

## WITH APOLOGIES TO PAXTON BLAIR

PETER B. RUTLEDGE\*

### I. INTRODUCTION

I would like to thank New York University, Dean Richard Revesz, Professors José Alvarez, Franco Ferrari, and Linda Silberman, the student editors of the *NYU Journal of International Law and Politics* and, most importantly, the Rubin family for the opportunity to speak at last October's symposium. When one reads about the accomplishments of the Rubin family over the last half century, both professional<sup>1</sup> and personal, one can only stand in awe of their record of accomplishment.

On the subject of great lawyers, it is particularly appropriate to speak on *forum non conveniens* doctrine in New York. For one thing, the doctrine traces its roots to a series of decisions in New York state courts developed by members of the New York bar.<sup>2</sup> For another thing, the doctrine's modern form was heavily influenced by an article written in the early twentieth century by Wall Street lawyer Paxton Blair and published in the *Columbia Law Review*.<sup>3</sup> Finally, New York lawyers argued at least one side of virtually all of the major Supreme Court cases on the doctrine in the last century.<sup>4</sup>

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\* Herman E. Talmadge Chair, University of Georgia School of Law.

1. Herbert Rubin of Herzfeld & Rubin, P.C. has practiced law in New York City for more than half a century. Among his greatest accomplishments was successfully arguing *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) before the Supreme Court. Justice Rose L. Rubin, a retired New York State Supreme Court Justice, served as Chief Administrative Law Judge of the City of New York Office of Trials and Hearings during the Guiliani Administration.

2. See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 566–69 (5th ed. 2011).

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

4. This is apparent from the attorneys of record listed in cases such as *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 237 (1981), *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 501–02 (1947), *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 519 (1947), and *Canada Malting Co. v. Paterson Steamships Ltd.*, 285 U.S. 413, 414 (1932).

Much has been written on the *forum non conveniens* doctrine,<sup>5</sup> yet I nonetheless believe that recent developments in related areas still enable scholars to offer an original perspective on the subject. In this brief essay, I advance the following

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5. See, e.g., SAMUEL P. BAUMGARTNER, *THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS: TRANS-ATLANTIC LAWMAKING FOR TRANSNATIONAL LITIGATION* (2003); ANDREW S. BELL, *FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION* (2003); RONALD A. BRAND & SCOTT R. JABLONSKI, *FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS* (2007); J.J. FAWCETT, *DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW* (P.B. Carter ed., 1995); *INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION* (Fourteenth Sokol Colloquium, Jack L. Goldsmith ed., 1997); MICHAEL MOUSA KARAYANNI, *FORUM NON CONVENIENS IN THE MODERN AGE* (2004); Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380 (1947); Alexander M. Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q. 12 (1949); Blair, *supra* note 3; Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947); Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 TEX. INT'L L.J. 467 (2002); Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 HOUS. J. INT'L L. 385 (2004); Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309 (2002); Douglas W. Dunham & Eric F. Gladbach, *Forum Non Conveniens and Foreign Plaintiffs in the 1990s*, 24 BROOK. J. INT'L L. 665 (1999); Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609 (2008); Julius Jurianto, *Forum Non Conveniens: Another Look at Conditional Dismissals*, 83 U. DET. MERCY L. REV. 369 (2006); Andreas F. Lowenfeld, Editorial Comment, *Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM. J. INT'L L. 314 (1997); Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559 (2007); Elizabeth T. Lear, *Congress, The Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147 (2006); Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, 16 LOY. L.A. INT'L & COMP. L.J. 455 (1994); 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 (1992); Joel H. Samuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis*, 85 IND. L.J. 1059 (2010); 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 (1993); Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781 (1985); Martine Stückelberg, *Lis Pendens and Forum Non Conveniens at the Hague Conference*, 26 BROOK. J. INT'L L. 949 (2001).

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thesis: the *forum non conveniens* doctrine developed in response to a specific set of doctrines and specific social phenomena. The waning of some of those doctrines have diminished though not altogether eliminated the need for *forum non conveniens*, which always has had a suspect status following *Erie's* declaration that there is “no federal general common law.”<sup>6</sup> While it is most certainly not the case that the underlying justification for the *forum non conveniens* doctrine has disappeared entirely, other doctrines may potentially better serve those residual functions. At bottom, then, we are entering an era where the *forum non conveniens* doctrine is ripe for radical reexamination.

## II. FORUM NON CONVENIENS AND JURISDICTION

To begin to develop this thesis, let me align myself with the views of Linda Silberman and Steve Burbank that the *forum non conveniens* doctrine cannot be understood except by reference to a polity's views on jurisdiction—judicial, prescriptive, and enforcement.<sup>7</sup> Seen in this light, at the early stages of the Republic, the need for a doctrine like *forum non conveniens* was rather thin. Courts took a narrow view of their judicial jurisdiction over non-residents and a similarly crabbed view of their legislatures' ability to regulate extraterritorial conduct.<sup>8</sup> The combined effect of these views was to reduce inter-jurisdictional competition because it was highly unlikely that more than one state (or nation) might lay claim to regulating (or resolving) a dispute.

Admiralty cases supplied the prime exception to the general lack of inter-jurisdictional competition. Foreign flagged vessels temporarily entering the United States might engage in conduct triggering some legal claim during their stay. Examples include claims by foreign seamen against foreign flagged vessels or, in the famous case of *Canada Malting Co. Ltd. v. Paterson Steamships Ltd.*, cases between two foreign flagged vessels

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6. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

7. Burbank, *supra* note 5; Silberman, *supra* note 5.

8. *See, e.g.*, *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (rejecting the extraterritorial application of U.S. law); *Pennoyer v. Neff*, 95 U.S. 714 (1877) (holding that a state only has jurisdiction over a non-resident if that person is served with process in the state or voluntarily appears).

that collided while technically in United States waters.<sup>9</sup> Under these circumstances, the need for a doctrine like *forum non conveniens* became readily apparent: more than one nation might reasonably lay claim to regulating the conduct at issue or resolving the dispute. Yet given the distinct “foreignness” of these admiralty cases, the doctrine (which often was not even formally denominated *forum non conveniens*) served a function more akin to the modern-day international comity doctrine.<sup>10</sup> A United States court would abstain from resolving the suit in order to avoid aggravating a foreign sovereign that might reasonably lay a superior claim to resolving the parties’ liabilities. Apart from these sorts of cases, so long as jurisdictional rules remained restrictive (and consequently the risks of jurisdictional competition limited) the need for a channeling doctrine like *forum non conveniens* remained correspondingly limited.

As jurisdictional rules loosened in the early decades of the twentieth century, the potential for jurisdictional competition grew. By this point, the *Pennoyer v. Neff*<sup>11</sup> doctrine had largely broken down. No longer was it strictly necessary that a non-resident defendant be personally served in the forum state or voluntarily appear there in order for *in personam* jurisdiction to lie. Instead its originally strict limits had become riddled with exceptions like consent, presence, and doing business.<sup>12</sup> As other scholars have thoroughly accounted,<sup>13</sup> the steady erosion of *Pennoyer* culminated in *International Shoe v. Washington*, which jettisoned this framework in favor of one based on “minimum contacts.”<sup>14</sup>

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9. *Canada Malting Co.*, 285 U.S. at 413.

10. For classic doctrinal definitions of comity, see *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522 n.27 (1987) (“Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.”); *Hilton v. Guyot*, 159 U.S. 113, 135 (1895) (“[T]he inquiry, therefore, what comity is, is only another mode of inquiring what the law is in respect to the force which the laws, judicial proceedings or other acts done in one State ought to have in another State.”). For a good scholarly exposition on the concept, see William S. Dodge, *International Comity in American Courts*, available at <http://www.asil.org/files/dodge.pdf>.

11. *Pennoyer*, 95 U.S. at 714.

12. See BORN & RUTLEDGE, *supra* note 2, at 86–91.

13. *Id.* at 933, n.1.

14. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

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Similar developments occurred in other fields. With respect to prescriptive jurisdiction, the territoriality principle exemplified by decisions like *American Banana*<sup>15</sup> was overtaken by tests grounded on the “effects” of a party’s conduct on the regulating jurisdiction.<sup>16</sup> In admiralty jurisdiction, the Court employed a multi-factor approach to the regulation of foreign-flagged vessels.<sup>17</sup> By relaxing the limits on prescriptive and judicial jurisdiction, these developments significantly enhanced the risks of interstate jurisdictional competition.

Amid these developments, it is hardly surprising that Paxton Blair issued his famous call for the increased judicial use of the previously obscure doctrine of *forum non conveniens*. Blair lamented the explosion of court dockets, the consequent burden on the courts, and the ultimate delay borne by the parties.<sup>18</sup>

Shortly thereafter, the *forum non conveniens* doctrine expanded its reach. The two Supreme Court decisions formally enshrining the doctrine in federal common law—*Gulf Oil v. Gilbert*<sup>19</sup> and *Koster v. Lumbermans Mutual Casualty Co.*<sup>20</sup>—both were decided a mere two years after the Supreme Court’s seminal decision in *International Shoe*. While these decisions certainly found support in the above-described admiralty decisions such as *Canada Malting*, they served a fundamentally different purpose. Instead of international comity, considerations of jurisdictional competition and forum shopping animated the Court’s treatment of the doctrine. Thus, the familiar factors guiding the *forum non conveniens* doctrine took greater account of the “private” interests of the litigants and not just the public interests of the regulating sovereign.

While the federal transfer statute eventually codified the doctrine for cases involving competition and forum shopping

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15. *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

16. *See, e.g.*, *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) (holding that U.S. antitrust law applies to actions committed outside the territory of the United States that are intended to and actually have an effect in the United States).

17. *See, e.g.*, *Lauritzen v. Larsen*, 345 U.S. 571, 583–91 (1953) (employing a seven-factor test).

18. *See Blair, supra* note 3, at 1, 25.

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

20. *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947).

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within the federal system,<sup>21</sup> cases involving competition and forum shopping across international boundaries remained unregulated by statute and instead subject to federal common law. The incidence of those transnational cases only grew more pronounced by the 1960's as the stream of commerce doctrine began to summon international manufacturers to distant U.S. forums based on the sale and resale of their products in the United States.<sup>22</sup>

The Court might have stemmed this rising tide of international jurisdictional competition by trimming back its liberalized judicial and prescriptive jurisdictional doctrines. Yet, in 1980, when Herbert Rubin prevailed in *World Wide Volkswagen v. Woodson*,<sup>23</sup> the issue of jurisdiction over the foreign manufacturers was not before the Court. Instead, the Court merely had to consider the effects of liberal conceptions of personal jurisdiction on interstate commerce, not international commerce. When *Piper Aircraft v. Reyno*<sup>24</sup> reached the Court a year later, *forum non conveniens* became the vehicle by which it could trim back excessive assertions of jurisdiction by United States courts in cases against foreign companies.

To do so, the *Reyno* Court transformed the doctrine in several critical respects. First, it required federal courts to consider the "adequacy" of the foreign forum (something not required by the earlier comity-based doctrine applied in *Canada Malting*)<sup>25</sup> and to set a low bar for adequacy.<sup>26</sup> Second, it articulated a principle of differentiated deference to the plain-

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21. 62 Stat. 937, June 25, 1948 (codified as amended at 28 U.S.C. § 1404 (2011)).

22. See, e.g., *Gray v. Am. Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432 (1961) (foreign radiator valve manufacturer did not directly conduct business in Illinois, but was subject to suit there when one of its valves malfunctioned and injured plaintiff); *Honeywell, Inc. v. Metz Apparatewerke*, 509 F.2d 1137 (7th Cir. 1975) (following *Gray* in federal court).

23. *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (addressing the question of whether New York corporations could be sued in Oklahoma).

24. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (declining to hear a claim related to a plane crash in Scotland on the basis of *forum non conveniens*).

25. See discussion in *supra* text accompanying notes 9–10.

26. Specifically, the Court held that differences in substantive law and even potential recovery did not render a forum inadequate. *Reyno*, 454 U.S. at 247–56.

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tiffs' choice of forum based on the plaintiffs' nationality, one of the few instances in Supreme Court jurisprudence where the Court affirmatively sanctioned a degree of discrimination based on nationality.<sup>27</sup> Third, drawing on the "private interest" factors that now animated the doctrine after *Gulf Oil and Koster*, the Court recognized the possibility of conditioning dismissal on the defendant's consent to various matters, including waiving certain defenses or honoring any judgment rendered by the foreign court. Thus, the modern form of the *forum non conveniens* doctrine embraced in *Reyno* can be understood to respond to a very particular set of conditions, namely the extensive jurisdictional competition enabled by the apex of liberalized doctrines of judicial and prescriptive jurisdiction.<sup>28</sup>

After *Reyno* jurisdictional and venue doctrines did not counterbalance each other as they did in the 1940's, but instead joined forces to increase restrictions on access to federal courts. In the years immediately following *Reyno*, United States law, both statutory and judge-made, underwent a series of changes that further reduced the risks of jurisdictional competition. The Foreign Trade Antitrust Improvements Act trimmed the exercise of prescriptive jurisdiction in the antitrust context.<sup>29</sup> Such statutory developments were paralleled on the judicial side by the articulation of comity-based limits on prescriptive jurisdiction (such as the *Timberlane* factors<sup>30</sup>) and, more generally, the reemergence of the territoriality ca-

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27. For criticism, see Burbank, *supra* note 5, at 393–94.

28. Here, I focus on the effect of these doctrinal developments in jurisdictional competition. As I have explained elsewhere, these developments also exacerbated comity concerns. The "adequacy" determination forced federal courts to make value-laden judgments about foreign forums, and the possibility of "conditional dismissals" invited courts to impose unwelcome procedural proscriptions on those foreign courts. See Peter B. Rutledge, *Toward a Functional Approach to Sovereign Equality*, 53 VA. J. INT'L L. 181 (2012).

29. 15 U.S.C. § 6a (2011).

30. *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976) ("The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.").

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non in cases like *Equal Employment Opportunity Commission v. Aramco*.<sup>31</sup> Developments in the judicial jurisdiction sphere complemented this trimming, especially the Court's reluctance to embrace any sweeping "stream of commerce" theory in its jurisprudence and its refusal to accept Justice Brennan's invitation to reconceptualize the whole canon of constitutional civil jurisdiction as a multi-faceted "fairness and reasonableness" test.<sup>32</sup>

More recent trends in the last decade have only accelerated the decline in jurisdictional competition, thereby further eroding the need for the *forum non conveniens* doctrine. The most significant trend has been the continued retraction of jurisdictional doctrines. On the prescriptive jurisdiction side, the Supreme Court's broad pronouncement in *Morrison v. National Australia Bank* that the presumption against the extraterritorial application of federal statutes applies "in all cases" has significantly reduced the risk of inter-jurisdictional regulatory competition over conduct taking place outside the territory of the United States.<sup>33</sup> On the judicial side, the Supreme Court's decision in *Goodyear v. Brown* largely shuts down general jurisdiction as a vehicle for exercising authority over cases involving foreign conduct and foreign defendants.<sup>34</sup> In a similar vein, the plurality opinion in *J McIntyre Machinery v. Nicastro* signals a broader intent on the part of at least four justices to return the constitutional rules governing judicial jurisdiction to their territorial roots (seemingly subject to a latitude given to Congress to authorize jurisdiction on the basis of nation-

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31. *Equal Emp't Opportunity Comm. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

32. *See Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 116 (1987) (Brennan, J., concurring in part and concurring in the judgment); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980) (Brennan, J., dissenting).

33. *Morrison v. Nat'l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2881 (2010). For a discussion of post-*Morrison* decisions, see Rutledge, *supra* note 28, at 195 n.64.

34. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (holding that occasional sales of tires in North Carolina through other Goodyear entities did not create sufficient links to the state to justify the exercise of general jurisdiction).

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wide contacts).<sup>35</sup> The collective effect of these developments is to reduce the incidence of jurisdictional competition and, consequently, to reduce the need for the *forum non conveniens* doctrine to operate as a mechanism for channeling disputes among different national forums.

While the trend in United States jurisprudence has been to reduce the need for *forum non conveniens*, the trend internationally has been to jettison the doctrine altogether. Europe did so long ago, preferring instead to opt for a “first filed” rule and a robust “*lis pendens*” doctrine (at least as pertains to forum shopping within European courts).<sup>36</sup> Similarly, the Hague Choice of Courts Convention (signed though not ratified by the United States) would abandon the doctrine entirely in disputes subject to forum selection clauses within the scope of the Convention.<sup>37</sup> As with the domestic developments in jurisdictional law, these international developments also have mitigated the need for a robust *forum non conveniens* doctrine in the twenty-first century.

### III. THE COUNTER-NARRATIVE

As with any conceptual account, there is a counter-narrative, and fairness to the doctrine requires me to address two bits of evidence suggesting that *forum non conveniens* should not be so lightly abandoned. The first is the Supreme Court’s decision in *Sinochem International v. Malaysian International Shipping Corporation*,<sup>38</sup> where a unanimous Court held that a district court could dismiss a case on *forum non conveniens* grounds without the need to address threshold jurisdictional issues like subject matter jurisdiction or personal jurisdiction. The effect of this decision was to accentuate the importance of *forum non conveniens* dismissals. Had the Court reached the opposite conclusion and required district courts to address juris-

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35. *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) (finding that jurisdiction would be improper where the foreign entity did not intentionally avail itself of the laws of New Jersey).

36. See Council Regulation 44/2001, art. 27, 2001 O.J. (L 12) 1 (EC) [hereinafter European Regulation 44/2001].

37. Hague Convention on Choice of Court Agreements arts. 4–5, June 30, 2005, 44 I.L.M. 1294, available at <http://www.hcch.net/upload/conventions/txt37en.pdf>.

38. *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422 (2007).

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dictional defenses before turning to venue defenses such as *forum non conveniens*, the use of the doctrine might well have been reduced.

While *Sinochem* enhanced the likelihood that courts would resolve cases on *forum non conveniens* grounds it should not be understood as an reaffirmation of the doctrine's essential importance as a device for channeling disputes among multiple forums laying claim to them. Instead, as I have explained elsewhere, the decision is best understood as an effort to conserve judicial resources.<sup>39</sup> Forcing district courts to follow a strict sequence for resolving cases (as early cases like *Steel Company*<sup>40</sup> were read to suggest) would require district courts to invest more resources to resolve nettlesome questions and risk an erroneous result. By contrast, the *Sinochem* approach, which accords district courts a degree of flexibility to choose from among potential non-merits grounds for dismissal, conserves judicial resources by allowing district courts to avoid complex issues and instead resolve a case on a more straightforward one. At bottom then, *Sinochem* should not be read to herald a reaffirmation of the importance of *forum non conveniens*.

The second and more problematic bit of evidence supporting the counter-narrative is the Supreme Court's decision in *Quackenbush v. Allstate Insurance Company*.<sup>41</sup> *Quackenbush* is a sleeper of a case for most lawyers but a dream for federal jurisdiction nerds. The Court held that a federal court may not abstain from exercising jurisdiction over a case where the only remedy sought by the plaintiff is damages (as opposed to equitable relief).<sup>42</sup> Taken literally, *Quackenbush* might well have been the death knell for the *forum non conveniens* doctrine because it prohibits almost precisely what a federal court does when it declines to exercise jurisdiction over a case in favor of a foreign forum.<sup>43</sup> Yet when it confronted the logical implications of its rule for the *forum non conveniens* doctrine the Court

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39. See Peter B. Rutledge, *Decisional Sequencing*, 62 ALA. L. REV. 1 (2010).

40. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) (rejecting the "hypothetical jurisdiction" doctrine that allowed consideration of merits issues before determining jurisdiction).

41. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996).

42. *Id.* at 716–23, 731.

43. Technically, an issue arises whether a district court resolving a case on *forum non conveniens* grounds should dismiss the case or merely suspend proceedings. The latter keeps the case on the court's docket. For a discus-

blinked. The end of Justice O'Connor's opinion (the part where the Court always confronts the greatest challenge to its rulings) distinguishes *forum non conveniens* from other abstention-related doctrines:

The fact that we have applied the *forum non conveniens* doctrine in this manner does not change our analysis in this case, where we deal with the scope of the *Burford* abstention doctrine. To be sure, the abstention doctrines and the doctrine of *forum non conveniens* proceed from a similar premise: In rare circumstances, federal courts can relinquish their jurisdiction in favor of another forum. But our abstention doctrine is of a distinct historical pedigree, and the traditional considerations behind dismissal for *forum non conveniens* differ markedly from those informing the decision to abstain. Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism. Dismissal for *forum non conveniens*, by contrast, has historically reflected a far broader range of considerations, most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality.<sup>44</sup>

This treatment of *forum non conveniens* in *Quackenbush* cannot be as easily rationalized as its treatment of the doctrine in *Sinochem*. The Court's opinion carefully avoids denying that the *forum non conveniens* doctrine involves the same considerations of comity and deference to other sovereigns that the Court uses to distinguish abstention doctrines. It hardly could have done so. As I explained above, it was precisely in such considerations that the doctrine found its origin in the United States.<sup>45</sup> Instead, the Court rather blithely notes that the doctrine has "reflected a far broader range of considerations"<sup>46</sup> without explaining precisely *why* those considerations countenance a different result. This weak reasoning suggests that the

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sion of this oft-overlooked remedial question, see BORN & RUTLEDGE, *supra* note 2.

44. *Quackenbush*, 517 U.S. at 722–23 (citations omitted).

45. See *supra* text accompanying note 9.

46. *Quackenbush*, 517 U.S. at 723.

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Court's salvaging of *forum non conveniens* from the jaws of its more general ruling limiting the application of abstention doctrine can only be understood as an affirmation of the doctrine's importance as a channeling device in transnational cases. In this regard, *Quackenbush* admittedly presents a challenge to my thesis that the doctrine is diminishing in importance. But this is so only because the Court failed to have the courage of its convictions and simply see their principle through to its logical conclusion.

#### IV. WHITHER FORUM NON CONVENIENS?

Given the waning relevance of *forum non conveniens* one is left to wonder precisely what role the doctrine plays today. It would appear to be of limited use to foreign defendants who already have firmer protections as a result of *Goodyear* and *Niastro*. It likewise has little role in cases involving foreign conduct and federal statutes now that *Morrison* limits the reach of federal law. Consequently, in the twenty-first century the doctrine would appear to have the greatest bite in cases involving tort and other common law claims based on conduct taking place abroad but brought in the United States by foreign plaintiffs against domestic defendants because of some perceived procedural advantage (such as class action, discovery, or attorneys' fees).<sup>47</sup>

Seen in this light, the continued vitality of the doctrine of *forum non conveniens* raises two fundamental questions. First, *should* there be a doctrine essentially designed to allow domestic defendants to avoid jurisdiction in their own home forums? Second, even assuming that such a doctrine should exist as a matter of policy, *what institution* should engage in that policy assessment?

One could well imagine that the answer to the first question would be "no." Home forums might well have a strong regulatory interest in having disputes involving their local companies heard at home. Moreover, plaintiffs might well file in the defendant's home forum not in order to secure some tactical advantage, but simply to enhance the enforceability of an eventual judgment (particularly where the domestic defen-

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47. I thank Linda Silberman, Steve Burbank, and Judge Diane Wood for their observations on this point during conversation following my remarks at the symposium.

dant lacks assets in the forum where the underlying events took place). Of course, good countervailing arguments exist on the other side of this question. Certainly there have been instances where a foreign plaintiffs' choice of forum can be explained by nothing other than naked forum shopping. *Reyno* might well be a good example.<sup>48</sup> Moreover, doctrines like conditional dismissals can address the concern about judgment enforceability by requiring that the domestic defendant agree to be bound by and to execute on the eventual judgment following the *forum non conveniens* dismissal.

As to the second question, one could well imagine that the answer would be “Congress should engage in the policy assessment.” Obviously, Congress has authorized federal court jurisdiction over certain cases, and the *forum non conveniens* doctrine interferes with a court’s “unflagging obligation”<sup>49</sup> to exercise its jurisdiction over those cases. Moreover, because Congress has seen fit in other contexts to instruct courts when they should stay their hand, it stands to reason that when they *don’t* do so courts should be reluctant to step in and arrogate the power to decline jurisdiction unto themselves.<sup>50</sup>

Here too, of course, there is a counterargument. One might contend that the *forum non conveniens* doctrine serves as a sort of gap filler for cases that Congress could not have anticipated when it authorized subject matter jurisdiction. Alternatively, one could point to the decades of congressional silence since the Supreme Court first formalized the *forum non conveniens* doctrine.<sup>51</sup> While that argument is not without its detractors,<sup>52</sup> it finds some support in legislation which demon-

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48. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 237 (1981).

49. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

50. See, e.g., 26 U.S.C. § 7421 (2011) (prohibiting suits “for the purpose of restraining the assessment or collection of any tax”); 28 U.S.C. § 1341 (limiting the ability of federal district courts to enjoin state law tax collection proceedings); Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified in statutory note following 28 U.S.C. § 1350) (requiring exhaustion of remedies in the jurisdiction where conduct giving rise to the claim occurred).

51. See, e.g., *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530 (1967) (finding tacit consent in Congressional silence with respect to the federal interpleader statute).

52. See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting) (“The majority’s response . . . asserts that, since ‘Congress has

strates that Congress knows perfectly well how to forbid the courts from applying judicially crafted abstention-based doctrines it disagrees with.<sup>53</sup> Congress's failure to do so in the *forum non conveniens* context could thus be understood as a sort of tacit approval.

At this point in the argument, it is perhaps appropriate to clearly state what I am saying—and what I am not. In no way do I fault American companies for seeking *forum non conveniens* dismissals. Forum shopping unquestionably occurs, and the *forum non conveniens* doctrine supplies an efficacious tool for combatting it. At the same time, I am saying that, given the evolutions in jurisdictional doctrines, *forum non conveniens* might not be the best calibrated tool for addressing the residual set of cases in which it appears to remain most important. So what would an alternative look like?

Four alternatives present themselves. One alternative would be for the Supreme Court to abolish the *forum non conveniens* doctrine altogether. This would have the palliative effect of a forcing rule<sup>54</sup> prompting Congress to either embrace a statute not unlike Section 1404<sup>55</sup> (except regulating the suspension or dismissal of cases in favor of a foreign court instead of a transfer within the federal system) or accept the doctrine's demise. The downside of this approach is that it presupposes a congressional willingness to act. Absent congressional action this approach would leave domestic defendants vulnerable to excessive forum shopping by plaintiffs.

A second option would be to scale back the doctrine to one more concerned with comity and restore the doctrine to its *Canada Malting* roots. This would have several salutary effects. It would get courts out of the business of making value-laden judgments about whether a foreign forum is "adequate." It likewise would get courts out of the business of discriminat-

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not amended the statute to reject our construction, . . . we . . . may assume that our interpretation was correct.' This assumption, which frequently haunts our opinions, should be put to rest.").

53. See, e.g., Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (2011) (restricting the application of the act of state doctrine); Helms-Burton Act, 22 U.S.C. § 6082(a)(6) (2011) (same).

54. For a discussion of these rules, see generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 95–100 (1989).

55. 28 U.S.C. § 1404 (2011).

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ing among domestic and foreign plaintiffs, something not authorized by the statutes granting subject matter jurisdiction.<sup>56</sup> Finally, it would reduce the need for paternalistic “conditional dismissals.” Instead, a comity-based approach would enable a *court* to undertake a nuanced case-by-case analysis of the particular implications of the exercise of jurisdiction for the foreign relations of the United States.

Third, the Supreme Court might move in the direction of the European model and replace *forum non conveniens* with a *lis alibi pendens* approach. Under a *lis alibi pendens* approach, courts presumptively defer to the first court in which a suit is filed, at least until that court has ascertained whether it has competence over the dispute. This has been the approach adopted in European Regulation 44/2001 with respect to parallel proceedings filed within the European Union.<sup>57</sup> The upsides of this approach include a relative clarity as well as avoidance of the sorts of value-laden judgments that sometimes bedevil the *forum non conveniens* doctrine (both as a positive and normative matter). The downside, as the European experience with the *lis pendens* doctrine has demonstrated, is that it can actually worsen forum shopping.<sup>58</sup> Defendants have little recourse in cases where plaintiffs exploit broad theories of jurisdiction, and on the other side of the coin, plaintiffs may have little recourse if defendants file a preemptive suit to tie them up in protracted litigation in unfriendly forums (like Italy) known to move exceptionally slowly.<sup>59</sup>

Fourth, the Supreme Court might move in the direction of a much more modest version of the *forum non conveniens* doctrine along the lines of proposed Articles 21 and 22 of the draft Hague Convention on Jurisdiction and Judgments.<sup>60</sup> Although generally adopting an approach similar to *lis pendens*,

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56. See text accompanying *infra* note 63.

57. See European Regulation 44/2001, *supra* note 36.

58. See Peter B. Rutledge, *Convergence and Divergence in International Dispute Resolution*, 2012 J. DISP. RES. 49, 55.

59. Case C-185/07, *Allianz SpA v. West Tankers Inc.*, 2009 E.C.R. I-663, [2009] 1 Lloyd's Rep. 413, 416–17 (holding that the use of an anti-suit injunction to prevent parties from using such a tactic is incompatible with European Regulation 44/2001).

60. See Hague Preliminary Draft Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, arts. 21–22, Oct. 30, 1999, available at <http://www.hcch.net/upload/wop/jdgm11.pdf>.

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articles 21 and 22 envisioned a limited opportunity for *forum non conveniens* dismissal where warranted by the private interests of the case.<sup>61</sup> In contrast to the rigid “first filed” rule such as that which predominates in Europe, this would mitigate the worst risks of forum shopping while avoiding mirroring courts in value-laden judgments about the “public interest” in where a suit should be heard.<sup>62</sup>

Whichever of these innovations a Supreme Court were to adopt, they would herald several improvements over the current version of the *forum non conveniens* doctrine. For one thing, any of these versions would avoid the difficulties that have arisen over the proper level of deference to the plaintiffs’ choice of forum. *Reyno* suggested a rather blunt approach that essentially favored enhanced deference to domestic plaintiffs and weaker deference to foreign ones. Not only does this approach seemingly embed a principle of discrimination in the doctrine as Steve Burbank has observed, it has proven remarkably difficult to apply in cases where the plaintiffs comprise an amalgam of domestic and foreign parties.<sup>63</sup> Notwithstanding the Second Circuit’s commendable efforts in the *Irragori* decision to put some flesh on the bones of *Reyno*’s general principle of deference to the plaintiffs’ choice of forum,<sup>64</sup> the doctrine remains hopelessly opaque. Reforms along the lines described above avoid these difficulties.

Any of the four potential paths for reform I have identified also would obviate the need to undertake the adequacy analysis. As I have explained elsewhere, the adequacy analysis actually undercuts one of the central purposes of the doctrine.<sup>65</sup> While the *forum non conveniens* doctrine aims to minimize jurisdictional competition (presumably on the theory that this somehow exacerbates international tensions), the ad-

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61. *See id.*

62. For a good description of the draft Convention’s history, see BRAND & JABLONSKI, *supra* note 5.

63. *See* Burbank, *supra* note 5, at 393–94. For a difficult case on how to apply the deference principle, see *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321 (11th Cir. 2011) (plaintiffs in consolidated action were largely though not exclusively foreign).

64. *See Irragori v. United Techs. Corp.*, 274 F.3d 65 (2d Cir. 2001) (en banc) (setting out a “sliding scale” of deference to plaintiff’s choice of forum).

65. Rutledge, *supra* note 28, at 187–88.

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equacy analysis simply worsens matters by miring courts in value-laden judgments about the acceptability or unacceptability of a foreign forum. To make matters worse, unlike the retrospective “fairness” analysis that courts sometimes must undertake when deciding whether to enforce a foreign judgment, the “adequacy” analysis prong of *forum non conveniens* requires courts to undertake a prospective prediction about how they *think* a foreign forum will assess the lawsuit.

Finally, any of these variations would also avoid adventurous misapplications of the doctrine. Among the most egregious has been the occasional trend, unfortunately in the Second Circuit, to allow for *forum non conveniens* dismissals in the enforcement of certain treaty rights such as those under the New York Convention.<sup>66</sup> The entire purpose underlying the New York Convention is to enhance the currency of arbitral awards and to make open the courts of signatory countries (for instance where the award debtor has assets in those countries). Thus, as Judge Lynch recently observed in his trenchant dissent in the *Figueiredo* case in the Second Circuit, to apply the *forum non conveniens* doctrine in actions to enforce rights granted under those treaties seemingly violates the international law obligations of the signatory state.<sup>67</sup> Reformulating the *forum non conveniens* doctrine as a comity principle or eliminating it altogether subject to congressional override would eliminate the possibility that courts will construe the doctrine to apply in these sorts of settings, where the international law obligations of the United States coupled with the general grant of jurisdiction by Congress create a double presumption in favor of hearing the case.

The theme of this symposium—“Tug of War: The Tension Between Regulation and International Cooperation”—has many facets. As José Alvarez explained in his opening remarks, one facet is the degree to which countries, including the United States, will tolerate jurisdictional competition or instead employ doctrines designed to mitigate it. In my view, shifts in the jurisdictional paradigm, particularly over the last two decades (including ones to which Herbert Rubin contrib-

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66. See *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011); *Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 497–98 (2d Cir. 2002).

67. See *Figueiredo*, 665 F.3d at 394 (Lynch, J., dissenting).

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uted on behalf of his clients), have diminished the importance of *forum non conveniens* as a device to mitigate such competition. To be sure, the need for such a doctrine has not been eliminated entirely, but other more modest measures might fill the gap. Thus, with respect to this particular "tug of war" I stand on the other side of the rope from Paxton Blair. At present I may not be pulling strongly, but if present trends continue, I expect to see a continued move away from Blair's doctrine as a solution to the diminishing problem of inter-jurisdictional competition.

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