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THE EVOLVING FORUM SHOPPING SYSTEM

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This Article uses empirical analysis to provide a new understanding of transnational litigation in U.S. courts. According to conventional wisdom, the United States has a forum shopping system with two features that encourage plaintiffs to file claims in U.S. courts, even when those claims involve foreign parties or foreign activity: a permissive approach to personal jurisdiction, giving plaintiffs broad court access, and a strong tendency of U.S. judges to apply plaintiff-favoring domestic law. This forum shopping system purportedly contributes to a rising tide of transnational litigation in the United States. Scholars and interest groups have therefore proposed new anti-forum shopping measures aimed at curtailing transnational litigation in U.S. courts.

This Article shows that the forum shopping system has evolved and that it no longer encourages plaintiffs to pursue transnational claims in U.S. courts to the extent it supposedly once did. It also presents empirical evidence that transnational litigation in the United States may have actually decreased, not increased, over the last two decades. The analysis suggests that new anti-forum shopping measures may not be as urgent or necessary as their advocates claim. If adopted, such measures could unduly limit access to justice for both American and foreign citizens who, in our era of globalization, are increasingly affected by transnational activity.

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INTRODUCTION

The claim that the United States is experiencing a litigation explosion has long been a fixture of American discourse.¹ Using careful empirical analysis, legal scholars and social scientists have challenged this claim and provided a more realistic picture of the American legal system.² As one scholar puts it, the litigation explosion is “more rhetorical than real.”³

In our era of globalization, however, this claim has taken on a new twist. It is now widely believed that the United States is experiencing an explosion of *transnational* litigation—litigation involving foreign parties or foreign activity.⁴ Far from being merely rhetorical, a highly plausible logic supports this belief: Globalization entails increasingly frequent interactions between U.S. and foreign citizens,

¹ See, e.g., WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991); see also Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 5–10 (1983) (surveying the history of the litigation explosion claim).

² See generally WILLIAM HALTOM & MICHAEL McCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 74 (2004) (reviewing scholarly research and concluding that it has “significantly qualified if not refuted claims about mushrooming litigation . . . and [has] provided a far more reasonable portrait of our civil legal system and its workings”); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 5–10 (1986) (using litigation-rate data to challenge the litigation explosion claim).

³ Michael J. Saks, *If There Be a Crisis, How Shall We Know It?*, 46 MD. L. REV. 63, 63 (1986).

⁴ See, e.g., Spencer Weber Waller, *A Unified Theory of Transnational Procedure*, 26 CORNELL INT'L L.J. 101, 102 (1993) (noting “explosive growth of transnational litigation” in U.S. courts); see also *infra* Part II.B (documenting this belief).

thus leading to more transnational disputes.⁵ The United States has substantive and procedural laws that are more advantageous to plaintiffs than the laws of other countries.⁶ And, according to the conventional understanding, two features of the U.S. legal system encourage plaintiffs to bring transnational disputes to the United States by promising access to these advantages.⁷ First, the United States employs a permissive approach to personal jurisdiction, giving plaintiffs—both domestic and foreign—broad access to U.S. courts. Second, U.S. judges have a strong tendency to apply the U.S. substantive law that plaintiffs often prefer, even in lawsuits arising out of events occurring in foreign countries.⁸ Together, these features constitute what Louise Weinberg has aptly called a “forum shopping system.”⁹

Unlike the standard version of the litigation explosion claim, this more recent transnational variant has so far escaped empirical scrutiny, perhaps precisely because of its plausibility. Yet such scrutiny is sorely needed. Based on legitimate concerns about the potentially adverse economic and political consequences of excessive transnational forum shopping, scholars and interest groups are calling for legal reforms aimed at reducing the flow of transnational litigation into U.S. courts.¹⁰ But these reforms could themselves entail significant costs, such as reduced access to justice, negative repercussions for foreign relations, and underregulation of transnational activity.¹¹ The risk is that exaggerated perceptions of transnational litigation in the United States could result in exaggerated policy responses that carry their own adverse consequences.

This Article uses empirical analysis to provide a new, more up-to-date understanding of the American forum shopping system and its impact on transnational litigation in U.S. courts. Specifically, it argues that the forum shopping system has evolved and no longer encourages plaintiffs to file transnational suits in U.S. courts to the extent it

⁵ See ANDREW S. BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION 335 (2003) (“[T]he . . . emergence of a global economy[is] a factor which has been apt to generate an increased number of disputes with a transnational dimension . . .”).

⁶ See Russell J. Weintraub, *Introduction to Symposium on International Forum Shopping*, 37 TEX. INT’L L.J. 463, 463–64 (2002) (describing proplaintiff features of the U.S. legal system).

⁷ See *infra* Part II.A (documenting and explaining this understanding).

⁸ As used in this Article, *U.S. law* refers to either U.S. state law or U.S. federal law.

⁹ Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 68 (1991).

¹⁰ See, e.g., INST. FOR LEGAL REFORM, GLOBAL FORUM SHOPPING FACT SHEET (2008), <http://www.instituteforlegalreform.com/images/stories/documents/pdf/GlobalForum-ShoppingFactSheet.pdf> (advocating reforms to reduce global forum shopping into U.S. courts); Alan O. Sykes, *Transnational Forum Shopping as a Trade and Investment Issue*, 37 J. LEGAL STUD. 339, 368–74 (2008) (proposing doctrinal changes to reduce forum shopping); see also *infra* Conclusion (discussing proposed anti-forum shopping measures).

¹¹ See generally Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081 (2010) (discussing these costs); *infra* Conclusion (same).

supposedly once did. Moreover, this Article presents evidence suggesting that there actually has been less—not more—transnational forum shopping into U.S. courts over the last two decades. Thus, new anti–forum shopping measures may not be as appropriate or urgent as advocates of these measures suggest, particularly in light of the potential costs of such measures.

This Article proceeds in four main parts. Part I outlines the theoretical foundations for understanding forum shopping behavior and forum shopping systems. Drawing on strategic choice theory, it argues that, other things being equal, the greater plaintiffs' expectations of favorable court access and choice-of-law decisions in a particular legal system, the more likely they are to file transnational suits in that system's courts, thus increasing levels of transnational litigation in those courts. Generalizing from Weinberg's concept, Part I defines a forum shopping system as the features of a legal system that influence forum shopping behavior by shaping these expectations.

Part II explains the conventional understanding of the American forum shopping system and its effects on transnational litigation in U.S. courts. The system's permissive approach to personal jurisdiction raises expectations of favorable court access decisions, and its pro-domestic-law bias creates high expectations of favorable choice-of-law decisions. The system is therefore said to encourage plaintiffs to forum shop into the United States, thus contributing to a transnational litigation explosion.

Part III empirically evaluates the conventional understanding and finds that it is no longer accurate. First, in the current American forum shopping system, U.S. judges aggressively use the doctrine of forum non conveniens to dismiss transnational suits, thereby offsetting the effects of permissive personal jurisdiction, and they no longer exhibit pro-domestic-law bias. Second, at least one major form of transnational litigation in the United States has become less, not more, frequent over the last two decades: alienage litigation—litigation over which U.S. federal courts have jurisdiction because the dispute is between a U.S. citizen and a foreign citizen.¹² This finding cuts against the claim that transnational litigation in U.S. courts is increasing.

As Part III argues, the forum non conveniens doctrine plays a central role in the current forum shopping system. However, we know very little about how judges actually make forum non conveniens decisions. Part IV addresses this gap in our understanding of the American forum shopping system by presenting a systematic empirical analysis of forum non conveniens decision making. The results sug-

¹² See 28 U.S.C. § 1332(a)(2) (2006) (providing for alienage jurisdiction in controversies between "citizens of a [U.S.] State and citizens or subjects of a foreign state").

gest that judges' forum non conveniens decisions do a better job distinguishing between appropriate and inappropriate forum shopping, are more predictable, and are less influenced by caseload and ideology than the doctrine's critics indicate. However, the results also reveal evidence of significant discrimination against foreign plaintiffs, at least in decisions by judges nominated by Republican presidents. This finding may raise questions about the United States' compliance with equal-access provisions in bilateral friendship, commerce, and navigation treaties.

The Article concludes by drawing out the broader implications of its analysis for legal scholarship and for proposed new anti-forum shopping measures.

I

A THEORY OF FORUM SHOPPING

Forum shopping is a plaintiff's decision to file a lawsuit in one court rather than another potentially available court.¹³ Domestic forum shopping occurs when a plaintiff chooses between two or more courts within a single country's legal system, whereas transnational forum shopping occurs when the choice is between the courts of two or more countries' legal systems.¹⁴ Some commentators use the term *forum shopping* to refer to lawsuits filed by foreign plaintiffs in U.S. courts.¹⁵ However, a U.S. plaintiff's decision to file a transnational suit in a U.S. court is also forum shopping insofar as the decision represents a choice between that court and an available court in another country.¹⁶

¹³ See Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 554 (1989) ("[F]orum shopping connotes the exercise of the plaintiff's option to bring a lawsuit in one of several different courts."). The term *forum shopping* is sometimes used pejoratively. See Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1683–89 (1990) (discussing, but challenging, reasons for this negative view). However, it is important not to embed the definition of forum shopping with assumptions about whether it is an appropriate behavior. To do so would conflate two distinct modes of analysis: (1) descriptive analysis of forum shopping and its consequences, and (2) normative analysis of forum shopping. Because sound normative analysis of forum shopping depends on accurate evidence regarding actual forum shopping behavior and its consequences, these two modes of analysis should be kept distinct.

¹⁴ See Sykes, *supra* note 10, at 339; cf. Juenger, *supra* note 13, at 560 (distinguishing domestic and international forum shopping).

¹⁵ See, e.g., *Global Forum Shopping*, INST. FOR LEGAL REFORM, http://www.instituteforlegalreform.com/component/iler_issues/29/item/GFS.html?expand=1 (last visited Nov. 9, 2010) ("Global forum shopping is a disturbing new trend in which foreign plaintiffs take advantage of the unusually expansive features of the American judicial system to file lawsuits in U.S. courts.").

¹⁶ See Daniel J. Dorward, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. PA. J. INT'L ECON. L. 141, 165 (1998) (noting that "a domestic plaintiff injured abroad is as likely to forum shop in the United States as is a foreign plaintiff"); Linda J. Silberman, *Developments in Jurisdiction*

Forum shopping depends on two conditions: First, as the foregoing definition implies, more than one court must be potentially available for resolving the plaintiff's claim.¹⁷ Second, the potentially available legal systems must be heterogeneous.¹⁸ If all legal systems were the same, plaintiffs would have little reason to prefer one court instead of another.¹⁹ In contrast, the heterogeneity of legal systems means that a plaintiff may be more likely to win (and likely to recover more) in some legal systems than others, thus creating an incentive to forum shop.²⁰

In transnational disputes, these two conditions are frequently satisfied. By definition, transnational disputes have connections to more than one country.²¹ These connections may be territorial when the activity or its effects touch the territory of more than one country; or they may be based on legal relationships between a country and the actors engaged in or affected by that activity, such as citizenship.²² Because of these multicountry connections, there will often be a potentially available court in more than one country.²³ And because the world's legal systems are not uniform, transnational disputes will also generally satisfy the heterogeneity condition.²⁴

By comparing potentially available courts, a plaintiff can determine the court in which she prefers to pursue her claim. From a simple rational choice perspective, she will choose the court in which the

and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard, 28 TEX. INT'L L.J. 501, 502 (1993) ("Courts in the United States attract plaintiffs, both foreign and resident, because they offer procedural advantages beyond those of foreign forums . . .").

¹⁷ Andrew Bell refers to this condition as "concurrent jurisdiction." See BELL, *supra* note 5, at 5 ("The existence of concurrent jurisdiction is the *sine qua non* for [forum shopping].").

¹⁸ See *id.* at 25 ("The *raison d'être* for forum shopping lies in lack of uniformity throughout the world's legal systems . . .").

¹⁹ Even if legal systems were formally homogeneous, nonlegal differences could motivate forum shopping. See ARTHUR TAYLOR VON MEHREN, *THEORY AND PRACTICE OF ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY OF THE DOCTRINE, POLICIES AND PRACTICES OF COMMON- AND CIVIL-LAW SYSTEMS* 194 (2003) ("A party will, other things being equal, prefer to litigate in a forum that is, geographically speaking, readily accessible, impartial (or even inclined to favour him), and whose administration of justice is within his cultural and legal tradition.").

²⁰ See BELL, *supra* note 5 ("[T]he venue in which a transnational dispute is to be resolved may be of vital importance for the ultimate outcome of the dispute. This will especially be so the greater the differences, whether in matters of procedure, substantive principles of law, or conflict of law rules, between potentially available forums.").

²¹ See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1329 (11th ed. 2004) (defining "transnational"); Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67, 71 n.11 (2009) (same).

²² See Whytock, *supra* note 21.

²³ See BELL, *supra* note 5, at 5 (noting that in transnational litigation, "there will invariably be a number of potential forums whose jurisdictional rules would, prima facie at least, permit the dispute to be entertained").

²⁴ See *id.* at 15 (noting "lack of uniformity . . . in states' internal laws").

expected value of her claim (less the costs of litigation) is the highest based on the substantive and procedural rules of that court's legal system.²⁵ For example, commentators generally believe that "compared with foreign courts, United States forums offer a plaintiff both lower costs and higher recovery."²⁶

But forum shopping is not simply a matter of analyzing substantive and procedural law to estimate the comparative expected values of claims. It also depends on plaintiffs' expectations about two types of court decisions: court access decisions and choice-of-law decisions. In a court access decision, a court determines whether it will allow a plaintiff's claim to proceed in that court. For example, court access decisions in the United States include subject matter jurisdiction, personal jurisdiction, and forum non conveniens decisions. If a court grants a motion to dismiss for lack of subject matter or personal jurisdiction or based on the forum non conveniens doctrine, the plaintiff's claim cannot proceed in that court.²⁷ A plaintiff is unlikely to incur the costs of filing a lawsuit in a particular court unless she believes that there is some chance of a favorable court access decision.²⁸ Stated more generally, other things being equal, the higher a plaintiff's expectation that a particular court will make a favorable court access decision, the more likely she is to file a lawsuit in that court.²⁹

²⁵ This perspective is based on the standard rational-choice model of the decision to sue, according to which a plaintiff will only file a claim if the expected value of the claim (the probability that the plaintiff will win, p , times the amount of recovery if it wins, w , less the costs of suit, c) is greater than zero. The so-called "filing condition" is thus $(p^*w) - c > 0$. ROBERT G. BONE, *CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE* 33–34 (2003). Extending this basic model to transnational forum shopping, a rational plaintiff will file her claim in the legal system that maximizes $(p^*w) - c$. See Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 383 (2006) ("The law regularly provides more than one authorized, legitimate forum in which a litigant's claims may be heard. To shop among those legitimate choices for the forum that offers the potential for the most favorable outcome is the only rational decision under rational choice theory and game theory because forum shopping maximizes the client's expected payoff."); Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, 25 CARDOZO L. REV. 1367, 1372 (2004) ("[P]laintiffs will generally seek to file claims in jurisdictions where the expected net gain is the largest.").

²⁶ Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 323 (1994).

²⁷ See generally Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 786–94 (1985) (arguing that these different types of court-access decisions are largely redundant).

²⁸ In terms of the rational-choice model, other things being equal, the lower the expectation of a favorable court-access decision, the lower the value of p ; and the lower the value of p , the less likely the filing condition will be satisfied in a particular legal system and the less likely that $(p^*w) - c$ will be maximized in that system.

²⁹ Cf. Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 12 (1998) ("Rational litigants will take into account the prevailing (and shifting) biases of personal jurisdiction in deciding whether to bring a case at all, and in what forum, and whether (and how far) to litigate the personal jurisdiction defense, once suit is brought.").

In a choice-of-law decision, a court decides whether to apply its own legal system's substantive law or a foreign system's substantive law.³⁰ Like court access decisions, choice-of-law decisions can have important implications for forum shopping, particularly transnational forum shopping.³¹ For example, even if a plaintiff files a transnational suit in a U.S. court because she prefers U.S. substantive law, and even if the court makes a favorable court access decision, the plaintiff will not obtain the sought-after benefits of U.S. substantive law unless the court also decides to apply U.S. law rather than the substantive law of another country that also has connections to the dispute. In this sense, choice-of-law decisions can be understood as "law access" decisions. Insofar as a plaintiff's preference for a court in a particular legal system stems from a preference for that system's substantive law, then, other things being equal, the higher the plaintiff's expectation that the court will apply its own domestic law, the higher the likelihood that the plaintiff will select that court.³²

In these ways, forum shopping is strategic behavior—that is, behavior by one actor that depends not only on that actor's preferences but also on her expectations about the behavior of other actors.³³ Forum shopping behavior is based not only on a plaintiff's preference for a particular legal system's substantive and procedural law but also on the court access and choice-of-law decisions of courts. After all, those decisions will determine whether a plaintiff will be able to ob-

³⁰ Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 724 (2009). Ordinarily, domestic courts apply domestic procedural law without making a choice-of-law decision. EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* 128 (4th ed. 2004).

³¹ See Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT'L L.J. 559, 567–68 (2002) (noting the impact of choice-of-law doctrine on international forum shopping and arguing that it is stronger than the impact on domestic forum shopping). In addition to the relatively simple relationship between choice of law and forum shopping described here, there can be more complex forum shopping behavior, such as where a plaintiff selects a court because its choice-of-law rules point to the preferred substantive law of another legal system.

³² Cf. Ghei & Parisi, *supra* note 25, at 1372 (“[T]he certainty of knowing that forum law will always apply could . . . encourag[e] forum shopping.”).

³³ Cf. ROBERT COVER, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 51, 58–59 (Martha Minow et al. eds., 1992) (describing “strategic behavior entailed in forum shopping”). Strategic behavior occurs when one actor's ability to further his or her goals depends on how other actors behave. Under these conditions, each actor's decisions must take into account the expected actions of those other actors. See David A. Lake & Robert Powell, *International Relations: A Strategic-Choice Approach*, in *STRATEGIC CHOICE AND INTERNATIONAL RELATIONS* 3, 3–6 (David A. Lake & Robert Powell eds., 1999) (noting that “choices . . . are frequently strategic; that is, each actor's ability to further its ends depends on how other actors behave, and therefore each actor must take the actions of others into account”). Thus, the strategic behavior of an actor is a function not only of that actor's preferences but also of that actor's expectations about the behavior of other relevant actors.

tain the substantive and procedural benefits of her preferred legal system. If the court decides to deny access, the plaintiff will not be able to pursue her claim in that court at all; if the court allows access but decides not to apply its own domestic substantive law, she will not secure the benefits of that law.

Generalizing from Weinberg's concept,³⁴ I define a forum shopping system as those features of a legal system that influence levels of forum shopping into that system by shaping plaintiffs' expectations of favorable court access and choice-of-law decisions. According to strategic choice theory, an actor's expectations about the behavior of another actor are based largely on inferences about the other actor's future behavior drawn from that other actor's past behavior.³⁵ For this reason, strategic behavior is largely a function of available information about the past behavior of other actors. In forum shopping, this information includes published court access and choice-of-law decisions.³⁶ By publishing such decisions—either in official reporters or in widely available electronic databases such as LexisNexis or Westlaw—a court signals how it likely will decide similar future cases, influencing plaintiffs' expectations of favorable court access and choice-of-law decisions.³⁷ Thus, the key features of a forum shopping system may include not only prominent published opinions but also

³⁴ See Weinberg, *supra* note 9, at 68 (“What has evolved seems to be a forum shopping system. The plaintiff can sue the defendant in any number of states having ‘minimum contacts’ with, or general jurisdiction over, the defendant . . . [and] [t]he forum is free to apply its own law to any issue it has some interest in governing.” (footnotes omitted)).

³⁵ See Lake & Powell, *supra* note 33, at 9 (observing that without knowing how the other party will act, “the [actor] has to base her decision on the [other party’s] past behavior”).

³⁶ Court decisions are not necessarily the only source of information. Repeat players may develop intuitions based on their own direct litigation experience, regardless of publication, with these intuitions giving repeat players an advantage over other parties in transnational litigation. See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97–104 (1974) (discussing the advantages of repeat players in litigation).

³⁷ In the United States, most court decisions are not published. See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 125–26 (2002) (explaining that published decisions are a small percentage of total court decisions and are not necessarily representative of unpublished decisions). Unpublished decisions are, of course, important and known to the parties to the particular suits in which courts make the decisions. However, because parties beyond these particular suits are unlikely to have widespread knowledge of these decisions, unpublished decisions are unlikely to be as important as published decisions in shaping the expectations of plaintiffs in general. See Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 988 (2008) (“[Unpublished] opinions cannot be systematically reviewed and researched without immense resources.”); Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67, 96 (2004) (noting that “[a]n unpublished disposition is, more or less, a letter from the court to parties familiar with the facts’ . . . [and] ‘is not written in a way that will be fully intelligible to those unfamiliar with the case’” (quoting *Hart v. Massanari*, 266 F.3d 1155, 1176, 1178 (9th Cir. 2001))).

more general patterns of court access and choice-of-law decision making in published decisions.

In summary, forum shopping is a form of strategic behavior that depends, among other things, on expectations about favorable court access and choice-of-law decisions. A forum shopping system refers to those features of a legal system—including published court decisions—that affect levels of litigation in that system by shaping plaintiffs' expectations of favorable court access and choice-of-law decisions. A forum shopping system affects transnational litigation levels because, other things being equal, the higher plaintiffs' expectations of favorable court access and choice-of-law decisions by courts in a particular legal system, the more lawsuits plaintiffs will file there.

II

THE FORUM SHOPPING SYSTEM AND ITS CONSEQUENCES: THE CONVENTIONAL UNDERSTANDING

Using the theoretical framework developed in Part I, this Part explains the conventional understanding of the American forum shopping system and its consequences for transnational litigation in the United States. According to this understanding, the system has two key features that encourage plaintiffs to file transnational suits in U.S. courts: a permissive approach to personal jurisdiction (which fosters high expectations of favorable court access decisions) and pro-domestic-law bias in choice-of-law decision making (which creates high expectations of favorable choice-of-law decisions).³⁸ This system is said to have contributed to a transnational litigation explosion.³⁹

A. The American Forum Shopping System

When making forum shopping decisions, plaintiffs involved in transnational disputes will often prefer to litigate in the United States⁴⁰ because the substantive and procedural laws of the United States often are more favorable to plaintiffs than those of other countries.⁴¹ Substantively, U.S. law is “more likely than foreign law to allow recovery and allow it for more elements of harm.”⁴² For example, the United States offers not only theories of strict liability but also punitive

³⁸ See *infra* Part II.A.

³⁹ See *infra* Part II.B.

⁴⁰ See Weintraub, *supra* note 26, at 323–24 (explaining reasons for this preference).

⁴¹ See Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 HARV. L. REV. 1137, 1137 (2007) (“The substantive tort law and related procedural mechanisms available in U.S. courts are generally much more favorable to plaintiffs, and produce much larger recoveries, than the law and procedures available in foreign courts.”).

⁴² Weintraub, *supra* note 26, at 323; see also Whitten, *supra* note 31, at 567 (comparing foreign “substantive law of liability or remedies that is either anti-recovery or that would

damages.⁴³ Procedurally, the United States offers advantages including liberal pretrial discovery, trial by jury, contingency fee arrangements, and the so-called “American rule,” whereby a losing plaintiff ordinarily is not liable for the defendant’s attorney fees.⁴⁴ Together, these substantive and procedural advantages for plaintiffs purportedly make the United States a “magnet forum,” a forum that “attract[s] the aggrieved and injured of the world.”⁴⁵

However, as indicated by the theory of forum shopping developed in Part I, forum shopping behavior depends not only on plaintiffs’ substantive and procedural law preferences but also on their expectations about court access decisions and choice-of-law decisions—expectations that the forum shopping system shapes.⁴⁶ According to the conventional understanding, two features of the American forum shopping system encourage transnational forum shopping into U.S. courts by raising plaintiffs’ expectations that U.S. courts will grant them court access and give them the benefits of favorable U.S. substantive and procedural rules: a permissive approach to personal jurisdiction and a pro-domestic-law bias in choice-of-law decision making.

1. Court Access

The first feature of the American forum shopping system is said to be a permissive approach to personal jurisdiction. One can best understand this feature by comparing it to an earlier approach to personal jurisdiction that was based on the Supreme Court’s 1878 decision in *Pennoyer v. Neff*.⁴⁷ In *Pennoyer*, the Supreme Court adopted a strict territorial approach to personal jurisdiction that provided for two primary grounds of jurisdiction over nonconsenting foreign defendants: seizure of the defendant’s property within the forum state’s territory or service of process on the defendant within the forum state’s territory.⁴⁸ Under this approach, a plaintiff ordinarily could

allow a lower recovery compared to U.S. law” with U.S. courts that will apply “pro-recovery rules”).

⁴³ See Russell J. Weintraub, *Choice of Law for Products Liability: Demagnetizing the United States Forum*, 52 ARK. L. REV. 157, 163 (1999) (noting advantages of strict liability and punitive damages in the United States).

⁴⁴ See Weintraub, *supra* note 26 (discussing these advantages); see also Silberman, *supra* note 16, at 502 (“Courts in the United States attract plaintiffs, both foreign and resident, because they offer procedural advantages beyond those of foreign forums . . .”).

⁴⁵ Weintraub, *supra* note 6, at 463; see also BELL, *supra* note 5, at 28 (calling the United States “a forum shopper’s delight”).

⁴⁶ See *supra* Part I.

⁴⁷ 95 U.S. 714, 722 (1878).

⁴⁸ See *id.* (“[N]o State can exercise direct jurisdiction and authority over persons or property without its territory.”). Courts did not require territorial presence when there was express or implied consent of the defendant. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 106 (4th ed. 2005). Eventually, the concept of implied consent developed into “a

pursue litigation against a nonconsenting defendant only in those U.S. states in which the defendant either had property or could be served—and if no such states existed, the plaintiff would not have access to any U.S. court to sue the defendant.⁴⁹ The ruling in *Pennoyer* thus “created a system in which . . . a plaintiff’s choice of forum was severely limited.”⁵⁰

The current U.S. approach to personal jurisdiction—derived from the Supreme Court’s 1945 decision in *International Shoe Co. v. Washington*⁵¹—is considerably more permissive than its approach under *Pennoyer*.⁵² In *International Shoe*, the Court held that

due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”⁵³

Thus, physical presence of the defendant’s property or person in the forum state’s territory is no longer required.⁵⁴

This approach makes it easier for a plaintiff to establish personal jurisdiction over a defendant even when the defendant is outside the United States, even when the activity that gave rise to the dispute occurred outside the United States, and regardless of whether the plain-

major means of asserting in-personam jurisdiction over a mobile, business citizenry when a strict application of territorial jurisdiction premised on physical presence would have precluded jurisdiction.” *Id.* at 111.

⁴⁹ As William Richman and William Reynolds explain:

Absent in-state service, courts upheld jurisdiction over non-domiciliary natural persons only if they could infer consent from the defendant’s engaging in activities that were closely regulated by the state. If defendant caused personal or economic injury as a result of simply travelling through the state or engaging in unregulated business activity in the state, the state courts could not compel him to appear and defend. The resident plaintiff was forced to travel to defendant’s home to litigate.

The ability of the territorial theory to reach the corporate defendant was similarly limited; if the corporation was not doing business locally, the state could not exercise jurisdiction. “Doing business” meant activity of a systematic and continuous nature, but a corporation by dint of a modern chain of distribution could derive very substantial economic benefit from a state without doing business there.

WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 29 (3d ed. 2002) (footnotes omitted).

⁵⁰ Stein, *supra* note 27, at 802.

⁵¹ 326 U.S. 310 (1945).

⁵² See *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (“The immediate effect of this departure from *Pennoyer*’s conceptual apparatus was to increase the ability of the state courts to obtain personal jurisdiction over nonresident defendants.”); VON MEHREN, *supra* note 19, at 399 (arguing that “American jurisdictional theory became even more embracing and, in the view of some, more aggressive” after *International Shoe*).

⁵³ *Int’l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

⁵⁴ See *id.* (allowing for jurisdiction even “if [defendant] be not present within the territory of the forum”).

tiff is a U.S. or foreign citizen.⁵⁵ For example, under the theory of specific jurisdiction, personal jurisdiction may be based on slight contacts with a U.S. state's territory if those contacts are related to the plaintiff's claim.⁵⁶ And under the theory of general jurisdiction, personal jurisdiction may exist in a U.S. state even if the defendant's contacts with that state are unrelated to the plaintiff's claim provided that those contacts are sufficiently extensive.⁵⁷

A plaintiff can access the substantive and procedural advantages of the U.S. legal system only if a U.S. court has personal jurisdiction over the defendant.⁵⁸ The United States' permissive approach to personal jurisdiction increases the likelihood that a plaintiff will have access to these advantages, thereby encouraging plaintiffs to file transnational lawsuits in U.S. courts.⁵⁹

2. Choice of Law

According to the conventional understanding, the second feature of the forum shopping system is strong pro-domestic-law bias in choice-of-law decision making. Until the 1950s, territoriality dominated choice of law just as it had dominated personal jurisdiction. Joseph Story's influential *Commentaries on the Conflict of Laws*, pub-

⁵⁵ See Goldsmith & Sykes, *supra* note 41, at 1144 (noting that "U.S. firms and firms with close U.S. connections can be sued in U.S. courts for torts committed outside the United States"); Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L. 327, 336 (2004) (noting that "multinational defendants with offices or extensive activities in the United States can be sued here even on claims that bear no relationship to the activities in the United States").

⁵⁶ See FRIEDENTHAL ET AL., *supra* note 48, at 129–30.

⁵⁷ See *id.*

⁵⁸ Without personal jurisdiction, a plaintiff's transnational lawsuit is subject to dismissal. FED. R. CIV. P. 12(b)(2).

⁵⁹ See VON MEHREN, *supra* note 19, at 191 ("The analysis employed [in *International Shoe*] increases the number of available forums, with the result that ordinarily a plaintiff's forum is produced."); Juenger, *supra* note 13, at 557 (arguing that *International Shoe* "enhanced the potential for forum shopping" because it was "intended to expand rather than to constrict" personal jurisdiction); Peter Huber, *Courts of Convenience or Have Lawsuit, Will Travel*, REGULATION, Sept./Oct. 1985, at 18, 20 (arguing that *International Shoe*'s minimum-contacts test allows many large corporations to "be sued everywhere"). Some litigants and interest groups use this logic as part of their legal strategies. For example, in *Goodyear Luxembourg Tyres, S.A. v. Brown*, now pending before the Supreme Court, the petitioners and their amici curiae supporters are using claims about permissive personal jurisdiction and its impact on forum shopping to argue for a more restrictive approach to general jurisdiction in transnational product liability actions. See Brief for Petitioners at 9, *Goodyear*, No. 10-76 (U.S. Nov. 19, 2010), 2010 WL 4624153 at *9 (arguing that approving North Carolina's approach to general jurisdiction—based on which it asserted jurisdiction over petitioners—would be an "invitation to rampant forum shopping"); Brief of the Org. for Int'l Inv. & Ass'n of Int'l Auto. Mfrs. Inc. as Amici Curiae in Support of Petitioner at 16, *Goodyear*, No. 10-76 (U.S. Nov. 19, 2010), 2010 WL 4803149 at *16 (asserting that "[t]he U.S. legal system has had a problem with forum shopping" and that affirming the state court's decision "would dramatically expand opportunities for forum shopping").

lished in 1834, began with the premise that the laws of each state bind persons within that state's territory but not beyond.⁶⁰ To justify a domestic court's application of foreign law, Story relied on a theory of comity.⁶¹ The reporter for the American Law Institute's 1934 First Restatement of Conflict of Laws, Joseph Beale, adopted Story's territorial approach but rejected the theory of comity in favor of a theory of vested rights to justify the application of foreign law by a domestic court.⁶² Reflecting Beale's twin principles of territoriality and vested rights, the First Restatement's general choice-of-law rule for tort cases was that a court should apply "the law of the place of wrong."⁶³ The First Restatement defines the "place of wrong" as "the state where the last event necessary to make an actor liable for an alleged tort takes place."⁶⁴ Usually this was the location where the plaintiff was injured since liability does not arise without injury.⁶⁵ For contract cases, the rule was that the law of the place of contracting should apply.⁶⁶ The First Restatement's territorial choice-of-law rules are widely understood to have limited the substantive-law incentive for plaintiffs to forum shop into U.S. courts.⁶⁷ After all, "[i]t would do the plaintiff no good to sue in a forum with favorable domestic law if a court there would apply the law of some other jurisdiction."⁶⁸

However, beginning in the 1950s, U.S. courts increasingly discarded the classic territorial approaches to choice of law embodied in Story's *Commentaries* and the First Restatement; instead, courts began replacing them with various modern choice-of-law methods,⁶⁹ the most prominent of which is the "most significant relationship"

⁶⁰ See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 7 (Boston, Hilliard, Gray, & Co. 1834) ("It is plain, that the laws of one country can have no intrinsic force . . . except within the territorial limits and jurisdiction of that country.")

⁶¹ *Id.* at 7–8 ("Whatever extra-territorial force [a nation's laws] are to have, is the result, not of any original power to extend them abroad, but of that respect, which from motives of public policy other nations are disposed to yield to them . . ."); see also SCOLES ET AL., *supra* note 30, at 18–20 (describing this approach and noting that it "was generally accepted as an operational theory in the courts during the half century from 1850–1900").

⁶² See SCOLES ET AL., *supra* note 30, at 20–21 (explaining Beale's vested-rights theory).

⁶³ RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 377–378 (1934).

⁶⁴ *Id.* § 377.

⁶⁵ SCOLES ET AL., *supra* note 30, at 713.

⁶⁶ RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 311.

⁶⁷ See Ghei & Parisi, *supra* note 25, at 1374 (arguing that, in theory at least, "[a]s long as the rules [of the First Restatement] are applied consistently, the same substantive law should apply to identical facts, resulting in identical outcomes . . . [and that t]his rules-based system would eliminate forum shopping by ensuring uniform and predictable results."). *But see* Juenger, *supra* note 13, at 559 (noting the anti-forum shopping purpose of a place-of-wrong approach but arguing that various "escape devices" enabled judges to deviate from strict territoriality, thus diluting its anti-forum-shopping effects).

⁶⁸ Weintraub, *supra* note 26, at 323.

⁶⁹ See generally RICHMAN & REYNOLDS, *supra* note 49, at 180 (noting that the traditional First Restatement choice-of-law system "prevailed in most American courts until the work of a new generation of judges and scholars began to supplant it in the [1950s] and

method set forth in the Second Restatement of Conflict of Laws.⁷⁰ Rather than emphasizing a single territorial connecting factor—as was the case under the First Restatement—the modern approaches generally involve more flexible multifactor tests.⁷¹

According to choice-of-law scholars, this “choice-of-law revolution” gave rise to a strong bias in favor of applying domestic law.⁷² This bias is said to be the second key feature of the forum shopping system. As one leading choice-of-law scholar argues, the modern approaches have an “inherent forum law preference.”⁷³ As another puts it, “if [plaintiffs’ attorneys] are competent they will at least be generally aware that the U.S. court selected will apply a modern conflicts approach that has . . . pro-forum, pro-recovery tendencies”⁷⁴ This pro-domestic-law bias purportedly encourages transnational forum shopping into U.S. courts by raising plaintiffs’ expectations that judges will apply plaintiff-favoring U.S. substantive law in transnational litigation.⁷⁵

B. The Transnational Litigation Explosion

By encouraging plaintiffs to file transnational lawsuits in U.S. courts, the American forum shopping system is said to have combined with the process of globalization to create a transnational litigation explosion.⁷⁶ Globalization entails increasingly numerous transna-

[1960s]). For a leading account of this revolution, see generally SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* (2006).

⁷⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

⁷¹ See Whytock, *supra* note 30, at 725–28 (describing these modern methods).

⁷² See, e.g., SCOLES ET AL., *supra* note 30, at 107 (noting “homeward trend” in American choice of law); Goldsmith & Sykes, *supra* note 41, at 1137 (“[C]ompared to the *lex loci* rule, the modern rules have one unmistakable consequence: they make it more likely that the forum court will apply local tort law to wrongs that occurred in another jurisdiction.”); Whitten, *supra* note 31, at 560 (arguing that “[b]oth the empirical evidence and the existing scholarly consensus . . . indicate that there is a strong tendency under all modern conflicts systems to apply forum law”); see also SYMEONIDES, *supra* note 69, at 334 (noting “widely held assumption” that courts applying modern methods have strong pro-forum-law bias).

⁷³ FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* 148 (spec. ed. 2005).

⁷⁴ Whitten, *supra* note 31, at 568.

⁷⁵ See Juenger, *supra* note 13, at 558 (arguing that modern choice-of-law methods’ forum-law tendency “present[s] yet another incentive to the forum shopper”); Whitten, *supra* note 31 (describing the impact of pro-domestic-law bias on transnational forum shopping).

⁷⁶ See, e.g., Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2365 (1991) (referring to the post-1970s “explosion of transnational commercial litigation in United States courts” (emphasis omitted)); Waller, *supra* note 4, at 102 (noting “explosive growth of transnational litigation” in U.S. courts); John Bies, Comment, *Conditioning Forum Non Conveniens*, 67 U. CHI. L. REV. 489, 489 (2000) (noting the “explosion of international civil litigation in U.S. courts”).

tional interactions.⁷⁷ More transnational interactions give rise to more transnational disputes.⁷⁸ And plaintiffs purportedly bring a disproportionately large number of these disputes to U.S. courts because the American forum shopping system promises them access to favorable U.S. substantive and procedural laws.⁷⁹ The theory of forum shopping presented in Part I supports this logic: the permissive approach to personal jurisdiction should create high expectations of favorable court access decisions, and the pro-domestic-law bias should create high expectations of favorable choice-of-law decisions, thus encouraging plaintiffs to file transnational claims in U.S. courts.

Thus, many observers assume that transnational litigation in U.S. courts is increasing.⁸⁰ As one observer puts it, “certain facts on the ground are clear: [i]n recent decades, litigation in U.S. courts with a foreign or international component has been growing in volume and

⁷⁷ Cf. DAVID HELD & ANTHONY MCGREW, *GLOBALIZATION/ANTI-GLOBALIZATION* 1 (2002) (defining globalization as “expanding scale, growing magnitude, speeding up and deepening impact of transcontinental flows and patterns of social interaction”).

⁷⁸ See BELL, *supra* note 5, at 4 (“Quite simply, more international trade means more transnational disputes, contractual, quasi-contractual, and arising from the negligent provision of goods and services.”); David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: “An Object Lesson in Uncontrolled Discretion,”* 29 TEX. INT’L L.J. 353, 367–68 (1994) (“[D]evelopments in industrial, communications, and transportation technology have facilitated international activity, which in turn has multiplied the number of international disputes.”); Frank Eric Marchetti, Comment, *Alienage Jurisdiction over Stateless Corporations: Revealing the Folly of Matimak Trading Company v. Khalily*, 36 SAN DIEGO L. REV. 249, 250 (1999) (“One unavoidable consequence of increased interaction between citizens of the United States and . . . foreign businesses will be an increase in legal disputes involving parties from foreign countries.”).

⁷⁹ See Sykes, *supra* note 10, at 339 (“Plaintiffs regularly bring tort and tortlike cases in U.S. courts seeking damages for harms that have occurred abroad, attracted by higher expected returns than are available in the jurisdiction in which the harm arose.”); Weintraub, *supra* note 6, at 463 (describing the United States as “first among the world’s magnet forums”).

⁸⁰ See, e.g., *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 552 (1987) (Blackmun, J., concurring in part and dissenting in part) (noting that “transnational litigation is increasing”); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 441–42 (2003) (stating that “with the ‘globalization’ of any number of aspects of human endeavor—commerce, communications including the Internet, crime, human rights—the importance of transnational issues in national courts has grown,” and that “the number of cases with transnational elements has also continued to increase”); Eugene J. Silva, *Practical Views on Stemming the Tide of Foreign Plaintiffs and Concluding Mid-Atlantic Settlements*, 28 TEX. INT’L L.J. 479, 480 (1993) (“Over the last fifteen years . . . multinational litigation has demonstrated particularly sustained growth.”); Molly M. White, *Home Field Advantage: The Exploitation of Federal Forum Non Conveniens by United States Corporations and Its Effects on International Environmental Litigation*, 26 LOY. L.A. L. REV. 491, 493 (1993) (“As the world has become more interdependent, the amount of litigation between foreign citizens and United States nationals also has escalated.”). In prior scholarship, I also made this assumption. See Whytock, *supra* note 21, at 74 (noting that “legal scholars speculate that globalization and the intensifying transnational interactions it entails have caused transnational litigation to grow in recent decades”).

also in complexity.”⁸¹ According to another, “the last thirty years have seen a growing torrent of cases with international and foreign issues.”⁸² Although both U.S. plaintiffs and foreign plaintiffs can forum shop transnational claims into U.S. courts, some commentators focus specifically on the latter.⁸³ For example, one scholar describes a “tide of foreign plaintiffs against United States shores.”⁸⁴ According to another, “[t]he number of lawsuits filed in the United States by foreign plaintiffs against U.S. corporations has increased considerably over the past fifteen years.”⁸⁵

III

THE FORUM SHOPPING SYSTEM AND ITS CONSEQUENCES: A NEW UNDERSTANDING

The conventional understanding of the American forum shopping system and its consequences is highly plausible. However, perhaps precisely because of its plausibility, it has largely escaped empirical scrutiny.⁸⁶ This Part empirically evaluates the conventional understanding and finds that it is no longer accurate. This Part therefore provides a new and more up-to-date understanding of the American forum shopping system and its impact on transnational litigation in U.S. courts. It argues that the forum shopping system has evolved

⁸¹ Paul R. Dubinsky, *The Future of Transnational Litigation in U.S. Courts: Distinct Field or Footnote?*, 101 AM. SOC’Y INT’L L. PROC. 365, 366 (2007).

⁸² HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS V (2008).

⁸³ See, e.g., John M. Barcus, *Money (It’s What They Want): Quantifying Damage Awards for Foreign Tort Victims in United States Admiralty Courts*, 21 REV. LITIG. 635, 658 (2002) (noting but not necessarily agreeing with the claim that there is a “tidal wave of foreign plaintiffs clogging up the dockets in our courts”); Douglas W. Dunham & Eric F. Gladbach, *Forum Non Conveniens and Foreign Plaintiffs in the 1990s*, 24 BROOK. J. INT’L L. 665, 665–66 (1999) (claiming that number of product-liability claims filed by foreign plaintiffs in U.S. courts increased in the 1990s); Paul G. Cereghini & John D. Sear, *Huddled Masses Yearning to Strike It Rich: Foreign Plaintiffs Shopping for Gold in American Courts*, LAW.COM (July 17, 2009), <http://www.law.com/jsp/article.jsp?id=1202432312841> (“With increased frequency, American companies conducting operations abroad face lawsuits in American courts by foreign plaintiffs seeking the benefits of the American system of justice.”); *Global Forum Shopping*, *supra* note 15 (identifying “global forum shopping” as a “disturbing new trend in which foreign plaintiffs take advantage of the unusually expansive features of the American judicial system to file lawsuits in U.S. courts”); John Niblock, *Obscure Statute Has Prompted Flood of Foreign Claims in U.S. Courts*, ROLL CALL (Sept. 3, 2003), http://www.rollcall.com/features/Global-Trade_2003/global_trade/2661-1.html (claiming that “U.S. plaintiffs’ lawyers are crowding U.S. court dockets with product liability, environmental tort, unfair wage, and human rights claims on behalf of hundreds of thousands of foreign plaintiffs”).

⁸⁴ Silva, *supra* note 80, at 481.

⁸⁵ Don Mayer & Kyle Sable, *Yes! We Have No Bananas: Forum Non Conveniens and Corporate Evasion*, 4 INT’L BUS. L. REV. 130, 131 (2004).

⁸⁶ In fact, there is a general lack of empirical analysis of forum shopping and its consequences. See Juenger, *supra* note 13, at 553–54 (noting the absence of “in-depth study, empirical or otherwise, that focuses on [forum shopping]”).

in a manner that no longer encourages transnational forum shopping into U.S. courts to the extent it supposedly once did; and, contrary to claims that there is a transnational litigation explosion, it demonstrates that at least one important form of transnational litigation—alienage litigation—has actually been decreasing.

A. The Current Forum Shopping System

The conventional understanding of the American forum shopping system is based largely on developments that took place decades ago, particularly the Supreme Court's 1945 decision in *International Shoe* and the American choice-of-law revolution that began in the 1950s.⁸⁷ In this subpart, I use a combination of doctrinal and empirical analysis to update our understanding of the American forum shopping system. Specifically, I identify two key differences between the current American forum shopping system and the system described by the conventional understanding. First, by aggressively using the forum non conveniens doctrine to dismiss transnational litigation, the U.S. district courts have significantly offset the incentives that permissive personal jurisdiction created. Second, there no longer appears to be a pro-domestic-law bias in international choice-of-law decision making. The evidence indicates that the American forum shopping system has evolved in a direction that has made it less likely to encourage transnational forum shopping into U.S. courts than it supposedly once did.

1. Court Access

A key feature of the current American forum shopping system is the forum non conveniens doctrine. Although this doctrine is relatively obscure and often neglected, it plays a central role in transnational litigation.⁸⁸ Existing forum non conveniens scholarship is largely doctrinal and emphasizes the implications of the doctrine for litigants after they have filed their lawsuits.⁸⁹ In contrast, my goal here is to highlight the signals sent by U.S. federal courts in their forum non conveniens decisions and the impact of those signals on transna-

⁸⁷ See *supra* Part II.A.

⁸⁸ See Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 985 (2009) (referring to the doctrine as "strange and understudied"); Silberman, *supra* note 55, at 341 (noting that the "doctrine of *forum non conveniens* occupies a central role in international litigation").

⁸⁹ For some of the best scholarship on the forum non conveniens doctrine, see generally Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309 (2002); Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147 (2006); David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 LAW Q. REV. 398 (1987); Stein, *supra* note 27; and Weintraub, *supra* note 26.

tional forum shopping behavior—that is, on the decisions of plaintiffs to file transnational suits in U.S. courts in the first place. Specifically, I argue that U.S. federal courts have signaled that they will aggressively use the forum non conveniens doctrine to dismiss transnational litigation when they deem a foreign court to be a more appropriate forum. This signal offsets the incentive created by the forum shopping system’s permissive approach to personal jurisdiction by lowering expectations of court access, thus reducing plaintiffs’ incentives to file transnational claims in U.S. courts.

Under the forum non conveniens doctrine, a U.S. district court may dismiss a transnational suit “on the ground that a court abroad is the more appropriate and convenient forum for adjudicating the controversy.”⁹⁰ It may do so even if it has subject matter jurisdiction and personal jurisdiction; in fact, it may do so without even determining whether it has jurisdiction.⁹¹ However, dismissal on forum non conveniens grounds is not permitted unless the proposed foreign court provides an adequate alternative forum.⁹² The adequacy requirement is ordinarily satisfied unless the defendant is not amenable to process in the foreign jurisdiction or in “rare circumstances . . . where the remedy offered by the other forum is clearly unsatisfactory.”⁹³ To guide judges’ forum non conveniens decisions, the Supreme Court has specified a variety of private and public interest factors. The former relate to the convenience of the litigants⁹⁴ while the latter relate to the convenience of the court.⁹⁵

⁹⁰ *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 425 (2007).

⁹¹ *See id.* (holding that “a court need not resolve whether it has . . . subject-matter jurisdiction[] or personal jurisdiction” before dismissing on forum non conveniens grounds).

⁹² *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254–55 (1981) (describing the adequate-alternative-forum requirement).

⁹³ *Id.* at 254 n.22. For example, “dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.” *Id.*

⁹⁴ These “private interest” factors include:

relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Id. at 241 n.6 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

⁹⁵ These “public interest” factors include:

the administrative difficulties flowing from court congestion; the “local interest in having localized controversies decided at home”; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

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

The Supreme Court's seminal *forum non conveniens* cases were decided in 1947 and involved domestic litigation.⁹⁶ Until the 1980s, "the federal courts confronted only a handful of international *forum non conveniens* disputes."⁹⁷ Moreover, during this period, the lower courts took a restrictive "abuse of process" approach to the *forum non conveniens* doctrine, according to which they generally would refuse to dismiss the action unless the defendant would be "'unfairly prejudiced' or 'deprived of substantial justice' by being tried in the United States."⁹⁸ Simply put, the doctrine was rarely used in transnational litigation and, when used, dismissal was unlikely.⁹⁹

This changed in 1981. That year, the Supreme Court in *Piper Aircraft Co. v. Reyno* specifically applied the *forum non conveniens* doctrine to dismiss a transnational claim.¹⁰⁰ *Piper's* key holdings were twofold. First, "dismissal on grounds of *forum non conveniens* may be granted even though the law applicable in the alternative forum is less favorable to the plaintiff's chance of recovery" than the law applicable in the U.S. court.¹⁰¹ The Court explicitly linked this holding to a pol-

⁹⁶ *Gulf Oil*, 330 U.S. at 501; *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947). In fact, the *forum non conveniens* doctrine can be traced back even earlier to admiralty cases. See generally Alexander M. Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty: An Object Lesson in Uncontrolled Discretion*, 35 CORNELL L.Q. 12 (1949) (discussing the admiralty origins of the doctrine). In domestic litigation in the federal court system, decisions once made under the *forum non conveniens* doctrine are now made under the federal transfer rules. See 28 U.S.C. § 1404 (2006).

⁹⁷ Robertson, *supra* note 78, at 370.

⁹⁸ Robertson, *supra* note 89, at 403 (footnotes omitted).

⁹⁹ See *id.* (noting that "[o]nly a handful of reported decisions resulted in *forum non conveniens* dismissals" during this period).

¹⁰⁰ 454 U.S. 235 (1981) (applying *forum non conveniens* doctrine to the suit of Scottish real parties in interest against U.S. defendants arising out of an air crash in Scotland); see VON MEHREN, *supra* note 19, at 319 (noting that "the Court [in *Piper*] approved the use of the [*forum non conveniens*] doctrine by federal courts in international cases"). In addition to *Piper*, there were two personal-jurisdiction decisions by the Supreme Court in the 1980s involving transnational litigation, both of which resulted in dismissal of a transnational suit filed in a U.S. court against a foreign defendant. See *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984). These prominent personal-jurisdiction decisions may also have contributed to the signal that the U.S. federal courts would be less likely than before to grant court access for transnational suits. The Supreme Court's recent reinvigoration of the presumption against the extraterritorial application of legislation, and its use of that presumption to dismiss a transnational securities fraud suit, might also be considered part of this trend. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010). A decision by the Court in *Goodyear Luxembourg Tires, S.A. v. Brown* to reverse a North Carolina court's assertion of general jurisdiction in a transnational product liability case would contribute further to this trend. See *Brown v. Meter*, 695 S.E.2d 756 (N.C. 2010), *cert. granted sub nom. Goodyear Lux. Tires, S.A. v. Brown*, 131 S. Ct. 63 (2010) (No. 10-76).

¹⁰¹ *Piper*, 454 U.S. at 250. However, the Court clarified:

We do not hold that the possibility of an unfavorable change in law should *never* be a relevant consideration in a *forum non conveniens* inquiry. Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in

icy of deterring transnational forum shopping into U.S. courts: because plaintiffs shop for the forum with the most favorable law, a dismissal to a different court will almost inevitably entail a change to less favorable law.¹⁰² Therefore, if dismissal were allowed only in the absence of such a change, “dismissal would rarely be proper”¹⁰³ and “American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.”¹⁰⁴

The second key holding in *Piper* differentiates between domestic and foreign plaintiffs. While there is “ordinarily a strong presumption in favor of the plaintiff’s choice of forum,” a foreign plaintiff’s choice “deserves less deference” than that of a U.S. plaintiff.¹⁰⁵ The Court explained:

When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff’s choice deserves less deference.¹⁰⁶

Thus, according to *Piper*, the plaintiff’s citizenship is, in effect, a proxy for convenience.

As David Robertson argues, the Court in *Piper* essentially replaced the abuse-of-process approach to forum non conveniens with a more aggressive “most suitable forum” approach.¹⁰⁷ The endorsement of this approach gave the lower courts “much broader discretion to decline jurisdiction,” allowing them to dismiss transnational litigation “whenever it appeared to the court on balance . . . that trial elsewhere would . . . be more appropriate.”¹⁰⁸ In addition, the lower courts “began seeing a large number of international forum non conveniens cases” after the *Piper* decision.¹⁰⁹

As explained above, the key features of a forum shopping system include not only prominent precedents—like *Piper*—but also broader patterns of court decisions that send signals that can influence plain-

law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice.

Id. at 254. According to the Court, this will only be the case in “rare circumstances.” *Id.* at 254 n.22.

¹⁰² *Id.* at 250.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 252 (footnote omitted).

¹⁰⁵ *Id.* at 255–56.

¹⁰⁶ *Id.*

¹⁰⁷ See Robertson, *supra* note 89, at 405.

¹⁰⁸ *Id.* at 399.

¹⁰⁹ See Robertson, *supra* note 78, at 370.

tiffs' expectations about court access.¹¹⁰ What signals do the lower courts send in their published forum non conveniens decisions? Prior studies describe a signal that "the vast majority of forum non conveniens motions [will be] granted by the federal courts"¹¹¹ and that "[f]oreign plaintiffs . . . [will] find their claims almost uniformly dismissed."¹¹² However, these studies did not employ random sampling, and they relied on only a small number of decisions.¹¹³

To obtain more reliable estimates, I created a data set consisting of a random sample of more than 200 published forum non conveniens decisions by U.S. district court judges between 1990 and 2005.¹¹⁴ I then created the variable *Decision*, and for each case, I coded it as 1 (motion granted) if the court granted the motion to dismiss on forum non conveniens grounds and 0 (motion denied) if the court denied the motion. I also coded each case to indicate whether the plaintiffs were all domestic, mixed, or foreign.

According to my analysis, published U.S. district court decisions signal that judges will aggressively use the forum non conveniens doctrine to dismiss transnational litigation. However, the signal is not as discouraging to plaintiffs as the prior studies suggest. As Table 1 indicates, the U.S. district courts dismiss transnational claims on forum non conveniens grounds at an estimated rate of 47.1% in their published decisions, with 95% confidence that the actual dismissal rate is between 40.5% and 53.9% (hereinafter, I indicate estimates and their 95% confidence intervals as follows: 47.1% [40.5, 53.9]).¹¹⁵ Dismissal

¹¹⁰ See *supra* Part I.

¹¹¹ Elizabeth T. Lear, *Federalism, Forum Shopping, and the Foreign Injury Paradox*, 51 WM. & MARY L. REV. 87, 101 (2009); see also David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 940 (1990) (claiming that the forum non conveniens doctrine "effectively closes the federal courts" to most transnational personal injury litigation and that "forum non conveniens has led to the dismissal of most federal-court actions brought on behalf of transnational personal injury victims").

¹¹² Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 561 (2007).

¹¹³ See *id.* at 568 n.49, 570 n.58 (listing forty-four cases upon which estimates were based); Robertson & Speck, *supra* note 111, at 940 n.19 (citing only one case in support of the proposition that forum non conveniens has led to the dismissal of "most" transnational personal injury cases). Random sampling is a standard technique for reducing the risk of selection bias. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 110 (2002) (explaining how random sampling avoids selection bias).

¹¹⁴ I generated the sample in three steps: First, I searched the LexisNexis Academic database of U.S. district court decisions for the term "forum non conveniens" between 1990 and 2005. Second, I randomly sorted the results. Third, I analyzed each case in the randomly generated order, discarding those decisions that were not actual decisions by U.S. district court judges to either grant or deny a motion to dismiss in favor of a foreign court on forum non conveniens grounds. I continued this process until I had a sample of approximately 200 decisions (the exact number was 210).

¹¹⁵ Similarly, another recent study found that the dismissal rate in 769 forum non conveniens decisions published by the U.S. district courts between 1982 and 2006 was 52%.

TABLE 1
FORUM NON CONVENIENS DECISIONS

Decision	Domestic Plaintiffs	Mixed	Foreign Plaintiffs	Total
Motion Denied	N=64 69.6% [59.5, 78.1]	N=9 64.3% [38.6, 83.8]	N=37 36.6% [27.9, 46.4]	N=111 52.9% [46.1, 59.5]
Motion Granted	N=28 30.4% [21.9, 40.5]	N=5 35.7% [16.2, 61.4]	N=64 63.4% [53.6, 72.1]	N=99 47.1% [40.5, 53.9]
Total	N=92 100.0%	N=14 100.0%	N=101 100.0%	N=210 100.0%

Notes: This table shows the number of motions to dismiss on forum non conveniens grounds denied and granted by U.S. district court judges between 1990 and 2005 in my sample of published decisions. It also shows estimates of the percentage of motions denied and granted in the overall population of published forum non conveniens decisions. The figures in brackets are the lower and upper bounds of each estimate's 95% confidence interval. Due to lack of citizenship information for one case in which a forum non conveniens motion was denied and for two cases in which a forum non conveniens motion was granted, the totals in the far right column do not equal the sum of the number of observations in the columns to the left.

rates appear to be even higher since the Supreme Court's most recent forum non conveniens opinion, *Sinochem International Co. v. Malaysia International Shipping Corp.*¹¹⁶

Table 1 also indicates that the dismissal rate for claims filed by foreign plaintiffs (63.4% [53.6, 72.1]) is higher than the dismissal rate for claims filed by domestic plaintiffs (30.4% [21.9, 40.5]). Given the Supreme Court's holding in *Piper*, the difference between dismissal rates for domestic and foreign plaintiffs is doctrinally unsurprising. However, the extent of the disparity between domestic and foreign

Michael T. Lii, *An Empirical Examination of the Adequate Alternative Forum in the Doctrine of Forum Non Conveniens*, 8 RICH. J. GLOBAL L. & BUS. 513, 526 (2009). Two notes are in order regarding the interpretation of these results: First, although published forum non conveniens decisions are likely to have the strongest influence on plaintiffs' expectations of court access, estimates based on those decisions may not accurately describe unpublished forum non conveniens decisions. See *supra* Part I. Second, the overall dismissal rate approaches 50%—a tendency consistent with the so-called “50% hypothesis,” according to which litigation win rates naturally converge on 50%. See generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (developing the 50% hypothesis). But see Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 499–501 (1996) (arguing that the 50% plaintiff win rate is not a “central tendency, either in theory or in fact”). Whether or not the 50% hypothesis explains why forum non conveniens dismissal rates approach 50%, the signal sent to plaintiffs would seem to remain the same: dismissals are frequent, not rare.

¹¹⁶ 549 U.S. 422 (2007); see Donald Earl Childress III, *When Erie Goes International*, 105 Nw. U. L. REV. (forthcoming 2011) (finding that since 2007, the dismissal rate is 62%).

plaintiffs is striking: the signal seems to be that foreign plaintiffs are twice as likely to have their suits dismissed.

In summary, the court access component of the American forum shopping system has evolved. Until 1981, the forum non conveniens doctrine was infrequently used in transnational litigation.¹¹⁷ When used, courts applied it cautiously to dismiss cases only when necessary to avoid an abuse of process.¹¹⁸ The permissive approach to personal jurisdiction that emerged in the wake of *International Shoe* was thus left largely unchecked, fostering high expectations of favorable court access decisions. The current system—a centerpiece of which is an aggressively applied forum non conveniens doctrine—is likely to foster lower expectations of favorable court access decisions, thus reducing the incentive to file transnational lawsuits in U.S. courts.

2. Choice of Law

The choice-of-law component of the American forum shopping system has also evolved. According to the conventional understanding, strong pro-domestic-law bias in choice-of-law decision making emerged in the wake of the American choice-of-law revolution.¹¹⁹ This bias is said to encourage transnational forum shopping into U.S. courts by plaintiffs seeking favorable U.S. substantive law.¹²⁰

But empirical analysis suggests that in the current forum shopping system, courts are sending a different signal. To perform this analysis, I created a data set consisting of a random sample of more than 125 published choice-of-law decisions by U.S. district court judges in transnational tort cases between 1990 and 2005.¹²¹ I then

¹¹⁷ See Robertson, *supra* note 78, at 370.

¹¹⁸ See Robertson, *supra* note 89, at 403.

¹¹⁹ See *supra* Part II.A.2.

¹²⁰ *Id.*

¹²¹ I generated the sample in three steps: First, I searched the LexisNexis U.S. District Court database for decisions between 1990 and 2005 in which a judge decided whether domestic law or foreign law should apply to a tort claim. I used the following search query: “([COUNTRY SEARCH TERM] w/3 law) w/200 ((choice or conflict or appli! or govern!) w/2 law) and tort!” I used the first element of the query to identify cases involving foreign law; I repeated the search for each country in the world, inserting appropriate country search terms into the query. I used the second element of the query to limit the search to choice-of-law decisions. The third element limited the search to tort cases. Second, I consolidated the results of these searches and randomly sorted them. Third, I analyzed each case in the randomly generated order, discarding those that did not actually decide whether domestic or foreign law should apply to a tort claim. I continued this process until I had a sample of approximately 200 decisions (the exact number was 213). See Whytock, *supra* note 30, at 755 nn. 187–88. I then also discarded 85 decisions made in the context of a forum non conveniens analysis because these decisions are highly skewed in favor of foreign law. See *id.* at 756. The result was a sample of 128 cases. Analysis of choice-of-law decisions in contract cases would likely be less illuminating because of the prevalence of choice-of-law clauses, which courts generally enforce. SCOLES ET AL., *supra* note 30, at 947.

created the variable *Decision*, and for each case, I coded it as 1 if the court applied foreign law and 0 if the court applied U.S. law.

TABLE 2
INTERNATIONAL CHOICE-OF-LAW DECISIONS

Law Applied	Number of Decisions	Estimated Percentage	95% Confidence Interval
U.S. Law	71	55.5%	[46.8, 63.8]
Foreign Law	57	44.5%	[36.2, 53.2]
Total	128	100.0%	

Notes: This table shows the number of decisions to apply U.S. and foreign law by U.S. district court judges between 1990 and 2005 in my sample of published choice-of-law decisions in transnational tort cases. It also shows estimates of the percentage of decisions to apply U.S. law and foreign law in the overall population of published choice-of-law decisions in transnational tort cases. The figures in brackets are the lower and upper bounds of each estimate's 95% confidence interval.

As Table 2 shows, in their published decisions—those most likely to influence the expectations of forum shopping plaintiffs—U.S. district court judges apply foreign law in almost half of all cases. Specifically, they apply foreign law rather than U.S. law at an estimated rate of 44.5% [36.2, 53.2].¹²² These decisions are driven primarily by two factors: the territorial locus of the activity giving rise to the litigation and the citizenship of the parties.¹²³ Other things being equal, the greater the extent to which these factors point toward a foreign country, the less likely a U.S. district court judge is to apply U.S. law.¹²⁴

Contrary to the conventional understanding, the current forum shopping system does not exhibit strong pro-domestic-law bias. Plaintiffs' expectations of favorable choice-of-law decisions in U.S. courts therefore are likely to be lower than they were under the prior system, thus reducing the incentive to forum shop into U.S. courts to obtain the advantages of U.S. substantive law.

In summary, the American forum shopping system has evolved. This subpart has provided an updated understanding of the system's key features. After *International Shoe*, the system's permissive approach to personal jurisdiction may have fostered high expectations of

¹²² See Whytock, *supra* note 30, at 765 tbl.2 (comparing pro-domestic-law and pro-foreign-law decision rates). Due to potential selection effects, the pro-forum-law decision rates alone cannot conclusively demonstrate lack of bias. Therefore, in an earlier analysis I applied methods to take these effects into account. See *id.* at 765–69 (describing these methods and the resulting findings confirming lack of pro-forum-law bias). The notes regarding interpretation of the forum non conveniens estimates, *supra* note 115, apply equally to the choice-of-law estimates.

¹²³ See Whytock, *supra* note 30, at 772.

¹²⁴ See *id.* at 768 tbl.3.

favorable court access decisions. In the current system, however, those expectations are offset by aggressive use of the forum non conveniens doctrine to dismiss transnational suits. After the choice-of-law revolution, the system's pro-domestic-law bias may have fostered high expectations of favorable choice-of-law decisions; but at least since the 1990s, there does not appear to be such a bias. As a result, the current forum shopping system is less likely to encourage transnational forum shopping into U.S. courts than the system described by the conventional understanding.

B. Transnational Litigation: An Empirical Assessment

The second pillar of the conventional understanding of the American forum shopping system is that it has contributed to a transnational litigation explosion in the United States. Consistent with the finding that the forum shopping system has evolved, this subpart argues that transnational forum shopping into U.S. courts might not be increasing after all. Specifically, this subpart explains that one of the principal forms of transnational litigation in the United States—alienage litigation—has been decreasing. This subpart begins by defining alienage litigation and explaining its importance. It then presents empirical evidence of alienage litigation's decline. By doing so, this subpart challenges the claim that there is a transnational litigation explosion in U.S. courts.

1. *The Importance of Alienage Litigation*

The two principal types of subject matter jurisdiction in U.S. district courts are federal question jurisdiction and diversity jurisdiction.¹²⁵ Alienage jurisdiction is one type of diversity jurisdiction and is a primary basis for subject matter jurisdiction in transnational litigation. Under § 1332(a) of the United States Code, alienage jurisdiction exists over “all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of a [U.S.] State and citizens or subjects of a foreign state.”¹²⁶ I use the term *alienage litigation* to refer to litigation over which the U.S. district courts have subject matter jurisdiction on this basis.

Alienage litigation presumably represents the bulk of transnational tort and contract litigation in U.S. district courts because the other leading basis for federal subject matter jurisdiction in transna-

¹²⁵ See 28 U.S.C. § 1331 (2006) (federal-question jurisdiction); *id.* § 1332 (diversity jurisdiction).

¹²⁶ *Id.* § 1332(a). For alienage jurisdiction purposes, “an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.” *Id.*

tional litigation, federal question jurisdiction, generally is not available for such claims. Tort and contract claims ordinarily arise under U.S. state law, not U.S. federal law.¹²⁷

Historically, the central concern motivating alienage jurisdiction in the federal courts was to avoid “the potentially adverse foreign relations consequences” of having U.S. state courts, with their supposed antiforeigner bias, adjudicate disputes involving foreign citizens.¹²⁸ Another motivation was the prospect that by providing a more neutral federal forum for disputes involving foreign citizens, the United States could attract more foreign investment.¹²⁹ Scholars today emphasize the continued importance of alienage jurisdiction for similar reasons.¹³⁰

2. *The Decline of Alienage Litigation*

If there is a transnational litigation explosion in the United States, then one would expect alienage litigation to be increasing. To the contrary, analysis of data collected by the Administrative Office of the U.S. Courts (AO) indicates that alienage litigation actually has declined over the last two decades.¹³¹

¹²⁷ Nevertheless, alienage litigation does not account for all transnational tort and contract claims. Plaintiffs may file such claims in federal courts on the basis of supplemental jurisdiction if these claims are so closely related to a federal claim that “they form part of the same case or controversy.” *Id.* § 1367(a). Moreover, aliens may file civil actions in federal courts under the Alien Tort Statute (ATS) for torts committed in violation of international law. *Id.* § 1350.

¹²⁸ See Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 *YALE J. INT’L L.* 1, 6 (1996):

By providing for alienage jurisdiction in the national courts, the Framers acted to avoid the potentially adverse foreign relations consequences caused by allowing state courts, fueled by a mixture of anti-British and anticreditor sentiment, to resolve disputes involving noncitizens. Instead, the Framers ensured that foreigners had access to a national court system perceived as less susceptible to the democratic impulse than the state courts.

¹²⁹ See *id.* (“Many, particularly the Federalists, hoped that alienage jurisdiction would attract much needed foreign capital to the fledgling nation.”).

¹³⁰ See, e.g., Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 *BYU L. REV.* 67, 92 (arguing that “cases involving foreign citizens should have a high priority in the jurisdiction of the federal courts” because of foreign-relations risks raised by such cases); Johnson, *supra* note 128, at 48–49 (arguing that “other things being equal, access to a federal forum should increase the attractiveness of the United States to foreign business” and that, “[t]o the extent that the United States takes steps to promote the perception that foreign businesses are entitled to procedural fairness in its court systems, other nations might be expected to reciprocate . . . result[ing] in fairer treatment of this nation’s businesses by foreign nations”).

¹³¹ The AO is the administrative branch of the federal judiciary. For an overview of the AO data, see INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, *FEDERAL COURT CASES: INTEGRATED DATA BASE, 1970–2000, CIVIL TERMINATIONS, 1995*, at 19–20 (2005) [hereinafter 1995 CODEBOOK], available at <http://dx.doi.org/10.3886/ICPSR08429> (follow “Browse Documentation” hyperlink; after creating or entering username and password, follow “DS98: Civil Terminations, 1995” hyperlink and download codebook). For

The AO collects data on every case filed in the U.S. district courts.¹³² For each statistical year, the Federal Judicial Center (FJC) consolidates the AO data into two separate data sets: one including all cases terminated in that year (Civil Terminations) and the other including all cases pending at the end of that year (Civil Pending).¹³³ Both the Civil Terminations data and the Civil Pending data indicate the filing date and the basis for subject matter jurisdiction for each case.¹³⁴ Since 1986, for diversity cases only, the Civil Terminations data and Civil Pending data also has included a citizenship variable that indicates whether the plaintiff is a citizen of a U.S. state or of a foreign country and whether the defendant is a citizen of a U.S. state

information on the Civil Pending data, see INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, FEDERAL COURT CASES: INTEGRATED DATA BASE, 1970–2000, CIVIL PENDING, 1995 (2005), available at <http://dx.doi.org/10.3886/ICPSR08429> (follow “Browse Documentation” hyperlink; after creating or entering username and password, follow “DS99: Civil Pending, 1995” hyperlink and download codebook). As one group of scholars explain:

[T]he ICPSR [Inter-university Consortium for Political and Social Research] disseminates a series of data sets gathered and assembled by the Administrative Office of the U.S. Courts (AO) and the Federal Judicial Center (FJC). The data in these sets originate from each of the federal district courts . . . in the country. For every case that is filed and for every case that terminates in one of these courts, the court clerk sends the AO a form containing information about the case. The AO compiles this information each year into two data sets, one for cases terminated during that year and the other for cases still pending at the end of that year. The AO then passes these sets on to the FJC for further processing, and the FJC passes the final product to the ICPSR for dissemination on its Web site.

John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 33 (2005) (footnotes omitted). To perform my analysis, I downloaded the data for the years 1987 through 2008 from the ICPSR website and consolidated them into a single data set.

¹³² See INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, FEDERAL COURT CASES: INTEGRATED DATABASE, 2008, CIVIL TERMINATIONS DATA, 2008, at 5, 15–16 (2010) [hereinafter 2008 CIVIL TERMINATIONS CODEBOOK], available at <http://dx.doi.org/10.3886/ICPSR25002> (follow “Browse Documentation” hyperlink; after creating or entering username and password, download “Codebook” under “DS2: Civil Terminations Data, 2008” folder) (“The Civil Cases Terminations File contains one record for every civil case terminated in the Federal Court System in 2008.”); Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455, 1462–63 (2003) (“Unlike any other data set covering the federal courts, [the AO data] purports to cover every case filed. And it seems more than likely that this is indeed its coverage.”). This distinguishes the AO data from data available from online databases such as Westlaw and Lexis, which only include decisions that are published in official reporters or otherwise made available by judges for electronic publication.

¹³³ From 1987 to 1991, the statistical year ends on June 30. For subsequent years, the statistical year ends on September 30. See 1995 CODEBOOK, *supra* note 131, at 12.

¹³⁴ See 2008 CIVIL TERMINATIONS CODEBOOK, *supra* note 132, at 12 (describing the JURIS variable).

or of a foreign country.¹³⁵ I use this variable to identify alienage cases.¹³⁶ In addition, the Civil Terminations data includes the date on which each case terminated, by judgment or otherwise.

Like any large data set, the AO data is not perfectly reliable.¹³⁷ However, “both field studies and other data sets confirm the general picture of district court litigation suggested by the AO data.”¹³⁸ Moreover, unlike databases such as LexisNexis and Westlaw, the AO data includes all cases filed in U.S. district courts, not simply those with published decisions.¹³⁹ Therefore, the AO data, even if imperfect, appears to be the best available source of data for analysis of general trends in civil litigation.¹⁴⁰

¹³⁵ See Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11*, 4 J. EMPIRICAL LEGAL STUD. 441, 452 (2007) (noting that “[s]ince fiscal year 1986, the [data] . . . specifies whether the two principal parties in diversity and alienage cases were American or foreign”). In the AO data set, the citizenship variable is named *residenc*. The variable is coded as a two-digit number. The first digit indicates the citizenship of the principal plaintiff, and the second digit indicates the citizenship of the principal defendant. The following values are used: 1 = Citizen of this State; 2 = Citizen of another State; 3 = Citizen or Subject of a foreign country; 4 = Incorporated or principal place of business in this State; 5 = Incorporated or principal place of business in another State; and 6 = Foreign Nation. 2008 CIVIL TERMINATIONS CODEBOOK, *supra* note 132, at 15–16.

¹³⁶ I counted a case as an alienage case only if the plaintiff was a citizen of a U.S. state and the defendant was a foreign citizen or if the plaintiff was a foreign citizen and the defendant was a citizen of a U.S. state. Thus, I counted a case as an alienage case only if the citizenship variable equals 13, 23, 43, 53, 31, 32, 34, or 35. I did not count a case as an alienage case if a foreign nation was a party or if the plaintiff and the defendant were both foreign citizens because these party configurations are not included in alienage litigation. See 28 U.S.C. § 1332(a)(2) (2006) (covering only controversies between “citizens of a [U.S.] State and citizens or subjects of a foreign state”); *cf.* Clermont & Eisenberg, *supra* note 135, at 452 n.39 (taking the same approach). This means that my count of alienage cases does not include suits under 28 U.S.C. § 1332(a)(3) (suits between “citizens of different [U.S.] States and in which citizens or subjects of a foreign state are additional parties”) or suits under 28 U.S.C. § 1332(a)(4) (suits between “a foreign state . . . as plaintiff and citizens of a [U.S.] State or of different [U.S.] States”). See 28 U.S.C. § 1332(a)(3), (a)(4).

¹³⁷ See Eisenberg & Schlanger, *supra* note 132, at 1458 (“Like many large data sets, the AO data are not completely accurate.” (footnote omitted)). For example, when new coding procedures are introduced, complete and proper implementation of those procedures might not be immediate. I am not aware of any implementation problems regarding the foreign-citizen coding introduced in fiscal year 1986. Out of an abundance of caution, however, my analysis begins with 1987 to account for the possibility of an implementation lag. Insofar as such a lag may have persisted into 1987 or even 1988, data for those years may not be as reliable as for subsequent years.

¹³⁸ *Id.* at 1464. However, there is evidence suggesting reliability problems with the AO’s bankruptcy-court data, as well as with the AO data on class actions, patent cases, and amounts awarded following trials. *Id.* at 1464 & n.46. My analysis does not use these types of data.

¹³⁹ See *id.* at 1462–63 (“[O]ne strength of the AO data set is its completeness. Unlike any other data set covering the federal courts, it purports to cover every case filed. And it seems more than likely that this is indeed its coverage. Cases get entered into the database on filing, and there is a built-in check because they get entered again, on termination.”).

¹⁴⁰ See *id.* at 1463–64 (“[F]or researchers seeking to identify all federal district court cases in a certain subject matter category, it is clear that the AO database is the easiest, and

My analysis of the AO data indicates that alienage filings, pending alienage cases, and alienage terminations all have been declining. First, as Figure 1 shows, the estimated number of alienage filings declined dramatically in the late 1980s (from 9,276 in 1987 to 4,806 in 1989).¹⁴¹ The decline continued at a more modest rate through the 1990s—the “decade of globalization” (from 3,618 in 1990 to 2,610 in 1999).¹⁴² After a one-year uptick to an estimated 3,131 alienage filings in 2000,¹⁴³ the decline continued into the 2000s (from 2,342 in 2001 to 1,637 in 2005).

As Figure 2 shows, both U.S.–plaintiff and foreign–plaintiff alienage filings have exhibited this same general downward trend. Between 1987 and 1989, U.S.–plaintiff alienage filings fell from approximately 5,693 to 3,226, and foreign–plaintiff alienage filings fell from approximately 3,583 to 1,580. Between 1990 and 1999, U.S.–plaintiff alienage filings fell from approximately 2,296 to 1,433, and foreign–plaintiff alienage filings fell from approximately 1,322 to 1,177 (although with significant fluctuation). Between 2000 and 2005, U.S.–plaintiff alienage filings fell from approximately 1,142 to 744, and foreign–plaintiff alienage filings, after a spike to 1,989 in 2000, fell to approximately 893 in 2005.¹⁴⁴ Until the late 1990s, the number of U.S.–plaintiff alienage filings exceeded the number of foreign–plaintiff alienage filings, but more recently, the annual number of foreign–plaintiff filings has been slightly higher.

Might the decline in alienage filings merely reflect a broader decline in litigation in U.S. district courts? Figure 3 suggests that this is not the case. There are signs of a decline in total litigation, federal question, and domestic-diversity filing rates in 2005, but the general trend in both total and federal question filings is upward, and domestic-diversity filing rates have held roughly steady. Compared to other types of litigation, then, the decline in alienage litigation is unusual.

Figure 3 also indicates that alienage litigation constitutes a very small portion of the total civil workload of the U.S. district courts—so

perhaps the most reliable, method of doing so, provided that the subject matter of interest matches one or a group of the AO case categories.”).

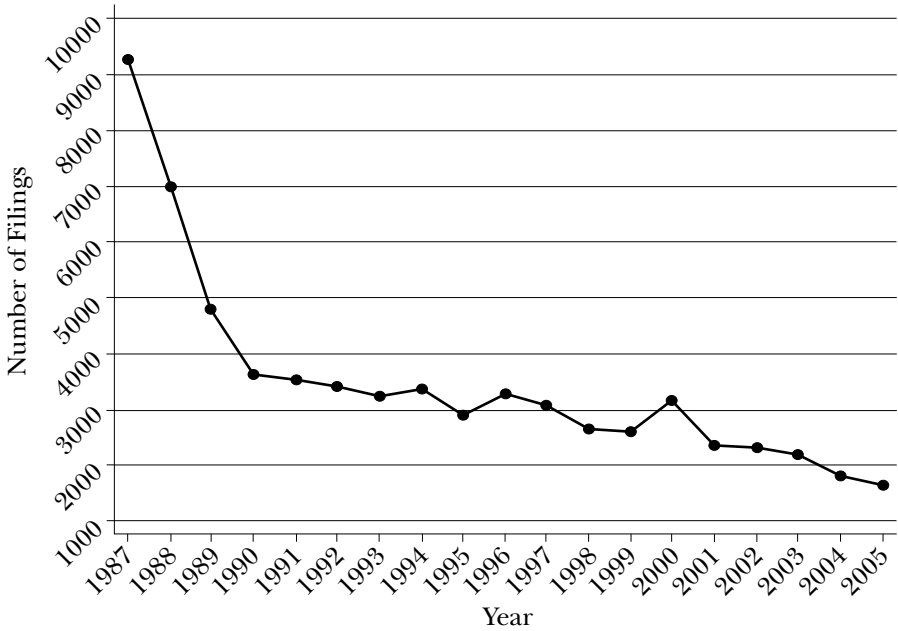
¹⁴¹ The annual filings figures are extracted from the Civil Terminations data sets. As explained below, they likely underestimate the total number of cases filed each year, especially in the most recent years. See *infra* notes 146–47 and accompanying text. Therefore, the raw estimates should be treated with caution.

¹⁴² See Paul Krugman, *Once and Again*, N.Y. TIMES, Jan. 2, 2000, at WK9 (“Whatever else they may have been, the 90’s were the decade of globalization.”); Barry Eichengreen, *One Economy, Ready or Not: Thomas Friedman’s Jaunt Through Globalization*, FOREIGN AFFAIRS (May–June 1999) (suggesting that it is now “obvious that historians will look back on the 1990s as the decade of globalization”).

¹⁴³ My analysis of the AO’s nature-of-suit codes indicates that this uptick consisted principally of a cluster of asbestos product-liability claims filed by foreign plaintiffs in 2000.

¹⁴⁴ The spike appears to reflect an increase in asbestos product-liability claims. See *supra* note 143.

FIGURE 1
ALIENAGE FILINGS (1987–2005)



small a portion that the trends over time in alienage filings are barely discernible in the figure. As Table 3 shows, in the decade ending in 2005, alienage filings represented an estimated 0.97% of total civil actions filed in U.S. district courts. This percentage has declined from an estimated 1.26% in 1996 to 0.71% in 2005. Alienage suits by foreign plaintiffs against U.S. defendants—the focus of some observers concerned about the supposed rise of transnational suits—constitute only about one half of one percent of all civil actions filed in the U.S. district courts. Contrary to some claims, these results suggest that there is not a “tidal wave of foreign plaintiffs clogging up the dockets in our courts”¹⁴⁵—and if there is such a wave, it does not consist of alienage filings and thus most likely does not consist of tort or contract claims either.¹⁴⁶

¹⁴⁵ Barcus, *supra* note 83, at 658.

¹⁴⁶ See *supra* text accompanying note 127 (linking alienage litigation to transnational tort and contract claims).

FIGURE 2
ALIENAGE FILINGS BY CITIZENSHIP OF PARTIES (1987–2005)

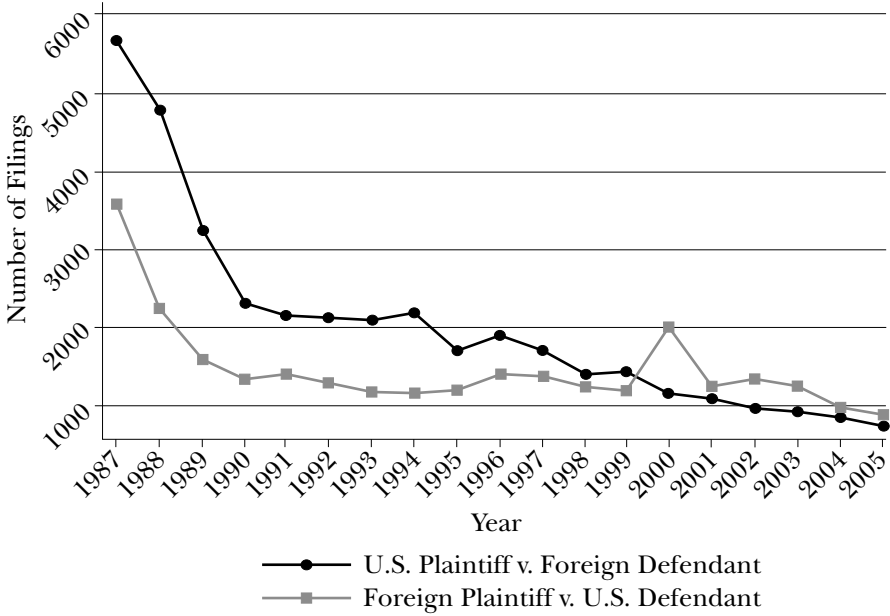


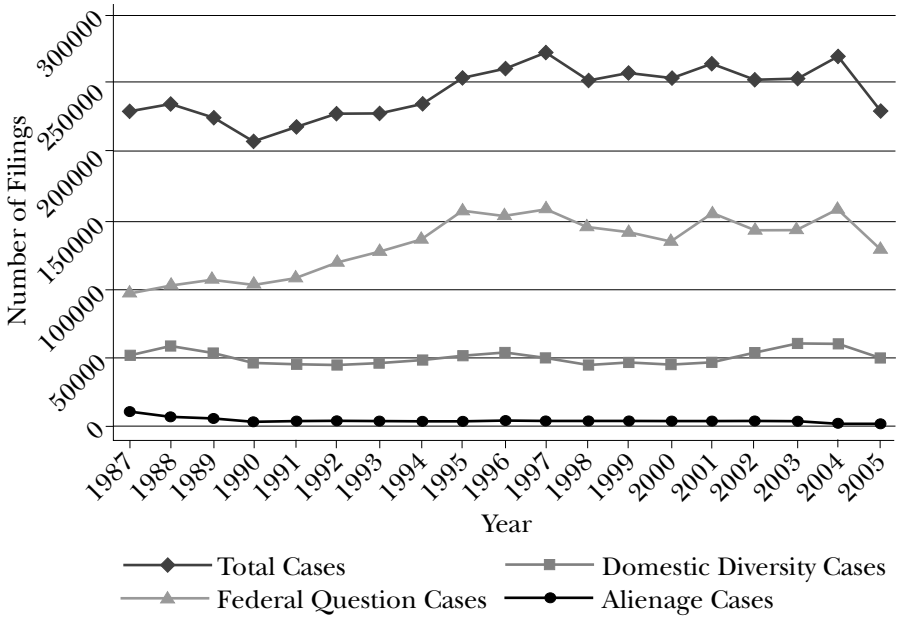
TABLE 3
ALIENAGE FILINGS (1996–2005)

Year	Total	Alienage	Alienage (% of Total)	Domestic Plaintiff	Domestic Plaintiff (% of Total)	Foreign Plaintiff	Foreign Plaintiff (% of Total)
1996	261,270	3,293	1.26%	1,909	0.73%	1,384	0.53%
1997	273,773	3,051	1.11%	1,697	0.62%	1,354	0.49%
1998	251,684	2,645	1.05%	1,387	0.55%	1,258	0.50%
1999	258,429	2,610	1.01%	1,433	0.55%	1,177	0.46%
2000	253,698	3,131	1.23%	1,142	0.45%	1,989	0.78%
2001	263,737	2,342	0.89%	1,096	0.42%	1,246	0.47%
2002	252,445	2,308	0.91%	984	0.39%	1,324	0.52%
2003	254,578	2,167	0.85%	925	0.36%	1,242	0.49%
2004	270,178	1,818	0.67%	848	0.31%	970	0.36%
2005	230,282	1,637	0.71%	744	0.32%	893	0.39%
Average	257,007	2,500	0.97%	1,217	0.47%	1,284	0.50%

Notes: This table presents estimates of the annual number of civil cases, alienage cases, “domestic plaintiff versus foreign defendant” alienage cases, and “foreign plaintiff versus domestic defendant” alienage cases filed each year from 1996 to 2005. The annual filing rates are extracted from the Civil Terminations datasets.

Alienage filings are a more direct measure of transnational forum shopping into U.S. courts than are pending alienage cases or alienage terminations. However, this measure has a significant disadvantage.

FIGURE 3
ALIENAGE FILINGS COMPARED TO OTHER FILINGS (1987–2005)



The annual filings figures used for Figure 1, Figure 2, Figure 3, and Table 3 are extracted from the Civil Terminations data sets. The record for a case does not appear in those data sets until the case has terminated.¹⁴⁷ As a result of this lag, the Civil Terminations data may understate the annual number of alienage cases filed, particularly in recent years, and the estimates of raw alienage filing numbers should be treated with caution.¹⁴⁸

Therefore, I analyzed a second alienage litigation trend that is not subject to this lag: the annual number of pending alienage cases.¹⁴⁹ The results, presented in Figure 4, confirm the downward trend in alienage litigation: the number of pending alienage cases in

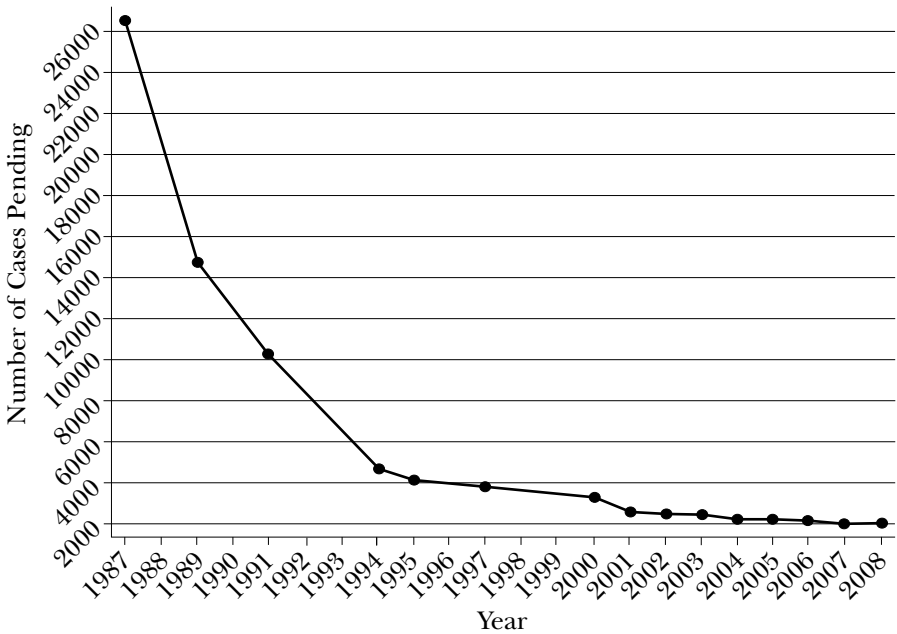
¹⁴⁷ For example, cases filed in 2004 or in 2005 that were still pending in 2005 would not be counted in the Civil Terminations data sets as of 2005.

¹⁴⁸ The earlier the year, the less significant the lag, and the more accurate the estimate. For example, my analysis indicates that the filing figures extracted from the Civil Terminations data sets underestimate actual filings by approximately 6.2% in 2005, 2.4% in 2004, and between 0.5% and 1.6% in earlier years. Assuming that the extent of lag on average is the same for alienage cases and civil cases in general, the lag should not affect the percentage calculations in Table 3. Because my analysis indicates that by 2006 the Civil Terminations data sets substantially underestimate actual filings (by more than 15.6% for 2006), I do not report filings data based on the 2006, 2007, or 2008 Civil Terminations data sets.

¹⁴⁹ I extracted the pending-cases figures from the Civil Pending data sets, which are available for statistical years 1987–89, 1991, 1994–95, 1997, and 2000–2007, and calendar year 2008.

the U.S. district courts declined from 26,506 in 1987, to 3,287 in 2000, to 2,029 in 2008. Moreover, as Table 4 confirms, alienage litigation constitutes only a small fraction of the civil caseload of the U.S. district courts.

FIGURE 4
ALIENAGE CASES PENDING (1987–2008)



Finally, in an earlier study using the AO Civil Terminations data, Kevin Clermont and Theodore Eisenberg were the first to discover a “plummeting” number of alienage cases terminating—by settlement, judgment, or otherwise—in the U.S. district courts each year.¹⁵⁰ Specifically, Clermont and Eisenberg found that the number of alienage terminations declined from 24,202 in 1986 to 8,092 in 1989; from 6,374 in 1990 to 2,725 in 1999; and from 3,230 in 2000 to 1,976 in 2005.¹⁵¹ This finding is further evidence that, contrary to claims of a transnational litigation explosion, alienage litigation has been on the decline.

¹⁵⁰ See Clermont & Eisenberg, *supra* note 135, at 462 tbl.4 (noting that “alienage terminations plummeted” between 1986 and 2005). Clermont and Eisenberg also discovered a decline in the number of alienage judgments. See *id.* at 461 tbl.3 (noting the “dramatically decreasing number of . . . alienage judgments over the last two decades”).

¹⁵¹ *Id.* at 462 tbl.4. My own analysis of the most recent version of the Civil Terminations data indicates that a more accurate estimate of alienage terminations in 2005 is 1,868 and that the number of alienage terminations in 2006 and 2007 was approximately 1,929 and 1,978, respectively.

TABLE 4
ALIENAGE CASES PENDING (2000–2008)

Year	Total	Alienage	Alienage (% of Total)	Domestic Plaintiff	Domestic Plaintiff (% of Total)	Foreign Plaintiff	Foreign Plaintiff (% of Total)
2000	249,261	3,287	1.32%	1,697	0.68%	1,590	0.64%
2001	252,935	2,619	1.04%	1,339	0.53%	1,280	0.51%
2002	265,926	2,439	0.92%	1,161	0.44%	1,278	0.48%
2003	261,065	2,466	0.94%	1,119	0.43%	1,347	0.52%
2004	267,270	2,245	0.84%	993	0.37%	1,252	0.47%
2005	266,216	2,125	0.80%	948	0.36%	1,177	0.44%
2006	251,832	2,144	0.85%	973	0.39%	1,171	0.46%
2007	265,082	1,997	0.75%	903	0.34%	1,094	0.41%
2008	304,869	2,029	0.67%	864	0.28%	1,165	0.38%
Average	264,940	2,372	0.90%	1,111	0.42%	1,262	0.48%

Notes: This table presents the number of total civil cases, alienage cases, “domestic plaintiff versus foreign defendant” alienage cases, and “foreign plaintiff versus domestic defendant” alienage cases pending as of September 30, 2000 through September 30, 2007 and December 31, 2008. The pending cases figures are extracted from the Civil Pending datasets.

What about other types of transnational litigation in U.S. courts? Unfortunately, the AO data does not separately identify transnational litigation over which the U.S. district courts have subject matter jurisdiction on grounds other than alienage.¹⁵² For example, it does not identify diversity cases between citizens of different U.S. states arising out of activity with connections to one or more foreign countries; cases involving foreign citizens as additional parties;¹⁵³ or transnational suits over which there is federal question,¹⁵⁴ admiralty,¹⁵⁵ or bankruptcy jurisdiction,¹⁵⁶ or jurisdiction based on the Alien Tort

¹⁵² See *id.* at 461 n.50 (noting that AO “has chosen to code foreign citizenship only for [alienage cases]”); see also Dubinsky, *supra* note 81, at 366 n.10 (“Surprisingly, little has been done by the Federal Judicial Center, the National Center for State Courts, or the Judicial Conference of the United States to provide Congress or the public with hard data on the number and kind of suits in the system with a transnational component . . .”).

¹⁵³ 28 U.S.C. § 1332(a)(1) (2006) (domestic diversity jurisdiction); *id.* § 1332(a)(3) (domestic diversity jurisdiction with foreign citizens as additional parties).

¹⁵⁴ *Id.* § 1331. Thus, the alienage data probably does not include most transnational regulatory litigation in U.S. courts. See generally Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT’L L. 251 (2006) (providing seminal analysis of transnational regulatory litigation).

¹⁵⁵ 28 U.S.C. § 1333.

¹⁵⁶ *Id.* § 1334.

Statute¹⁵⁷ or the Foreign Sovereign Immunities Act.¹⁵⁸ Moreover, because the AO data includes only filings in U.S. federal courts, it cannot capture transnational litigation in U.S. state courts. Although the AO data therefore leaves open the possibility that the decline in alienage filings extends to other types of transnational litigation in U.S. courts,¹⁵⁹ it also leaves open the possibility that one or more of these other types of transnational litigation may be increasing even as alienage litigation is decreasing. Without more comprehensive data, inferences about broader trends in transnational litigation in U.S. courts must remain uncertain.¹⁶⁰ Nevertheless, my findings challenge the widely held assumption that transnational forum shopping into U.S. courts is on the rise.

IV

A CLOSER LOOK AT THE SYSTEM: FORUM NON CONVENIENS IN ACTION

As argued in Part III, the forum non conveniens doctrine plays a central role in the current forum shopping system. In general, aggressive use of the doctrine to dismiss transnational litigation should reduce expectations of favorable court access decisions, thus reducing the incentives to file transnational lawsuits in U.S. courts.¹⁶¹ However, we know very little about how judges actually make forum non conveniens decisions. In particular, we know very little about whether the doctrine, as applied, is a well-tailored anti-forum shopping device that

¹⁵⁷ See *id.* § 1350 (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”). Although lawsuits brought under the ATS have attracted considerable attention and appear to have increased since the 1980s, existing studies suggest that they remain relatively uncommon. See, e.g., Jeffrey Davis, *Justice Without Borders: Human Rights Cases in U.S. Courts*, 28 LAW & POL’Y 60, 73–74 (2006) (finding that federal courts of appeals decided fourteen ATS cases between 2000 and 2004 but decided only thirty-one cases between 1976 and 1999 and that federal district courts have decided thirty-six ATS cases between 2000 and 2004 but only forty before then); Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT’L L. 773, 810–11 (2008) (noting that since 1980, approximately 185 cases have been litigated under the ATS, about 105 of which have been filed since 2004, and about 123 of which were dismissed).

¹⁵⁸ See 28 U.S.C. § 1330 (jurisdiction over civil suits against foreign sovereigns if there is no sovereign immunity). Nor does the AO data identify cases over which jurisdiction exists because the dispute is between a foreign state as a plaintiff and a citizen of a U.S. state, *id.* § 1332(a)(4), or where the suit is against a foreign consul or diplomat, *id.* § 1351.

¹⁵⁹ Cf. Clermont & Eisenberg, *supra* note 135, at 461 n.50 (noting that the “drop in terminations involving foreign litigants could extend well beyond alienage cases” and that AO data may therefore “be hiding a drop in foreigners litigating on other jurisdictional bases”).

¹⁶⁰ Christopher A. Whytock, *Litigation, Arbitration, and the Transnational Shadow of the Law*, 18 DUKE J. COMP. & INT’L L. 449, 461 (2008) (“For now, it is difficult to do more than speculate about whether transnational litigation in general is characterized by the same trends that characterize alienage cases in the U.S. federal district courts.”).

¹⁶¹ See *supra* Part III.A.1.

focuses on discouraging suits that would more appropriately be resolved in a foreign court, as judicial statements of the doctrine suggest;¹⁶² or whether it is instead incoherent, unpredictable, or driven by judges' individual preferences, as the doctrine's critics suggest.¹⁶³ In this Part, I address this gap in our understanding and attempt to shed further light on the operation of the current forum shopping system by presenting a systematic empirical analysis of forum non conveniens in action.¹⁶⁴

A. Potential Determinants of Forum Non Conveniens Decisions

My analysis focuses on two questions. First, to what extent does the forum non conveniens doctrine, as actually applied by judges, further the doctrine's stated goals? According to the U.S. Supreme Court's most recent discussion of the doctrine, dismissal on forum non conveniens grounds is for cases in which "the court abroad is the more appropriate and convenient forum for adjudicating the controversy."¹⁶⁵ It is widely accepted that the appropriateness of a forum depends largely on the extent of the forum's connections to the dispute.¹⁶⁶ Ordinarily, the most important connections are thought to be the citizenship of the parties to the dispute and the territorial locus of the events giving rise to the dispute—particularly the place of conduct and the place of injury.¹⁶⁷ The private interest and public inter-

¹⁶² See, e.g., *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007) (noting that dismissal on forum non conveniens grounds is for cases in which a "court abroad is the more appropriate and convenient forum for adjudicating the controversy").

¹⁶³ See, e.g., *Lear*, *supra* note 112, at 602–03 ("Federal forum non conveniens decisions appear to depend more on the individual biases of district court judges than any identifiable legal standard."); Stein, *supra* note 27, at 785 (describing "crazy quilt of ad hoc, capricious, and inconsistent [forum non conveniens] decisions").

¹⁶⁴ See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910) (distinguishing between "law in the books" and "law in action"). For an empirical analysis of judicial application of the doctrine's adequate alternative-forum requirement, see Lii, *supra* note 115.

¹⁶⁵ See, e.g., *Sinochem*, 549 U.S. at 425.

¹⁶⁶ See, e.g., BELL, *supra* note 5, at 337 (arguing that appropriate forum is "that forum with which the dispute has the closest and most real connection"); ROBERT A. LEFLAR ET AL., *AMERICAN CONFLICTS LAW* 152–53 (Michie Co. 4th ed. 1986) (discussing that under forum non conveniens doctrine, courts "refuse to hear actions in which the cause of action sued on . . . has little or no connection with the state in which suit is brought and can more fairly be tried elsewhere"); Bassett, *supra* note 25, at 379–80 (describing the most convenient forum as the forum with the "most obvious connection to the litigation"); Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 1013–14 (1994) (describing an inappropriate forum as a "forum with little or no connection to the dispute at hand"); Bies, *supra* note 76, at 517 (arguing that forum choice is legitimate when there is "some clear connection of the cause of action to the forum").

¹⁶⁷ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 cmt. f (1971) (stating that in the "great majority" of cases, three forums will be "appropriate": the state where occurrence took place; the state of the defendant's domicile; or the state of the plaintiff's domicile); Silberman, *supra* note 16, at 527 (referring to "the more relevant jurisdiction" as "the place of residence, injury, or sale"); Silberman, *supra* note 55, at 336 (referring to "most

est factors that the Supreme Court enumerated to evaluate the convenience of a forum are themselves closely related to these types of connections.¹⁶⁸

But to what extent do these connections influence judges' actual forum non conveniens decisions? In other words, how effectively does the doctrine, as applied, distinguish between appropriate and inappropriate transnational forum shopping into U.S. courts? If judges are effectively making this distinction, then, other things being equal, the probability of a forum non conveniens dismissal should be higher when the parties are foreign and when the territorial locus of the activity giving rise to the dispute is foreign. To estimate these influences, I created four variables and coded them for each case in my forum non conveniens data set as follows: *Foreign Plaintiffs* (1 if the plaintiffs are all foreign, 0 otherwise); *Foreign Defendants* (1 if the defendants are all foreign, 0 otherwise); *Foreign Conduct* (1 if the conduct giving rise to the dispute occurred entirely outside U.S. territory, 0 otherwise); and *Foreign Injury* (1 if the injury giving rise to the dispute occurred entirely outside U.S. territory, 0 otherwise).¹⁶⁹ These variables and the other variables in my analysis are summarized below in Table 5.

However, scholars have suggested at least three factors unrelated to the appropriateness of a plaintiff's choice of a U.S. court that may nevertheless influence forum non conveniens decision making: caseload, foreign country regime type, and judges' ideological attitudes. Regarding caseload, one of the forum non conveniens doc-

egregious" cases of transnational forum shopping as those in which "neither party to the dispute is a resident of the United States and the dispute is centered abroad").

¹⁶⁸ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947). For example, ease of access to proof and witnesses—which is among the doctrine's private interest factors—depends on the location of the parties and other relevant sources of evidence, which in turn will often overlap with the parties' countries of citizenship and with the place of the activity giving rise to the litigation. In addition, one of the public interest factors is whether the underlying dispute is a "localized controvers[y]." See *id.* at 509. The Court does not define the meaning of the phrase, but the phrase implies that one of the parties or some part of the underlying activity is local.

¹⁶⁹ I coded these variables based on the published opinions in the data set. This "connecting factor" approach is widely accepted as a method of gauging appropriateness. See *supra* notes 165–67 and accompanying text. However, it is not necessarily the best or only possible approach. Indeed, in one of its seminal forum non conveniens decisions, the U.S. Supreme Court avoided specifying particular connecting factors, explaining that it was "[w]ise[]" to avoid any attempt "to catalogue the circumstances which will justify or require either grant or denial" of motions to dismiss on forum non conveniens grounds and preferring case-by-case analysis based on the court's discretion. *Gulf Oil*, 330 U.S. at 508. The Court instead articulated the private interest and public interest factors discussed above. *Id.* at 508–09. As a practical matter of empirical methodology, it would be difficult to measure these factors and test their distinct influences on forum non conveniens decision making. However, the citizenship and territoriality variables used in my analysis, being correlated with those factors, should be reasonable proxies.

trine's public interest factors is "administrative difficulties flowing from court congestion."¹⁷⁰ Some critics argue that this factor has led judges to use the doctrine as a caseload-management tool. As one of the doctrine's critics argues, "The American courts' overt reliance on calendar congestion as a standard reason for dismissing cases tips the scales far too heavily against retaining jurisdiction."¹⁷¹ One would expect the busiest judges to feel the greatest pressure to use the forum non conveniens doctrine in this manner. Thus, if judges are in fact using the forum non conveniens doctrine to reduce their caseloads, then, other things being equal, the larger the judge's caseload, the higher the probability that the judge will dismiss on forum non conveniens grounds. To estimate this influence, I created the variable *Caseload* using the Federal Court Management Statistics maintained by the AO.¹⁷²

Liberal international law theory suggests another factor that may influence forum non conveniens decision making: whether the foreign country in which the proposed alternative forum is located is a liberal democracy. According to this theory, the "courts of liberal [countries] handle cases involving other liberal [countries] differently from the way they handle cases involving nonliberal [countries]."¹⁷³ In particular, within the community of liberal countries, courts see themselves as "cooperating in an effort to direct the [transnational] litigation to the natural or most appropriate forum."¹⁷⁴ Critics of liberal international law theory reject the claim that U.S. courts relate differently to liberal democracies than to other countries.¹⁷⁵ But if the theory is correct, then, other things being equal, U.S. judges

¹⁷⁰ Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n.6 (1981).

¹⁷¹ Robertson, *supra* note 89, at 417; see also Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 750 n.10 (1982) ("[T]he explosion of litigation has created a strong incentive for district courts to [use the forum non conveniens doctrine] to shunt burdensome business elsewhere.").

¹⁷² *Federal Court Management Statistics 2008: U.S. District Court—Judicial Caseload Profile*, U.S. COURTS, <http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2008.pl> (last visited Nov. 9, 2010) (select "All District Courts" from drop-down menu, then follow "Generate" hyperlink). I used the "weighted filings" per judgeship figure. I used a one-year lag because, due to the typical duration of cases, the prior year's filings are likely to be a more accurate measure of the district's current workload.

¹⁷³ Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1917 (1992). Anne-Marie Burley (later Anne-Marie Slaughter Burley and now Anne-Marie Slaughter) specifically claims that the theory applies to forum non conveniens decision making. Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 232 (1993).

¹⁷⁴ Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 105 (1994); see also *id.* at 131 (arguing that this tendency is "likely to be stronger among the courts of liberal democracies").

¹⁷⁵ See generally José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183, 217 (2001) (arguing that regime type does not determine interactions by U.S. courts with other courts).

should be more likely to dismiss cases in favor of the courts of other liberal democracies than in favor of courts outside the community of liberal countries. To estimate this influence, I created the variable *Liberal Democracy* based on the annual Freedom House *Freedom in the World* survey.¹⁷⁶ I coded the variable as 1 (yes) if the proposed alternative forum is in a country rated “free” in the survey for the year prior to the court’s decision; otherwise, I coded it as 0 (no).¹⁷⁷

Finally, some scholars argue that “[f]ederal forum non conveniens decisions appear to depend more on the individual biases of district court judges than any identifiable legal standard.”¹⁷⁸ The predominant political science theory of judicial decision making—the attitudinal model—provides support for this claim. According to the attitudinal model, the most important factor influencing a judge’s decision is the judge’s conservative or liberal ideological attitude.¹⁷⁹ The attitudinal model thus implies that the probability that a judge will dismiss a case on forum non conveniens grounds depends at least partly on whether the judge is conservative or liberal. As George Brown has argued, conservative judges should have a particularly strong aversion to forum shopping.¹⁸⁰ If this is correct, then, other

¹⁷⁶ The *Freedom in the World* survey is a leading annual survey on national levels of democracy. For information about the survey, see *Freedom in the World*, FREEDOM HOUSE, <http://www.freedomhouse.org/template.cfm?page=15> (last visited Nov. 9, 2010).

¹⁷⁷ Although these ratings generally are stable over the time period covered by my data set, I use a one-year lag based on the theory that a judge is unlikely to become immediately aware of changes in a foreign country’s politics. For purposes of liberal international-law theory, Slaughter defines “liberal” states as those “with juridical equality, constitutional protections of individual rights, representative republican governments, and market economies based on private property rights.” Burley, *supra* note 173, at 1909. The Freedom House rankings capture these characteristics by explicitly accounting for equal treatment under the law, protection of individual rights (including freedoms of assembly, open public discussion, and defendants’ rights), representative government (including election of representatives through free and fair elections and other political rights), and private-property rights. See *Methodology*, FREEDOM HOUSE, http://www.freedomhouse.org/template.cfm?page=351&ana_page=363&year=2010 (last visited Nov. 9, 2010). The other leading measure, the POLITY IV PROJECT, <http://www.systemicpeace.org/polity/polity4.htm> (last visited Nov. 9, 2010), captures the concept of representative government well, but it only indirectly captures the other elements of Burley’s definition. Therefore, for testing Slaughter’s liberal theory of international law, the Freedom House measure appears more appropriate.

¹⁷⁸ Lear, *supra* note 112, at 602–03.

¹⁷⁹ According to two of the theory’s leading proponents, “[t]his model holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices.” JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002). As Segal and Spaeth put it, “Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.” *Id.*

¹⁸⁰ See George D. Brown, *The Ideologies of Forum Shopping—Why Doesn’t a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 651 (1993). Brown argues that “[a]nything other than a broad condemnation” of forum shopping from conservative judges would be surprising because

things being equal, conservative judges should be more likely than liberal judges to dismiss transnational litigation on forum non conveniens grounds. To estimate the influence of judges' ideological attitudes, I created the variable *Judge Nominated by Republican* and coded it as 1 (yes) if a Republican president nominated the deciding judge, and 0 (no) otherwise.¹⁸¹

My analysis also asks a second question about forum non conveniens in action: To what extent are judges' forum non conveniens decisions predictable? According to some of the doctrine's critics, these decisions are very *unpredictable*.¹⁸² If that is correct, then the forum non conveniens doctrine would generate considerable forum non conveniens litigation, but it would not be an effective anti-forum shopping instrument.¹⁸³ So far, however, scholars have not attempted to estimate the extent to which forum non conveniens decision mak-

[f]orum-shopping threatens such conservative values as the desire to avoid the proliferation of lawsuits, a distrust of manipulation of the system to achieve substantive ends (at least by plaintiffs), and a general pro-defendant tilt. The principal victims of state-state forum-shopping are interstate corporate entities, an interest group that [conservative judges] might be expected to favor.

Id. (footnote omitted).

¹⁸¹ This is a common measure of judges' ideological attitudes. See Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 328 (1992) (using the party of the nominating president as a proxy for ideological attitudes); see also Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1650–55 (1998) (defending this approach and introducing alternatives). However, tests using the party of the nominating president as a proxy for a judge's ideological attitudes may underestimate the impact of those attitudes. See Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 170–71 (2009). Therefore, such tests are “best interpreted as providing only a lower bound on ideology.” *Id.* at 171. I obtained the data on nominating presidents from the *Biographical Directory of Federal Judges*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Nov. 9, 2010).

¹⁸² See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 516 (1947) (Black, J., dissenting):

The broad and indefinite discretion left [by the forum non conveniens doctrine] to federal courts to decide the question of convenience from the welter of factors which are relevant to such a judgment, will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible.

See also Robertson & Speck, *supra* note 111, at 971, 975 (arguing that the forum non conveniens doctrine “is vague and amorphous, yielding little predictability and virtually guaranteeing against clear explanation of the outcomes achieved under it”); Stein, *supra* note 27, at 785 (describing “crazy quilt of ad hoc, capricious, and inconsistent [forum non conveniens] decisions”).

¹⁸³ See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) (arguing that because of its unpredictability, “*forum non conveniens* cannot really be *relied upon* . . . in deciding . . . where to sue”); *Gulf Oil*, 330 U.S. at 516 (Black, J., dissenting) (arguing that due to its unpredictability, the forum non conveniens doctrine will “clutter the very threshold of the federal courts with a preliminary trial of fact concerning the relative convenience of forums”); VON MEHREN, *supra* note 19, at 324 (noting criticism that “the doctrine compromises legal security and predictability and breeds litigation”).

TABLE 5
EXPLANATORY VARIABLES: FACTORS POTENTIALLY INFLUENCING FORUM
NON CONVENIENS DECISIONS

Variable	Coding	Source
<i>Foreign Plaintiffs</i>	1 (yes) if plaintiffs all foreign, 0 (no) otherwise.	Court's published opinion.
<i>Foreign Defendants</i>	1 (yes) if defendants all foreign, 0 (no) otherwise.	Court's published opinion.
<i>Foreign Conduct</i>	1 (yes) if conduct giving rise to dispute occurred entirely outside U.S. territory, 0 (no) otherwise.	Court's published opinion.
<i>Foreign Injury</i>	1 (yes) if injury giving rise to dispute occurred entirely outside U.S. territory, 0 (no) otherwise.	Court's published opinion.
<i>Caseload</i>	Log of caseload of judicial district in year prior to decision.	Administrative Office of the U.S. Courts, Federal Court Management Statistics.
<i>Liberal Democracy</i>	1 (yes) if foreign state rated "free" by Freedom House, 0 (no) if rated "partly free" or "not free," in year before decision.	Freedom House, <i>Freedom in the World Survey</i> .
<i>Judge Nominated by Republican</i>	1 (yes) if judge nominated by Republican president, 0 (no) otherwise.	Federal Judicial Center, <i>Biographical Directory of Federal Judges</i> .

ing is unpredictable. I will attempt to do so using a number of standard statistical measures.

B. Empirical Findings

To estimate the effects of these factors on the probability that a judge will grant a motion to dismiss on forum non conveniens grounds, I used logit analysis—a standard statistical method for estimating the effects that hypothesized explanatory variables have on dependent variables with only two possible values.¹⁸⁴ The results are presented below in Table 6.¹⁸⁵ As the table indicates, I estimated

¹⁸⁴ Here, the dependent variable is *Decision*, which either has the value of Yes (1) for decisions to grant a motion to dismiss on forum non conveniens grounds or No (0) for decisions to deny such motions. For further information on logit analysis, see generally DAVID W. HOSMER & STANLEY LEMESHOW, *APPLIED LOGISTIC REGRESSION* (2d ed. 2000). I used the Clarify software program in Stata to simulate a change in the expected value of the dependent variable caused by increasing each dichotomous explanatory variable from 0 to 1 (and *Caseload*, a continuous variable, from its 25th to 75th percentile), setting each of the other variables at its mode (for dichotomous variables) or mean (for *Caseload*). MICHAEL TOMZ ET AL., *CLARIFY: SOFTWARE FOR INTERPRETING AND PRESENTING STATISTICAL RESULTS* (2001).

¹⁸⁵ As noted above, my sample consists only of published decisions and therefore might not be representative of unpublished decisions. However, because I am interested in the impact of domestic court decisions on plaintiffs' decisions to forum shop into U.S. courts, published decisions are the most relevant. See *supra* Part I. Moreover, any unrepresentativeness that may result from relying only on published decisions does not create

these effects using two different models. Model 1 includes all explanatory variables except the *Judge Nominated by Republican* variable. By excluding this variable, I am able to estimate Model 1 in three different ways: with all judges included; with only judges nominated by Democrats; and with only judges nominated by Republicans. This in turn allows me to estimate whether the factors influencing the forum non conveniens decisions of conservative judges differ from the factors influencing the forum non conveniens decisions of liberal judges. To estimate whether judges' ideological attitudes influence the probability of a forum non conveniens dismissal, the *Judge Nominated by Republican* variable is included in Model 2.

Are forum non conveniens decisions based on factors of citizenship and territoriality—factors that are widely understood as distinguishing between appropriate and inappropriate transnational forum shopping into U.S. courts? The results suggest that such factors do have a considerable influence on judges' forum non conveniens decisions. In both Model 1 (with all judges included) and Model 2, the impact of one of the citizenship variables (*Foreign Plaintiffs*) and both of the territoriality variables (*Foreign Conduct* and *Foreign Injury*) are statistically significant and, as expected, have a positive effect on the probability of dismissal. For example, in Model 1, the probability of dismissal is an estimated 24.1% [6.5, 42.2] higher when the plaintiffs are all foreign, 18.8% [1.6, 36.7] higher when the conduct occurred outside U.S. territory, and 30.5% [11.0, 49.1] higher when the injury occurred outside U.S. territory. As Model 2 shows, these effects remain even after controlling for the judge's ideological attitudes.¹⁸⁶

sample-selection bias in causal inferences unless two conditions are met: (1) a criterion used to select the sample upon which the inferences are based (e.g., whether a decision was published) is a cause of the dependent variable (i.e., whether the judge granted a motion to dismiss) and (2) that criterion is correlated with an explanatory variable of interest (e.g., the place of conduct). My analysis suggests that there is not a substantial risk that these conditions are met, with the possible exception of *Caseload*. See Christopher Alexander Whytock, *Domestic Courts and Global Governance: The Politics of Private International Law* 147–48 (2007) (unpublished Ph.D. dissertation, Duke University) (on file with Duke University Library) (discussing potential determinants of publication and concluding that most possible determinants of publication are unlikely to have a causal effect on forum non conveniens decision making and that there are not obvious reasons to expect them to be correlated with my explanatory variables).

¹⁸⁶ Specifically, with the *Judge Nominated by Republican* variable included, the probability of dismissal is an estimated 26.5% [7.9, 45.1] higher when the plaintiffs are all foreign, 20.3% [1.9, 38.6] higher when the conduct occurred outside U.S. territory, and 27.5% [8.4, 47.8] when the injury occurred outside U.S. territory. The impact of the *Foreign Defendants* variable is not statistically significant at traditionally accepted levels. See generally HOSMER & LEMESHOW, *supra* note 184, at 36–43 (discussing methods for testing statistical significance of models and estimating confidence intervals, using a 95% confidence interval as a baseline).

TABLE 6
ESTIMATED EFFECTS ON PROBABILITY OF FORUM NON
CONVENIENS DISMISSAL

Explanatory Variables	Estimated Effects on Probability of Forum Non Conveniens Dismissal			
	Model 1			Model 2
	All	Dem.	Rep.	
<i>Foreign Plaintiffs</i>	24.1%*** [6.5, 42.2]	17.3% [-5.6, 48.8]	32.6%** [8.2, 57.0]	26.5%*** [7.9, 45.1]
<i>Foreign Defendants</i>	9.7% [-10.8, 28.0]	-0.01% [-25.9, 22.4]	13.6% [-10.8, 40.3]	8.4% [-9.9, 27.0]
<i>Foreign Conduct</i>	18.8%** [1.6, 36.7]	8.2% [-11.7, 35.4]	31.0%** [4.6, 56.2]	20.3%** [1.9, 38.6]
<i>Foreign Injury</i>	30.5%*** [11.0, 49.1]	40.7%*** [8.2, 66.4]	17.1% [-5.0, 43.1]	27.5%*** [8.4, 47.8]
<i>Caseload</i>	-1.4% [-10.9, 7.8]	-8.2% [-23.7, 2.5]	4.6% [-7.4, 16.9]	-2.2% [-11.4, 7.7]
<i>Liberal Democracy</i>	26.6%*** [8.1, 44.0]	25.5%* [-2.5, 53.7]	28.5%*** [9.4, 49.7]	25.4%*** [8.3, 40.9]
<i>Judge Nominated by Republican</i>				-11.7% [-27.4, 4.6]
Number of Observations	196	89	105	194
Prob > Chi2	0.000	0.000	0.000	0.000
Correctly Classified	70.9%	76.4%	71.4%	71.1%
Adjusted Count R-Squared	.394	.500	.348	.398
Area Under ROC Curve	.788	.827	.785	.793

Notes: This table presents estimates of the effects of the listed explanatory variables on the probability that a U.S. district court judge will grant a motion to dismiss a transnational lawsuit based on the forum non conveniens doctrine. The 95% confidence interval for each estimate is provided in brackets. Standard indicators of statistical significance are also provided (*p < .10, **p < .05, ***p < .01).

Controlling for other factors, the defendant's nationality does not significantly affect the probability of dismissal.¹⁸⁷

The *Caseload* variable does not have a significant impact on judges' forum non conveniens decisions. Of course, this finding does not disprove the claim that judges improperly use the forum non conveniens doctrine to limit their caseloads. However, it would seem to alleviate this concern.

¹⁸⁷ No models showed 95% confidence that the effect of the *Foreign Defendants* variable is either positive or negative.

The *Liberal Democracy* variable has a strong positive effect: the probability of dismissal is an estimated 26.6% [8.1, 44.0] higher in Model 1 (with all judges included) and 25.4% [8.3, 40.9] higher in Model 2 when the alternative foreign court is in a liberal democracy than when it is not.¹⁸⁸ This result provides support for the liberal international law theory hypothesis that U.S. judges are more likely to dismiss cases in favor of the courts of other liberal democracies than in favor of courts outside the community of liberal countries.¹⁸⁹

As Model 2 shows, the *Judge Nominated by Republican* variable does not have a significant impact. Thus, my results do not support the attitudinal model hypothesis that judges' ideological attitudes affect the probability of dismissal.¹⁹⁰

However, the results do suggest that the factors influencing the forum non conveniens decisions of conservative judges may differ from those influencing the forum non conveniens decisions of liberal judges. When Model 1 is limited to nominees of Democratic presidents, the only significant connecting factor is the place of the injury (40.7% [8.2, 66.4]).¹⁹¹ The plaintiff's nationality does not have a significant effect on the probability of dismissal. In contrast, when Model 1 is limited to nominees of Republican presidents, the place of the injury is not statistically significant, but the place of conduct is significant (31.0% [4.6, 56.2]). Notably, the plaintiff's nationality has a strong positive impact on the probability of dismissal (32.6% [8.2, 57.0]) when the sample includes only Republican nominees.

These results do not support the theory that conservative judges have a stronger aversion to forum shopping than liberal judges (at

¹⁸⁸ When the variable *Liberal Democracy* is replaced with a variable equal to 1 if the Polity IV democracy rating is greater than or equal to 5 on a -10 to +10 scale, the effect is statistically significant at a 90% (but not a 95%) level of confidence.

¹⁸⁹ The impact of the *Liberal Democracy* variable may reflect not a concern about regime type per se but rather a concern with the perceived adequacy of the proposed alternative forum. Judges may intuitively be more comfortable dismissing cases in favor of countries in which there likely would be a fair judicial process. To that extent, the *Liberal Democracy* variable might indeed be considered relevant to the determination of whether the foreign court would be an appropriate alternative. However, in the twenty-two cases in the sample in which a judge concluded that the alternative forum requirement was not satisfied, the foreign country was a liberal democracy in ten cases and not a liberal democracy in twelve cases, suggesting that judges do not use regime type as a proxy for forum adequacy. *But see* Lii, *supra* note 115, at 537–38 (finding that “district courts are less apt to find an adequate forum in countries with fewer political rights and fewer civil liberties”).

¹⁹⁰ As noted above, however, my use of the party of the nominating president as a measure of the judge's ideological attitude may underestimate the impact of ideology. *See supra* note 181.

¹⁹¹ This is the sort of “situs” tendency that Elizabeth Lear has argued largely explains forum non conveniens decision making in general. *See* Lear, *supra* note 111, at 103 (referring to “the strength of the federal courts’ situs presumption” in forum non conveniens decision making).

least not in the *forum non conveniens* context).¹⁹² But they do suggest that conservative and liberal judges may have different conceptions of what constitutes inappropriate transnational forum shopping into U.S. courts. Judges nominated by Republicans appear more concerned with keeping foreign plaintiffs from forum shopping into the U.S. federal courts than those nominated by Democrats; and, in terms of territorial factors, Republican nominees appear more concerned with the place of conduct, and Democratic nominees appear more concerned with the place of injury.

The impact of the *Foreign Plaintiffs* variable may have implications for U.S. compliance with equal-access provisions in bilateral friendship, commerce, and navigation treaties.¹⁹³ These provisions require each signatory to give the other signatory's citizens access to its courts equal to that given to its own citizens.¹⁹⁴ As previously explained,¹⁹⁵ one of the Supreme Court's key holdings in *Piper Aircraft Co. v. Reyno* was that a foreign plaintiff's choice of a U.S. court "deserves less deference" than that of a U.S. plaintiff.¹⁹⁶ The Court justified this distinction as a nondiscriminatory proxy for the convenience of litigating in a U.S. court.¹⁹⁷ Some lower courts have nevertheless held that the distinction violates the guarantee of equal access.¹⁹⁸

If the plaintiff's nationality is indeed merely a proxy for convenience, then after controlling for other factors affecting convenience—such as the defendant's citizenship (which generally should be correlated with how convenient it would be for the defendant to litigate in a U.S. court) and the place of the plaintiff's injury and the defendant's conduct (which generally should be correlated with the location of evidence and witnesses)—the plaintiff's citizenship should not have a significant and strong independent effect on *forum non*

¹⁹² See *supra* note 180 and accompanying text.

¹⁹³ See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 281–82 (5th ed. 2006) (noting approximately twenty-five such treaties and arguing that discrimination in *forum non conveniens* decision making could violate them). See generally Allan Jay Stevenson, *Forum Non Conveniens and Equal Access Under Friendship, Commerce, and Navigation Treaties: A Foreign Plaintiff's Rights*, 13 HASTINGS INT'L & COMP. L. REV. 267 (1990) (analyzing the relationship between the *forum non conveniens* doctrine and equal-access provisions).

¹⁹⁴ WEINTRAUB, *supra* note 193.

¹⁹⁵ See *supra* text accompanying notes 100–09.

¹⁹⁶ 454 U.S. 235, 255–56 (1981).

¹⁹⁷ See *id.*:

When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

¹⁹⁸ See GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 380 (4th ed. 2007) (discussing cases holding that courts must treat foreign plaintiffs as U.S. citizens for *forum non conveniens* purposes if they are citizens of signatories of treaties with equal-access provisions).

conveniens decisions.¹⁹⁹ Yet it does: other things being equal, U.S. district court judges are approximately 25% more likely to dismiss on forum non conveniens grounds when the plaintiff is foreign than when the plaintiff is a U.S. citizen.²⁰⁰ Moreover, if the doctrine's goal is indeed to measure convenience, then the defendant's citizenship should also have an impact—but this does not appear to be the case.²⁰¹ Although further analysis would be necessary to reach a more definitive conclusion, this finding suggests that the *Piper* distinction between U.S. and foreign plaintiffs, as applied by the U.S. district courts, is not merely a proxy for convenience, but instead may discriminate against foreign plaintiffs as such, thus raising significant questions about compliance with equal-access provisions.

Finally, my analysis suggests that forum non conveniens decision making might not be as unpredictable as widely believed. Model 2 correctly classifies decisions at a rate of 71.1%,²⁰² and the adjusted count R-squared figure indicates that this represents a 39.8% improvement over the rate at which decisions would be correctly classified by always guessing the more frequent outcome.²⁰³ The 0.793 area under the Receiver Operating Characteristic (ROC) curve suggests that this model does an acceptable job discriminating between grants and denials of forum non conveniens motions.²⁰⁴ A stripped-down model

¹⁹⁹ Cf. Paula K. Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul*, 18 J. MAR. L. & COM. 185, 194 (1987):

[A] court should not grant an FNC dismissal to a defendant who has shown only slight inconvenience, merely because the opposite party is not a U.S. citizen or resident. Such a doctrine would place foreigners in an unfavorable position *qua* foreigners, and they should be able to successfully counter it by appealing to a treaty designed to protect them in such situations.

²⁰⁰ The estimated effect is 24.1% [6.5, 42.2] in full Model 1 and 26.5% [7.9, 45.1] in Model 2.

²⁰¹ As Table 6 shows, the *Foreign Defendants* variable is not statistically significant.

²⁰² This “correctly classified” figure indicates the proportion of outcomes that the model correctly classified using a 0.5 probability cutoff to translate predicted probabilities into dichotomous predictions. See LAWRENCE C. HAMILTON, *STATISTICS WITH STATA: UPDATED FOR VERSION 9*, at 270–71 (2006) (explaining the correctly classified statistic). Thus, it indicates the proportion of outcomes for which the model estimated at least a 0.5 probability of a dismissal and in which the court in fact granted a dismissal.

²⁰³ When a dependent variable has only two possible outcomes (as is the case here), one can correctly predict at least 50% of outcomes without any explanatory variables by always guessing the outcome that is most frequent. See J. SCOTT LONG & JEREMY FREESE, *REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA* 111 (2d ed. 2006). *Adjusted count R-squared* uses this guessing strategy as a baseline to measure the improvement in predictive power provided by a statistical model. More precisely, *adjusted count R-squared* is the proportion of correct predictions beyond the number that would be correctly predicted simply by choosing the outcome with the largest percentage of observed cases, using a 0.5 probability cutoff. *Id.* at 111–12.

²⁰⁴ The ROC curve plots 1 minus specificity (the false positive rate) on the x-axis and sensitivity (the true positive rate) on the y-axis for each possible probability cutoff. See Douglas G. Altman & J. Martin Bland, *Diagnostic Tests 3: Receiver Operating Characteristic Plots*, 309 BRIT. MED. J. 188, 188 (1994) (explaining the ROC curve in the medical-diagnostic

including only factors that can be discerned relatively easily by a forum shopper—the citizenship of the parties and the territorial locus of the underlying transnational activity—correctly classifies decisions at a rate of 72.1%, and the adjusted count R-squared figure indicates that this represents a 40.0% improvement over the rate at which decisions would be correctly classified by always guessing the more frequent outcome. The area under the ROC curve for the stripped down model is 0.763, suggesting that it also does an acceptable job discriminating between grants and denials of forum non conveniens motions.

Overall, my findings suggest that judges apply the forum non conveniens doctrine fairly well. Their decisions appear to be more influenced by factors widely thought to be relevant to the appropriateness of a U.S. court,²⁰⁵ more predictable,²⁰⁶ and less influenced by caseload and ideology than critics of the doctrine indicate. Moreover, although the level of democracy in the country of a proposed alternative foreign court is not directly relevant to the appropriateness of a plaintiff's choice of a U.S. court, this factor may reduce the likelihood of dismissals in favor of countries with legal systems that lack fair judicial processes.²⁰⁷

But my findings also suggest potential problems. Liberal and conservative judges may emphasize different factors when making forum non conveniens decisions. And contrary to justifications of *Piper's* distinction between U.S. and foreign citizens as a proxy for convenience, the results suggest that forum non conveniens decisions may discriminate against foreign plaintiffs.

context). The area under the ROC curve is equal to the probability that a random decision to grant a forum non conveniens motion has a higher value of the dependent variable than a random decision to deny a forum non conveniens motion. *See id.* A larger area under the curve indicates a more discriminating model. *See id.* One rule of thumb is that an area of 0.7 to 0.8 is acceptable discrimination, 0.8 to 0.9 is excellent discrimination, and greater than 0.9 is outstanding discrimination. HOSMER & LEMESHOW, *supra* note 184, at 162.

²⁰⁵ To be clear, I am not suggesting that connections such as territoriality and citizenship are the only, or even the best, measures of appropriateness. To the contrary, there are almost surely more sophisticated and refined measures. However, these other measures would be difficult to test empirically and for judges to apply.

²⁰⁶ Of course, while even more predictability might be desirable, it is unclear whether this could be accomplished without significant tradeoffs in terms of fairness in individual cases. *Cf.* Erwin Chemerinsky, *Assessing Minimum Contacts: A Reply to Professors Cameron and Johnson*, 28 U.C. DAVIS L. REV. 863, 866–67 (1995) (arguing that in the context of personal jurisdiction, uncertainty is “inevitable and desirable” because personal jurisdiction is ultimately about fairness and fairness cannot be reduced to “a formula or a clear rule”).

²⁰⁷ *Cf. Lii, supra* note 164, at 542 (arguing that “even though the definition of an adequate forum does not explicitly require it, there is evidence that district courts are less likely to find foreign forums adequate in countries with ineffective and corrupt governments and countries that lack the rule of law”).

CONCLUSION

“As a moth is drawn to the light, so is a litigant drawn to the United States.”²⁰⁸ Notwithstanding Lord Denning’s widely cited aphorism, this Article suggests that the draw may no longer be as strong as it once was. According to the conventional understanding, two features of the American forum shopping system encourage plaintiffs to file transnational claims in U.S. courts: a permissive approach to personal jurisdiction, which increases plaintiffs’ expectations of favorable court access decisions; and pro-domestic-law bias in choice-of-law decision making, which increases plaintiffs’ expectations that U.S. judges will apply plaintiff-favoring U.S. substantive law. In our era of globalization, this system is said to have contributed to a transnational litigation explosion.²⁰⁹

But this Article has argued that the forum shopping system has evolved. In the current system, U.S. district court judges aggressively use the forum non conveniens doctrine to dismiss transnational litigation, thereby offsetting the incentives created by permissive personal jurisdiction doctrine; and there no longer appears to be pro-domestic-law bias in international choice-of-law decision making. Thus, the current system is unlikely to encourage transnational forum shopping into U.S. courts to the extent suggested by the conventional understanding. In addition, this Article has provided evidence that one important form of transnational litigation—alienage litigation—actually has been decreasing. Due to lack of data, it is unclear whether other types of transnational litigation in U.S. courts—such as transnational litigation in U.S. state courts and transnational litigation in U.S. federal courts based on federal question jurisdiction—are on the same trajectory or not. Nevertheless, the decline of alienage litigation raises substantial doubts about the claim that the United States is experiencing a transnational litigation explosion.

However, unlike some of the broader claims about a litigation explosion in the United States,²¹⁰ the assumption that there is a *transnational* litigation explosion is based on a highly plausible logic.²¹¹ Thus, this Article’s findings pose a genuine puzzle for legal scholars: Why, in an age of globalization in which one would expect an increase in disputes between U.S. citizens and foreign citizens²¹²—and why, given the well-documented attractions that the U.S. legal system offers to plaintiffs²¹³—would the number of alienage filings be decreasing?

208 Smith Kline & French Labs. Ltd. v. Bloch, [1983] 1 W.L.R. 730, 733 (C.A. 1982).

209 See *supra* Part II.

210 See *supra* notes 1–3 and accompanying text.

211 See *supra* notes 76–85 and accompanying text.

212 See *supra* Part II.B.

213 *Id.*

There are several intriguing possibilities for scholars to explore as they work to improve their understanding of the current forum shopping system and its consequences for transnational litigation. For example, perhaps the evolution of the forum shopping system has itself contributed to the decline in alienage filings by reducing plaintiffs' expectations of favorable court access and choice-of-law decisions.²¹⁴ However, even if this is one piece of the alienage litigation puzzle, other factors are almost surely at play as well. Perhaps transnational disputes that would once have been filed in the U.S. federal courts are increasingly being filed in U.S. state courts²¹⁵ or submitted to transnational arbitration.²¹⁶ Perhaps "tort reform" in the United States has reduced the attractiveness of the U.S. legal system for plaintiffs relative to other legal systems;²¹⁷ or perhaps changes to foreign legal sys-

²¹⁴ From this perspective, the role of domestic courts in shaping patterns of transnational forum shopping would be an example of transnational judicial governance. See Whytock, *supra* note 21, at 100–01 (describing the impact of judicial allocation of adjudicative authority on transnational forum shopping). In addition to the changes in the American forum-shopping system described above, the amount-in-controversy requirement for diversity jurisdiction increased from \$10,000 to \$50,000 in 1988 and to \$75,000 in 1996. FRIEDENTHAL ET AL., *supra* note 48, at 45. However, if this were a substantial cause of the decline in alienage filings, one would expect to see a similar drop in domestic diversity cases, which did not occur. See *supra* Figure 3. Second, in 1988, permanent-resident aliens were classified as U.S. state citizens for diversity purposes, arguably reducing the number of transnational suits covered by alienage jurisdiction. Cf. Clermont & Eisenberg, *supra* note 135, at 461 (noting this possibility). However, this possibility is difficult to assess without data on the proportion of transnational suits brought by permanent-resident aliens based on alienage jurisdiction prior to this change.

²¹⁵ See, e.g., Robertson & Speck, *supra* note 111, at 940 (arguing that more transnational personal-injury claims are being filed in state courts precisely because of federal courts' aggressive use of the forum non conveniens doctrine). But see 28 U.S.C. § 1441(b) (2006) (allowing removal in non-federal-question cases "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought"); KOH, *supra* note 82, at 15 (arguing that transnational commercial litigation is concentrated in the U.S. federal courts rather than U.S. state courts); Solimine, *supra* note 29, at 37 (providing empirical evidence that "appears to confirm the assumption that foreign defendants see federal courts as more congenial [than state courts], and when able will remove the case to that forum"). Unfortunately, there is no existing data on transnational litigation rates in U.S. state courts that permits empirical testing of this explanation.

²¹⁶ See Christopher A. Whytock, *The Arbitration-Litigation Relationship in Transnational Dispute Resolution: Empirical Insights from the U.S. Federal Courts*, 2 WORLD ARB. & MEDIATION REV. 39, 48 (2008) (empirically documenting an upward trend in transnational arbitration but concluding that this does not substantially account for the decline in alienage litigation); see also KOH, *supra* note 82, at 15 (arguing that the "vast bulk of the international commercial dispute resolution in the United States has tended to transpire not through arbitration, but through lawsuits in the national courts").

²¹⁷ See generally Linda Lipsen, *The Evolution of Products Liability as a Federal Policy Issue*, in TORT LAW AND THE PUBLIC INTEREST 247 (Peter H. Schuck ed., 1991) (surveying tort-reform efforts); Glenn Blackmon & Richard Zeckhauser, *State Tort Reform Legislation: Assessing Our Control of Risks*, in TORT LAW AND THE PUBLIC INTEREST, *supra*, at 272. But see Weintraub, *supra* note 43, at 163 ("[A]lthough 'tort reform' is spreading in the United States, American law is nevertheless more likely than foreign law to create liability, permit recov-

tems have increased the attractiveness of those systems compared to the United States.²¹⁸ It is also possible that foreigners attempt to avoid litigating in U.S. courts in fear of antiforeigner bias.²¹⁹ By moving toward an answer to the alienage litigation puzzle, legal scholars will develop a better understanding of transnational forum shopping behavior and the factors that influence it.

An improved understanding is important for legal policy because there are legitimate concerns about the potentially adverse economic and political consequences of transnational forum shopping into U.S. courts.²²⁰ Based on these concerns, some legal scholars and policy advocates have called for legal reforms aimed at curtailing transnational litigation, including the enhanced use of the forum non conveniens doctrine and modified choice-of-law methods that would guard against pro-domestic-law bias.²²¹ And in *Goodyear Luxembourg*

ery for more elements of injury, and award punitive damages. Therefore, choice of United States law rather than foreign law is likely to favor a foreign plaintiff.” (footnote omitted)).

²¹⁸ See Mark A. Behrens et al., *Global Litigation Trends*, 17 MICH. ST. J. INT’L L. 165, 193–94 (2009) (noting the growing list of countries recognizing multclaimant litigation and gradually moving away from prohibitions on contingent fees and punitive damages); R. Daniel Kelemen & Eric C. Sibbitt, *The Globalization of American Law*, 58 INT’L ORG. 103, 131 (2004) (arguing that American legal style is spreading globally); Eugene Gulland, *All the World’s a Forum*, NAT’L L.J., Feb. 11, 2002, at B13 (arguing that “[r]ecent court decisions . . . suggest a more aggressive tendency to prefer non-U.S. forums and apply non-U.S. law to disputes involving U.S. companies”).

²¹⁹ See Utpal Bhattacharya et al., *The Home Court Advantage in International Corporate Litigation*, 50 J.L. & ECON. 625, 629 (2007) (concluding that foreign firms are disadvantaged in U.S. courts). But see Clermont & Eisenberg, *supra* note 135, at 464 (finding no support for the existence of antiforeigner bias in U.S. courts). However, regardless of whether there is in fact an antiforeigner bias, the perception of antiforeigner bias could affect transnational litigation rates in U.S. courts. See Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 45 (2006) (“Foreign defendants believe that U.S. courts favor U.S. litigants.”).

²²⁰ See Dorward, *supra* note 16, at 142 (arguing that “tolerance of international forum shopping creates inefficiencies and conflicts with basic notions of comity and respect for foreign sovereignty”); Parrish, *supra* note 219, at 47–48 (noting potential foreign-relations consequences of transnational litigation in U.S. courts); Sykes, *supra* note 10, at 340 (arguing that transnational forum shopping into U.S. courts may cause global and national economic welfare to decline); cf. Silberman, *supra* note 16, at 507 (noting the U.S. Solicitor General’s argument in *Helicopteros Nacionales de Colombia v. Hall* that assertion of personal jurisdiction over a foreign corporation in U.S. court based on the corporation’s transactions with a U.S. corporation in the United States would have “significant potential for discouraging foreign forums from purchasing American products” and “would thwart positive efforts of Congress and the Executive Branch to make American firms and products more competitive internationally”) (quoting Brief for the United States as Amicus Curiae at 9–10, 11–12, *Helicopteros Nacionales*, 466 U.S. 408 (1984) (No. 82-1127)).

²²¹ See, e.g., Sykes, *supra* note 10, at 340 (arguing “for limiting foreign tort plaintiffs to the law and forum of the jurisdiction in which their harm arose” in appropriate cases); *Global Forum Shopping*, *supra* note 15 (advocating reforms to reduce global forum shopping into U.S. courts); see also Dorward, *supra* note 16, at 168 (arguing for continued evolution of the forum non conveniens doctrine to respond to problems posed by international forum shopping); Weintraub, *supra* note 43, at 161 (arguing for elimination of “choice-of-law rules that select American liability law”); cf. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235,

Tires, S.A. v. Brown, now pending before the Supreme Court, the petitioners and their amici curiae supporters are using concerns about forum shopping to argue for limitations on general jurisdiction in transnational product liability actions.²²² However, according to this Article's updated understanding of the American forum shopping system, new anti-forum shopping measures might not be as urgent or necessary as their advocates claim. Judges are already using the forum non conveniens doctrine aggressively to dismiss transnational suits, and they do not appear to display pro-domestic-law bias in international choice-of-law decision making.²²³

More fundamentally, this Article has presented empirical evidence that raises questions about the need for new anti-forum shopping measures in the first place. Alienage litigation—one of the principal forms of transnational litigation—is decreasing and constitutes only a small fraction of the total caseload of U.S. district

251–52 (1981) (holding that an unfavorable change in law does not bar forum non conveniens dismissal and justifying that holding with the assertion that “flow of litigation into the United States would [otherwise] increase and further congest already crowded courts”).

²²² See Brief for Petitioners, *supra* note 59, at 9 (arguing that affirming North Carolina's assertion of general jurisdiction would be an “invitation to rampant forum shopping”); Brief of the Org. for Int'l Inv. & Ass'n of Int'l Auto. Mfrs. Inc. as Amici Curiae in Support of Petitioner, *supra* note 59, at 16 (asserting that “[t]he U.S. legal system has had a problem with forum shopping” and that affirming the state court's decision “would dramatically expand opportunities for forum shopping”). As suggested *supra* note 215 and accompanying text, it is possible that these concerns may be more serious with respect to transnational claims that are filed in state courts with versions of the forum non conveniens doctrine that are not as robust as the federal doctrine and that are not removable to federal court. Concern about forum shopping was an explicit factor in the Supreme Court's 1981 adoption of a more robust forum non conveniens doctrine in *Piper Aircraft Co. v. Reyno*. See 454 U.S. 235 (1981) (asserting that “[t]he American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive” and “[t]he flow of litigation in to the United States would increase and further congest already crowded courts”).

²²³ See *supra* Part III. Clermont has suggested that the courts may be moving back toward a stricter abuse-of-process approach to forum non conveniens. Kevin M. Clermont, *The Story of Piper: Forum Matters*, in *CIVIL PROCEDURE STORIES* 199, 224 (Kevin M. Clermont ed., 2d ed. 2009). My data is not inconsistent with this possibility: forum non conveniens dismissal rates in the published decisions of the U.S. district courts have declined from an estimated 61.3% [48.8, 72.4] in 1990–94, to 45.0% [33.1, 57.5] in 1995–99, to 38.6% [29.1, 49.1] in 2000–2005. *But see* Childress, *supra* note 116 (presenting evidence of an increase in the dismissal rate to 62% since 2007). The overlapping confidence intervals indicate that these comparative estimates are somewhat uncertain. However, if there has in fact been such a decline, it may be partly due to selection effects. Having received the judicial signal that dismissal of transnational suits on forum non conveniens grounds is likely and aware that the likelihood of dismissal increases as the connections between the litigation and the United States decrease, plaintiffs may now be filing transnational suits in U.S. courts that, on average, have closer connections to the United States (and which are therefore less likely to be dismissed) than previously. In other words, plaintiffs may be learning: the cases most likely to be dismissed on forum non conveniens grounds may increasingly be selected out by plaintiffs' filing decisions, thus depressing forum non conveniens dismissal rates.

courts.²²⁴ Trends in other forms of transnational litigation may be different. However, the low and declining levels of alienage litigation strongly suggest that new anti–forum shopping measures are not advisable absent empirical evidence that transnational forum shopping into U.S. courts has actually reached levels that are likely to have a net negative effect on foreign relations or economic welfare. Without such evidence, the risk is that exaggerated perceptions of transnational litigation in the United States will lead to exaggerated policy responses.

This risk must be taken seriously because anti–forum shopping measures aimed at curtailing transnational litigation in U.S. courts may entail significant costs in terms of access to justice, foreign relations, and regulation of transnational activity.²²⁵ For plaintiffs suffering from transnational harms, a forum non conveniens dismissal may be tantamount to no remedy at all.²²⁶ And from a global governance perspective, transnational litigation in U.S. courts under U.S. substantive law may play an essential role in deterring harmful transnational activity and ensuring internalization of the negative externalities of that activity by those engaging in it.²²⁷ Anti–forum shopping measures may inhibit these potentially important functions.

The extent of these costs and whether they outweigh the benefits of additional anti–forum shopping measures are questions that are not easily answered. Nevertheless, before we adopt such measures, it is important to take full advantage of available empirical evidence. As one prominent group of legal scholars puts it, “[i]mproving the civil justice system requires thoughtful, objective analysis based on sound

²²⁴ See *supra* Part III.B.2.

²²⁵ Cf. John R. Wilson, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 OHIO ST. L.J. 659, 661 (2004) (arguing that the forum non conveniens doctrine “makes American justice less accessible to foreign plaintiffs”). For a discussion of the potential costs to foreign relations and the regulatory costs of limiting court access in transnational disputes using instruments such as the forum non conveniens doctrine, see Robertson, *supra* note 11.

²²⁶ See Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 HOUS. J. INT’L L. 385, 398 (2004) (arguing that forum non conveniens dismissals are often insuperable barriers to transnational claims); Robertson, *supra* note 89, 417–21 (finding that after forum non conveniens dismissals, plaintiffs rarely refile in the proposed alternative forum).

²²⁷ See Lear, *supra* note 112, at 562 (arguing that liberal use of forum non conveniens doctrine undermines an important national interest in deterring harmful transnational activity); Weinberg, *supra* note 9, at 70–71 (arguing that application of foreign law rather than U.S. law both undermines regulation and risks eroding national and worldwide safety and security); Stephen J. Darmody, Note, *An Economic Approach to Forum Non Conveniens Dismissals Requested by U.S. Multinational Corporations—The Bhopal Case*, 22 GEO. WASH. J. INT’L L. & ECON. 215, 240–51 (1988) (arguing that by sending transnational suits to jurisdictions that will not ensure that defendants adequately internalize negative externalities of their transnational activity, forum non conveniens dismissals can reduce economic efficiency).

empirical data.”²²⁸ This Article’s findings are a step toward building the empirical foundations needed for well-informed deliberation about the proper legal responses to transnational forum shopping into U.S. courts.

The debate over transnational litigation in the United States is marked by one of the basic dilemmas of litigation policy: How should we balance the goal of ensuring access to justice with concerns about the economic costs of litigation? Recent developments in civil procedure—including shifts toward more prodefendant, litigation-limiting standards of summary judgment and pleading—indicate that the balance may be tilting away from access to justice.²²⁹ This Article’s analysis suggests that the evolution of the American forum shopping system may be part of this broader trend.

²²⁸ Marc Galanter et al., *How to Improve Civil Justice Policy: Systematic Collection of Data on the Civil Justice System Is Needed for Reasoned and Effective Policy Making*, 77 JUDICATURE 185, 185 (1994).

²²⁹ See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–54 (2009) (adopting more restrictive pleading standards); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–28 (1986) (reducing moving party’s burden in summary judgment context). See generally Robertson, *supra* note 11 (documenting reduced court access in transnational litigation); A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 200 (2010) (referring to “a shift toward a restrictive ethos in civil procedure, meaning an ethos oriented more towards protecting the interests of defendants—particularly those from the dominant or commercial class—against the civil claims of members of societal out-groups” (footnote omitted)).