” forbid suits based on “generalized grievances,” and require that the plaintiff’s complaint “fall within the zone of interests protected by the law invoked.”<sup>107</sup> In adopting these limitations, the judiciary pays heed to the idea of comparative institutional competence: as the U.S. Supreme Court has noted, these prudential access rules offer a mode of judicial self-governance, without which “the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.”<sup>108</sup>

Many of the commonly stated goals of *forum non conveniens* fit well with other common law doctrines of judicial restraint and deference.<sup>109</sup> The discretionary dismissal power protects judicial functioning by combating plaintiffs’ abuse of process,<sup>110</sup> guarding overcrowded

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<sup>103</sup> 28 U.S.C. §§ 1391, 1331, 1332 (2006); Fed. R. Civ. P. 4(k).

<sup>104</sup> See *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 99–100 (1979) (discussing the judge-made doctrine of prudential standing).

<sup>105</sup> *Id.*; see also Jeffrey Kahn, *Zoya’s Standing Problem, or, When Should the Constitution Follow the Flag?*, 108 MICH. L. REV. 673, 673 (2010) (critiquing the “strange but proliferating” test of standing).

<sup>106</sup> Joshua L. Sohn, *The Case for Prudential Standing*, 39 U. MEM. L. REV. 727, 728 (2009) (“[T]he Court has noted how the ‘constitutional’ standing requirements improve judicial decision-making, conserve judicial resources, and reduce conflict between the judiciary and the political branches. These are all worthy goals, but they are prudential goals, related to wise and efficient judicial administration.”).

<sup>107</sup> *Id.* at 732 (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004)).

<sup>108</sup> *Elk Grove*, 542 U.S. at 12.

<sup>109</sup> See *infra* notes 110–112 and accompanying text.

<sup>110</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) (noting that some plaintiffs may seek “not simply justice but perhaps justice blended with some harassment”).

dockets from the incursion of cases unrelated to the forum,<sup>111</sup> and deferring to the competence of foreign courts through considerations of comity.<sup>112</sup>

But even from an early time, the *forum non conveniens* doctrine has not been limited to these prudential goals; instead, it also captures broader policy considerations that could be affected by court access.<sup>113</sup> By assertively dismissing non-forum-related cases, for example, courts favor taxpayers whose dollars support court operations.<sup>114</sup> On the other hand, when broad court access would encourage business and commercial considerations, the courts are less likely to apply the *forum non conveniens* doctrine—thus showing deference to substantive economic goals.<sup>115</sup> Other policies informally influence the *forum non conveniens* analysis, as dismissing courts sometimes express distaste for contingent-fee lawyers and for foreign plaintiffs who seek higher damage awards than their own countries would be willing to award.<sup>116</sup>

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<sup>111</sup> *Heine v. N.Y. Life Ins. Co.*, 50 F.2d 382, 387 (9th Cir. 1931) (stating that the court has “the power to prefer resident litigants of the district in access to overcrowded calendars”).

<sup>112</sup> *Id.* (“Comity between the United States and Germany should also have consideration.”); *Universal Adjustment Corp. v. Midland Bank, Ltd.*, 184 N.E. 152, 159 (Mass. 1933) (“In determining whether to entertain jurisdiction of a cause as matter of comity, courts undertake to recognize a state of friendliness and reciprocal desire to do justice existing between nations and between the several States of the Union.”).

<sup>113</sup> See Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 212 (2001) (“Ostensibly a tool to implement litigation convenience for litigants and courts, as formulated by the Supreme Court in the 1940’s, *forum non conveniens* doctrine invited attention to regulatory concerns, and hence to choice of law, through consideration of what the Court called ‘public interest factors.’”); see also Alexandra Wilson Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 TEX. L. REV. 351, 398 (1992) (“In making decisions about *forum non conveniens*, the state is making public policy decisions that affect the state’s economy as well as the influence that the state’s laws may have in foreign countries.”).

<sup>114</sup> See Barrett, *supra* note 61, at 404; see also *One Hundred & Ninety-Four Shawls*, 18 F. Cas. 703, 705 (S.D.N.Y. 1848) (No. 10,521) (concluding that courts should not prioritize cases involving litigants “owing no allegiance to its laws, and contributing in no way to its support”).

<sup>115</sup> See Barrett, *supra* note 61, at 405 (noting that New York would allow dismissal for *forum non conveniens* in tort actions but not in commercial actions, because in commercial actions “presumably some benefit will ultimately accrue to the state through encouraging the use of its courts in the furtherance of business activities”).

<sup>116</sup> *Heine*, 50 F.2d at 387 (noting that the court “no doubt had inherent power to protect itself from a deluge of litigation by nonresidents, inspired by contingent retainers to avoid or overcome foreign laws and interpretation and application thereof by foreign courts of the country of the situs of the contract”).

Excluding foreign plaintiffs based on standing similarly evokes both prudential and policy considerations.<sup>117</sup> By excluding a particular class of litigants, the doctrine indeed reduces the administrative burden of the courts.<sup>118</sup> But the policy questions are even more central: by adopting such a doctrine, the court is also affecting economic, political, and regulatory interests in ways that may have substantial ramifications.<sup>119</sup>

The next Section argues that the competing components of these access doctrines must be openly acknowledged and evaluated.<sup>120</sup> The prudential component serves the goals of fair and efficient adjudication, while the policy strand promotes substantive economic and political goals.<sup>121</sup> The judiciary itself has been inconsistent and often contradictory about what the court access doctrines are intended to accomplish.<sup>122</sup> Until the separate underpinnings of these court-access doctrines are acknowledged, the doctrines will serve neither the prudential nor the policy goals successfully.

#### A. *Does the Trial Judge's Discretion Allow for Retention of Cases?*

Acknowledging the tension between prudential and policy goals would help define the limits of the district court's power. At this time, it is unclear where the limits on discretion fall: specifically, may a judge retain a case on the docket even when the *forum non conveniens* factors are clearly met? Certainly, the judge would have discretion to dismiss the case when the factors are met. But would the judge also have discretion to retain the case?

Separating the prudential and policy considerations of the doctrine is critical to answering this question. If the prudential considerations are paramount, then the judge should indeed possess such discretion; after all, the judge is in the best position to consider the administrative impact of retaining such a case. If, on the other hand, we expect the doctrine to also further substantive policy goals, then retaining the case would make no sense: unlike prudential concerns that one can

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<sup>117</sup> See Kahn, *supra* note 105, at 673.

<sup>118</sup> See *id.* at 718–19 (noting that denying prudential standing for foreign-based takings claims may reduce “court clog,” but only at risk of “creat[ing] an arbitrary device to exclude plaintiffs with legitimate claims” and potentially threatening the property interests of aliens abroad).

<sup>119</sup> See *infra* notes 123–142 and accompanying text.

<sup>120</sup> See *infra* notes 123–142 and accompanying text.

<sup>121</sup> See *infra* notes 123–142 and accompanying text.

<sup>122</sup> See BORN & RUTLEDGE, *supra* note 20, at 369 (“[T]he *forum non conveniens* doctrine rests on unarticulated and unexamined substantive assumptions.”).

reasonably address on a case-by-case basis, meeting policy goals requires a stable system in which dismissals can reasonably be predicted.

One reason for this lack of clarity regarding the retention power is that appellate courts are rarely asked to address a district judge's refusal to dismiss under *forum non conveniens*. It is clear that a decision to dismiss may be reviewed by higher courts under an "abuse of discretion" standard: if the factors do not weigh in favor of dismissal, the district court's decision to dismiss is a final judgment that will be reversed for abuse of discretion.<sup>123</sup> A decision denying a motion to dismiss, however, is more difficult to review: because the decision to retain a case is not a final order, it is not immediately appealable as of right.<sup>124</sup> Moreover, if the defendant does raise the issue after a trial on the merits, many of the factors supporting a *forum non conveniens* dismissal will have become moot: whatever inconvenience the parties and court would have suffered from trying the case in a particular forum becomes a sunk cost after trial.<sup>125</sup> Remanding the case for retrial in a more convenient forum would only add to the overall expense and delay of the case.<sup>126</sup>

Because of the rarity of such appeals, a district judge's decision to retain a case is rarely disturbed—even when it conflicts with other judges' decisions. Thus, at a minimum, district judges possess "review-limiting" discretion to retain cases; that is, "there may be law constraining the trial court's decision, but there will be [almost] no appellate

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<sup>123</sup> See, e.g., *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 429–30 (2007) (reviewing a dismissal under *forum non conveniens*); *Syngy, Inc. v. ZS Assocs., Inc.*, No. 08–2355, 2009 WL 1532117, at \*2–3 (3d Cir. June 1, 2009) (concluding that the district court failed to properly evaluate the availability of the alternative forum); *Adelson v. Hananel*, 510 F.3d 43, 52–54 (1st Cir. 2007) (concluding that the district court afforded too much weight to concurrent litigation ongoing in Israel and that it provided insufficient deference to the plaintiff's choice of forum).

<sup>124</sup> *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1998). Interlocutory review may be available by mandamus or through 28 U.S.C. § 1292(b) (2006) in exceptional cases. *Id.* at 529–30. In addition, a right of interlocutory appellate review could be granted through the rulemaking process under 28 U.S.C. § 1292(e) (2006).

<sup>125</sup> See *Zelinski v. Columbia 300, Inc.*, 335 F.3d 633, 643 (7th Cir. 2003) ("The fact that the district court tried this case to a conclusion indicates that Zelinski's forum of choice was, if not convenient for Columbia, at least workable. Furthermore, at this point the public interest certainly would not be well-served by deciding to jettison the untold hours of work put into this case . . ."); see also *Demenus v. Tinton 35, Inc.*, 873 F.2d 50, 54 (3d Cir. 1989) (suggesting that a *forum non conveniens* motion "fails to survive the mootness effect of the actual litigation of the suit in the putative inconvenient forum"). *But see Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876, 881 (5th Cir. 1987) (reversing, even after trial, the lower court's judgment which had denied a motion to dismiss on *forum non conveniens* grounds, and transferring the case to Peru).

<sup>126</sup> See *Zelinski*, 335 F.3d at 643.

review of that decision—such discretion ‘gives the trial judge a right to be wrong without incurring reversal.’”<sup>127</sup>

But a more difficult question is whether the district judge also possesses “decision-liberating” discretion to retain a case even when the factors would easily permit dismissal. That is, is the court “free to render the decision it chooses” in such an instance?<sup>128</sup> The U.S. Supreme Court’s typical phrasing of the *forum non conveniens* doctrine states that

a federal court has discretion to dismiss a case on the ground of *forum non conveniens* “when an alternative forum has jurisdiction to hear [the] case, and . . . trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience, or . . . the chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems.”<sup>129</sup>

What is unclear, however, is whether the “discretion” identified by the Court means that the judge could, in such instances, choose either to retain or dismiss.

Conventional wisdom leans toward a substantive view of the doctrine, suggesting that a defendant may have a right to dismissal even if the trial judge were willing to keep the case.<sup>130</sup> Under this view, if the stated *forum non conveniens* factors are satisfied, then a judge’s decision to retain the case would be an abuse of discretion.<sup>131</sup> At one level, this makes sense: if the factors truly weigh heavily in favor of permitting dismissal, then what reason could the court have for retaining jurisdiction?<sup>132</sup> And if indeed the court has no good reason for retaining juris-

<sup>127</sup> Cassandra Burke Robertson, *Judging Jury Verdicts*, 83 TUL. L. REV. 157, 202 (2008) (quoting Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 638 (1971)).

<sup>128</sup> *Id.* (quoting Rosenberg, *supra* note 127, at 638).

<sup>129</sup> *Sinochem*, 549 U.S. at 429.

<sup>130</sup> *See Gonzalez*, 832 F.2d at 881.

<sup>131</sup> *See id.* (“[W]e conclude that the District Court abused its discretion in denying Neptuno’s motion to dismiss for *forum non conveniens*. Consequently, the judgment must be reversed. Both private and public interests weigh heavily in favor of a Peruvian forum, applying Peruvian law.”); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 809 F.2d 195, 202 (2d Cir. 1987) (“[I]t might reasonably be concluded that it would have been an abuse of discretion to deny a *forum non conveniens* dismissal.”).

<sup>132</sup> *See Gonzalez*, 832 F. 2d at 881.

diction, but simply does so arbitrarily or capriciously, then the court would certainly be abusing its discretion.<sup>133</sup>

On the other hand, the source of the dismissal power supports the view that prudential considerations should control, and that the judge may indeed have such power.<sup>134</sup> Unlike personal jurisdiction, which has constitutional underpinnings,<sup>135</sup> or venue limitations, which are codified in statute,<sup>136</sup> authority for the *forum non conveniens* doctrine is based on the court's "inherent power."<sup>137</sup> As other commentators have noted, the U.S. Supreme Court has stated that such inherent power should be strictly interpreted, "suggesting that the inherent power extends only to those instances 'necessary to permit the courts to function.'"<sup>138</sup> It may be that the courts need the *forum non conveniens* doctrine to function—specifically, to protect their dockets from cases that have little connection to the forum and can be more easily resolved elsewhere. But if so, a court's decision not to exercise that outlet in a particular case should be respected—even if the case would otherwise fit the paradigm for dismissal under *forum non conveniens*.

Thus, when both the Constitution and Congress would permit a court to exercise jurisdiction, the court may reasonably decide to retain a case that would otherwise qualify for dismissal under *forum non conveniens*.<sup>139</sup> Even if the case has little connection to the forum, the court may believe that it can still manage its docket while hearing the case,

<sup>133</sup> See *Richards v. United Mine Workers Health & Ret. Fund*, 895 F.2d 133, 135–36 (4th Cir. 1990) ("Although the 'abuse of discretion' standard is perhaps broader and less deferential than the 'arbitrary and capricious' standard, 'arbitrary and capricious' definitely is encompassed by 'abuse of discretion.'").

<sup>134</sup> *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) ("In addition, it is firmly established that '[t]he power to punish for contempts is inherent in all courts.' This power reaches both conduct before the court and that beyond the court's confines . . . . Of particular relevance here, the inherent power also allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court." (citations omitted)).

<sup>135</sup> See *Pennoy*, 95 U.S. at 741–47.

<sup>136</sup> See 28 U.S.C. § 1391 (2006).

<sup>137</sup> *Chambers*, 501 U.S. at 44 ("There are other facets to a federal court's inherent power. The court may bar from the courtroom a criminal defendant who disrupts a trial. It may dismiss an action on grounds of *forum non conveniens*, and it may act *sua sponte* to dismiss a suit for failure to prosecute.") (citations omitted); see also Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1159–66 (2006); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 743 (2001).

<sup>138</sup> Lear, *supra* note 137, at 1160 (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 819–20 (1987) (Scalia, J., concurring in the judgment)).

<sup>139</sup> See Lear, *supra* note 137, at 1160–62.

and may reasonably defer to Congress's choice to allow jurisdiction.<sup>140</sup> If the power to dismiss a case under *forum non conveniens* is truly based on the court's inherent power, then it is not unreasonable to view such power as a one-way safety valve: the court may override Congress's grant of jurisdiction when, under its inherent power, the court finds dismissal to be necessary; if the court concludes that it can function without such a dismissal, however, it is not obligated to dismiss even when it would have authority to do so.

It might be reasonable to defer to the judge's retention power, but this view is far from universal. Although most decisions to retain cases evade appellate review, a few courts have reached out, either through interlocutory review before trial or even post-trial, to hold that a court abuses its discretion by retaining a case eligible for *forum non conveniens* dismissal.<sup>141</sup> These courts thus treat the doctrine as a substantive one that protects defendants' rights, rather than a prudential doctrine that protects the functioning of the courts.<sup>142</sup>

B. *May a Foreign Plaintiff Intentionally Foreclose an  
"Adequate Alternative Forum"?*

The prudential-policy distinction is also apparent when courts must decide how to address the effects of plaintiffs' forum choices. The prudential side of the doctrine allows a court to decide which of two available courts is better suited to hear the case. What happens, however, when the plaintiff could have filed suit in a more appropriate forum, but chose not to and thereby "closed" the formerly available forum? At this point, the U.S. court no longer has the ability to choose between two forums—the prudential option of sending the case to a

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<sup>140</sup> See *id.* Indeed, some scholars have argued that deference to Congress is required, and that current *forum non conveniens* doctrine impermissibly encroaches on areas of exclusive Congressional control. See *id.* and sources cited therein.

<sup>141</sup> See *Gonzalez*, 832 F.2d at 881 (reversing, even after trial, the lower court's judgment which denied a motion to dismiss on *forum non conveniens* grounds and transferring the case to Peru); see also *Union Carbide Corp.*, 809 F.2d at 202 ("[I]t might reasonably be concluded that it would have been an abuse of discretion to deny a *forum non conveniens* dismissal.").

<sup>142</sup> *Nalls v. Rolls-Royce, Ltd.*, 702 F.2d 255, 260 (D.C. Cir. 1983) (Wilkey, J., dissenting from denial of rehearing en banc) (stating that *forum non conveniens* protects "the right not to be tried in an unreasonably inconvenient forum," and comparing it to the "district court's denial of a motion to dismiss on double jeopardy grounds"); Christina Melady Morin, Note, *Review and Appeal of Forum Non Conveniens and Venue Transfer Orders*, 59 GEO. WASH. L. REV. 715, 729 (1991) ("Both *forum non conveniens* and venue transfer protect the defendant from proceeding to trial in an unreasonably inconvenient forum.").

better decisionmaker is closed.<sup>143</sup> All that is left is the policy question: should the court dismiss the case to incentivize future plaintiffs to make more appropriate forum choices, even though the current plaintiffs have no such option?

The discord over this question arises from a changing conception of the role that the “alternative forum” concept should play in a forum non conveniens analysis.<sup>144</sup> Originally, the doctrine was conceived as a way to steer cases away from a vexatious or abusive forum and into a more convenient one.<sup>145</sup> Courts later transformed it into a doctrine aimed at choosing the most suitable forum, regardless of whether the original forum was vexatious or not.<sup>146</sup> Using the doctrine to shape litigant forum choice at the outset would effect an even more fundamental change, transforming the forum non conveniens doctrine from one that merely steers litigation to an appropriate forum into one that attempts to regulate litigant behavior.

This shift has not fully taken hold; the traditional view, which requires that the adequate alternative forum actually be available at the time of dismissal, is still prominent at this time.<sup>147</sup> If the statute of limitations is likely to be a problem in the alternative forum, courts following this doctrine often condition dismissal on the defendant’s willing-

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<sup>143</sup> Saint Dahl, *supra* note 89, at 22–24. As discussed further in this Section, alternative forums might become unavailable for different reasons: civil law countries may divest jurisdiction of other courts after a case has been filed in a court possessed of jurisdiction, and the statute of limitations may be shorter in one forum than in another. *See supra* notes 155–165 and accompanying text.

<sup>144</sup> *See infra* notes 145–181 and accompanying text.

<sup>145</sup> *See* Robertson, *supra* note 4, at 404–05.

<sup>146</sup> *Id.*

<sup>147</sup> *See* *Crimson Semiconductor, Inc. v. Electronum*, 629 F. Supp. 903, 909 (S.D.N.Y. 1986) (“Many cases have held that statute of limitations bars arising after the instigation of a lawsuit preclude a *forum non conveniens* dismissal. Yet our research uncovers only one case discussing the adequacy of a forum in which the claim would have been stale when brought.”); BORN & RUTLEDGE, *supra* note 20, at 415 (“The weight of authority . . . imposes an absolute requirement that an adequate alternative forum exist.”); Heiser, *supra* note 18 at 624 (“Under the traditional common law doctrine set forth in [*Gulf Oil*] and [*Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)] and followed in federal and most state courts, a court must first ascertain whether an adequate alternative forum is available when determining whether a forum non conveniens dismissal is appropriate. If the law in the alternative country prohibits jurisdiction over the plaintiff’s claim when the plaintiff first files in another country with competent jurisdiction, then the alternative forum is simply not available to the plaintiff.”); Rajeve Muttreja, Note, *How To Fix the Inconsistent Application of Forum Non Conveniens to Latin American Jurisdiction—And Why Consistency May Not Be Enough*, 83 N.Y.U. L. REV. 1607, 1638 (2008).

ness to waive it.<sup>148</sup> Because the traditional view requires that an alternative forum be available to take the case, it does not inquire into the reasons for a forum's unavailability.<sup>149</sup> Thus, under the traditional view, blocking statutes that preclude jurisdiction abroad would be effective: a statute destroying all other jurisdiction as soon as the case is filed in a court of proper jurisdiction the statutes would be considered in the dismissal analysis, and the U.S. court would keep the case if it concludes that, in light of the statute, there is no alternative forum.<sup>150</sup>

Nevertheless, a modern trend is emerging in which a growing number of courts will dismiss a case—even in the absence of an alternative forum—when it appears that the foreign forum is unavailable as a result of plaintiffs' early choices in litigation.<sup>151</sup> In the 2005 U.S. Court of Appeals for the Seventh Circuit case *In re Bridgestone/Firestone, Inc.*, for example, a district court had declined to hear a tort case against a U.S. corporation, concluding that Mexico was an adequate alternative forum.<sup>152</sup> The plaintiff, however, had also filed suit in Mexico, and a Mexican court had dismissed the case for lack of jurisdiction.<sup>153</sup> The Seventh Circuit remanded the case, holding that the district court should inquire into the nature of that dismissal: if the plaintiffs had acted in bad faith by purposefully filing in the wrong Mexican state, then the district court should feel free to dismiss for forum non conveniens, as "a forum may not become unavailable by way of fraud."<sup>154</sup>

The enactment of blocking statutes significantly increases the likelihood that courts will have to decide what effect to give to the plain-

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<sup>148</sup> 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828.3 (3d ed. 2007) ("A motion to dismiss for forum non conveniens will not be granted unless the district court is convinced that an alternative forum exists in which the action can be brought.").

<sup>149</sup> See Heiser, *supra* note 18, at 626 ("The relevant inquiry under the current forum non conveniens analysis is *whether* an alternative forum is in fact available, not *why* the alternative forum is unavailable.").

<sup>150</sup> See *id.*

<sup>151</sup> See, e.g., *In re Bridgestone/Firestone, Inc.*, 420 F.3d 702, 703 (7th Cir. 2005); *Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1248 n.10 (5th Cir. 1983) ("Perhaps if the plaintiff's plight is of his own making—for instance, if the alternative forum was no longer available at the time of dismissal as a result of the deliberate choice of an inconvenient forum—the court would be permitted to disregard [the available forum requirement] and dismiss. As we have pointed out, forum non conveniens is sensitive to plaintiff's motive for choosing his forum, at least in the extreme case where his selection is designed to 'vex, harass, or oppress the defendant.'").

<sup>152</sup> 420 F.3d at 703.

<sup>153</sup> *Id.* at 705.

<sup>154</sup> *Id.* at 707.

tiff's initial forum choice.<sup>155</sup> When another's country's statute attempts to limit its own courts' jurisdiction in an effort to shift the litigation to the United States, U.S. courts must decide how to react: accept the limitation and hear the case, or reject the limitation and refuse the case? Federal courts have gone both ways.<sup>156</sup> Courts may view such statutes as an encroachment on their judicial power,<sup>157</sup> but a judicial rejection of the foreign statutes would extend well beyond the judicial sphere, affecting foreign relations and regulatory goals.<sup>158</sup>

Even in the absence of a blocking statute, plaintiffs' litigation choices may foreclose an alternative forum and require the court to make a decision about whether to allow access to the U.S. court.<sup>159</sup> For example, in *In re Compania Naviera Johanna S.A.*, decided in 2007 by the United States District Court for the District of South Carolina, the plaintiff deliberately chose not to file suit in China, knowing that the Chinese statute of limitations would expire before the U.S. court ruled on the forum non conveniens motion.<sup>160</sup> The district court decided that dismissal was appropriate even though the Chinese forum was no longer available to the plaintiff, stating that "[i]f a plaintiff (or other party opposed to forum non conveniens dismissal) purposefully foreclosed the availability of an alternative forum, that conduct would certainly be in the realm of vexation, harassment, or oppression."<sup>161</sup>

District courts have also occasionally allowed dismissal when the alternative forum was lost due to mere inaction rather than a particular intent to preclude a forum non conveniens dismissal.<sup>162</sup> In the 2001 case of *Gamara v. Alamo Rent a Car* in the U.S. District Court for the Western District of New York, Canadian plaintiffs sued a number of defendants, including a U.S. car rental company.<sup>163</sup> The district court, in

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<sup>155</sup> See Oxman, *supra* note 88, at 128; see also Anderson, *supra* note 88 at 184 (2001); Santoyo, *supra* note 88, 724–25 (2005).

<sup>156</sup> Casey & Ristroph, *supra* note 93, at 30.

<sup>157</sup> Hal S. Scott, *What to Do About Foreign Discriminatory Forum Non Conveniens Legislation*, 49 HARV. INT'L L.J. ONLINE 95 (2009) ("[C]ourts would be succumbing to efforts to manipulate their jurisdiction. . . . [T]he United States should not reward foreign plaintiffs with U.S. jurisdiction when a country passes laws that discriminate against U.S. companies.").

<sup>158</sup> See *infra* notes 182–209 and 217–225 and accompanying text.

<sup>159</sup> *In re Compania Naviera Joanna S.A.*, 531 F. Supp. 2d 680, 686 (D.S.C. 2007).

<sup>160</sup> See *id.*

<sup>161</sup> See *id.*

<sup>162</sup> See, e.g., *Gamara v. Alamo Rent a Car*, No. 99-Civ-411, 2001 U.S. Dist. LEXIS 1146, at \*1 (W.D.N.Y. Jan. 4, 2001); *Castillo v. Shipping Corp. of India*, 606 F. Supp. 497 (S.D.N.Y. 1985).

<sup>163</sup> 2001 U.S. Dist. LEXIS 1146, at \*1–2.

dismissing for forum non conveniens, noted the expiration of the Canadian statute of limitations meant that a Canadian forum was no longer available to the plaintiff, but nonetheless concluded that because the claims “could have been brought in Canada,” Canada was an adequate alternative forum.<sup>164</sup> Similarly, in 1985 in *Castillo v. Shipping Corp. of India*, the United States District Court for the Southern District of New York stated that “[t]he plaintiff had a most convenient forum, the Dominican Republic. But, through his own inaction, he lost access to it. He let the Dominican Republic’s six-month statute of limitations pass and has lost his remedy there.”<sup>165</sup>

Thus, courts are in fundamental disagreement about whether they should take into account the reason for a forum’s unavailability in deciding whether to dismiss.<sup>166</sup> Like the question of a district court’s power to retain a case when the factors warrant dismissal,<sup>167</sup> the answer to this question depends on which of the theoretical strands underlying the forum non conveniens doctrine—prudence or policy—is paramount. Specifically, is the doctrine one that can, or should, shape conduct? Or is the doctrine merely a prudential and adjudicatory one, making the best forum choice only after the plaintiffs have played their hand?<sup>168</sup>

Allowing the forum non conveniens doctrine to play a larger regulatory role is attractive to judges who wish to reduce the magnet effect of U.S. courts.<sup>169</sup> If plaintiffs understand that, by choosing to file suit in the United States, they may be foreclosing other options, then they will be forced to determine whether the risk of dismissal in the United States outweighs a lower recovery in a more appropriate forum.<sup>170</sup> If the alternative forum truly offers the possibility of recovery (even if at a lower rate), then economic theory would suggest that the pull of the United States would diminish as some plaintiffs conclude that the risk

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<sup>164</sup> *Id.* at \*4.

<sup>165</sup> *Castillo*, 606 F. Supp. at 503–04.

<sup>166</sup> See *supra* notes 143–165 and accompanying text.

<sup>167</sup> See *supra* notes 123–142 and accompanying text.

<sup>168</sup> See MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR A BUREAUCRATIC SOCIETY 124 (1985) (describing a regulatory model of adjudication that focuses on the lawsuit’s “impact on the future conduct of others” and an arbitration model that focuses on “settling disputes between private parties”)(quoting Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 938 (1975)).

<sup>169</sup> See *supra* notes 79–101 and accompanying text.

<sup>170</sup> See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1055 (2000).

of dismissal in the United States outweighs the lower recovery they may see in the alternate forum.<sup>171</sup>

In order to make a rational-choice calculation, however, litigants would need to have accurate information about the risk of dismissal in a U.S. court.<sup>172</sup> Yet right now, as the Supreme Court has pointed out, the doctrine is applied far too inconsistently for any such calculation to be made, suggesting that *forum non conveniens*—at least under current practice—is incapable of effectively regulating litigants' behavior.<sup>173</sup> In the U.S. Supreme Court's 1994 decision in *American Dredging Co. v. Miller*, Justice Scalia wrote that "*forum non conveniens* cannot really be relied upon in making decisions about secondary conduct—in deciding, for example, where to sue or where one is subject to being sued."<sup>174</sup> The Court referenced the great discretion that district judges have in deciding whether to dismiss, combined with the "multifariousness of the factors relevant to its application."<sup>175</sup> In doing so, the Court concluded that these issues "make uniformity and predictability of outcome almost impossible" and mean that "one can rarely count on the fact that jurisdiction will be declined."<sup>176</sup>

The Supreme Court's statement that a litigant cannot "count on" a decision declining jurisdiction is at odds with certain lower court decisions, where courts have held that a plaintiff should have foreseen a *forum non conveniens* dismissal and, therefore, should be held accountable for their decision not to file suit elsewhere—even if that means that they lose their opportunity to bring suit at all.<sup>177</sup> The statement also conflicts with a commentator's suggestion that malpractice liability could arise from a lawyer's failure to predict that a U.S. court would dismiss for *forum non conveniens*<sup>178</sup>—if, as suggested above, the

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<sup>171</sup> *Id.* ("To speak coherently of the legal implications of viewing law as a series of incentives, analysts have to make assumptions about the consequences of those incentives to the people subject to the legal system.").

<sup>172</sup> *Id.* at 1084 ("In a world in which the consequences of most decisions are, to some degree, uncertain, actors can maximize the expected utility of a given decision only if their judgments are based on accurate perceptions of the likelihood that specific choices will lead to various possible outcomes.").

<sup>173</sup> See *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Oxman, *supra* note 88, at 129 n.12 ("An attorney may be liable for malpractice for advising a plaintiff to sue in the United States without considering the possibility of a *forum non conveniens* dismissal in the United States notwithstanding blocking statutes or similar rules overseas.").

trial judges always maintain discretion to retain a case, then predicting dismissal would be speculative at best.<sup>179</sup>

Without such predictability, forum non conveniens cannot act as an effective demagnetizing mechanism. It may well be that court-access policy should not include demagnetization as a goal.<sup>180</sup> But if it is a goal, then it will be necessary to sacrifice some of the discretionary nature of the dismissal decision and, instead, develop a legal doctrine more capable of standardization and subject to review by appellate courts.<sup>181</sup>

### C. *Is There a National Interest in Adjudicating the Conduct of Domestic Corporations Abroad?*

The expansion of the prudential standing and forum non conveniens doctrines also raises the question of whether—or to what extent—the U.S. has an interest in adjudicating the conduct of domestic corporations abroad.<sup>182</sup> Courts applying both doctrines have suggested that there is no such interest, and thus no countervailing policy consideration that would weigh against a dismissal based on administrative convenience. This view is shortsighted.

As currently applied, the forum non conveniens doctrine requires courts to consider the interests of both the target forum and the potential alternative forum in the subject matter of the lawsuit.<sup>183</sup> This inquiry is similar to the one undertaken in the choice-of-law context, where courts must decide whether the U.S. regulatory interest allows U.S. law to be applied.<sup>184</sup> In cases brought by foreign plaintiffs against

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<sup>179</sup> See *supra* notes 123–142 and accompanying text.

<sup>180</sup> See *supra* notes 217–225 and accompanying text.

<sup>181</sup> See *supra* notes 212–275 and accompanying text.

<sup>182</sup> See *infra* notes 183–209 and accompanying text. Although this Section focuses on national interests, other scholars have convincingly argued that federal judicial court-access policies have also ignored individual state regulatory interests. See Elizabeth T. Lear, *Federalism, Forum Shopping, and the Foreign Injury Paradox*, 51 WM. & MARY L. REV. 87, 141 (2009) (“[F]ederal judicial oversight of international forum shopping is incompatible with the critical goals of American federalism. Simply put, the forum non conveniens regime interferes with the states’ ability to govern.”); Stein, *supra* note 84, at 843.

<sup>183</sup> *Piper Aircraft*, 454 U.S. at 241 n.6. Courts consider the “local interest in having localized controversies decided at home.” *Id.* (quoting *Gulf Oil*, 330 U.S. at 509). Courts also consider “the unfairness of burdening citizens in an unrelated forum with jury duty.” *Id.*

<sup>184</sup> Walter W. Heiser, *Forum Non Conveniens and Choice Of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1179 (2005) (“[M]uch of the interest-balancing undertaken for purposes of forum non conveniens is similar to the analysis required by many modern choice-of-law doctrines. For example, when a trial court compares the deterrence and the regulatory interests of the country in which a defendant manufacturer resides versus those of the country where the injured plaintiff resides for purposes of forum non conveniens, that process of identifying and assessing respective

U.S. defendants in U.S. courts, these public interest factors take on added significance. Because the defendant corporations are sued in their home country, the private interest convenience factors weigh less heavily, as it is questionable how much inconvenience U.S. corporate defendants face in litigating in their home country.<sup>185</sup> Thus, analysis of the public interest factors assumes greater significance—but not, unfortunately, greater consistency.

In order to weigh the public interest factors, courts must decide what the United States' interest is in cases involving lawsuits brought by foreign plaintiffs for the conduct of U.S. corporations in their countries. Jurisprudence in this area has been particularly inconsistent and unclear.

One view is that “injuries done by American businesses to foreign nationals abroad are not America’s problem.”<sup>186</sup> Although it is not clear how many judges subscribe to this view, it has been clearly articulated on occasion: one judge, for example, has asked “why the American justice system should undertake to punish American corporations more severely for their actions in a foreign country than that country does?”<sup>187</sup> Indeed, a number of courts have quickly brushed aside the

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interests is not unlike a government interest choice-of-law analysis.”); Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 Nw. U. L. Rev. 411, 416–417 (2004) (“The act of interpreting and applying a legal standard is an important aspect of providing a legal rule. Where a state’s legislature may provide a general standard of conduct, the state’s judges and juries give particular meaning to that standard through adjudication. Issuance of a judgment, whether exonerating or imposing liability on a defendant, affects the primary behavior of people. It is part of the way a state crafts a legal order. Accordingly, both jurisdiction and choice of law advance a state’s regulatory interest.”); Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. Rev. 719, 723–25 (2009).

<sup>185</sup> See *Tech. Dev. Co. v. Onischenko*, 174 Fed. Appx. 117, 122 (3d Cir. 2006) (“Most forum non conveniens cases involve a defendant, sued far from home, arguing against being forced to litigate in a remote forum. Here, by contrast, Onischenko was sued in his own forum and is arguing that it would be more convenient for him to defend himself thousands of miles away.”); *Monegro v. Rosa*, 211 F.3d 509, 513 (9th Cir. 2000) (“[F]oreign plaintiffs seeking to avoid their home forums by filing in the United States do not typically sue in a forum with little or no relation to either the defendant or the action. Indeed, foreign plaintiffs typically bring such suits in the quintessentially convenient forum for the defendant—the defendant’s home forum.”); Robertson, *supra* note 4, at 405 (“[I]t should ordinarily be impossible for such a defendant [sued at home] to make a credible claim of vexation or harassment.”); see also Alejandro M. Garro, *Forum Non Conveniens: “Availability” and “Adequacy” of Latin American Fora from a Comparative Perspective*, 35 U. MIAMI INTER-AM. L. REV. 65, 99 (2003–2004) (“[I]f there is a forum that can hardly be deemed ‘inconvenient’ to the defendants, that is the court of their own home.”).

<sup>186</sup> Robertson, *supra* note 4, at 405.

<sup>187</sup> *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674, 707 n.11 (Tex. 1990) (Hecht, J., dissenting).

suggestion that a corporate defendant's home base has a significant interest in its actions abroad.<sup>188</sup> Even the U.S. Supreme Court, in its 1981 decision in *Piper Aircraft v. Reyno*, was unpersuaded that the United States' interest in deterring the sale of harmful products outweighed Scotland's interest in a products liability case where the harm occurred in Scotland.<sup>189</sup>

Another view, however, is that "injuries done by American businesses to foreign nationals abroad" clearly are "America's problem" when those injuries create economic and political consequences that resonate within the United States.<sup>190</sup>

### 1. Economic Interests

Contrary to the Supreme Court's conclusion in *Piper Aircraft*, scholars have concluded that the United States does have a strong interest in deterring the sale of harmful products abroad—at least when the case involves liability for a product or activity also present in the U.S. market.<sup>191</sup> If the U.S. tort system is supposed to place the cost of defective products on the manufacturer, then it is important that those costs be accurately measured. To the extent that harm caused abroad is not figured into those costs, the manufacturer can "absorb significant costs associated with American accidents before the combined foreign and domestic losses mandate a design change or the withdrawal of the product from the American market."<sup>192</sup> Thus, U.S. corporations may "avoid internalizing all of the costs imposed on others by their product, which in turn skews economic incentives to make the product or activity safer."<sup>193</sup> Professor Elizabeth Lear cites this phenomenon in explaining why a U.S. corporation, facing complaints from Latin American

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<sup>188</sup> See *Piper Aircraft*, 454 U.S. at 260–61; *Villar v. Crowley Mar. Corp.*, 780 F. Supp. 1467, 1485 (S.D. Tex. 1992) ("[B]eyond the general fact that CMC does business in Texas, the State of Texas has no interest in this case . . .").

<sup>189</sup> 454 U.S. at 260–61 ("Respondent argues that American citizens have an interest in ensuring that American manufacturers are deterred from producing defective products, and that additional deterrence might be obtained if Piper and Hartzell were tried in the United States, where they could be sued on the basis of both negligence and strict liability. However, the incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant.")

<sup>190</sup> See *infra* notes 191–209 and accompanying text.

<sup>191</sup> See Lear, *supra* note 26, at 574; see also Alan O. Sykes, *Transnational Forum Shopping as a Trade and Investment Issue*, 37 J. LEGAL STUD. 339, 342 (2008).

<sup>192</sup> Lear, *supra* note 26, at 574.

<sup>193</sup> *Id.*

plaintiffs, had offered a safer product in Latin America years before changing its United States product:

That same year, after 100 deaths and 400 accidents in Venezuela, Ecuador, and Colombia, Ford replaced the tires and fixed the suspensions on all Ford Explorers in those countries. Yet neither Bridgestone nor Ford initiated an American recall until August 2000, and then only after the large number of lawsuits filed in the United States attracted the attention of the American press. In the deterrence calculus, it was apparently cost effective for Ford and Bridgestone to continue offering products they knew to be dangerous, even fatal, in the United States for at least seven years, and more importantly, for three years after a significant number of injuries had occurred overseas.<sup>194</sup>

Thus, the United States may very well retain a strong interest in deterring U.S. corporations from selling harmful products abroad; when manufacturers sell those same products in the United States, they have less incentive to ensure their safety for the U.S. market.<sup>195</sup> Although U.S. damages are intended to deter the sales of harmful products, companies who sell worldwide may be able to internalize the harm caused in the American market—they profit from selling the harmful product worldwide, but pay significant damages only when Americans are injured.<sup>196</sup> The profits from the sale elsewhere may be sufficient to absorb the costs of American injuries.<sup>197</sup>

## 2. Political Interests

Economic concerns may also merge with political concerns in the foreign policy arena. It makes sense that countries such as Ecuador would protest when their citizens are unable to sue U.S. corporations in U.S. courts. The higher damage awards available in the United States, as well as the simplicity of enforcing a judgment in the defendant's home state (where assets likely reside), benefits the injured plaintiffs' home country as well as the plaintiffs themselves.

One such benefit of a higher damage award may be a reduced dependency on the government itself. Damage awards in the United States

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<sup>194</sup> *Id.* at 576.

<sup>195</sup> *Id.* 574–76.

<sup>196</sup> *See id.*

<sup>197</sup> *Id.* at 574.

are higher than in other countries, in part because U.S. damage awards must substitute for the social safety net that exists in a number of other countries.<sup>198</sup> In many countries, lower damage awards are offset by government-funded health care and other benefits.<sup>199</sup> Thus, when U.S. corporations injure foreign nationals, requiring the foreign plaintiffs to sue in their home country works an injustice on that nation. The corporation is not liable for the full harm it caused; instead, the foreign state picks up some of the expense through added burdens on the public fisc. Although some countries may decide that the benefits of foreign investment outweigh any such risk,<sup>200</sup> others may disagree.<sup>201</sup>

Even when the country's social safety net itself is limited or non-existent, the country's government may still benefit from its citizens' access to higher damage awards, either through the financial benefit of tax payments or through more indirect benefits of an increased standard of living. In such a situation, it is easy to understand why other nations may object to forum non conveniens dismissals of cases brought by their citizens. Expecting those nations to change their own court systems to award higher damages to all classes of plaintiffs is unrealistic; a state that has made a policy choice to enact a social safety net is unlikely to shift responsibility to the civil justice system for the sole reason of combatting United States dismissals. More realistically, such a

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<sup>198</sup> Weintraub, DISPUTE RESOLUTION, *supra* note 21, at 213; Julius Jurianto, *Forum Non Conveniens: Another Look at Conditional Dismissals*, 83 U. DET. MERCY L. REV. 369, 404 (2006) ("The possibility to obtain larger damages in the United States is also due to the fact that the amount of the damage award is likely to be keyed to the higher living standards but lower social safety net in the United States.").

<sup>199</sup> Diane P. Wood, *Commentary on The Futures Problem*, by Geoffrey C. Hazard, Jr., 148 U. PA. L. REV. 1933, 1940 (2000) ("[M]any of the problems in tort law that bedevil the United States do not arise at all in Europe, and other problems are far less pressing, for the simple reason that [most of] the European countries have national health insurance systems, as well as other national 'safety net' payments. The individual who needs sustained medical care because of asbestos-caused emphysema, or exposure to HIV-tainted blood, or anything else, will get it from the state; the need to find someone else to foot crushing hospital and doctor's bills is different by orders of magnitude.").

<sup>200</sup> See Malcolm J. Rogge, *Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non Conveniens* in *In re: Union Carbide, Alfaro, Sequihua, and Aguinda*, 36 TEX. INT'L L.J. 299, 314 (2001) ("[G]overnments in both rich and poor nations compete in a 'race to the bottom' to attract needed foreign investment.").

<sup>201</sup> Christopher M. Marlowe, Comment, *Forum Non Conveniens Dismissals and the Adequate Alternative Forum Question: Latin America*, 32 U. MIAMI INTER-AM. L. REV. 295, 316 n.102 (2001) ("The Ecuadorian government, concerned with the [Chevron] lawsuit's potential impact on foreign investment, first objected to U.S. jurisdiction over the case. Upon a political shift in government, Ecuador offered to conditionally relinquish its sovereign immunity and thus assist plaintiffs in pursuing their claims against Texaco.").

state will instead enact a more targeted blocking statute, or perhaps allow U.S.-level damages in cases dismissed from U.S. courts.<sup>202</sup>

Even in the absence of a specific blocking statute, there may be foreign policy implications.<sup>203</sup> The political history of the Americas is marked, first by conquest and imperialism as the Spanish explorers searched for gold centuries ago, and later by economic and political domination by the United States.<sup>204</sup> The long history of exploitation remains salient in the Latin American political consciousness, and creates skepticism toward the motives of the U.S. government and of multinational corporations.<sup>205</sup> Given the differences in history and experience, it is not surprising that a U.S. citizen and an Ecuadorian citizen might view a case dismissal quite differently.<sup>206</sup> Thus, although a U.S. judge might view the decision as necessary to avoid hearing a case that truly belongs elsewhere,<sup>207</sup> the Ecuadorian citizen might view that same dismissal as a partisan decision allowing U.S. corporations the chance to operate with impunity in foreign lands.<sup>208</sup> Such a view could result in

<sup>202</sup> BRAND & JABLONSKI, *supra* note 9, at 132–39; Dante Figueroa, *Conflicts of Jurisdiction Between the United States and Latin America in the Context of Forum Non Conveniens Dismissals*, 37 U. MIAMI INTER-AM. L. REV. 119, 156 (2005).

<sup>203</sup> See, e.g., Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT'L ECON. L. 1297, 1369 (2004) (noting that procedural reformists need to “act in awareness of the complex interdependence between transnational actors and the law applicable to them,” or risk unwanted foreign policy ramifications and “unintentionally supporting patterns of individual and group behavior they may not wish to condone”).

<sup>204</sup> Sukanya Pillay, *Absence of Justice: Lessons from the Bhopal Union Carbide Disaster for Latin America*, 14 MICH. ST. J. INT'L L. 479, 482 (2006); Anne McClintock, *The Angel of Progress: Pitfalls of the Term “Post-Colonialism”*, 10 SOC. TEXT 84, 89 (1992) (“‘Post-colonial’ Latin America has been invaded by the United States over a hundred times . . . . [W]hile Latin America hand-picked bananas for the United States, the United States hand-picked dictators for Latin America.”); Ralph R. Reiland, *Nothing “Spiritual” About Imperialism*, PITTSBURGH TRIB. REV. (May 27, 2002), available at [http://www.pittsburghlive.com/x/pittsburghtrib/opinion/columnists/reiland/s\\_510026.html](http://www.pittsburghlive.com/x/pittsburghtrib/opinion/columnists/reiland/s_510026.html).

<sup>205</sup> Pillay, *supra* note 204, at 482.

<sup>206</sup> Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 58 EMORY L.J. 499, 518–19 (2008) (citing Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129, 133–34 (1954) (“We can watch a football game, a person eating a hamburger, or a couple arguing as if these are ‘things’ that are ‘out there’ to be viewed in one way; and yet what we ‘see’ is significantly determined by influences beyond our conscious purview.”)).

<sup>207</sup> See, e.g., *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 902 (3d Cir. 1977) (using the phrase “social jingoism”); *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 867 (S.D.N.Y. 1986) (concluding that retaining a suit arising from a gas plant disaster in India would amount to imperialism).

<sup>208</sup> See Pillay, *supra* note 204, at 517 (“Although TNCs [transnational corporations] can make significant contributions to development, the potential for human rights violations by TNCs is great. The Union Carbide tragedy in India remains an outstanding and terrible example of TNC impunity.”).

favoring foreign investment or trade from non-U.S. corporations, a decision that would have a significant effect on the United States both economically and politically.<sup>209</sup>

#### D. *Prudence and Policy in the Court-Access Doctrines*

The judiciary developed prudential court-access doctrines to ensure that the administration of justice would function smoothly—to channel cases to convenient forums, to allow courts some discretion to dismiss cases brought for vexation and harassment, and to create a safety valve that would allow dismissal of cases that might overwhelm the court or embroil it in issues best handled by another institution.<sup>210</sup>

In transnational cases involving foreign plaintiffs, however, these access doctrines have expanded in an attempt to shape substantive rights and policy, not just to meet prudential goals. Because this shift has remained unexamined and unacknowledged, it has created a mass of doctrinal confusion and inconsistent application. It is unclear whether a judge who wishes to retain a case on the docket may do so even if the *forum non conveniens* factors point to dismissal. Furthermore, courts disagree about whether the *forum non conveniens* doctrine is intended to regulate litigation behavior or whether it is merely intended to adjudicate whether one forum is more suitable than another. Courts that accept the doctrine as a means of regulation will freely dismiss cases when the plaintiff's own conduct has led to the unavailability of another forum. Courts and commentators also disagree over the effects of the court-access doctrines; in particular, they disagree about whether dismissing cases arising from the foreign conduct of domestic corporations will have problematic effects. Some view such dismissals as respectful of other nations' sovereignty and a natural response to an attempt to find the most suitable forum.<sup>211</sup> This view, however, does not account for either the potential economic and foreign policy ramifications of such dismissals or the protests that other nations have lodged against such dismissals.

Accepting that the theoretical underpinnings of these court-access doctrines have expanded from prudential administration to encompass

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<sup>209</sup> Pillay, *supra* note 204, at 517; Georges Fauriol & Sidney Weintraub, *U.S. Policy, Brazil, and the Southern Cone*, WASH. Q., Summer 1995, at 125.

<sup>210</sup> See *supra* notes 104–108.

<sup>211</sup> See *Union Carbide*, 634 F. Supp. at 867 (“In the Court’s view, to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation.”).

policy goals allows those goals to be better evaluated. The next Section begins that process of evaluation by considering the competing goals and choices underlying the question of transnational court access and which institutions are best suited to develop that policy.

### III. COMPARATIVE INSTITUTIONAL CHOICE

A number of commentators have argued for particular refinements of the forum non conveniens doctrine, any one of which would likely improve the current incoherent state of the law in this area.<sup>212</sup> Thus far, recent scholarship on transnational court access has largely assumed that the judiciary—and typically at the district-court level—should be the primary agent of reform.<sup>213</sup> This focus on a single institution, however, is at odds with the larger academic move toward comparative institutional analysis, which addresses not only what changes should be made to legal rules, but also who should make them: it analyzes which institution is the most appropriate vehicle for legal reform.<sup>214</sup> Institutional choice both affects and is affected by goal choice; social goals and institutions are “inextricably related.”<sup>215</sup> As a result,

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<sup>212</sup> Alan Reed, *To Be or Not to Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stage*, 29 GA. J. INT'L & COMP. L. 31, 60 (2000); John R. Wilson, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 OHIO ST. L.J. 659, 690–95 (2004); Jeffrey E. Baldwin, Note, *International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens*, 40 CORNELL INT'L L.J. 749, 779–80 (2007); Daniel J. Dorward, Comment, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. PA. J. INT'L ECON. L. 141, 161–64 (1998); Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 685–86 (1992).

<sup>213</sup> See *supra* notes 25–26 and accompanying text.

<sup>214</sup> Joan MacLeod Heminway, *Rock, Paper, Scissors: Choosing the Right Vehicle for Federal Corporate Governance Initiatives*, 10 FORDHAM J. CORP. & FIN. L. 225, 383 (2005) (“Comparative institutional analysis is critically important to the work of scholars and other proponents of law reform. These rule proponents should not suggest changes in legal rules without also suggesting the vehicle for the suggested reforms.”); see also NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 3–13 (1994); Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1231–46 (2003); William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 509, 529–32 (2000); Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 961–64 (2008) (examining the respective institutional competencies of attorneys general and the legislature), Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1424–33 (1996); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003).

<sup>215</sup> KOMESAR, *supra* note 214, at 5 (“[T]he decision as to who decides determines how a goal shapes public policy.”).

reforming transnational court access requires attention both to the goals underlying the doctrine and to the institution or institutions best capable of meeting them. Institutional choice theory suggests that the goals should be articulated first, and then institutions' competence at meeting those goals can be compared.<sup>216</sup>

### A. Goals

What should be the goals of a transnational court-access policy? As noted in the prior Section, goals may be both prudential (relating to the efficient and fair administration of justice) and policy-oriented (relating to substantive economic, regulatory, or foreign relations interests).

#### 1. Prudential Goals

On the prudential side, most participants would agree that a court-access doctrine should promote predictability and uniformity of application. The doctrine of *forum non conveniens*, as currently applied, is not very successful at shaping litigant behavior.<sup>217</sup> A more determinate set of court-access rules should be more successful. When litigants do not know whether their case can go forward in a particular forum, the resulting uncertainty causes large transaction costs as the parties must fully litigate the question of access in each case. The lack of uniformity also causes a basic fairness problem, as some district judges are more likely than others to dismiss a case under similar facts. Without uniformity, success depends largely on successful forum shopping: plaintiffs who can identify more favorable district judges will be more likely to prevail on the *forum non conveniens* analysis.

Some of the other prudential goals of the *forum non conveniens* doctrine may still remain goals in shaping a revamped court-access doctrine. For example, one goal might be to facilitate thoughtful judicial decision making by directing cases to the courts with the most experience dealing with the applicable law and by preventing court dockets from becoming unmanageably crowded. Another goal might be to reduce conflicts between the branches of government, perhaps by allowing the judiciary to restrict court access in cases that prove detrimental to the foreign relations policies of the other branches.

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<sup>216</sup> Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J. L. & TECH. 569, 575–76 (2001).

<sup>217</sup> *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) (discussing the difficulty of relying on the doctrine, due to its discretionary nature and the multifariousness of its factors).

## 2. Policy Goals

The policy goals of a transnational court-access doctrine are more controversial. One perennial issue, of course, is whether to attempt to reduce the “magnet effect” of U.S. courts. Although some scholars have identified such a goal as an important aspect of transnational court-access policy,<sup>218</sup> others have disagreed.<sup>219</sup> Steering cases away from U.S. courts may aid the prudential goals of reducing caseloads and encouraging cases to be heard in the forums most familiar with the governing law, but it is also likely—at least in the short run—to minimize the potential liability of U.S. multinational corporations.

As discussed above, adjudicating cases brought by foreign plaintiffs against U.S. defendants may promote U.S. interests, and thus it may be unwise to adopt a policy of discouraging such litigation.<sup>220</sup> One such reason is the risk of retaliation. In the long run, other nations may continue to adopt retaliatory legislation, pulling additional litigation into foreign courts while assessing damages at U.S. levels—or even higher.

Thus, a second policy goal is managing foreign relations to avoid such a risk. Even in the absence of retaliatory legislation, as foreign court systems diversify their own transnational experience and remedial schemes, defendants may find that dismissal from U.S. courts is not the advantage it once was. Plaintiffs may be more easily able to pursue remedies abroad; if an aggressively limited court-access doctrine pushes those cases out of the United States, defendants may find themselves litigating more often in unfamiliar courts without the same due process protections offered by the U.S. Constitution. Thus, policymakers should consider a policy that encourages open access to U.S. courts, if only to forestall litigation in less comfortable forums.

A third policy goal is regulating the conduct of U.S. corporations abroad. Depending on how this policy goal is articulated, it could militate in favor of either greater or less court access for foreign plaintiffs. If the goal is to deter U.S. companies from selling defective products or otherwise engaging in tortious conduct abroad, then greater court ac-

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<sup>218</sup> See Weintraub, *DISPUTE RESOLUTION*, *supra* note 21, at 225–32.

<sup>219</sup> Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT’L L. 41, 46 (1998) (“Given that the parties will mostly be foreign and that the abuses will occur abroad in human rights cases, this doctrine of convenience, which focuses on the location of the evidence and parties, is a formidable obstacle for plaintiffs.”); Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CAL. L. REV. 1259, 1324 (1986) (arguing that *forum non conveniens* should be abolished).

<sup>220</sup> See *supra* notes 182–190 and accompanying text.

cess may be to ensure that companies pay the full cost of the harms they cause. If, on the other hand, the goal is to promote U.S. exports and foreign trade, then a more restrictive court-access policy may protect these interests, at least in the absence of any protest or retaliatory effort from the affected countries.

A fourth policy goal is exporting American due process values. The “liberal legal ideology of justice” has been described as a “prized American cultural export.”<sup>221</sup> Although extending U.S. courts to foreign plaintiffs may cause added expense and delay in the short run, it could also influence the development of the law in the long run. As more foreign plaintiffs choose to sue in the United States, appreciation for American due process protections may grow, and other court systems may integrate familiar U.S. procedures that are perceived to work well.<sup>222</sup>

Finally, a fifth policy goal is providing an effective mechanism for corrective justice.<sup>223</sup> At this time, the goal of corrective justice suggests a policy of more open access to U.S. courts. As noted, foreign plaintiffs are rarely able to obtain a legal remedy after dismissal from U.S. courts, even if one is theoretically available.<sup>224</sup> A desire for corrective justice may run deeper than the instrumentalist concerns of deterrence or protecting the U.S. markets from harmful products also sold abroad; one may also hold an “ordinary moral conception”<sup>225</sup> that those harmed by

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<sup>221</sup> UPENDRA BAXI, *INCONVENIENT FORUM AND CONVENIENT CATASTROPHE: THE BHOPAL CASE 1* (1986).

<sup>222</sup> Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 14 (2008) (noting that “through migration of litigation overseas,” origin states will “have clear evidence of their weaknesses” and thus incentive to adopt reforms). *But see id.* at 21–22 (acknowledging the tensions between “exit” and “voice,” in that while an option to litigate elsewhere may improve the judicial system by increasing citizens’ calls for reform, it may also have the opposite effect if the most influential citizens simply take their judicial business elsewhere).

<sup>223</sup> Jeffrey A. Van Datta, *The Irony of Instrumentalism: Using Dworkin’s Principle-Rule Distinction to Reconceptualize Metaphorically a Substance-Procedure Dissonance Exemplified by Forum Non Conveniens Dismissals in International Product Injury Cases*, 87 MARQ. L. REV. 425, 441–42 (2004) (noting that “[s]cholars typically view corrective justice as a principle underlying the substantive aims of tort law,” and explaining how regulatory principles interact with corrective justice principles in the area of forum non conveniens).

<sup>224</sup> *See supra* note 4 and accompanying text.

<sup>225</sup> *See* Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 193 (2000) (“Tort scholarship on the law of negligence has long been torn between two competing conceptions. One of these conceptions—the justice conception—holds that negligence law is (and should be) an articulation of our ordinary moral conceptions of agency and responsibility, carelessness and wrongdoing, harm and reparation. The other conception—the economic conception—holds that the law of negligence embodies an appropriate public morality, but it takes that morality to be at best a distant echo of the morality of responsibility and reparation found in ordinary life.”).

tortious conduct should be compensated, and if compensation is unavailable in the victim's home country, then U.S. courts should be made available for that purpose.

The following Section examines how our governmental institutions are likely to evaluate these varying goals, which goals are likely to be chosen, and how they may be reconciled into a coherent court-access policy. It examines the comparative institutional competencies of each branch of government and outlines how each may use its comparative strengths to develop a more effective and sustainable court-access policy.

## B. *Institutions*

### 1. The Judiciary

As noted above, the federal district courts currently play the largest role in transnational court access decisions. They have considerable discretion to weigh the *forum non conveniens* factors set out by the U.S. Supreme Court, and—at least when a district court decides to retain a case—that discretion is largely unreviewable. Certainly, there are some advantages to district court discretion. To the extent that the *forum non conveniens* doctrine is aimed at protecting limited space on court dockets, district court judges know the limits of their dockets better than anyone else and are in the best position to decide whether accepting a case with limited connection to their forum will cause hardship or delay to other litigants.

District court judges may also be in the best position to evaluate litigant motives and convenience. Unlike appellate courts that must deal with a cold record, the district court judge has considerable power to hold preliminary hearings and to view the litigants themselves.<sup>226</sup> In addition, federal court judges tend to be much more insulated from political pressures than members of the other branches.<sup>227</sup> Given both the insulation from political pressure and the ground-level view of the litigants and proceedings, it has been said that “[t]he judiciary is the

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<sup>226</sup> Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 761 (1982) (noting that the trial judge has a “superior opportunity to get the feel of the case”) (quoting *Noonan v. Cunard Steamship Co.*, 375 F.2d 69, 71 (2d Cir. 1967)); Robertson, *supra* note 127, at 215 (“One area of trial court competence is its direct contact with witnesses.”).

<sup>227</sup> David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 555 (1988) (“Federal judges are not elected, and in the states, where election is more common, a variety of efforts have been made to reduce the susceptibility of judges to political pressures.”).

institution of sober second thought—the branch responsible for relating broad policy objectives to flesh-and-blood facts.”<sup>228</sup>

District court control, however, also comes with several disadvantages. Although a court might be good at applying “broad policy objectives” to specific cases, the policy objectives of the *forum non conveniens* doctrine are extremely imprecise. As noted in the prior Section, it is unclear whether the doctrine is mandatory or permissive, to what extent it should be used to punish or regulate forum shopping, and whether it should recognize economic and foreign policy concerns.<sup>229</sup> Although district courts may be good at applying policy objectives, they are less capable of setting those objectives. This difficulty lies partially in the structure of district courts, as a single judge may adopt a perfectly reasonable policy objective, but no other judge will be obligated to follow it. Thus, without systematic appellate review, inconsistency and unpredictability are all but guaranteed.

Furthermore, a district court’s policy objectives may remain unarticulated—to the public if the judge does not write an opinion explaining his or her underlying policy assumptions, and, potentially, to the court itself if policy assumptions exist only in the judge’s subconscious mind.<sup>230</sup> One scholar has argued that district judges’ tendency to dismiss cases under the doctrine of *forum non conveniens* suggests that judges are making a policy decision to defer to other sovereigns’ regulatory authority by “for[going] opportunities to influence transnational activity.”<sup>231</sup> Yet this largely unstated assumption may just as easily cut the other way: by dismissing cases involving U.S. defendants, judges may indeed be “influencing transnational activity.” Specifically, they may be shielding U.S. defendants from facing liability for transnational activity. To the extent that either policy underlies a significant number of dismissals, however, such policies are largely unarticulated and may well operate entirely unnoticed.<sup>232</sup>

In addition, any attempt to influence transnational activity is also hampered by a lack of information. Scholars have noted that few judges rely on empirical evidence of sovereign interests; instead, they tend to rely on “simple intuitive judgment about the foreign relations conse-

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<sup>228</sup> David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 585 (1985).

<sup>229</sup> See *supra* notes 123–209 and accompanying text.

<sup>230</sup> See Friendly, *supra* note 226, at 757 (describing “the subconscious mind-set from which few judges are immune”).

<sup>231</sup> Whytock, *supra* note 85, at 16.

<sup>232</sup> See Robertson, *supra* note 74, at 371–75.

quences” of a case disposition.<sup>233</sup> Of course, district court judges are not in a position to collect empirical evidence on their own, and information supplied by the parties is necessarily partisan. Nevertheless, these case-by-case intuitive judgments hamper standardization—they have led to “non-uniform foreign policy proclamations by the federal courts.”<sup>234</sup>

Some commentators have recommended giving the appellate courts a more significant role in forum non conveniens rulings through interlocutory appeals, specifically by allowing the circuit courts of appeals to review decisions retaining cases in addition to decisions dismissing cases.<sup>235</sup> Appellate courts can offer more standardization; unlike district court rulings, which bind no other court, appellate court rulings bind a vast swath of district court judges within their geographical region. As a result, appellate rulings can offer a greater degree of predictability and certainty to future litigants.

Although appellate courts might be a standardizing influence, they cannot establish a full set of court-access rules all at once. Appellate courts still analyze only one particular case at a time. Thus, if an appellate court were to consider the foreign relations implications of dismissing a case, it would look at the impact of dismissing a particular case: would another sovereign be offended that the case had been dismissed? Occasionally, a foreign sovereign may participate in a case either as a party or an amicus, and the court can consider its position at that time.<sup>236</sup> Much of the foreign relations impact, however, comes not from a particular case or a particular disposition, but rather from the aggregate of dispositions over time. Dismissal of a single plaintiff’s case may not cause an appreciable effect on foreign relations, but the repeated dismissal of many cases over time might cause considerably more concern.<sup>237</sup> An appellate court considering a single case will not examine the aggregate impact of litigation.

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<sup>233</sup> Lumen N. Mulligan, Note, *No Longer Safe at Home: Preventing the Misuse of Federal Common Law of Foreign Relations as a Defense Tactic in Private Transnational Litigation*, 100 MICH. L. REV. 2408, 2438 (2002) (citing Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1414–15 (1999)).

<sup>234</sup> *Id.*

<sup>235</sup> Morin, *supra* note 142, at 716–19, 729–36.

<sup>236</sup> *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 546–48 (S.D.N.Y. 2001) (including Ecuador as a participant in pretrial hearings); *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 867 (S.D.N.Y. 1986) (including India as a party).

<sup>237</sup> See *Aguinda*, 142 F. Supp. 2d at 544–46. The dismissal of this very large class action lawsuit did spark protest. See Letter from Leonidas Plaza Verduga, Attorney Gen. of Ecuador, to Janet Reno, U.S. Attorney Gen. (Jan. 15, 1997), available at [http://www.iaba.org/LLinks\\_forum\\_non\\_Ecuador.htm](http://www.iaba.org/LLinks_forum_non_Ecuador.htm) (lodging an official complaint that the courts have used

Furthermore, although appellate courts have a standardizing influence, appellate decisions still leave much room for inconsistency. In areas of law where the policy goals are clear, appellate rulings may be sufficient to clear up procedural disagreements. In the area of forum non conveniens, however, there is so little agreement, that even in the one area where appellate review is allowed—when a judgment of dismissal has been entered—the large number of circuit splits have made it so that litigants can find little to help them predict how future cases will be resolved.<sup>238</sup> U.S. Supreme Court review could have a substantial impact in standardizing transnational court-access policy and correcting these circuit splits, but they are currently so numerous that they would overwhelm the Supreme Court docket.

## 2. Congress

Congressional action could succeed in two important ways in which the judiciary's case-by-case determinations cannot. First, codifying the principles of court access could provide a higher level of standardization and clarity, as a statute could proactively set out a cohesive scheme for courts to decline jurisdiction, rather than forcing courts to wait for issues to arise in particular cases. A number of state legislatures have adopted forum non conveniens statutes, much as they have adopted statutes prescribing personal jurisdiction.<sup>239</sup> Statutory authority can clarify the factors to be considered, and can specify whether dismissal is permissive or mandatory when the factors are met.<sup>240</sup>

The second major benefit of congressional action is that it would provide a platform for intentional policymaking, rather than require deference to the unacknowledged mix of prudential and policy goals

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the forum non conveniens doctrine to “close the doors of American courts to citizens of my country”).

<sup>238</sup> See Davies, *supra* note 4, at 385 (“[T]here are so many conflicts between circuit courts of appeal on forum non conveniens issues that the Supreme Court could grant certiorari to consider any or all of these issues almost at any time it desires.”); J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 930 (1983) (concluding that circuit splits “encourag[e] tactical ploys designed to avoid the unfavorable approach of one circuit or take advantage of the favorable approach of another circuit”).

<sup>239</sup> See, e.g., ALA. CODE § 6–5–430 (2005); TEX. CIV. PRAC. & REM. CODE § 71.051(b) (2008); WIS. STAT. § 801.63 (2008); see also other statutes cited in Weintraub, *International Litigation*, *supra* note 21, at 345 n.188.

<sup>240</sup> See *In re Gen. Elec. Co.*, 271 S.W.3d 685–87, 686 (Tex. 2008) (noting that the Texas legislature had amended the forum non conveniens statute to provide that the district judge “shall” dismiss when the factors are met, whereas the prior statute had provided that the judge “may” dismiss).

articulated by the judiciary.<sup>241</sup> Such a platform would also include substantial resources devoted to that task.<sup>242</sup> Although judicial decisions dismissing cases under the *forum non conveniens* doctrine certainly have policy implications, they do not provide the same institutional legitimacy that lawmaking by Congress could provide.<sup>243</sup> As others have noted, because the very function of the legislative branch is to debate and determine policy, Congress's institutional competence in the policymaking arena is unparalleled: "The Congress is elected to make policy, and its members campaign on what kind of policy decisions they propose to make. There is active and partisan debate about those decisions . . . ." <sup>244</sup>

The lawmaking process is also much more open to outside participation than the judicial branch. Whereas judges are more likely to rely on heuristics such as territoriality as a proxy for actually gathering information about the "preferences and decisions of other political actors,"<sup>245</sup> the lawmaking process is specifically designed to encourage input from those affected by its decisions: "Congress, functioning through committees, solicits the views of all concerned about decisions to be made. Experts are consulted who offer all kinds of testimony and material as to how policy should be crafted. Moreover, every special interest makes sure that its interests are addressed."<sup>246</sup>

Finally, Congress can set court-access fees at a level that ensures the U.S. judiciary will not be financially burdened by litigation arising elsewhere. One of the oft-stated concerns that supports a robust doctrine of *forum non conveniens* is the need to ensure that taxpayers whose dollars support court operations are not unduly burdened.<sup>247</sup> Congress can, by statute, require foreign litigants to pay higher fees in cases that

<sup>241</sup> See *supra* notes 120-122 and accompanying text.

<sup>242</sup> See Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1682 (1997) ("Furthermore, Congress has special committees and subcommittees with permanent staffs devoted to monitoring various aspects of the United States' relations with foreign countries.").

<sup>243</sup> Shapiro, *supra* note 227, at 551 ("It is *possible* for courts to do many of the things that legislatures do, and vice-versa. Yet there comes a point when the effort involves a considerable strain on the institution in question—when it is clear that one branch is doing something that is done far better, or with a good deal more legitimacy, by the other.").

<sup>244</sup> Abner J. Mikva, *Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825, 1828 (1998).

<sup>245</sup> Whytock, *supra* note 85, at 13.

<sup>246</sup> Mikva, *supra* note 244, at 1828.

<sup>247</sup> See Barrett, *supra* note 61, at 404; see also *One Hundred & Ninety-Four Shawls*, 18 F. Cas. 703, 705 (S.D.N.Y. 1848) (No. 10,521) (concluding that courts should not prioritize cases involving litigants "owing no allegiance to its laws, and contributing in no way to its support").

might otherwise be dismissed under the doctrine of *forum non conveniens*.<sup>248</sup> A variable fee structure would reduce costs in two ways: first, in a direct way through externalizing the cost of hearing foreign cases, and second, indirectly through avoiding the cost of an initial hearing. Right now, even dismissals under the doctrine of *forum non conveniens* impose costs in the initial hearing and in any enforcement action after the case is tried elsewhere.<sup>249</sup> With congressional authorization, however, fees could be set at level to recoup the actual cost of litigation and thereby avoid the need for local taxpayer subsidization.<sup>250</sup>

Congress's most significant disadvantage—its vulnerability to interest-group capture—is the flip side of its advantage in openness and participation.<sup>251</sup> It is easy to imagine that a statute regulating foreigners' access to U.S. courts would tilt strongly toward parochial interests and support U.S. multinationals' desire to avoid American courts. Such a result is not guaranteed; after all, at the time such legislation is proposed, future litigation is likely speculative, and a more generous court-access policy might encourage other countries to allow greater direct investment and corporate activity.<sup>252</sup> Multinational corporations acting behind a veil of ignorance may not know whether the risk of unwanted U.S. lawsuits is likely to outweigh the benefits of opening access to new markets.<sup>253</sup> Not all corporations, however, operate behind such a veil. In particular, large oil and gas or agricultural entities may rightly suspect that their operations are particularly likely to be targeted in large

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<sup>248</sup> Dammann & Hansmann, *supra* note 222, at 64–65.

<sup>249</sup> See Casey & Ristroph, *supra* note 93, at 41.

<sup>250</sup> See Dammann & Hansmann, *supra* note 222, at 64–65.

<sup>251</sup> Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. 1, 35–36 (2008) (“[C]apture appears particularly relevant for Congress . . . . [T]he quid pro quo is fairly straightforward: elected officials want campaign contributions, and powerful interests are in a position to help deliver them. And, not surprisingly, many commentators now believe that Congress is particularly subject to quid pro quo influence by powerful incumbent interests.”); Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625, 652 (2007) (noting that narrowly targeted initiatives may be especially vulnerable to interest-group capture).

<sup>252</sup> See Brooke Clagett, Comment, *Forum Non Conveniens in International Environmental Tort Suits: Closing the Doors of the U.S. Courts to Foreign Plaintiffs*, 9 TUL. ENVTL. L.J. 513, 522 (1996) (“U.S. multinational corporations will continue to injure the environment in developing countries whose needs for foreign investment appear greater than their interest in preserving a healthy natural environment for their own citizens.”).

<sup>253</sup> See JOHN RAWLS, A THEORY OF JUSTICE 118–23 (1975) (developing the concept of a ‘veil of ignorance,’ which asks what societal rules parties would make if they were forced to act without knowledge of whether those rules would prove beneficial or detrimental to them personally).

transnational lawsuits.<sup>254</sup> As a result, they are likely to lobby heavily for a limited court-access doctrine.

Assuming that Congress is likely to adopt such a restrictive policy, are the benefits worth the risks of legislative action? For those who support a restrictive access policy in general, the answer is clearly yes.<sup>255</sup> Yet even those who support more openness may be willing to accept the risk of restrictive congressional action. First, the benefits that stem from predictability are not insignificant. If parties know at the outset that court access is strictly limited, they can plan accordingly; such legislation in the United States may encourage other countries to adopt legislation allowing higher damages awards, much like the *Parlatino* model.<sup>256</sup> In addition, such legislation could provide a firm target for lobbying Congress: if, indeed, there is international opposition to such legislation, it would not be unusual to revisit the issue again. As others have pointed out, Congress is in a much better position than the courts “to experiment, to monitor the results, and to revise the experiment in the light of those results.”<sup>257</sup> Finally, legislative action does not foreclose the possibility of executive action through treaty negotiation—in fact, even highly restrictive court-access legislation may function as a starting point for bilateral or multilateral conventions.

### 3. Executive Branch

Given that the executive branch generally has the largest role in foreign relations, it is somewhat surprising that it has had only a small role in articulating transnational court-access policies. The executive branch, however, has not been entirely without influence; its participation in individual cases as well as its treaty-making powers guarantee that the executive branch has a role in ensuring that federal courts’ openness to litigation comports with U.S. interests in the foreign policy arena.

When an individual case is clearly important enough to influence foreign relations, the executive branch will share its views with the fo-

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<sup>254</sup> *Dole Food Co.*, for example, has been the frequent target of lawsuits based on events occurring in Central America and has funded legal research on the subject of the *forum non conveniens* doctrine. See Scott, *supra* note 157, at 103–04 (arguing in favor of mandatory dismissal of cases brought by foreign plaintiffs against U.S. defendants in federal court based on conduct abroad) (research funded by *Dole Food Co.*).

<sup>255</sup> See *id.*

<sup>256</sup> See *supra* notes 12–14 and accompanying text.

<sup>257</sup> Shapiro, *supra* note 227, at 555.

rum court.<sup>258</sup> U.S. courts have been quite receptive to executive branch participation in comparable matters; in foreign sovereign immunity cases, for example, the Supreme Court noted that it has “consistently . . . deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction’ over particular actions against foreign sovereigns and their instrumentalities.”<sup>259</sup> Thus, in a case of extraordinary importance, the executive branch may file an amicus brief or otherwise present its views to the forum court.

A more systematic executive influence arises through the treaty-making power. Treaties are considered equivalent to statutes as sources of governing law.<sup>260</sup> Since 1775—even before the Declaration of Independence was signed—the United States has entered into commercial treaties that gave foreign nationals some access to U.S. courts.<sup>261</sup> Today, the United States has bilateral “Friendship, Commerce, and Navigation” (FCN) treaties with a large number of countries, and many of those treaties provide access to U.S. courts on the same terms as U.S. citizens.<sup>262</sup> As a result, some courts have held that any *forum non conveniens* analysis involving a plaintiff from a treaty member state cannot treat the foreign plaintiff any less deferentially than the court would treat a U.S. resident plaintiff.<sup>263</sup> Other courts have interpreted such

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<sup>258</sup> See 28 U.S.C. § 517 (2006) (“The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.”).

<sup>259</sup> *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004) (quoting *Verlinden B.V. v. Cen. Bank of Nigeria*, 461 U.S. 480, 486 (1983)).

<sup>260</sup> LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 63 (1990) (“[I]n case of conflict between a statute and a treaty the one which is later in time prevails”).

<sup>261</sup> See Allan Jay Stevenson, *Forum Non Conveniens and Equal Access Under Friendship, Commerce, and Navigation Treaties: A Foreign Plaintiff's Rights*, 13 *HASTINGS INT'L & COMP. L. REV.* 267, 281 (1990) (“The treaty provided that ‘inhabitants of the territories’ of each party were to have ‘free access’ to the courts of justice of the other party for prosecuting suits for recovery of their property, paying debts, and satisfying their damages.”) (citing Robert R. Wilson, *Access-to-Courts Provisions in United States Commercial Treaties*, 47 *AM. J. INT'L L.* 20, 33 (1953)).

<sup>262</sup> *Id.* at 267, 281.

<sup>263</sup> See, e.g., *Blanco v. Banco Indus. de Venez., S.A.*, 997 F.2d 974, 981 (2d Cir. 1993) (“Because such a treaty exists between the United States and Venezuela, no discount may be imposed upon the plaintiff’s initial choice of a New York forum in this case solely because *Proyecfin* is a foreign corporation.”); *Irish Nat’l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 92 (2d Cir. 1984) (“Because of the existence of the two international compacts, the district court should have applied the same *forum non conveniens* standards that it would

treaties more narrowly, however, holding that the treaties require only that foreign citizens be treated similarly to U.S. citizens residing abroad—and that neither category of plaintiff should be accorded much deference in the *forum non conveniens* analysis.<sup>264</sup> It is clear that the treaties are open to more than one interpretation. The existence of the treaties themselves, however, speaks to executive branch interest in foreign citizens' access to U.S. courts. If the executive branch and U.S. treaty partners believe that the treaties are being interpreted too narrowly, they can negotiate clarifications to more explicitly address access standards and the role of *forum non conveniens*.

The United States has also participated in negotiations for a number of multilateral conventions that bear on the question of court access and, specifically, on *forum non conveniens*. The proposed Hague Judgments Convention dealt with *forum non conveniens* explicitly, offering a compromise between the civil law tradition of *lis pendens* and the common law tradition of *forum non conveniens*.<sup>265</sup> Ultimately, however, the convention failed,<sup>266</sup> and a less ambitious choice-of-court convention was adopted in its stead; this convention allows parties to include a choice-of-court clause in commercial contracts and ensures

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have applied to a United States citizen.”); *Jennings v. Boeing Co.*, 660 F. Supp. 796, 800 (E.D. Pa. 1987) (“The Treaty provides for similar treatment in like situations; clearly it affords Irish citizens no greater rights than those afforded to United States citizens.”).

<sup>264</sup> *Varnelo v. Eastwind Transp.*, No. 02 Civ. 2084, 2003 U.S. Dist. LEXIS 1424, at \*44 (S.D.N.Y. Feb. 3, 2003) (“Thus, a foreign plaintiff residing overseas should receive the same diminished degree of deference as would be accorded an expatriate U.S. citizen living abroad.”); *In re Dow Corning Corp.*, 255 B.R. 445, 527 (E.D. Mich. 2000) (“The FCN treaties afford the foreign party equal access to the courts only. The FCN treaties do not preclude a court from dismissing a claim based on . . . the *forum non conveniens* doctrine. If a domestic plaintiff was faced with a *forum non conveniens* motion in a court, that court is not barred from dismissing that plaintiff’s case just because the plaintiff is from another state.”).

<sup>265</sup> See Stuckelberg, *supra* note 54, at 961 (“In the negotiation in The Hague, the questions of *forum non conveniens* and *lis pendens* were linked together, the former being the traditional common law rule for declining jurisdiction, the latter being the civil law rule on the subject. The flexibility of the former and the predictability of the latter had to be combined to find a solution agreeable to both legal traditions.”); see also Christopher Tate, Note, *American Forum Non Conveniens in Light of the Hague Convention on Choice-of-Court Agreements*, 69 U. PITTS. L. REV. 165, 168 (2007) (criticizing the convention’s rejection of *forum non conveniens*).

<sup>266</sup> See Stuckelberg, *supra* note 54, at 967–68 (describing the controversy surrounding *forum non conveniens* at the Hague convention and noting that common law countries perceive the doctrine “as an indispensable tool for a fair exercise of justice . . . in particular, a way to fight against forum-shopping,” while civil law countries, by contrast, “are afraid of this new exception offered to the defendants; which increases the duration and the costs of civil litigation. They deplore the absence of predictability of the doctrine and its discretionary character.”).

that courts in each of the signatory nations will enforce such clauses.<sup>267</sup> If the convention is ratified, forum non conveniens would no longer be an issue in cases arising under such contracts; parties could specify by contract which court, or courts, should be deemed convenient, and courts in member nations would be obligated to follow that ruling.<sup>268</sup>

Until now, the executive branch has had little direct involvement in forum non conveniens issues. Yet, given the increasing recognition that the court-access doctrine implicates U.S. foreign interests, executive branch participation may well increase. The United States can intervene in particular cases if they are individually significant. Otherwise, the treaty-making power offers a more systematic approach to ensuring access to U.S. courts.

### C. Combining Institutional Strengths

Each branch of government possesses relative institutional strengths and weaknesses. If the branches work together, however, they may be able to articulate a more coherent approach to court access that improves upon the current chaos of the forum non conveniens doctrine. Reform should begin in Congress: Congress's experience in weighing difficult policy choices, ensuring participation of all interested parties, and legislating proactively all suggest that it should take the lead in articulating a court-access doctrine. This policy debate should explicitly consider U.S. interests in opening federal courts to suits by foreign plaintiffs. Congress can, and should, consider the economic and regulatory interests in having U.S. courts decide cases involving the foreign conduct of domestic corporations.

Ideally, forum non conveniens legislation would open the federal courts to cases brought by foreign plaintiffs. A closed system may save administrative costs and may protect U.S. corporate defendants in the short run.<sup>269</sup> Yet it also creates a significant risk of retaliation, encouraging other countries to create mechanisms to hold U.S. corporations accountable for the harms they cause abroad—and, perhaps, to hold

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<sup>267</sup> BRAND & JABLONSKI, *supra* note 9, at 147–48. The United States had signed the convention but not yet ratified it. *Convention of 30 June 2005 on Choice of Court Agreements, Status Table*, HAGUE CONF. ON PRIVATE INT'L L., [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=98](http://www.hcch.net/index_en.php?act=conventions.status&cid=98) (last visited Aug. 3, 2010).

<sup>268</sup> See Jeffrey Talpis & Nick Krnjevic, *The Hague Convention on Choice of Court Agreements of June 30, 2005: The Elephant That Gave Birth to a Mouse*, 13 SW. J. L. & TRADE AM. 1, 17–20 (2006).

<sup>269</sup> See Barrett, *supra* note 61, at 405.

them accountable with much higher damages than they would face in the United States, and without U.S.-style due process protections.<sup>270</sup>

An open system avoids this risk and offers several other benefits. First, it provides an opportunity to regulate the conduct of U.S. corporations, which may be particularly important when that conduct affects U.S. residents as well as nonresidents. In addition, openness to foreign plaintiffs advertises the advantages of the U.S. justice system, and may encourage the export of U.S. due process protections.<sup>271</sup> As business becomes ever more global, U.S. parties are likely to benefit from justice systems influenced by the U.S. system. Finally, an open court system would help ensure the availability of corrective justice when harms occur.<sup>272</sup> At this time, the remedies available elsewhere are still more theoretical than real; an open court system in the U.S. facilitates redress.

Although the mechanics of open-access legislation are less important than the existence of such legislation, it is nevertheless helpful to examine what such a statute might look like. I propose that the statute should provide, at a minimum, that U.S. district courts presumptively accept a case against U.S. resident defendants as long as jurisdiction and venue are satisfied. Dismissal should be allowed only upon a finding both that another forum is available in another country and that the defendant would be unable to present its defenses in the U.S. due to difficulties in obtaining evidence or establishing jurisdiction over parties or witnesses located elsewhere. Given concerns about cost and administrative burden, such legislation might be tied to a higher fee schedule that allows such cases to proceed without taxpayer subsidy.<sup>273</sup>

Although the benefits of open access outweigh its detriments, it is possible that Congress would be persuaded by constituent corporations to create a more restrictive court-access doctrine. Such legislation might function similarly (but with opposite effect) to the one described above; for example, it might presumptively dismiss cases brought by foreign plaintiffs that involve actions occurring outside the United States.<sup>274</sup> The possibility of such legislation is not an argument against

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<sup>270</sup> Anderson, *supra* note 88, at 182; Oxman, *supra* note 88, at 128.

<sup>271</sup> See Dammann & Hansmann, *supra* note 222, at 14 (noting that “through migration of litigation overseas,” origin states will “have clear evidence of their weaknesses” and thus incentive to adopt reforms).

<sup>272</sup> See Van Detta, *supra* note 223, at 441–42 (explaining how regulatory principles interact with corrective justice principles in the area of forum non conveniens).

<sup>273</sup> See Barrett, *supra* note 61, at 404 (discussing burdens on taxpayers).

<sup>274</sup> See Scott, *supra* note 157, at 102–04 (recommending a federal statute that mandates such dismissal).

congressional intervention. Such restrictive legislation, although short-sighted, may still offer substantial benefits of certainty and predictability and therefore provide at least incremental improvement over the current haphazard doctrine.

Restrictive legislation could also provide a default rule subject to modification through treaty. If indeed congressional policy is overly parochial and too deferential to U.S. corporate interests, then the executive branch can take the lead in developing bilateral and multilateral treaties ensuring access to courts. Individual countries could negotiate such treaties bilaterally as part of trade negotiations; perhaps as a condition of allowing more U.S. investment, countries might insist that their citizens be granted access to U.S. courts for torts arising out of the conduct of U.S. defendants and that the doctrine of *forum non conveniens* should not apply in such a case. Although the executive branch may not want to encroach upon congressional action, it is also not formally bound by such action; a later-enacted treaty will trump previous legislation.<sup>275</sup>

In any case, even if Congress has set a restrictive default rule, it may not object to more specific treaties enacted in response to international political negotiation. After all, if the executive branch negotiates bilateral court-access treaties only with specific countries that have objected to a restrictive court-access policy, such treaty-based exceptions may be individualized enough that Congress does not perceive them as an obstacle to a generally restrictive policy. Furthermore, if an individual country has objected to restrictive court access, that objection may signal that the country is likely to enact retaliatory legislation. Congress—and its affected constituents—may strongly prefer that such countries are exempted from restrictive court-access statutes.

The executive branch can also continue to negotiate multilateral conventions. Although the Hague Judgments Convention failed to pass, the need for standardized enforcement of judgments is great enough that future efforts to renew such an agreement are likely. If the parties are negotiating under a framework where the default court-access rules have been codified, then expectations may be framed accordingly: other parties may have a greater understanding of the U.S. policy once it has been articulated by a legislative body, and to the extent that

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<sup>275</sup> HENKIN, *supra* note 260, at 63.

changes to that policy can be negotiated, they will have a clear starting point for discussion.<sup>276</sup>

Finally, even with legislative—and perhaps executive—action, judicial discretion will still play a role. Once the court-access policies have been set, district judges can apply them more easily than the multi-factor considerations they now apply. And even a well-articulated and open-access legislative policy should still leave some room for judicial discretion. Because of district courts' proximity to litigants and witnesses, Congress may want to defer to district court discretion in allowing judges to dismiss individual cases when the court concludes that the plaintiff is abusing the legal process, or when the State Department intervenes to seek dismissal due to a specific foreign-relations matter.<sup>277</sup> With congressional guidance about what factors to apply, courts can more easily determine the adequacy of particular alternative forums; the court can hear testimony and develop an individual case record in a way that no other branch can do. Judicial discretion is likely to be enhanced by input from the other branches: because the courts will not need to re-create policy in each decision, judges can focus on the primary judicial strength of "relating broad policy objectives to flesh-and-blood facts."<sup>278</sup>

### CONCLUSION

Scholars, courts, and commentators agree that the current court-access doctrines are confused, chaotic, and in need of reform. Until now, however, reform has proved to be an elusive goal. That may now be changing. In the past, dismissal from a U.S. court often represented a win for defendants, as foreign plaintiffs rarely attempted to re-file the cases abroad. Yet, as other countries have begun to enact retaliatory legislation that allows such cases to go forward with U.S.-level (or greater) damage awards, multinational corporations face a real threat of liability. In the *Aguinda* case cited at the beginning of this Article, for example, Chevron might have preferred to face liability in U.S. courts rather than the \$27 billion judgment that was recommended in the Ecuadorian court. Because domestic corporations can no longer rely on

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<sup>276</sup> See SAMUEL P. BAUMGARTNER, THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS 192 (2003) (noting that transnational procedural standardization has suffered from a "lack of information about the respective approaches on the other side of the Atlantic Ocean and the jurisprudential preferences underlying them" and suggesting that there is a strong need for "a better mutual understanding").

<sup>277</sup> See Robertson, *supra* note 74, at 379.

<sup>278</sup> Shapiro, *supra* note 228, at 585.

court-access doctrines to insulate them from liability in transnational cases, they may be more willing to join the call for reform.

Traditionally, most scholarship has had a “single institution” focus on the judiciary as the agent of such reform. Such a focus is short sighted and does not accommodate the growing importance of transnational legal and business activity. Reform will be best accomplished when all three branches take an active role: Congress in articulating an initial court-access policy, the executive branch in negotiating bilateral treaties and multilateral court-access conventions, and the judiciary in applying these policies to individual cases.

