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RETHINKING LEGAL GLOBALIZATION: THE CASE OF TRANSNATIONAL PERSONAL JURISDICTION

DONALD EARL CHILDRESS III*

ABSTRACT

Under what circumstances may a United States court exercise personal jurisdiction over alien defendants? Courts and commentators have yet to offer a coherent response to this question. That is surprising given that scholars have been calling for the globalization of U.S. law since the late 1980s as part of a transnational litigation narrative.

* Associate Professor of Law, Pepperdine University School of Law. Earlier drafts of this Article were presented at the Stanford Law School, the University of Virginia School of Law, and the University of Milan School of Law. This Article also benefited from being presented as part of the 2011 Southeastern Association of Law Schools discussion group on the future of civil procedure and the American Society of International Law Midyear Meeting hosted by the University of Georgia. I thank the attendees at each of these venues for their very helpful comments and suggestions. I especially thank Roger Alford, Gary Born, Nathan Chapman, Jack Coe, Scott Dodson, Michael Helfand, John Meixner, Derek Muller, Bo Rutledge, Linda Silberman, Paul Stephan, and Chris Whytock for helpful conversations, comments, and suggestions at various stages. Geelan Fahimy and Kris Wood deserve a note of profound thanks for their incredibly helpful research assistance. Jennifer Allison's library and research skills were, as always, exceptional and above and beyond the call of duty. Finally, thanks to Shanna Reulbach, Jean-Paul Theroux, Tom Burnham, Merideth Snow, Cassandra Roeder, and Jarred Taylor of the *William & Mary Law Review* for outstanding editorial efforts.

Through doctrinal and empirical analysis, this Article argues that a U.S. court should have power to exercise personal jurisdiction over an alien defendant not served with process within a state's borders when (1) the defendant has received constitutionally adequate notice, (2) the state has a constitutionally sufficient interest in applying its law or adjudicating a controversy involving its domiciliaries, and (3) the policies of other interested nations whose laws would be arguably applicable are given due respect and consideration and would not be adversely affected by the exercise of jurisdiction. Personal jurisdiction in transnational cases is, therefore, about choice of law. This Article revises the transnational personal jurisdiction doctrine through a concrete set of rules for courts to apply given the parties and laws at issue before a court.

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INTRODUCTION

Transnational law and globalization talk is in vogue.[1] Scholars have created a massive oeuvre of transnational legal scholarship.[2] Judges, including United States Supreme Court Justices, frequently travel abroad to teach transnational law and take part in law reform efforts in foreign countries.[3] In some cases, judges cite foreign law.[4] United States law firms have created transnational practice groups.[5] Many law schools include courses in international, transnational, and comparative law as part of their curricula and encourage study abroad programs.[6]

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1. Some recent examples include Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891 (2008); Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1 (2008); and Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775 (2011).

2. "Massive" is not an overstatement. Indeed, a search of the Westlaw database for law review articles in the last ten years turns up over 4,000 pieces that discuss "transnational law," with over 600 pieces having the word "transnational" in their titles.

3. *See, e.g.*, Nathan Koppel, *Supreme Court Justices Have a Busy Summer Ahead*, WALL ST. J. L. BLOG (June 14, 2011, 10:27 AM), http://blogs.wsj.com/law/2011/06/14/supreme-court-justices-have-a-busy-summer-ahead/ (detailing the Justices' international summer travel plans).

4. *E.g.*, Roper v. Simmons, 543 U.S. 551, 575-78 (2005) (considering foreign law and international authorities to ascertain whether applying the death penalty to people under the age of eighteen violates the Eighth Amendment). Less controversially, foreign law may appear in judicial opinions when courts apply that law under choice-of-law rules. *See, e.g.*, Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to Greater Global Understanding*, 46 WAKE FOREST L. REV. 887, 890 (2011).

5. *See, e.g.*, *Global Disputes*, JONES DAY, http://www.jonesday.com/globaldisputes/ (last visited Feb. 28, 2013); *Transnational Litigation and Foreign Judgments*, GIBSON DUNN, http://www.gibsondunn.com/practices/pages/GTT.aspx (last visited Feb. 28, 2013).

6. Some schools now require such courses. *See, e.g.*, *About the J.D. Program at W&L*, WASH. & LEE SCH. L., http://law.wlu.edu/admissions/page.asp?pageid=311 (last visited Feb. 28, 2013); *International Law*, YALE L. SCH., http://www.law.yale.edu/intellectuallife/internationallaw.htm (last visited Feb. 28, 2013); *International Opportunities*, HARV. L. SCH., http://www.law.harvard.edu/news/spotlight/ils/international-opportunities/index.html (last visited Feb. 28, 2013). Other schools offer these courses as electives in the first year of study. *See, e.g.*, *Academics*, U.C. BERKELEY SCH. L., http://www.law.berkeley.edu/academics.htm (last visited Feb. 28, 2013); *First Year Courses*, U. CHI. L. SCH., http://www.law.uchicago.edu/prospective/1Lcourses (last visited Feb. 28, 2013); *First-Year Electives,* COLUM. L. SCH., http://www.law.columbia.edu/courses/browse?global.c_id=304 (last visited Feb. 28, 2013); *First Year Information*, GEO. U. L. CENTER, http://www.law.georgetown.edu/academics/academic-programs/jd-program/full-time-program/first-year.cfm (last visited Feb. 28, 2013).

This transnational focus responds to the notion that law practice and the problems that lawyers resolve are increasingly "going global."[7] The trend also responds to arguments for a "global community of courts" to resolve transnational legal problems—the idea being that increased transnational activity will encourage courts to interact more frequently with one another.[8] Because of this globalization narrative, judges, lawyers, and law students are encouraged to study transnational law to gain tools to be modern, global lawyers practicing before modern, global courts. The academic narrative is appealing. This narrative, however, has a real-world problem.

For all of globalization's educational and personal benefits—and, to be clear, there are many[9]—empirical analysis of the work of U.S. courts in transnational cases surprisingly undercuts the practical relevance of the globalization narrative for judicial decision making.[10] For instance, there is little empirical evidence that courts extensively cite foreign law.[11] Indeed, lawyers seldom rely on it in arguing before courts, unless choice-of-law principles demand otherwise.[12] Instead of applying foreign law, U.S. courts typically adopt one of two strategies. First, courts reject the application of foreign law and apply U.S. law to transnational facts.[13] Second, especially in cases involving a foreign plaintiff, U.S. courts dismiss the case in

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7. *See, e.g.*, J.M. Balkin & Sanford Levinson, Commentary, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 969 (1998) (explaining how American legal education is "going global"); *see also* ANDREW S. BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION 3 (2003) (exploring how transnational litigation has emerged).

8. *See, e.g.*, Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 193 (2003) (encouraging transnational legal dialogue between courts of different countries).

9. *See generally* LISA K. CHILDRESS, THE TWENTY-FIRST CENTURY UNIVERSITY: DEVELOPING FACULTY ENGAGEMENT IN INTERNATIONALIZATION (2010) (explaining the history, rationales, and benefits of international education in U.S. higher education).

10. *See, e.g.*, Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 483-84 (2011) (detailing empirical analysis of transnational cases).

11. There is some evidence that this may be changing, with courts engaging with foreign law "more often than ever." Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT'L LAW 31, 37-39 (2011) (suggesting that "foreign law issues are indeed growing in the U.S. federal courts—at least in the Southern District of New York").

12. This may also be changing. *Id.*

13. *See, e.g.*, Donald Earl Childress III, *When* Erie *Goes International*, 105 NW. U. L. REV. 1531, 1554 (2011).

favor of another adequate foreign forum.[14] Put simply, scholars urge the global, and yet courts remain local.

One need look no further than recent Supreme Court decisions involving transnational litigation to find a prime example of this puzzle concretely moored in the personal jurisdiction doctrine. In the case of *Goodyear Dunlop Tires Operations, S.A. v. Brown*, North Carolina domiciliaries were killed in a bus accident in Paris, France, due to an allegedly defective tire manufactured in Turkey by a foreign subsidiary of Goodyear.[15] Plaintiffs argued that the North Carolina state court had general jurisdiction over the foreign defendants because the defendants sold their product in the United States, including in North Carolina.[16] In another case argued and decided the same day, *J. McIntyre Machinery, Ltd. v. Nicastro*, a New Jersey plaintiff was injured by a metal-shearing machine while working in New Jersey.[17] The machine was manufactured in England, where the defendant was incorporated, and distributed in the United States through the English manufacturer's independent Ohio distributor.[18] Plaintiffs argued that the New Jersey state court had specific jurisdiction because the product was purposefully directed at the United States market and caused an injury in New Jersey.[19] Given the foreign elements, both cases were ripe for the Justices to take account of the transnational context in which the personal jurisdiction doctrine operates, as the Court had done previously in *Asahi Metal Industry Co. v. Superior Court*.[20]

The Justices, however, never addressed the transnational facts of the cases in the controlling opinions. Instead, the Court held in both cases that the domestic personal jurisdiction doctrine did not permit the suits to be maintained in the United States.[21] Justice Ginsburg's

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14. *Id.* at 1561-64 (documenting this trend).

15. 131 S. Ct. 2846, 2850 (2011).

16. *Id.* at 2850-51.

17. 131 S. Ct. 2780, 2786 (2011) (plurality opinion).

18. *Id.* at 2786, 2796.

19. *Id.* at 2786.

20. 480 U.S. 102, 106, 116 (1987) (finding no personal jurisdiction in California over a Japanese manufacturer).

21. *Goodyear*, 131 S. Ct. at 2851; *Nicastro*, 131 S. Ct. at 2785. Justice Breyer's concurrence in *Nicastro*, joined by Justice Alito, recognized that stating an absolute rule for personal jurisdiction when the case involves a foreign defendant might be unfair. *Nicastro*, 131 S. Ct. at 2793-94 (Breyer, J., concurring). However, Justice Breyer did not develop this argument.

dissent in *Nicastro* provided the only extended consideration of the case's transnational elements. There, she highlighted the reality of marketing arrangements used by international sellers in a globalized commercial world in which U.S. companies distribute the sellers' products all over the United States.[22] Justice Ginsburg suggested that suing international sellers at the place their products cause injury would be a fair and "reasonable cost of transacting business internationally."[23] The plurality did not address these arguments. In other words, the plurality was not concerned that these cases were transnational and implicated the applicability of U.S. law to facts occurring in whole or in part outside the United States. For this reason, the transnational personal jurisdiction doctrine will continue to confound courts and commentators in the years to come.

How courts treat these cases matters. Affording personal jurisdiction may increase transnational cases filed in the United States. It may also increase the possibility of regulatory conflict between U.S. and foreign sovereigns and their laws. Declining jurisdiction may decrease the incentive of filing such cases in the United States and impact the transnationalization of U.S. law. Whatever rule for transnational personal jurisdiction is adopted will impact whether transnational cases are filed in the United States; it will also influence whether U.S. courts engage with foreign law.

This concern is not purely academic. Since 1986, roughly 120,000 lawsuits involving a non-U.S. party have been filed in U.S. federal district courts.[24] In 2005 alone, when the most recent data were analyzed, 1,976 alienage cases terminated in U.S. federal district courts.[25] Although no precise figures exist, many of these cases likely involved personal jurisdiction questions.[26] As such, the Court's

22. *Nicastro*, 131 S. Ct. at 2799 (Ginsburg, J., dissenting).

23. *Id.* at 2800-01.

24. Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67, 74 n.18 (2009).

25. *Id.*

26. Indeed, personal jurisdiction problems could grow in future years because the Supreme Court may be on the verge of sending a significant number of international human rights cases to state courts. *See* Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 712-15 (2012); *see also* Donald Childress, *What If Federal Courts Close Their Doors to Human Rights Litigation?*, OPINIO JURIS (Mar. 5, 2011, 12:32 AM), http://opiniojuris.org/2012/03/06/what-if-federal-

unwillingness to examine the transnational elements in the cases and provide concrete direction to lower courts is unsatisfactory.

The Court's failure to analyze personal jurisdiction from a transnational perspective presents an important and compelling question: Is globalization of law a chimera in U.S. judicial decision making? Concretely challenging the claim that globalization of law is occurring in U.S. courts, one recent study concluded that the number of transnational cases filed is going down and has been for some time.[27] Despite the fact that the general caseload of the federal courts has continued to rise, transnational cases have decreased from a high of 3,293 cases in 1996 to 1,637 cases in 2005.[28] The author concluded that, among other things, U.S. federal courts may evidence antiforeigner bias, at least as to extraterritorial harms.[29] On account of this bias, plaintiffs in transnational cases may be forum shopping away from the United States, which contradicts a key component of the globalization narrative—namely, that the United States is a magnet forum that attracts foreign cases to U.S. courts. Foreign plaintiffs, in other words, may not wish to take advantage of a U.S. approach to transnational cases that is parochial.[30]

There may even be a backlash to transnationalism. As one leading federal appellate judge and former law professor provocatively argued before the January 2012 gathering of the Association of American Law Schools, the "cult of globalization" that has entranced law schools should be discarded.[31] "Quite a few law schools have launched programs overseas, entered partnerships with foreign law schools, hosted globalization conferences, founded centers geared towards globalization and fostered student exchanges

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courts-close-their-doors-to-human-rights-litigation/.

27. Whytock, *supra* note 10, at 512-13.

28. *Id.*

29. *Id.* at 533.

30. For one recent example of this phenomenon, see Ashby Jones, *Lawyers Looking to Canada for Shareholder Litigation*, WALL ST. J. L. BLOG (Feb. 27, 2012), http://online.wsj.com/article/SB10001424052970203833004577247211369677658.html (discussing U.S. plaintiffs' lawyers filing securities cases in Canada to avoid strict U.S. legal doctrines).

31. Walter Sobchak, *Judge Cabranes' Three-Part Prescription for Law Schools*, TAXPROF BLOG (Jan. 8, 2012, 11:34 AM), http://taxprof.typepad.com/taxprof_blog/2012/01/judge-.html (quoting Judge José Cabranes, U.S. Court of Appeals for the Second Circuit, Remarks at the Association of American Law Schools Annual Meeting (Jan. 6, 2012)).

overseas."[32] In his view, although "[m]any of these international programs are worthy endeavors ... [they] are mostly a distraction from the core objective of a law school."[33] Something funny has happened on the way to U.S. legal globalization.

In light of this disconnect between academic and popular belief and the current state of practice, foundational questions arise: Should U.S. courts resolve transnational cases at all? If so, how should they be resolved? Should generally applicable domestic doctrines be used, or should they be updated to account for transnational facts? These questions are not about transnational law per se but are questions of domestic law and domestic institutional competency to resolve transnational issues.

To answer these questions, this Article examines the personal jurisdiction and forum non conveniens doctrines as they are applied in transnational cases.[34] Although globalization's academic clarion call has largely been ignored in judicial decision making, it must be accounted for and developed by judges, lawyers, and academics to meet the realities of litigation today. This process requires updating domestic legal doctrines to account for transnational cases by encouraging U.S. courts to treat transnational cases differently—by focusing on the foreign facts and parties and their nexus with the United States.

The Article proceeds in five parts. Part I presents a brief review of the transnational litigation narrative that has gripped the legal academy in recent years. Unpacking this narrative provides an understanding of the nature of the problem that lawyers and courts are supposed to address through transnational law. After explaining the narrative's development in the late 1980s, this Part evaluates the accuracy of that narrative in light of modern transnational litigation realities. After concluding that a robust version of the

32. *Id.*

33. *Id.*

34. The goal of this Article is both theoretical and practical and thus responds to recent entreaties to make scholarly commentary relevant to practice. *See, e.g.*, Jess Bravin, *Chief Justice Roberts on Obama, Justice Stevens, Law Reviews, More*, WALL ST. J. L. BLOG (Apr. 7, 2010, 7:20 PM), http://blogs.wsj.com/law/2010/04/07/chief-justice-roberts-on-obama-justice-stevens-law-reviews-more/. *See generally* David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345 (2011) (examining the veracity of the claim that scholarship has a limited impact on practice).

transnational narrative has been lost on courts, the Article sets forward a new approach to the narrative grounded in domestic legal doctrines. Specifically, Part II addresses the question of transnational personal jurisdiction. After detailing the differences between personal jurisdiction in domestic and transnational cases, this Part critically evaluates the impact of the personal jurisdiction doctrine when facts, law, or parties are foreign. Part III then grapples with the increasing use of the forum non conveniens doctrine by U.S. federal courts. Among other things, this Part shows through new empirical evidence that forum non conveniens dismissals serve as a growing, yet problematic, proxy for engaging foreign elements in the personal jurisdiction inquiry. Part IV brings the transnational litigation narrative detailed in Part I into closer focus and provides a concrete proposal to resolve transnational personal jurisdiction cases. Specifically, the Article proposes that a U.S. court may exercise personal jurisdiction over an alien defendant not served with process within a state's borders when (1) the defendant has received constitutionally adequate notice, (2) the state has a constitutionally sufficient interest in applying its law or adjudicating a controversy involving its domiciliaries, and (3) the policies of other interested nations whose laws would be arguably applicable are given due respect and consideration and would not be adversely affected by the exercise of jurisdiction. In Part V, the Article closes by pointing to ways in which the transnational litigation narrative may be invigorated by grounding it, as does this Article, more concretely in the work of courts in transnational cases.

I. THE TRANSNATIONAL LITIGATION NARRATIVE

Before discussing the transnationalization (or lack thereof) of the personal jurisdiction doctrine,[35] some account should be given to the importance of transnational litigation and globalization for U.S. law generally. At one point, the narrative pointed in one direction: U.S. legal doctrines will be transnationalized as courts face global legal problems.[36] Recent studies point to a far different reality: U.S.

35. *See infra* Part II.

36. *See* Peter Roorda, *The Internationalization of the Practice of Law*, 28 WAKE FOREST L. REV. 141, 142 (1993).

courts do not treat transnational cases differently in any significant way.[37] This Part describes the transnational litigation narrative that created the academic field of transnational litigation and evaluates recent empirical studies questioning the narrative's veracity. It next situates the transnational litigation narrative within the larger framework of U.S. law before analyzing what happens when courts approach transnational cases through the personal jurisdiction and forum non conveniens doctrines.[38] In so doing, it provides a starting point for the evaluation in Parts IV and V of how transnational law should relate to domestic legal doctrines.

A. Early Incantations: Creating the Field of Transnational Law

In its simplest articulation, the academic transnational litigation narrative proceeds as follows: The Internet and cross-border activities have resulted in a transnational litigation explosion in the United States and increasing transnational activity in legal practice.[39] The world, and with it law, is going global—the idea being that in a world of international commerce and communications, national courts cannot avoid interactions with the larger, global legal world, and lawyers and scholars cannot ignore the transnational aspects of modern litigation.[40] Because lawyers and courts will increasingly face transnational issues, students, lawyers, and judges should receive training in transnational law to deal with these issues in sophisticated ways.[41] Such training equips lawyers to deal with the realities of modern legal practice and serve their clients by encouraging sensitivity to transnational issues.[42]

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37. *See, e.g.*, Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 325 (2002) (arguing for a "cosmopolitan jurisdiction" in light of the rise of cyberspace and globalization).

38. *See infra* Parts II-III.

39. *See, e.g.*, Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2365 (1991) (detailing the litigation explosion); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 432 (2003) (same).

40. *See* PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS 4-5 (2012) (discussing the difficulty for actors confronted with "regulat[ion] by multiple legal or quasi-legal authorities").

41. *See, e.g.*, Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 63-64 (1995) (urging international legal education for judges, practitioners, and students).

42. *See id.*

As entrenched as the transnational narrative may be in today's legal discourse, the serious academic study of transnational litigation in the United States is of a relatively recent vintage. The modern usage of the term "transnational law" can be traced to 1956 when Philip Jessup, the Hamilton Fish Professor of International Law and Diplomacy at Columbia University, delivered three Storrs Lectures on jurisprudence at Yale Law School.[43] Later publishing these lectures in a book entitled *Transnational Law*, Jessup observed that the old labels of public and private international law did not well serve the increased privatization of many international legal disputes.[44] He thus proposed a reexamination of traditional international law doctrines under the umbrella of "transnational law" to resolve issues crossing and transcending national borders.[45] To Jessup, transnational law would include all municipal laws and intergovernmental agreements that directly regulate the transnational activity of individuals and the relationship between individuals and state governments.[46]

Jessup's approach was largely experimental and designed to encourage lawyers to approach transnational problems with "open-minded intelligence instead of open-mouthed surprise."[47] In other words, he recognized that old international law labels did not well encapsulate current litigation realities—namely, that much litigation involved private parties and not governments.[48] Although Jessup provided a new way to view these cases, he left it for another day to provide a prescription for how lawyers should handle them.

The fact that transnational law came so late to academic discourse is perplexing. To be sure, a public international law dialogue in academic literature dates back to the dawn of the modern law school in the late nineteenth century. But this dialogue was concerned mostly with the relationship between nations and interna-

43. PHILIP C. JESSUP, *Acknowledgement*, *in* TRANSNATIONAL LAW (1956). For other early proponents of transnational law, see Myres S. McDougal et al., *Nationality and Human Rights: The Protection of the Individual in External Arenas*, 83 YALE L.J. 900, 901 (1974).

44. *See* JESSUP, *supra* note 43, at 106-07.

45. *See id.*

46. *See id.* at 102-03, 106-07.

47. *Id.* at 108-09.

48. *See id.*

tional organizations.[49] Relatedly, a comparative law and comparative constitutional law dialogue boomed after World War II, but it was stifled in the late 1970s as academic winds blew towards public law and the Warren Court.[50] Surprisingly, international civil litigation and transnational law study was sidelined.

Jessup's call for transnational law largely lay dormant until the late 1980s, with the state of academic commentary scattered across various doctrinal areas without systemization—in other words, without the unified narrative that Jessup proposed.[51] Academic focus then began to shift to studying transnational law as a species of transnational litigation or international litigation in U.S. courts, with significant attention given to issues relating to transnational discovery.[52] Discovery was the starting point for much of the academic discourse because of percolating issues related to the passage of the Hague Evidence Convention in 1970, which entered into force in the United States in 1972.[53] To put the state of the field in perspective, as late as 1988, no casebook addressed the subject, and virtually no courses in major U.S. law schools dealt with transnational law or litigation.[54]

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49. *See, e.g.*, Simeon E. Baldwin, *The Responsibilities of the United States, Internationally, for Acts of the States*, 5 YALE L.J. 161, 161 (1896); Tokichi Masao, *The Kowshing, in the Light of International Law*, 5 YALE L.J. 247, 248 (1896).

50. David Fontana, *The Rise and Fall of Comparative Constitutional Law in the Postwar Era*, 36 YALE J. INT'L L. 1, 2-3, 8 & n.24 (2011) (citing William O. Douglas, *Foreword*, 55 YALE L.J. 865, 868-69 (1946)).

51. Indeed, this was one of the main reasons that Born and Westin produced their influential casebook. Curtis A. Bradley & Jack L. Goldsmith III, Book Review, 34 VA. J. INT'L L. 233, 239 (1993) (reviewing GARY B. BORN WITH DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (2d ed. 1992)) ("[O]nly by a holistic approach to the doctrines of international civil litigation can one fully appreciate the nature and complexity of certain recurring concepts and themes.").

52. *E.g.*, Raymond Paretzky, *A New Approach to Jurisdictional Questions in Transnational Litigation in U.S. Courts*, 10 U. PA. J. INT'L BUS. L. 663 (1988); Mark J. Sadoff, *The Hague Evidence Convention: Problems at Home of Obtaining Foreign Evidence*, 20 INT'L LAW. 659 (1986); Spencer Weber Waller, *A Unified Theory of Transnational Procedure*, 26 CORNELL INT'L L.J. 101, 101-02 (1993).

53. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 (entered into force for the United States Oct. 7, 1972).

54. GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS, at xi (4th ed. 2007).

The publication of Born and Westin's landmark casebook in 1989[55] coincided with a series of high profile court decisions and the publication of the *Restatement (Third) of Foreign Relations Law of the United States*, which together caused academic discourse to shift and engage transnational law and litigation more fully.[56] At that time, some law review articles again focused on extraterritorial discovery and the taking of evidence abroad under the Hague Convention, largely in response to the Supreme Court's 1987 decision in *Société Nationale Industrielle Aérospatiale v. U.S. District Court*.[57] Other articles focused on the question of antisuit injunctions, largely in response to decisions by the Second and D.C. Circuits.[58] A prescient article by Gary Born, written at the time the *Asahi* case was pending before the Supreme Court in 1987, outlined the issues faced when U.S. judicial jurisdiction extends to international cases.[59] Likewise, commentators began to investigate the doctrine of forum non conveniens, largely in response to the Supreme Court's ruling in *Piper Aircraft Co. v. Reyno*[60] and litigation regarding the disaster in Bhopal, India,[61] which brought state courts, and the appropriateness of those courts adjudicating transnational harms, into the international law conversation.[62]

Academic discourse and judicial decisions at this time proposed a certain way of viewing transnational cases. The approach was

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55. GARY B. BORN WITH DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (1st ed. 1989).

56. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1986).

57. 482 U.S. 522 (1987). For an example of commentary surrounding the *Aérospatiale* decision, see George A. Bermann, *The Hague Evidence Convention in the Supreme Court: A Critique of the* Aérospatiale *Decision*, 63 TUL. L. REV. 525 (1989).

58. *See, e.g.*, George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589, 589-91 (1990); William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1711-14 (1992).

59. Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1 (1987).

60. 454 U.S. 235 (1981).

61. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 809 F.2d 195 (2d Cir. 1987).

62. *See, e.g.*, David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 938-42 (1990); 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, 502-04 (1993).

largely one of balancing the transnational elements of a case within a larger domestic discourse for adjudication.[63] For instance, in the antisuit injunction context,[64] the rule was that the court should examine "(A) whether the foreign action threatens the jurisdiction of the enjoining forum, and (B) whether strong public policies of the enjoining forum are threatened by the foreign action."[65] Forum non conveniens motions were subject to a series of public and private interest factors.[66] Personal jurisdiction determinations were subject to the *Asahi* Court's unique reasonableness inquiry in transnational cases that was meant to take account of the international context.[67] Taken together, these balancing approaches to transnational cases provided little concrete direction to courts and litigants.

Before the late 1980s, therefore, scholars paid little attention to transnational law, and certainly no extended transnational litigation narrative existed in the academic literature. Furthermore, to the extent scholars directed serious attention at transnational issues, their interest was largely responsive to particular cases taken up by the Supreme Court or other courts—cases involving discovery, antisuit injunctions, personal jurisdiction, and forum non conveniens. In its infancy, the field of transnational law was reactive to court decisions and not constitutive of a new view of U.S. law when it encountered transnational elements.

Following these cases, another wave of transnational scholarship emerged. Scholars began to recognize more concretely the internationalization of law and legal practice and organized symposia to consider the implications.[68] Scholarly attention also became directed

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63. *See, e.g.*, Paretzky, *supra* note 52, at 688-90.

64. Such injunctions may be sought (1) to prevent an adversary in the same dispute from undertaking action in a foreign forum, (2) to consolidate claims pursued in multiple fora, (3) for declaratory purposes, (4) to bar relitigation, and (5) to foreclose the foreign issuance of an antisuit injunction. BORN & RUTLEDGE, *supra* note 54, at 540-41.

65. China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987) (citing Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 927, 937 (D.C. Cir. 1984)).

66. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 & n.6 (1981).

67. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 115 (1987).

68. Thomas E. Carbonneau, *Introduction*, *Eason-Weinmann Center for Comparative Law Colloquium: The Internationalization of Law and Legal Practice*, 63 TUL. L. REV. 439 (1988); *see* Roorda, *supra* note 36, at 141 (discussing Wake Forest's Business Law Symposium, *Globalization of Law and Business in the 1990's*); Symposium, *Current Issues in International Litigation*, 28 TEX. INT'L L.J. 439 (1993).

at international litigation in light of the Supreme Court's decision in *Asahi* and continuing questions related to the Bhopal disaster and the extraterritorial application of United States law, especially federal antitrust laws.[69] Thus began the academic field of international civil litigation and the early transnational litigation narrative that exists today.

Besides court decisions, what created this narrative in the late 1980s? An answer to this question can be found in the scholarship of Harold Hongju Koh. Writing at this time, Koh, who later became dean of Yale Law School and legal advisor to the U.S. Department of State, observed that an explosion in transnational commercial cases was obliging federal courts to adjudicate suits with foreign elements.[70] Because of this explosion, Koh argued that new legal tools should be developed to take account of its impact.[71] Koh's approach, however, was directed at the development of international law by U.S. courts and not the updating of domestic law to transnational issues.[72]

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69. *See, e.g.*, Earl M. Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on* Asahi Metal Industry Co. v. Superior Court of California, 1987 Duke L.J. 669, 670; Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799, 1799-1801 (1992). Some attention was given during this time to the Alien Tort Statute and the increased possibility of filing human rights claims under that statute. *See, e.g.*, Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 461-64 (1989). For purposes of this Article, I am leaving that discussion aside as it relates only tangentially to the above narrative and is a narrative unto itself. Likewise, I am purposefully glossing over the development of academic literature related to international arbitration. Although international arbitration is a species of transnational litigation, it is also a narrative unto itself and not the subject of study here.

70. Koh, *supra* note 39, at 2365 ("This growing faith in the capacity of the courts to engage in domestic public law litigation coincided with a second trend: the explosion of *transnational commercial* litigation in United States courts. As nations increasingly entered the marketplace, and the United States adopted the doctrine of restrictive sovereign immunity by statute, federal courts became increasingly obliged to adjudicate commercial suits brought by individuals and private entities against foreign governments." (footnotes omitted)).

71. *See id.* at 2382.

72. *See, e.g.*, Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1414 (1999); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2640 n.209 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995)); Harold Hongju Koh, Gerald C. and Bernice Latrobe Smith Professor of International Law, Yale Law Sch., The 1998 Frankel Lecture at the University of Houston Law Center: Bringing International Law Home (Apr. 8, 1998), *in* 35 HOUS. L. REV. 623, 646-55, 665-66

Another scholar writing at the same time, Spencer Weber Waller, provided a different approach. Waller argued that the explosive growth of transnational litigation should lead to a unified approach to all questions transnational that would replace the hodgepodge of balancing approaches applied by courts.[73] Waller's argument for unification sought to provide clear guidance to courts in adjudicating these complex questions.[74] His conclusion was that U.S. courts should create a unified approach, based on comity, to determine whether the United States is an appropriate forum to adjudicate a case.[75] This "quick look" at the beginning of a case, in his view, would be more efficient and productive than the balancing tests previously applied.[76] The courts, however, never heeded Waller's call.[77] These and related reform proposals were based on an explosion of transnational cases that allegedly necessitated a new way of viewing transnational law.[78]

The transnational litigation narrative is now fragmented. Considerable attention is still given to the effects of globalization on the law,[79] to international human rights issues,[80] and to treaty

(1998); *see also* Burley, *supra* note 69, at 489-93.

73. Waller, *supra* note 52, at 101-02.

74. *See id.* at 102.

75. *Id.*

76. *Id.*

77. *See* Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1006 (2006) ("One area where convergence is not taking place is the law of personal jurisdiction in international cases.").

78. *See, e.g.*, Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 869 (2012) (advocating the development of international tribunals); Michaels, *supra* note 77, at 1069 ("If this traditional image of sovereignty is inadequate under conditions of globalization, as is frequently claimed, then both [U.S. and European] paradigms are similarly inadequate as well, and both sides must come together to create a new, third paradigm of jurisdiction."); Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1143 (2005) ("[T]he field of 'Federal Courts' scholarship ought to expand to consider the relations not just between state and federal courts, but also between domestic courts and judicial institutions operating at the international level.").

79. *See, e.g.*, Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505 (1997); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999).

80. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

issues.[81] Scholars also vigorously debate the role of customary international law in United States courts[82] and the legal implications of the Internet.[83] However, no unified narrative brings together these various strands of transnational law. Furthermore, although the educational benefits of studying transnational law are real, questions remain as to the real-world impact that transnational law has had on domestic courts. This impact, which is the subject of the next Section, encourages a reconsideration of the transnational litigation narrative.

B. Modern Realities: Are Transnational Cases Different?

Due to the leadership of Koh and others, a generation of law students and lawyers have been exposed to international and comparative legal materials.[84] This study has blossomed today, with virtually every major U.S. law school focused on the study of international and transnational law.[85] On its own, this transnational narrative is appealing because transnational cases have been heard for as long as U.S. courts have existed.[86] The narrative is also appealing because of a presumed increase in transnational litigation,[87]

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81. *See, e.g.*, Bradley, *supra* note 79, at 546-50; David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000).

82. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997).

83. *See, e.g.*, Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

84. For an example of Koh's efforts, see Harold Hongju Koh, Commentary, *Is There a "New" New Haven School of International Law?*, 32 YALE J. INT'L L. 559 (2007).

85. *See* Helen Hershkoff, *Integrating Transnational Legal Perspectives into the First Year Civil Procedure Curriculum*, 56 J. LEGAL EDUC. 479, 479 (2006); *see also* Franklin A. Gerurtz et al., *Report Regarding the Pacific McGeorge Workshop on Globalizing the Law School Curriculum*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 267 (2006) (detailing a 2005 conference of professors from thirty-one law schools to discuss the introduction of international and comparative law issues into the law school curriculum).

86. *See* Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301, 305 & n.22 (2008) (discussing this development).

87. *See* Whytock, *supra* note 10, at 496.

which should lead to an increase in transnational issues for lawyers to resolve. Questions do remain, however, about the impact of transnational cases on U.S. courts.

Available data makes answering the question of impact hard. To begin with, federal and state courts keep incomplete information on the filing and disposition of transnational cases.[88] What data is available seems to discount the belief that there is increasing transnational litigation,[89] although, of course, there may be increasing transnational issues requiring legal advice that do not make it to litigation or are not reported by courts. Furthermore, even when evidence is available showing transnational issues, such as through judicial decisions available in legal databases, the courts' treatment of transnational cases is incredibly parochial. In most cases, little attention is given to the transnational nature of the case. Domestic doctrines are applied as they are in purely domestic cases, with perhaps some passing reference given to the transnational facts or parties involved in the dispute.[90]

In a nutshell, the problem with the transnational litigation narrative is that in its modern incarnation it is a narrative designed to encourage transnational litigation in U.S. courts in order to develop international law. The reaction of courts to that narrative has been mixed, with empirical evidence suggesting that (1) courts are resisting adjudicating such cases, and (2) to the extent they adjudicate such cases, they do so using a domestic frame of reference.[91]

There are some doctrinal outliers, and these outliers will be the focus of the parts that follow. As will be discussed below, the personal jurisdiction and forum non conveniens doctrines include analytical prongs to account for transnational facts.[92] This Article will analyze the uniqueness of foreign elements for these doctrines.

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88. *See id.* at 509 & n.137, 529.

89. *Id.* at 506-07, 529.

90. *See infra* notes 175-80 and accompanying text.

91. *See infra* Part III.

92. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987) ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."); Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n.6 (1981) (including the avoidance of applying foreign law among the public interest factors affecting the convenience of a forum).

But, before reaching that point, some preliminary consideration should be given to why such a study is fruitful and how it relates to the transnational narrative discussed above in this Part.

First, the goal of exposing law students and lawyers to transnational law should be more than life enriching (of course, it certainly is that); it should also inform legal doctrine. There is an increasing divide between the academy and practice, and that divide is clearly apparent in the transnational litigation narrative, which in many respects is oblivious to the "law in action."[93] Thus, in what follows, the Article attempts to correct that issue.

Second, failing to take account of foreign elements stymies critical evaluation of judicial caseload management.[94] If we do not know the precise reasons a court resolves a case, we cannot effectively provide a democratic check on what courts do. Courts should tell us why transnational cases are different and how that difference leads to a particular rule of decision. Failing to do this prevents the potential for legislative and other legal reform. In other words, "honesty is the best policy, even in judicial opinions."[95]

Third, the lack of clear rules in transnational cases creates litigation costs.[96] Parties are forced to litigate transnational issues without knowing what rules apply and thus cannot determine whether filing a case in the United States makes legal and economic sense.[97] Judicial resources are also expended in resolving what should be fairly straightforward questions on account of the lack of a clear rule.[98]

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93. *See* WILLIAM M. SULLIVAN ET AL., THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 4 (2007), *available at* http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf; John A. Barrett, Jr., *International Legal Education in the United States: Being Educated for Domestic Practice While Living in a Global Society*, 12 AM. U. J. INT'L L. & POL'Y 975, 991-96 (1997) (recognizing the lack of preparation among graduating law students for the growing global challenges, despite the proliferation of international law courses in the late 1990s).

94. *See generally* Whytock, *supra* note 10.

95. ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW 300 (4th ed. 1986).

96. *Cf.* Barry Friedman & Erwin Chemerinsky, *The Fragmentation of the Federal Rules*, 79 JUDICATURE 67, 70 (1995) ("The more the two sides in a lawsuit see the costs or outcome depending on the district where the case is litigated, the more there will be fights over venue and jurisdiction.").

97. *See* Whytock, *supra* note 10, at 486-87.

98. *See Global Forum Shopping Fact Sheet*, INST. FOR LEGAL REFORM, http://www.

Fourth, the short shrift given to foreign elements may cause backlash. If domestic courts do not resolve such cases in honest and respectful ways, then the impression that the U.S. legal system is a system of law is discounted.[99] That in turn may lead to conflict with foreign sovereigns, such as through blocking statutes, and may create access-to-justice issues.[100] It may also lead to foreign law reform—namely, forum shoppers may return to their home countries and seek justice there through procedural and substantive changes to that law.[101] This may lead to conflicts with U.S. law.

Tackling these important issues requires concrete perspective. Rather than taking a holistic perspective on transnational litigation generally and treating it as a general field for study, this Article looks at the two most pressing areas of domestic law in which transnational elements are resolved. Those areas are, in the order they are discussed in the Parts that follow, personal jurisdiction and forum non conveniens.[102] These areas represent the critical issues in transnational cases[103] and help answer the following questions.

First, can a transnational case be filed in the United States (personal jurisdiction)? Second, should a transnational case be filed here (forum convenience)? Third, what law will be applied if a transnational case is filed here (choice of law)? Fourth and finally, in the event a transnational case is not filed here or is filed here but dismissed on account of one of the other doctrines, will a U.S. court enforce a judgment rendered abroad (enforcement)? Answering these questions provides the starting point for evaluating whether the transnational narrative is viable today and, more importantly,

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instituteforlegalreform.com/featuredtool/global-forum-shopping-fact-sheet (last visited Feb. 28, 2013).

99. *See* Wilson, *supra* note 4, at 889 ("[T]he resolution of foreign law claims in national courts is generally consistent with comity and amicable commercial relations between nations. It is akin to recognizing the legitimacy and application of the foreign state's law.").

100. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 & cmt. b (1987) (describing countermeasures); Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1492-93 (2011) (describing how foreign displeasure with the handling of international matters in U.S. courts has resulted in retaliatory legislation).

101. *See* Whytock & Robertson, *supra* note 100, at 1493.

102. *See infra* Parts II-III.

103. *See, e.g.*, Robertson & Speck, *supra* note 62, at 938 ("The battle over where litigation occurs is typically the hardest fought and most important issue in a transnational case.").

what should be done with transnational cases filed in U.S. courts, which is the subject of Part V.

II. TRANSNATIONAL PERSONAL JURISDICTION

Part of the problem with the transnational litigation narrative explained in Part I is that it in many ways lacks concrete application. In other words, it is a narrative about *why* transnational cases should be filed in the United States and not one directed at *what* courts should do when such cases are filed. To make the narrative more concrete and relevant for transnational practice, this Part first discusses the domestic personal jurisdiction doctrine and then how that doctrine is applied in transnational cases. After explaining briefly the doctrine's development, attention is given to empirical evidence of what actually happens in transnational cases when a party files a personal jurisdiction motion. This Part and the ones that follow are organized around the key questions in most transnational cases. I will call these questions the "who," "when," and "where" of transnational litigation: *Who* can be sued in the United States (personal jurisdiction)?[104] *When* can they be sued here (forum non conveniens)?[105] And *where* should transnational cases be filed (the normative question addressed last, or in some cases first as a proxy for choice of law)?[106]

A. Domestic Personal Jurisdiction

The most important question in virtually every case relates to jurisdiction: Can suit be brought against a particular defendant in a forum of the plaintiff's choosing?[107] So, for instance, a Virginia

104. *See infra* Parts II, IV.

105. *See infra* Part III.

106. *See infra* Part IV.

107. This inquiry of personal jurisdiction is one dimension of adjudicatory jurisdiction, "which refers to the power of a court to hear a case." A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 617-18 (2006) (identifying adjudicatory jurisdiction, which encompasses personal jurisdiction, as "the central and most basic preliminary issue faced by courts in the United States"). Of course, other preliminary questions also matter: Should the case be pursued? Can the case be settled? Is litigating the case economically efficient? But, assuming the decision is made to bring the case in court, the question then becomes one of jurisdiction. To be clear, two types of jurisdiction are relevant

plaintiff injured in Virginia by a California corporation—if the corporation's only contacts are with Virginia and California—must choose whether to bring suit in California under general jurisdiction or in Virginia under specific jurisdiction.[108] The decision to file in one or another U.S. forum will be made based on both convenience to the plaintiff (which would include an expectation of a favorable court) and choice of law. In other words, filing the case in her home state might be most convenient for the Virginia plaintiff. Yet, she might choose to file the case in California if California law, which is arguably applicable under California choice-of-law rules, is more favorable to her case.[109] In this hypothetical, the question of forum choice is not unlimited because the plaintiff may file suit only in Virginia or California. In the event the plaintiff's chosen forum is inconvenient, the case may be transferred to the other forum.[110]

Unlike this simple hypothetical, the question of forum choice is far from clear in many cases. For instance, imagine that a Virginia plaintiff is injured in Virginia by a product distributed by an independent distributor in New York; the distributor purchased the product from a manufacturer in California who has never sold any of its products in Virginia and had no reason to believe the product would end up there.[111] Subjecting the distributor to specific personal jurisdiction in Virginia seems clear enough, but what of the manufacturer? Likewise, should the suit be brought in Virginia, New York, or California?[112] What law should apply?

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in U.S. federal courts: subject matter and personal jurisdiction. *Id.* Personal jurisdiction is most relevant in U.S. state courts. *See id.* at 618. The focus in this Part and in what follows is on personal jurisdiction.

108. Should the case be in excess of $75,000, the plaintiff will also have a choice to bring suit in either state or federal court. 28 U.S.C. § 1332 (2006). Regardless, the personal jurisdiction will be the same. FED. R. CIV. P. 4(k)(1)(A) (requiring federal courts in diversity to apply the personal jurisdiction rules of the state in which they sit).

109. This hypothetical demonstrates many of the common considerations of forum shopping. *See* Whytock, *supra* note 10, at 486-90 ("[F]orum shopping is a form of strategic behavior that depends, among other things, on expectations about favorable court access and choice-of-law decisions.").

110. 28 U.S.C. § 1404. A state court might transfer the case to another state court under the forum non conveniens doctrine.

111. This hypothetical is a modification of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

112. Here again, transfer can resolve the problem. *See* 28 U.S.C. § 1404.

Unfortunately, personal jurisdiction questions continue to confound, even though sixty-seven years have passed since the Supreme Court's seminal decision in *International Shoe Co. v. Washington* established the modern doctrine of personal jurisdiction.[113] To understand this confusion, consideration must be given to established doctrine in domestic cases before analyzing its relevance to transnational cases.[114] What follows is a brief exploration of the domestic personal jurisdiction doctrine's highlights.

The original understanding of personal jurisdiction in the United States "evolved in a rich and complex historical setting," creating a "story [that] is long, convoluted, and not lacking in ambiguity."[115] Before *International Shoe*, a state's jurisdiction over a nonresident defendant depended on the defendant's presence in the forum, either through voluntary appearance or through service of process in the forum state.[116] Service provided the requisite notice that the defendant was subject to suit, and presence in the forum gave the state power over the defendant.[117] In the Court's view, this requirement was based not only on international law limits on sovereignty[118] but also on the Due Process Clause of the Fourteenth Amendment.[119] The benefit of this approach was that choice-of-

113. 326 U.S. 310, 316 (1945) (announcing the minimum contacts requirement for personal jurisdiction over out-of-state defendants).

114. For a short list of some of the treatments of the doctrine, see, for example, Paul D. Carrington & James A. Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227 (1967); Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189 (1998); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529 (1991); and Todd David Peterson, *The Timing of Minimum Contacts*, 79 GEO. WASH. L. REV. 101 (2010).

115. ARTHUR T. VON MEHREN, THE HAGUE ACAD. OF INT'L LAW, ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY 79 (2007).

116. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877).

117. *See id.* at 729-34.

118. *See id.* at 722-24 (recognizing two principles of public law that limit state sovereignty: (1) "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," and (2) "no State can exercise direct jurisdiction and authority over persons or property without its territory"); *see also* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 50-51, 100 (2006) (discussing *Pennoyer* and other Supreme Court cases to highlight the Court's historical use of international law in constitutional analysis).

119. *See Pennoyer*, 95 U.S. at 733 (explaining that due process of law requires a tribunal to have personal jurisdiction over a defendant before it can exert its power to render a valid

forum questions were easily resolvable. One could either sue a defendant in the defendant's home state or serve her with process in the state in which the plaintiff would prefer to sue. Forum choice, and with it choice of law, was tied to presence.[120]

Why did personal jurisdiction exist only when the defendant was physically present in the forum? The traditional story is one of power. At least since Justice Oliver Wendell Holmes, Jr., courts have noted that "[t]he foundation of jurisdiction is physical power."[121] In other words, courts have the power to decide a case only when they have the power over a defendant to adjudicate the controversy, and that power comes by serving a party with process within the borders of a state—an act akin to seizing the defendant.[122] The invocation of a state's "power" serves as a proxy for other values, such as due process. Uncovering these proxies provides important understanding for what the personal jurisdiction doctrine seeks to accomplish.

For example, Albert Ehrenzweig called such an understanding of judicial jurisdiction the "power myth."[123] Ehrenzweig's thesis was that little to no case law around the time of *Pennoyer v. Neff* supported explaining personal jurisdiction as a function of power.[124] In his view, "[T]he concepts of 'physical power[,]' ... which are commonly invoked to justify [personal jurisdiction,] can ... be shown to be results of an unsuccessful endeavor to give the appearance of

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judgment affecting private rights). The Fourteenth Amendment was arguably not relevant at all given that the facts of *Pennoyer* occurred before its ratification. *Id.* at 719-20 (explaining the facts of the case, which took place in 1866, two years before the ratification of the Fourteenth Amendment). Nonetheless, the Court later ratified the constitutional argument in *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189, 196-97 (1915).

120. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 321 (1945) (noting, once presence was established in Washington, that "[t]he activities which establish [the company's] presence subject it alike to taxation by the state and to suit to recover the tax"). This understanding is consonant with early understandings of judicial jurisdiction in England. *See* Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 261 (1991) (noting that "jurisdiction to adjudicate was synonymous with jurisdiction to prescribe in early England").

121. McDonald v. Mabee, 243 U.S. 90, 91 (1917).

122. *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604, 618-19 (1990) (recognizing the territorial limits of a state's power and finding that a forum has jurisdiction over a defendant when that defendant is served within the forum).

123. Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 296 (1956).

124. *Id.* at 292-93.

rationality to an irrational rule" that was the result of "a lack of insight into the significance of contemporary events or intervening changes in the functioning of legal rules."[125] Instead of basing personal jurisdiction on power, Ehrenzweig proposed that personal jurisdiction be reconceived as a species of venue that would "limit[] the choice of the forum on rational grounds to one having such contacts with the case as [would] justify the application of the chosen forum's own law."[126] In other words, power over the defendant is an incident of the power to declare a certain law binding on the defendant. In Ehrenzweig's view, personal jurisdiction is concerned with choice of law.[127]

His is not the only way to view the doctrine. Notwithstanding Ehrenzweig's interpretation of the governing precedents and broadside attack on the power theory of personal jurisdiction, various studies have continued to ground personal jurisdiction in power. In perhaps the most comprehensive survey of what would appear to be all judicial jurisdiction cases leading up to *Pennoyer*, James Weinstein concluded that whereas English case law was not based on a power theory of jurisdiction,[128] American case law at the time of that case clearly recognized a concern with the allocation of power.[129] Weinstein's conclusion, however, departed from the traditional power theory in an important way. In his view, the traditional power theory is used to connect personal jurisdiction to the Due Process Clause.[130] According to Weinstein, the power theory that existed at common law was designed to promote interstate federalism, most specifically through the Full Faith and Credit Clause.[131] Under Weinstein's view, the power that the courts were concerned with was not simply the power of a state over a defendant but the

125. *Id.* at 293.

126. *Id.* at 292. For a similar argument contesting the power theory of jurisdiction, see Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241.

127. Ehrenzweig, *supra* note 123, at 290-92; *see also* James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 872-73 (1980) (suggesting a connection between personal jurisdiction and choice of law by arguing that a state should not be able to apply forum law unless it meets the minimum contacts test required for specific jurisdiction).

128. James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169 (2004).

129. *Id.* at 203-04.

130. *Id.* at 171, 214-22.

131. *Id.* at 181-204.

power of a state over a case in relation to the power of other states to adjudicate the controversy.[132] As such, a pure due process theory of personal jurisdiction does not give adequate concern to important federalism facets of the debate.[133] Personal jurisdiction, in this view, is a doctrine of federalism concerned with the allocation of adjudicatory authority between the several states.[134]

Even with these very broad strokes, we can provide an answer to a not-so-simple question: What is the power narrative in personal jurisdiction a proxy for? On the one hand, power is a proxy for fairness. It would seemingly be unfair for a defendant to be brought before a forum court in which, because of her lack of presence, she could not expect suit to be brought because she would not expect that court to apply forum law. On the other hand, this concern of state power might be directed at the allocation of power between the several states. So, fairness to the defendant is really a question of appropriateness in a federal system to have the case heard in one or another state's court and under one or another state's law. Put simply, the doctrine is not concerned with power alone; the concern is the power to apply law and through that application either infringe on a defendant's rights or the balance of power in the federal system.

These debates have largely been disregarded in modern personal jurisdiction case law in favor of jurisdictional tests based on purposeful "minimum contacts"[135] and "reasonableness"[136] grounded in due process.[137] The test is now a modification of the well-known

132. *Id.* at 260-61.

133. *Id.* at 181-204.

134. *E.g.*, Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 61-62 (2010); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 690 (1987). *But see* Parrish, *supra* note 114, at 55 (suggesting that interstate sovereignty concerns may no longer be relevant in domestic personal jurisdiction cases but recognizing that "sovereignty remains the key constraint on jurisdiction internationally").

135. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).

136. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) (articulating the following factors as relevant to determining whether jurisdiction is reasonable: (1) the burden on the defendant; (2) the forum state's interests; (3) the plaintiff's interests; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and (5) "the shared interest of the several States in furthering fundamental substantive social policies").

137. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 n.10 (1982) (noting that the Due Process Clause "is the only source of the personal jurisdiction

International Shoe test: a defendant must have the requisite minimum contacts with the forum state such that the assertion of jurisdiction does not offend "traditional notions of fair play and substantial justice."[138] The due process analysis in personal jurisdiction protects the defendant's due process right in "not being subject to the binding judgments of a forum with which [the defendant] has established no meaningful 'contacts, ties, or relations.'"[139] In order to ensure the requisite connection between the defendant and the sovereign, the Supreme Court has distinguished between two types of adjudicatory authority.[140] General jurisdiction applies when the defendant's connections with a forum are "so substantial and of such a nature as to justify suit against [her] on causes of action arising from dealings entirely distinct from those activities"; thus, for example, the "paradigm forum" for general jurisdiction is the defendant's home forum.[141] Specific jurisdiction, on the other hand, applies when the defendant has fewer contacts with the forum, but the defendant's in-forum actions "may be sufficient to render [her] answerable in that State with respect to those acts, though not with respect to matters unrelated to the forum connections."[142]

Thus, the Court has rejected federalism as a ground for personal jurisdiction, noting that the personal jurisdiction doctrine "must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause rather than as a function of federalism concerns."[143] Yet, the Court has also observed that "we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution."[144]

In sum, personal jurisdiction in domestic cases is designed to protect a defendant's right not to stand trial in a domestic forum

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requirement").

138. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

139. *Burger King*, 471 U.S. at 471-72 (quoting *Int'l Shoe*, 326 U.S. at 319).

140. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2849 (2011).

141. *Id.*

142. *Id.* at 2853.

143. *Burger King*, 471 U.S. at 472 n.13 (quoting Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 n.10 (1982)).

144. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).

with which she has no contacts. Although choice-of-law and federalism concerns may remain relevant, they do not, in the end, control the question. The question before the court is whether the defendant is subject to suit in a given domestic forum in light of her contacts with that forum. If she is not, then she may be sued in another domestic forum—at a minimum, her place of domicile. Domestic personal jurisdiction thus allocates adjudicatory authority between the several states.[145]

As rich and interesting as this analysis may be at the doctrinal level, the resulting practical realities should not be missed. In a purely domestic case, there will be at least one forum in the United States where a domestic defendant is subject to suit—at a minimum, that defendant's home state for purposes of general jurisdiction.[146] When viewed in this way, personal jurisdiction is in many ways a question of venue. The question is can the defendant be sued here (with the "here" being one of the several states)? If not, then should she be sued there (with the "there" being another U.S. forum)? A motion to dismiss for lack of personal jurisdiction in a domestic case, although important, is mostly a tactic of delay and reverse forum shopping designed to transfer the case to an appropriate venue from the defendant's perspective. Although this concern for venue protects a defendant's due process rights, it also prevents inappropriate forum shopping between the several states.[147] A plaintiff may seek a forum that is law favorable—so-called forum shopping—but a defendant may equally reverse forum shop to find a place where the locus and the law are more convenient, either in federal or state court.[148] If the plaintiff's choice of forum, and with

145. This is not the only way to view the purpose of personal jurisdiction. Indeed, in the Supreme Court's most recent decision in the area, personal jurisdiction was viewed in several different ways by different members of the Court: aimed at placing limits on sovereign authority, J. McIntyre Mach. Ltd. v. Nicastro, 131 S. Ct. 2780, 2787 (Kennedy, J., plurality opinion), focused on fairness to the defendant, *id.* at 2793 (Breyer, J., concurring), or concerned with "litigational convenience and the respective situations of the parties," *id.* at 2804 (Ginsburg, J., dissenting).

146. Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728-35 (1988).

147. Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 353-54, 369-70 (2006) (explaining that personal jurisdiction limits the dangers of forum shopping abuse by restricting a litigant's choices of forum).

148. *See, e.g.*, 28 U.S.C. § 1441 (2006) (permitting a defendant to remove a case from state court to an appropriate federal court); Bassett, *supra* note 147, at 344, 362, 380-91 (explaining

it choice of law, bears little relationship with the domestic defendant, then a court will reject the plaintiff's choice in favor of the defendant's convenience and due process rights.[149]

B. Transnational Personal Jurisdiction

Transnational cases are different from domestic ones when questions of judicial jurisdiction arise. They differ from domestic cases not only in that they have foreign parties and foreign law but they also present different issues of litigation planning and forum choice. To return again to the hypothetical from the previous Section, if a Virginia plaintiff is injured in Virginia by a product manufactured in England by an English company and sent to Virginia, is there specific jurisdiction?[150] The answer would appear to be yes because the English corporation has targeted a Virginia domiciliary and sold its product there.[151] From this decision, however, flow other outcomes. First, Virginia would likely apply Virginia law to the case.[152] Second, the chance that the U.S. court would dismiss the case in favor of a foreign forum is slight.[153] Finally, this simple hypothetical makes forum choice relatively easy for a court to resolve: the plaintiff could either bring suit in Virginia or England, with Virginia having an equal, if not greater, interest in the case than England.[154]

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the countermeasures available to defendants that allow them to forum shop through removal, a motion to transfer venue, and forum non conveniens).

149. *See* Bassett, *supra* note 147, at 369.

150. These facts are drawn from the Court's recent decision in *J. McIntyre Machinery Ltd. v. Nicastro*, 131 S. Ct. at 2786, as discussed in what follows.

151. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 290 (1980) (illustrating that targeting of the forum is key to the analysis).

152. For tort cases, Virginia follows the *Restatement (First) of Conflict of Laws* approach to choice of law, which requires the rule of *lex loci delicti*—the law of the place of injury. Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 331 tbl.1 (2011). Note, apparently most states would apply the law of the place of injury in this arrangement even under interest-based approaches because of the plaintiff's U.S. domicile and U.S. injury.

153. Forum non conveniens dismissals are unlikely when there is a domestic plaintiff. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 (1981).

154. General jurisdiction would be appropriate in England, the defendant's place of incorporation, whereas specific jurisdiction would exist in Virginia. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853-54 (2011) (explaining the differences between specific and general jurisdiction).

However, what if the English corporation sells its products to an independent distributor in California and that distributor then sells the product to the Virginian? Is there specific jurisdiction over the manufacturer in Virginia? If not, can the Virginia plaintiff bring suit in California or must the Virginian go to England? To complicate the issue further, what if the Virginian receives the product in Virginia but is injured in France while on vacation there? To complicate matters even more, what if a French plaintiff is injured in France by a product manufactured by a Virginia corporation that is sent to France? Can the French plaintiff sue in Delaware if the Virginia corporation is incorporated there?[155] What law will be applied? These questions, and perhaps the reader's reactions to them, confirm that personal jurisdiction serves as a proxy for other values—not just due process but also intuitions about *where* the most appropriate forum is to hear a case and *what* the appropriate law is to apply.

Regardless of where one thinks the most appropriate forum is, remember that a successful motion to dismiss for lack of personal jurisdiction in a transnational case may mean that the plaintiff may not sue in any of the several states, as a foreign defendant will not necessarily be at home, or have any other contacts, in any of the several states. Likewise, if a court finds personal jurisdiction, the court may, in some cases, adjudicate claims that bear little or no relationship to the United States because they are based on foreign facts. For instance, if a court finds that it has general jurisdiction over a foreign corporation then it may hear any and all claims, including claims based on facts wholly occurring abroad, against that corporation.[156]

This observation touches on an important characteristic of the relationship between judicial jurisdiction and choice of law. Once a court finds that it has jurisdiction it will control the case before it, even when potentially applying foreign law. As such, it will apply

155. I note that such a case may be a prime candidate for a forum non conveniens dismissal. I will discuss this more completely below in Part III.

156. For a recent example, with a pending petition for certiorari before the Court, see *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 929-31 (9th Cir. 2011) (finding that a German corporation is subject to suit in the United States for human rights violations in Argentina on account of general jurisdiction).

the forum's social and procedural policies.[157] Doing so risks frustration of a foreign state's policies, thereby offending foreign sovereigns.[158]

There are also other concerns that warrant careful attention in transnational cases. As explained by Linda Silberman,

> On the one hand, there is concern that the plaintiff, if he cannot sue the foreign defendant in the United States, may not be able to sue at all. The burdens of travel, distance, and costs—as well as access to a lawyer abroad—may make litigation abroad impractical or impossible. On the other hand, a foreign defendant who is sued in the United States faces burdens of cost and distance, particularly since the U.S. system is one of the few that requires a defendant to pay its own legal fees even if ultimately successful. More generally, domestic institutions and attitudes within a particular country can differ markedly from those in foreign states, increasing the litigation burden of the foreign defendant.[159]

This realization severs the link between domestic and transnational personal jurisdiction. Among other things, domestic personal jurisdiction is arguably about venue, due process, and the allocation of power between the several states.[160] Transnational personal jurisdiction may be about venue and due process, but the allocation of power between the several states is not at issue. Instead, the allocation of power between nations is at stake.[161] As Austen Parrish observes, "[W]hile jurisdictional assertions within the United States may be unlikely to create state jealousies, those jealousies can and do arise in the international context."[162] How due process should intersect with transnational cases is far from clear but can be glimpsed through the Supreme Court's case law involving non-U.S. defendants.

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157. Maier & McCoy, *supra* note 120, at 252.

158. Dimitrios Evrigenis, *Interest Analysis: A Continental Perspective*, 46 OHIO ST. L.J. 525, 526-27 (1985).

159. Linda J. Silberman, Goodyear *and* Nicastro*: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 595-96 (2012).

160. *See supra* Part II.A.

161. *See* Parrish, *supra* note 114, at 55.

162. *Id.*

Before this past Term, the Supreme Court's only specific jurisdiction case involving transnational elements was *Asahi Metal Industry Co. v. Superior Court*.[163] In *Asahi*, the Supreme Court faced the question "whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes 'minimum contacts' between the defendant and the forum State."[164] Addressing the transnational elements in the case, the Court held in Part II(B) of Justice O'Connor's opinion, written for an eight-Justice majority, that due process entails more than showing that the defendant purposefully directed its behavior at the forum and more than demonstrating a bare minimum of contacts between the defendant and the forum.[165] Justice O'Connor's opinion first reiterated five factors, drawn from *World-Wide Volkswagen Corp. v. Woodson*,[166] to be considered in all cases—domestic and international—potentially bearing on whether litigation in the forum is reasonable.[167] The Court emphasized three considerations in particular that would help courts identify instances in which the assessment of reasonableness might be different for foreign nonresident defendants than for domestic nonresident defendants. These three transnational reasonableness factors were (1) the "procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction," (2) the "unique burdens placed upon one who must defend oneself in a foreign legal system," and (3) the effects of adjudicating such a case on the foreign relations policies of the United States.[168]

The Court decided *Asahi* in 1987, and for twenty-four years, the Court issued no further opinions on the subject of specific jurisdiction in the transnational context. The Supreme Court's 2010 Term provided an opportunity to clarify the doctrine. In two cases heard in January 2011 and decided in June 2011, the Court faced the question of when U.S. courts have personal jurisdiction over foreign companies under general and specific jurisdiction. In *Goodyear*

163. 480 U.S. 102 (1987).
164. *Id.* at 105 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).
165. *Id.* at 113-16.
166. 444 U.S. 286 (1980).
167. *Asahi*, 480 U.S. at 113 (citing *World-Wide Volkswagen*, 444 U.S. at 292).
168. *Id.* at 114-15 (emphasis omitted).

Dunlop Tires Operations, S.A. v. Brown, a case involving general jurisdiction, North Carolina plaintiffs were killed in a bus accident in Paris, France when an allegedly defective tire manufactured by foreign subsidiaries of Goodyear U.S.A. exploded.[169] Plaintiffs alleged general jurisdiction in North Carolina because defendants sold their products in the United States, including North Carolina. In *J. McIntyre Machinery, Ltd. v. Nicastro*, a case of specific jurisdiction, a New Jersey plaintiff brought suit in New Jersey state court when he was injured by a metal-shearing machine at work in New Jersey.[170] The machines were manufactured by an English company in England, and the machines were distributed throughout the United States through the manufacturer's independent Ohio distributor.[171]

In *Goodyear*, the Court held that general jurisdiction was lacking given that North Carolina was not the defendant's state of incorporation, its principal place of business, or a state that, based on the defendant's contacts with it, could be said to be its home.[172] In so finding, the Court did not address the transnational elements in the case. In *Nicastro*, the Court held that specific jurisdiction was lacking.[173] Echoing the consideration of power explored earlier in this Part, Justice Kennedy framed the issue as follows:

> First, personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis. The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct. Personal jurisdiction, of course, restricts "judicial power not as a matter of sovereignty, but as a matter of individual liberty," for due process protects the individual's right to be subject only to lawful power. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.[174]

169. 131 S. Ct. 2846, 2848 (2011).

170. 131 S. Ct. 2780, 2786 (2011) (plurality opinion).

171. *Id.* at 2786, 2796.

172. *Goodyear*, 131 S. Ct. at 2855-57.

173. *Nicastro*, 131 S. Ct. at 2791.

174. *Id.* at 2789 (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)).

What is striking about this articulation of the doctrine is that the Justices failed to account for the transnational elements in the case. Indeed, the Justices failed to apply *Asahi*'s international prongs to the cases at bar. The case law therefore shows that the problem with personal jurisdiction in transnational cases lies not so much with the lack of a test—although, to be sure, contestable versions of the test exist—but with a lack of concrete direction as to how courts should apply the test in actual cases. Put simply, when and under what circumstances is an alien defendant subject to personal jurisdiction in a given U.S. forum? Put another way, who is amenable to suit in the United States for transnational harms?

Lower court opinions in this area do not do much better. In most cases, lower courts have disregarded any precise transnational inquiry and have instead favored the application of the standard domestic framework.[175] Courts that have analyzed the transnational nature of the case as a separate prong do not generally agree on how to treat the international element. Some courts place special emphasis on the transnational nature of the dispute and acknowledge that this factor is worthy of heightened scrutiny.[176] Other courts downplay the importance of the transnational nature of the dispute, and merely acknowledge that the defendant may suffer some hardship in litigating the case in the United States, while arriving at the resolution that the court's minimum contacts analysis points toward.[177]

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175. *See, e.g.*, Ainsworth v. Cargotec USA, Inc., No. 2:10-CV-236-KS-MTP, 2011 WL 1814111, at *2-3 (S.D. Miss. May 9, 2011), *reconsideration denied*, No. 2:10-CV-236-KS-MTP, 2011 WL 4443626 (S.D. Miss. Sept. 23, 2011), *and motion to certify appeal granted*, No. 2:10-CV-236-KS-MTP, 2011 WL 6291812 (S.D. Miss. Dec. 15, 2011); ReedHycalog UK, Ltd. v. United Diamond Drilling Servs., Inc., No. 6:07 CV 251, 2009 WL 2834274, at *3-5 (E.D. Tex. Aug. 31, 2009); *see also* Local Billing, LLC v. Webbilling, No. CV 08-3083 PSG (MANx), 2008 WL 5210667, at *1-5 (C.D. Cal. Dec. 10, 2008); Elayyan v. Sol Melia, SA, 571 F. Supp. 2d 886, 896 (N.D. Ind. 2008); Alliance Royalties, LLC v. Boothe, 329 S.W.3d 117, 127 (Tex. Ct. App. 2010).

176. *E.g.*, Santora v. Starwood Hotel & Resorts Worldwide, Inc., 580 F. Supp. 2d 694, 701 (N.D. Ill. 2008) ("[T]he burden on the defendant forced to litigate in a foreign forum is still the primary concern." (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980))); Jones v. Boto Co., 498 F. Supp. 2d 822, 831 (E.D. Va. 2007) ("Given the international context in which this dispute arises, this court must also make a careful inquiry into the reasonableness of the assertion of jurisdiction over Boto." (citing Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 115 (1987))).

177. *E.g.*, *In re* S. African Apartheid Litig., 643 F. Supp. 2d 423, 436 (S.D.N.Y. 2009) ("Plaintiffs have also presented arguably sufficient allegations that make the exercise of jurisdiction by this Court over this case perfectly reasonable. Although this case would be less

These variations often occur within the same state or circuit and appear to depend heavily on the individual case.[178] The upshot of this case law is that, even when courts acknowledge the difficulties of transnational cases, such difficulties seldom affect the outcome of the case.[179] Rather, the minimum contacts analysis is nearly always dispositive.[180]

At bottom, scholars believe transnational cases should be treated differently; yet, courts tend to treat them like domestic cases in addressing questions of personal jurisdiction. To the extent trans-

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burdensome for Rheinmetall to defend if it were brought in Germany, New York is 'a major world capital which offers central location, easy access, and extensive facilities of all kinds,' lessening the burden." (quoting Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 99 (2d Cir. 2000))); Pope v. Elabo GmbH, 588 F. Supp. 2d 1008, 1021 (D. Minn. 2008) ("The Court appreciates that it must be somewhat inconvenient for a German company such as Elabo to litigate in Minnesota."); Etchieson v. Cent. Purchasing, LLC, 232 P.3d 301, 309 (Colo. App. 2010) ("First, we note that in the context of product liability, the limits on personal jurisdiction have been relaxed as trade has nationalized (and, more recently, globalized) and as modern transportation and communication have eased the burden of defending oneself in a distant state where one engages in economic activity." (citing *World-Wide Volkswagen*, 444 U.S. at 293)).

178. *E.g.*, Zero Motorcycles, Inc. v. Pirelli Tyre S.p.A., 802 F. Supp. 2d 1078, 1096-97 (N.D. Cal. 2011) ("Where, as here, the plaintiff's showing is insufficient to establish either purposeful availment or that the claims arise from [the] defendant's forum-related activities, 'the Court need not reach the third prong of the specific jurisdiction test.'" (quoting Doe v. Unocal Corp., 248 F.3d 915, 925 (9th Cir. 2001))); Doe v. Geller, 533 F. Supp. 2d 996, 1008 (N.D. Cal. 2008) ("[L]itigation against an alien defendant creates a higher jurisdictional barrier than litigation against a citizen from a sister state because important sovereignty concerns exist."(quoting Sinatra v. Nat'l Inquirer, 854 F.2d 1191, 1199 (9th Cir. 1988))).

179. One of the few cases in which a court refused to exercise personal jurisdiction based solely on unreasonableness was *TH Agriculture & Nutrition, LLC v. Ace European Group Ltd.*, 488 F.3d 1282, 1297-98 (10th Cir. 2007) ("In sum, three of the five reasonableness factors weigh in favor of the Insurers and against exercising jurisdiction in Kansas. In addition, the two factors that do not weigh against the exercise of jurisdiction also do not weigh in its favor. Even though modern technology and the worldwide nature of the Insurers' business minimize the burden of litigating in a foreign forum, they do not completely remove the burden. And although Kansas has an interest in providing a forum for resolution of its resident's dispute, this factor ultimately does not weigh in favor of the exercise of jurisdiction because the law of the Netherlands, not Kansas, will govern the dispute. Because the Insurers have limited contacts with Kansas, they need not make a strong showing of unreasonableness to defeat personal jurisdiction. Under these circumstances, we conclude that the exercise of personal jurisdiction over the Insurers would violate traditional notions of fair play and substantial justice.").

180. *See, e.g.*, Illustro Sys. Int'l, LLC v. Int'l Bus. Machs. Corp., No. 3:06-CV-1969-L., 2007 WL 1321825, at *3 (N.D. Tex. May 4, 2007) ("[O]nce minimum contacts are established, a defendant must present 'a compelling case that the presence of some consideration would render jurisdiction unreasonable.'" (quoting Eviro Petroleum, Inc. v. Kondur Petroleum, 79 F. Supp. 2d 720, 725 (S.D. Tex. 1999))).

national cases are treated differently, the Court has never explained how lower courts, both federal and state, should analyze the transnational elements in the case. The courts are thus in need of concrete guidance.

C. Critical Evaluation: The Impact of Choice of Law

As already alluded to, transnational cases are different from domestic cases when a personal jurisdiction motion is filed. Transnational cases involve foreign individuals and foreign corporations as defendants; they also involve foreign law. If these individuals and corporations are not amenable to suit in a U.S. forum then the likelihood of suing the individual or corporation substantially diminishes. That is so because foreign defendants are often either amenable to suit in a given U.S. forum or not amenable at all to suit in the United States, unless contacts can be aggregated in a federal question case.[181] To the extent that a foreign defendant is not amenable to suit in the United States, many plaintiffs will not refile in a foreign forum.[182] Thus, the motion to dismiss for lack of personal jurisdiction in a U.S. forum is critical to the case.

This realization dovetails with another important facet of modern personal jurisdiction litigation in the case of non-U.S. defendants. Plaintiffs do not bring transnational suits in the United States against foreign defendants simply because courts have jurisdiction here; they bring suit because the underlying substantive law is more favorable to their claims.[183] In other words, personal jurisdiction in transnational cases is not about jurisdiction per se but about choice of law. A plaintiff would certainly not bring a transnational suit in the United States solely for the purpose of securing jurisdiction over a foreign defendant when a U.S. court would apply a law that would necessarily doom the plaintiff's case. The personal jurisdiction determination in most transnational cases is, therefore, not about personal jurisdiction in the abstract but about what law a U.S. court

181. *See* FED. R. CIV. P. 4(k)(2).

182. David W. Robertson, Forum Non Conveniens *in America and England: "A Rather Fantastic Fiction,"* 103 L.Q. REV. 398, 418-20 (1987).

183. *See* Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, 25 CARDOZO L. REV. 1367, 1391 & n.123 (2004).

will choose to apply against a certain defendant in the transnational case at bar.[184]

Surprisingly, the connection between personal jurisdiction and choice of law is underanalyzed in the scholarly literature, especially in transnational cases.[185] This is partially due to the Supreme Court, which has stated on multiple occasions in dicta that personal jurisdiction and choice of law are separate inquiries.[186] In these cases, however, the personal jurisdiction discussion was about a domestic case and not about a transnational case.[187] These cases thus reflect the realization that in domestic cases constitutional doctrines such as full faith and credit provide checks on the ability of a plaintiff to sue a multistate corporation. More so, these statements do not account for the burgeoning litigation reality that most transnational cases are resolved on the basis of forum non conveniens motions even before the determination of jurisdiction.[188] This development shows that U.S. courts recognize that choice of law is perhaps the major inquiry in many transnational cases.[189] Put simply, courts reach many personal jurisdiction determinations by examining choice of law through other doctrines like forum non conveniens. Personal jurisdiction is thus a secondary factor in many transnational cases and a proxy for choice of law.

Recourse to choice of law is illuminating. The historical development of the personal jurisdiction doctrine occurred when the choice-of-law process had settled on certain jurisdiction-selecting rules

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184. *See* Linda J. Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978) (noting that focusing only on forum issues and not choice of law amounts to being concerned with where a person will be hanged rather than whether she should be hanged at all).

185. Most of the scholarship connecting the doctrines is concerned with purely domestic cases. *See* Alfred Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960, 960-62 (1981); Maier & McCoy, *supra* note 120, at 256; Martin, *supra* note 127, at 873-75; Courtland H. Peterson, *Personal Jurisdiction and Choice of Law Revisited*, 59 U. COLO. L. REV. 37, 37-40 (1988); Robert Allen Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of* Shaffer v. Heitner, 63 IOWA L. REV. 1031, 1032-34 (1978).

186. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 481 (1985); Hanson v. Denckla, 357 U.S. 235, 254 (1958); *see also* Perdue, *supra* note 114, at 529-31 (explaining Supreme Court personal jurisdiction case law in full).

187. *E.g.*, *Burger King*, 471 U.S. at 464-68; *Hanson*, 357 U.S. at 238.

188. *See* Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 425 (2007) (permitting this sequencing).

189. *See* Childress, *supra* note 13, at 1563-64 (providing empirical support regarding the relevance of choice of law).

under the *Restatement (First) of Conflict of Laws* that sought to provide clear answers to conflicts questions.[190] So, for instance, if a Virginia citizen sued a North Carolina citizen in a Virginia court for a tort that occurred in North Carolina, the Virginia court, assuming it had jurisdiction, would apply North Carolina law.[191] The Virginia court's application of North Carolina law raises issues of interstate relations and federalism. Most notably, there is the question of whether the Virginia court should adjudicate a case or controversy occurring outside of its territory. If the North Carolina defendant is found in Virginia or consents to jurisdiction, then the federalism question is resolved through conflict-of-laws rules that grant the North Carolina defendant similar treatment, subject to constitutional provisions. However, given the fact that during the historical development of the doctrine mobility was limited, the case would be localized in North Carolina, affording North Carolina courts the ability to determine questions of their own law.

Judicial power is not about power in the abstract but is about the power to declare law. The power to declare law presupposes that a court has the power to choose a certain law, over all others, to govern a case or controversy. As such, the choice-of-law analysis should be connected to the personal jurisdiction analysis. If courts do not declare law in the abstract, then they must choose between laws to determine whether, and in what circumstances, one law or the other governs a case. This leads to the realization that choice of law is not incident to the personal jurisdiction analysis but inextricably connected to it. To put it a slightly different way, the question in cases of judicial jurisdiction should be: "May this decision maker select among the various competing policies reflected in choice of law and local law rules to determine the outcome in this case between these parties?"[192] Personal jurisdiction "is not merely the assertion of the right to decide the case between the parties at a given geographical location .... Rather, selection of the forum selects

190. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934) ("The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."); *id.* § 378 ("The law of the place of wrong determines whether a person has sustained a legal injury."). *See generally* JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935) (detailing the history of conflicts at law and solutions offered by the *Restatement (First) of Conflict of Laws*).

191. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 377-378.

192. Maier & McCoy, *supra* note 120, at 255.

an entire decision making regime."[193] As such, personal jurisdiction is really a proxy for choice of law.

Although courts consider choice-of-law concerns when evaluating whether a transnational case should be filed here, they do not address these issues through personal jurisdiction analysis. Rather, they do so through the forum non conveniens doctrine, which is the subject of the next Part.

III. TRANSNATIONAL FORUM NON CONVENIENS

In this Part, the Article illustrates how forum non conveniens motions serve as a proxy for both determinations of personal jurisdiction and choice of law and how such a short circuiting of the choice-of-law process may lead to an access-to-justice gap. After describing the doctrine's scope, this Part analyzes its impact in federal and state courts by documenting new empirical evidence on courts' use of the doctrine. Finally, this Part considers the doctrine's implications for a theory of personal jurisdiction that encapsulates choice of law.

A. The Doctrine's Scope

Forum non conveniens plays a unique role in transnational cases by permitting U.S. courts to allocate adjudicatory authority between the various countries that impact a court's decision. According to the Supreme Court, the "doctrine of forum non conveniens has a long history."[194] The doctrine as we know it—not as a doctrine of comity or abstention but as a concrete, multifactored test—is, however, of relatively recent vintage. The modern doctrine traces its roots in the United States to a law review article published by a New York law firm associate in 1929.[195] According to one commentator, "Not until 1948 was the doctrine accepted for general application in the federal courts, and it received little or no attention in the state courts until after the federal adoption."[196] This application and adoption was due

193. *Id.*

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

195. Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929).

196. Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*,

in large part to the Supreme Court's decision in *Gulf Oil Corp. v. Gilbert*.[197]

In *Gulf Oil*, a Virginia plaintiff sued a Pennsylvania defendant corporation in the U.S. District Court for the Southern District of New York for alleged negligence occurring in Virginia.[198] The corporation was registered to do business in New York and Virginia, and thus there was personal jurisdiction in New York.[199] Because all the conduct giving rise to the litigation occurred in Virginia and because the witnesses and evidence were there, the district court dismissed the case on grounds of forum non conveniens.[200] On appeal, the Supreme Court found no error in the dismissal.[201] According to the Court, the forum non conveniens doctrine empowers a federal district court to dismiss a case in favor of another court—here, another U.S. court—even when jurisdiction and venue are established, when private and public interest factors weigh in favor of another adequate forum.[202]

The Court detailed the factors for balancing as follows. The private factors include:

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all

133 U. PA. L. REV. 781, 796 (1985).

197. 330 U.S. 501 (1947). A companion case, *Koster v. (American) Lumbermens Mutual Casualty Co*., which the Court decided the same day, stated different facts but the same legal principles. 330 U.S. 518, 519-21, 531-32 (1947). Although the Court did not mention the doctrine by name, one precursor appeared in *Canada Malting Co. v. Paterson Steamships, Ltd*., in which Justice Brandeis, writing for the Court, stated the following: "Courts of equity and of law occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." 285 U.S. 413, 423 (1932). The doctrine arose mostly in the admiralty context, although some state court case law supported a broader doctrine outside of the admiralty context, BORN & RUTLEDGE, *supra* note 54, at 347-49 & n.14, as did the Court's opinion in *Slater v. Mexican National Railroad Co*., 194 U.S. 120, 124-26, 129 (1904).

198. *Gulf Oil Corp*., 330 U.S. at 502-03.

199. *See id*. at 503.

200. *Id.*

201. *Id*. at 512.

202. *See id*. at 504.

> other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.[203]

The public interest factors include:

> [a]dministrative difficulties ... for courts when litigation is piled up in congested centers instead of being handled at its origin; [j]ury duty [a]s a burden that ought not to be imposed upon the people of a community which has no relation to the litigation; ... [the] local interest in having localized controversies decided at home [; and finally, the] appropriateness ... in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.[204]

According to the Court, such discretion was to be used judiciously: "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[205] In the domestic forum non conveniens context as outlined in *Gulf Oil*, the plaintiff's choice of forum should be disturbed only in limited circumstances.[206] Such limited circumstances would appear to be those cases in which the plaintiff's choice of an inconvenient forum causes injustice to the defendant by forcing litigation in a forum with little or no nexus to the case at bar, and thereby compromises the defendant's ability to mount an appropriate defense.[207]

To return again to a hypothetical, if a Virginia plaintiff is injured by a product manufactured and distributed by an English corporation as part of a targeted plan to market products in Virginia, the plaintiff may file the case in Virginia based on specific jurisdiction. The defendant may respond, however, with a forum non conveniens

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203. *Id.* at 508.

204. *Id.* at 508-09.

205. *Id.* at 508.

206. Lonny Sheinkopf Hoffman & Keith A. Rowley, *Forum Non Conveniens in Federal Statutory Cases*, 49 EMORY L.J. 1137, 1153 (2000). Note, however, the passage of the federal transfer statute, 28 U.S.C. § 1404 (2006), has rendered the domestic forum non conveniens analysis in federal cases obsolete.

207. *See* Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524-25 (1947).

motion and argue that the case should instead be heard in England. What should the court do?

The answer to the hypothetical presented above would appear to be that the motion should be denied and the case should be heard in Virginia unless the defendant can show that convenience weighs in favor of hearing the case in England. What if, however, an English plaintiff wishes to sue a German corporation for injuries sustained in England in a Virginia court, where for the sake of argument, the German corporation would be subject to specific jurisdiction? Or, what if an English plaintiff wishes to sue a Virginia defendant in Virginia for injuries occurring in England?

The rule for such cases follows the Supreme Court's decision in *Piper Aircraft Co. v. Reyno*, which explicitly applied the doctrine in the transnational context.[208] In that case, Scottish plaintiffs brought a wrongful death action in California state court against two American defendants who had manufactured the engine and propellers of a plane that crashed in Scotland.[209] The defendants removed the case to California federal court and then transferred the case to a Pennsylvania federal court, where they then moved for dismissal on forum non conveniens grounds.[210] The district court granted dismissal in favor of a Scottish forum, and the Third Circuit reversed, finding that dismissal was inappropriate because Scottish law was less favorable to the plaintiff.[211]

The Supreme Court reversed[212] and clarified the doctrine in two important ways as applied in transnational cases. First, in evaluating the above *Gulf Oil* factors, when a plaintiff chooses her home forum, "it is reasonable to assume that this choice is convenient."[213] Yet, "[w]hen the plaintiff is foreign, ... this assumption is much less reasonable."[214] In short, "a foreign plaintiff's choice [of forum] deserves less deference" than a domestic plaintiff's choice.[215] Second, the Court explained that an unfavorable change in law, should a

208. 454 U.S. 235, 238 (1981).
209. *Id.* at 238-40.
210. *Id.* at 240-41.
211. *Id.* at 241-46.
212. *Id.* at 261.
213. *Id.* at 255-56.
214. *Id.* at 256.
215. *Id.*

case be sent to a foreign jurisdiction, does not by itself bar dismissal on forum non conveniens grounds.[216]

In light of these rules, the answer to the above hypotheticals with English plaintiffs would appear to be that the district court may dismiss both cases in favor of an adequate alternative foreign forum (1) because the foreign plaintiff's choice of forum is due less deference, and (2) because of complex choice-of-law issues. In *Sinochem International Co. v. Malaysia International Shipping Corp.*, the Court's most recent foray into the doctrine, the Court explained that a court may dismiss a case under forum non conveniens without even determining whether it has jurisdiction.[217] So, a reasonable defendant, when faced with a forum-shopping plaintiff's choice of an inconvenient and law-unfriendly forum, will herself reverse forum shop to find a more convenient and law-friendly foreign forum, with the hope that the plaintiff may never refile the case.[218]

It is important to remember that the private and public interest factors are only guideposts and the Supreme Court has declined to catalogue all of the circumstances when dismissal would be proper.[219] Although it is hard to precisely identify a hierarchy of factors compelling dismissal, one of the leading rationales is that transnational cases require complicated applications of foreign law.[220] Indeed, many lower federal courts have given this factor substantial and decisive weight in the forum non conveniens analysis.[221] Though this factor is not conclusive,[222] the Court has emphasized that the doctrine "is designed in part to help courts avoid conducting complex exercises in comparative law.... [T]he public interest factors point towards dismissal where the court would be required to 'untangle problems in conflict of laws, and in law foreign to itself.'"[223] Another important factor is whether the plaintiff is domestic or foreign. One recent empirical study concludes that "foreign plaintiffs are twice as likely to have their suits dismissed" compared to

216. *Id.* at 254-55.

217. 549 U.S. 422, 432 (2007).

218. *See* Robertson, *supra* note 182, at 418-20.

219. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

220. *See id.* at 509.

221. *E.g.*, Scottish Air Int'l, Inc. v. British Caledonian Grp., PLC, 81 F.3d 1224, 1234 (2d Cir. 1996); Ilusorio v. Ilusorio-Bildner, 103 F. Supp. 2d 672, 679 (S.D.N.Y. 2000).

222. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250 (1981).

223. *Id.* at 251 (quoting *Gulf Oil*, 330 U.S. at 509).

domestic plaintiffs.[224] In other words, foreign plaintiffs pleading foreign law even against domestic defendants may not have access to a U.S. forum.

The upshot of this case law is that a court is vested with wide discretion to dismiss a case with foreign elements, especially when a foreign plaintiff and foreign law are involved.[225] In the federal system, appellate courts review such decisions based on an abuse of discretion standard, which confirms the discretion vested in district courts to resolve these motions.[226] The impact of such a decision to dismiss is consequential. Unlike a domestic transfer under 28 U.S.C. § 1404(a), a forum non conveniens dismissal ends the case and may, in some cases, end the case permanently in the United States, as evidence suggests that most forum non conveniens dismissals are never refiled in a foreign forum.[227] Intriguingly, a forum non conveniens dismissal is generally not subject to preclusive effect as it is not a judgment on the merits.[228] The current state of case law, however, indicates that although not preclusive of filing suit in another federal district or in a state court, an initial forum non conveniens decision in many cases will be respected by another U.S. court for similar reasons given by the dismissing court.[229] As such, a plaintiff gets one shot at having her case heard here, and if it is dismissed on forum non conveniens grounds, the plaintiff must go abroad to have the case heard.

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224. Whytock, *supra* note 10, at 503-04.

225. *See Piper*, 454 U.S. at 257.

226. *Id. But see, e.g.*, Bos. Telecomms. Grp., Inc. v. Wood, 588 F.3d 1201, 1210 (9th Cir. 2009) ("Here, the district court abused its discretion in holding that this private interest factor was neutral when Wood provided very little information that would have enabled the district court to understand why various witnesses were material to his defense."); Reid-Walen v. Hansen, 933 F.2d 1390, 1401 (8th Cir. 1991) ("We conclude that the district court erred in granting a dismissal based on forum non conveniens. Proper deference to the plaintiff's forum choice, where the defendants reside, coupled with the proper weighing of the *Gilbert* factors, requires reversal.").

227. Robertson, *supra* note 182, at 418-20.

228. *See* Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 432 (2007).

229. *See* Exxon Corp. v. Choo, 817 F.2d 307, 309 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140 (1988).

B. The Relationship to Choice of Law

It has been noted that "the last thirty years have seen a growing torrent of ... cases [filed in the United States with i]nternational and foreign issues."[230] This growth may be due in part to a foreign plaintiff's ability to forum shop her way into a U.S. court, in hopes of finding a more favorable forum to litigate her case.[231] Alienage jurisdiction[232] and permissive personal jurisdiction doctrines[233] afford foreign plaintiffs the opportunity to choose among various U.S. courts in which to file their cases.[234] This gives plaintiffs the choice of various conflict-of-laws rules leading to various substantive laws. A plaintiff would thus compare the conflict-of-laws rules of several states, determine which rule would require the federal court sitting in diversity to apply the most favorable substantive law, be it foreign or domestic, and then file suit in the most favorable court.[235]

For example, a foreign plaintiff harmed by a defendant United States company operating abroad may have the benefit of various United States fora in which to file suit, assuming the defendant is subject to personal jurisdiction and venue in those fora. Because Supreme Court precedent requires federal courts' application of

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230. HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS, at v (2008).

231. *See* Jack L. Goldsmith & Alan O. Sykes, Lex Loci Delictus *and Global Economic Welfare:* Spinozzi v. ITT Sheraton Corp., 120 HARV. L. REV. 1137, 1137 (2007) ("[M]odern choice-of-law approaches give plaintiffs an incentive to sue in a forum that has more generous tort laws than the place of injury.").

232. 28 U.S.C. § 1332(a)(2) (2006).

233. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); VON MEHREN, *supra* note 115, at 163 ("The analysis [in *International Shoe*] increases the number of available forums, with the result that ordinarily a plaintiff's forum is produced.").

234. Although both domestic and foreign plaintiffs may request the court's application of foreign law, domestic plaintiffs are less likely to do so. *Cf.* Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 721 (2009) ("[S]trong biases favor[ ] domestic over foreign law, domestic over foreign litigants, and plaintiffs over defendants."(footnote omitted)). *But see id.* at 722 (arguing that supporters of the "strong bias" view "underestimate the influence of choice-of-law doctrine on judges' decisions and overestimate the extent of bias in those decisions"). Whytock eventually concludes that empirical evidence suggests that there is little bias in the context of international tort claims. *Id.*

235. *See, e.g.*, ROBERT M. COVER, NARRATIVE, VIOLENCE, AND THE LAW 58-59 (Martha Minow et al. eds., 1992) (explaining the "strategic behavior entailed in forum shopping").

state conflict-of-laws rules,[236] a plaintiff will compare the conflicts rules in the potential fora in search of the most favorable conflicts law that would lead to the most favorable substantive law. So, for example, a foreign plaintiff hoping to have foreign law applied to an injury sustained abroad might choose to file a lawsuit against a California corporation in Virginia or another state that still follows the *Restatement (First) of Conflict of Laws*,[237] where the conflict-of-laws rules would direct the federal court to the place of the injury and thus foreign law.[238] The plaintiff would therefore choose to forum shop away from California's "comparative impairment" approach[239] if Virginia's conflicts rules were more favorable to the plaintiff and resulted in the application of favorable substantive law to the plaintiff's case.[240] Of course, a plaintiff might in fact prefer to have California's conflicts rules applied if foreign law is not helpful to her claim, because California's rules might direct the application of California law or some other better substantive law. Such a choice would encourage forum shopping away from the Virginia courts.

In this way, the forum non conveniens doctrine and choice of law overlap as part of a unified theory designed to prevent forum shopping. Courts resolve this very problem of forum shopping not through the application or nonapplication of foreign substantive law

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236. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

237. *See* Symeonides, *supra* note 152, at 231-32 tbl.1 (listing the conflict-of-laws rules of the several states).

238. *See, e.g.*, Hodson v. A. H. Robins Co., 528 F. Supp. 809, 823 (E.D. Va. 1981) ("[T]he Virginia rule in personal injury actions is that the law of the place of the injury, the *lex loci delecti*, will control. Since plaintiffs' injuries were incurred in England, the laws of that country must be applied in the present cases." (citation omitted)); *see also* Dunham v. Hotelera Canco S.A. de C.V., 933 F. Supp. 543, 555 (E.D. Va. 1996) (same approach).

239. *See, e.g.*, Pubali Bank v. City Nat'l Bank, 777 F.2d 1340, 1341, 1343 (9th Cir. 1985) (finding under California's "comparative impairment test" that California had the greatest interest in a breach of contract and fraud action brought by a foreign bank against a California bank, and thus California law applied); Marsh v. Burrell, 805 F. Supp. 1493, 1497-1502 (N.D. Cal. 1992) (same approach).

240. *See, e.g.*, Bassett, *supra* note 147, at 383 ("The law regularly provides more than one authorized, legitimate forum.... To shop among those legitimate choices for the forum that offers the potential for the most favorable outcome is the only rational decision under rational choice theory and game theory because forum shopping maximizes the client's expected payoff."); Ghei & Parisi, *supra* note 183, at 1372 ("[P]laintiffs will generally seek to file claims in jurisdictions where the expected net gain is the largest. The amount of litigation is likely to be positively correlated with the extent to which the jurisdiction's laws favor plaintiffs.").

(the question of choice of law) but through the doctrine of forum non conveniens.[241]

C. The Doctrine's Impact

This realization makes scrutiny of the doctrine's present-day impact important and timely. If courts utilize the doctrine, they have the potential to deny litigants access to a forum, perhaps the only reasonable forum, in their case. This may mean that the forum non conveniens doctrine creates an access-to-justice gap in transnational cases. To examine this claim, this Section is divided into two Subsections that each examine new empirical research conducted for this Article: the doctrine's impact in federal courts and the doctrine's impact in state courts.[242]

1. Federal Impact

A significant increase in forum non conveniens decisions in federal courts has occurred in recent years.[243] Between 1990 and 2005, reports show roughly 691—about 43 per year—transnational forum non conveniens decisions by federal courts.[244] Overall, the courts dismissed in favor of a foreign forum in about 47% of these cases.[245] In cases involving a foreign plaintiff, the dismissal rate was

241. *See, e.g.*, Elizabeth T. Lear, *Federalism, Forum Shopping, and the Foreign Injury Paradox*, 51 WM. & MARY L. REV. 87, 87 (2009) ("Federal judges subject forum choice in transnational tort actions to exacting scrutiny, routinely dismissing such claims on forum non conveniens grounds with no examination of the state interests at stake.").

242. Part III.C develops arguments regarding forum choice that are explored in different ways in Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT'L L. 157, 168-72 (2012).

243. Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1092 (2010).

244. Christopher A. Whytock, Politics and the Rule of Law in Transnational Judicial Governance: The Case of Forum Non Conveniens 15 (Feb. 28, 2007) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=969033.

245. *Id.* at 16 & tbl.1.

higher, at 63%.[246] Foreign plaintiffs are "twice as likely to have their suits dismissed" compared to domestic plaintiffs.[247]

Forum non conveniens motions are likely to increase in future years in light of recent Supreme Court precedent encouraging the doctrine's use.[248] A search of cases invoking the doctrine after the Supreme Court's decision in *Sinochem International Co. v. Malaysia International Shipping Corp.*[249] confirms that motions to dismiss on grounds of forum non conveniens may be on the rise. Although the most recent study of the subject showed about a 50% dismissal rate for the period between 1990 and 2005,[250] which was before the Court's *Sinochem* decision, the analysis conducted for this Article starting in 2007, after the Court decided *Sinochem*, presents a more nuanced picture.[251]

Since *Sinochem*, 94 reported cases have raised the issue, or about 24 per year. Of those, 48% were dismissed. Of these dismissals, 82% explicitly recognized that a reason for dismissal was the application of foreign law. When foreign plaintiffs were involved, the numbers tell a slightly different story. Since *Sinochem*, 56 of the 94 cases, nearly 60%, involved foreign plaintiffs. Of these cases, the dismissal rate was 52%.

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246. Whytock, *supra* note 10, at 503 & tbl.1. This is likely accounted for by the fact that in conducting the forum non conveniens analysis a court may give less deference to a foreign plaintiff's choice of forum under Supreme Court case law. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 (1981) ("When the home forum [is] chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference."). Although not my concern here, I note that such a demonstrated disparity between domestic and foreign plaintiffs may itself have implications for U.S. foreign relations. *See* BORN & RUTLEDGE, *supra* note 54, at 378-80 (noting that a failure to afford equal access to the courts may violate various treaties to which the United States is a signatory); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 281-82 (5th ed. 2006) (same).

247. Whytock, *supra* note 10, at 504.

248. *See* Robertson, *supra* note 243, at 1088-89.

249. 549 U.S. 422 (2007).

250. Whytock, *supra* note 244, at 16 & tbl.1.

251. In short, the approach was as follows: First, the Westlaw database was searched for all U.S. district court cases raising the term "forum non conveniens" between March 5, 2007 (the date of the *Sinochem* decision) and January 1, 2012. Second, all decisions were reviewed and cases that were not actual decisions by U.S. federal district courts granting or denying a forum non conveniens motion in favor of a foreign forum were discarded. Third, these cases were analyzed to yield the results explained in the text.

These numbers likely underreport the real impact of the doctrine on cases before the federal courts. Since 2007, courts have increasingly dealt with these issues through unpublished opinions—going from reporting 45% of these cases in 2007 to only 17% in 2011.[252] Indeed, during the timeframe of the most recent study, the reporting rate was closer to 45%.[253] Although the dismissal rate for unpublished decisions hovered around 51%, what is striking is that 261 such cases came after *Sinochem*. Of these unreported cases, 75% explicitly recognized the application of foreign law as a reason for dismissal. When foreign plaintiffs were involved, which represents 102 of these cases, the dismissal rate jumped to 71%. In sum, courts have decided approximately 355 cases—reported and unreported—since *Sinochem*, with an average of 78.5% of cases recognizing foreign law as an important factor in dismissal. One hundred fifty-eight of these cases involved foreign plaintiffs, with the average dismissal rate of reported and unreported cases being 62%.[254] Therefore, courts may be resisting application of foreign law through the forum non conveniens doctrine, and the trend to do so is growing as courts push such decisions to unreported cases.

Based on these numbers, several observations can be offered. First, historical notions of litigation convenience are being subsumed as questions of choice of law, especially in cases in which a foreign plaintiff is involved. In other words, when a federal court is asked to adjudicate a foreign plaintiff's case and foreign law is arguably applicable, the trend is to dismiss in favor of a foreign forum. Second, this approach may accentuate concerns of choice of law over convenience. Federal courts perhaps recognize that U.S. courts are ill equipped to adjudicate cases of foreign law. Such adjudication may needlessly enmesh U.S. courts in foreign sover-

252. These statistics were reached by comparing the number of published cases to unpublished cases during the relevant time period. They suffer from some incompleteness for lack of a good denominator because not all published and unpublished cases are included in the available databases. In short, estimating publication rates based on current databases is complicated.

253. This number was reached by comparing the number of published cases to unpublished cases during the time of Whytock's study of decisions: 1990 to 2005. *See* Whytock, *supra* note 244, at 14-17. This statistic also suffers from some incompleteness for the same reason. *See supra* note 252.

254. See *supra* notes 251-52 for methodology.

eigns' public policy; as a result, the trend appears to be for federal courts to encourage suits to be brought in foreign courts.

Of course, the decision to bring a case domestically may be due in part to a plaintiff's forum-shopping decision to avail herself of more favorable U.S. law and procedural rules. Another reason such a decision may be made is the United States will be the locus of later enforcement of judgment proceedings. Surprisingly, courts have given little attention to the issue of enforcement in their analyses, even though the Supreme Court has explained enforcement as one of the factors for consideration.[255] This evidence gives reason to believe that convenience, one of the ostensible reasons for the doctrine,[256] is a primary concern for federal courts.

2. State Impact

Most state courts have recognized the forum non conveniens doctrine in some fashion as a matter of common law.[257] While doing so as a matter of state law, most courts have cited federal authority in adopting the doctrine and follow a rule of decision closely aligned with the *Gulf Oil* and *Piper* factors discussed above.[258] According to Martin Davies, "Thirty states, the District of Columbia, and all U.S. territories engage in an analysis effectively identical to that undertaken in federal courts, and thirteen other states employ a factor-based analysis very similar to [federal law]."[259] Some outliers exist. For instance, Delaware courts apply an "overwhelming hardship" test, which is more stringent than the federal standard.[260] Montana courts reject the doctrine outright in most cases.[261]

Let me begin with a disclaimer. Reviewing state court forum non conveniens decisions is incredibly difficult. Many state court trial

255. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

256. *E.g.*, *id.* at 513.

257. *E.g.*, AT&T Corp. v. Sigala, 549 S.E.2d 373, 375-76 (Ga. 2001) (discussing the doctrine's status).

258. *See supra* notes 203-07, 212-16 and accompanying text.

259. Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 315 (2002) (footnote omitted).

260. *See, e.g.*, Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC, 859 A.2d 989, 998 (Del. 2004).

261. *See* State *ex rel.* Burlington N. R.R. Co. v. District Court, 891 P.2d 493, 499-500 (Mont. 1995).

decisions are not reported in research databases like Westlaw, and this makes the sample size incredibly small and hard to analyze in terms of impact. With this qualifier, since *Sinochem*, 8 reported cases have raised the issue (about 2 per year). Of those, 88% were dismissed.[262] In terms of unreported cases, there have been 16 since 2007 (about 4 per year). Of those, 44% were dismissed. There were thus only 24 total cases. These 24 cases came from the following states: New York (13); Delaware (3); California (3); Connecticut (1); Arizona (1); Indiana (1); West Virginia (1); and Massachusetts (1).

Given that more state appellate court decisions are available on Westlaw, one would have to trace the appellate decisions backwards to figure out when and how the trial court decided the forum non conveniens issue to get a more complete picture. Even doing this, the data would be incomplete, as there is no publication of many state appellate court decisions. Based on a preliminary review of the state court appellate decisions, taking these decisions into account would add anywhere from 2 to 10 additional cases per year depending on the year.

When compared to federal cases, the numbers provide some information that would be a worthwhile subject for further study. Federal forum non conveniens cases have gone up 55% in the past four years. The number of forum non conveniens cases occurring in state court appear to have remained the same. Dismissal rates are even more telling. Federal dismissal seems to hover around 50%, whereas state court dismissal, at least in reported cases, is as high as 88%. Given the small sample size, however, these numbers do not provide a complete picture.

These numbers certainly underreport the real impact of the doctrine on cases before the state courts. Interestingly, it appears that there are more state forum non conveniens cases in New York than in other states. This might suggest that more transnational cases are being filed in New York, or that the defendant's choice to move for forum non conveniens is forum-specific to that state. It also

262. In short, the approach was as follows: First, the Westlaw database was searched for all state court cases raising the term "forum non conveniens" between March 5, 2007 (the date of the *Sinochem* decision) and January 1, 2012. Second, all decisions were then reviewed and cases that were not actual decisions by state courts granting or denying a forum non conveniens motion in favor of a foreign forum were discarded. Third, these cases were then analyzed to yield the results explained in the text above.

might mean that New York state courts have a better system of reporting cases.

One other observation is in order. As noted previously, many courts conclude that the application of foreign law is an important reason in granting a forum non conveniens motion. Some states, particularly Delaware, deny forum non conveniens motions even if application of foreign law is likely. They do this by suggesting in their analysis that application of foreign law is not that important, arguing that it is common for courts to wrestle with such questions.[263] Clearly, more work remains to be done in determining the total impact of forum non conveniens on cases filed in state courts.

D. Transnational Impact

When one compares the domestic and transnational analyses, the result is striking. First, domestic personal jurisdiction dismissals do not necessarily end the case; they merely delay the case or encourage the filing of the case in another United States court.[264] Second, transnational dismissals *do* amount to a closing of United States courts to a case, although many of these cases come back to the United States as enforcement of judgment proceedings.[265] However, when they come back, a court's ability to review the case in full is limited, with deference given to the foreign court.[266] Third, transnational cases that are dismissed on forum non conveniens grounds illustrate the importance of choice of law. Importantly, federal courts see choice of law as a reason to dismiss the case in favor of a foreign forum.[267] As such, the choice-of-law analysis is not fully engaged.

The historical development of personal jurisdiction occurred when courts began employing relatively clear jurisdiction-selecting rules to localize a suit in domestic cases. At the time *International Shoe*

263. *See, e.g.*, Lisa, S.A. v. Mayorga, 993 A.2d 1042, 1047-49 (Del. 2010).

264. *See supra* notes 146-49 and accompanying text.

265. *See* Whytock & Robertson, *supra* note 100, at 1451 (explaining "boomerang litigation" in forum non conveniens dismissals, in which "litigation that begins in the United States moves to a foreign judiciary, only to return once again to a U.S. court").

266. *See, e.g.*, Van Den Biggelaar v. Wagner, 978 F. Supp. 848, 858, 861 (N.D. Ind. 1997) (finding the judgment of the Dutch Court of Appeals enforceable and noting that "a domestic court normally will give effect to executive, legislative, and judicial acts of a foreign nation").

267. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947).

was decided, conflict-of-laws approaches throughout the United States had coalesced around widely accepted rules, resulting in little difference from forum to forum as to which state's substantive law should govern.[268] All things being equal, therefore, whether a Virginia plaintiff injured in Virginia filed her case against a California corporation in Virginia or California was immaterial because, under the *Restatement (First) of Conflict of Laws*, Virginia law would apply.[269] Viewed in this light, a plaintiff had little incentive to forum shop because "[a]s long as the rules [of the *Restatement (First) of Conflict of Laws* were] applied consistently, the same substantive law should apply to identical facts, resulting in identical outcomes" no matter where the plaintiff filed the case.[270] The only arguable incentive would be convenience, and thus personal jurisdiction was merely a question of venue.

Transnational cases, especially those occurring under modern choice-of-law theories, are different. Modern-day permissive doctrines of personal jurisdiction dovetail with permissive choice-of-law doctrines that allow a forum court in many cases to apply forum law to a case or controversy even when the acts or omissions complained of occur outside of the forum.[271] So, for instance, when a California plaintiff sues a French defendant in California, if the California court determines that it has jurisdiction it may similarly determine that California law is applicable to the case. This creates significant problems.

First, how appropriate is application of California law to a case whose contacts are mostly with a foreign state? Second, in so doing, does the California court risk implicating foreign relations concerns? Third, does the extraterritorial application of California law impose California law on a foreign sovereign?

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268. *See supra* note 190 and accompanying text (discussing the *Restatement (First) of Conflict of Laws*); *see also* Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 357 (1992) (stating that the *Restatement (First) of Conflict of Laws* "commanded a nearly universal following" from its publication in 1934 until 1963).

269. *See supra* notes 190-91 and accompanying text.

270. Ghei & Parisi, *supra* note 183, at 1374. *But see* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 559 (1989) (noting that escape devices might permit judges to deviate from these clear and consistent rules).

271. *See* Goldsmith & Sykes, *supra* note 231, at 1137 (explaining that the "one unmistakable consequence" of modern choice-of-law rules is that forum courts are more likely to apply local tort law to actions that occurred in another jurisdiction).

On account of these concerns, United States courts' use of forum non conveniens is not surprising. At best, it is a way to respect the foreign nature of the proceeding and give due regard to the sovereignty of another state to resolve a dispute. At worst, the use of forum non conveniens may risk inhibiting plaintiffs' access to justice by denying them a United States forum and potentially denying plaintiffs the benefit of any law to resolve their claims; in many circumstances foreign law will not recognize a claim or will provide fewer damages and other procedural options, such as discovery and contingency fees, that incentivize plaintiffs to bring claims.[272]

At bottom, the Supreme Court has created a personal jurisdiction doctrine that provides very few limits on a court's ability to exercise jurisdiction over an alien defendant.[273] As a result, courts have created a doctrine of forum non conveniens that seeks to balance the appropriateness of a court exercising jurisdiction in an individual case. The forum non conveniens analysis is a proxy for the choice-of-law analysis. As such, it covers up important questions of the relationship between United States law and United States courts in applying law to foreign facts and parties. This realization encourages a reconnection of choice-of-law with personal jurisdiction, and that is the subject of the next Part.

IV. COMMON THEMES FOR TRANSNATIONAL PROBLEMS

In this Part, I provide a suggested approach to guide courts in resolving personal jurisdiction issues in transnational cases, especially cases involving alien defendants. After first explaining common themes present in transnational cases, I put forward a new approach to transnational personal jurisdiction grounded in choice of law.

A. The Relevance of Choice of Law

The connection between personal jurisdiction, forum non conveniens, and choice of law is, unfortunately, a connection that

272. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 & n.18 (1981) (explaining advantages of litigating in the United States for international plaintiffs).

273. *See supra* Part II.B.

the Supreme Court has resisted. To the extent it has been addressed, the Court has emphasized that the doctrines should be analytically separated.[274] However, a close relationship exists between personal jurisdiction and choice of law.[275] As Justice Black explained in his *Hanson v. Denckla* dissent, although the questions of personal jurisdiction and choice of law may be different, "the two are often closely related and to a substantial degree depend upon similar considerations."[276] Justice Brennan went so far as to connect the choice-of-law inquiry to personal jurisdiction's reasonableness inquiry when he stated that "the decision that it is fair to bind a defendant by a State's laws and rules should prove to be highly relevant to the fairness of permitting that same State to accept jurisdiction for adjudicating the controversy."[277] Justice Brennan has further recognized a key observation of this Article: "[T]oday there is an interaction among rules governing jurisdiction, *forum non conveniens*, and choice of law."[278] Finally, Justice Ginsburg explained in her recent *Nicastro* dissent that "litigational convenience and choice-of-law considerations" contribute to it being "fair and reasonable ... to require the international seller to defend at the place its products cause injury[,]" because a foreign corporation's compliance with the laws of the jurisdiction in which its products are used is "a reasonable cost of transacting business internationally."[279] These statements give room to situate transnational

274. *See, e.g.*, Hanson v. Denckla, 357 U.S. 235, 254 (1958) ("The issue is personal jurisdiction, not choice of law.").

275. *See supra* Parts II-III.

276. 357 U.S. at 258 (Black, J., dissenting).

277. Shaffer v. Heitner, 433 U.S. 186, 225 (1997) (Brennan, J., concurring in part and dissenting in part).

278. Burnham v. Superior Court, 495 U.S. 604, 635 n.9 (1990) (Brennan, J., concurring).

279. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2800-01 (2011) (Ginsburg, J., dissenting) (footnote omitted). Justice Stevens also acknowledged that a court should consider personal jurisdiction and choice of law separately, although each protects the same interests—state sovereignty and fairness to the litigants. Allstate Ins. Co. v. Hague, 449 U.S. 302, 320 n.3 (1981) (Stevens, J., concurring). Over the years, scholars too have argued for a separate and more rigorous choice-of-law analysis in cases involving foreign defendants. *See, e.g.*, Martin, *supra* note 127 (arguing that a contacts-based test, similar to that used in a personal jurisdiction inquiry, in which the plaintiff's contacts with the forum and the forum's contacts with the facutal elements of the case are analyzed, should be employed in a choice-of-law analysis to ensure fairness to the defendant). Other scholars have also argued that the current personal jurisdiction and choice-of-law inquiry regime creates an unfair and untenable litigation risk for foreign defendants. *See, e.g.*, Stephen F. Williams, *Preemption:*

personal jurisdiction within a broader framework concerned with choice of law.

Problematically, the Court in its recent decision in *Sinochem* dealt with the question of whether a district court could resolve a forum non conveniens motion in advance of determining the question of the court's jurisdiction.[280] Finding forum non conveniens akin to venue and accounting for prior Supreme Court precedent allowing for venue dismissals in advance of jurisdictional determinations,[281] the Court held that a district court may dismiss on forum non conveniens grounds even in advance of determining jurisdiction.[282] As noted above, the outcome of this decision has been substantial: forum non conveniens motions have increased.[283] As part of that increase, Courts are not engaging in personal jurisdiction determinations and choice-of-law questions are being subsumed within the larger rubric of the forum non conveniens analysis. In a nutshell, district courts are now empowered to resist choice-of-law analysis, especially when a foreign plaintiff and foreign law are involved, in that they have wide discretion to dismiss on forum non conveniens grounds.

Sinochem is thus an important decision for transnational litigation generally. To put it in perspective, roughly 120,000 lawsuits since 1986 involving a non-U.S. party were filed in federal district courts.[284] Since 2005, when the most recent data were reported, 1976 alienage cases terminated in U.S. federal district courts.[285] Although no precise figures exist on the personal jurisdiction and conflict-of-laws question just presented here, many of these

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First Principles, 103 NW. U. L. REV. 323, 328 (2009) ("[I]n our federal system, given (1) the Supreme Court's rather mild limits on in personam jurisdiction, (2) its almost complete laissez faire as to state choice-of-law decisions, (3) the way in which products and buyers wander among the states, and (4) modern courts' virtually complete indifference to contract provisions relating to liability, firms selling in interstate commerce cannot, as a practical matter, match selling prices to varying levels of litigation risk.").

280. Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 428-29 (2007).

281. *Id.* at 429-32.

282. *Id.* at 436. Specifically, if "subject-matter or personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course" by issuing a forum non conveniens dismissal without determining whether jurisdiction is present. *Id.*

283. *See supra* Part III.C.1.

284. Whytock, *supra* note 24, at 74 n.18.

285. *Id.*

cases likely touched on transnational legal issues as opposed to being concerned with solely the application of domestic law to transnational facts. Indeed, the most recent study reviewing federal cases from 1990 to 2005 found that at least 200 cases raised the issue of whether foreign law should apply in tort cases.[286] This number could be higher, given that this study excluded cases in which the court did not make a choice-of-law decision.[287] Personal jurisdiction determinations will thus be relevant in many of these cases and will become increasingly relevant should the Court decide to limit federal law in the area of international human rights litigation.[288]

Given these numbers and the accelerating process of globalization, a significant number of cases filed in U.S. courts in the years to come will raise transnational personal jurisdiction and conflict-of-laws issues. In at least some of these cases, courts will be thrust into choosing between competing normative claims as the parties present these claims to invoke the court's jurisdiction. Domestic courts will face the choice between domestic and foreign laws, and in some cases foreign laws that do not comport with domestic normative commitments. How a domestic court is to resolve this ethical tension is less than clear but obviously important for scholars and practitioners.

This is a question at the very core of judicial discretion in transnational cases. If one accepts the proposition that a forum court should be concerned with nonforum interests[289]—a noble, yet contestable, statement[290]—a domestic court must, in reaching a

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286. Whytock, *supra* note 10, at 504 n.121.

287. *See id.*

288. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011) (regarding whether corporations are liable for international human rights abuses under the Alien Tort Statute); *supra* note 26 and accompanying text.

289. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(c) (1971) (noting that "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue" are relevant in choice-of-law analysis). The value of considering nonforum interests is justifiably stronger in cases involving certain multijurisdictional causes of action. *See, e.g.*, James R. Pielemeier, *Constitutional Limitations on Choice of Law: The Special Case of Multistate Defamation*, 133 U. PA. L. REV. 381, 428 (1985) (arguing that the application of forum law to a multistate defamation claim cannot only "discourage[ ] interstate publication" but can also "unjustifiably infringe[ ] on first amendment freedoms").

290. *See, e.g.*, Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 93 (1991) (noting that

decision, balance the norms of at least two juridical systems: it must determine whether domestic legal norms should give way, accommodate, or preempt legal norms of a foreign legal system.[291] In cases arising between the several United States, such questions are largely resolved through application of the Full Faith and Credit Clause and other constitutional doctrines, such as due process and equal protection.[292] Indeed, the archetypical conflict of laws and normative commitments in U.S. cases between federal law and state law is resolved through the Supremacy Clause.[293] In cases that implicate foreign—that is, non-U.S.—law, the process for negotiating these normative commitments has only minimal constitutional control.[294] In fact, these questions are apparently more likely to be resolved through forum non conveniens than other doctrines that more concretely grapple with the issues at stake in many transnational cases.

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when a court shows such concern for nonforum interests, specifically by electing to apply nonforum laws, it "subordinates [the forum's] own policies, ... generate[s] irrational and discriminatory classifications, and undermine[s] forum policy for future cases").

291. The Supreme Court has generally given state courts significant license to make their own decisions about whether to apply the forum's own law or that of another forum, adhering to its principle that "it is frequently the case ... that a court can lawfully apply either the law of one State or the contrary law of another." Sun Oil Co. v. Wortman, 486 U.S. 717, 727 (1988); *see also* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992).

292. *See* Laycock, *supra* note 291, at 259-60 (noting that the constitutional doctrines that shape domestic choice-of-law doctrine in the United States share a common purpose: the express prohibition of the states "treat[ing] each other like foreign countries" in order to build a common nation).

293. U.S. CONST. art. VI, § 2; *see* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 260 (2000) ("Under the Supremacy Clause, ... [c]ourts are required to disregard state law if ... it contradicts a rule validly established by federal law.").

294. U.S. judges frequently use, cite, and interpret foreign law; indeed, they may be constitutionally required to do so if the case involves a valid contractual clause specifying the applicability of foreign law to the controversy, or if conflict-of-laws principles require such applicability. *See* Stephen Yeazell, *When and How U.S. Courts Should Cite Foreign Law*, 26 CONST. COMMENT. 59, 61-65 (2009). Furthermore, it may be constitutionally acceptable for a U.S. court to exercise subject matter jurisdiction, under the Alien Tort Statute or any other federal law, over a controversy even if the court will use foreign law to resolve the controversy. *See* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 57-58 (1985). Interestingly, some U.S. states have constitutional and statutory provisions that prohibit a court from applying foreign law if such application violates individual rights guaranteed under the U.S. Constitution. *See* Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1233 & nn.3-4 (2011).

In light of this litigation reality, what is needed is a new approach to personal jurisdiction that connects personal jurisdiction with forum non conveniens and choice of law. The doctrines should be connected because folding choice-of-law considerations into forum non conveniens analysis, and using that analysis to avoid personal jurisdiction determinations, obscures the substantive implications of the doctrine and creates "an informal and inconsistent process" giving unbounded discretion to courts.[295] The next Section proposes an approach that brings choice of law more concretely to light.

B. Transnational Personal Jurisdiction: A New Approach

Based on the above analysis, this Article offers the following default rule for transnational personal jurisdiction cases. A state court may exercise personal jurisdiction over an alien defendant not served with process within the state's borders when (1) the defendant has received constitutionally adequate notice,[296] (2) the state has a constitutionally sufficient interest in applying its law or adjudicating a controversy involving its domiciliaries, and (3) the policies of other interested nations whose laws would be arguably applicable are given due respect and consideration and would not be adversely affected by the exercise of jurisdiction. In determining state interests, recourse would be given to choice of law.[297]

The three steps for a court would be as follows. First, the court should determine at the personal jurisdiction stage whether domestic or foreign law would apply. Second, if U.S. law would apply, then the court should exercise personal jurisdiction when (1) the plaintiff and defendant are both domestic, subject to transfer, (2) the plaintiff is a U.S. domiciliary and the defendant is a foreign domiciliary, subject to a forum non conveniens dismissal when there are extreme cases of inconvenience to the defendant with due regard given to the question of enforcement of judgments, (3) the plaintiff is a foreign

295. Stein, *supra* note 196, at 841.

296. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

297. For an extensive discussion of how the consideration of state interests, rather than only the rights of the individual litigants, has come to impact choice-of-law doctrine in the United States, see Hans W. Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers,* The Choice-of-Law Process, 46 TEX. L. REV. 141 (1967); Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277 (1989); and Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990).

domiciliary and the defendant is a U.S. domiciliary, subject to transfer, and (4) if the plaintiff is a foreign domiciliary and the defendant is also a foreign domiciliary, subject to the exceptions noted above in (2). Third, if foreign law would apply, then the court should give due respect and consideration as to the impact that asserting U.S. jurisdiction would have on foreign law.[298] In what follows, the Article details various party and choice-of-law lineups for transnational cases and points to potential solutions to transnational personal jurisdiction problems.

Domestic Plaintiff v. Domestic Defendant (question of foreign law)[299]

To begin with, such a case is least likely to be subject to the personal jurisdiction and forum non conveniens problems discussed above.[300] As such, it is a relatively easy case. The presence of a domestic defendant means that the defendant will be subject to personal jurisdiction in one of the several states.[301] The presence of a domestic plaintiff means that the court will generally defer to the plaintiff's choice of forum and will not dismiss on forum non conveniens grounds.[302] The implication of foreign law in the case does, however, give a court at least some discretion to dismiss on forum non conveniens grounds.[303] Before doing so, however, courts

298. For an attempt to do this in the context of international comity, see generally Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11 (2010).

299. I note that a Domestic Plaintiff v. Domestic Defendant case in which U.S. state law is at issue would be resolved through domestic personal jurisdiction doctrines, as the concern in these cases is about both due process and the allocation of adjudicatory and prescriptive authority between the several states. *See supra* Part II.A.

300. *See supra* Parts II-III.

301. Clearly a U.S. citizen defendant is subject to general jurisdiction in the court of the state in which he or she resides. *See supra* text accompanying note 141. However, such a defendant is also subject to personal jurisdiction in another state, as long as the defendant has "certain minimum contacts with" the other state so that such exercise of personal jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

302. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 (1981). The main reason for this is that "the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient," which it presumptively is if a domestic plaintiff files the lawsuit in his or her own state. *Id.*

303. The applicability of foreign law to a controversy is one of the "[f]actors of public interest" that courts may consider in assessing whether to dismiss a case on forum non

should be concerned at first with whether U.S. state law could apply to the case. This is so because even when foreign facts allegedly give rise to an injury, state law might apply to the claim, especially when state law and foreign law do not conflict.

As the Court explained in its most recent choice-of-law cases, a court must first consider whether the laws competing for application conflict.[304] If the laws do not conflict, "[t]here can be no injury in applying [state] law,"[305] so long as the state has "a significant contact or significant aggregation of contacts, creating state interests, such that the choice of its law is neither arbitrary nor fundamentally unfair."[306] In such a situation, the court need not resolve the case as a transnational one or resort to forum non conveniens. If foreign law applies under choice-of-law rules, then the question for the court would be whether that law can be determined under Federal Rule of Civil Procedure 44.1 and, if needed, through expert testimony.[307] To the extent that it can, the district court would be constitutionally justified in rendering a decision so long as one of its domiciliaries is involved in the case and the defendant is not substantially inconvenienced. Even in such cases of inconvenience, the more appropriate outcome would be to transfer the case to the defendant's home state under the federal transfer statute.[308] Only to the extent that foreign law cannot be determined and state law cannot be applied would dismissing the case on forum non conveniens grounds appear appropriate.

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conveniens grounds. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947). As a result, many courts have "held that the need to apply foreign law favors dismissal." *Piper*, 454 U.S. at 260 n.29.

304. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 816 (1985) ("We must first determine whether Kansas law conflicts in any material way with any other law which could apply.").

305. *Id.* at 816.

306. *Id.* at 818 (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981)).

307. The relevant part of this rule reads as follows: "In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." FED. R. CIV. P. 44.1. Although the use of expert testimony to assist in the interpretation and application of foreign law is permitted if needed under the Federal Rules of Civil Procedure, it is not required. *E.g.*, Bodum USA, Inc. v. La Cafetiere, Inc., 621 F.3d 624, 628 (7th Cir. 2010).

308. *See* 28 U.S.C. § 1404(a) (2006).

Domestic Plaintiff v. Foreign Defendant (question of U.S. law)

Unlike the first case, the presence of a foreign defendant means that personal jurisdiction will be an issue. Obviously, should the defendant be subject to general jurisdiction, then the court would be justified in hearing the case. However, rather than focusing on specific contacts with the forum state,[309] the question for the court should first be what law applies. To the extent that U.S. law applies, the court would be justified in hearing the case so long as the defendant is not unreasonably inconvenienced. Here again, presence of a domestic plaintiff means that the court will generally defer to the plaintiff's choice of forum and will not dismiss on forum non conveniens grounds.[310] The appropriateness of such a dismissal would need to be balanced with the domestic plaintiff's interest in having the case heard in her home forum.

Domestic Plaintiff v. Foreign Defendant (question of foreign law)

The presence of a domestic plaintiff means that the court will generally defer to the plaintiff's choice of forum and will not dismiss on forum non conveniens grounds.[311] The implication of foreign law does, however, give a court at least some discretion to dismiss on forum non conveniens grounds.[312] Here again, assuming a lack of general jurisdiction, courts should be concerned at first with whether U.S. state law could apply to the case. To the extent that it can, the case would be similar to the prior case. To the extent foreign law is applicable, the court should concretely weigh the

309. A plurality of the Supreme Court recently held that a New Jersey court set to exercise personal jurisdiction over a British corporation would violate the Due Process Clause, because "[a]t no time did [the corporation] engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws." J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2791 (2011) (plurality opinion). In his concurring opinion in the case, Justice Breyer succinctly described just how minimal the defendant's contacts were with the state of New Jersey. It had sold and shipped only one machine there, it used an American distributor for the purpose of selling its merchandise in the United States, and, although the manufacturer's employees had visited trade shows in several American cities, none were in New Jersey. *See id.* at 2786 (Breyer, J., concurring).

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

311. *See id.*

312. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947).

difficulty in ascertaining that law against the plaintiff's interest in having the case heard in her home forum.

Foreign Plaintiff v. Domestic Defendant (question of foreign law)

In this case, the jurisdictional question is easy given that a domestic defendant is involved. A traditional forum non conveniens analysis may, however, point to dismissal in light of the fact that a foreign plaintiff is present.[313] Choice of law helps resolve the problem by encouraging a court to determine whether U.S. state law can apply. I note, however that the state must have some contact with the parties or occurrence giving rise to litigation to make the court's application of that state's law comport with due process.[314] As the Supreme Court has explained, Fourteenth Amendment due process requires that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[315] The Court adopted this test to regulate the application of state law in the state-to-state context. A logical corollary follows, however, that if a state court[316]—or a federal court—cannot apply forum law or the law of another state without sufficient contacts, so too it cannot apply any other law without sufficient contacts. The question, of course, is what amounts to sufficient contacts, especially in the international context. Although the Supreme Court has intimated that general jurisdiction plus

313. Forum non conveniens dismissals may be more likely in cases involving foreign plaintiffs not only because the convenience of the defendant is generally the primary consideration but also because of the plaintiff's obvious engagement in blatant and unfair forum shopping in selecting the forum. In *Piper*, the Supreme Court upheld the district court's dismissal of the case on forum non conveniens grounds, ruling that the district court was "fully justified" in affording the foreign plaintiff's choice of forum little deference, as "the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient." *Piper*, 454 U.S. at 255-56. The district court judge had rejected the Scottish plaintiff's choice of a U.S. forum, characterizing her actions as seeking only to take advantage of "the more liberal rules concerning products liability law" and "the more liberal tort rules provided for the protection of citizens and residents of the United States." Reyno v. Piper Aircraft Co., 479 F. Supp. 727, 731 (M.D. Pa. 1979).

314. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981).

315. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985); *Hague* 449 U.S. at 312-13.

316. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

additional factors might provide such a nexus,[317] the bounds of that test in the context of the application of state law or foreign law to foreign facts is an open question.

Foreign Plaintiff v. Foreign Defendant (question of U.S. law)

Recent Supreme Court case law has held that, generally speaking, federal laws have a geographic scope. The Court has made clear that federal law is presumed not to apply extraterritorially absent a clear indication of congressional intent. In *EEOC v. Arabian American Oil Co.* (*ARAMCO*), for example, the Court held that Title VII of the Civil Rights Act of 1964 did not apply extraterritorially to torts committed by U.S. employers against U.S. citizens employed abroad.[318] Courts, it explained, must "assume that Congress legislates against the backdrop of the presumption against extraterritoriality."[319] Likewise, just this past Term in *Morrison v. National Australia Bank Ltd.*, the Supreme Court held that section 10(b) of the Securities Exchange Act does not apply extraterritorially to "provide[ ] a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges."[320] As in *ARAMCO*, the Court applied the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[321] "When a statute gives no clear indication of an extraterritorial application," the Court instructed, "it has none."[322] The presumption reflects practical considerations. It "protect[s] against unintended clashes between our laws and those of other nations which could result in

317. *See Hague*, 449 U.S. at 317-18 & n.24 (noting that because the defendant was "doing business in Minnesota and was undoubtedly aware that Mr. Hague was a Minnesota employee, it had to have anticipated that Minnesota law might apply to an accident in which Mr. Hague was involved").

318. 499 U.S. 244, 248-49 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1077 (codified as amended at 42 U.S.C. § 2000e(f) (2006)) (altering only the extraterritoriality of federal antidiscrimination statutes, not the presumption stated in *ARAMCO*).

319. *Id.* at 248.

320. 130 S. Ct. 2869, 2875, 2883 (2010).

321. *Id.* at 2877 (quoting *ARAMCO*, 499 U.S. at 248 (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949))).

322. *Id.* at 2878.

international discord."[323] Consequently, when a plaintiff seeks recovery under federal law for injuries sustained abroad, courts must ask at the outset whether the asserted cause of action extends overseas.[324]

Of course, this presumption is one that applies only when courts construe federal law. Whether such a presumption is transferable to a court reviewing claims under state law or whether the appropriate analysis is, as discussed above and below, due process based is unclear. The *Restatement (Third) of Foreign Relations Law of the United States* implies that the analysis should be the same.[325] But the Supreme Court has not spoken to this issue. In any event, although this presumption may not be applicable in interpreting state law, a court can only apply law subject to due process. Further work remains to be done to determine whether court decisions regarding extraterritorial application of federal law should apply to cases raising state law claims.

This proposal, however, does not cover the situation addressed next.

Foreign Plaintiff v. Foreign Defendant (question of foreign law)

Such a case, sometimes referred to in a slightly different context as an "f-cubed case,"[326] is most appropriately dealt with through forum non conveniens. This is so because such a case risks, as explained above, the unconstitutional application of U.S. law to foreign facts. In any event, such cases are an exception even under present jurisdictional theory on account of a lack of contacts with the United States. The lack of a U.S. nexus thus becomes a compelling factor in the analysis as well as the fact that non-U.S. law is to

323. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 173-74 (1993)*; see also* Smith v. United States, 507 U.S. 197, 204 n.5 (1993); *ARAMCO*, 499 U.S. at 248.

324. *See, e.g.*, *Sale*, 509 U.S. at 170-74; McCulloch v. Sociedad Nacional de Marineros de Hond., 372 U.S. 10, 19 (1963).

325. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 reporters' note 5 (1986) (noting that the same extraterritoriality principles govern federal and state law, except in the case of federal preemption under the foreign affairs power).

326. *See* Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 475-76 (explaining such cases as foreign plaintiffs bringing suit against foreign defendants for alleged illegal conduct occurring outside the United States).

apply. The next Section considers the benefits of and objections to this suggested approach.

C. Benefits and Objections

The major benefit of this approach is that it more concretely and candidly requires United States courts to grapple with the application of United States and foreign law to foreign facts or parties. By not hiding the choice-of-law analysis in personal jurisdiction and forum non conveniens analyses, it provides a more complete framework for plaintiffs to make their cases and for courts to sort out complicated questions in full light. In so doing, the public at large is also informed as to the appropriate role of courts in transnational cases. We must decide whether United States courts should be open to transnational cases, and to the extent that they are, identify any precise limits on when a foreign case should be heard in the United States.

To return again to the Court's recent decision in *Nicastro*, the benefits of this suggested approach are many. First, unlike the *Nicastro* plurality's near-singular focus on targeted contacts at the forum state of New Jersey,[327] the above analysis illustrates that the most-concerned state was not the United Kingdom, where the *Nicastro* case would have had to be filed under the Court's approach, but the State of New Jersey. This is so because a New Jersey domiciliary was injured in New Jersey and thus New Jersey's law could apply in a constitutionally permissible manner.[328] Given these facts, choice of law—and with it the choice of New Jersey law—clears much of the intellectual overgrowth appended to the personal jurisdiction doctrine. In so doing, this approach illustrates that if a suit may be brought against a corporation in some state—in *Nicastro*, the United Kingdom—and that state will apply the law of the state of injury—which is New Jersey—then bringing the case in New Jersey would be appropriate, unless shown that the choice of forum presented substantial inconvenience to the defendant that would compromise the litigation of the case.

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327. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2785 (2011) (plurality opinion).

328. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 814-23 (1985) (illustrating that the place of injury would give the state a significant contact creating state interests to justify application of that state's law).

This suggested approach thus affords district courts the opportunity to determine up front whether they should hear the case at all. As noted, many cases that are dismissed on forum non conveniens grounds ultimately return to the United States as enforcement of judgment proceedings. In these proceedings, U.S. courts have limited powers of review, so the important interests of the United States in adjudicating these cases are not fully realized. The primary benefit of the above approach is that it more forthrightly brings choice-of-law consideration to the forefront of jurisdictional analysis.

The above approach is not without objections. First, the approach may seem a departure from Supreme Court case law. But the approach can actually be seen as in accord with the Court's approach to transnational cases. Although the Court has stated that choice of law should not obfuscate the personal jurisdiction analysis, those cases must be read based on the facts of the cases. Those cases were about purely domestic issues. Transnational issues raise a host of other concerns that, at present, are taken account of through the doctrine of forum non conveniens. That doctrine is less than forthright as to the precise issues at stake in most transnational cases.

Second, the approach may encourage parties to file transnational cases in the United States. Of course, U.S. courts should not hear all transnational cases. One objection is that conflating choice of law and personal jurisdiction means that many courts may decide to hear cases that are more appropriately adjudicated elsewhere. By conflating personal jurisdiction and choice of law, courts may be inclined to apply forum law and risk creating international relations concerns. These concerns present compelling questions bearing on the institutional competency of U.S. courts to resolve transnational problems. In my view, a residual forum non conveniens analysis will resolve most of these problems.

Third, the approach does not resolve complex agency relationships that are frequently at play in transnational cases.[329] Further work thus remains to be done in applying these rules to more complex factual scenarios in light of case law developments.

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329. *See supra* text accompanying notes 17-18.

V. A REVISED TRANSNATIONAL LITIGATION NARRATIVE

This Part offers several observations to guide future scholarship in the area of transnational litigation. It seeks to discern the role of courts in a plural, transnational society as they go about negotiating conflicting norms in transnational legal cases. This Part also scrutinizes the future of the transnational litigation narrative in U.S. courts.

First, notwithstanding the transnational litigation narrative, courts appear to exhibit the fact that they are primarily national actors. That U.S. courts seem to favor U.S. plaintiffs over foreign plaintiffs, favor the application of U.S. law over foreign law, utilize a personal jurisdiction doctrine that focuses on contacts as opposed to choice of law, and increasingly use the forum non conveniens doctrine to resist hearing transnational cases points to a failure of the transnational litigation narrative to convince and equip courts to deal with such cases. In the end, this may be due to the fact that the narrative was largely concerned with encouraging public law litigation and internalizing international law norms. If the transnational litigation narrative is to have any purchase, therefore, it must refocus on private cases and the concrete domestic doctrines that courts use to resolve such cases. It must also focus on questions of choice of law.

Second, the lack of a clear method for negotiating conflicts between legal orders perhaps encourages courts to resist conflicts and reject the application of foreign law and/or dismiss the case in favor of a foreign forum. In the United States, courts are resolving more and more normative questions at the procedural level, even in private international law cases. This intimates that courts are resisting substantive engagement with transnational law. At one level, this is not problematic; many cases should not be heard in U.S. courts because such cases present intractable questions of legal and regulatory authority between states. The problem, however, with the present transnational litigation narrative is that it does not concretely focus on resolving conflicts. This is why, as explained above, a choice-of-law approach may reinvigorate the narrative.

Third, even when cases survive procedural questions, U.S. courts resolve many substantive questions by invoking legal formulae

designed to resist engaging law's normativity and especially the normativity of foreign law. As explained above, U.S. courts favor forum non conveniens to avoid a foreign legal order's normative claims. Here again, courts should be equipped to deal with questions of foreign law and should be encouraged to focus on the potential for conflict rather than the fact that foreign law is applicable.

With the increased pace of globalization and transnational litigation, we may, however, be at the beginning of a potential change in this area of law, and with it, a change in the transnational litigation narrative. As plaintiffs seek out through forum shopping and/or are forced through jurisdictional rules and forum non conveniens to utilize foreign fora for litigation, the potential for normative clashes between different legal systems, especially when cases come back to the United States as enforcement of judgment proceedings, increases. The process for engaging these norms is far from clear. Put simply, even in cases involving countries with similar political organizations, significant differences in societal values and legal rules still exist that will require court resolution.[330]

The most notable question facing courts in transnational cases is whether they should view themselves as purely domestic or transnational actors. Should courts be charged with ascertaining whether certain foreign normative commitments should be respected, accommodated, or preempted based upon an evaluation of the differences between the forum's policies and those of the foreign forum? Or should the role of the courts be to develop international rules to negotiate these differences that give respect not only to domestic legal interests but also those of the international legal system writ large?

Finally, there are questions of institutional competency. Whether courts are the most appropriate actors to exercise the lead role in managing transnational cases is not totally clear. This question thus raises an antecedent question concerning what the appropriate role of U.S. courts is in transnational cases and whether other institutional actors, such as the U.S. Congress, should have a role in transnational litigation. Until a time of congressional action,

330. Robert Wai, *In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law*, 39 CANADIAN Y.B. INT'L L. 117, 185 (2001).

however, the courts are left to their own devices. These devices should more accurately and practically take account of transnational issues in adjudicating cases.

CONCLUSION

We live in a transnational legal order. But what this means for the practice of law is far from certain. Commentators encourage the transnational, but courts seem to resist it. This Article has sought to provide some clarity to the murky waters of transnational litigation by focusing on what happens when personal jurisdiction goes transnational. In so doing, the Article has pointed to new ways to argue for the engagement of transnational law in the United States. If there is hope of a truly transnational practice in the United States, that practice must be concerned with the ways in which domestic doctrines operate concretely in the transnational arena. This Article is a first step in that direction.