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FORUM NON CONVENIENS IN FEDERAL STATUTORY CASES[†]

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I. INTRODUCTION

“We have no more right to decline to exercise the jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution,” Chief Justice John Marshall emphatically declared in *Cohens v. Virginia*.¹ Yet, nearly two decades before making this sweeping exclamation of mandatory jurisdiction, the Supreme Court held that an admiralty court could decline to exercise its jurisdiction over a dispute between non-citizens—an apparently “treasonous” ruling by none other than Marshall himself.²

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¹ 19 U.S. (6 Wheat.) 264, 404 (1821). In other and more recent contexts, the Court has expressed a similarly broad principle of mandatory jurisdiction. For instance, in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the Court noted that

[a]bstention from the exercise of federal jurisdiction is the exception, not the rule. “The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstance where the order to the parties to repair to the state court would clearly serve an important countervailing interest.”

Id. at 813 (quoting *County of Allegheny v. Frank Mastuda Co.*, 360 U.S. 185, 188-89 (1959)). See generally Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (discussing the principle of mandatory jurisdiction); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (same); *infra* text accompanying notes 390-99 (discussing the “obligation theory” of federal jurisdiction).

² *Mason v. The Blaireau*, 6 U.S. (2 Cranch) 240, 264 (1804).

Two centuries later, the federal doctrine of *forum non conveniens*—to borrow a phrase from Justice Robert Jackson—remains one of the “soft spots in the judicial system.”³ The doctrine of *forum non conveniens* empowers a court vested with jurisdiction to decline to exercise that jurisdiction over a particular dispute.⁴ As a judge-made mechanism for controlling access to the courts and regulating caseloads, the doctrine has always threatened to be one of the points at which judicial and legislative power may collide. Indeed, in its landmark decision affirming the federal doctrine of *forum non conveniens*, the Court in *Gulf Oil Corp. v. Gilbert*⁵ divided over the basic jurisprudential issue of whether courts may decline to exercise the jurisdiction granted to them by the legislative branch.⁶ The tension present when courts have, as in *Gilbert*, declined to exercise diversity jurisdiction over common law claims is even more pronounced when a claim for relief is premised on a violation of a federal statute.

As the new millennium dawns, lower federal courts are splintered over whether, and under what circumstances, a district court may dismiss a federal statutory case⁷ on *forum non conveniens* grounds. At various times, the Sec-

³ *Miles v. Illinois Cent. R.R.*, 315 U.S. 698, 706 (1942) (Jackson, J., concurring).

⁴ See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) (“The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.” (emphasis omitted)). See generally GARY E. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY & MATERIALS* 289 (3d ed. 1996).

The federal doctrine of *forum non conveniens* overlaps with other discretionary doctrines, such as federal abstention doctrine. See *supra* note 1. The Supreme Court has noted this overlap, and has struggled to define the precise contours of the distinction between abstention and *forum non conveniens*. See, e.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 721-23 (1996) (discussing the scope of the *Burford* abstention doctrine and its relationship with federal *forum non conveniens* doctrine); see also Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 TUL. J. INT’L & COMP. L. 111, 120 (1999) (observing that “in rationalizing and limiting the power of the federal courts to dismiss cases by abstaining in favor of state courts in the *Quackenbush* case, the Supreme Court recognized, but did not seek to justify, *forum non conveniens* as discrete”).

⁵ 330 U.S. 501 (1947).

⁶ Compare *id.* at 504 (Jackson, J., writing for the majority) (“This Court, in one form of words or another, has repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances.”), with *id.* at 513 (Black, J., dissenting) (“Neither the venue statute nor the statute which has governed jurisdiction since 1789 contains any indication or implication that a federal district court, once satisfied that jurisdiction and venue requirements have been met, may decline to exercise its jurisdiction.”).

⁷ We use the phrase “federal statutory case” as shorthand to refer to a case in which the plaintiff alleges a claim for relief premised on violation of a federal statute with a specific venue provision. The cases discussed in Parts II and III involve the application of the federal *forum non conveniens* doctrine in cases where the federal statute pleaded as grounds for relief contained or was accompanied by a specific venue provision dictating where, in addition to or in lieu of those courts identified by the general venue statute, suit could be maintained.

ond, Fifth, Ninth, Tenth, and Eleventh Circuits, along with several federal district courts, have held that a district court lacks discretionary dismissal authority in federal statutory cases.⁸ Adopting what is often referred to as a “modified approach” to forum non conveniens, these courts have concluded that Congress intended to preempt judicial discretion to decline jurisdiction under the forum non conveniens doctrine for claims properly brought under certain federal statutes. Many of these courts have purported to find evidence of legislative intent to trump judicial discretion in the existence of “special” statutory venue provisions.⁹ Although only a handful have been the subject of litigation involving the forum non conveniens doctrine, such “special” venue provisions are hardly rare. In hundreds of statutes currently in force,¹⁰ Congress has prescribed both a remedy and one or more venues in addition to or in lieu of those provided by the general venue statute.¹¹

In contrast to this modified approach, the First Circuit and more recent decisions of the Second Circuit apply the traditional *Gilbert* forum non conveniens analysis, refusing to exempt any federal statutory claim from forum non conveniens dismissal—even claims governed by statutes containing specific venue provisions.¹² Although they recognize that Congress has the power to limit forum non conveniens authority, these courts have concluded that Congress has never expressly done so.

We have chosen the phrase “federal statutory case” over “federal question case” because a “federal question case” is commonly understood to refer to a case in which at least one of the plaintiff’s claims for relief “arises under” the Constitution, laws, or treaties of the United States. *See* U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 1331 (1994 & Supp. IV 1998). *See generally* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 878-83 (4th ed. 1996) (describing federal question jurisdiction). We do not address the propriety of forum non conveniens dismissal of constitutional or treaty-based claims. We also do not address forum non conveniens doctrine under state law.

⁸ *See infra* notes 166-73, 256-60, 270-95, 305-07, 310-12 and accompanying text.

⁹ *See, e.g., infra* text accompanying notes 53-55 and 100-03.

¹⁰ *See* American Law Institute, Study of Division of Jurisdiction Between State and Federal Court, Official Draft, Appendix F, at 498-501 (1969) (cataloguing more than 330 venue provisions in U.S. Code sections other than Title 28); 17 GEORGENE M. VAIRO, MOORE’S FEDERAL PRACTICE § 110.60 (3d ed. 1997) (identifying and summarizing more than 120 statutory venue provisions); *see, e.g.,* 28 U.S.C. §§ 1400-03, 1407-10, 1413-14 (1994). *See generally* 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION & RELATED MATTERS §§ 3804, 3816-25 (2d ed. 1986 & Supp. 1999); Gary P. Naftalis & Michael S. Oberman, *Venue, Forum Selection, and Transfer*, in 1 BUSINESS & COMMERCIAL LITIGATION IN FEDERAL COURTS § 3.5 (Robert L. Haig ed., 1998) (both commenting in some detail on the plethora of special venue statutes and addressing several—including those covering statutory admiralty, antitrust, copyright, patent, RICO, and securities claims).

¹¹ *See* 28 U.S.C. § 1391 (1994).

¹² *See infra* notes 190-244, 328-42 and accompanying text.

The pervasiveness of the problem is marked not only by division among the circuits, but also by seemingly inconsistent decisions within individual circuits. For instance, the Fifth Circuit has held that antitrust cases governed by the Sherman¹³ and Clayton Acts¹⁴ are exempt from forum non conveniens dismissal,¹⁵ while claims arising under the Racketeer Influenced and Corrupt Organizations Act ("RICO"),¹⁶ and actions subject to § 157(b)(5) of the Bankruptcy Code,¹⁷ may be dismissed at the trial court's discretion despite the presence of a specific venue provision.¹⁸ For many years the Second and Fifth Circuits afforded a similar exemption to cases governed by the Jones Act,¹⁹ but have since disclaimed that exemption.²⁰ The Ninth and Eleventh Circuits exempt Jones Act cases from discretionary forum non conveniens dismissal,²¹ but do not similarly exempt claims governed by the Carriage of Goods by Sea Act ("COGSA"),²² RICO,²³ the Copyright Act,²⁴ or the Lanham Act.²⁵ Even courts that follow a similar approach to forum non conveniens in federal statutory cases often do so for dissimilar reasons. Thus, the First Circuit's reasoning diverges from that of more recent Second Circuit decisions, even though both circuits now refuse to depart from applying the traditional *Gilbert* test in all federal statutory cases.²⁶

What explains this remarkable inconsistency in the applicability of forum non conveniens when the plaintiff has alleged that a federal statute affords her a right of recovery? The answer is surely multifaceted, and may include that the federal doctrine of forum non conveniens is judge-made and, thus, evolves over time, and that individual cases must, of necessity, be handled individually. Yet, there are two other, more central explanations for the considerable confusion and divergence of opinion among the lower federal courts.

¹³ 15 U.S.C. § 1 (1994).

¹⁴ 15 U.S.C. §§ 12-14, 19-21, 22-27 (1994 & Supp. IV 1998).

¹⁵ See *infra* text accompanying notes 270-95.

¹⁶ 18 U.S.C. §§ 1961-1968 (1994 & Supp. IV 1998).

¹⁷ 28 U.S.C. § 157(b)(5) (1994).

¹⁸ See *infra* text accompanying notes 294-302.

¹⁹ 46 U.S.C. app. § 688 (1994); see *infra* text accompanying notes 166-73 and 256-60.

²⁰ See *infra* text accompanying notes 191-215 and 263-72.

²¹ See *infra* notes 305 and 307 and accompanying text.

²² 46 U.S.C. app. §§ 1300-1315 (1994); see *infra* note 314.

²³ See *infra* note 317.

²⁴ 17 U.S.C. §§ 101-1332 (1994 & Supp. 1998); see *infra* note 316 and text accompanying notes 321-27.

²⁵ 15 U.S.C. § 1051-1127 (1994 & Supp. 1998); see *infra* note 320.

²⁶ See *infra* notes 190-244, 328-42 and accompanying text.

The first essential difficulty courts face in applying the forum non conveniens doctrine in federal statutory cases is the persistent problem of ascertaining legislative intent. It is widely accepted that Congress may restrict the discretionary dismissal authority of courts under the forum non conveniens doctrine. Yet, in no statute currently in force has Congress expressly granted or refused courts the authority to decline jurisdiction on the grounds of forum non conveniens. Courts have been left, then, to try to ascertain legislative intent in the absence of clear direction from Congress. Sharing a common assumption that Congress possesses authority to trump judicial discretion to decline jurisdiction, the lower courts diverge over whether—and, if so, under which statutes—Congress has exercised its authority to grant blanket exemption from forum non conveniens dismissal in any federal statute.

Even when a court determines that Congress did not intend to trump judicial discretion entirely, a second problem in applying the doctrine in federal statutory cases is that, under the *Gilbert* test, the “ultimate inquiry” in deciding whether a court should retain or decline jurisdiction “is where trial will best serve the convenience of the parties and the ends of justice.”²⁷ To determine how convenience and the ends of justice will be best served, a district court must balance a variety of fact-intensive, and sometimes competing, “private” and “public” interest factors outlined by the Supreme Court in *Gilbert* and reaffirmed in *Piper Aircraft Co. v. Reyno*.²⁸ In so doing, a district court is supposed to accord no greater significance to one factor than to any other.²⁹ Yet, as we argue below, a fundamental deficiency in the current law is that, at least in federal statutory cases, federal forum non conveniens doctrine should—but does not—explicitly emphasize the central importance of determining which sovereign has the more compelling interest in adjudicating the dispute.

²⁷ *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 527 (1947); see also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981) (“[T]he central focus of the forum non conveniens inquiry is convenience . . .”).

²⁸ 454 U.S. 235 (1981); see, e.g., *Pereira v. Utah Transp., Inc.*, 764 F.2d 686, 689 (9th Cir. 1985), cert. dismissed, 475 U.S. 1040 (1986). In the opinion of at least one commentator, the “overly extensive criteria” applied by American courts “have led to an unpredictable, non-uniform, and sometimes ‘chaotic’ application of the doctrine.” See Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, 16 LOY. L.A. INT’L & COMP. L.J. 455, 508 (1994).

²⁹ See *Piper Aircraft*, 454 U.S. at 249-50 (observing that “[i]f central emphasis were placed on any one factor, the forum non conveniens doctrine would lose much of the very flexibility that makes it so valuable”).

Our analysis begins with the current state of the forum non conveniens doctrine in federal statutory cases.³⁰ Part II examines the Supreme Court's efforts to define a role for forum non conveniens when Congress has provided both a statutory remedy and the specific venue(s) in which a plaintiff may bring suit. Part III examines the consequences of the Supreme Court's forum non conveniens jurisprudence by considering how the lower federal courts have applied the doctrine in federal statutory cases.

Finally, in Part IV, we discuss the deficiencies of the current forum non conveniens doctrine in cases in which the plaintiff alleges that a federal statute provides her right to recovery, and we offer some suggestions for improving the doctrine's application in these cases. The challenge in addressing the shortcomings of the current forum non conveniens doctrine in federal statutory cases is two-fold. First, there is the issue of ascertaining legislative intent, if any, concerning the applicability of forum non conveniens in federal statutory cases. Second, to the extent that Congress did not intend to deprive courts of the discretion to dismiss cases over which they properly have jurisdiction, when and under what circumstances is the exercise of such discretion appropriate?

Although Congress may restrict a court's exercise of authority under the forum non conveniens doctrine, we argue that, absent a clear statement of congressional intent to abrogate the doctrine, the better rule is to presume that courts possess the discretion to decline jurisdiction. Assuming such discretion exists, we then argue that a court most appropriately exercises it, first and foremost, to ensure that the forum with the more significant interest in the dispute adjudicates it; and, only secondarily, to decline the exercise of jurisdiction when it would be seriously inconvenient for the suit to proceed in the forum court. Competing sovereign interests are part of current forum non conveniens doctrine, but their importance may be masked because they are only one of the many private and public interest factors a court must currently balance.³¹ If the forum non conveniens inquiry in federal statutory cases recognized the central importance of sovereign interest analysis, the doctrine would better support the most compelling reasons for granting federal courts discretionary dismissal authority.

³⁰ For a discussion of the history and original purposes of forum non conveniens doctrine generally, see, for example, 15 WRIGHT ET AL., *supra* note 10, § 3828; Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947); Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781 (1985).

³¹ See *infra* notes 421-29 and accompanying text.

II. FORUM NON CONVENIENS DOCTRINE IN THE SUPREME COURT

The tension between the judiciary's prerogative to decline to exercise jurisdiction and the legislature's prerogative to prescribe the place of suit has long troubled the Supreme Court. It is symptomatic of the Supreme Court's forum non conveniens jurisprudence that, at various times, two seemingly incompatible principles have been embraced to justify its forum non conveniens law. One principle is that courts are without any discretion to decline to exercise jurisdiction over a case brought in a district authorized by legislative decree.³² A second, countervailing principle suggests that courts possess broad discretion to decline to exercise jurisdiction notwithstanding the establishment of specific rules by Congress apportioning jurisdiction and venue.

This Part examines the Court's jurisprudence in three stages, although it readily should be observed that, in large measure, this tripartite division is artificial. The first stage is comprised of the Court's pre-1947 body of common law addressing the judiciary's discretionary dismissal powers in federal statutory cases. The second stage is devoted to *Gulf Oil Corp. v. Gilbert*,³³ the mainsail of federal forum non conveniens doctrine since 1947. The third and final stage includes congressional enactment of 28 U.S.C. § 1404, the general venue transfer provision, and the Supreme Court's post-*Gilbert* decisions interpreting section 1404's and *Gilbert*'s impact on the availability of discretionary dismissal when the alternative forum lies outside the United States.

It is possible at every jurisprudential stage to see that the Court simultaneously has embraced both a broad discretionary dismissal power and a greater deference to the legislative pronouncement of where suit may be brought. What is evident is that, more than a half century after *Gilbert*, the Court continues to struggle with defining the limits of the common law forum non conveniens doctrine.

A. *Discretionary Forum Non Conveniens Dismissal in the Supreme Court Before 1947*

There is sharp disagreement over the extent to which, prior to *Gilbert*, the Supreme Court recognized a court's discretionary right to dismiss a suit over which the court could properly exercise jurisdiction and venue. In *Gilbert*, Justice Jackson observed that the Court, "in one form of words or another, has

³² See *infra* text accompanying notes 38-78.

³³ 330 U.S. 501 (1947).

repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances.”³⁴ All members of that Court, however, did not share his view. Justice Black, in dissent, offered this rebuttal: “Neither the venue statute nor the statute which has governed jurisdiction since 1789 contains any indication or implication that a federal district court, once satisfied that jurisdiction and venue requirements have been met, may decline to exercise its jurisdiction.”³⁵ Justice Black maintained that, while a discretionary dismissal power had been recognized in admiralty and equity cases, never before the decision in *Gilbert* had the Supreme Court held that a court could decline to exercise its jurisdiction “in actions for money damages for violations of common law or statutory rights.”³⁶

Even if the Court had suggested on some occasions before 1947 that a general power to decline jurisdiction existed,³⁷ it typically upheld dismissals only when it perceived that the dismissal did not interfere with the legislature’s determination of where a suit could properly be maintained. If the Court believed that Congress had enacted a specific rule to govern where suit could be brought, the Court generally was reluctant to permit discretionary dismissal from the selected forum.

The most prominent of the decisions limiting the power of discretionary dismissal—and the thorniest of the cases that the *Gilbert* Court eventually would have to distinguish—is *Baltimore & Ohio Railroad v. Kepner*.³⁸ In *Kepner*, an employee of the Baltimore & Ohio Railroad who had sustained job-related personal injuries brought an action under the Federal Employers’ Liability Act (“FELA”)³⁹ in the United States District Court for the Eastern District of New York.⁴⁰ Kepner, an Ohio resident who had been injured in Ohio, apparently decided that he could secure more favorable relief from the New York federal court than from an Ohio court.⁴¹ Although it may seem odd for a

³⁴ *Id.* at 504.

³⁵ *Id.* at 513 (Black, J., dissenting).

³⁶ *Id.*

³⁷ See *infra* text accompanying note 79.

³⁸ 314 U.S. 44 (1941).

³⁹ 45 U.S.C. §§ 51-60 (1994).

⁴⁰ See *Kepner*, 314 U.S. at 48.

⁴¹ The plaintiff’s action in *Kepner* illustrates that parties have long chosen fora based not on convenience—it would certainly have been cheaper and more convenient for this Ohio plaintiff to sue in Ohio—but based on where they believe the substantive law most favors them. See, e.g., *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 164 (2d Cir. 1980) (en banc reconsideration of appeal from judgment) (Van Graafeiland, J., dissenting) (“We are not so naive as to believe that the dispute between the parties . . . concerns the convenience of witnesses. This Court is really being asked to decide whether the defendants may

plaintiff to seek relief far from his home state, this appears to have been a common litigation strategy in FELA cases.⁴²

In response to Kepner's complaint, the railroad brought an action in Ohio state court seeking to enjoin Kepner's federal suit in New York.⁴³ Why the railroad sought injunctive relief from the Ohio state court judge rather than asking the New York federal court for a dismissal is open to speculation. Perhaps the railroad's failure to ask the New York federal district court to dismiss the action may have stemmed from its belief that its significant New York presence precluded it from arguing that litigating there would burden the railroad sufficiently to justify dismissal. Of course, it is also possible that the railroad simply felt more confident of convincing the Ohio judge to grant it relief.⁴⁴

Section 6 of FELA provided that venue was permissible "in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."⁴⁵ The railroad, which had begun operations one hundred years earlier in Baltimore,⁴⁶ did not dispute that it was doing business in New York within

reduce their obvious liability to the plaintiff by being given the benefit of Trinidad's limitation of liability statute."). Other factors that seem, in practice, to eclipse the convenience of the parties include favorable choice-of-law rules, see, e.g., *Piper Aircraft*, 454 U.S. at 250 (commenting that "[o]rdinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous"); see also Linda Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 82-83 (1978) (observing that the "impact of a conflict of laws decision more seriously affects the rights of the parties than a decision on jurisdiction which merely directs the parties to an appropriate forum in which to litigate their case"), and the availability of a presumptively favorable trier of fact, see Russell J. Weintraub, *Admiralty Choice-of-Law Rules for Damages*, 28 J. MAR. L. & COM. 237, 253 (1992) (commenting that, even when foreign law provides the measure of recovery, "the slogan of a plaintiff's lawyer might well be, 'give me French law, give me German law, give me Ugandan law, just give me an American jury'"). See generally Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769, 776-77 (1995) (observing that "[l]itigators are well aware of the careful maneuvering over where a lawsuit will proceed and believe—rightly or wrongly—that the answer to the 'where' question may drastically impact the ultimate outcome of the case," and that "[j]urisdictional disputes often turn on the preferences of parties for one court, or one court system, over another").

⁴² See GEOFFREY C. HAZARD, JR. ET AL., *PLEADING AND PROCEDURE: STATE AND FEDERAL CASES AND MATERIALS* 464 (8th ed. 1999) (noting that "Kepner was typical of a large number of cases in which FELA plaintiffs brought suit in distant forums in order to secure litigation advantage not available at home").

⁴³ See *Kepner*, 314 U.S. at 48.

⁴⁴ Cf. *supra* note 41.

⁴⁵ 45 U.S.C. § 56 (1994).

⁴⁶ SARAH H. GORDON, *PASSAGE TO UNION: HOW THE RAILROADS TRANSFORMED AMERICAN LIFE 1829-1929*, at 27 (1996) (chronicling that the Baltimore & Ohio Railroad began operations in May 1830, although at the time it had not yet acquired a steam locomotive).

the meaning of this venue provision.⁴⁷ The railroad argued, however, that suit would have been more conveniently brought in Ohio, and that Kepner was "acting in a vexatious and inequitable manner in maintaining the federal court suit in a distant jurisdiction when a convenient and suitable forum" was at Kepner's "doorstep."⁴⁸ The incident occurred in Ohio, and Kepner was from Ohio, as were nearly all of the witnesses (possibly as many as twenty-five) who would be required to travel to New York at considerable expense to testify.⁴⁹ Moreover, the state and federal courts in Ohio were open to Kepner. The railroad argued "that the continued prosecution of the federal court action would be an undue burden on interstate commerce" and "an unreasonable, improper and inequitable burden" on it.⁵⁰ Thus, the railroad argued, the state courts should continue to possess the discretionary power to enjoin an inconvenient suit, notwithstanding the FELA venue provision.⁵¹

The trial court in *Kepner* dismissed the railroad's state court suit. Its decision was upheld by an Ohio court of appeals, and then by the Ohio Supreme Court, on the grounds that the plaintiff, as the railroad's employee, was privileged to enjoy the venue allowed by FELA without interference from a state court.⁵² The United States Supreme Court, likewise, rejected the railroad's argument. The Court relied heavily on Congress's purpose in enacting the FELA venue statute, observing that, before this special venue statute was enacted, venue over FELA actions was governed by the general venue statute, which at the time permitted suit to be brought only in the district the defendant inhabited.⁵³ Congress enacted section 6 out of concern for ameliorating "the injustice to an injured employee of compelling him to go to the possibly far distant

⁴⁷ See *Kepner*, 314 U.S. at 48, 51.

⁴⁸ *Id.* at 51.

⁴⁹ See *id.* at 48.

⁵⁰ *Id.* The irony that the Baltimore & Ohio Railroad—one of the first railroads to seek to connect the East Coast of the United States with the Ohio River to make life and commerce more convenient, efficient, and profitable—would now be arguing that suit in New York was inconvenient apparently went unexpressed. For an excellent general history of the founding of the Baltimore & Ohio Railroad, see JOHN F. STOVER, *HISTORY OF THE BALTIMORE & OHIO RAILROAD* (1987).

⁵¹ See *Kepner*, 314 U.S. at 53. In its brief to the Supreme Court, the railroad argued that both federal and English precedents established that "the mere conferring of jurisdiction by statute gives no absolute right to proceed in a court having jurisdiction so conferred, when there are good reasons for the trial of the case in another and more appropriate forum." Supplement to Brief for Petitioner on the Merits at 3, *Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44 (1941) (No. 20). Whatever discretionary dismissal power for which these authorities may have stood, though, it is evident from the railroad's brief that the law was not well established at the time in the federal courts. See *id.* at 2 (commenting that the doctrine is "frequently applied in England, and is sometimes referred to as the doctrine of *forum non conveniens*").

⁵² See *Baltimore & Ohio R.R. v. Kepner*, 30 N.E.2d 982, 985-86 (Ohio 1940), *aff'd*, 314 U.S. 44 (1941).

⁵³ See *Kepner*, 314 U.S. at 49.

place of habitation of the defendant carrier with consequent increased expense for the transportation and maintenance of witnesses, lawyers and parties away from their homes.”⁵⁴

The Court also recognized that the language Congress eventually adopted

must have been deliberately chosen to enable the plaintiff, in the words of Senator Borah, who submitted the report on the bill, “to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so.”⁵⁵

In light of what it considered to be a clear expression of legislative intent to expand the available fora for an injured employee to bring suit, the Court rejected the argument that a court could interfere with that venue choice:

A privilege of venue, granted by the legislative body which created this right of action, cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative. . . . Whatever burden there is here upon the railroad, because of inconvenience or cost, does not outweigh the plain grant of privilege for suit in New York.⁵⁶

The Court upheld the plaintiff’s “privilege of venue” to sue the railroad in New York, specifically because the majority determined that Congress had expressed a clear intent that the plaintiff’s choice of venue in FELA actions was not to be disturbed.⁵⁷

Justice Frankfurter, in dissent, critiqued his brethren for inventing such a “novel doctrine.”⁵⁸ Frankfurter questioned why the majority discerned anything unique either in the wording of the FELA venue statute⁵⁹ or in its legislative history.⁶⁰ Unable to divine any difference between the general venue stat-

⁵⁴ *Id.* at 49-50. In *Kepner*, the plaintiff chose to travel to the place of defendant’s habitation to litigate. *Id.* Thus, the Court in some respects turned congressional intent on its head in reading the statute as precluding discretionary dismissal based on a perceived concern for protecting the plaintiff from litigating in a distant forum.

⁵⁵ *Id.* at 50.

⁵⁶ *Id.* at 54.

⁵⁷ *See id.*

⁵⁸ *Id.* at 55 (Frankfurter, J., dissenting).

⁵⁹ *Id.* at 56 (observing that the “phrasing of the section is not unique: it follows the familiar pattern generally employed by Congress in framing venue provisions” and questioning how the majority’s decision could rest “upon any peculiarities of the language of the provision”).

⁶⁰ *Id.* at 56-57 (observing that he could find no justification for the Court’s conclusion in the legislative history of section 6 or in “the clearly expressed reasons of policy underlying its enactment”).

ute and the venue provision in FELA, Frankfurter expressed concern that the Court's reasoning would have wide-ranging implications:

If the privilege afforded a plaintiff to bring suit under [FELA] in one place rather than in another is to be regarded as an absolute command to the federal courts to take jurisdiction regardless of any considerations of justice and fairness, why is not the same effect to be given the comparable general venue provisions of § 51 of the Judicial Code, 28 U.S.C. § 112? Nothing in the language or the history of the venue provision of [FELA] differentiates it from the numerous other venue provisions of the Judicial Code. Is the settled doctrine of *forum non conveniens* to be deemed impliedly repealed by every such venue provision?⁶¹

Justice Frankfurter's observation was more prescient than he may have anticipated, as Part III will explore.

A second pre-1947 FELA decision that seemed to give great deference to a specific legislative enactment of venue was *Miles v. Illinois Central Railroad*.⁶² Miles, a Tennessee resident and employee of the defendant railroad, was killed in a railroad accident in Tennessee.⁶³ The railroad, which was incorporated in Illinois, had its principal place of business in Tennessee.⁶⁴ Some or all witnesses to the accident resided in Tennessee.⁶⁵ Despite all of these contacts with Tennessee, the administrator of the decedent's estate brought a FELA action against the railroad in Missouri state court.⁶⁶ Like the plaintiff in *Kepner*, the administrator apparently believed that she could obtain more favorable relief in a distant jurisdiction than in her home state.⁶⁷ Venue of the action was proper in Missouri pursuant to section 6 of FELA because the railroad was doing business in Missouri.⁶⁸

Echoing *Kepner*,⁶⁹ the railroad brought an action in Tennessee chancery court seeking to enjoin the Missouri suit.⁷⁰ In still another parallel with *Kep-*

⁶¹ *Id.* at 62.

⁶² 315 U.S. 698 (1942).

⁶³ *Id.* at 699.

⁶⁴ *See id.* at 699-700.

⁶⁵ *See id.* at 700.

⁶⁶ *See id.*

⁶⁷ *See supra* note 41 and accompanying text.

⁶⁸ *See Miles*, 315 U.S. at 701-02.

⁶⁹ *See Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44, 48 (1941); *supra* text accompanying note 43.

⁷⁰ *See Miles*, 315 U.S. at 700.

ner, the railroad did not petition the Missouri court to dismiss the action.⁷¹ The Tennessee chancery court temporarily enjoined the administrator from prosecuting the Missouri suit,⁷² finding that it was more convenient and less of a burden on the railroad for the suit to be maintained in Tennessee.⁷³ The administrator argued that section 6 prevented Tennessee from enjoining the Missouri court because doing so would thwart congressional intent concerning venues in which FELA plaintiffs may bring suit.⁷⁴ The chancery court rejected the administrator's argument,⁷⁵ however, and on appeal, the Tennessee Court of Appeals made the temporary injunction permanent.⁷⁶

Reversing the grant of injunctive relief, the United States Supreme Court equated the attempt by the Tennessee courts to enjoin one of their own citizens from enforcing a federal right in state court with the attempt in *Kepner* by the Ohio state court to enjoin one of its citizens from enforcing a federal right in federal court:

Since the existence of the cause of action and the privilege of vindicating rights under the F.E.L.A. in state courts spring from federal law, the right to sue in state courts of proper venue where their jurisdiction is adequate is of the same quality as the right of [sic] sue in federal courts. It is no more subject to interference by state action than was the federal venue in the *Kepner* case.⁷⁷

Concluding that the FELA special venue provision mandated deference, the Court upheld the plaintiff's choice to sue in Missouri.⁷⁸

Standing in contrast to *Kepner* and *Miles*, a number of Supreme Court decisions before 1947 support a view that the judiciary possesses broad discretionary power to dismiss. Before *Gilbert*, the Court had recognized on several oc-

⁷¹ After the Court's decision in *Kepner*, Missouri courts apparently believed that a forum non conveniens dismissal was improper, at least in FELA cases—a belief the Court apparently did not share. See *State ex rel. Southern Ry. v. Mayfield*, 224 S.W.2d 105, 108 (Mo. 1949) (noting that the “doctrine of forum non conveniens has been held inapplicable to cases instituted under ‘special venue’ statutes, such as actions arising under the Federal Employers’ Liability Act”), *vacated*, 340 U.S. 1 (1950).

⁷² To be precise, the procedural history is somewhat more complicated. The original administrator dismissed her suit following entry of the temporary injunction. Thereafter, she withdrew as administrator and another was appointed. The new administrator then promptly refiled a suit asking for identical relief in Missouri and the Tennessee court issued a second temporary injunction enjoining the new action. See *Miles*, 315 U.S. at 699-700.

⁷³ See *id.* at 700.

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 704.

⁷⁸ See *id.*

casions that a federal trial court's exercise of jurisdiction was not necessarily mandatory, absent express congressional expression to the contrary. The Court first, and with some frequency, recognized this "discretionary power to decline jurisdiction" in admiralty cases.⁷⁹ Because the general venue statute did not apply to federal admiralty cases,⁸⁰ approval of a discretionary dismissal power did not directly conflict with any congressional pronouncement on venue. In *Canada Malting Co. v. Patterson Steamships Ltd.*,⁸¹ the Court upheld a dismissal of an admiralty case and observed in dicta that the general power of discretionary dismissal also existed in other non-admiralty contexts:

Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts administering other systems of our law. Courts of equity and of law also 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.⁸²

Examples of other cases in which the pre-*Gilbert* Court approved a lower court's decision to decline to exercise jurisdiction "in the interest of justice" include disputes involving the internal affairs of a corporation,⁸³ cases that "might interfere with state proceedings, or state functions, or the functioning of state administrative agencies,"⁸⁴ and cases in which the burden on interstate commerce was undue and unreasonably obstructive.⁸⁵

Many commentators have observed that, prior to *Gilbert*, both federal and state courts had recognized the discretionary right of a court not to take jurisdiction over a case, even though in most instances the phrase "forum non conveniens" was not to be found in the reported decisions. Robert Braucher, writ-

⁷⁹ See Braucher, *supra* note 30, at 919; see, e.g., *The Belgenland*, 114 U.S. 355, 365-66 (1885); *The Maggie Hammond*, 76 U.S. (9 Wall.) 435, 450 (1869); see also *American Dredging Co. v. Miller*, 510 U.S. 443, 449 (1994) (observing that federal forum non conveniens doctrine "may have been given its earliest and most frequent expression in admiralty cases").

⁸⁰ See, e.g., *In re Louisville Underwriters*, 134 U.S. 488, 490 (1890); *Connecticut Fire Ins. Co. v. Lake Transfer Corp.*, 74 F.2d 258, 259 (2d Cir. 1934). See generally Braucher, *supra* note 30, at 919 (noting that the then-extant general venue statute, section 51 of the Judicial Code, had "long been held not to apply" in admiralty cases).

⁸¹ 285 U.S. 413 (1932).

⁸² *Id.* at 422-23 (footnote omitted).

⁸³ See, e.g., *Rogers v. Guaranty Trust Co. of N.Y.*, 288 U.S. 123, 130-31 (1933).

⁸⁴ See, e.g., *Williams v. Green Bay & W. R.R.*, 326 U.S. 549, 558 (1946).

⁸⁵ See *Davis v. Farmers' Coop. Equity Co.*, 262 U.S. 312, 317 (1923). For an excellent discussion of the Court's approval of discretionary dismissal before *Gilbert*, see Stein, *supra* note 30, at 808-12.

ing shortly after the decision in *Gilbert*, concluded that “the Supreme Court has recently given [the forum non conveniens doctrine] a scope it did not clearly have before.”⁸⁶ Indeed, even the *Gilbert* Court acknowledged that, although “[m]any of the states have met misuse of venue by investing courts with a discretion to change the place of trial on various grounds, such as the convenience of witnesses and the ends of justice,” prior federal law “contain[ed] no such express criteria to guide the district court in exercising its power.”⁸⁷ Thirty-four years later, in *Piper Aircraft Co. v. Reyno*,⁸⁸ the Court acknowledged that “the doctrine of *forum non conveniens* was not fully crystallized” until *Gilbert*.⁸⁹

The legacy of the Court’s pre-*Gilbert* cases, then, is uncertain but not inconsequential. One line of pre-*Gilbert* decisions, notably *Kepner* and *Miles*, reflects a conscious effort on the part of the Court to permit discretionary dismissal only where it will not interfere with the legislative prescription for where suit can be maintained.⁹⁰ On the other hand, other pre-1947 decisions⁹¹ illustrate the Court’s willingness to recognize a broad discretionary dismissal power, even in cases in which Congress has arguably prescribed the available fora in which a suit may be maintained. As we will see in the next Part, *Gilbert* solidified the judiciary’s discretionary dismissal powers under the forum non conveniens doctrine. However, the decision failed to mark a definite and discernable boundary between legislative and judicial power. The tension so prevalent in the Court’s pre-1947 jurisprudence between the judiciary’s discretionary authority to decline jurisdiction and the legislature’s prerogative to prescribe the place of suit remained unresolved.

B. Gilbert and the Current Doctrine of Forum Non Conveniens

Gulf Oil Corp. v. Gilbert is recognized as having ushered in a revolution in the law of forum non conveniens.⁹² Yet, in certain key respects the decision did not depart far from prior precedents. Not only had the Court recognized (albeit cautiously) a discretionary dismissal authority before 1947, but perhaps the most overlooked aspect of *Gilbert* is that the Court continued to recognize the *Kepner* distinction between special and general venue provisions. Thus,

⁸⁶ Braucher, *supra* note 30, at 908-09.

⁸⁷ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) (footnote omitted).

⁸⁸ 454 U.S. 235 (1981).

⁸⁹ *Id.* at 248.

⁹⁰ See *supra* text accompanying notes 38-78.

⁹¹ See *supra* text accompanying notes 79-85.

⁹² 330 U.S. 501 (1947).

both before and after *Gilbert*, the rule was that courts should not decline to exercise jurisdiction when Congress had expressed its intent that the plaintiff be given additional venue choices beyond those accorded by the general venue rules.

Gilbert, a Virginia public warehouse operator, sued Gulf Oil Corporation, a Pennsylvania company qualified to do business in both Virginia and New York.⁹³ *Gilbert* sued Gulf Oil in the Southern District of New York, alleging that Gulf Oil's negligence resulted in an explosion and fire that destroyed *Gilbert's* business.⁹⁴ Gulf Oil moved to dismiss the suit based on New York's law of forum non conveniens,⁹⁵ claiming that the suit should be adjudicated in Virginia, the site of the accident giving rise to the action. *Gilbert* attempted to counter Gulf Oil's argument for dismissal by invoking *Baltimore & Ohio Railroad v. Kepner*⁹⁶ to support the proposition that a "plaintiff's choice of forum cannot be defeated on the basis of forum non conveniens."⁹⁷

The *Gilbert* Court declared that a court may dismiss a case under the common law doctrine of forum non conveniens, even though it has subject matter jurisdiction, personal jurisdiction, and venue.⁹⁸ To conclude that discretionary dismissal was justified, the Court had to explain why *Kepner* was not controlling. The *Gilbert* Court drew a sharp distinction between the general venue statute,⁹⁹ on which *Gilbert's* action relied,¹⁰⁰ and special venue provisions enacted by Congress, including section 6 of FELA,¹⁰¹ on which venue over *Kep-*

⁹³ See *id.* at 502-03.

⁹⁴ See *id.*

⁹⁵ Because *Gilbert* was a diversity action, the district court determined that it was bound to apply state forum non conveniens doctrine to the suit. *Id.* Although the U.S. Supreme Court articulated more fully the parameters of the federal law of forum non conveniens, it expressly left undecided whether in a diversity action the federal courts should apply state or federal forum non conveniens law. Finding that the "law of New York as to the discretion of a court to apply the doctrine of forum non conveniens, and as to the standards that guide discretion is, so far as here involved, the same as the federal rule," the Court concluded that "it would not be profitable, therefore, to pursue inquiry as to the source from which our rule must flow." *Id.* at 509. Of course, if New York law governed, then there was no reason for the Court to discuss the boundaries of federal forum non conveniens doctrine.

More than fifty years later, the Court has still not confronted head-on the *Erie* question of whether the federal courts in diversity cases are to apply the federal or state versions of forum non conveniens. See HAZARD ET AL., *supra* note 42, at 480; Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935 (1991).

⁹⁶ 314 U.S. 44 (1941).

⁹⁷ *Gilbert*, 330 U.S. at 505.

⁹⁸ See *id.* at 507.

⁹⁹ 28 U.S.C. § 112 (1940) (current version at 28 U.S.C. § 1391 (1994)).

¹⁰⁰ See *Gilbert*, 330 U.S. at 504, 506.

¹⁰¹ 45 U.S.C. § 56 (1994); see *supra* text accompanying note 44.

ner's action was based.¹⁰² The *Gilbert* Court found that Kepner's choice to sue in New York had to be honored because "the special venue act"—section 6 of FELA—proscribed forum non conveniens dismissal of a suit brought in the plaintiff's chosen forum, as long as the plaintiff's chosen forum was proper.¹⁰³ By contrast, Gilbert's choice to bring his diversity action in New York did not have to be honored because it was not founded on a special venue provision.¹⁰⁴ Although neither plaintiff resided in New York (Kepner was from Ohio and Gilbert was from Virginia), and although both decided it was to their litigation advantage to bring suit in New York (which was a proper forum in each case), Gilbert's inability to base his action on a special venue statute meant that the district court did not have to give unlimited respect to his choice of forum and could dismiss his action without untoward interference with the will of Congress.

The *Gilbert* Court also set forth the now well-known two-part test for determining whether to retain or dismiss a case. First, a court must decide whether an alternative forum exists that is both adequate and available.¹⁰⁵ If such an alternative forum exists, then the court must consider whether the balance of "private" and "public" interest factors favors retention or dismissal.¹⁰⁶ By prescribing consideration of private interest factors, such as location of witnesses, documents, and other sources of proof, the Court departed from its previous view that "as a practical matter, courts [cannot] undertake to ascertain in advance of trial the number and importance of probable witnesses within and without the state and retain or refuse jurisdiction according to the relative inconvenience of the parties."¹⁰⁷

Even as the Court embraced the forum non conveniens doctrine in *Gilbert*, it also indicated that discretionary dismissal was meant to be available only in limited circumstances. "[U]nless the balance is strongly in favor of the defendant," the Court wrote, "the plaintiff's choice of forum should rarely be disturbed."¹⁰⁸ However, the Court actually succeeded in opening the door wider

¹⁰² See *Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44, 49, 51 (1941).

¹⁰³ See *Gilbert*, 330 U.S. at 505. Kepner's choice of New York federal district court was proper because section 6 of FELA entitled an injured worker to sue the railroad there. See *supra* text accompanying notes 44-46; see also *Gilbert*, 330 U.S. at 506 (stating that "as interpreted by *Kepner*, FELA increases the number of places where the defendant may be sued and makes him accept the plaintiff's choice").

¹⁰⁴ See *Gilbert*, 330 U.S. at 505-06.

¹⁰⁵ See *id.* at 506-07.

¹⁰⁶ See *id.* at 508-09; *infra* text accompanying notes 419-28 (discussing the "private" and "public" interest factors identified by the *Gilbert* Court).

¹⁰⁷ *Denver & Rio Grande W. R.R. v. Terte*, 284 U.S. 284, 287-88 (1932).

¹⁰⁸ *Gilbert*, 330 U.S. at 508.

for dismissals by committing the forum non conveniens determination to the sound discretion of the trial judge, whose judgment could be reversed only for a clear abuse of discretion.¹⁰⁹ In *Piper Aircraft Co. v. Reyno*,¹¹⁰ the Court noted that a trial court's disposition of a motion to dismiss on the basis of forum non conveniens "may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference."¹¹¹

C. *The Aftermath of Gilbert*

In the wake of *Gilbert* and *Piper Aircraft*, what is the proper course for a district court to follow when a plaintiff's choice of forum is based on a special venue provision? The *Gilbert* Court's decision not to overrule *Kepner*, but instead to carve out a definable niche into which the *Kepner* holding could be placed (by virtue of the special venue provision in section 6 of FELA), has proven to be highly problematic in the intervening half-century. Both the Supreme Court and other federal courts have confronted more and more variations of the *Kepner* problem involving "special" venue provisions, as well as a growing number of forum non conveniens challenges to litigation involving one or more foreign parties.

I. 28 U.S.C. § 1404

In 1948, Congress enacted 28 U.S.C. § 1404, which permits a federal district court to transfer a civil action to another federal district court in which the case might have originally been brought, "[f]or the convenience of parties and witnesses, in the interest of justice."¹¹² Drafters of the transfer statute opined that § 1404 was a "codification" of the Supreme Court's existing forum non conveniens doctrine.¹¹³ If the trial court had applied the statutory criteria of § 1404 to the facts of *Kepner*, the drafters presumably believed the case should

¹⁰⁹ See *id.* at 511; see also, e.g., *Pereira v. Utah Transp., Inc.*, 764 F.2d 686, 690 (9th Cir. 1985) (noting that a "district court abuses its discretion if it fails to balance the relevant factors").

¹¹⁰ 454 U.S. 235 (1981).

¹¹¹ *Id.* at 257; see also, e.g., *Alfadda v. Fenn*, 159 F.3d 41, 45 (2d Cir. 1998) (describing appellate review of a district court's forum non conveniens dismissal as "severely cabined").

¹¹² 28 U.S.C. § 1404(a) (1994). In so doing, Congress essentially supplanted common law forum non conveniens dismissal by one federal court in favor of another federal court. See generally James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 942-43 (1999).

¹¹³ The Historical and Statutory Notes following § 1404 indicate that § 1404(a) "was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper." 28 U.S.C. § 1404 annot. (1994).

have been transferred from New York to Ohio. Some courts¹¹⁴ and commentators¹¹⁵ have suggested that Congress intended § 1404(a) to overrule *Kepner*.¹¹⁶ This view, though, seems exaggerated¹¹⁷ and, in any event, beside the point.

It was the specific outcome in *Kepner*, rather than the underlying rationale of the decision, to which Congress addressed itself in enacting § 1404(a). Section 1404 reflects Congress's view that federal courts properly possess a discretionary power to transfer a case in the interest of justice and for the convenience of parties and witnesses, absent express congressional direction to the contrary. The rationale underlying the *Kepner* decision—that congressional pronouncement of where a specific kind of suit may be maintained can trump the judiciary's discretionary power to dismiss the suit from that forum—should have remained undisturbed even after the 1948 enactment. The notion that Congress was dissatisfied with the supporting premise of *Kepner*, which recognized and respected the legislature's prerogative to announce special venue rules, seems dubious.

By enacting § 1404, Congress was more likely seeking not to express its disapproval of the Court's reasoning in *Kepner*, but rather to correct a defi-

¹¹⁴ See, e.g., *Nunn v. Chicago, Milwaukee, St. Paul & Pac. R.R.*, 80 F. Supp. 745, 747 (S.D.N.Y. 1948); *Hayes v. Chicago, Rock Island & Pac. R.R.*, 79 F. Supp. 821, 825-26 (D. Minn. 1948).

¹¹⁵ See, e.g., Stein, *supra* note 30, at 807; Timothy O'Shea, Note, *The Jones Act's Specific Venue Provision: Does It Preclude Forum Non Conveniens Dismissal?*, 14 FORDHAM INT'L L.J. 696, 726 & n.214 (1990/91).

¹¹⁶ The Historical and Statutory Notes following § 1404 cite *Kepner* as "[a]n example of the need for" section 1404(a). See 28 U.S.C. § 1404 annot.

¹¹⁷ Indeed, had Congress wished to "overrule" *Kepner*, it could simply have amended FELA to either eliminate section 6 or to modify it to clarify that forum non conveniens analysis was proper in FELA cases. As Chief Justice Vinson observed in *Pope v. Atlantic Coast Line Railroad*, 345 U.S. 379 (1953):

[W]ith the exception of the transfer powers conferred upon the federal courts by § 1404(a), Congress deliberately chose to leave this Court's decision in the *Kepner* case intact. . . .

Congress might have gone further In fact, the same Congress which enacted § 1404(a) refused to enact a bill which would have amended § 6 of the Federal Employers' Liability Act by limiting the employee's choice of venue to the place of his injury or to the place of his residence.

This proposed amendment—the Jennings Bill—focused Congress' attention on the decisions of this Court in both the *Miles* and the *Kepner* cases. The broad question—involving many policy considerations—of whether venue should be more narrowly restricted, was reopened; cogent arguments—both pro and con—were restated. Proponents of the amendment asserted that, as a result of the *Miles* and *Kepner* decisions, injured employees were left free to abuse their venue rights under § 6 and 'harass' their employers in distant forums without restriction. They insisted that these abuses be curtailed. These arguments prevailed in the House, which passed the Jennings Bill, but the proposed amendment died in the Senate Judiciary Committee, and § 6 of the Federal Employers' Liability Act was left just as this Court had construed it.

Id. at 385-87 (footnotes omitted).

ciency in the law that the decision in *Kepner* had made apparent. Not all courts have interpreted the enactment of the transfer provision and its effect on *Kepner* in this fashion, however. A pair of Supreme Court decisions bracketing the passage of § 1404, known as *National City Lines I* and *National City Lines II*, could have shed some light on the continued vitality of the Court's pre-*Gilbert* forum non conveniens jurisprudence on post-*Gilbert* (and post-§ 1404) forum non conveniens challenges, where the issue is not domestic transfer but transnational allocation of jurisdiction.¹¹⁸ Unfortunately, instead of clarifying the question, the *National City Lines* decisions left the issue even more unresolved than before.

2. *The National City Lines Decisions*

In *National City Lines I*, the Court directly confronted whether the choice of forum provided by Congress in Section 12 of the Clayton Act was "subject to qualification by judicial application of the doctrine of forum non conveniens."¹¹⁹ Section 12 expressly expanded the available venue choices for a plaintiff asserting antitrust claims by authorizing suit not only in the judicial district of the defendant's residence, but also in any district where the defendant is found or transacts business.¹²⁰

The government brought a civil enforcement action under sections 1 and 2 of the Sherman Act¹²¹ against nine corporations, charging them with intent to monopolize various local transportation markets throughout the country.¹²² The defendants argued that the Southern District of California, where the action was commenced, was inconvenient and that the action should be dismissed on the grounds of forum non conveniens.¹²³ The district court dismissed the action, without prejudice, to the government refiling suit "in a more appropriate and convenient forum."¹²⁴ Justice Rutledge, writing for the Court, framed the issue on direct appeal as follows:

¹¹⁸ Following the passage of § 1404, federal forum non conveniens doctrine is almost exclusively concerned with the transnational context. See *supra* note 112 and accompanying text. However, it is still theoretically possible for federal forum non conveniens to be available when the alternative forum is a state court. See, e.g., *Gross v. Owen*, 221 F.2d 94 (D.C. Cir. 1955).

¹¹⁹ *United States v. National City Lines, Inc.*, 334 U.S. 573, 575 (1948) ("*National City Lines I*").

¹²⁰ 15 U.S.C. § 22 (1994).

¹²¹ *Id.* §§ 1-2.

¹²² See *National City Lines I*, 334 U.S. at 575.

¹²³ See *id.* at 575-76.

¹²⁴ *Id.* at 577; see *United States v. National City Lines, Inc.*, 7 F.R.D. 456 (S.D. Cal. 1947).

The only question presented concerning the court's power is whether, having jurisdiction and venue of the cause and personal jurisdiction of the defendants, the court also was authorized to decline to exercise its jurisdiction upon finding, without abuse of discretion, that the forum was not a convenient one within the scope of the non-statutory doctrine commonly, though not too accurately, labeled forum non conveniens.¹²⁵

The Court held that the district court lacked discretion to dismiss the case pursuant to the forum non conveniens doctrine because section 12's mandate regarding venue was binding on federal courts.¹²⁶ As the *Kepner* Court did with section 6 of FEHA,¹²⁷ the *National City Lines I* Court traced the legislative history behind enactment of section 12.¹²⁸ Section 12 was an amendment to the existing venue provision in the Sherman Act which had limited venue to districts in which the defendant "resides or is found."¹²⁹ Section 12, on the other hand, laid venue in any district in which the defendant "transacts business."¹³⁰ Reviewing this legislative history, the Court concluded:

The basic aim of the advocates of change was to give the plaintiff the right to bring suit and have it tried in the district where the defendant had committed violations of the Act and inflicted the forbidden injuries [Legislators] were convinced that restricting the choice of venue to districts in which the defendant "resides or is found" was not adequate to assure that the suit could be brought where the cause of action arose, and therefore insisted on change in order to assure that result.¹³¹

Confronted with such a clear expression of legislative intent for "trial to take place in the district specified by the statute and selected by the plaintiff," the Court concluded that courts were without any discretionary dismissal powers.¹³² Notwithstanding the arguments advanced by the defendants, the *National City Lines I* Court refused to accept that forum non conveniens doctrine was "a principle of universal applicability."¹³³ Rather, citing *Kepner* and *Miles* as supporting authority, the Court offered an "invariable, limiting principle"¹³⁴

¹²⁵ *National City Lines I*, 334 U.S. at 578.

¹²⁶ *See id.* at 588-89.

¹²⁷ *See supra* text accompanying notes 53-57.

¹²⁸ *See National City Lines I*, 334 U.S. at 582-87.

¹²⁹ 15 U.S.C. § 15 (1994).

¹³⁰ *Id.* § 22.

¹³¹ *National City Lines I*, 334 U.S. at 583.

¹³² *Id.* at 588-89.

¹³³ *Id.* at 596.

¹³⁴ *Id.*

on the doctrine: “[W]henever Congress has vested courts with jurisdiction to hear and determine causes and has invested complaining litigants with a right of choice among them which is inconsistent with the exercise by those courts of discretionary power to defeat the choice so made, the doctrine can have no effect.”¹³⁵

As he had done seven years earlier in *Kepner*,¹³⁶ Justice Frankfurter dissented in *National City Lines I*, refusing to find in the language of the antitrust statute or in the legislative record sufficient proof that Congress intended to preempt judicial discretion to decline to adjudicate.¹³⁷

In at least one respect, Justice Frankfurter’s earlier criticism in *Kepner* prevailed in *National City Lines I*. The *National City Lines I* Court abandoned the distinction—which Justice Jackson called “overly simple”¹³⁸—between “special” and “general” venue statutes in favor of a more refined approach. Recall that this distinction was invoked not only by *Kepner*,¹³⁹ but also by the majority in *Gilbert*.¹⁴⁰ Although the *National City Lines I* majority continued to rely on *Kepner* to demonstrate the limits on the proper exercise of the forum non conveniens doctrine, its opinion included a more exacting inquiry into congressional intent than either *Kepner* or *Gilbert* had demanded: whether Congress has vested “courts with jurisdiction to hear and determine causes and has invested complaining litigants with a right of choice among them,” is not

to be answered by such indecisive inquiries as whether the venue or jurisdictional statute is labeled a “special” or a “general” one. Nor is it to be determined merely by the court’s view that applicability of the doctrine would serve the ends of justice in the particular case. It is rather to be decided, upon consideration of all the relevant materials, by whether the legislative purpose and the effect of the language used to achieve it were to vest the power of choice in the plaintiff or to confer power upon the courts to qualify his selection.¹⁴¹

¹³⁵ *Id.* at 596-97.

¹³⁶ *See* *Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44, 54-63 (1941) (Frankfurter, J., dissenting, joined by Stone, C.J., and Roberts, J.); *see also supra* notes 58-61 and accompanying text.

¹³⁷ *See National City Lines I*, 334 U.S. at 600-01 (Frankfurter, J., dissenting, joined by Burton, J.) (observing that, while “Congress may leave no choice to a court to entertain a suit even though it is vexatious and oppressive for the plaintiff to choose the particular district in which he pursues his claim,” he did “not find in the scheme of the anti-trust acts and of their relevant legislative history the duty to exercise jurisdiction so imperative as to preclude judicial discretion in refusing to entertain a suit where ‘the interest of justice’ commands it”).

¹³⁸ *Id.* at 598 (Jackson, J., concurring).

¹³⁹ *See Kepner*, 314 U.S. at 53-54.

¹⁴⁰ *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 505 (1947).

¹⁴¹ *National City Lines I*, 334 U.S. at 596-97.

This approach followed that which Frankfurter urged in his dissent in *Kepner*, in which he rejected any artificial distinction between “special” and “general” venue provisions.¹⁴² However, it is at this juncture that the *National City Lines I* majority and Justice Frankfurter parted ways. The majority concluded that it was clear Congress had vested the exclusive choice with plaintiffs.¹⁴³ Consequently, the Court declined to usurp that grant “by application of the vague and discretionary power” of forum non conveniens.¹⁴⁴ By contrast, Justice Frankfurter’s reading of the statute and legislative history led him to “find nothing in the antitrust acts comparable to the considerations which led this Court to conclude that the provisions of [FELA] were designed to give railroad employees a privileged position in bringing suits under that Act.”¹⁴⁵

National City Lines I was decided on June 7, 1948. Nine days later, Congress passed § 1404, which became effective on September 1, 1948.¹⁴⁶ Shortly thereafter, the *National City Lines I* defendants filed a new motion seeking transfer of the action from California pursuant to § 1404.¹⁴⁷ The district court granted the motion.¹⁴⁸ In *National City Lines II*, the Supreme Court upheld the transfer.¹⁴⁹ The Court observed that Congress possessed the prerogative to change the law, and nothing said in *National City Lines I* “intimates that we could fail to respect whatever modification of the law Congress might enact.”¹⁵⁰ In the spirit of *Kepner* and *National City Lines I*, the Court explained that the legislative history of § 1404 made it apparent that Congress intended to invest courts with the power to transfer any case for the convenience of the parties and witnesses, and in the interest of justice.¹⁵¹ *Kepner* was an example of a case where transfer may have been appropriate,¹⁵² but FELA was not the only statute specifying venue covered by the new transfer provision. The *National City Lines II* Court held that any civil action—whether brought under

¹⁴² See *Kepner*, 314 U.S. at 55 (Frankfurter, J., dissenting).

¹⁴³ See *National City Lines I*, 334 U.S. at 581.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 601 (Frankfurter, J., dissenting) (citations omitted).

¹⁴⁶ Pub. L. No. 773, 80th Cong., 2d Sess., § 38 (June 25, 1948); see 28 U.S.C. preamble (1994); *United States v. National City Lines, Inc.*, 337 U.S. 78, 80 n.1 (1949) (“*National City Lines II*”).

¹⁴⁷ See *National City Lines II*, 337 U.S. at 80.

¹⁴⁸ See *United States v. National City Lines, Inc.*, 80 F. Supp. 734, 745 (S.D. Cal. 1948).

¹⁴⁹ See *National City Lines II*, 337 U.S. at 84.

¹⁵⁰ *Id.* at 82.

¹⁵¹ See *id.* at 80-82.

¹⁵² See *supra* note 113.

Title 28 of the Judicial Code or other statutory authority—would now be subject to transfer under § 1404.¹⁵³

National City Lines II left several critical questions unanswered. Following enactment of § 1404, can Congress still decide in a particular statute to grant the plaintiff an unconditional right to bring suit in a particular forum, without being subjected to dismissal or transfer? If Congress may do so, which seems well established notwithstanding *National City Lines II*,¹⁵⁴ what evidence of legislative intent short of a clear, express statement is sufficient? Additionally, because § 1404 applies only to domestic suits, and because *National City Lines II* considered a domestic transfer, to what extent does the reasoning of *National City Lines I* and *Kepner* apply to forum non conveniens motions seeking to dismiss in favor of a foreign forum? If a plaintiff brings suit pursuant to a federal statute, and in a forum authorized by that statute, can her choice of forum be defeated by forum non conveniens?

Subsequent federal courts have struggled with and split over the answers to these questions. Even after *Gilbert*, many federal courts have followed both the reasoning and holding in *Kepner* to conclude that forum non conveniens dismissal is unavailable when Congress, by special statutory provision, has given the plaintiff a remedy and a forum in which to bring suit. Other federal courts have categorically rejected the notion that cases brought pursuant to a federal statute with a special venue provision are exempt from forum non conveniens dismissal. We now turn to the application of the current federal forum non conveniens doctrine by the lower federal courts in cases in which a federal statute is alleged to provide the basis for relief.

¹⁵³ See *National City Lines II*, 337 U.S. at 80-82 (considering, and then disposing, of the government's argument that § 1404 only applies to Title 28 actions).

¹⁵⁴ The Supreme Court has long recognized congressional authority to legislate specific venue choices; and, as noted earlier, Congress has exercised such legislative prerogative repeatedly. See *supra* note 10. In *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, 120 S. Ct. 1331 (2000), the Court recently reiterated that the analysis of special venue statutes "must be specific to the statute." *Id.* at 1339. In particular, *Cortez Byrd* held that the venue provisions of the Federal Arbitration Act permit a suit to confirm, vacate or modify an arbitration award to be brought either where the award was made or in any district proper under the general venue statute. See *id.* In our judgment, the relevance of *Cortez Byrd* to the present discussion is that a court's decision whether a special venue provision was intended to trump forum non conveniens dismissal authority should similarly be judged by a statute's specific language and history. We develop this argument further in Part IV, *infra*.

III. DISCRETIONARY DISMISSAL OF FEDERAL STATUTORY CASES IN THE LOWER FEDERAL COURTS

We have traced some of the historical developments in the federal doctrine to see the doctrinal difficulties the Court has had in identifying the role of forum non conveniens and in resolving the tension between the judiciary's discretion to decline jurisdiction and the legislature's power to prescribe the place of suit. In this Part we examine how the lower federal courts have applied the forum non conveniens doctrine in federal statutory cases. Reviewing the body of case law that has developed in the lower federal courts immediately suggests two possible analytical approaches: first, an assessment of how the doctrine has evolved over time without regard to the deciding court; and second, a circuit-by-circuit analysis. The latter appears to be the sounder analytical approach because, to a surprising degree, each of the individual circuits has addressed independently the application of the forum non conveniens doctrine in federal statutory cases. This is not to suggest, of course, that they have not been aware of what sister courts have done. Nor is it true that the law developed in a particular circuit has had no influence on the legal decisions of other circuits. Indeed, it is unmistakable that the Second and Fifth Circuits appear to have had considerable influence on the other circuits. That said, one unavoidable conclusion is that the resolution of a motion to dismiss on forum non conveniens grounds a case involving federal statutory claims may depend as much on the circuit in which the forum court is located as on the merits of the motion.

A. *The Second Circuit*

The Second Circuit has developed some of the most important and influential decisional law in the area. Additionally, the Second Circuit's decisional law has shifted dramatically over time. Where it once viewed the assertion of a federal statutory claim as a mandate for taking jurisdiction, the Second Circuit now squarely rejects the notion that courts are without power to dismiss any claim on forum non conveniens grounds, merely because a federal statute provides both the grounds for relief and the appropriate venue or venues in which to seek that relief. A review of pertinent Second Circuit case law thus offers perspectives into two fundamentally different views of the role of forum non conveniens doctrine in federal statutory cases.

1. *The Regime of Mandatory Jurisdiction*

Our discussion of the Second Circuit's forum non conveniens jurisprudence begins with *Bartholomew v. Universe Tankships, Inc.*¹⁵⁵ Although not a forum non conveniens case, the Second Circuit's decision in *Bartholomew* significantly influenced how it would later view discretionary dismissal of a claim based on the violation of a federal statute with a provision specifying the place of suit.

Bartholomew was a British West Indian employed as a seaman on the Liberian ship *Ulysses*. While the vessel was in United States territorial waters, a fellow crew member allegedly assaulted him.¹⁵⁶ Bartholomew sued the ship owner (Universe) in the Southern District of New York, alleging violations of the Jones Act¹⁵⁷ and general maritime law.¹⁵⁸ The district court found that the Jones Act applied to Bartholomew's claim, and the jury awarded Bartholomew damages on both his Jones Act claim and his general maritime law claims.¹⁵⁹ On appeal, Universe challenged, *inter alia*, the district court's finding that a citizen of the British West Indies could invoke the Jones Act against his Liberian employer.¹⁶⁰ The Second Circuit looked to the Supreme Court's decision in *Lauritzen v. Larsen* for assistance on this issue.¹⁶¹

In *Lauritzen*, the Supreme Court set forth a multi-factor analysis¹⁶² to determine whether a foreign plaintiff could assert a claim under the Jones Act.¹⁶³

¹⁵⁵ 263 F.2d 437 (2d Cir. 1959).

¹⁵⁶ *See id.* at 438.

¹⁵⁷ 46 U.S.C. app. § 688 (1994).

¹⁵⁸ *See Bartholomew*, 263 F.2d at 438.

¹⁵⁹ *See id.* at 439.

¹⁶⁰ *See id.*

¹⁶¹ 345 U.S. 571 (1953).

¹⁶² These factors included (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured seaman; (4) the allegiance of the defendant shipowner; (5) the place of contract; (6) the inaccessibility of a foreign forum; and (7) the law of the forum. *See id.* at 583-92.

¹⁶³ In subsequent cases, the Court extended the application of these factors to claims for personal injury under general maritime law, *see Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382 (1959), and added an eighth, the defendant shipowner's base of operations, *see Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 308-09 (1970). The *Lauritzen* factors continue to play an important role in choice of law determinations in admiralty cases. *See, e.g., Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 182-98 (3d Cir. 1995) (relying on the *Lauritzen* factors and the *Restatement of Foreign Relation Law* in determining that American general maritime law applied); *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1119-21 (5th Cir. 1995) (applying the *Lauritzen* factors and concluding that United States maritime law governed the plaintiff's claim); *Kukias v. Chandris Lines, Inc.*, 839 F.2d 860, 862-65 (1st Cir. 1988) (holding that United States law was inapplicable based upon the *Lauritzen* factor analysis); *Warn v. M/Y Maridome*, 961 F. Supp. 1357, 1369-73 (S.D. Cal. 1997) (finding that the court lacked subject matter jurisdiction over plaintiffs' Jones Act claims under the *Lauritzen* factor analysis).

Although some later courts have interpreted the *Lauritzen* factors as a test for measuring whether a district court has subject matter jurisdiction,¹⁶⁴ it is now largely settled that the *Lauritzen* factors do not so much determine subject matter jurisdiction as guide a court making a choice of law determination.¹⁶⁵

Applying the *Lauritzen* factors, the *Bartholomew* Court held that it was “clear beyond peradventure of doubt” that the plaintiff had a viable Jones Act claim.¹⁶⁶ Then, in a critical passage, the Second Circuit observed that, because the district court had correctly determined that the Jones Act applied, its jurisdiction was mandatory:

The facts either warrant the application of the Jones Act or they do not. Under 28 U.S.C. § 1331, once federal law is found applicable the court’s power to adjudicate must be exercised. While at times the impact of intricate questions of state law may require a federal court to stay its hand, . . . it is clear that the District Court in the instant case had no discretionary power to refuse to adjudicate the case.¹⁶⁷

Bartholomew unequivocally stands for the proposition that a court lacks any discretionary dismissal power over a Jones Act claim. Indeed, the *Bartholomew* Court said it is not just necessary, but *mandatory* for the court to exercise jurisdiction over such a controversy.¹⁶⁸ For twenty years, this language in *Bartholomew* formed the basis of a Second Circuit rule that exempted any claim under the Jones Act—and by extension, other federal statutes that vested venue in the federal courts—from forum non conveniens dismissal.

¹⁶⁴ See, e.g., *Gutierrez v. Diana Invs. Corp.*, 946 F.2d 455, 456-57 (6th Cir. 1991) (per curiam) (finding that the district court lacked subject matter jurisdiction because United States law was inapplicable and there was no other basis for federal jurisdiction); *Dracos v. Hellenic Lines, Ltd.*, 762 F.2d 348, 349-51 (4th Cir. 1985) (en banc) (holding that the district court lacked subject matter jurisdiction because United States law did not apply under the *Lauritzen* factors); *Rodriguez v. Flota Mercante Grancolombiana, S.A.*, 703 F.2d 1069, 1071-72 (9th Cir. 1983) (holding that the district court lacked subject matter jurisdiction because the shipowner was not an employer for Jones Act purposes).

¹⁶⁵ See, e.g., *Neely*, 63 F.3d at 177-78 (“[T]he multi-factored analysis of *Lauritzen*, *Romero*, and *Rhoditis* is not to be used to determine whether a district court has subject matter jurisdiction over suits brought under the Jones Act or the general maritime law.”); *Schexnider v. McDermott Int’l, Inc.*, 817 F.2d 1159, 1161 (5th Cir. 1987) (“The determination of the law governing this maritime action is made pursuant to a multifactored analysis set out in *Lauritzen v. Larsen*”); see also, e.g., *Warn*, 961 F. Supp. at 1369 n.5 (“Although this [*Lauritzen*] analysis determines whether the Court has subject matter jurisdiction over this lawsuit, it is really a choice of law issue.”). See generally *Coats*, 61 F.3d at 1119 (“The *Lauritzen* . . . factors govern the choice of law”).

¹⁶⁶ *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 443 (2d Cir. 1959).

¹⁶⁷ *Id.* (citations omitted).

¹⁶⁸ See *id.* (“[O]nce federal law is found applicable the court’s power to adjudicate must be exercised.”).

In *Antypas v. Compania Maritima San Basilio*,¹⁶⁹ the Second Circuit invoked the mandatory jurisdiction language from *Bartholomew* to reverse the district court's dismissal of a Jones Act claim on *forum non conveniens* grounds. Antypas, a foreign seaman, was injured while working on a Greek-flagged ship, the *Eurybates*, owned by a Panamanian corporation, Maritima. At the time of his injuries, the *Eurybates* was on the high seas, en route to the Far East from Hamburg, Germany.¹⁷⁰ Antypas sued Maritima in New York federal court, claiming under the Jones Act. The district court dismissed the case because it found, applying the *Lauritzen* factors, that the contacts of the employer with the United States were "minimal."¹⁷¹

In a 2-1 decision written by retired Supreme Court Justice Tom Clark, sitting by designation, the Second Circuit reversed. The Second Circuit held, contrary to the district court's conclusion, that the Jones Act supplied the subject matter jurisdiction predicate in the case: "We find these contacts between the transaction involved and the United States to be substantial and that Jones Act jurisdiction exists."¹⁷² Having determined that the Jones Act applied, Justice Clark invoked *Bartholomew* and declared that "[w]here the Jones Act applies, . . . a district court has no power to dismiss on grounds of *forum non conveniens*."¹⁷³

2. *The Retreat from Mandatory Jurisdiction*

In *Alcoa Steamship Co. v. M/V Nordic Regent*,¹⁷⁴ the en banc Second Circuit suggested a more liberal approach to discretionary dismissal, signaling a retreat from *Bartholomew* and *Antypas*. Alcoa, a New York corporation engaged in business throughout the world, owned and operated a pier in Trinidad. The *Nordic Regent* collided with the pier, causing damage estimated at \$8 million.¹⁷⁵ Alcoa sued the *Nordic Regent* and its owner, Norcross, a Liberian corporation, in the Southern District of New York, pursuant to that court's admiralty jurisdiction. Alcoa asserted no statutory claims, instead seeking to recover for the defendants' negligence. The district court dismissed Alcoa's

¹⁶⁹ 541 F.2d 307 (2d Cir. 1976).

¹⁷⁰ See *id.* at 308-09.

¹⁷¹ *Id.* at 308.

¹⁷² *Id.* at 310.

¹⁷³ *Id.*

¹⁷⁴ 654 F.2d 147 (2d Cir. 1980) (en banc).

¹⁷⁵ See *id.* at 149.

claims on the ground of forum non conveniens.¹⁷⁶ A divided panel of the Second Circuit affirmed the district court's dismissal without agreeing on the rationale for affirmance.¹⁷⁷ On rehearing, the panel reversed on the strength of Alcoa's arguments that *Gilbert* "does not, and should not, establish the correct standard for determining when American citizens should have access to their country's admiralty courts."¹⁷⁸

Not surprisingly, in light of two sharply divided panel opinions, the Second Circuit accepted the case for en banc review. The en banc court addressed two issues: first, whether the *Gilbert* test applies to admiralty cases—that is, whether admiralty claims were subject to the same forum non conveniens analysis as non-admiralty claims, despite the legacy of *Bartholomew* and *Antypas*;¹⁷⁹ and, second, whether an action brought by an American resident is subject to forum non conveniens dismissal in favor of a non-U.S. forum.¹⁸⁰ The court answered both questions in the affirmative, concluding that, despite the fact that the claim was in admiralty and that the claimant was an American citizen, the claim was subject to the same forum non conveniens analysis as any other case.¹⁸¹ Finally, having answered each of these questions, the en banc court then turned to whether the district judge abused his discretion in dismissing Alcoa's claims and found no abuse of discretion.¹⁸²

¹⁷⁶ See *Alcoa S.S. Co. v. M/V Nordic Regent*, 453 F. Supp. 10, 12-13 (S.D.N.Y. 1978), *aff'd and rev'd on rehearing*, 654 F.2d 165 (2d Cir. 1979), *vacated*, 654 F.2d 147 (2d Cir. 1980) (en banc).

¹⁷⁷ See *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 165, 166 (2d Cir. 1979), *vacated*, 654 F.2d 147 (2d Cir. 1980) (en banc). Each member of the panel wrote his own opinion. Judge Timbers, writing for the court, found no abuse of discretion and affirmed the dismissal for the reasons set forth in the district court's *Gilbert* analysis. See *id.* Judge Waterman concurred in the result "with great reluctance" in light of Judge Van Graafeiland's "extremely convincing" dissent, but was unwilling to adopt the district court's analysis. See *id.* (Waterman, J., concurring). Judge Van Graafeiland found that the district court abused its discretion by dismissing the case based on the defendants' unsubstantiated claim that New York would be an inconvenient forum for witnesses, see *id.* at 167-69 (Van Graafeiland, J., dissenting), and the defendants' argument that it could not implead the Trinidadian harbor pilot's association into the New York federal action, see *id.* at 169.

¹⁷⁸ *Id.* at 169-70 (opinion on rehearing). Alcoa's arguments in the petition for rehearing were apparently enough to swing Judge Waterman's rather tenuous vote to affirm, see *supra* note 177, into a vote to reverse. See *Alcoa Steamship*, 654 F.2d at 172. Judge Timbers dissented on the ground that Alcoa's argument that *Gilbert* did not apply, based on "the most cursory briefing and no oral argument at all," did not support the majority's "unprecedented" carving out of a special privilege against forum non conveniens dismissal. *Id.* (Timbers, J., dissenting on rehearing).

¹⁷⁹ See *Alcoa Steamship*, 654 F.2d at 150.

¹⁸⁰ See *id.* at 153.

¹⁸¹ See *id.* at 152-53 (observing, *inter alia*, that "[t]here is neither reason nor authority for creating an exception to the general forum non conveniens standard established in *Gilbert* simply because the case invokes the admiralty and maritime jurisdiction of the court" and "that American citizenship is *not* an impenetrable shield against dismissal on the ground of forum non conveniens").

¹⁸² See *id.* at 159.

The en banc decision in *Alcoa Steamship* suggests that, by 1980, the Second Circuit was already leaning toward a more liberal forum non conveniens doctrine than it had applied in previous cases. However, because *Alcoa Steamship* did not involve any alleged violation of federal statute, it did not abrogate the earlier decisions in *Bartholomew* and *Antypas*. Thus, even after *Alcoa Steamship*, it would appear that a claim premised on violation of a federal statute specifying venue still mandated that the court exercise jurisdiction. Although the district court weighed all of the *Gilbert* private and public interest factors, the en banc majority's holding that the district court had not abused its discretion appeared to depend significantly on the determination that the law of Trinidad and Tobago would govern the dispute.¹⁸³ Having found the law of Trinidad and Tobago would apply, the Second Circuit upheld the dismissal.

The decision in *Alcoa Steamship* also revealed a sharp division among Second Circuit judges over the proper role of forum non conveniens and a court's discretionary dismissal power. In a searing dissent, Judge Van Graafeiland, echoing (perhaps ironically) Justice Frankfurter,¹⁸⁴ criticized the majority for being "ignorant as judges of what its members know as men."¹⁸⁵ Judge Van Graafeiland argued that his colleagues should have known that dismissal of the case to a foreign jurisdiction would not afford the plaintiff—an American resident—a fair hearing.¹⁸⁶ In his view, forum non conveniens dismissal should turn not on a balancing of convenience factors, but on a determination of "oppressiveness and vexation"¹⁸⁷—meaning that a plaintiff's choice of forum should be respected "as long as no harassment is intended."¹⁸⁸ Judge Oakes, concurring with Judge Van Graafeiland's dissent, also argued that the case should be retained because of the significant United States interests implicated

¹⁸³ See *id.*

¹⁸⁴ Justice Frankfurter championed the judiciary's broad authority to exercise discretionary dismissal powers in both *United States v. National City Lines Inc.*, 334 U.S. 573, 599-601 (1948) (Frankfurter, J., dissenting) ("I do not find in the scheme of the anti-trust acts and of their relevant legislative history the duty to exercise jurisdiction so imperative as to preclude judicial discretion in refusing to entertain a suit where 'the interest of justice' commands it.") and *Baltimore & Ohio Railroad v. Kepner*, 314 U.S. 44, 54-63 (1941) (Frankfurter, J., dissenting) (opining that venue provisions under federal statutes should be discretionary and subject to traditional equity considerations). See *supra* text accompanying notes 136-37 and 58-61, respectively. Yet, Judge Van Graafeiland cites Frankfurter as authority for a severely restrictive view of a court's discretionary dismissal power. In fairness to Justice Frankfurter, the line Van Graafeiland parroted was from a case not involving forum non conveniens.

¹⁸⁵ *Alcoa Steamship*, 654 F.2d at 161 (Van Graafeiland, J., dissenting) (quoting *Watts v. Indiana*, 338 U.S. 49, 52 (1949)).

¹⁸⁶ See *id.* at 161-62.

¹⁸⁷ *Id.* at 162 (quoting *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)).

¹⁸⁸ *Id.* (quoting *Thomson v. Palmieri*, 355 F.2d 64, 66 (2d Cir. 1966)).

by the dispute.¹⁸⁹ Taken together, Judge Van Graafeiland's and Judge Oakes's opinions argue that the forum non conveniens doctrine inappropriately turns on balancing of private and public interest factors and that the guiding concerns for a court in determining whether to keep a case should be the competing national interests that may exist in adjudicating the case.

3. *Discretionary Dismissal Prevails: The Return to the Traditional Gilbert Forum Non Conveniens Approach*

If *Alcoa Steamship* signaled the Second Circuit's declining commitment to a narrow forum non conveniens rule, it was not long before the court completely abandoned the reasoning of *Bartholomew* and *Antypas* and embraced discretionary dismissal of even federal statutory claims. This brought the circuit back to the traditional approach to forum non conveniens, under which all determinations were made under the *Gilbert* test. Interestingly, the Second Circuit first rejected the idea that district courts should defer to congressional pronouncements on venue in a common law action—*Cruz v. Maritime Co. of Philippines*¹⁹⁰—which was subject to the general venue rule, rather than doing so in a case in which a federal statute dictated a specific venue.¹⁹¹

Cruz, a seaman working on a Philippine vessel, was injured while the vessel was moored in United States waters.¹⁹² At the time of his injuries, Cruz was a resident of the Philippines.¹⁹³ Following his injuries, Cruz resided in the United States.¹⁹⁴ The defendant vessel owner was a Philippine corporation, wholly owned by Philippine shareholders, having its principal place of business in the Philippines.¹⁹⁵ Cruz sued in the Southern District of New York, claiming under the Jones Act and the general maritime law of the United States.¹⁹⁶

¹⁸⁹ See *id.* at 165 (Oakes, J., concurring in dissent).

¹⁹⁰ 702 F.2d 47 (2d Cir. 1983) (per curiam).

¹⁹¹ In this respect, the evolution of the Second Circuit's jurisprudence is remarkably similar to that of the Fifth Circuit, which also abandoned a long-standing policy of deference in Jones Act cases in the course of deciding a case in which there was no Jones Act claim at issue. See *infra* notes 255-61 and accompanying text.

¹⁹² See *Cruz v. Maritime Co. of Philippines*, 549 F. Supp. 285, 287 (S.D.N.Y. 1982), *aff'd per curiam*, 702 F.2d 47 (2d Cir. 1983).

¹⁹³ See *id.* at 286.

¹⁹⁴ See *id.* at 287.

¹⁹⁵ See *id.*

¹⁹⁶ See *id.* at 288.

The defendant moved to dismiss the claim on the ground of forum non conveniens.¹⁹⁷ The district court found that, if the Jones Act and the general maritime law of the United States applied to the case, then it was “without power” to dismiss on grounds of forum non conveniens;¹⁹⁸ and, on the other hand, if Philippine law applied, then it was “required” to apply the *Gilbert* test.¹⁹⁹ After considering the *Lauritzen* factors,²⁰⁰ the district court concluded that the Jones Act did not apply.²⁰¹ It then concluded that the private and public interest factors weighed heavily in favor of the Philippines, and dismissed.²⁰²

The Second Circuit upheld the dismissal, noting in a brief per curiam opinion that the “district court appropriately applied the correct standards for determining whether to dismiss on forum non conveniens grounds.”²⁰³ The remainder of the short opinion, however, is devoted to explaining why the district court was wrong in its initial estimation that, had the Jones Act or general United States maritime law applied, it would have been forced to retain jurisdiction.²⁰⁴ Observing that *Antypas* had caused “confusion,” the Second Circuit sought to distinguish *Antypas*—and *Bartholomew* for that matter—as non-binding precedent in forum non conveniens cases.²⁰⁵ *Antypas*, the *Cruz* Court wrote, “does not actually deal with a forum non conveniens issue” and “can only be read to stand for the proposition that if the Jones Act applies the court may not dismiss for lack of subject matter jurisdiction.”²⁰⁶ Likewise, the *Cruz* Court admonished, *Bartholomew* was not a forum non conveniens case.²⁰⁷ The Second Circuit concluded that “[a] case involving forum non conveniens” presents “exceptional circumstances” that warrant a district court’s refusal to adjudicate a case even when the Jones Act (or, presumably, similar federal statutory law) applies.²⁰⁸ For this proposition, the court cited, of all cases, *Bartholomew*.²⁰⁹

¹⁹⁷ *See id.*

¹⁹⁸ *Id.* (citing *Antypas v. Cia. Maritime San Basilio, S.A.*, 541 F.2d 307, 310 (2d Cir. 1976)).

¹⁹⁹ *Id.*

²⁰⁰ *See supra* note 162.

²⁰¹ *See Cruz*, 549 F. Supp. at 288-89.

²⁰² *See id.* at 290-91.

²⁰³ *Cruz*, 702 F.2d at 47.

²⁰⁴ *See supra* text accompanying notes 198-99.

²⁰⁵ *Cruz*, 702 F.2d at 48.

²⁰⁶ *Id.*

²⁰⁷ *See id.*

²⁰⁸ *Id.*

²⁰⁹ *See id.* (citing *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 443 (2d Cir. 1959)).

There are several curious features worth noting about *Cruz*. For starters, the proposition that the *Antypas* case did not “actually deal with a forum non conveniens issue”²¹⁰ is difficult to follow. It certainly would have been news to the defendant in *Antypas* that the appellate court’s decision did not concern forum non conveniens. The district judge’s order in that case, dismissing the suit on forum non conveniens grounds, was reversed by the Second Circuit, and the case was remanded for further proceedings.²¹¹ This meant, of course, that the defendant had to defend the action in the forum where suit was originally filed.

A second weakness of the *Cruz* decision is its citation to *Bartholomew* as legal precedent for the proposition that the doctrine of forum non conveniens is one “exceptional situation” in which a court need not exercise its otherwise well-founded jurisdiction. As the *Cruz* Court itself correctly noted, *Bartholomew* did not concern a forum non conveniens issue.²¹² Thus, *Bartholomew* could not be clear or convincing authority for demonstrating that the forum non conveniens doctrine is an exception to an otherwise mandatory jurisdiction rule.

Finally, perhaps the most peculiar aspect of *Cruz* is why it addressed the applicability of forum non conveniens in a Jones Act case at all. The district court held the Jones Act to be inapplicable,²¹³ and the Second Circuit did not reexamine this finding.²¹⁴ That the Second Circuit chose to express its views of what role forum non conveniens should play in some other case in which the Jones Act or other federal statute provided the venue choice strongly suggests that the Second Circuit wanted to “correct” what it considered to be a misperception of *Bartholomew* and *Antypas*.

Whether dicta or not, however, *Cruz* expressed a more expansive view of the discretionary power of courts to dismiss, certainly in Jones Act cases and possibly, by extension, in other federal statutory cases. The impact of this decision has proved to be far-reaching, not only in the Second Circuit, but in other courts as well.²¹⁵ Subsequent courts have drawn two conclusions about

²¹⁰ See *supra* text accompanying note 206.

²¹¹ See *Antypas v. Compania Maritime San Basilio, S.A.*, 541 F.2d 307, 310 (2d Cir. 1976); see also *supra* text accompanying notes 169-73.

²¹² See *Cruz*, 702 F.2d at 48.

²¹³ See *Cruz v. Maritime Co. of Philippines*, 549 F. Supp. 285, 288-89 (S.D.N.Y. 1982), *aff’d per curiam*, 702 F.2d 47 (2d Cir. 1983).

²¹⁴ See *Cruz*, 702 F.2d at 47-48.

²¹⁵ See, e.g., *Capital Currency Exch., N.V. v. National Westminster Bank PLC*, 155 F.3d 603, 608, 611 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1459 (1999); *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 949-50 (1st

the holding in *Cruz*, neither of which is warranted by any plausible reading of the decision. One conclusion reached in subsequent cases is that Congress has not expressed its intent that jurisdiction over Jones Act cases be mandatory.²¹⁶ But, as noted earlier, *Cruz* did not overrule *Bartholomew* or *Antypas* or reject their mandatory jurisdiction language.²¹⁷ In other words, the *Cruz* Court did not dispute that, in enacting the Jones Act, Congress mandated that courts take jurisdiction of cases properly brought under the Act absent some "exceptional situation." The *Cruz* Court merely opined that a forum non conveniens dismissal based on the *Gilbert* convenience factors was such an "exceptional situation."²¹⁸ The most that may be said about *Cruz*, then, is that the decision is silent on how to reconcile the conflict between legislative intent and judicial discretion, as the case itself presented no such conflict.

The second erroneous conclusion often reached in later decisions is that the *Cruz* Court repudiated an approach to forum non conveniens whereby choice of law is decided before the *Gilbert* test is applied. As will be seen in the next Part, a number of courts have followed, and several continue to follow, a "modified" forum non conveniens analysis in federal statutory cases, which requires that choice of law be resolved before applying the two-part *Gilbert* formula.²¹⁹ Despite the belief by some later panels of the Second Circuit that *Cruz* rejected a modified approach, the analysis adopted by the *Cruz* Court is not, in fact, inconsistent with a forum non conveniens approach that looks first at the choice of law question. Indeed, given the rationale of the decision, it is difficult to see how a court following *Cruz* can avoid first resolving the choice of law question. The *Cruz* Court purportedly rejected a modified approach when it wrote that "maritime choice of law principles are not involved in a forum non conveniens analysis."²²⁰ But, within the context of the *Cruz* decision, the most plausible way to interpret this language is that a court must resolve choice of law *before* the forum non conveniens inquiry begins. In other words, a case must follow the modified forum non conveniens approach. Under the *Cruz* formula, if the Jones Act applies, then the court must exercise jurisdiction

Cir. 1991); *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147, 1163 n.25 (5th Cir. 1987) (en banc), *vacated on other grounds*, 490 U.S. 1032 (1989); *Ioannides v. Marika Maritime Corp.*, 928 F. Supp. 374, 377 (S.D.N.Y. 1996); *Doufexis v. Nagos S.S., Inc.*, 583 F. Supp. 1132, 1133 (S.D.N.Y. 1983). These cases all cite *Cruz* to support the availability of forum non conveniens dismissal in federal statutory cases.

²¹⁶ See *Capital Currency Exchange*, 155 F.3d at 608.

²¹⁷ See *supra* text accompanying notes 205-09.

²¹⁸ *Cruz*, 702 F.2d at 48.

²¹⁹ See *infra* notes 256-60, 270-96, 305-07, 310-12 and accompanying text.

²²⁰ *Cruz*, 702 F.2d at 48.

(unless some “exceptional circumstances” arise).²²¹ Whether the Jones Act applies, therefore, must be settled before a forum non conveniens analysis is performed.

The Second Circuit solidified its view that federal statutory claims are subject to forum non conveniens dismissal in *Transunion Corp. v. Pepsico, Inc.*²²² The plaintiff Philippine corporations sued Pepsico, a United States corporation, in the Southern District of New York, alleging breach of contract, common law fraud, and RICO claims.²²³ The plaintiffs argued, *inter alia*, that because they alleged a RICO violation, dismissal on forum non conveniens grounds was inappropriate.²²⁴ There were actually two arguments. The first was that RICO was more favorable to the plaintiffs than Philippine law and, therefore, the plaintiffs should be entitled to seek redress under the more favorable law.²²⁵ This argument seemed doomed from the outset. The Supreme Court had already ruled that “dismissal may not be barred solely because of the possibility of an unfavorable change in law” from one forum to the next.²²⁶

The plaintiffs’ second argument was that, because the RICO statute contains a provision vesting the federal district courts with venue,²²⁷ judicial dismissal under forum non conveniens was inappropriate.²²⁸ The Second Circuit rejected this argument on several grounds. The court first noted that the argument was unavailable because the plaintiffs’ RICO cause of action was legally deficient, as the plaintiffs failed to properly plead the necessary predicate acts.²²⁹ This alone should have ended the court’s discussion. Because RICO did not apply, its special venue provision would have no bearing on the application of the forum non conveniens doctrine. But, just as the *Cruz* Court had been undeterred by the inapplicability of the Jones Act in rendering an (advisory) opinion on the availability of forum non conveniens dismissal in Jones Act cases,²³⁰ the *Transunion* Court proceeded to address the RICO special

²²¹ See *id.*

²²² 811 F.2d 127 (2d Cir. 1987) (per curiam).

²²³ See *id.* at 127-28.

²²⁴ See *id.* at 130.

²²⁵ See *id.* at 129.

²²⁶ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981); accord *Transunion*, 811 F.2d at 129.

²²⁷ 18 U.S.C. § 1965(a) (1994).

²²⁸ See *Transunion*, 811 F.2d at 129.

²²⁹ See *id.*

²³⁰ See *supra* text accompanying notes 213-14.

venue provision argument despite the inapplicability of RICO to the plaintiffs' claims.²³¹

The *Transunion* plaintiffs attempted to draw an analogy between RICO claims and claims under federal antitrust law, hoping to convince the court that, for the same reasons that the Supreme Court had recognized an exemption from forum non conveniens dismissal for antitrust claims in *National City Lines I*,²³² the Second Circuit should recognize an exemption for RICO claims. To avoid *National City Lines I*, the Second Circuit distinguished the legislative history of the Clayton Act from that of RICO.²³³ Acknowledging that the Clayton Act legislative history demonstrated "no other thought than that the choice of forums was given as a matter of right, not as one limited by judicial discretion,"²³⁴ the court nonetheless saw the RICO statute differently, finding no indication in the RICO statute that Congress intended an interpretation similar to the Clayton Act's venue provision.²³⁵

The court also noted that RICO's legislative history expressly references "present" antitrust legislation.²³⁶ According to the *Transunion* Court, this meant that "Congress was aware that the result in *National City Lines I* was effectively overruled by Congress in 1948 when it enacted 28 U.S.C. § 1404(a)—apparently in all cases, domestic or foreign."²³⁷ What authorities did the *Transunion* Court cite to bolster its assertion that *National City Lines I*

²³¹ In *Capital Currency Exchange, N.V. v. National Westminster Bank PLC*, 155 F.3d 603 (2d Cir. 1998), cert. denied, 526 U.S. 1067 (1999), the Second Circuit rejected the plaintiff's argument that its analysis in *Transunion* of the availability of forum non conveniens dismissal in RICO cases was "mere dictum." See *id.* at 608. The *Capital Currency* Court argued that the plaintiff's analysis of RICO's legislative history "was necessary to our conclusion that *National City Lines I*'s holding did not apply to RICO cases." *Id.* This argument seems to miss the mark. Admittedly, *Transunion*'s analysis of RICO's legislative history was necessary to the *Transunion* Court's conclusion that *National City Lines I*'s holding did not apply to RICO cases. But, what the court overlooks is that there was no viable RICO claim in *Transunion*—both the district court and the Second Circuit found that the plaintiffs failed to state a RICO case. Therefore, the *Transunion* Court's opinion regarding whether a properly pleaded RICO claim was subject to forum non conveniens dismissal was not, as the *Capital Currency* Court argued, "necessary" to the circuit's affirmance of the district court's forum non conveniens dismissal of the *Transunion* plaintiffs' improperly pleaded RICO claims—and, hence, non-RICO claims.

²³² *National City Lines I*, 334 U.S. 573, 588-89 (1948); see *supra* text accompanying notes 119-45 (discussing *National City Lines I*).

²³³ See *Transunion Corp. v. Pepsico, Inc.*, 811 F.2d 127, 130 (2d Cir. 1987) (per curiam).

²³⁴ *Id.* (quoting *National City Lines I*, 334 U.S. at 586-87).

²³⁵ See *id.* (observing that "[a] review of the legislative history of RICO discloses no mandate that the doctrine of forum non conveniens should not apply, nor is there any indication that Congress had the interpretation of 15 U.S.C. § 22 [which defines venue under the Clayton Act] in *National City Lines I* in mind when it drafted section 1965 of RICO").

²³⁶ *Id.*

²³⁷ *Id.*

was overruled by § 1404 in a foreign forum case? First, the legislative history of § 1404 itself, which noted that the provision “was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper.”²³⁸ Apparently lost on the *Transunion* Court was the fact that the language in the legislative history does not lend any support to the theory that § 1404 was meant to overrule *National City Lines I* in cases in which the alternative forum was a *foreign* one.²³⁹ Congress presumably could have used § 1404 to vest district courts with statutory authority to dismiss a suit more appropriately brought in a foreign forum. However, Congress did not do so.

The only other authority cited by the *Transunion* Court was *National City Lines II*.²⁴⁰ The *Transunion* Court’s reliance on *National City Lines II* was unavailing, because *National City Lines II* was also a domestic case and it did not address the issue of whether the special venue provision in the Clayton Act still precluded dismissal in favor of a foreign forum in the wake of § 1404.²⁴¹ Put simply, the *Transunion* Court sidestepped the difficult question of whether a suit may be dismissed to a foreign forum under the doctrine of forum non conveniens when Congress has enacted a venue provision in a statute that the plaintiff alleges affords her a right of recovery.

Since *Transunion*, no panel of the Second Circuit has recognized a statutory exemption to forum non conveniens dismissal. Although acknowledging that domestic courts may have an interest in enforcing certain federal statutes, the current body of Second Circuit law shares little in common with *Bartholomew* and *Antypas*. The modern view in the circuit is that any such interest is not enough, by itself, to prohibit the dismissal of a claim on forum non conveniens grounds.²⁴² For example, in *Capital Currency Exchange, N.V. v. National*

²³⁸ *Id.* (quoting H.R. Rep. No. 80-308, at A132 (1947), reprinted in 28 U.S.C. § 1404 annot. (1982)); see *supra* note 113.

²³⁹ See *supra* note 112.

²⁴⁰ *United States v. National City Lines, Inc.*, 337 U.S. 78 (1949) (“*National City Lines II*”); see *Transunion*, 811 F.2d at 130; *supra* text accompanying notes 149-53 (discussing *National City Lines II*).

²⁴¹ See *supra* text following note 153.

²⁴² See, e.g., *Alfadda v. Fenn*, 159 F.3d 41, 47 (2d Cir. 1998) (dismissing cursorily the argument that forum non conveniens dismissal is unavailable in properly pleaded RICO or federal securities cases); *Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 1002 (2d Cir. 1993) (remarking that even if “United States courts have an interest in enforcing United States securities laws, this alone does not prohibit them from dismissing a securities action on the ground of forum non conveniens”); see also, e.g., *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 74 (2d Cir. 1998) (observing that “the nonexistence of a RICO statute there [in Indonesia] does not, by itself, preclude the use of another forum”).

Westminster Bank PLC,²⁴³ the Second Circuit recently held that antitrust claims are subject to forum non conveniens dismissal according to the standard *Gilbert* analysis, in part because allegedly anti-competitive or monopolistic actions may be prosecuted under Articles 85 and 86 of the Treaty of Rome, which create a private right of action “roughly analogous” to sections 1 and 2 of the Sherman Act.²⁴⁴ In reaching this conclusion, the Second Circuit relied heavily on its earlier decision in *Transunion*, and on the First Circuit’s opinion in *Howe v. Goldcorp Investments, Ltd.*²⁴⁵

B. The Fifth Circuit

Like the Second Circuit, the Fifth Circuit has been influential in the development of forum non conveniens doctrine in other circuits. Like the Second Circuit, but to a lesser degree, the Fifth Circuit’s methodology for analyzing forum non conveniens challenges has evolved over time. For many years, the Fifth Circuit followed a “modified” approach to forum non conveniens, under which a court first conducted a choice of law inquiry. This choice of law inquiry was almost always outcome-determinative of the forum non conveniens analysis: when a federal statute governed the plaintiff’s claim, jurisdiction was retained; when no federal statute applied in the case, the action was usually dismissed. Beginning in 1987, the Fifth Circuit embraced the traditional *Gilbert* approach—where choice of law is *a* factor, but not *the* factor in the forum non conveniens determination—in certain federal statutory cases. Unlike the Second Circuit, however, the Fifth Circuit continues to follow a modified approach to insulate other federal statutory claims from forum non conveniens dismissal. Therefore, a review of pertinent Fifth Circuit cases offers the opportunity to trace the evolution of the Fifth Circuit’s approach and to compare its former and current methodology.

²⁴³ 155 F.3d 603 (2d Cir. 1998), *cert. denied*, 526 U.S. 1067 (1999).

²⁴⁴ *Id.* at 608-10.

²⁴⁵ 946 F.2d 944 (1st Cir. 1991); *see infra* text accompanying notes 328-41. Neither *Transunion* (civil RICO) nor *Howe* (securities) is an antitrust case; yet, both *Transunion* and *Howe* rely on *National City Lines II* however, which was an antitrust case, but one that did not involve a forum non conveniens claim. This appears to be the functional equivalent of “double hearsay”: *Capital Currency* finds no exemption for antitrust claims based on dicta in *Transunion* and *Howe*—both of which involved forum non conveniens motions, but neither of which involved antitrust claims. *Transunion* and *Howe*, in turn, relied on *National City Lines II*, which involved antitrust claims, but not forum non conveniens. There is nothing wrong with reasoning by analogy, but there is no hint of analogy in the dicta in *Transunion* and *Howe*, nor in *Capital Currency*’s adoption of the dicta in *Transunion* and *Howe*.

1. *The Fifth Circuit's Evolving Approach to Admiralty Claims*

The Fifth Circuit's earliest foray into forum non conveniens doctrine is notable not so much for its methodology as for its basic assumption about the exercise of jurisdiction. In *Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S*,²⁴⁶ six British, Irish, and German owners of cargo on the *Hoheweg*, a German vessel, sued the owners of *The Sunny Prince*, a Norwegian vessel, in the Southern District of Florida for the loss of their cargo after *The Sunny Prince* collided with and sunk the *Hoheweg*, which was en route from the Philippines to the Netherlands.²⁴⁷ The plaintiffs brought this admiralty suit in the Southern District of Florida because that was where *The Sunny Prince* was located at the time.²⁴⁸ The defendants successfully moved to dismiss the Florida action, and the plaintiffs appealed.²⁴⁹ The Fifth Circuit,²⁵⁰ citing the Supreme Court's decision in *The Belgenland*,²⁵¹ acknowledged that admiralty claims were subject to forum non conveniens dismissal at the discretion of the trial court, but held that the trial court had improperly exercised that discretion in dismissing the case.²⁵² In *Poseidon Schiffahrt, G.M.B.H. v. M/S Netuno*,²⁵³ the Fifth Circuit reaffirmed the presumption in favor of retaining jurisdiction set forth in *Motor Distributors*.²⁵⁴

A second, and more populous, line of Fifth Circuit admiralty cases applying forum non conveniens doctrine involved claims under the Jones Act.²⁵⁵ Starting with *Fisher v. Agios Nicolaos V*,²⁵⁶ and culminating in *McClelland Engineers, Inc. v. Munusamy*,²⁵⁷ the Fifth Circuit held that motions to dismiss

²⁴⁶ 239 F.2d 463 (5th Cir. 1956).

²⁴⁷ See *id.* at 464.

²⁴⁸ See *id.* at 464-65 n.2.

²⁴⁹ See *id.* at 464.

²⁵⁰ This case was decided some 25 years before the Eleventh Circuit split from the Fifth. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). At the time of this decision, the Fifth Circuit included not only its current constituents—Texas, Louisiana, and Mississippi—but also Florida, Georgia, and Alabama. See *infra* note 307.

²⁵¹ 114 U.S. 355 (1885).

²⁵² *Motor Distributors*, 239 F.2d at 465 (observing that “[i]nstead of the rule being, as the trial court here stated, that jurisdiction should be denied unless such denial would work an injustice, the rule is, rather, that jurisdiction should be taken unless to do so would work an injustice”).

²⁵³ 474 F.2d 203 (5th Cir. 1973).

²⁵⁴ *Id.* at 205.

²⁵⁵ 46 U.S.C. app. §§ 688 (1994).

²⁵⁶ 628 F.2d 308 (5th Cir. 1980).

²⁵⁷ 784 F.2d 1313 (5th Cir. 1986); see *James v. Gulf Int'l Marine Corp.*, 777 F.2d 193, 194 (5th Cir. 1985); *Cuevas v. Reading & Bates Corp.*, 770 F.2d 1371, 1377-78 (5th Cir. 1985); *Ali v. Offshore Co.*, 753 F.2d 1327, 1330 (5th Cir. 1985); *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289, 292-93 (5th Cir. 1984); *In re McClelland Eng'rs, Inc.*, 742 F.2d 837, 838 (5th Cir. 1984); *Koke v. Phillips Petroleum Co.*, 730

Jones Act claims on the ground of forum non conveniens should be subjected to a three-step inquiry by the trial court. First, whose law governed the plaintiff's claims? If the Jones Act governed, the trial court should retain jurisdiction barring extraordinary circumstances.²⁵⁸ Second, if foreign law governed, did two or more fora exist in which the plaintiff could pursue its claims against all defendants?²⁵⁹ And, third, if foreign law governed and there did exist two or more viable fora, then (and only then), did the relevant private and public interest factors favor dismissal of the plaintiff's claims in favor of some other forum?²⁶⁰

The en banc Fifth Circuit disavowed the modified approach and this line of Jones Act cases in *In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, stating that all future Jones Act claims should be subjected to the same two-step forum non conveniens analysis the court had approved for most non-Jones Act cases—to wit, steps two and three of the *Fisher* inquiry.²⁶¹ No-

F.2d 211, 218 (5th Cir. 1984); *Gahr Dev., Inc. v. Nedlloyd Lijnen, B.V.*, 723 F.2d 1190, 1192 (5th Cir. 1984); *Diaz v. Humboldt*, 722 F.2d 1216, 1217 (5th Cir. 1984); *De Oliveira v. Delta Marine Drilling Co.*, 707 F.2d 843, 845-46 (5th Cir. 1983) (per curiam); *Bailey v. Dolphin Int'l Inc.*, 697 F.2d 1268, 1274 (5th Cir. 1983); *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 384 (5th Cir. 1983); *Zekic v. Reading & Bates Drilling Co.*, 680 F.2d 1107, 1108 (5th Cir. 1982); *Volyrakis v. M/V Isabelle*, 668 F.2d 863, 866 (5th Cir. 1982); *Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015, 1017-18 (5th Cir. 1981); see also *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140, 1145 (5th Cir. 1984) (applying similar analysis in non-Jones Act maritime case); *Fajardo v. Tidewater, Inc.*, 707 F.2d 858, 861-62 (5th Cir. 1983) (per curiam) (adopting without any discussion the trial court's reasoning).

²⁵⁸ See, e.g., *Vaz Borralho*, 696 F.2d at 384; *Chiazor*, 648 F.2d at 1017-18; *Fisher*, 628 F.2d at 315. The Fifth Circuit resolved the question of whose law governed the plaintiff's claims by applying eight factors set out by the Supreme Court in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970). See *supra* notes 162-63.

²⁵⁹ See, e.g., *Vaz Borralho*, 696 F.2d at 384; *Fisher*, 628 F.2d at 315. See generally *Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 342 (5th Cir. 1999) ("The doctrine of forum non conveniens presupposes at least two forums where the defendant is amenable to process . . .") (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07 (1947)); *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d at 1163-64 (5th Cir. 1987) (en banc), *vacated on other grounds*, 490 U.S. 1032 (1989).

²⁶⁰ See, e.g., *Chiazor*, 648 F.2d at 1018; *Fisher*, 628 F.2d at 315. Interestingly, none of the cases in the *Fisher* line—other than *Fisher* itself—actually held American law governed the dispute, precluding forum non conveniens dismissal. In most of these cases, the Fifth Circuit found that foreign law governed; therefore, the disposition of the motion to dismiss would depend on the availability and adequacy of an alternate forum and application of the *Gilbert* factors. See *James*, 777 F.2d at 194; *Cuevas*, 770 F.2d at 1379; *Ali*, 753 F.2d at 1330; *Koke*, 730 F.2d at 218-20; *Gahr Developments*, 723 F.2d at 1192; *Diaz*, 722 F.2d at 1218-19; *De Oliveira*, 707 F.2d at 845-46; *Bailey*, 697 F.2d at 1274-78; *Vaz Borralho*, 696 F.2d at 385-90; *Zekic*, 680 F.2d at 1108; *Volyrakis*, 668 F.2d at 866-68; *Chiazor*, 648 F.2d at 1018-19.

²⁶¹ 821 F.2d at 1147. After *In re Air Crash*, the Fifth Circuit apparently concludes that choice of law is still relevant to deciding a forum non conveniens motion, but is now just one of several factors for a trial court to weigh in the traditional *Gilbert* analysis. See, e.g., *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 725 (5th Cir. 1990) ("*In re Air Crash* does not preclude a choice-of-law determination as part of a public-factors analysis made after a determination that an adequate forum is available.").

tably, this disavowal of the *Fisher* modified approach was mere dicta, because *In re Air Crash* was not a Jones Act case.²⁶² For that very reason, Judges Garza,²⁶³ Garwood,²⁶⁴ Higginbotham,²⁶⁵ and Johnson²⁶⁶ did not join in that part of the en banc court's opinion that purported to overrule the *Fisher* line of cases. Moreover, *Sherrill v. Brinkerhoff Maritime Drilling*,²⁶⁷ the only published opinion that the *In re Air Crash* Court could find that "squarely confront[ed] the issue of whether a modified analysis in the context of a Jones Act action is appropriate" in the wake of *Piper Aircraft*,²⁶⁸ was subsequently reversed by the Ninth Circuit. Nonetheless, subsequent panels have embraced the *Fisher* line of cases "reversal" of the *In re Air Crash* Court's and have applied the traditional approach of the *Gilbert* test to Jones Act claims brought by foreign plaintiffs.²⁶⁹

2. The Fifth Circuit's Steady Approach to Antitrust Claims

Although the Fifth Circuit's approach to forum non conveniens analysis of Jones Act and other admiralty-related claims has changed post-*In re Air Crash*, the court has remained unwavering in its refusal to permit dismissal of claims brought under the Sherman and Clayton Acts, even though its rationale for that unwillingness has evolved.

*Tivoli Realty, Inc. v. Interstate Circuit, Inc.*²⁷⁰ exemplifies this deferential approach in antitrust cases. In *Tivoli*, the plaintiff brought suit in the United States District Court for the District of Delaware alleging conspiracy in restraint of trade in violation of the Sherman and Clayton Acts.²⁷¹ Two of the fourteen defendants named in the Delaware case brought a separate action in

²⁶² Compare *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2d Cir. 1983) (per curiam) (disavowing, in dicta, an existing line of cases giving preferential forum non conveniens status to Jones Act cases). See *supra* text accompanying notes 203-07.

²⁶³ See *In re Air Crash*, 821 F.2d at 1179 (Garza, J. concurring in part and dissenting in part).

²⁶⁴ See *id.* at 1163 n.25, 1180 (Garwood, J. concurring in part and dissenting in part).

²⁶⁵ See *id.* (Higginbotham, J. concurring).

²⁶⁶ See *id.* (Johnson, J. concurring).

²⁶⁷ 615 F. Supp. 1021 (N.D. Cal. 1985), *rev'd in part and aff'd in part on other grounds by* *Zipfel v. Haliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *aff'd as modified on other grounds*, 861 F.2d 565 (9th Cir. 1988).

²⁶⁸ *In re Air Crash*, 821 F.2d at 1163 n.25.

²⁶⁹ See, e.g., *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 724-25 (5th Cir. 1990); *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1379 (5th Cir. 1988). In both *Quintero* and *Camejo*, the Fifth Circuit affirmed the district court's dismissal of the plaintiff's Jones Act cases in favor of foreign fora, see *Quintero*, 914 F.2d at 720, 726 and *Camejo*, 838 F.2d at 1376, 1381, results that the district courts almost certainly would not have reached prior to *In re Air Crash*.

²⁷⁰ 167 F.2d 155 (5th Cir. 1948).

²⁷¹ *Id.* at 156.

the United States District Court for the Northern District of Texas, in which seven of their co-defendants eventually intervened, to enjoin the prosecution of the Delaware action on the ground of forum non conveniens.²⁷² The Texas court granted the temporary injunction, and the Delaware plaintiff appealed the Texas court's ruling.²⁷³

On appeal, the Fifth Circuit reversed on three grounds.²⁷⁴ Most important for present purposes, the Fifth Circuit found that the Sherman and Clayton Acts contained a special venue provision,²⁷⁵ "substantially identical" to that contained in FELA,²⁷⁶ on the basis of which numerous earlier Supreme Court and lower federal court decisions had refused to apply the doctrine of forum non conveniens.²⁷⁷ Finding that the special venue provision in the Sherman and Clayton Acts "c[ould] not be distinguished in principle" from the one in FELA, the Fifth Circuit held that the district court had improperly enjoined the Delaware action.²⁷⁸ "The general rule," the court wrote, "is that a court possessing jurisdiction must exercise it if the venue is properly laid."²⁷⁹ But because the court found that venue was "properly laid" pursuant to the Clayton Act's specific venue provision, the forum non conveniens doctrine was inapplicable.²⁸⁰

Thirty-four years later, the Fifth Circuit revisited the question of whether the doctrine of forum non conveniens properly applied to federal antitrust ac-

²⁷² See *id.*

²⁷³ See *id.* at 155-56.

²⁷⁴ The Fifth Circuit first questioned whether, "as a matter of comity," one federal district court ought to enjoin another federal district court solely for the convenience of one or more parties before the second court. *Id.* at 156 (footnotes omitted). Additionally, because five of the 14 defendants failed to intervene in the Texas action and took the position that the Texas court lacked jurisdiction over them, the Fifth Circuit also questioned whether there existed two fora to whose jurisdiction the entire group of defendants was subject, *id.* at 157, as required by *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07 (1947).

²⁷⁵ See *Tivoli*, 167 F.2d at 156; see also 15 U.S.C. § 22 (1994).

²⁷⁶ 45 U.S.C. § 56 (1994); see *supra* text accompanying note 45.

²⁷⁷ See *Miles v. Illinois Cent. R.R. Co.*, 315 U.S. 698 (1942); *Tivoli*, 167 F.2d at 157-58 & n.11 (citing *Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44 (1941); *Chesapeake & Ohio Ry. Co. v. Vigor*, 90 F.2d 7 (6th Cir. 1937); *Wood v. Delaware & H. R. Corp.*, 63 F.2d 235 (2d Cir. 1933); *Schendel v. McGee*, 300 F. 273 (8th Cir. 1924); *Sacco v. Baltimore & Ohio R.R. Co.*, 56 F. Supp. 959 (E.D.N.Y. 1944); *Baltimore & Ohio R.R. Co. v. Clem*, 36 F. Supp. 703 (N.D. W. Va. 1941), *aff'd*, 123 F.2d 399 (4th Cir. 1941); *Beem v. Illinois Cent. R. Co.*, 55 F.2d 708 (D. Minn. 1930); *Norris v. Illinois Cent. R.R. Co.*, 18 F.2d 584 (D. Minn. 1925); and *Trapp v. Baltimore & Ohio R.R. Co.*, 283 F. 655 (N.D. Ohio 1922)); see generally *supra* text accompanying notes 37-91 (discussing the Supreme Court's pre-*Gilbert* cases).

²⁷⁸ See *Tivoli*, 167 F.2d at 157-58.

²⁷⁹ *Id.* at 158.

²⁸⁰ *Id.*

tions in the case of *Industrial Investment Development Corp. v. Mitsui & Co.*²⁸¹ In *Mitsui*, the Fifth Circuit, citing to the Supreme Court's decision in *National City Lines I*,²⁸² held that "[t]he common law doctrine of forum non conveniens is inapplicable to suits brought under the United States antitrust laws."²⁸³ As the Fifth Circuit explained:

Defendants argue that *National City Lines* is distinguishable because it dealt with forum non conveniens "in a purely venue-related context." This argument is wrong for several reasons. First, it misstates the facts of *National City Lines*, which involved a dismissal, not a change-of-venue order. Second, it misconceives the holding of *National City Lines*, which was that 15 U.S.C. § 22 was a statutory elimination of judicial discretion concerning where the case should be tried. Third, it ignores the reasons behind that holding, which apply with even greater force to this case.²⁸⁴

Finding the rationale of *National City Lines I* fully applicable to the antitrust context before the court in *Mitsui*, the Fifth Circuit chose to follow the Supreme Court's lead.²⁸⁵ Moreover, the Fifth Circuit rejected the argument that *National City Lines II*,²⁸⁶ "effectively nullified" *National City Lines I*.²⁸⁷ Contrary to the interpretation of those decisions by the First²⁸⁸ and Second Circuits,²⁸⁹ the Fifth Circuit concluded that *National City Lines II* "in no way questioned" *National City Lines I* "concerning the effect of [the Clayton Act venue provision] on common law forum non conveniens."²⁹⁰

The *Mitsui* Court did not rest its holding solely on *National City Lines I* and its interpretation of the effect on that decision by the Court's subsequent holding in *National City Lines II*. "Even without the authority of *National City Lines*," the *Mitsui* Court wrote, "we would reach the conclusion that antitrust

²⁸¹ 671 F.2d 876 (5th Cir. 1982), *vacated and remanded on other grounds*, 460 U.S. 1007 (1983).

²⁸² *United States v. National City Lines, Inc.*, 334 U.S. 573 (1948) ("*National City Lines I*").

²⁸³ *Mitsui*, 671 F.2d at 890.

²⁸⁴ *Id.* at 890 (footnote and citations omitted). Among the reasons identified by the *Mitsui* Court as motivating the Supreme Court's *National City Lines I* decision was the belief that Congress had enacted the venue provision in the Clayton Act to give plaintiffs wide discretion in choosing the forum; and to ensure that trials would not be prolonged by extensive forum non conveniens litigation. *See id.* *See generally supra* text accompanying notes 119-45 (discussing *National City Lines I*).

²⁸⁵ *See id.*

²⁸⁶ *United States v. National City Lines, Inc.*, 337 U.S. 78 (1949) ("*National City Lines II*").

²⁸⁷ *Mitsui*, 671 F.2d at 890 n.18. *See generally supra* text accompanying notes 148-54 (discussing *National City Lines II*).

²⁸⁸ *See infra* text accompanying notes 332-37.

²⁸⁹ *See supra* text accompanying notes 237-41.

²⁹⁰ *Mitsui*, 671 F.2d at 890 n.18.

cases cannot be dismissed on the ground that a foreign country is a more convenient forum.”²⁹¹ According to the court, the Sherman Act does not focus solely on civil obligations but also criminalizes monopolistic behavior.²⁹² Thus, it would be inconsistent to dismiss an action on forum non conveniens grounds when Congress intended to regulate, punish, and deter wrongdoers.²⁹³ Moreover, due to this penal element, claims under the Sherman and Clayton Acts are distinguishable from those at issue in *Piper Aircraft Co. v. Reyno*.²⁹⁴ Therefore, the *Mitsui* Court concluded, *Piper Aircraft* did not require it to abandon *Tivoli* and allow forum non conveniens dismissal of antitrust claims.²⁹⁵

3. *Forum Non Conveniens Analysis of Other Federal Statutory Claims in the Fifth Circuit*

In *Kempe v. Ocean Drilling & Exploration Co.*, the plaintiffs, joint liquidators of an insolvent Bermudan insurer, sued the insurer’s parent company and a reinsurer in Louisiana, the parent company’s principal place of business.²⁹⁶ The defendants moved to dismiss the case to Bermuda, the place of origin and principal place of business of both the reinsurer and the bankrupt.²⁹⁷ The district court granted the motion.²⁹⁸ The plaintiffs appealed on the ground that their civil RICO claims should be afforded the same deference in considering forum non conveniens motions as federal antitrust claims.²⁹⁹ The *Kempe* Court distinguished civil RICO claims from claims under federal antitrust law on the ground that civil RICO claims, unlike federal antitrust claims, have common

²⁹¹ *Id.* at 890-91.

²⁹² *See id.* at 891.

²⁹³ *See id.*

²⁹⁴ *See id.* at 891 n.20 (“*Reyno* involved the civil obligations owed by one private party to another in a tort case; by contrast, a private antitrust suit is conceived as a part of the scheme of enforcement of statutes enacted to protect United States commerce.”) (citations omitted).

²⁹⁵ Since *Mitsui*, the Fifth Circuit has reaffirmed on three occasions that forum non conveniens dismissal is unavailable in federal antitrust cases. *See Haynsworth v. The Corporation*, 121 F.3d 956, 968 (5th Cir. 1997); *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 829-30 (5th Cir. 1993); *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1142 (5th Cir. 1989).

²⁹⁶ 876 F.2d 1138 (5th Cir. 1989).

²⁹⁷ *See id.* at 1140-41.

²⁹⁸ *See id.* at 1141.

²⁹⁹ *See id.* at 1139-41. The plaintiffs argued that the RICO statute “was conceived by Congress as part of a national scheme of enforcement to protect United States commerce,” and that permitting discretionary forum non conveniens dismissal of RICO claims “would frustrate Congress’ intent to give RICO plaintiffs a right of access to a federal forum to seek redress.” *Id.* at 1143.

law counterparts, and concluded that no special treatment should be afforded to civil RICO claims.³⁰⁰

More recently, in *Baumgart v. Fairchild Aircraft Corp.*,³⁰¹ the court considered whether claims subject to the venue provision in section 157(b)(5) of the Bankruptcy Code³⁰² were sufficiently analogous to the federal antitrust claims in *Mitsui* to justify affording the bankruptcy claims the same deference.³⁰³ As with the civil RICO claims in *Kempe*, the *Baumgart* court answered "No."³⁰⁴

C. Other Federal Courts

The Ninth,³⁰⁵ Tenth,³⁰⁶ and Eleventh³⁰⁷ Circuits all have followed the lead of the pre-*In re Air Crash* Fifth Circuit in adopting a modified approach to

³⁰⁰ See *id.* at 1145.

³⁰¹ 981 F.2d 824 (5th Cir. 1993).

³⁰² 28 U.S.C. § 157(b)(5) (1994) ("The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy is pending.").

³⁰³ *Baumgart*, 981 F.2d at 829.

³⁰⁴ *Id.* at 829-30 ("[T]his case does not involve issues peculiar to American jurisprudence, and we conclude that the results reached in *National City Lines [II]* and *Mitsui* are therefore not controlling precedents in this case.") (citations and footnotes omitted).

³⁰⁵ See *Pereira v. Utah Transp., Inc.*, 764 F.2d 686, 688 (9th Cir. 1985) (citing, *inter alia*, *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289, 292-93 (5th Cir. 1984)); *accord* *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1487 (9th Cir. 1987), *aff'd as modified on other grounds*, 861 F.2d 565 (9th Cir. 1988); see also, e.g., *Creative Tech., Ltd. v. Aztech Sys. Pte.*, 61 F.3d 696, 699-700 (9th Cir. 1995) ("The forum non conveniens doctrine is inapplicable to certain federal statutes such as the Jones Act or the Federal Employers' Liability Act (FELA) which contain special provisions mandating venue in the United States district courts."); *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 771 (9th Cir. 1991) ("Where the Jones Act applies, forum non conveniens dismissal is precluded.").

³⁰⁶ See *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481, 1483 (10th Cir. 1983) (citing, *inter alia*, *De Oliveira v. Delta Marine Drilling*, 707 F.2d 843, 845 (5th Cir. 1983) (*per curiam*), and *Bailey v. Dolphin Int'l, Inc.*, 697 F.2d 1268, 1274 (5th Cir. 1983)).

³⁰⁷ See *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983) (citing *Volyrakis v. M/V Isabelle*, 668 F.2d 863 (5th Cir. 1982); *Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015 (5th Cir. 1981); *Fisher v. Agios Nicolaos V*, 628 F.2d 308, 315 (5th Cir. 1980)); see also *C.A. La Seguridad v. Transytur Line*, 707 F.2d 1304, 1310 n.10 (11th Cir. 1983) (acknowledging the special treatment of forum non conveniens motions in proper Jones Act cases, but distinguishing the plaintiff's COGSA claims from claims under the Jones Act).

Until 1981, the Eleventh Circuit was part of the Fifth Circuit, and the decisions of the Fifth Circuit prior to the split were binding precedents in the Eleventh Circuit following the split. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*). Fifth Circuit decisions following the split, on the other hand, are not binding on the Eleventh Circuit, but are merely "persuasive" authority. See *Bill Harbert Constr. Co. v. Cortez Byrd Chips, Inc.*, 169 F.3d 693, 695 (11th Cir. 1999), *rev'd on other grounds*, 120 S. Ct. 1331 (2000).

forum non conveniens. According to these courts, the first step a trial court must take in a forum non conveniens analysis of a Jones Act claim is to determine whose law governs. If the trial court determines that the Jones Act governs, it forecloses forum non conveniens dismissal except in extraordinary cases. The Third Circuit, in a case pre-dating the Fifth Circuit's *Fisher* decision, affirmed the dismissal of a Jones Act claim on forum non conveniens grounds, but only after ascertaining that the district court correctly determined that foreign law would govern the plaintiff's claims.³⁰⁸ The Fourth Circuit, in a brief per curiam opinion, affirmed the district court's dismissal of a Jones Act claim based on the conclusion that Greek law, rather than the Jones Act or American general maritime law, would apply to the injured seaman's claims.³⁰⁹ Both cases appear to remain good law in those circuits.

Unlike the Fifth Circuit, the Ninth Circuit continues to afford special treatment to Jones Act cases, even after *In re Air Crash*,³¹⁰ and the Eleventh Circuit has not disavowed its earlier decisions. The Tenth Circuit has gone even further, requiring a finding that foreign law governs as a prerequisite to conducting the *Gilbert* balancing³¹¹—even in non-federal statutory cases.³¹²

Interestingly, the Ninth and Eleventh Circuits do not afford the same deference to claims under COGSA³¹³ as they do to claims under the Jones Act³¹⁴—

Thus, *Fisher v. Agios Nicolaos V*, 628 F.2d 308 (5th Cir. 1980)), was binding precedent in the Eleventh Circuit, while *In re Air Crash*, 821 F.2d at 1147 (5th Cir. 1987), was not.

³⁰⁸ See *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977) ("The propriety of the forum non conveniens dismissal would seem to turn, then, on whether the District Court was correct in concluding that American law does not apply.").

³⁰⁹ See *Ullah v. Canion Shipping Co.*, 589 F. Supp. 552, 554-59 (D. Md. 1984), *aff'd*, 755 F.2d 1116 (4th Cir. 1985).

³¹⁰ See *Creative Tech., Ltd. v. Aztech Sys. Pte.*, 61 F.3d 696, 699-700 (9th Cir. 1995); *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 771 (9th Cir. 1991); *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1486-89 (9th Cir. 1987), *aff'd as modified on other grounds*, 861 F.2d 565 (9th Cir. 1988).

³¹¹ See *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481, 1483 (10th Cir. 1983); *see also*, e.g., *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 605-06 (10th Cir. 1998) ("There are two threshold questions in the forum non conveniens determination: first, whether there is an adequate alternative forum in which the defendant is amenable to process, and second, whether foreign law applies. If the answer to *either* of these questions is no, the forum non conveniens doctrine is inapplicable.") (citations omitted and emphasis added), *cert. denied*, 526 U.S. 1112 (1999); *Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990, 993 n.4 (10th Cir. 1993) ("If domestic law applies, . . . then forum non conveniens doctrine is inapplicable."); *In re Atteberry*, 159 B.R. 1, 6 (D. Kan. 1993) (quoting *Rivendell Forest Products*, 2 F.3d at 993 n.4).

³¹² See *Gschwind*, 161 F.3d at 605-06 (products liability); *Rivendell Forest Products*, 2 F.3d at 993 n.4 (breach of contract).

³¹³ 46 U.S.C. app. § 1300-15 (1994).

³¹⁴ See *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1449-53 (9th Cir. 1990) ("[A]ppellants' claim that COGSA governs the dispute is by itself insufficient to support their contention that the United States is the only appropriate forum."); *C.A. La Seguridad v. Transytur Line*, 707 F.2d 1304, 1310

even though both are “island[s] in the ocean of admiralty law.”³¹⁵ Similarly, most federal courts have not afforded claims under federal securities law,³¹⁶ RICO,³¹⁷ the Copyright Act,³¹⁸ or the Lanham Act,³¹⁹ any special forum non

n.10 (11th Cir. 1983) (“[O]ur Jones Act cases would appear to have little bearing on claims governed by COGSA, and *La Seguridad* cites no case in which the applicability of COGSA was held to bar dismissal on forum non conveniens grounds.”); see also *Union Ins. Soc’y of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721, 725 (4th Cir. 1981); *C.A. Seguros Orinoco v. Naviera Transpapel, C.A.*, 677 F. Supp. 675, 685-86 (D.P.R. 1988) (both holding that the applicability of COGSA does not foreclose forum non conveniens dismissal).

³¹⁵ *Contact Lumber*, 918 F.2d at 1451. Interestingly, the *Contact Lumber* Court looked not to the Ninth Circuit’s earlier Jones Act decisions but to decisions of the Second Circuit, see *Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147 (2d Cir. 1980) (en banc) and see *supra* text accompanying notes 174-89, and the Southern District of New York, *Travelers Indem. Co. v. S/S Alca*, 710 F. Supp. 497 (S.D.N.Y. 1989), *aff’d*, 895 F.2d 1410 (2d Cir. 1989). See *Contact Lumber*, 918 F.2d at 1450-51. This reliance on *Alcoa Steamship* and *Travelers Indemnity* is puzzling. First, as discussed *supra* text accompanying notes 155-74, the statement from *Alcoa Steamship* may be an overstatement, as the pre-*Cruz* Second Circuit clearly treated certain admiralty claims—particularly, Jones Act and general maritime law claims—quite deferentially when reviewing forum non conveniens dismissals. Second, while the Second Circuit, in *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47 (2d Cir. 1983) (per curiam), had purportedly dispensed with preferential treatment for Jones Act claims by the time *Contact Lumber* was decided, the Ninth Circuit continued to afford Jones Act claims preferential treatment. See *supra* note 305 and accompanying text. It seems odd that the Ninth Circuit would look for guidance to a circuit whose stance on a closely related issue—namely, the proper analytical framework for forum non conveniens motions in Jones Act cases—was clearly at odds with that of the Ninth Circuit.

³¹⁶ 15 U.S.C. §§ 77a-78aa (1994); see, e.g., *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 948-50 (1st Cir. 1991); *Winex, Ltd. v. Paine, No. CIV.A.89-2083*, 1990 WL 121483, at *5-8 (E.D. Pa. Aug. 15, 1990); cf. *Richards v. Lloyd’s of London*, 135 F.3d 1289, 1294-96 (9th Cir. 1998) (upholding choice of forum clauses to divest federal court of jurisdiction over the plaintiffs’ federal and state securities claims). But see *Welek v. Solomon*, 650 F. Supp. 972, 974-75 (E.D. Mo. 1987) (refusing foreign defendant’s motion to dismiss in favor of Canadian forum in light of, *inter alia*, “the special venue provisions of the 1933 Act [and] the 1934 Act”); *Pioneer Properties, Inc. v. Martin*, 557 F. Supp. 1354, 1362 (D. Kan. 1983) (holding that 1933 Securities Act’s special venue statute bars forum non conveniens dismissal), *appeal dismissed*, 776 F.2d 888 (10th Cir. 1985); *SEC v. Wimer*, 75 F. Supp. 955, 963-65 (W.D. Pa. 1948) (same).

³¹⁷ 18 U.S.C. §§ 1961-1968; see *Gemini Capital Group v. Yap Fishing Corp.*, 150 F.3d 1088, 1092 (9th Cir. 1998); *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 771 (9th Cir. 1991); *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 952 (11th Cir. 1997); *Tkachyov v. Levin*, No. 98C3120, 1999 WL 782070, at *7-9 (N.D. Ill. Sep. 27, 1999); *Trujillo v. Banco Cent. Del Ecuador*, 35 F. Supp. 2d 908, 911-16 (S.D. Fla. 1998); *BCCI Holdings (Luxembourg), S.A. v. Mahfouz*, 828 F. Supp. 92, 95-100 (D.D.C. 1993); *Capri Trading Corp. v. Bank Bumiputra Malaysia Berhad*, 812 F. Supp. 1041, 1044-46 (N.D. Cal. 1993); *Winex*, 1990 WL 121483, at *5-8; *Penwest Dev. Corp. v. Dow Chem. Co.*, 667 F. Supp. 436, 437-38 (E.D. Mich. 1987); cf. *Richards v. Lloyd’s of London*, 135 F.3d at 1294-96 (upholding choice of forum clauses to divest federal court of jurisdiction over the plaintiffs’ RICO claims and declaring, in dicta, that “the loss of RICO claims does not suffice to bar dismissal for forum non conveniens”). But see *Welek*, 650 F. Supp. at 974-75 (refusing foreign defendant’s motion to dismiss in favor of Canadian forum in light of, *inter alia*, RICO’s “special venue provisions”); *State ex rel. Long v. Alexander & Alexander Servs., Inc.*, 680 F. Supp. 746, 752 (E.D.N.C. 1988) (holding that dismissal on grounds of forum non conveniens was not warranted where, *inter alia*, the alternative forum, England, had no comparable RICO statute); cf. *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1353 n.1 (9th Cir. 1990) (leaving open the question of whether U.S. federal courts are the only permissible fora for RICO claims).

³¹⁸ 17 U.S.C. § 101 (1994); see, e.g., *Creative Tech., Ltd. v. Aztech Sys. Pte.*, 61 F.3d 696, 700 (9th Cir. 1995); *Intercontinental Dictionary Series v. De Gruyter*, 822 F. Supp. 662, 678-81 (C.D. Cal. 1993); see also *P&D Int’l v. Halsey Publ’g Co.*, 672 F. Supp. 1429, 1433-34 (S.D. Fla. 1987) (electing to retain jurisdiction

conveniens treatment. The only court outside of the Second or Fifth Circuit to have ruled squarely on the availability of forum non conveniens dismissal in actions under federal antitrust law has followed the Fifth Circuit, and exempted well-pleaded federal antitrust claims from forum non conveniens scrutiny.³²⁰

In *Creative Technology, Ltd. v. Aztech System Pte. Ltd.*,³²¹ the Ninth Circuit found that the venue provision³²² governing Copyright Act³²³ claims was distinguishable from those governing Jones Act³²⁴ and FELA³²⁵ claims, in that the latter were "mandatory," whereas the Copyright Act "merely states that United States district courts shall have exclusive jurisdiction of United States copyright claims over state courts."³²⁶ Therefore, the defendant's motion was subject to standard forum non conveniens analysis, the end result of which was dismissal of the plaintiff's claims to Singapore.³²⁷

In *Howe v. Goldcorp Investments, Ltd.*,³²⁸ the First Circuit, through then-Chief Judge Breyer, weighed and rejected the plaintiff's argument that the venue provisions in the 1933 Securities Act³²⁹ and 1934 Securities Exchange

over copyright claim after conducting non-deferential forum non conveniens analysis considering interests in favor of Florida and British fora).

³¹⁹ 15 U.S.C. §§ 1051-1127 (1994 & Supp. IV 1998); see, e.g., *Lockman*, 930 F.2d at 771; *Fluoroware, Inc. v. Dainichi Shoji K.K.*, 999 F. Supp. 1265, 1271 (D. Minn. 1997); see also *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 431 (9th Cir. 1977) (reversing the district court's subject matter jurisdiction dismissal and remanding with instructions that a finding of subject matter jurisdiction under the Lanham Act would not foreclose a forum non conveniens dismissal of the remanded cause).

³²⁰ *Laker Airways Ltd. v. Pan Am. World Airways*, 568 F. Supp. 811, 818 (D.D.C. 1983). But cf. *Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944, 949-50 (1st Cir. 1991) (suggesting, in dicta, that *National City Lines II* effectively overruled *National City Lines I*, and, therefore, antitrust claims are entitled to no more deference than any other claim for purposes of forum non conveniens analysis). For a discussion of *Laker Airways*, see *infra* text accompanying notes 444-53. For a discussion of *Howe*, see *infra* text accompanying notes 328-42.

³²¹ 61 F.3d 696 (9th Cir. 1995).

³²² 28 U.S.C. § 1338(a) (1994).

³²³ 17 U.S.C. § 101 (1998).

³²⁴ 46 U.S.C. app. § 688(a) (1988).

³²⁵ 46 U.S.C. § 56 (1994).

³²⁶ *Creative Technology*, 61 F.3d at 700.

³²⁷ See *id.* at 701-04. The decision was not unanimous. See *id.* at 705.

I am astounded when I read that it is not convenient to try an American copyright case in an American court for copyright infringement that takes place solely in America. I am also astounded by a decision that the convenient place to hold the trial is in Singapore, particularly when the majority have not the slightest idea that a court in that nation would even recognize an American copyright.

Id. (Ferguson, J., dissenting).

³²⁸ 946 F.2d 944 (1st Cir. 1991).

³²⁹ 15 U.S.C. § 77v (1994 & Supp. 1998).

Act³³⁰ foreclosed the option of forum non conveniens dismissal. Relying on the Supreme Court's decision in *National City Lines I*, Howe argued (as did the Securities Exchange Commission in an amicus brief) that the presence of a "special" venue statute in the securities acts meant Congress intended to exempt securities actions from forum non conveniens dismissal.³³¹ The First Circuit disagreed. Observing that the "rule" of *National City Lines I* rested on the Court's reading of the legislative history of the antitrust venue statute and its conclusion that the legislative history provided "especially strong reasons for believing that Congress did not want to permit courts to transfer [antitrust] cases, irrespective of convenience,"³³² the *Howe* Court found "no such unusual legislative history relevant to the Securities Acts' special venue statutes. . . ."³³³ This conclusion was similar to that reached by the Second Circuit in *Transunion Corp. v. Pepsico, Inc.*³³⁴ The First Circuit went further than *Transunion*, however, arguing that 28 U.S.C. § 1404 could be read as reflecting a congressional policy "strongly favoring transfers,"³³⁵ and implying that § 1404 reflected Congress's intent that courts possess discretion not only to transfer domestically, but also to dismiss on forum non conveniens grounds.³³⁶ The *Howe* Court concluded by noting that "most case law in recent years has taken positions contrary to that which the SEC now urges upon us [to exempt securities act claims from dismissal]."³³⁷

One difficulty with *Howe* is that the court does not explain why it was appropriate to infer congressional intent about a court's forum non conveniens powers out of the enactment of the domestic transfer statute. If Congress had wanted to make known that courts continue to possess discretion to dismiss a suit more appropriate brought in a foreign forum, it could clearly say so.³³⁸ A further difficulty with the court's analysis is that it fails to explain why it is appropriate to infer that Congress intended the domestic transfer statute to have transnational implications but inappropriate to read *National City Lines I*³³⁹ as anything other than a domestic case.³⁴⁰ Lastly, *Howe*'s characterization that

³³⁰ 15 U.S.C. § 78aa (1994).

³³¹ *Howe*, 946 F.2d at 948.

³³² *Id.*

³³³ *Id.* at 949.

³³⁴ 811 F.2d 127 (2d Cir. 1987) (per curiam).

³³⁵ *Howe*, 946 F.2d at 949.

³³⁶ *See id.* at 949-50.

³³⁷ *Id.* at 949.

³³⁸ *See supra* text accompanying notes 238-39.

³³⁹ 334 U.S. 573 (1948).

³⁴⁰ *See Howe*, 946 F.2d at 949.

“most case law” supported granting no forum non conveniens exemption overlooks numerous other decisions discussed earlier in this Part that reached precisely the opposite conclusion—and which, incidentally, even *Howe* cited in almost equal number to the cases it relied upon in support of its ruling in the case.³⁴¹

IV. RETHINKING FORUM NON CONVENIENS IN FEDERAL STATUTORY CASES

As Part III revealed, the lower federal courts have taken disparate approaches in addressing the role of forum non conveniens when the plaintiff alleges that a federal statute provides her basis for relief. The traditional approach employed in all federal statutory cases by the First and, more recently, Second Circuits invites a court to give insufficient consideration to sovereign interests by relegating them to one of the many factors a court must consider in its *Gilbert* analysis. The modified approach employed by the Second and Fifth Circuits in admiralty cases until the mid-1980s, and still used by the Fifth, Ninth, Tenth, and Eleventh Circuits in some federal statutory cases, on the other hand, invites a more thorough consideration of the policy purposes Congress may have been seeking to advance by enacting a particular statute. Having explored the divergent approaches to the lower federal courts have taken to forum non conveniens in federal statutory cases, in this Part we evaluate those divergent approaches and develop our argument that the most compelling justification for having a discretionary dismissal doctrine in federal statutory cases is to ensure that the sovereign with the more significant interest adjudicates the dispute.

A. *Evaluating the Competing Approaches to Discretionary Dismissal*

Those federal courts that have written on this subject appear to share a common predicate assumption that Congress has the power to restrict the judiciary's discretion to decline jurisdiction. However, there is considerable divergence in interpreting whether Congress has sought to do so in any particular statute. Indeed, it appears that markedly different interpretations of legislative intent principally explain why the circuits have reached entirely different conclusions as to the role of forum non conveniens in federal statutory cases.

³⁴¹ *Id.* at 950 (citing, *inter alia*, *Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *aff'd as modified on other grounds*, 861 F.2d 565 (9th Cir. 1987); *Industrial Inv. Dev. Cop. v. Mitsui & Co.*, 671 F.2d 876 (5th Cir. 1982)), *vacated and remanded on other grounds*, 460 U.S. 1007 (1983); *Pioneer Properties, Inc. v. Martin*, 557 F. Supp. 1354 (D. Kan. 1983), *appeal dismissed*, 776 F.2d 888 (10th Cir. 1985); *SEC v. Wimer*, 75 F. Supp. 955 (W.D. Pa. 1948)).

1. *The Traditional Gilbert Approach*

Since 1983, the Second Circuit has rejected the argument that federal courts lack discretion to dismiss a case on forum non conveniens grounds merely because a federal statute is alleged to provide the basis for relief.³⁴² In so doing, it has repudiated its own earlier decisions that viewed the alleged violation of a federal statute as a mandate for exercising jurisdiction.³⁴³ The First Circuit similarly holds that all claims, whether based on a federal statute or the common law, are subject to the *Gilbert* test.³⁴⁴ As does the modified approach, the traditional approach assumes that Congress has authority to trump judicial discretion to decline jurisdiction. But, unlike the modified approach, the traditional approach assumes that Congress has never intended to exempt any federal statute from forum non conveniens dismissal absent express statutory language to the contrary.

One significant virtue of the traditional approach to forum non conveniens is that it properly recognizes the broad discretion possessed by courts to decline to exercise jurisdiction, even in federal statutory cases, absent legislative restriction of that discretion. The principal weakness of the traditional approach, however, is that it places insufficient weight on comparing competing sovereign interests; focusing, instead, on the *Gilbert* private and public interest factors.

To illustrate that the traditional approach fails to explicitly recognize the importance of competing sovereign interests, and the consequences that may directly result from that failure, consider the Second Circuit's decisions in *Alfadda v. Fenn*.³⁴⁵ Several Saudi Arabian and Bahrainian citizens sued a French investment company and its related corporate entities, including a New York bank, in which they had invested.³⁴⁶ Also named as defendants were a senior officer and director (Fenn), who was an American citizen, and the former chairman (Radwan), who was an American expatriate. The plaintiffs accused the bank and its directors of defrauding them in their investments and alleged claims for relief under American securities laws, the RICO statute, and pursuant to several common law counts. The district court determined that it lacked subject matter jurisdiction over the securities and RICO claims because it

³⁴² See *supra* text accompanying notes 190-245.

³⁴³ See *supra* text accompanying notes 174-89.

³⁴⁴ See *supra* text accompanying notes 328-42.

³⁴⁵ See 159 F.3d 41 (2d Cir. 1998) ("*Alfadda II*").

³⁴⁶ See *Alfadda v. Fenn*, 935 F.2d 475 (2d Cir. 1991) ("*Alfadda I*").

found that all of the defendants' alleged conduct was perpetrated outside of the United States.³⁴⁷

The Second Circuit reversed the district court's dismissal of the complaint for lack of subject matter jurisdiction.³⁴⁸ The extraterritorial reach of American securities law is ascertained, the Second Circuit found, by discerning "whether Congress would have wished the precious resources of the United States courts' to be devoted to such transactions."³⁴⁹ The court prescribed a similar test for determining the extraterritorial application of the RICO statute.³⁵⁰ To ascertain Congress's wishes, the Second Circuit discussed two tests. Under the "conduct" test, subject matter jurisdiction exists if the defendant's conduct in the United States was more than "merely preparatory" to the fraud, and such actions caused direct losses to investors outside of the United States.³⁵¹ Under the "effects" test, subject matter jurisdiction may also be found where conduct causes a "substantial effect" within the United States.³⁵² The district court erred in *Alfadda I*, the Second Circuit held, because it ignored the uncontested allegations of defendant's conduct that occurred in the United States, which was more than "merely preparatory" to the alleged fraud. Thus, subject matter jurisdiction existed under the conduct test.³⁵³ Contrary to the lower court's conclusions, then, the Second Circuit found clear evidence of congressional intent that American securities law and the RICO statute should apply to—and that significant national interests were implicated by—the controversy before it.³⁵⁴

Seven years later, however, the Second Circuit concluded that the United States' interest in applying its securities and RICO laws was not significant enough to preclude dismissal of the suit on forum non conveniens grounds.³⁵⁵ After remand of the action following the initial appeal, the defendants moved for forum non conveniens dismissal; which, following lengthy and expensive

³⁴⁷ See *Alfadda v. Fenn*, 751 F. Supp. 1114, 1118 (S.D.N.Y. 1990), *rev'd*, 935 F.2d 475 (2d Cir. 1991).

³⁴⁸ See *Alfadda I*, 935 F.2d at 476.

³⁴⁹ *Id.* at 478.

³⁵⁰ See *id.* at 479.

³⁵¹ *Id.* at 478.

³⁵² *Id.*

³⁵³ See *id.* at 478-79.

³⁵⁴ See *id.* at 478-80. The *Alfadda I* Court treated the same conduct that had satisfied the "conduct" test with regard to the plaintiffs' securities claims as requisite predicate acts for the plaintiffs' RICO claims. In light of this domestic conduct, the Second Circuit held that the district court had subject matter jurisdiction over the RICO claims as well. *Id.*

³⁵⁵ See *Alfadda II*, 159 F.3d 41 (2d Cir. 1998).

discovery, the district court granted.³⁵⁶ The second appeal yielded a far less favorable outcome for the plaintiffs.³⁵⁷ The Second Circuit was unwilling to accept the plaintiffs' argument that whatever significant national interests supported the extraterritorial reach of the securities laws and the RICO statute should also prevent forum non conveniens dismissal. The court did acknowledge "that this argument finds some support in our previous decisions, at least in regard to securities actions."³⁵⁸ "However," the court explained, "we made clear that this interest is merely one consideration to be weighed in the totality of the *Gilbert* analysis."³⁵⁹

Thus, the *Alfadda II* Court disregarded its own previous determination that congressional intent warranted application of American securities laws to the dispute.³⁶⁰ Nor did it seem to matter, as the court had previously counseled, that civil RICO was "all inclusive" and was not intended to "have a parochial application."³⁶¹ The court's earlier conclusion that the "salutary purposes of the [RICO] Act would be frustrated" by a narrow application of its reach³⁶² was put to one side. Instead, because "the traditional *Gilbert* public interest factors weigh[ed] heavily in favor of" the foreign jurisdiction, the Second Circuit held that American interests in applying American securities and RICO laws to the controversy were insufficient to defeat dismissal.³⁶³ The net result, then, was that federal law would not apply after all.

Reasonable minds may certainly differ as to whether forum or foreign interests predominated in the *Alfadda* litigation; but the failure of the current *Gilbert* test to allow for a direct consideration of forum interests makes the Second Circuit's dismissal particularly troubling. The Second Circuit's failure to recognize the incongruity between its approach to forum non conveniens determinations and its approach to deciding the extraterritorial application of

³⁵⁶ See *Alfadda v. Fenn*, 966 F. Supp. 1317, 1332-34 (S.D.N.Y. 1997), *aff'd*, 159 F.3d 41 (2d Cir. 1998).

³⁵⁷ Despite the facts that the action was dismissed more than eight years after it was initially filed and that, by the time the trial court dismissed the case, the parties had engaged in substantial discovery, the fruits of which were stored in a document repository in the Southern District of New York, the Second Circuit upheld the dismissal. See *Alfadda II*, 159 F.3d at 48.

³⁵⁸ *Id.* at 47. Specifically, the *Alfadda II* Court cited its previous language in *Allstate Life Insurance Co. v. Linter Group Ltd.*, 994 F.2d 996, 1002 (2d Cir. 1993), *cert. denied*, 510 U.S. 945 (1993), in which it noted that "United States courts have an interest in enforcing United States securities laws" and its own previous opinion in *Alfadda I*. *Alfadda II*, 159 F.3d at 48 (citing *Alfadda I*, 935 F.2d at 478).

³⁵⁹ *Id.*

³⁶⁰ Compare *id.* with *Alfadda I*, 935 F.2d at 478-80.

³⁶¹ Compare *Alfadda II*, 159 F.3d at 47 with *Alfadda I*, 935 F.2d at 479-80.

³⁶² *Alfadda I*, 935 F.2d at 479 (quoting *United States v. Parness*, 503 F.2d 430, 439 (2d Cir. 1974)).

³⁶³ *Alfadda II*, 159 F.3d at 47.

United States statutes reflects the extent to which the traditional approach, at least as applied in federal statutory cases, may fail to adequately vindicate the same sovereign interest that justified applying the federal securities statutes extraterritorially in the first place.

2. *The Modified Approach*

Adopting a "modified approach" to forum non conveniens, the Ninth,³⁶⁴ Tenth,³⁶⁵ and Eleventh Circuits,³⁶⁶ following the Fifth Circuit's initial lead in *Fisher v. Agios Nicolaos V*,³⁶⁷ emphasize governing law as the threshold factor when deciding whether a federal statutory case is subject to forum non conveniens dismissal, as the Fifth Circuit continues to do, at least, in antitrust actions.³⁶⁸ This approach assumes both that Congress possesses authority to trump judicial discretion to decline jurisdiction and that it has done so in a number of statutory enactments. The modified approach rests on the premise that forum non conveniens dismissal interferes with Congress's judgment that cases properly pleaded under a federal statute should be governed by it.

The most significant virtue of the modified approach to forum non conveniens is that it requires a court to focus on competing sovereign interests in determining whether to retain or decline jurisdiction. Once it finds that a federal statute governs the substance of the parties' dispute, a court following the modified approach presumes significant national interests are implicated by the dispute and will retain jurisdiction absent compelling countervailing reasons.³⁶⁹ Conversely, when a federal statute does not govern the rights and obligations of the parties, the United States is presumed to have considerably less interest in the outcome of the dispute. In these circumstances, a court following the modified approach will decline to exercise jurisdiction when the balance of the *Gilbert* factors favors dismissal.³⁷⁰

The mistake made by many courts following the modified approach, however, is that they often place undue emphasis on the artificial distinction be-

³⁶⁴ See *supra* note 305.

³⁶⁵ See *supra* note 306.

³⁶⁶ See *supra* note 307.

³⁶⁷ 628 F.2d 308 (5th Cir. 1980); see *supra* text accompanying notes 256-60.

³⁶⁸ See *supra* text accompanying notes 270-95.

³⁶⁹ See, e.g., *Fisher*, 628 F.2d at 315 ("Because the consequences of a decision that American law applies are so conclusive on the issue, it has in fact been suggested that the initial inquiry in determining a forum non conveniens issue . . . should be centered around the choice of law question.").

³⁷⁰ See, e.g., *Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015, 1018-19 (5th Cir. 1981).

tween special and general venue clauses.³⁷¹ This distinction has rightly been criticized.³⁷² Other courts have found evidence of legislative intent not in the mere presence or absence of a special venue provision but more directly in the national interests implicated by applying a particular federal statute.³⁷³ However, as discussed earlier in Part III, attempts to distinguish one statute from another—and thus compulsory from non-compulsory jurisdiction—often appear ad hoc and arbitrary.³⁷⁴ The Supreme Court's recent refusal to decide a case involving the special venue provisions of the Federal Arbitration Act based solely on presence of the special venue provisions underscores this conclusion. In *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*,³⁷⁵ the Court eschewed drawing a bright line,³⁷⁶ and reaffirmed that lower courts must analyze special venue provisions on a case-by-case basis.³⁷⁷

By elevating the choice of law question in the forum non conveniens analysis, the modified approach more keenly focuses on sovereign interests than does the traditional approach. But, as discussed in Part III, the lower federal courts have often applied the modified approach too mechanically—having found that a federal statute governs the dispute, they ignore countervailing interests of the other sovereign and automatically retain jurisdiction.

B. Justifying Judicial Discretion in Federal Statutory Cases

To have the authority to dismiss a federal statutory case for forum non conveniens, a court must first determine that it has jurisdiction over the subject matter of the case.³⁷⁸ Establishing subject matter jurisdiction over a federal statutory case generally requires that the plaintiff make neither “immaterial nor insubstantial and frivolous” claims under the statute.³⁷⁹ Even if subject matter jurisdiction requirements are met, a plaintiff may fail to state a claim upon

³⁷¹ See, e.g., *Tivoli Realty, Inc. v. Interstate Circuit, Inc.*, 167 F.2d 155, 157-58 (5th Cir. 1948).

³⁷² See, e.g., *United States v. National City Lines, Inc.*, 334 U.S. 573, 598 (1948) (Jackson, J., concurring) (“*National City Lines I*”); *Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44, 55-62 (1941) (Frankfurter, J., dissenting); *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 949 (1st Cir. 1991).

³⁷³ See, e.g., *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 890-91 (5th Cir. 1982), *vacated and remanded on other grounds*, 460 U.S. 1007 (1983).

³⁷⁴ See *supra* text accompanying notes 256-327.

³⁷⁵ 120 S. Ct. 1331 (2000).

³⁷⁶ See *id.* at 1335-36.

³⁷⁷ See *id.* at 1339.

³⁷⁸ See 1 ROBERT C. CASAD & WILLIAM B. RICHAM, *JURISDICTION IN CIVIL ACTIONS* §§ 1-4, at 21 (3d ed. 1998).

³⁷⁹ *Bell v. Hood*, 327 U.S. 678, 682-83 (1946).

which relief may be granted.³⁸⁰ This distinction is important but is often misunderstood.

Assume, for example, that a Chinese sailor is injured aboard a Chinese junk by a fellow crewman while plying Chinese waters, and that this foreign plaintiff brings an action in a United States federal court asserting claims against the boat owner, also a Chinese national, under the Jones Act.³⁸¹ Assuming that the plaintiff can assert material, substantial, and non-frivolous claims, his action will not be dismissed for lack of subject matter jurisdiction.³⁸² The defendant may, of course, move to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that the plaintiff can state no claim for statutory relief under these facts. The court's task in such a case would be to determine whether Congress intended the statute to apply.³⁸³ Given the absence of conduct or effects in the United States,³⁸⁴ and that none of the parties involved are citizens of the United States,³⁸⁵ it is likely that the court would dismiss. Dismissal results, in the above example, not because the district court lacked jurisdiction, but because the plaintiff had no right to recover under the statute against the

³⁸⁰ See *id.* at 682.

Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

Id.

³⁸¹ We borrow this hypothetical from Justice Jackson's concurrence in *Lauritzen v. Larsen*, 345 U.S. 571 (1953). See *id.* at 577 (Jackson, J., concurring).

³⁸² Justice Jackson commented on the "literal catholicity" of many federal statutes, such as the Jones Act. *Id.* at 576-77. Of the latter, in particular, he wrote in a memorable passage, "unless [otherwise restricted], Congress has extended our law and opened our courts to all alien seafaring men injured anywhere in the world in service of watercraft of every foreign nation—a hand on a Chinese junk, never outside Chinese waters, would not be beyond its literal wording." *Id.* at 577.

³⁸³ See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 812-13 (1993) (Scalia, J., dissenting).

³⁸⁴ Conduct or effects in the United States often satisfy a court that the United States has a compelling interest in applying its law. See *supra* text accompanying notes 351-52 (discussing the "conduct" and "effects" tests for subject matter jurisdiction). For more thorough discussions of subject matter jurisdiction based on conduct or effects, see, e.g., Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW. & POL'Y INT'L BUS. 1, 29-40 (1992); William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 121-27 (1998); Michael Wallace Gordon, *United States Extraterritorial Subject Matter Jurisdiction in Securities Fraud Litigation*, 10 FLA. J. INT'L L. 487, 495-505 & 511-39 (1996).

³⁸⁵ Likewise, the fact that one or more parties to the lawsuit are United States citizens often satisfies a court that the United States has a compelling interest in applying its law to protect or punish the American parties. See, e.g., *De Melo v. Lederle Labs.*, 801 F.2d 1058, 1061 (8th Cir. 1996); *Harrison v. Wyeth Labs.*, 510 F. Supp. 1, 4 (E.D. Pa. 1980), *aff'd*, 676 F.2d 685 (3d Cir. 1982).

defendant.³⁸⁶ The defendant might also have moved to dismiss under the forum non conveniens doctrine, and the court would again probably be correct in granting a dismissal on that basis. Neither dismissal under Rule 12(b)(6) nor under the forum non conveniens doctrine in this example threatens to interfere with the legislative prerogative.

A collision between judicial discretion and legislative intent may occur, however, if the court, on other facts, were to conclude that Congress intended a federal statute to apply extraterritorially. Once the court has determined that Congress intended a federal statute to apply, a dismissal on forum non conveniens grounds may interfere with congressional intent that the federal law should govern.³⁸⁷ While forum non conveniens dismissal does not necessarily mean that the federal statute will not apply,³⁸⁸ as a practical matter the foreign forum will most likely resolve the dispute by applying its own law, rather than the relevant federal statute.³⁸⁹

The argument that judicial discretion threatens the legislature's prerogative is explicit in cases following the modified approach to forum non conveniens and, properly understood, is part of the "obligation theory" of federal jurisdiction. In his now-classic exposition of the obligation theory of federal jurisdiction, Martin Redish argued that it is inappropriate "as a matter of legal process and separation of powers" for courts to decline on their own authority

³⁸⁶ See, e.g., *Hartford Fire*, 509 U.S. at 813.

³⁸⁷ See, e.g., Elliott E. Cheatham & Willis L.M. Reese, *Choice of Applicable Law*, 52 COLUM. L. REV. 959, 961 (1952) (observing that "a court must follow the dictates of its own legislature to the extent that these are constitutional"); Michael D. Ramsey, *Escaping "International Comity,"* 83 IOWA L. REV. 893, 906 (1998) ("When U.S. law applies by its terms, U.S. courts are ordinarily bound to apply it.").

³⁸⁸ See, e.g., *Murray v. British Broadcasting Co.*, 81 F.3d 287, 293 (2d Cir. 1996) (affirming forum non conveniens dismissal of foreign plaintiff's suit alleging copyright violations in favor of English proceeding because "[t]he Berne Convention's national treatment principle insures that no matter where Murray brings his claim, United States copyright law would apply to exploitation of the [plaintiff's] character in [the United States]").

³⁸⁹ See Symeon Symeonides, *Maritime Conflicts of Law from the Perspective of Modern Choice of Law Methodology*, 7 MAR. LAW. 223, 256 nn.123-24 (1982) (arguing that, at least in the context of "true conflicts"—that is, conflicts "in which both the involved states are actually interested in applying their own law to effectuate their policies," "[d]ismissal on grounds of forum non conveniens . . . is functionally equivalent to applying foreign law, since the plaintiff is relegated to the foreign forum which, presumably, will apply its own law"); see also Laurel E. Miller, Comment, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369, 1389-90 (1991).

[A] forum non conveniens dismissal can change the applicable law. Even if the foreign forum eventually tries the dismissed suit, that forum will apply its own choice of law rules, potentially leading to application of a different law and therefore a different outcome than if a U.S. court had tried the case.

Id.

to exercise jurisdiction.³⁹⁰ He contended that a federal statute should not be interpreted as vesting a court with "power . . . to adjudicate the relevant claims without a corresponding duty to do so"³⁹¹ In the context of addressing the role of the forum non conveniens doctrine, proponents of the obligation theory of federal jurisdiction would argue that even if courts possess discretion to decline jurisdiction in common law matters, cases governed by federal statute are different in kind. If Congress enacts a law governing a particular type of dispute, on what authority can the judicial branch decline to apply it?

Writing in response to Redish's obligation theory, David Shapiro canvassed a large range of existing discretionary dismissal powers possessed by American courts.³⁹² Shapiro concluded that the exercise of judicial discretion "has much to contribute to the easing of interbranch and intergovernmental tensions in our complex system of government."³⁹³ One of Shapiro's examples of particular relevance to our discussion of discretionary forum non conveniens dismissal in federal statutory cases is the abstention doctrine of exhaustion of remedies in the context of habeas corpus proceedings.³⁹⁴ In *Ex Parte Royal*,³⁹⁵ a defendant on trial before a state criminal court petitioned for federal habeas corpus relief, asserting that the state statute he allegedly infringed was unconstitutional. The Court, which ultimately denied the defendant's petition, began by noting that it possessed jurisdiction in the case pursuant to the habeas corpus statute enacted by Congress.³⁹⁶ The Court's disposition of the case, however, was premised on the notion that a general grant of jurisdictional authority by Congress did not deprive a court of the power to decline jurisdiction in particular circumstances.³⁹⁷ The habeas corpus statute, the Court wrote, "does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it."³⁹⁸ As Shapiro noted, the Court "refused to read the grant of jurisdiction in habeas corpus cases as a legislative mandate to resolve on its merits every case that fell within its scope, or as depriving the judicial branch of discretion as to the appropriate occasions for withholding relief."³⁹⁹

³⁹⁰ Redish, *supra* note 1, at 74.

³⁹¹ *Id.* at 112.

³⁹² See Shapiro, *supra* note 1, at 545-61.

³⁹³ *Id.* at 545.

³⁹⁴ See *id.* at 557-59.

³⁹⁵ 117 U.S. 241 (1886).

³⁹⁶ See *id.* at 245-50.

³⁹⁷ See *id.* at 251-52.

³⁹⁸ *Id.* at 251.

³⁹⁹ Shapiro, *supra* note 1, at 559.

The argument that general forum non conveniens dismissal authority exists in federal statutory cases, absent a clear legislative intent to restrict such authority, is further reinforced by *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*.⁴⁰⁰ There, the Supreme Court held that a foreign arbitration clause in a bill of lading must be given effect,⁴⁰¹ notwithstanding the applicability of the COGSA.⁴⁰² The leading case prior to *Sky Reefer* invalidating a foreign forum selection clause was the Second Circuit's *Indussa Corp. v. S.S. Ranborg*.⁴⁰³ Because honoring the foreign forum selection clause would interfere with "enforcing liability" under the federal statute, and because "there could be no assurance" COGSA would be applied by the foreign court, the *Indussa* court invalidated the selected forum.⁴⁰⁴ In *Sky Reefer*, a majority of the Supreme Court declined to follow *Indussa*. Even as it acknowledged COGSA's "substantive obligations," the Court found no evidence in the statute that "prevents the parties from agreeing to enforce these obligations in a particular forum."⁴⁰⁵

In the wake of *Sky Reefer*, one may argue that a grant of jurisdiction in a particular statute does not routinely reflect "a legislative mandate" to deprive a court of its discretionary power to dismiss federal statutory cases pursuant to the forum non conveniens doctrine. Absent legislative proscription of judicial authority, it does not follow that the mere applicability of a federal statute necessarily signals Congress's intent to trump judicial discretion.

The most challenging question is whether any evidence short of a clear, express statement by Congress is sufficient to demonstrate legislative intent to trump forum non conveniens. The Supreme Court, when faced with a statute subject to two reasonable constructions of legislative intent, has insisted on a "clear" (or "plain") statement of Congress's intent⁴⁰⁶ to, for example, subject states to suit in federal court;⁴⁰⁷ encroach on a state's "traditional and essen-

⁴⁰⁰ 515 U.S. 528 (1995).

⁴⁰¹ See *id.* at 537-39.

⁴⁰² 46 U.S.C. § 1303(8) (1994).

⁴⁰³ 377 F.2d 200 (2d Cir. 1967), *abrogated by* *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995).

⁴⁰⁴ *Id.* at 203-04.

⁴⁰⁵ *Sky Reefer*, 515 U.S. at 535.

⁴⁰⁶ See *Salinas v. United States*, 522 U.S. 52, 59 (1997). The "clear statement" rule is "merely [a rule] of statutory interpretation, to be relied upon only when the terms of a statute allow." *United States v. Lopez*, 514 U.S. 549, 610-11 (1995). It should be used to aid a court in determining intent only "when legislation leaves intent subject to question." *Id.* at 611.

⁴⁰⁷ See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 56-57 (1996); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985).

tial" functions⁴⁰⁸ or its "substantial sovereign powers;"⁴⁰⁹ apply a statute affecting "substantive rights" retroactively;⁴¹⁰ impose a condition on the grant of federal monies;⁴¹¹ dispense with mens rea as an element of a felony;⁴¹² or apply a federal statute overseas.⁴¹³ On the other hand, the Court has declined to require a "clear statement" of congressional intent to preempt substantive state law.⁴¹⁴

The "clear statement" rule "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."⁴¹⁵ The question here is whether a similarly strict standard would be appropriate for deciding Congress's intent regarding the general applicability of the forum non conveniens doctrine in federal statutory cases. Most of the "clear statement" cases involve federalism or other constitutional issues,⁴¹⁶ which seem materially different from those involved in a common law forum non conveniens determination. And, while forum non conveniens is not unrelated to the question of extraterritorial application of a federal statute,⁴¹⁷ we discuss elsewhere the differences between the doctrines of forum non conveniens and extraterritoriality.

Although it would certainly be preferable for Congress to make its intentions plain, it is also possible that evidence short of express statutory language should be considered sufficient to demonstrate that Congress intended to restrict judicial discretion under the forum non conveniens doctrine. It is neither necessary nor plausible to try to articulate what evidence short of express language will be sufficient. At one end of the spectrum, a clear statement of Congress's intent to trump forum non conveniens dismissal authority should suffice. For example, a regulatory statute granting exclusive federal jurisdiction coupled with evidence in the legislative history of Congress's intent to trump judicial discretion may be sufficient to overcome the presumption that judicial

⁴⁰⁸ See, e.g., *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 209 (1998).

⁴⁰⁹ *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).

⁴¹⁰ *Landgraf v. USI Film Prods.*, 511 U.S. 244, 263-64, 272-73 (1994); *Automobile Club v. Commissioner*, 353 U.S. 180, 184 (1957).

⁴¹¹ See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

⁴¹² See, e.g., *Staples v. United States*, 511 U.S. 600, 618 (1994).

⁴¹³ See, e.g., *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991).

⁴¹⁴ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516-17 (1992); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

⁴¹⁵ *United States v. Bass*, 404 U.S. 336, 349 (1971).

⁴¹⁶ See *supra* notes 407-12 and accompanying text.

⁴¹⁷ See *supra* note 413 and accompanying text.

discretion under the forum non conveniens doctrine has been abrogated.⁴¹⁸ At the opposite end, the mere application of a federal statute to a particular dispute ought not be considered adequate evidence of legislative intent to exempt all cases brought under the statute from forum non conveniens dismissal.

C. *Focusing on Interest Analysis*

Even if Congress did not intend to exempt federal statutory cases from discretionary forum non conveniens dismissal, when and under what circumstances is the exercise of such discretion appropriate?

1. *The Gilbert Doctrine: Balancing Private and Public Interest Factors*

Focusing on where witnesses and documents are located, on whether view of the premises is necessary, on the enforceability of the judgment, and on the relative ease of access to other sources of proof,⁴¹⁹ the *Gilbert* “private interest” factors are meant to measure the convenience of a particular forum to the individual litigants—and, more particularly, the relative inconvenience of the forum to the defendant.⁴²⁰

By comparison, the Court has struggled with readily defining what objectives the “public interest” factors are meant to serve.⁴²¹ Some public interest factors, such as the “administrative difficulties flowing from court congestion,” and “the unfairness of burdening citizens in an unrelated forum with jury duty,”⁴²² are clearly directed at measuring how best to apportion limited judicial resources—that is, institutional convenience.⁴²³ Other public interest factors, notably “the difficulty of ascertaining and applying foreign law” and the

⁴¹⁸ Cf. *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 120 S. Ct. 1331, 1337-39 (2000) (holding that the special venue provisions of the Federal Arbitration Act are permissive, not mandatory, and observing, generally, that analysis of special venue provisions “must be specific to the statute”).

⁴¹⁹ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); accord *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981).

⁴²⁰ See BORN, *supra* note 4, at 335-36.

⁴²¹ Williams Reynolds has identified at least three distinct “public interest” concerns: choice of law; comparison of competing interests; and burden on the domestic forum. See 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, 1677-83 (1992). Reynolds has also observed that applying the private interest factors is significantly easier for courts than applying the less-focused public interests. See *id.* at 1683 (remarking that “the nature of the private interests inquiry—relative convenience—is a much easier question to address than some of those raised in the public interest category”).

⁴²² *Gilbert*, 330 U.S. at 509; accord *Piper Aircraft*, 454 U.S. at 241 n.6.

⁴²³ See BORN, *supra* note 4, at 336 (observing that most of *Gilbert*’s “public interest” factors “bear upon the ‘convenience’ of the forum court”).

“local interest in having local controversies decided at home,”⁴²⁴ appear addressed to measuring which sovereign has a significant interest in the dispute, in the fashion of a modern conflicts analysis.⁴²⁵

Yet, while the “difficulty of ascertaining and applying foreign law” seems to require a choice of law inquiry, the Supreme Court has cautioned that courts should “avoid conducting complicated exercises in comparative law.”⁴²⁶ According to *Piper Aircraft*, “[i]f the possibility of a change in law were given substantial weight, deciding motions to dismiss on the ground of forum non conveniens would become quite difficult.”⁴²⁷

The public interest factor that requires the court to consider the “local interest in having local controversies decided at home” is even more opaque. The Court has never explained whether this interest analysis is to be conducted as a modern conflicts analysis, such as under the *Restatement (Second) of Conflict of Laws*,⁴²⁸ although *Piper Aircraft*’s proscription against complicated choice of law inquiries certainly suggests otherwise. If courts are not to conduct this interest analysis as a modern choice of law inquiry, the Supreme Court has not advised them how they should weigh competing interests. Although comparing competing interests is a part of the current forum non conveniens test, sovereign interests are only one of many private and public interest factors and the Court has admonished that no single factor may be given greater weight than any other.⁴²⁹

A related, and fundamental, shortcoming of the current test is that neither *Gilbert* nor *Piper Aircraft* explains how a court should balance the totality of the private and public interest factors. What if the private interest factors point to one forum, and the public interest factors to another? What if some of the private and public interest factors favor dismissal, while other public interest factors support retaining jurisdiction? Asking a court to balance convenience

⁴²⁴ *Gilbert*, 330 U.S. at 509; accord *Piper Aircraft*, 454 U.S. at 241 n.6.

⁴²⁵ Other commentators have noted the correlation between choice of law and the forum non conveniens determination. See David R. Robertson, *Forum Non Conveniens in America and England: “A Rather Fantastic Fiction,”* 103 L.Q. REV. 398, 406-07 (1987) (observing that a “surprising[ly] strong correlation exists between forum non conveniens and choice of law”); see also Stein, *supra* note 30, at 784 (remarking that “courts have taken into consideration the very question purportedly addressed by jurisdiction, venue and choice of law: which government has the appropriate relationship to the parties and the controversy to justify resolving the dispute in its courts or under its law”).

⁴²⁶ *Piper Aircraft*, 454 U.S. at 251.

⁴²⁷ *Id.* at 252.

⁴²⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

⁴²⁹ See *Piper Aircraft*, 454 U.S. at 250.

factors with considerations of competing sovereign interests is an apples and oranges proposition. Yet, all *Gilbert* and *Piper Aircraft* direct is that a court must consider “all relevant public and private interests factors” and that its balancing of those factors be “reasonable.”⁴³⁰

2. Taking Sovereign Interests Seriously

When considering a motion to dismiss a federal statutory case on the ground of forum non conveniens, a court should explicitly recognize the central importance of comparing competing sovereign interests, so that its determination of the motion seeks to insure that the sovereign with the more significant interest adjudicates the dispute. If the court determines that the United States has the greater interest, then it should retain jurisdiction unless doing so would be seriously inconvenient. If, on the other hand, the court determines that another jurisdiction has a greater interest than the United States, then the court should dismiss in favor of the other jurisdiction unless doing so would be seriously inconvenient.

It might seem that *Piper Aircraft* precludes a court from emphasizing competing sovereign interests when deciding a forum non conveniens motion in a federal statutory case. However, *Piper Aircraft*, like *Gilbert* before it, was a diversity case, not a federal statutory case. Therefore, a court should be able to distinguish *Piper Aircraft* on that basis.

That said, affording competing sovereign interests special consideration certainly seems to be contrary to the spirit of *Piper Aircraft*. The litigation in *Piper Aircraft* was initiated in California state court following an airplane crash in Scotland in which all five decedents were Scottish citizens.⁴³¹ A California probate court named Gaynell Reyno, the legal secretary of the lawyer who filed the action, as administratrix of the five estates.⁴³² She asserted common claims for negligence and strict liability against Piper Aircraft and

⁴³⁰ *Id.* at 256. Stephen Burbank has remarked that if, in applying territorial jurisdiction rules, courts choose only to count contacts and “make no effort to consider interests other than those suggested by the defendant’s activities in the forum, forum non conveniens serves as a critically important equilibrating device.” Burbank, *supra* note 4, at 122; *see also* BORN, *supra* note 4, at 315 (discussing the relationship between judicial jurisdiction and forum non conveniens). Even if forum non conveniens serves as a check on exercises of jurisdiction permitted by the expansive modern rules of territorial jurisdiction, the question remains how forum non conveniens doctrine should be structured. A doctrine that emphasizes convenience serves as a very different kind of check than one that emphasizes sovereign interests.

⁴³¹ *See Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727, 729 (M.D. Pa. 1979).

⁴³² *See Piper Aircraft*, 454 U.S. at 239.

Hartzell Propeller, both American corporations.⁴³³ In her suit, Reyno did not hide the fact that she brought suit in the United States because American common law was more favorable than Scottish law as to both liability and damages.⁴³⁴

On appeal, the Third Circuit reversed, holding that the dismissal granted by the district court was improper. The Third Circuit's decision was based, in large part, on its conclusion that Ohio and Pennsylvania law would govern the claims as to both defendants, thus signaling significant domestic interests in the case.⁴³⁵ The Third Circuit also found that dismissal was improper because following dismissal Scottish law would be applied to the case and Scottish law was far less favorable to the plaintiffs.⁴³⁶

The Supreme Court reversed, reaffirming the two-part test of *Gilbert*.⁴³⁷ The Court held that "merely . . . showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum" may not defeat forum non conveniens dismissal.⁴³⁸ The Court also admonished that no one factor is to be given more weight than any other factor under *Gilbert*, and this is particularly so with placing too great an emphasis on choice of law.⁴³⁹

In fact, if conclusive or substantial weight were to be given to the possibility of a change in law, the forum non conveniens doctrine would become virtually useless. . . . [P]laintiffs will select that forum whose choice-of-law rules are most advantageous. Thus, if the possibility of an unfavorable change in substantive law is given substantial weight in the forum non conveniens inquiry, dismissal would rarely be proper.⁴⁴⁰

Moreover, requiring district courts to engage in an extensive choice of law inquiry in order to decide a forum non conveniens motion would be contrary to doctrine's design, which, in part, is "to help courts avoid conducting complex exercises in comparative law."⁴⁴¹

⁴³³ See *id.* at 240.

⁴³⁴ See *id.*

⁴³⁵ See *id.* at 245.

⁴³⁶ See *id.* at 246 ("Only when American law is not applicable, or when the foreign jurisdiction would . . . give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.").

⁴³⁷ See *id.* at 261.

⁴³⁸ *Id.* at 247.

⁴³⁹ See *id.* at 250.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* at 251.

However, a more careful reading of *Piper Aircraft* suggests that, despite the Court's rhetoric to the contrary, nothing in *Piper Aircraft* is inconsistent with the conclusion that, at least in federal statutory cases, deciding which sovereign has the more significant interest in adjudicating a dispute should be central to a court's decision whether to retain or decline jurisdiction. Having admonished the Third Circuit for placing too heavy an emphasis on choice of law, the Court tried to explain the relevance of "the difficulty of ascertaining and applying foreign law" in the *Gilbert* test. It observed that choice of law was still relevant, to the extent it was necessary for a court to decide whether "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all."⁴⁴² What the Court failed to consider, however, was that the choice of law inquiry is often employed to identify which sovereign has the most significant interest in the dispute—which is precisely what the Third Circuit used it for in comparing American and Scottish interests in the case. Moreover, the *Piper Aircraft* Court did not dispute the Third Circuit's choice of law conclusions, and did not hesitate to conclude that Scotland had "a very strong interest in this litigation."⁴⁴³ It is certainly possible that Scotland could possess a significant interest in adjudicating the dispute, notwithstanding a proper assessment under the conflicts of laws that American law should govern in the case. The Court, however, never adequately explained how it could gloss over the Third Circuit's choice of law determination and still find dismissal appropriate.

One decision that recognizes the appropriateness of focusing on sovereign interests in the forum non conveniens determination in federal statutory cases is *Laker Airways, Ltd. v. Pan American World Airways*.⁴⁴⁴ In *Laker Airways*, the trial court declined to dismiss plaintiff's action on forum non conveniens grounds in a decision that offers a promising model for application of the doctrine after the proposed modification. The *Laker Airways* Court refused to be bound to a mechanical application of "convenience" factors; the court recognized, instead, the importance of focusing the forum non conveniens determination on an assessment of the forum's interests in the dispute.

⁴⁴² *Id.* at 254-55.

⁴⁴³ *See id.* at 260. Allan Stein has previously—and persuasively—criticized *Piper Aircraft*, a diversity case, for using the federal forum non conveniens doctrine to "disregard Pennsylvania's interest analysis for choice-of-law purposes." Stein, *supra* note 30, at 828. A federal court sitting in diversity is bound to apply state choice of law rules. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Despite the fact that state choice of law rules pointed to the application of Pennsylvania and Ohio law in *Piper Aircraft*, 454 U.S. at 245 n.10, the dismissal of the action on forum non conveniens grounds resulted in Scottish law ultimately being applied in the case, *see id.* at 257-61.

⁴⁴⁴ 568 F. Supp. 811 (D.D.C. 1983).

The plaintiff, a low-cost airline based in England which operated transatlantic flights between Europe and the United States, alleged that the defendants had conspired in violation of the Sherman Act to drive the plaintiff from offering low budget service on these transatlantic routes.⁴⁴⁵ The defendants were primarily American and foreign air carriers.⁴⁴⁶ Rejecting the defendants' assertion that it would be more "convenient" for the suit to be adjudicated in England, the court noted that, when necessary, witnesses and documents could be ferried across the Atlantic easily and at little expense to the defendants.⁴⁴⁷ More important than this riposte of the defendants' assertion, however, was the court's willingness to see through the convenience argument as merely a smokescreen concealing defendants' real purposes in seeking dismissal in favor of England:

Justice is blind; but courts nevertheless do see what there is clearly to be seen. What is apparent is that the defendants, secure in the knowledge that no liability attaches to their activities under the laws of Great Britain, are seeking to have the matter decided in the British tribunal rather than in an American court.⁴⁴⁸

The court rejected the defendants' forum non conveniens argument, first, because it found that the law of England denied the plaintiff any remedy; thus, England was not an adequate and available alternative forum within the meaning of the *Gilbert and Piper Aircraft* test.⁴⁴⁹ The court did not rest its decision solely on the conclusion, however, that the threshold requirement of the forum non conveniens test had not been met. The allegation that defendants' actions violated the antitrust laws of the United States, the court held, evinced a significant forum interest in adjudicating the controversy.

What is in jeopardy is the enforcement of the Sherman Act with respect to a market—travel between the United States and Europe—in which this nation has the highest interest. . . . [T]he antitrust laws of the United States embody a specific congressional purpose to en-

⁴⁴⁵ See *id.* at 813.

⁴⁴⁶ See *id.* at 813-14. Also named as defendants were McDonnell Douglas Corp. and McDonnell Douglas Finance Corp., which, respectively, manufactured and financed airplanes. See *id.* at 813 n.7.

⁴⁴⁷ See *id.* at 814 (noting that any argument "based on the convenience of witnesses has little validity when advanced in the context of a lawsuit involving transatlantic air passenger carriers," and taking "judicial notice that these carriers provide frequent flights between the continents" and "that the time involved and the expense of transporting witnesses would be minimal.").

⁴⁴⁸ *Id.* at 816.

⁴⁴⁹ See *id.* at 816-17.

courage the bringing of private claims in the American courts in order that the national policy against monopoly may be vindicated.⁴⁵⁰

To dismiss on the grounds of forum non conveniens in favor of a foreign jurisdiction that does not recognize similar antitrust principles “would . . . defeat this congressional direction by means of a wholly inappropriate procedural device.”⁴⁵¹ Judge Greene recognized that a United States court, “bound to enforce the Sherman Act with respect to those who are resident in or are doing business in the United States,” should not confuse convenience concerns with the legitimate purposes for a forum non conveniens dismissal.⁴⁵² The court, he ruled,

[w]ould not be justified in regarding defendants’ desire to litigate in Britain—because they expect there to be exonerated—as a search for a more convenient forum. That is not what the doctrine of forum non conveniens is all about.⁴⁵³

The Supreme Court, itself, has recognized the importance of taking foreign interests into consideration in a number of different contexts. In *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*,⁴⁵⁴ for instance, the Supreme Court held that a district court is not bound to follow the Hague Evidence Convention, but, instead, has a choice either to compel discovery under the Federal Rules of Civil Procedure or to direct the parties to comply with Convention procedures.⁴⁵⁵ That choice, *Aerospatiale* decreed, is to be guided by “international comity,” which “requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation.”⁴⁵⁶ Even the dissent accepted “international comity” as a guiding principle, but concluded that comity would be better served if the district court had been required to follow the Convention before ordering discovery under the Federal Rules.⁴⁵⁷

In another well-known case, *Hilton v. Guyot*,⁴⁵⁸ the Court adopted a rule to govern when foreign judgments should be enforced. This rule similarly involved recognition of foreign interests, or “the comity of nations.” Comity, the

⁴⁵⁰ *Id.* at 817-18.

⁴⁵¹ *Id.* at 818.

⁴⁵² *Id.* at 816.

⁴⁵³ *Id.*

⁴⁵⁴ 482 U.S. 522 (1987).

⁴⁵⁵ *See id.* at 529-32.

⁴⁵⁶ *Id.* at 543-44.

⁴⁵⁷ *See id.* at 555-56 (Blackmun, J., concurring in part and dissenting in part).

⁴⁵⁸ 159 U.S. 113 (1895).

Court wrote, refers to "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."⁴⁵⁹

Consideration of foreign interests has also been deemed relevant in the act of state doctrine,⁴⁶⁰ and in rules concerning foreign sovereign immunity,⁴⁶¹ in restrictions on the issuance of anti-suit injunctions when there is concurrent jurisdiction in the United States and abroad,⁴⁶² in the application of personal jurisdiction rules,⁴⁶³ and in choice of law inquiries.⁴⁶⁴

It is far beyond the scope of this Article to examine, as others have indeed already ably done,⁴⁶⁵ the similarities and differences between these different contexts and their assessment of foreign interests. Although the motivations and principles that inform and shape these doctrines and rules vary significantly, that foreign interests are often included in the ultimate determination reached demonstrates that there are recognized and legitimate instances in which courts must take account not only of forum interests, but the interests of other nations and the international community as well.

Several arguments support focusing the forum non conveniens analysis on comparing foreign and forum interests. One rationale for doing so, advanced long before the forum non conveniens doctrine was even fully crystallized, is the principle of reciprocity.⁴⁶⁶ Simply stated, the principal of reciprocity is that, if Americans expect foreign countries to decline jurisdiction when American interests are paramount, then federal courts must similarly decline jurisdiction when foreign interests predominate.⁴⁶⁷ In *The Maggie Hammond*, for example, the Supreme Court determined that an admiralty court was authorized to decline jurisdiction when the dispute concerned "the citizens or subjects of a

⁴⁵⁹ *Id.* at 163-64.

⁴⁶⁰ *See, e.g.,* Liu v. Republic of China, 892 F.2d 1419, 1432 (9th Cir. 1989).

⁴⁶¹ *See, e.g.,* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

⁴⁶² *See, e.g.,* China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33 (2d Cir. 1987).

⁴⁶³ *See, e.g.,* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).

⁴⁶⁴ *See, e.g.,* Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

⁴⁶⁵ *See, e.g.,* Ramsey, *supra* note 387; Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L. REV. 1 (1991).

⁴⁶⁶ *See* Willendson v. Forsoket, 29 F. Cas. 1283 (D. Pa. 1801) (No. 17,682).

⁴⁶⁷ *See* Harry Litman, Comment, *Considerations of Choice of Law in the Doctrine of Forum Non Conveniens*, 74 CAL. L. REV. 565, 596 n.175 (1986) ("[D]eferring to another forum with a substantially greater interest might be an attribute appropriate to an evolved system of justice, and also might advance the forum's substantive policies in the long run by encouraging other forums to reciprocate.").

foreign country whose courts are not clothed with the power to give the same remedy in similar controversies to the citizens of the United States. . . .”⁴⁶⁸

Another rationale for considering foreign interests is to prevent domestic courts “from interfering with foreign states’ sovereign and regulatory regimes.”⁴⁶⁹ In support of this view, Gary Born notes that nineteenth century admiralty courts took foreign interests into consideration in deciding whether to decline jurisdiction.⁴⁷⁰ Still others have posited that international law acts as a limitation on a court’s exercise of jurisdiction, even when a basis for legislative jurisdiction has been established and all jurisdictional and venue prerequisites have been satisfied.⁴⁷¹ As Gary Born has suggested, international law “could be interpreted to restrict the ‘competence’ or ‘subject matter jurisdiction’ of a nation’s courts to resolve certain cases . . . because the subject matter of the dispute lacked any connection to that nation.”⁴⁷²

Others may question, however, whether it is appropriate for federal courts to weigh competing sovereign interests when making a forum non conveniens determination. One objection may be that, in deciding the extraterritorial reach of a federal statute, courts have already considered the judgment made by Congress regarding foreign interests. Although Congress may enact a federal statute that runs afoul of international law and courts are nonetheless bound to apply the statute,⁴⁷³ one recognized canon of statutory construction is the presumption that Congress did not intend to violate international law.⁴⁷⁴ Thus, after a court has applied this *Charming Betsy* principle, and determined that Congress intended a statute to apply extraterritorially, it may be argued that the court lacks authority as a matter of separation of powers to decline jurisdiction based on its own view that a comparison of competing interests favors dismissal. Put another way, it is not the judiciary’s province to limit application of a federal law out of concern for foreign interests when the other branches have not seen fit to do so.

⁴⁶⁸ 76 U.S. 435, 451 (1869).

⁴⁶⁹ BORN, *supra* note 4, at 314.

⁴⁷⁰ *See id.* at 290-91, 314.

⁴⁷¹ *See id.* at 32, 318 (suggesting that “international law could also forbid U.S. courts from hearing certain disputes—even where the parties are subject to U.S. personal jurisdiction and even though non-U.S. law is applied”).

⁴⁷² *Id.* at 32.

⁴⁷³ *See* 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 115(1) & 403 cmt. g (1987).

⁴⁷⁴ *See Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

The most immediate reply to this objection is that it reads far too much into the rules for legislative jurisdiction. The premise that Congress has taken foreign interests into account in deciding the general applicability of a federal statute is not the same as saying that Congress has taken foreign interests into account in deciding the applicability of a federal statute in a particular case. The *Charming Betsy* presumption is a tool for deciding the scope of a federal statute when Congress has been silent as to its extraterritorial reach. It is not, however, a substitute for sober rules to guide a court in deciding whether the exercise of jurisdiction in the case before it is excessive and inappropriate. To the extent reciprocal treatment may be expected in foreign courts, consideration of foreign interests means that the *forum non conveniens* doctrine serves an important moderating function in the federal system, a purpose entirely consonant with its use as a doctrine to avoid excessive exercises of jurisdiction.⁴⁷⁵

A related objection to including foreign interests in the *forum non conveniens* calculus is that courts will be forced to make imprecise, vague, and subjective judgments. How can a court know what foreign interests are implicated by a dispute? And how is it to balance domestic and foreign concerns? Some have urged that federal courts should consider only whether domestic interests are implicated by a dispute, and not try to identify and compare competing foreign interests.⁴⁷⁶ Indeed, the Supreme Court's decision in *Hartford Fire Insurance Co. v. California*, may limit the force of the argument that foreign interests should be taken into account in the *forum non conveniens* determination.⁴⁷⁷

The *Restatement (Third) of Foreign Relations Law* counsels that, even when a basis for prescriptive jurisdiction exists under section 402, such jurisdiction may not be exercised if it would be "unreasonable."⁴⁷⁸ Section 403(2) then contains a list of factors to be considered in determining whether the exercise of jurisdiction would be "unreasonable."⁴⁷⁹ Two key factors are "the extent to which another state may have an interest in regulating the

⁴⁷⁵ BORN, *supra* note 4, at 315.

⁴⁷⁶ See, e.g., Dodge, *supra* note 384, at 150-68. See generally Stanley E. Cox, *The Interested Forum*, 48 MERCER L. REV. 727, 732-55 (1997) (advancing the same argument without particular reference to weighing the interests of a domestic forum and a foreign forum). But see Litman, *supra* note 467, at 596 n.175 ("Allowing for comparisons of the intensity of competing forums' interests, as opposed to simply asking whether the chosen forum has an interest, does accord with *forum non conveniens*'s role as a discretionary doctrine.").

⁴⁷⁷ 509 U.S. 764 (1993).

⁴⁷⁸ 1 RESTATEMENT (THIRD) OF THE FOREIGN LAW OF THE UNITED STATES § 403(1) (1987).

⁴⁷⁹ *Id.* § 403(2).

activity,” and “the likelihood of conflict with regulation by another state.”⁴⁸⁰ Yet, in *Hartford Fire*, Justice Souter, writing for the majority, adopted a narrow approach in which the kind of interest balancing favored by section 403(2) of the *Restatement* may be inappropriate. Purporting to rely on section 403(2), Justice Souter held that when prescriptive jurisdiction exists, a court should apply United States law unless—only unless—foreign law compels the defendant to do something that is prohibited by United States law.⁴⁸¹ This circumstance—which Justice Souter referred to as a “true conflict”⁴⁸²—has been sharply criticized by leading scholars,⁴⁸³ but may remain the guiding rule. As Justice Souter noted, in the absence of a true conflict, the court need not “address other considerations which might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.”⁴⁸⁴

Although *Hartford Fire* may suggest limitations on weighing the competing interests of foreign sovereigns in the context of deciding the extraterritorial scope of federal statutes and so, by extension, perhaps in the forum non conveniens determination, it seems that on balance there are good reasons why consideration of foreign interests remains appropriate.

First, it is difficult to see how, in practice, courts can avoid considering competing sovereign interests, even in the *Hartford Fire* context of measuring prescriptive jurisdiction. Certainly, at a minimum, a foreign law mandating the conduct in question—Andreas Lowenfeld refers to as a case of “true compulsion”⁴⁸⁵—should trump even a strong forum interest. Professor Lowenfeld has also argued that, notwithstanding Justice Souter’s *Hartford Fire* majority opinion, courts will still need to engage in some form of interest balancing.⁴⁸⁶ Justice Scalia’s dissent in that case recognized this necessity, and would ascribe significant weight to the interests of a competing sovereign in determining the extraterritorial reach of United States antitrust law.⁴⁸⁷

⁴⁸⁰ *Id.* § 403(2)(g) & (h).

⁴⁸¹ *See Hartford Fire*, 509 U.S. at 798-99.

⁴⁸² *Id.* at 798 (quoting *Societe Nationale Industrielle Aerospatiale et al. v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part)).

⁴⁸³ *See, e.g.,* Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT’L L. 42 (1995).

⁴⁸⁴ *Hartford Fire*, 509 U.S. at 799.

⁴⁸⁵ Lowenfeld, *supra* note 483, at 48.

⁴⁸⁶ *See id.*

⁴⁸⁷ *See Hartford Fire*, 509 U.S. 764, 818-19 (Scalia, J., dissenting).

Second, the objection that courts are not capable of assessing foreign interests ignores that courts are already called upon to weigh competing interests in the broad range of contexts listed above. Moreover, even in the current forum non conveniens test, courts take foreign interests into consideration. In order to weigh the “local interest in having localized controversies decided at home,” the district court presumably must examine all contacts between the litigation and any foreign forums, if only to gauge, by comparison, the connections between the litigation and domestic concerns and legislative policies. The problem, as we argue above, is that under the current *Gilbert* test, the weight of this single factor may be minimized, as it is part of the larger constellation of private and public convenience factors.⁴⁸⁸

V. CONCLUSION

Writing just after the Court’s 1947 *Gilbert* decision, Robert Barrett sagely observed:

The general inference to be drawn from the Latin phrase forum non conveniens is that jurisdiction should be declined when the forum is inconvenient. But inconvenient to whom? The court? The plaintiff? The defendant? Even if we have an answer to these questions, . . . [p]erhaps the search should be a broader one for that forum in which the ends of justice will best be served. Obviously, these questions must be answered before we know anything of the meaning of the doctrine of *forum non conveniens*.⁴⁸⁹

Those who seek the true “meaning of the doctrine of forum non conveniens” must recognize that it will not be found in shallow interpretations of legislative intent. Although judicial discretion to decline the exercise of jurisdiction may threaten to interfere with the legislative prerogative to prescribe both the remedy and place of suit, conflict is not always unavoidable or undesirable. Moreover, if we seek to add meaningful content to a doctrine of discretionary dismissal, then we must recognize the central importance of considering competing sovereign interests in the forum non conveniens determination.

Forum non conveniens doctrine in federal statutory cases should explicitly assign interest analysis a central role. When a plaintiff alleges a well-pleaded claim for relief based on violation of a federal statute, the district court’s forum

⁴⁸⁸ See *supra* text accompanying note 429.

⁴⁸⁹ Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380, 404 (1947) (emphasis omitted).

non conveniens analysis should principally turn on which sovereign has the more significant interest in the dispute. If the United States has the more significant interest, that should create a strong presumption that the forum court should retain jurisdiction. Alternatively, if another sovereign has a more significant interest, then the forum court should usually decline jurisdiction. This presumption that the forum with the more significant interest should adjudicate the dispute could be overcome in exceptional circumstances.

Of course, the decision whether to retain or decline jurisdiction will not always be self-evident. The task of identifying significant and legitimate forum governmental interests and, where necessary, of reconciling such interests with the competing interests of other sovereigns, will certainly continue to challenge federal courts. How is a court to decide whether significant forum interests will be advanced by adjudication of the dispute? How is a court to decide which interests of two or more sovereigns should be given greater weight? Does the analysis change if another court has concurrently decided to exercise adjudicatory jurisdiction, having made its own assessment of competing interests?

The answers to these questions are elusive—largely because they are probably not capable of definitive answers. In this area of the law, as in so many others, courts must make difficult judgments. Moreover, guidance must also come from non-judicial sources.⁴⁹⁰ These hard questions underline the importance of articulating the most compelling justifications for a discretionary dismissal doctrine in federal statutory cases. By arguing that courts should pay particular attention to which sovereign has the more significant interest, we seek to give better guidance to those who must make these close and often difficult determinations.

⁴⁹⁰ Some such efforts are already currently underway. See Burbank, *supra* note 4, at 112 (discussing his involvement in a group to advise the United States delegation to the Hague Conference on Private International Law to establish a more coherent set of rules or governing principles concerning the propriety of exercising adjudicatory jurisdiction, as well as for recognizing and enforcing each other's judgments).

