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Home Is Where the Hurt Is: Forum Non Conveniens and Antitrust

by Jeremy C. Bates†

In 1996 a Netherlands Antilles corporation specializing in currency exchange, along with its New York affiliate, sued two English banks in the District Court for the Southern District of New York, alleging that the banks had conspired to deprive the currency exchanger of banking services.¹ The banks moved for dismissal for forum non conveniens,² which the district court granted.³ The United States Court of Appeals for the Second Circuit affirmed the dismissal, noting that most of the allegedly anticompetitive conduct took place in England⁴ and that the true parties were English.⁵ In affirming, the Second Circuit split with the Fifth Circuit⁶ and became the first court of appeals to uphold applying forum non conveniens to dismiss an international antitrust suit.⁷

The circuits’ disagreement arose out of tensions between principles of civil procedure and antitrust jurisprudence long established by the Supreme Court. In procedure, the Court has held


² Literally, “the forum not being appropriate.” The term may be a nineteenth-century neo-Latinism. See Robert Braucher, The Inconvenient Federal Forum, 60 Harv L Rev 908, 909 (1947) (tracing the doctrine as “forum non competens” to early Scottish cases, but suggesting that the term “forum non conveniens” arose much later).


⁴ See Capital Currency Exchange, 155 F3d at 612 (“At bottom, this is a suit about two English banks’ refusal to do business in England with CCE and Chequepoint UK.”).

⁵ See id (“The real parties in interest are foreign corporations.”).


that courts may decline to exercise jurisdiction in certain cases, such as when a more convenient foreign forum exists. Yet in antitrust the Court has concluded that Congress intended the Clayton Act's special remedies to further antitrust enforcement. Which, then, should prevail: the interests of justice and convenience of parties, or the public interest in international antitrust safeguards?

This Comment concludes that the public interest in international antitrust enforcement should take precedence. Part I of the Comment sketches the development of forum non conveniens; § 12 of the Clayton Act, which creates special venue rules for antitrust cases; and the general transfer statute, 28 USC § 1404(a).

I. THE RULES IN TENSION: FORUM NON CONVENIENS, § 12 OF THE CLAYTON ACT, AND 28 USC § 1404(A)

In disagreeing over forum non conveniens in antitrust, the circuits parted company where three legal doctrines intersect. First, the common-law abstention doctrine of forum non conveniens permits a court to dismiss cases over which it has jurisdiction. Second, § 12 of the Clayton Act, a special corporate venue provision, grants antitrust plaintiffs a broad choice of forum in which to sue. Third, 28 USC § 1404(a), the general transfer provision, enables district courts to transfer cases to each other for

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8 See Gulf Oil Corp v Gilbert, 330 US 501, 504–07 (1947) (recognizing forum non conveniens and collecting cases applying the doctrine).
10 See, for example, Zenith Radio Corp v Hazeltine Research, Inc, 395 US 100, 130–31 (1969) ("[T]he purpose of giving private parties treble-damage and injunctive remedies was . . . to serve . . . the high purpose of enforcing the antitrust laws.").
12 28 USC § 1404(a) (1994) (authorizing transfers for justice and convenience).
13 See Gilbert, 330 US at 507.
14 See 15 USC § 22. See also Part I B.
convenience and justice.\textsuperscript{15} The common-law doctrine enabled courts to dismiss cases, § 12 prevented courts from dismissing antitrust cases, and § 1404(a) permitted courts to transfer domestic antitrust cases. Tracing the development of the doctrine and statutes reveals the tension among their underlying principles.

A. Forum Non Conveniens

Forum non conveniens began as a discretionary Scottish common-law doctrine that empowered a court to decline to exercise jurisdiction over an action when it appeared another court could try the case more efficiently and fairly.\textsuperscript{16} The doctrine crept slowly into American law. In an early case, Justice John Marshall, in dictum and on policy grounds, asserted that the Supreme Court had discretion to decline to hear an admiralty case between foreigners.\textsuperscript{17} Justice Marshall's reasoning encouraged other judges to follow suit in admiralty cases, from which courts later extended the doctrine to suits at law.\textsuperscript{18}

The Supreme Court first addressed forum non conveniens in \textit{Gulf Oil Corp v Gilbert},\textsuperscript{19} a tort case, and described the doctrine as enabling a court to "resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."\textsuperscript{20} The Court enumerated private and public interest fac-

\textsuperscript{15} See 28 USC 1404(a).


\textsuperscript{17} See \textit{Mason v Ship Blaireau}, 6 US 240, 264 (1804) (suggesting such discretion on "principles of general policy" rather than on "any positive incapacity" to hear the case).

\textsuperscript{18} See Braucher, 60 Harv L Rev at 919 (cited in note 2) ("[I]t was in admiralty cases ... that the federal courts first developed their discretionary power to decline jurisdiction."); id at 921 (describing spread of forum non conveniens to cases at law). See also Bies, \textit{Comment, Conditioning Forum Non Conveniens}, 67 U Chi L Rev at 496 n 30 (cited in note 16) (collecting cases in admiralty). In 1932 Justice Brandeis noted that courts of law "occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or residents, or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." \textit{Canada Malting Co, Ltd, v Paterson Steamships, Ltd}, 285 US 413, 422-23 (1932) ("Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts administering other systems of our law.").

\textsuperscript{19} \textit{Gulf Oil Corp v Gilbert}, 330 US 501, 504-09 (1947).

\textsuperscript{20} Id at 507. But see id at 513-17 (Black dissenting) (urging that in the absence of explicit legislation, the Court cabin forum non conveniens to equity and admiralty cases). The Court had earlier discussed forum non conveniens or equivalent principles. See \textit{Broderick v Rosner}, 294 US 629, 642 (1935) (recognizing the ability of state courts to apply
tors (the "Gilbert factors") that a trial court must weigh in determining whether to dismiss. In a Gilbert analysis, the litigants' private interests 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.

The public interest factors include controlling the court's docket, reducing the burden of jury service for a local community unrelated to the case, trying a case within view of those whose affairs it touches, holding trial in a forum that knows the applicable law, and respecting the "local interest in having localized controversies decided at home." The trial court may dismiss if the factors weigh heavily in the defendant's favor.

Although the Gilbert Court approved forum non conveniens, it did not address whether courts may apply the doctrine to trump a special venue provision such as § 12 of the Clayton Act, which provides that

> any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business.
One year after Gilbert, in *United States v National City Lines* ("National City Lines I"), the Court held that § 12 prohibited courts from dismissing antitrust cases for forum non conveniens. The Court heavily emphasized the language and intent of § 12 and reviewed its history at length.

To the *National City Lines I* Court, the legislative history of § 12 justified depriving federal courts of a means of controlling their dockets and ridding themselves of suits of marginal venue. Why did the Court find the legislative history so convincing?

B. Section 12 of the Clayton Act

Generally, the *National City Lines I* Court recognized that Congress wrote the Clayton Act to "mak[e] the nation's antitrust policy more effective." Specifically with regard to § 12, the Court noted that Congress intended to broaden venue. This intent—to strengthen antitrust enforcement by broadening venue—is clear from the genesis of the Clayton Act, especially from the debate on its venue provisions. It is no wonder that courts construing those provisions have read congressional intent expansively.

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26 *United States v National City Lines*, 334 US 573 (1948) ("National City Lines I").

27 Id at 588 ("In face of this [legislative] history, we cannot say that room was left for judicial discretion to apply the doctrine of *forum non conveniens* so as to deprive the plaintiff of the choice given by the section. That result ... would be utterly inconsistent with the purpose of Congress."). Justice Jackson, concurring, argued that Congress had provided both special venue for antitrust and special protections against its abuse, obviating any need for forum non conveniens. Id at 598–99. Because the parties in *National City Lines I* were entirely domestic, id at 575 & n 2, courts disagree on its implications for international antitrust suits. See notes 73–75 and 106–07 and accompanying text.

28 See id at 578–88, especially id at 586 (concluding that Congress intended § 12 "to aid plaintiffs by giving them a wider choice of venues, and thereby to secure a more effective, because more convenient, enforcement of antitrust provisions").

29 On the current Court, only Justice Scalia opposes using legislative history to interpret unclear text. See, for example, *Wisconsin Public Intervenor v Mortier*, 501 US 597, 622 (1991) (Scalia, concurring in the judgment) ("[U]tilizing legislative history for the purpose of giving authoritative content to the meaning of a statutory text ... is the [ ] practice I object to."). In *Mortier* itself, the eight other Justices then sitting disagreed. See id at 610 n 4 ("Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. We suspect that the practice will likewise reach well into the future."). Since then, Justice Thomas has clarified that he too will rely on hearings and a committee report in a doubtful case. See *National Credit Union Administration v First National Bank and Trust Co*, 522 US 479, 493 n 6 (1998) ("The legislative history ... supports this conclusion."). For a general discussion, see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S Cal L Rev 845 (1992).


31 Id.
1. Enactment of § 12.

Before 1914, a plaintiff could file a Sherman Act suit against a corporation in the district "in which the defendant reside[d] or [was] found," and could recover threefold the damages sustained as a result of the defendant's restraint of trade, monopolization of trade, or trust. However, underfunded federal enforcement supplied potential private plaintiffs with few ready-made causes of action, and the Sherman Act's limited scope, combined with several unfavorable court rulings, discouraged private litigation.

The lack of effective private enforcement impelled members of Congress to encourage private antitrust plaintiffs to sue. After lengthy debate in 1914, Congress passed the Clayton Act, which contained several provisions intended to encourage private enforcement. The Act outlawed practices that, although not themselves restraints of trade, are preparatory to or concomitant with such restraints. These forbidden practices include price discrimination, exclusive contracts, and holding companies or interlocking directorships that permit control of a company by its competitor. The Act permitted treble damages in suits arising under these new provisions, and it enabled plaintiffs to seek injunctive relief. Thus, the special corporate venue provision in § 12 is but one of several aspects of the Clayton Act that evince a congressional policy to promote private antitrust enforcement.

This textual inference is confirmed by the legislative history of the special corporate venue provision, which shows that Congress intended to shorten and to smooth the antitrust plaintiff's road to the courthouse. Congress strengthened this provision at nearly every step of the legislative process.

As introduced by Congressman Henry Clayton, his bill would have enabled an antitrust plaintiff to sue "not only in the judicial

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32 Sherman Act, July 2, 1890, ch 647, § 7, 26 Stat 209, 210 (1890); which was superseded by Clayton Act, Oct 15, 1914, ch 323, § 4, 38 Stat 731 (1914), codified at 15 USC § 15 (1994); and then repealed by Act of July 7, 1955, ch 283, § 3, 69 Stat 283.
34 See id at 996–1000 (describing such attempts prior to 1914).
35 See id at 1000–23 (summarizing consideration of the Clayton Act).
40 15 USC § 15.
district whereof [a corporate defendant] is an inhabitant, but also in any district wherein it may be found." The House Judiciary Committee report on the bill noted that this provision expanded on existing law, which permitted "a suit against a corporation ... [to] be brought in the district whereof it [was] an inhabitant." Such report language strongly suggests that the Committee intended to broaden the choice of venue for plaintiffs bringing antitrust suits against corporations.

Floor debate on the special venue provision focused on whether to strengthen it. One congressman broached the possibility in general debate by asking that the House not compel those who have suffered damages at the hands of a corporation ... to bring suit in the remote State or district of which the corporation is an inhabitant by virtue of its incorporation therein, having selected that remote State for its home, while it goes forth in remote sections of the country, and where its greed for unlawful gain willfully disregards the rights of others and boldly sets aside the provisions of the law.4

Several members proposed to broaden venue by amending the bill's treble damages provision.45 The House then adopted a committee amendment allowing plaintiffs to sue for treble damages not only where the defendant "resides" or "is found," but also where the defendant has an "agent."46 When the House turned to

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42 HR 15657, 63d Cong, 2d Sess, § 9 (Apr 14, 1914), reprinted in Kintner, 2 Legislative History at 1084 (cited in note 33).
43 Antitrust Legislation, HR Rep No 627, 63d Cong, 2d Sess 20 (1914), reprinted in Kintner, 2 Legislative History at 1100 (cited in note 33) (describing the nascent § 12, then § 10 of the committee amendment).
44 51 Cong Rec 9190 (May 23, 1914).
45 See 51 Cong Rec 9414–17 (May 28, 1914). For views of amendment supporters, see id at 9416 (statement of Congressman Cullop) ("I do not want to make a resident of California come to Trenton, N.J., to bring a suit for violation of this law, but I want him to sue at home in the jurisdiction where the cause of action arose."); id at 9417 (statement of Congressman Dickinson) ("I give the widest liberty of bringing suits where the damage is done and where the action arose."); id at 9467 (May 29, 1914) (statement of Congressman Sumners) ("The philosophy of legislation with regard to this subject should give the venue at the place wherein the cause of action arises."). The Supreme Court has discussed this floor debate at length. See National City Lines I, 334 US 573, 586–88 (1948).
46 For the value of using statements of individual legislators as guides to statutory construction, see Norman J. Singer, 2A Statutes and Statutory Construction § 48.13 at 355–57 (Clark 5th ed 1992). See also Department of Revenue v ACF Industries, Inc, 510 US 332, 346 (1994) (using statements of three members of the House of Representatives to confirm apparent meaning).
the special venue provision for antitrust actions against corporations, members agreed without debate to a parallel amendment permitting suit where the corporation "has an agent."\textsuperscript{47}

The Chairman of the House Judiciary Committee, Congressman Edwin Webb, argued that wherever a corporation "may be found" meant the same thing as wherever it "has an agent."\textsuperscript{48} This perceived equivalence may explain his willingness to add the latter language, but it also may explain why the Senate Judiciary Committee proposed striking out "has an agent" in the special venue provision and replacing it with "transacts any business."\textsuperscript{49} The Senate Committee may have intended the transacting business test to be broader than the agent test; Chairman Webb had hinted that there might have been some states where registering an agent for the service of process was not necessary for a corporation to do business.\textsuperscript{50} But the Senate Committee report provided no explanation for the change,\textsuperscript{51} and the Senate approved this committee amendment without debate.\textsuperscript{52} In conference, the House agreed to the Senate amendment with one minor change, omitting "any" before "business."\textsuperscript{53}

In House debate on the conference report, Chairman Webb described § 12 as one of the "teeth" of the bill, stating that "we are liberalizing the procedure in the courts in order to give the individual who is damaged the right to get his damages anywhere—anywhere you can catch the offender."\textsuperscript{54} The liberalized venue provision had become one of the bill's chief selling points.

\textsuperscript{47} 51 Cong Rec 9607 (June 1, 1914).
\textsuperscript{48} Id at 9608 (colloquy between Congressman Fowler and Congressman Webb).
\textsuperscript{49} HR 15657 as reported by the Senate Committee on the Judiciary, 63d Cong 2d Sess § 10 (July 22, 1914), reprinted in Kintner, \textit{2 Legislative History} at 1762 (cited in note 33).
\textsuperscript{50} See 51 Cong Rec 9608 (June 1, 1914).
\textsuperscript{51} See Report to Accompany HR 15657, S Rep No 698, 63d Cong, 2d Sess 49 (July 22, 1914), reprinted in Kintner, \textit{2 Legislative History} at 1751 (cited in note 33) (stating that §§ 10 and 11 "relate to the venue and issuance of process in suits arising under the antitrust laws. They are proposed to be amended in certain respects . . . but the amendments require no special explanation here").
\textsuperscript{52} See 51 Cong Rec 14324 (Aug 27, 1914); HR 15657 with Senate Amendments Numbered, 63d Cong, 2d Sess § 11 (Sept 3, 1914), reprinted in Kintner, \textit{3 Legislative History} at 2448 (cited in note 33) (numbering the Senate amendment to § 11 as amendment 54).
\textsuperscript{54} 51 Cong Rec 16274 (Oct 7, 1914). Statements of legislators in debate receive little weight in statutory construction, but courts accord more weight to those of the floor manager, committee chairman, or members of the conference committee; Congressman Webb was all three. See Norman J. Singer, \textit{2A Statutes and Statutory Construction} § 48.14 at 361–62 (cited in note 45). See also 51 Cong Rec 16320–21 (Oct 8, 1914) (statement of Congressman Floyd) (describing § 12 as one of the conference report's "teeth"). The House
2. Judicial application of § 12.

On the strength of this historical evidence, courts construing § 12 have taken the view that Congress intended the provision to facilitate private antitrust suits against corporations and thus to improve antitrust enforcement. For example, the Supreme Court held in *Eastman Kodak Co of New York v Southern Photo Materials Co*\(^5\) that § 12 extended federal district courts' reach "so as to establish the venue of [a private antitrust suit against a corporation] not only, as theretofore, in a district in which the corporation resides or is 'found,' but also in any district in which it 'transacts business'—although neither residing nor 'found' therein."\(^5\) To construe that provision more narrowly, the Court argued, would make the transaction of business standard redundant of the residence and "may be found" standards.\(^5\) Such a construction would also defeat the provision's purpose, which was to reliev[e] the injured person from the necessity of resorting for the redress of wrongs committed by a non-resident corporation, to a district, however distant, in which it resides or may be "found"—often an insuperable obstacle—and [to] enabl[e] him to institute the suit in a district, frequently that of his own residence, in which the corporation in fact transacts business.\(^5\)

In *United States v Scophony Corp of America*,\(^5\) the Court applied this expansive interpretation of the special venue provision in an international case.\(^5\) Scophony was an English corporation that sought to produce televisions in New York and to exploit its patents in the United States.\(^5\) Citing *Eastman Kodak* with ap-

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\(^{56}\) Id at 372–73. The facts of this case did not give rise to venue under the Sherman Act: Eastman Kodak, the defendant, had its residence and principal place of business in New York, lacked any office, place of business or resident agent in Georgia, and had not registered there as a nonresident corporation. Id at 370–71. However, the Court held that Kodak's shipment of products to Georgia for sale, its collection of orders from Georgia through nonresident salesmen, and its demonstration of products there amounted to the transaction of business within the meaning of § 12 of the Clayton Act. Id at 372–74.

\(^{57}\) Id at 374.

\(^{58}\) Id at 373–74.

\(^{59}\) *United States v Scophony Corp of America*, 333 US 795 (1948).

\(^{60}\) See id at 808.

\(^{61}\) See id at 810–12.
proval, the Court held that Scophony had transacted business sufficient to give rise to venue in New York under § 12 of the Clayton Act. The expansive view of the intent behind § 12, acknowledged in Scophony and Eastman Kodak, remains good law.

C. 28 USC § 1404(a)

Despite the acknowledged intent behind § 12, courts today view § 12 in the shadow of 28 USC § 1404(a), the general transfer provision, which permits "for the convenience of parties and witnesses, in the interest of justice," the transfer of "any civil action to any other district or division where it might have been brought." For example, in United States v National City Lines ("National City Lines I"), the Court applied § 1404(a) to domestic antitrust litigation, holding that § 12 notwithstanding, § 1404(a) enables courts to invoke forum non conveniens principles and transfer antitrust cases. Courts disagree on what lessons to draw from this holding for international antitrust cases.

II. THE CIRCUITS SPLIT

Clearly the general transfer provision of § 1404(a) is not available if the defendant seeks dismissal in favor of a foreign forum. A foreign court is not a "district or division" to which an American court can "transfer" an action. In international litigation generally, absent a special venue provision, courts may still invoke common-law forum non conveniens. But in the international antitrust context, the federal courts face a dilemma: does

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62 See id at 808 (describing Eastman Kodak as a case where "the Court yielded to and made effective Congress' remedial purpose. . . . A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating . . . to its headquarters defeat or delay the retribution due.").

63 Scophony, 333 US at 818.

64 See, for example, Campos v Ticketmaster Corp, 140 F3d 1166, 1173 (8th Cir 1998) (applying the "transacts business" standard to reverse the trial court's conclusion that the defendant's lack of day-to-day control over a subsidiary defeated venue); Tiger Trash v Browning-Ferris Industries, Inc, 560 F2d 818, 824 (7th Cir 1977) (holding that defendant's theory that a parent's loose control over a subsidiary defeated venue in the subsidiary's state would "thwart the Congressional intent to liberalize the restrictive venue provision in Section 7 of the Sherman Act by enacting Section 12 of the Clayton Act").

65 28 USC § 1404(a).

66 United States v National City Lines, 337 US 78 (1949) ("National City Lines II").

67 See id at 80–82, 84 (applying § 1404(a) to antitrust actions).

68 28 USC 1404(a).

69 See Fitzgerald v Westland Marine Corp, 369 F2d 499, 501–02 (2d Cir 1966) (upholding forum non conveniens dismissal of maritime tort action).
§ 12 require that they hear antitrust actions that courts would otherwise dismiss under forum non conveniens in favor of a foreign court, or do courts retain the discretion to dismiss? Only the Fifth and Second Circuits have taken up this question.

A. The Fifth Circuit’s View: *Mitsui*

In the Fifth Circuit case, *Industrial Investment Development Corp v Mitsui & Co*, a U.S. corporation and its foreign subsidiaries sued an Indonesian corporation, a Japanese corporation, and the latter’s U.S. subsidiary, alleging that the defendants had frozen the plaintiffs out of the Indonesian lumber market. The court reversed the trial court’s forum non conveniens dismissal, holding that “[t]he common law doctrine of forum non conveniens is inapplicable to suits brought under the United States antitrust laws” and citing *National City Lines I* for this proposition. The *Mitsui* court based this holding on Supreme Court precedent, choice-of-law principles, and congressional policy.

The Fifth Circuit construed *National City Lines I* as holding that § 12 of the Clayton Act was a “statutory elimination of judicial discretion concerning where [a] case should be tried.” The *Mitsui* court took this stance in part because it viewed Congress as intending that the plaintiff’s convenience should generally determine the choice of forum. The *Mitsui* defendants relied on *National City Lines II* for the principle that forum non conveniens ought to apply to international antitrust suits. But the Fifth Circuit distinguished that case as involving § 1404(a) transfers between federal courts, and irrelevant to a dismissal in favor of a foreign forum.

Although the court suggested that *National City Lines I* controlled the *Mitsui* outcome, the court also argued independ-
ently of precedent. That the plaintiffs sued under the Sherman Act, the court said, meant they were acting as private attorneys general in enforcing penal provisions of American law. Yet a foreign court applying international law would decline to enforce such penal provisions. Thus, "dismissal for forum non conveniens, then, would be the functional equivalent of a decision that defendants' acts are beyond the reach of the Sherman Act.")

*Mitsui* is susceptible to a third interpretation, beyond precedent and choice of law. Although the court did not discuss whether Indonesia had any antitrust law, the *Mitsui* analysis was in tension with the holding in *Piper Aircraft v Reyno* that a major change in substantive law did not render forum non conveniens unavailable. The Fifth Circuit distinguished *Reyno*, a private tort case, by arguing that "a private antitrust suit is conceived as a part of the scheme of enforcement of statutes enacted to protect United States commerce." The court thus implied that this broad congressional purpose barred forum non conveniens in international antitrust.

Despite some suggestions to the contrary, the Fifth Circuit has not retreated since *Mitsui* from either basis for its view that courts cannot dismiss antitrust cases for forum non conveniens. In *Kempe v Ocean Drilling and Exploration Co*, the Fifth Circuit explicitly rejected the Second Circuit's view that § 1404 overruled *National City Lines I* in the international context. Strangely, however, the *Kempe* court then characterized *Mitsui* as "deny[ing] dismissal on a very narrow and discrete ground—the impossibility of plaintiffs obtaining any remedy at all for their antitrust-

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80 See *Mitsui*, 671 F2d at 891 (arguing that the Sherman Act does not create private obligations but rather criminalizes restraints of trade).
81 Id ("[I]t is a well-established principle of international law that '[t]he Courts of no country execute the penal laws of another.'"), citing *The Antelope*, 23 US (10 Wheat) 66, 123 (1825); Restatement (Second) of Conflicts of Laws § 89 (1971).
82 *Mitsui*, 671 F2d at 891.
84 See id at 247 ("[A] change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry."). Despite the *Mitsui* court's failure to discuss Indonesian law, the Fifth Circuit later interpreted *Mitsui* along *Reyno* lines, as holding that "to determine Indonesia to be the proper forum . . . would, in effect, deprive [ ] [plaintiffs] of any remedy." *Kempe v Ocean Drilling and Exploration Co*, 876 F2d 1138 (5th Cir 1989) (all brackets original), citing *Reyno*, 454 US at 255.
86 See *Kempe*, 876 F2d at 1142, 1144 (relying on *Mitsui* for the proposition that courts cannot dismiss antitrust cases for forum non conveniens).
87 *Kempe v Ocean Drilling and Exploration Co*, 876 F2d 1138 (5th Cir 1989).
88 *National City Lines I*, 334 US 573.
89 See *Kempe*, 876 F2d at 1144.
based claims in Indonesia.\textsuperscript{90} This misdescribes Mitsui's dual holding.\textsuperscript{91} The Mitsui decision depended on National City Lines I,\textsuperscript{92} and nowhere did the Mitsui court discuss whether Indonesian law provided antitrust remedies.

Professor Waller argues that the Fifth Circuit has retreated from its Mitsui holding\textsuperscript{93} because a later Fifth Circuit panel did not refer to Mitsui in deciding American Rice, Inc v Arkansas Rice Growers Cooperative Association.\textsuperscript{94} This argument misinterprets Rice Growers, where the plaintiff alleged trademark and unfair competition violations under the Lanham Act.\textsuperscript{95} The Clayton Act's special venue provision does not extend to actions under the Lanham Act.\textsuperscript{96} Therefore reliance on Mitsui would have been inapposite in a Lanham Act case, and the Rice Growers court correctly avoided venue issues.\textsuperscript{97}

Furthermore, the Fifth Circuit disposed of the Rice Growers defendant's forum non conveniens argument by summarizing the factors, emphasizing that the case involved an American plaintiff alleging that an American defendant had violated American law, and concluding that "the district court did not abuse its discretion" by denying the motion for dismissal.\textsuperscript{98} The Rice Growers court simply ignored any tension between forum non conveniens and special venue. Rice Growers therefore does not support Professor Waller's contention that the Fifth Circuit has retreated from Mitsui. The Fifth Circuit and the Second Circuit disagree on

\textsuperscript{90} See id at 1145.
\textsuperscript{91} See Mitsui, 671 F2d at 891 n 20 ("In this case, the question is whether [forum non conveniens] should apply at all."); id at 890–91 ("Even without the authority of National City Lines [I], we would reach the conclusion that antitrust cases cannot be dismissed on the ground that a foreign country is a more convenient forum.").
\textsuperscript{92} See id at 890.
\textsuperscript{93} See Waller, Antitrust and American Business Abroad § 6.17 at 6-52 n 9 (cited in note 7) ("The force of Mitsui is diminished by the Fifth Circuit's subsequent opinion in the Rice Growers litigation where . . . the Fifth Circuit analyzed a forum non conveniens motion in an antitrust case on the merits without reference to Mitsui.").
\textsuperscript{94} American Rice, Inc v Arkansas Rice Growers Cooperative Association, 701 F2d 408 (5th Cir 1983).
\textsuperscript{95} See American Rice, Inc v Arkansas Rice Growers Cooperative Assoc, 532 F Supp 1376, 1380 (S D Tex 1982) (describing plaintiff's claims as arising under 15 USC §§ 1114(1), 1116(a), and 1125(a)).
\textsuperscript{96} See 15 USC § 22 (authorizing special venue for suits brought "under the antitrust laws"); 15 USC § 12(a) (1994) (defining "antitrust laws" to exclude the Lanham Act).
\textsuperscript{97} See Rice Growers, 701 F2d at 408–18.
\textsuperscript{98} See id at 417.
whether courts can apply forum non conveniens in antitrust, and lower courts are choosing between these approaches.99

B. The Second Circuit’s Analysis: Capital Currency Exchange

In Capital Currency Exchange, NV v National Westminster Bank PLC,100 the Second Circuit’s riposte to Mitsui, a Netherlands Antilles corporation and its New York affiliate sued two English banks in the Southern District of New York, alleging Sherman Act violations.101 The Second Circuit gave two reasons for affirming the district court’s forum non conveniens dismissal.102

The Second Circuit referred to its precedents holding that forum non conveniens trumped other special venue statutes, and described itself as “bound to follow”103 the view it took in Transunion Corp v Pepsico,104 a civil RICO case. Transunion described National City Lines I105 as “effectively overruled” by enactment of § 1404(a).106 In the Second Circuit, then, National City Lines I was “no longer good law, even in cases that are not governed by § 1404(a).”107 Furthermore, Mitsui court relied heavily on then-Chief Judge Breyer’s opinion in Howe v Goldcorp Investments, Ltd,108 which affirmed the use of forum non conveniens in a securities action despite the applicability of a special venue statute.109 In particular, the court found that “Justice Breyer specifically rejected the argument that the holding in National City [Lines] I continues to govern forum non conveniens dismissals.”110

Generally, then, the Second Circuit argued that National City Lines I111 governed domestic cases only and therefore was

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See, for example, Laker Airways Ltd v Pan American World Airways, 568 F Supp 811, 818 (D DC 1983) (“The Court fully agrees with Mitsui.”).


101 Id at 605–06. For a fuller factual account, see text accompanying notes 1–5.

102 Id at 608–09 (affirming forum non conveniens dismissal of private antitrust action).

103 Id at 609.

104 Transunion Corp v Pepsico, 811 F2d 127 (2d Cir 1987).

105 National City Lines I, 34 US 573 (exempting antitrust from forum non conveniens).

106 Transunion, 811 F2d at 130.

107 Capital Currency Exchange, 155 F3d at 608.


109 See id at 945 (affirming dismissal for forum non conveniens of a private securities law action against a Canadian corporation). For an evaluation of whether the Second Circuit accurately interpreted Howe, see text accompanying notes 124–33.

110 Capital Currency Exchange, 155 F3d at 608.

111 National City Lines I, 334 US 573.
entirely overruled by enactment of § 1404(a), while *National City Lines II*\(^\text{112}\) was ambiguous enough to permit forum non conveniens even in cases where § 1404(a) did not apply.\(^\text{113}\) The court also sought support for this general contention in *Howe*.\(^\text{114}\) Lastly, the Second Circuit stated that its precedents compelled the *Capital Currency Exchange* result and forced it to reject the Fifth Circuit's reasoning.\(^\text{115}\) Assessing the circuit split requires examining these claims.

### III. COURTS SHOULD INTERPRET § 12 TO BAR FORUM NON CONVENIENS

This Comment contends that courts should interpret § 12 to block courts from dismissing antitrust suits for forum non conveniens. First, the Second Circuit misinterpreted relevant precedent. Second, history does not support any implication that Congress enacted § 1404(a) to provide forum non conveniens in antitrust cases. Third, the text, evolution, and jurisdictional interpretation of the antitrust laws all support a broad reading of § 12, a reading that gives life to congressional policy favoring antitrust enforcement.

#### A. Capital Currency Exchange Lacks Foundation in Precedent

Gaping cracks riddle the precedential foundation undergirding *Capital Currency Exchange*.\(^\text{116}\) The Second Circuit based its ruling on a flimsy line of cases involving clearly distinguishable special venue provisions. The court also leaned heavily on a misinterpretation of a First Circuit case and depended on strained readings of relevant Supreme Court precedent.

The Second Circuit cases upon which the *Capital Currency Exchange* court built, *Cruz v Maritime Co of Philippines*\(^\text{117}\) and *Transunion*,\(^\text{118}\) provide little support for the *Capital Currency Exchange* holding. First, *Transunion* relied on *Cruz* for the proposition that forum non conveniens can trump a special venue provi-

\(\text{112}\) *National City Lines II*, 337 US 78.

\(\text{113}\) See text accompanying notes 134–40.

\(\text{114}\) *Howe*, 946 F2d 944. For a discussion of *Howe*, see text accompanying notes 130–33.

\(\text{115}\) *Capital Currency Exchange*, 155 F3d at 609.

\(\text{116}\) *Capital Currency Exchange*, 155 F3d 603 (2d Cir 1998).

\(\text{117}\) *Cruz v Maritime Co of Philippines*, 702 F2d 47 (2d Cir 1983).

\(\text{118}\) *Transunion Corp v Pepsico*, 811 F2d 127 (2d Cir 1987).
sion. Yet if Cruz stands for this proposition, it does so only implicitly. While the two-page, per curiam Cruz opinion did conclude that forum non conveniens could apply in a Jones Act case, nowhere did the court discuss special venue generally or the Jones Act's special venue provision. This silence renders Cruz dubious authority for the proposition that a special venue provision permits a forum non conveniens dismissal; there is no evidence from the Cruz opinion that the parties even briefed the issue.

Only later, in Transunion, did the Second Circuit take note of the Jones Act's special venue provision, which the Cruz opinion had overlooked. Despite the lacuna in Cruz, and without filling it by treating the question at any length, the Transunion court derived from Cruz the rule that forum non conveniens overrides a special venue statute. The court upheld forum non conveniens dismissal of a civil RICO action, despite an applicable special venue provision that was modeled on antitrust law.

Importantly, the Transunion court acknowledged the strength of the legislative history behind the Clayton Act's special venue provision, but argued that the absence of similar history of the RICO statute justified applying forum non conveniens to RICO litigation. In using legislative history to distinguish anti-

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119 See id at 130 ("[D]ismissal on forum non conveniens grounds has been upheld in many other cases involving statutes with special venue provisions.").
120 Cruz, 702 F2d at 48 (affirming the district court's use of the "equitable principle" of forum non conveniens to dismiss a seaman's tort action against a Philippine maritime firm).
122 See generally Cruz, 702 F2d 47 (per curiam).
123 46 USC § 688(a).
124 Transunion, 811 F2d 127 (2d Cir 1987) (affirming district court's dismissal for forum non conveniens of a suit that a Philippine corporation had brought against an American corporation, alleging RICO violations, fraud, and breach of contract).
125 See id at 130 (noting the special venue provision in the Jones Act).
126 See id (rejecting argument that special venue provision blocked forum non conveniens dismissal).
127 See id. The special venue provision at issue was 18 USC § 1965(a) (1994).
128 See Transunion, 811 F2d at 130:

The decision in National City Lines [I] was based upon a thorough review of legislative history of the Clayton Act. . . . A review of the legislative history of RICO [] discloses no mandate that the doctrine of forum non conveniens should not apply, nor is there any indication that Congress had the interpretation of 15 U.S.C. § 22 in National City Lines [I] in mind when it drafted section 1965 of RICO. Indeed, the House Report's reference to "present" antitrust legislation suggests that Congress was aware
trust from RICO, and to justify using forum non conveniens in RICO, the *Transunion* court described the history of §12 of the Clayton Act as disclosing "no other thought than that the choice of forums was given as a matter of right, not as one limited by judicial discretion."\(^{129}\) Such a view of the Clayton Act would bar forum non conveniens from antitrust cases. If the *Capital Currency Exchange* court had correctly followed the *Transunion* analysis, the Second and Fifth Circuits would agree.

The *Capital Currency Exchange* court also found support for its holding by badly misinterpreting then-Chief Judge Breyer's opinion in *Howe*,\(^ {130}\) a securities case. The Breyer opinion did strongly disparage the view that special venue statutes always operate to deprive courts of forum non conveniens discretion.\(^ {131}\) Yet like *Transunion*, *Howe* carefully exempted antitrust from this disparagement. Justice Breyer noted that in *National City Lines I*,\(^ {132}\) the Supreme Court "relied heavily on the legislative history of the antitrust statute"—legislative history once again absent from the special venue provision of securities law at stake in *Howe*—and that the "difference [between the legislative history of the two provisions] is significant."\(^ {133}\) Thus *Howe* should not control in antitrust, and the Second Circuit erred in citing it.

Lastly, the *Capital Currency Exchange* court read the *National City Lines* cases illogically. It interpreted *National City Lines I* overly narrowly, as prohibiting domestic forum non conveniens transfers.\(^ {134}\) Yet the defendants in that case moved to dismiss, not to transfer, as the law then did not permit transfers

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that the result in *National City Lines I* was effectively overruled by Congress in 1948, when it enacted 28 U.S.C. § 1404(a).

The court's understanding of "present" to mean the general transfer statute begs the question of how to interpret *National City Lines I*, 334 US 573.

\(^ {129}\) *Transunion*, 811 F2d at 130, quoting *National City Lines I*, 334 US at 586-87.

\(^ {130}\) *Howe*, 946 F2d 944.

\(^ {131}\) Id at 948-50.

\(^ {132}\) 334 US 573 (1948).

\(^ {133}\) *Howe*, 946 F2d at 948-49. See also id at 949 ("Neither [the general nor the special] kind of [venue] statute, explicitly or (absent some special legislative intent) implicitly, prohibits an international transfer [sic.]") (emphasis added); id at 944 ("We conclude that the federal courts possess the power to invoke the forum non conveniens doctrine in a private action claiming a violation of American anti-fraud securities statutes, as they do in cases brought under most other federal statutes.") (emphasis added).

\(^ {134}\) *Capital Currency Exchange*, 155 F3d at 606 ("In *National City Lines I*, the Supreme Court held that forum non conveniens could not be used to transfer an antitrust suit to a more convenient forum within the United States.").
between district courts.\textsuperscript{135} Then, as now, to apply forum non conveniens meant to dismiss. Although the case was entirely domestic, the court did not limit its holding to dismissals in favor of domestic fora,\textsuperscript{136} which would have been hard to do, since § 12 does not distinguish between domestic and foreign plaintiffs.\textsuperscript{137}

Conversely, the Second Circuit read \textit{National City Lines II}\textsuperscript{138} overly broadly, to reach beyond the domestic ambit of § 1404(a).\textsuperscript{139} However, the Court there confined its holding to the domestic transfer context.\textsuperscript{140} To stretch this result beyond the narrow domestic transfer context of § 1404(a) strains the text of both the statute and the Court's opinion.

B. Congress Did Not Enact § 1404(a) Out of Concern for Foreign Antitrust Defendants

Although by its text § 1404(a) authorizes domestic transfers and not international dismissals, both the Second and First Circuits used it to justify their dismissals of international claims.\textsuperscript{141} This reading is dubious: Congress did not enact § 1404(a) either to cabin American jurisdiction or to shield foreign defendants.

\textsuperscript{135} See \textit{National City Lines I}, 334 US at 576–77 (summarizing the defendants' motion for dismissal and the trial court's grant of it "without prejudice to the institution of a similar suit" in a more convenient forum).

\textsuperscript{136} See id at 596–97:

\textit{At least one invariable, limiting principle may be stated. . . . [W]henever Congress has vested courts with jurisdiction to hear and determine causes and has invested complaining litigants with a right of choice among them which is inconsistent with the exercise by those courts of discretionary power to defeat the choice so made, the doctrine [of forum non conveniens] can have no effect.}

\textsuperscript{137} See notes 157–62 and accompanying text.

\textsuperscript{138} \textit{National City Lines II}, 337 US 78.

\textsuperscript{139} See \textit{Capital Currency Exchange}, 155 F3d at 607, quoting \textit{National City Lines II}, 337 US at 79:

\textit{Although its decision was based upon § 1404(a), the [National City Lines II] Court did not explicitly limit its holding to cases governed by § 1404(a). . . . [It] did not distinguish § 1404(a) from the common law doctrine of forum non conveniens, noting that the issue before it was whether § 1404(a) "extends the doctrine of forum non conveniens to antitrust suits."}

\textsuperscript{140} \textit{National City Lines II}, 337 US at 84 ("We hold that § 1404(a) is applicable here.").

\textsuperscript{141} See \textit{Capital Currency Exchange}, 155 F3d at 609 ("National City II . . . did not draw a bright-line distinction between transfers under § 1404(a) and . . . forum non conveniens."); Howe, 946 F2d at 949 ("[Section] 1404(a) . . . reflects a congressional policy strongly favoring transfers.").
Both circuits have implied that the chronological propinquity in June 1948 of the National City Lines I opinion and the enactment of § 1404(a) suggests that Congress responded to the opinion by passing the statute. If Congress had done so, it might have set a legislative speed record. But the implication gets the chronology wrong, as a glance at the history shows. Section 1404(a) became law as part of a massive revision and recodification of Title 28 of the United States Code—a recodification that Congress and the private bar had gestated for years. The Supreme Court itself has noted the futility of attempting to link the recodification to National City Lines I.

In enacting § 1404(a), instead of reacting to National City Lines I, Congress responded to an entirely domestic federal tort suit brought under a special venue provision of the Federal Employers' Liability Act. The report accompanying the recodification

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142 334 US 573 (1948).
143 See Capital Currency Exchange, 155 F3d at 607 (observing that § 1404(a) became law “in September 1948, shortly after National City Lines I was decided”); Howe, 946 F2d at 949 (noting that Congress enacted the transfer provision “immediately after” the Court issued its ruling in National City Lines I, implying a connection between the ruling and the statute). But see National City Lines II, 337 US at 82 (explaining the timing); Mitsui, 671 F2d at 880 n 18 (accurately describing the two as “unrelated”).
144 Compare National City Lines I, 334 US at 573 (“Decided June 7, 1948”) and id at 862 (denying rehearing on June 21, 1948) with Act of June 25, 1948, Pub L No 80-773, ch 646, § 1404(a), 62 Stat 937, codified at 28 USC § 1404(a). The full House debated the recodification on May 12, 1947, see 93 Cong Rec 5049, and passed it on July 7, 1947, see 93 Cong Rec at 8392; the Senate passed the recodification on June 12, 1948, see 94 Cong Rec 7927. The district court had issued its opinion in National City Lines I on September 29, 1947. United States v National City Lines, 7 FRD 456, 456 (S D Cal 1947).
147 See Collett, 337 US at 65 (“This was scarcely hasty, ill-considered legislation. . . . Five years of Congressional attention supports [sic] the [Judicial Code].”; National City Lines II, 337 US 78, 82 (1949) (“Clearly, the failure of Congress expressly to consider [National City Lines I] proves nothing.”).
148 See Baltimore & Ohio Railroad Co v Kepner, 314 US 44, 54 (1941) (holding that the special venue provision of the Federal Employers' Liability Act “cannot be frustrated for reasons of convenience or expense”).
149 See 45 USC § 56 (1994) (“Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action.”).
tion bill cited the tort case as justification for what would become § 1404(a). This legislative history suggests that Congress did intend to limit the effect of certain special venue statutes, but only to provide relief to domestic defendants. To permit domestic transfers would have only minimally addressed the plight of foreign defendants haled into American courts.

Thus § 1404(a) cannot serve as indirect support for applying forum non conveniens. Section 1404(a) did nothing to impair § 12's textual breadth, statutory context, purpose and interpretive history, which direct courts not to dismiss antitrust suits for forum non conveniens.

C. To Apply Forum Non Conveniens
Ignored Congressional Policy

Section 12 of the Clayton Act evinces in several ways a congressional policy to vest the choice of forum in the plaintiff as "a matter of right, not as one limited by judicial discretion." By its text and context, and under most applicable canons of statutory interpretation, § 12 does not admit of qualification. More generally, courts apply the antitrust statutes extraterritorially. To dismiss antitrust suits for forum non conveniens would fly in the face of both a congressional policy that courts have long recognized and a statute that they have broadly interpreted.

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150 See House Committee on the Judiciary, Revision of Title 28, United States Code, HR Rep No 308, 80th Cong, 1st Sess, A132 (1947) (reviser's notes), citing Baltimore & Ohio Railroad v Kepner, 314 US 44 (1941), and stating that § 1404(a):

was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see ... Kepner, which was prosecuted under the Federal Employer's [sic] Liability Act in New York, although the accident occurred and the employee resided in Ohio.

151 But see Brunette Machine Works, Ltd v Kockum Industries, Inc, 406 US 706, 714 (1972) (holding that the Alien Venue Act, 28 USC § 1391(d), which also debuted in the 1948 recodification, "is properly regarded, not as a venue restriction at all, but rather as a declaration of the long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special"). Brunette would seem to have implications for interpreting § 12, but neither the Mitsui court nor the Capital Currency Exchange court discussed it.

152 National City Lines I, 334 US at 586–87 ("There was ... common agreement upon this among both the advocates and the opponents of [§ 12]. No one suggested that the courts would have discretionary power to decline to exercise the jurisdiction conferred.").

153 See text accompanying notes 157–64.
154 See text accompanying note 165.
155 See text accompanying notes 170–74; but see text accompanying notes 175–78.
156 See text accompanying notes 187–200.
1. Statutory text and history.

Section 12, read in isolation, presents little ambiguity. It provides special venue for "[a]ny suit, action, or proceeding under the antitrust laws against a corporation." Because dictionaries define "any" broadly, the phrase "any suit" ostensibly would include suits by foreign plaintiffs. But courts construe ambiguous language using a canon against extraterritoriality, unless a contrary intent appears in the statute. Looking at § 12 in isolation, then, the canon might narrow "any suit" so as to permit courts to dismiss foreign plaintiffs' antitrust suits.

But evidence of contrary intent lies close at hand. If § 12 alone is obscure, it becomes plain when considered in conjunction with other antitrust provisions. They permit "any person" to sue violators of the antitrust laws, and the Clayton and Sherman Acts both define "person" to include foreign corporations. The Clayton Act's special venue provision therefore governs suits brought by foreign plaintiffs. Similarly, the special venue stat-

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157 15 USC § 22 ("Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business.").

158 See James A.H. Murray et al, eds, The Oxford English Dictionary 378 (1933 reprinted 1961) (defining "any" as an "indeterminate derivative of one" that subordinates the idea of unity "to that of indifference as to the particular one or ones that may be selected" or as "concerning a being or thing of the sort named, without limitation as to which, and thus constructively of every one of them, since every one may in turn be taken as a representative"). See also Philip Babcock Gove, ed, Webster's Third New International Dictionary of the English Language, Unabridged 97 (Merriam-Webster 1986) (defining "any" first as "one indifferently out of more than two: one or some indiscriminately of whatever kind" or "one, no matter what one: every," and noting that "any" is used to indicate "one that is not a particular or definite individual of the given category but whichever one chance may select" and "one that is selected without restriction or limitation of choice"); Stuart Berg Flexner, ed, The Random House Dictionary of the English Language 96 (2d ed 1987) (defining "any" first as "one, a, an or some; one or more without specification or identification," second as "whatever or whichever it may be," and fourth as "every, all"); The American Heritage Dictionary 83 (Houghton Mifflin 3d ed 1992) (defining "any" first as "[o]ne, some, every, or all without specification").

159 See Equal Employment Opportunity Commission v Arabian American Oil Co, 499 US 244, 248, 258 (1991) ("Aramco"), which recast as a clear-statement rule the earlier presumption against extraterritoriality. That presumption was set forth most fully in Foley Brothers Inc v Filardo, 336 US 281, 285 (1949), citing Blackmer v United States, 284 US 421, 437 (1932) ("The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States ... is a valid approach whereby unexpressed congressional intent may be ascertained.").

160 15 USC 15(a).

161 See 15 USC §§ 7, 12(a) (1994) (defining "person" to include "corporations ... existing under or authorized by ... the laws of any foreign country").

162 Given the explicit inclusion of foreign corporations in "person," see note 161, it would be incongruous not to understand the term "any person" as implicitly including
ute does not distinguish between foreign and domestic corporate defendants. The chief penal provisions of the Sherman Act and the Clayton Act apply to both. Section 12 creates special venue for suits by those injured "by reason of anything forbidden in the antitrust laws." Hence special venue lies for suits against foreign corporations.

Construing § 12 to include actions brought either by foreign plaintiffs or against foreign corporate defendants or both conforms it with broader antitrust provisions. Both the Sherman and Clayton Acts mention foreign commerce in the same breath as interstate commerce, often using the constitutional phrase "commerce with foreign nations." Courts agree that in antitrust, Congress intended to exercise its power over foreign commerce to the full extent allowed by the Constitution.

This view finds support in congressional debate on the Clayton Act—debate which showed that the House of Representatives knew of the Sherman Act's international impact. Early federal prosecutions against shipping lines, and one similar private action, had already established that the Sherman Act covered even restraints of trade formed abroad that operate only partly in the

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15 USC § 1 (1994) ("Every person [contracting, combining or conspiring in restraint of trade] ... shall be deemed guilty of a felony."); 15 USC § 2 (1994) ("Every person [monopolizing trade] shall be deemed guilty of a felony."); 15 USC § 13(a) ("It shall be unlawful for any person ... to discriminate in price."); see also note 161.

164 15 USC § 15.

165 See US Const Art I, § 8 cl 1–3 ("The Congress shall have power ... To regulate Commerce with foreign Nations."); 15 USC § 1 (making illegal "every contract, combination ... or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations"); 15 USC § 2 (making monopolization of "any part of the trade or commerce among the several States, or with foreign nations" a felony); 15 USC § 3 (1994) (banning restraints of trade among territories, states, the District of Columbia, and "any ... foreign nations"); 15 USC § 12 (defining "commerce" as used in the Clayton Act to mean "trade or commerce among the several states and with foreign nations").

166 See Summit Health, Ltd v Pinhas, 500 US 322, 329 n 10 (1991) ("It is firmly settled that when Congress passed the Sherman Act, it 'left no area of its constitutional power [over commerce] unoccupied.'") (internal citation omitted); Gough v Rossmoor Corp, 487 F2d 373, 375 (9th Cir 1973) (stating that Congress intended to extend the Sherman Act "to the farthest reaches of its power under the Commerce Clause"); 20 Cong Rec 1167 (Jan 25, 1899) (statement of Senator Sherman) ("[The Sherman Bill] makes such agreements and combinations unlawful, and it goes as far as the Constitution permits Congress to go."). But see a non-antitrust case, Aramco, 499 US at 251 ("[W]e have repeatedly held that even statutes that contain broad language in their definitions of 'commerce' that expressly refer to 'foreign commerce' do not apply abroad.").
United States. While discussing what would become § 12, a congressman alerted the House of Representatives to two Sherman Act suits pending against foreign shipping lines. As they debated the Clayton Act, therefore, members of the House knew that foreign corporations were defending themselves in U.S. fora against antitrust claims.

2: Canons of construction.

Given the statutory evidence, both textualists and historians might conclude that § 12 bars forum non conveniens entirely. Yet others may object that Congress cannot have settled the matter in 1914, particularly since forum non conveniens then was a nameless, inchoate doctrine most prominent in admiralty. Judges

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See also Thomsen v Union Castle Mail Steam Ship Co, 166 F 251, 253 (2d Cir 1908) (reversing dismissal of action alleging that one German and several British shipowners entered into combination in restraint of trade between the United States and South Africa: "That the combination was formed in a foreign country is [ ] immaterial.").

affd as Thomsen v Cayser, 243 US 66, 88 (1917) (holding that this combination, though formed abroad, "affected the foreign commerce of this country and was put into operation here" and was therefore subject to U.S. antitrust law).

See also United States v Hamburg-Amerikanische Packet-Fahrt-Actien-Gesellschaft, 200 F 806, 806–07 (C C S D NY 1911), dismissed in part as United States v Hamburg-American Steam Ship Line, 216 F 971 (S D NY 1914), revd on grounds of mootness 239 US 466 (1916), where the trial court stated:

The prohibitions of the anti-trust [sic] statute apply broadly to contracts in restraint of trade or commerce with foreign nations.... Citizens of foreign nations are not free to restrain or monopolize the foreign commerce of this country by entering into combinations abroad nor by employing foreign vessels to effect their purpose.

The defendants in Hamburg-Amerikanische were shipping lines—one American, one Canadian, one Belgian, one Dutch, one Russian, two German, and four British. 239 US at 468–70.

168 See 51 Cong Rec 9416 (May 28, 1914) (statement of Congressman Alexander). In addition to Hamburg-Amerikanische and Thomsen, Congressman Alexander may have noticed United States v Prince Line, Ltd, 220 F 230, 232 (S D NY 1915) (alleging that two British and two German shipping companies had restrained trade between the United States and Brazil), revd on mootness grounds 242 US 537 (1917). Plaintiffs also alleged that one German, eight British, and two American steamship lines had combined in restraint of trade between the United States and the Far East. Prince Line, 220 F at 235.

World War I destroyed the shipping cartels alleged in these cases. But an early treatise acknowledged their import for antitrust's extraterritoriality. See W.W. Thornton, A Treatise on Combinations in Restraint of Trade § 66 at 177–78 (Anderson 1928).
skeptical of extraterritoriality\textsuperscript{169} might resort to canons of construction. But three general canons support the view that forum non conveniens should not apply in antitrust cases.

First, courts canonically disfavor implied amendments.\textsuperscript{170} Enactment of § 1404(a) permitted transfers between the district courts, and thus implicitly amended § 12 by balancing the plaintiff's choice of special venue against a defendant's right to transfer to another domestic forum. Textually, however, no amendment balanced a plaintiff's choice of special venue against a defendant's right to transfer to a foreign forum, because § 1404(a) by its text created no such right.\textsuperscript{171} Therefore, courts should not construe § 1404(a) as if it did.\textsuperscript{172}

Second, specific provisions of law canonically trump general ones.\textsuperscript{173} Thus § 12, which creates special venue for international, private antitrust actions against corporations, should prevail over any pro-dismissal penumbra of § 1404(a), a general domestic transfer provision.

Third, courts canonically avoid creating exemptions not provided for by text, even where there is legislative history demonstrating congressional intent to provide the exemption.\textsuperscript{174} The presumption against creating nontextual exemptions should apply more forcefully to § 12, which lacks any legislative history suggesting an exemption to special venue in international cases.

One canon may support forum non conveniens in antitrust: the "rule against congressional curtailment of the judiciary's 'in-

\textsuperscript{169} For a discussion of extraterritoriality and antitrust, see Part III C 3.

\textsuperscript{170} See United States v Welden, 377 US 95, 103 n 12 (1964) ("Amendments by implication, like repeals by implication, are not favored."); Norman J. Singer, 1A Statutes and Statutory Construction § 22.13 at 215-17 & n 3 (Clark 5th ed 1994) (collecting cases).

\textsuperscript{171} But see Norman J. Singer, 3A Statutes and Statutory Construction § 67.04 at 70, 72 & nn 13, 14 (Clark 5th ed 1992) (stating both that "[s]tatutes providing for venue . . . are given a liberal interpretation to avoid unnecessary litigation" and that "statutes authorizing change of venue are liberally construed to assure a fair trial to the parties"). Construction of service of process provisions is normally strict, but "statutes permitting substituted service upon foreign corporations have usually been given a broad interpretation so that foreign corporations doing business in the state cannot escape process." Id at 70.

\textsuperscript{172} See Norman J. Singer, 2B Statutes and Statutory Construction § 53.01 at 229-30 (Clark 5th ed 1992) ("[C]ourts have been said to be under a duty to construe statutes harmoniously where that can reasonably be done.").

\textsuperscript{173} See Green v Bock Laundry Machinery Co, 490 US 504, 524 (1989) ("A general statutory rule usually does not govern unless there is no more specific rule."); Crawford Fitting Co v J.T. Gibbons, Inc, 482 US 437, 444-45 (1987) ("[W]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.") (citations omitted).

\textsuperscript{174} See City of Chicago v Environmental Defense Fund, 511 US 328, 337 (1993) (refusing to create an exemption provided for in committee report language, but not in the text of the statute).
Among those inherent powers, the Supreme Court has suggested in dictum, is forum non conveniens. But to regard forum non conveniens as an inherent power in antitrust would overlook the Gilbert Court's statement that forum non conveniens permits courts to dismiss cases that are proper under general venue statutes. The Gilbert Court did not address whether a court's inherent power to dismiss overrides a special venue statute. The National City Lines I Court did, and found that § 12 trumps courts' inherent powers to dismiss.

These general canons, however, may not actually do much work to help a court interpret § 12. It is commonplace to observe that canons are largely indeterminate. For example, one might argue that § 12 is in derogation of common-law forum non con-

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176 Chambers, 501 US at 44 ("There are other facets to a federal court's inherent power .... It may dismiss an action on grounds of forum non conveniens.").


178 See id at 507 ("The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.").

179 National City Lines I, 334 US 573.

180 The Court phrased its conclusion in convenience terms:

In adopting § 12 Congress was not willing to give plaintiffs free rein to haul defendants hither and yon at their caprice. But neither was it willing to allow defendants to hamper or defeat effective enforcement by claiming immunity to suit in districts where by a course of conduct they had violated the Act with the resulting outlawed consequences. In framing § 12 to include those districts at the plaintiffs' election, Congress thus had in mind not only their convenience but also the defendant company's inconvenience, and fixed the limits within which each could claim advantage in venue and beyond which neither could seek it. ....

In the face of this history we cannot say that room was left for judicial discretion to apply the doctrine of forum non conveniens so as to deprive the plaintiff of the choice given by the section. That result .... would be utterly inconsistent with the purpose of Congress in conferring the broader range of choice.

National City Lines I, 334 US at 588 (citation omitted, emphasis added). See also Baltimore & Ohio Railroad Co v Kepner, 314 US 44, 54 (1941) ("A privilege of venue, granted by the legislative body which created this right of action, cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative."); Tivoli Realty v Interstate Circuit Inc, 167 F2d 155, 158 (5th Cir 1948) ("[T]he importance of unhampered commerce was as great as that of the [defendant's] freedom from harassing litigation, and did not outweigh the plain grant of a legal privilege as to venue .... The general rule is that a court possessing jurisdiction must exercise it if the venue is properly laid.").

181 See Karl Llewellyn, Remarks on the Theory of Appellate Decision and the Rules of Canons About How Statutes Are To Be Construed, 3 Vand L Rev 396, 401 (1950) ("[T]here are two opposing canons on almost every point.").
veniens\textsuperscript{182} and cite the canon that courts should construe such statutes narrowly.\textsuperscript{183} However, the relevant counter-canon, that courts should construe remedial statutes broadly, has an antitrust-specific corollary: exemptions to the antitrust statutes should be narrowly construed.\textsuperscript{184} Not surprisingly, some experts believe that many canons of construction are simply inaccurate.\textsuperscript{185}

Antitrust provides a salient example of this inaccuracy. The Supreme Court has held that the traditional canon against applying American law extraterritorially does not pertain to antitrust.\textsuperscript{186} Antitrust law is exceptional in its international scope.\textsuperscript{187}

3. Antitrust's extraterritoriality.

The Supreme Court initially hesitated to apply the antitrust laws to activity occurring wholly abroad. In 1909 Justice Holmes wrote that the antitrust laws did not extend to an American corporation's acts that were legal in Panama but that restrained trade in bananas with the United States.\textsuperscript{188} Yet the Court soon

\textsuperscript{182} Given the doctrine's history, however, one might well debate whether forum non conveniens had become part of the common law by 1914. See Part I A.


\textsuperscript{184} See Department of Treasury \textit{v} Fabe, 508 US 491, 516 (1993) (Kennedy dissenting) ("rule that exemptions from the antitrust laws are to be construed narrowly"), citing both \textit{Union Labor Life Ins Co v Pireno}, 458 US 118, 126 (1982) ("[O]ur precedents consistently hold that exemptions from the antitrust laws must be construed narrowly.") and \textit{Group Life & Health Ins Co v Royal Drug Co}, 440 US 204, 231 (1979) ("It is well settled that exemptions from the antitrust laws are to be narrowly construed. This doctrine is not limited to implicit exemptions from the antitrust laws, but applies with equal force to express statutory exemptions."); \textit{Federal Maritime Commission v Seatrain Lines, Inc}, 411 US 726, 733 (1973) (describing this principle as the Court's "frequently expressed view").

\textsuperscript{185} See Richard Posner, \textit{Statutory Interpretation—In the Classroom and in the Courtroom}, 50 U Chi L Rev 800, 806 (1983) ("[M]ost of the canons are just wrong.").

\textsuperscript{186} See \textit{Hartford Fire Insurance Co v California}, 509 US 764, 796 (1993) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.") (collecting cases and commentaries); id at 814 (Scalia dissenting) ("We have [ ] found the presumption [against extraterritoriality] to be overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially.").


\textsuperscript{188} See \textit{American Banana Co v United Fruit Co}, 213 US 347, 356–57 (1909) (using a territorial rule of jurisdiction to hold that defendant's conduct was beyond the reach of U.S. law).
retreated from this foreign legality test. Judge Learned Hand clarified the matter in *United States v Aluminum Company of America* ("Alcoa") by ruling that agreements made abroad in restraint of trade violate the Sherman Act "if they were intended to affect imports and did affect them." This effects test prevailed before the Supreme Court in the ensuing decades, and Congress codified a version of the effects test in the Foreign Trade Antitrust Improvements Act of 1982.

In line with their determination of extraterritoriality, the courts have also determined that § 12 permits worldwide service of process. Interestingly, however, it seems that few opinions written before 1990 used the word "worldwide" in describing § 12, preferring "nationwide" or the ambiguous "extraterritory-
Earlier opinions tended to advert obliquely at best to § 12′s implications for service abroad. The issue of extraterritoriality also arises when administrators interpret and enforce antitrust statutes. The Federal Trade Commission and the Antitrust Division of the Department of Justice have issued enforcement guidelines that contain expansive views of antitrust's extraterritoriality. The agencies defend the effects test by noting that other countries are adopting it.

Both courts and agencies thus have given effect to the antitrust laws' expansive purpose by construing their jurisdiction broadly. It therefore would be inconsistent for courts to construe

196 Ambiguous because there is no federal general incorporation law; therefore "extra-territorial" could mean either "worldwide" or merely "out-of-state."

197 See, for example, Hoffman Motors Corp v Alfa Romeo SpA, 244 F Supp 70, 79–80 (S D NY 1965) (stating, but neither holding nor providing citations for the proposition, that there is "no reason to limit the provisions of [15 USC] § 22 so as to apply only to service within the United States"); Petroleum Financial Corp v Stone, 116 F Supp 426, 428 (S D NY 1953) ("By virtue of section 12 of the Clayton Act, there are no territorial limits upon service of the corporate defendant in a private anti-trust action.") (citing cases that related to domestic service only). But see Herbert Hovenkamp, Personal Jurisdiction and Venue in Private Antitrust Actions in the Federal Courts: A Policy Analysis, 67 Iowa L Rev 485, 507 (1982) ("Section 12 of the Clayton Act provides for . . . worldwide service of process wherever the defendant may be found.").

198 The Sherman and Wilson Tariff Acts empower United States Attorneys to sue for damages or injunctive relief. See 15 USC §§ 4, 9 (1994). If against corporations, such suits fall under § 12 of the Clayton Act. See 15 USC § 22 (creating special venue for "any suit, action, or proceeding under the antitrust laws against a corporation").

199 See United States Department of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations 12 (1995) ("Anticompetitive conduct that affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved.").

200 Id at 12 n 51 ("In a world in which economic transactions observe no boundaries, international recognition of the 'effects doctrine' of jurisdiction has become more widespread."). See James F. Rill, Creating and Maintaining Competition in a Common Market: The Future of Antitrust in an Integrated World Economy, 1992 U Chi Legal F 263, 273–74 ("Countries from Canada to Czechoslovakia now employ the 'effects' test in their anti-trust statutes and enforcement policies."). See also notes 272–73 and accompanying text.

201 See Carnation Co v Pacific Westbound Conference, 383 US 213, 218 (1966) ("We have long recognized that the antitrust laws represent a fundamental national economic policy."); Northern Pacific Railway Co v United States, 356 US 1, 4 (1958) (describing the Sherman Act as a "comprehensive charter of economic liberty"); United States v South-Eastern Underwriters Assn, 322 US 533, 558 (1944) ("That Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . . admits of little, if any, doubt. The purpose was to use that power to make of ours, so far as Congress could under our dual system, a competitive business economy.") (citations omitted); D.R. Wilder Manufacturing Co v Corn Products Refining Co, 236 US 165, 173–74 (1915) (noting that with the Sherman Act, Congress "intended in the most comprehensive way to provide against combinations or conspiracies in restraint of trade or commerce"); Laker Airways, 568 F Supp at 818 ("[T]he antitrust laws of the United States embody a specific congressional purpose to encourage the bringing of private claims in the American courts in order that the national policy against monopoly may be vindicated."). See also note 166.
§ 12 to permit forum non conveniens dismissal in international antitrust cases. Courts have little textual, contextual, precedential, canonical, or administrative basis to dismiss cases in favor of more convenient foreign fora, particularly since Congress enacted § 12 in order to encourage enforcement.


Given antitrust’s settled extraterritoriality, courts should not flout congressional policy to shorten an antitrust plaintiff’s road to the courthouse. In particular, courts should retrospectively regard § 12 as a coherent legislative weighing of the public interest in antitrust enforcement against the convenience factors that the Supreme Court later enumerated in Gilbert. Recall that the public interest factors include docket management, the need to reduce the burden of jury service on a local community unrelated to the case, the desire to hold a trial within view of those whose affairs it touches, and the “local interest in having localized controversies decided at home.”

The last factor is hard for courts to apply in international antitrust: how to localize a controversy that stems from a possibly international conspiracy with certainly international effects? Courts and Congress have responded with the effects test: local controversies include international antitrust suits that arise out of conduct that affects American markets. This interpretation may even expand on legislative intent expressed during debate on the Clayton Act. Congressman Cullop argued that he wanted the antitrust plaintiff “to sue at home in the jurisdiction where the cause of action arose.” Other members of the House specifically stated their desire that plaintiffs sue where they sustained anti-

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202 See National City Lines I, 334 US at 588 (“[J]udicial discretion to apply the doctrine of forum non conveniens so as to deprive the plaintiff of the choice given by [§ 12] . . . would be utterly inconsistent with the purpose of Congress in conferring the broader range of choice.”).

203 See National City Lines I, 334 US at 587:

No one [in the House] suggested that the courts would have discretionary power to decline to exercise the jurisdiction conferred. But since it was universally agreed that the choice of venue, to whatever extent it might be conferred, was to be given as a matter of right, several of the broader amendments were opposed and defeated as going too far.

204 Gilbert, 330 US 501. For the factors, see text accompanying notes 21–24.

205 Id at 508–09.

206 See text accompanying notes 191–93.

207 51 Cong Rec 9416 (May 28, 1914).
trust injuries. Under the Clayton Act and the effects test, then, "home" may be where the hurt is—where allegedly anticompetitive behavior injured U.S. citizens (not necessarily the plaintiffs).

By firmer reasoning, if the effects test justifies jurisdiction, then the case and the local community are not unrelated. Jurors there have a stake in preventing antitrust injury to themselves, and the case goes to trial in view of those it touches. An American district may not be the place most affected by the alleged antitrust violation at issue; but Congress surely can inconvenience the jury-serving public in order to advance antitrust enforcement. Voters have political remedies if jury duty overburdens them.

Consider also the private interest factors at stake in a forum non conveniens determination: access to proof, availability of compulsory process, the cost of obtaining witnesses, and "all other practical problems that make trial of a case easy, expeditious and inexpensive." Such practical problems existed in 1914 just as today, yet the convenience of defendants lost out during debate on the Clayton Act. Courts cannot ignore this judgment; they must conform federal common law to the legislative will.

Even assuming that the legislative will was unclear at a time of railroads and telegraphs, modern economies in transportation and communications render concern for the convenience of foreign defendants or witnesses misplaced. In 1914, a private antitrust action in Los Angeles alleging a conspiracy in New York to

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208 See note 45.
209 Gilbert, 330 US at 508. The Court included as other possible private interest factors "the enforceability of a judgment if one is obtained," "advantages and obstacles to fair trial," and whether the plaintiff, by choosing an inconvenient forum, is vexing or harassing the defendant. Id. One Gilbert factor is inapposite in antitrust: as opposed to a tort case, for example, there is little need in an antitrust case for a jury to view any particular location.
210 See National City Lines I, 334 US at 582–87 (discussing the legislative history); id at 586 (describing § 12 as "designed to aid plaintiffs by giving them a wider choice of venues and thereby to secure a more effective, because more convenient, enforcement of antitrust prohibitions") (emphasis added).
211 See id at 589 ("Our general power to supervise . . . the federal courts does not extend to disregarding a validly enacted and applicable statute or permitting departure from it, even in such matters as venue.") (citation omitted); City of Milwaukee v Illinois, 451 US 304, 313 (1981), quoting New Jersey v New York, 283 US 336, 348 (1931) ("We have always recognized that federal common law is 'subject to the paramount authority of Congress.'").
212 A heroic assumption: see notes 31–54 and 157–68 and accompanying text.
213 See World Bank, World Development Report 1995: Workers in an Integrating World, fig 7.1 at 51 (Oxford 1995) (showing declines in prices of ocean freight, air transport revenues per mile, and transatlantic telephone calls). Even difficulties in translation have become more susceptible to technological solution. Yet it is important to view twentieth-century economies as improvements on revolutionary capabilities developed in the late nineteenth century. See text accompanying notes 253–55.
restrain trade nationwide would have posed logistical problems greater than those posed by international litigation today. Yet Congress then chose to ignore the transcontinental defendant's inconvenience and to enable the plaintiff to sue at home.\textsuperscript{214} Intercontinental air travel, international legal representation, and inexpensive international communications should assuage judges' concerns for parties' convenience.\textsuperscript{215} Any party sued under § 12 and urging forum non conveniens dismissal must be either a U.S. corporation or a foreign corporation that has enough wealth and global reach to transact business or be present in the United States\textsuperscript{216} and to create allegedly anticompetitive effects here.\textsuperscript{217}

It would be strange indeed for courts now to show the solicitude for such defendants' convenience that Congress did not show a century ago for at least American corporations' convenience, unless courts' solicitude stems from considerations that have nothing to do with convenience at all.

IV. DIPLOMATIC, ECONOMIC AND LEGAL EFFECTS

Proponents of forum non conveniens in antitrust make implicitly or explicitly three claims—about the international political system, the world economy and the American legal system. These claims go beyond the question, which this Comment suggests Congress has answered, of how to treat individual antitrust litigants fairly. The claims therefore deserve responses.

A. Forum Non Conveniens or Forum Non Pacificum?

Perhaps to minimize diplomatic repercussions from the global reach of American antitrust law, several commentators have argued that forum non conveniens should apply in antitrust because it affords courts more complete analysis and greater flexibility than do the traditional legal principle of comity\textsuperscript{218} and its

\textsuperscript{214} See note 45 (citing to floor discussion of transcontinental hypothetical).

\textsuperscript{215} See McGee v International Life Insurance Co, 355 US 220, 223 (1957) ("[M]odern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."); Calvaro Growers of California v Generali Belgium, 632 F2d 963, 969 (2d Cir 1980) (Newman concurring) ("Jet travel and satellite communications have significantly altered the meaning of 'non conveniens.'").

\textsuperscript{216} In which case defending an antitrust case in a U.S. forum cannot be very inconvenient. See note 292.

\textsuperscript{217} See 15 USC § 22.

\textsuperscript{218} See M.D. Kresic, Note, The Inconvenient Forum and International Comity in Private Antitrust Actions, 52 Fordham L Rev 399, 405 (1983) ("[F]orum non conveniens is the
application in international antitrust, the jurisdictional rule of reason. These commentators seek to prevent diplomatic disputes over international antitrust litigation. However, their diplomatic rationale twists forum non conveniens from a doctrine that promotes fair and efficient judicial administration to one that respects foreign sovereigns. Comity and the rule of reason would promote this respect more effectively.

1. Comity and convenience.

Forum non conveniens differs markedly from comity (or the rule of reason). In substance, forum non conveniens primarily assesses an American forum's convenience to the court, the parties, and the jury-serving public; the inquiry also asks whether evidence is available in the forum and whether the U.S. court can easily administer the case. Comity and the rule of reason, by contrast, incorporate conflict-of-laws principles and diplomatic deference. At its core, comity urges that each sovereign recognize and respect acts of other sovereigns.

Comity thus reins in international antitrust enforcement: the FTC and the Antitrust Division bow to comity's requirement that they take into account other nations' interests. Courts, too, acknowledge that comity circumscribes their jurisdiction. Comity marked international antitrust jurisprudence most strongly in

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219 See, for example, Waller, Antitrust and American Business Abroad § 6:17 at 6-51-6-52 (cited in note 7) (terming forum non conveniens "a powerful addition, if not substitute, for [sic] disputes over jurisdiction and comity"); id § 21:27 at 21-42-21-48 (stating that forum non conveniens "holds forth considerable promise for use in foreign commerce antitrust litigation" because "litigation of jurisdictional questions would shift from the all or nothing proposition of whether the United States has jurisdiction to whether the U.S. is the best forum for resolution of the dispute"); J. Sandage, Note, Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law, 94 Yale L J 1693, 1706 (1985) (terming the doctrine a "better response to the challenge of selecting cases appropriate for United States jurisdiction").

220 For examples of such disputes, see Diane P. Wood, The Impossible Dream: Real International Antitrust, 1992 U Chi Legal F 277, 299 nn 91-93 (tracing transatlantic repercussions of antitrust cases against the uranium, airline, and insurance industries).

221 For discussion of the Gilbert factors, see text accompanying notes 21-23.

222 See Hilton v Guyot, 159 US 113, 163-64 (1895) ("[Comity involves the] recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.").

223 See Antitrust Enforcement Guidelines at 20 (cited in note 199) ("[I]n determining whether to assert jurisdiction . . . each Agency takes into account whether significant interests of any foreign sovereign would be affected.").
Timberlane Lumber Co v Bank of America, where the Ninth Circuit applied conflict-of-laws and comity principles to develop what it termed a "jurisdictional rule of reason" for antitrust. Rather than assess the convenience of private parties involved in the case, the rule of reason aimed to assess the interests of the two nations that might assert jurisdiction, and to do so by weighing several factors:

the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

There is very little overlap between these governmental interests and the public and private interests enumerated in Gilbert.

The Restatement takes a slightly different view of the rule of reason, terming it a rule of international law rather than a result of comity analysis. But the jurisdictional result is the same: in antitrust, the Restatement supplements territoriality with both an intended-effects test derived from Alcoa and the rule of reason for marginal cases.

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224 Timberlane Lumber Co v Bank of America National Trust and Savings Association, 549 F2d 597 (9th Cir 1976).
226 Timberlane, 549 F2d at 614, citing Brewster, Antitrust and American Business Abroad at 446 (cited in note 225), and Restatement (Second) of Foreign Relations § 40 (1965).
227 For the Gilbert factors, see text accompanying notes 21-24. Even the further factors put forward in Reyno, 454 US at 241 n 6 (1981), do not overlap with the Timberlane analysis: although Reyno counsels avoiding conflicts of law, it seems to do so in the context of promoting easy administration. See id (including as factors "familiarity with the law to be enforced" and "avoidance of unnecessary conflicts of law and foreign law problems").
228 See Restatement (Third) of Foreign Relations § 403 comment (a) (1987).
229 See id at § 415(1).
230 See id at § 415(2).
231 See text accompanying notes 189-93.
Forum non conveniens and comity (or its antitrust corollary, the jurisdictional rule of reason) are therefore fundamentally separate inquiries that courts should keep distinct. Since the Timberlane comity factors relate to sovereign interests,\textsuperscript{233} they differ strikingly from the Gilbert forum non conveniens factors,\textsuperscript{234} which weigh the convenience of the U.S. forum to the parties, the court, and the jury-serving public.

2. Comity as the better respecter of sovereigns.

Despite this distinction, several commentators who advocate applying forum non conveniens do so not solely to enhance the convenience of foreign defendants, but also to accommodate the interests of foreign governments.\textsuperscript{235} It is not clear why forum non conveniens would do so more successfully than a Timberlane-comity analysis, unless screening for convenience would simply have the effect of dismissing more cases and thus mollifying other nations. But this approach misconstrues forum non conveniens, while providing an ineffective tool for limiting extraterritoriality.

So to apply forum non conveniens would require that courts weigh governmental interests again under an inaccurate rubric of convenience. This weighing would not only confuse terminology but would also stretch forum non conveniens beyond recognition into a diplomatic device better termed \textit{forum non pacificum}.\textsuperscript{236} Thus to use forum non conveniens would cast the doctrine loose from its common-law moorings in the waters of convenience.

Advocating forum non conveniens as the best method by which courts can screen out inappropriate suits also overlooks the sequence of analysis courts must follow. Comity and the rule of reason work to deprive a court of jurisdiction, while a forum non conveniens motion asks a court to dismiss a case over which it

\textsuperscript{233} See Timberlane, 549 F2d at 614 (discussing even the nationalities of parties and the “locations or principal places of business of corporations” in the context of the foreign government’s interest, despite their impact on expense to or convenience of corporate defendants).

\textsuperscript{234} See text accompanying notes 21–24.

\textsuperscript{235} See Waller, \textit{Antitrust and American Business Abroad} § 21:27 at 21-47 (cited in note 7) (“If another forum’s interest is predominant, the case can be dismissed. . . . The interests of foreign parties and governments could be addressed [through forum non conveniens analysis].”); Kresic, 52 Fordham L Rev at 418 (cited in note 218) (“Forum non conveniens . . . encompasses the requirement of comity within the framework of existing law. All factors used in balancing public or national interests involved in an antitrust action under Timberlane can be adequately weighed in a public interest analysis under forum non conveniens.”).

\textsuperscript{236} See P.G.W. Glare, ed, \textit{Oxford Latin Dictionary} 1280 (Oxford 1990) (defining \textit{pacificus} as “making or tending to make peace”).
has concluded that it has jurisdiction. A court can dismiss for forum non conveniens only after it finds that it has both subject-matter and personal jurisdiction and that venue is proper. Moreover, since choice of law affects the forum non conveniens balancing, a court determines whether American or foreign law applies before deciding whether to dismiss for forum non conveniens. This sequence of analysis makes forum non conveniens a poor means by which to limit the extraterritoriality of U.S. law.

Comity and the rule of reason are better candidates for this task because of their deep roots in international law and their close connection with jurisdiction. In Hartford Fire Insurance Co v California, both Justice Souter and Justice Scalia used comity principles to determine whether to apply American antitrust law to reinsurers' conduct in London. The Justices disagreed, including on whether comity and the rule of reason deprived the district court of jurisdiction or required the court not to exercise it. But comity set the framework for both Justices' analysis. Furthermore, as Justice Souter observed, Congress has recently endorsed courts' use of comity in antitrust. No similar endorsement supports using forum non conveniens.

237 See Gilbert, 330 US at 504 (“[T]he doctrine of forum non conveniens can never apply if there is an absence of jurisdiction.”); Scott v Monsanto Co, 868 F2d 786 (5th Cir 1989) (“[T]he doctrine of forum non conveniens . . . is not applicable if jurisdiction is lacking or venue is improper.”).


239 See In re McLelland Engineers, Inc, 742 F2d 837, 838 (5th Cir 1984) (“The first step in any forum non conveniens analysis is a determination of which substantive law governs the case.”); Barry E. Hawk, I-A United States, Common Market, and International Antitrust: A Comparative Guide 694 (Prentice Hall 2d ed 1993) (suggesting that using forum non conveniens to “limit the extraterritorial application of U.S. antitrust laws . . . puts the cart before the horse” because a court deciding a forum non conveniens motion has already determined which country's law applies, and uses that determination in the Gilbert factor analysis); Daniel J. Capra, Selecting an Appropriate Federal Court in an International Antitrust Case: Personal Jurisdiction and Venue, 9 Fordham Intl L J 401, 478 (1986).


241 Id at 797–99 (Souter) (concluding that comity did not prohibit the district court from exercising jurisdiction, because no true conflict with British law existed); id at 814–21 (Scalia dissenting) (contending that international law, comity and the jurisdictional rule of reason all required the lower court to dismiss for lack of prescriptive jurisdiction).

242 Compare id at 798 (Souter) (asking “whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity”) with id at 820 (Scalia) (terming erroneous the Court's choice “to make adjudicative jurisdiction (or more precisely, abstention) the vehicle for taking account of the needs of prescriptive comity” and describing the real issue as “whether the Sherman Act covers this conduct”).

243 See Hartford Fire, 509 US at 796, quoting HR Rep No 97-686, 97th Cong, 2d Sess 13 (1982) (expressing the Judiciary Committee's intent that the Foreign Trade Antitrust Improvements Act “have no effect on the courts' ability to employ notions of comity”).
3. Courts as diplomats.

Not only do courts lack clear authority to apply forum non conveniens in antitrust, but they also lack a scholarly consensus on whether they should. Courts cannot forge international antitrust cooperation case by case. And while some commentators decry Hartford Fire’s extraterritoriality, others note that erring on the side of territoriality may contribute to systemic under-regulation. Some scholars believe that for U.S. courts unilaterally to assert extraterritorial jurisdiction will lead to more international antitrust cooperation by forcing the issue. On this view, applying forum non conveniens is self-defeating. Deciding when other nations have sufficiently caught up with American antitrust law, therefore, is a judgment for the political branches to make, either by clarifying that forum non conveniens does apply or by ratifying treaties limiting private enforcement of American antitrust law. Given the congressional policy outlined above, even assuming that private antitrust enforcement wreaks diplomatic havoc, it cannot be the case that courts may on this basis depart from the text of the Clayton Act in order to still troubled international waters. Surely the political branches must make such an amendment, and thus far they have not.249

245 See id at 160 & 163–64 (collecting authorities).
246 See id at 153–58.
248 History cautions that Congress can be jealous of its jurisdiction over international antitrust, and leery of limitations on it. See Wood, 1992 U Chi Legal F at 284 (cited in note 220) (describing the 1940s Congress as “not ready to cede any antitrust jurisdiction”).
249 See Foreign Trade Antitrust Improvements Act of 1985, S 374, 99th Cong, 1st Sess (Feb 6, 1985) in 131 Cong Rec 1161 (statement of Senator DeConcini) (proposing in § 4 to legislate forum non conveniens for antitrust). In the two subsequent Congresses, but not thereafter, Senator DeConcini introduced similar bills, sections 104 of which would have affirmed the applicability of forum non conveniens. See S 572, 100th Cong, 1st Sess (Feb 19, 1987), reprinted with legislative analysis at 133 Cong Rec 3789–93; id at 3789 (statement of Senator DeConcini) (“The United States is no longer in a position where it can dictate the rules for international business transactions. We must seek to harmonize our policies and laws with those of our trading partners if we are to successfully compete for world markets.”); S 50, 101st Cong, 1st Sess (Jan 25, 1989), reprinted with statement and analysis at 135 Cong Rec 632–35. According to the latter statement, the purpose of § 104 was to “limit ‘forum shopping’ by antitrust plaintiffs and help to minimize litigation burdens on parties and witnesses.” Id at 635. The bill’s chief purpose, however, was to codify a jurisdictional rule of reason and specify factors for courts to balance in applying that rule. Id at 633. None of these bills passed the Senate.
B. Economic Globalization in Historical Context

Why has Congress not legislated forum non conveniens in antitrust? One immediately reaches for public choice explanations, but interest group analysis only gets so far. Certainly foreign antitrust defendants are unlikely to organize, and even if organized are unlikely to succeed in pressuring Congress to act. But forum non conveniens of course rescues American multinationals too from treble damages and U.S. discovery rules; such firms stand a much higher chance than their foreign counterparts of convincing Congress to act, but have not succeeded.

Perhaps we can best explain congressional inaction by understanding the rationale behind § 12 to have been reinforced, not undermined, by economic and technological change. That understanding would contradict Howe,\textsuperscript{250} where Justice Breyer suggested that increased economic interdependence justified using forum non conveniens in the face of special venue statutes.\textsuperscript{251} He implied that Congress did not foresee global commerce giving rise to spirited litigation among multinational firms.\textsuperscript{252} His argument, however, assumes in part that globalization today is unprecedented. History suggests the contrary.

It is true that since World War II the United States has progressively integrated into world markets. Imports and exports totaled barely 8 percent of gross domestic product in 1959 but over 27 percent of the American economy in 1997.\textsuperscript{253} Yet viewed properly, this increase represents a reintegration. Foreign trade accounted for 16 percent of national income in 1879, 13.9 percent in 1889, 11.2 percent in 1909, and 18.4 percent in 1919.\textsuperscript{254} Two

\textsuperscript{250} 946 F2d 944.
\textsuperscript{251} Id at 950 ("The growing interdependence of formerly separate national economies, the increased extent to which commerce is international, and the greater likelihood that an act performed in one country will affect citizens of another, all argue for expanded efforts to help the world's legal systems work together, in harmony, rather than at cross purposes."). See also Kenneth W. Dam, Extraterritoriality in an Age of Globalization: The Hartford Fire Case, 1993 S Ct Rev 289, 290–92 (showing growing international economic interdependence since World War II).
\textsuperscript{252} See text accompanying note 287.
\textsuperscript{253} See Economic Report of the President: Transmitted to the Congress February 1998 table B-2 (GPO 1998). In 1959, imports ($106.6 billion) and exports ($71.9 billion) were 8.03 percent of the gross domestic product ($2.22 trillion). In 1997, exports totaled $922.7 billion, imports $1,048.9 billion, and the gross domestic product $7.1 trillion; the international sector's share of the gross domestic product had thus risen to 27.8 percent. See also Dam, 1993 S Ct Rev at 291–92 (cited in note 251) (giving figures for post-war growth in dependence on international trade and in private foreign investment).
\textsuperscript{254} Karl W. Deutsch and Alexander Eckstein, National Industrialization and the Declining Share of the International Economic Sector, 1890-1959, 13 World Politics 267, 281
World Wars, the Depression, and the Cold War caused a twentieth-century retrenchment in international economic integration and mask how greatly the world economy of 1914 resembled that of today. U.S. antitrust law began amid rampant globalization.

Proponents of the Sherman Act aimed it at foreign commerce as much as at domestic commerce, particularly since the federal government's revenue depended on imports. Senator Sherman defended his bill against the charge that conspirators in restraint of trade would simply decamp to Canada or Mexico, and make their pacts there, by noting that "if an unlawful combination is made outside of the United States and in pursuance of it property

255 See Kevin H. O'Rourke and Jeffrey G. Williamson, Globalization and History: The Evolution of a Nineteenth-Century Atlantic Economy 30 (MIT 1999) (showing that US merchandise exports rose as a percentage of GDP from 4.1 percent in 1913 to just 6.3 percent in 1987, hardly an epochal shift); id at 207 ("The late nineteenth century saw international capital flows larger in scale than anything seen before or since."); id at 213 ("Since 1972, a global capital market has tried to regain what it had achieved in 1913. . . . [The current account's share of GDP, across fourteen industrial economies,] is still only half of what it was in the late 1880s."); id at 217 ("[T]he modern [multinational corporation] did emerge in the decades prior to World War I, and it played a more important role in the pre-1914 era than is commonly assumed. Indeed, the stock of U.S. investment abroad amounted to $2.65 billion in 1914, or 7 percent of GNP."). Generally, O'Rourke and Williamson argue that the railroad, steamship, telegraph, and undersea cable sparked true globalization, and that contemporary technology has caused a more incremental knitting together of the global economy. They note that the British merchant banking firm Barings, which went broke in 1995, had also collapsed in 1890 (because of bad loans to Argentina), and that both Argentina and Brazil experienced debt crises in the 1890s as well as the 1980s. Id at 207.

256 See 21 Cong Rec 2456 (Mar 21, 1890) (statement of Senator Sherman) ("Unlawful combinations . . . interfere with our foreign and domestic commerce and with the importation and sale of goods subject to duty under the laws of the United States . . . . They not only affect our commerce with other nations, but trade and transportation among the several States."); id at 2457 ("This bill . . . has for its single object . . . to deal with the combinations . . . when they affect injuriously our foreign and interstate commerce and our revenue laws."); id at 2460 ("[N]ow the people of the United States as well as of other countries are feeling the power and grasp of these combinations . . . Vast combinations to control production and trade and to break down competition . . . are imported from abroad. Congress alone can deal with them."); id ("[O]nly the General Government can deal with combinations reaching not only the several States, but the commercial world."). A leading antitrust practitioner described Senator Sherman's speech of March 21, 1890, as "his most important speech in support of his bill." Kintner, 1 Legislative History at 18 (cited in note 33). Senator Sherman sat on the Senate Finance Committee—the Senate committee with jurisdiction over tariffs—and it was the Finance Committee that reported his bill in both the 50th Congress, see 20 Cong Rec 1120 (Jan 23, 1889), and the 51st Congress, see 21 Cong Rec 2455 (Mar 21, 1890).
is brought within the United States such property is subject to
our laws” and “may be seized.”

Senator Sherman’s concern was entirely realistic. Before
World War I, which mooted international antitrust enforcement,
many American businesses made international arrangements
to restrain competition. These included several agreements that
carved up world markets among U.S. and European suppliers.

257 21 Cong Rec 2461 (Mar 21, 1890).
258 Mira Wilkins, The Emergence of Multinational Enterprise: American Business Abroad from the Colonial Era to 1914 76 (Harvard 1970) (“[M]any American businesses (as they exported, entered into foreign licensing arrangements, and made foreign investments) joined with others, especially Europeans, in restrictive international agreements.”). The “first American international business” was the Singer sewing-machine firm, id at 37, which in 1874 sold more than half of its sewing machines abroad, id at 43. Many U.S. industries developed internationally in the late nineteenth century. See, for example, id at 45 (metal manufacturing); id at 48 (telegraph); id at 49–51 (telephone); id at 59–62 (chemicals); id at 62–64 (oil); id at 64–65 (insurance). In 1899, New York Life’s stationery bragged that the company was “The Oldest International Life Insurance Company in the World. Supervised by 82 Governments.” Id at 71. Europeans first spoke of an “invasion” of American manufacturing at the turn of the century. Id at 70.

For a list of forty-one U.S. multinational firms that by 1914 had at least two production facilities abroad—firms including Coca-Cola, Heinz, Sherwin-Williams, Du Pont, Ford, General Electric, National Cash Register, Alcoa, Gillette, and Eastman Kodak—see Alfred Chandler, The Visible Hand: The Managerial Revolution in American Business 368 (Belknap 1977). Chandler viewed a “national or international marketing and distribution network” as one of the three prerequisites for a modern industrial enterprise. Alfred Chandler, Scale and Scope: The Dynamics of Industrial Capitalism 8 (Belknap 1990).

259 The Clayton Act Congress would have been aware that in three major industries, dominant U.S. firms and their European counterparts agreed that U.S. firms would not market in Europe and vice versa. In 1897, responding to a foreign manufacturer building a plant in New Jersey, representatives of ten U.S. explosives manufacturers traveled to Europe and negotiated a division of markets with the Vereinigte Köln-Rottweiler Pulverfabriken of Cologne and the Nobel-Dynamite Trust Company of London. See William S. Stevens, ed, Industrial Combinations and Trusts 160–61 (MacMillan 1913) (recounting the incident); id at 176–83 (reprinting the agreement). In 1901 the American Tobacco Company bought one British tobacco firm, which so alarmed thirteen other British tobacco manufacturers that they combined into the Imperial Tobacco Company. See id at 160 (describing the events). Then these two national tobacco trusts divvied up spheres of operation. See id at 161–67 (reprinting their contract). In 1908 Alcoa and the largest European aluminum manufacturer, the Neuhausen Company of Switzerland, allocated shares of the European, U.S., and common markets. Id at 183–84 (reprinting the agreement).

International cartels existed in other industries before 1914. See Ervin Hexner, International Cartels 206 (North Carolina 1945) (“Even before World War I there were international steel cartels . . . between American and European countries.”); J. Morgan Rees, Trusts in British Industry, 1914–1921 22 (King 1922) (noting that in 1904 the American Steel Rail Makers joined the international association of rail makers, already composed of British, German, and Belgian firms, and agreed on a division of markets in Canada and Newfoundland). The American meat trust grew so large that by around 1900 it alone accounted for “about 50 per cent” of Britain’s frozen meat supplies and threatened to control Australia’s beef exports. Alfred Plummer, International Combines in Modern Industry 137–39 (Pitman 3d ed 1951). “Before 1914 the International Quinine Agreement divided up ‘territories’ amongst the American, British, Dutch, French, and German companies who were members of the combine.” Id at 16.
It is therefore no wonder that foreign defendants featured prominently in early antitrust cases and that Congress salted a tariff bill with antitrust provisions.

As this history suggests, "globalization" refers to at least two different things. It can mean greater economic integration—a higher likelihood that any given transaction will be transnational. Or it can refer to technological progress that facilitates integration. Such progress has prevented defending an antitrust case over long distance from being more burdensome than it was in 1914. But the likelihood of a transaction today being transnational is not exponentially greater than it was a century ago.

The shipping industry embarked on many international restraints of trade. Just before 1914, there were eighty international shipping cartel agreements. See Robert Liefmann, Cartels, Concerns and Trusts 150 (Methuen 1932). A decade earlier, J.P. Morgan had attempted to take over British shippers. See Tony Freyer, Regulating Big Business: Antitrust in Great Britain and America, 1880-1990 106 (Cambridge 1992). Congress targeted shipping cartels by closing the Panama Canal to any ship "permitted to engage in the coastwise or foreign trade of the United States . . . if such ship is owned, chartered, operated, or controlled by any person or company" that has violated antitrust laws. Panama Canal Act, ch 390 § 11, 37 Stat 567 (1912), codified at 15 USC § 31 (1994). An opponent of this ban argued, to no avail, that it would affect foreign shipping firms. See 48 Cong Rec 11059 (Aug 16, 1912) (colloquy of Senators Reed and Brandegee) (noting that the provision had expanded in conference to cover foreign-owned ships); id at 11061 (statement of Senator Brandegee) ("We ought not to attempt to dictate . . . to the people of foreign nations how their ships should be owned, in what proportion, or by whom.").


See Wilson Tariff Act, ch 349 § 73, 28 Stat 509 (1894), codified at 15 USC § 8 (imposing criminal penalties on "every person who shall be engaged in the importation of goods or any commodity from any foreign country" and restrains trade in imports "from any foreign country into the United States"). The Senate accepted this provision as an amendment to a tariff bill after one senator argued that "under every tariff which has ever existed in the United States . . . opportunity exists . . . for the creation of trusts; . . . it is absolutely inseparable from tariff legislation that opportunity should be furnished for the creation of combinations to regulate importations, with a view to increase the price of certain commodities." 26 Cong Rec 7118 (July 3, 1894) (statement of Senator Morgan).

See notes 213-15 and 253-55 and accompanying text.
To argue from supposed American insularity around 1900 that Congress cannot have intended plaintiffs to bring antitrust actions against foreign corporations is to mistake economic history.

C. Consequences for American Law

Rather than focus on our economic past, some proponents of forum non conveniens concentrate on our legal future. They wonder what international antitrust will look like without forum non conveniens. They claim that the doctrine's absence will have negative consequences for both U.S. courts and U.S. law.

1. Controlling dockets.

Underneath the private and public interests of forum non conveniens doctrine lies the pragmatic reality that it enables American courts to control their dockets by dismissing cases that plaintiffs could bring abroad. Therefore, the Fifth Circuit's position, by depriving courts of a tool to manage their caseloads, will inevitably increase burdens on courts and on jury-serving citizens. This much is clear.

Less clear, however, is the magnitude of this burden shift. Forum non conveniens operates only at the margin of convenience, since "there is ordinarily a strong presumption in favor of the plaintiff's choice of forum." Furthermore, the multivariate nature of the forum non conveniens interest-balancing approach creates uncertainty, rather than a bright-line deterrent. One can only speculate as to how much antitrust litigation this uncertainty may chill. Since the Second Circuit itself has determined that it may decide forum non conveniens motions on affidavits

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263 See, for example, Bell v British Telecom, 1995 WL 476684, *3 (S D NY) (stating that "[t]he courts in this District, already laden with litigation," have no interest in resolving the action); Friedrich K. Juenger, Forum Non Conveniens—Who Needs it? [sic], in Michele Taruffo, ed, Abuse of Procedural Rights: Comparative Standards of Procedural Fairness 351, 365 (Kluwer 1999) (stating that federal courts tend to dismiss "to clear their dockets"); Margaret G. Stewart, Forum Non Conveniens: A Doctrine in Search of a Role, 74 Calif L Rev 1259 (1986) (terming forum non conveniens "a welcome discretionary method" of docket control); Bies, Comment, 67 U Chi L Rev at 490 n 5 (cited in note 16) (collecting authorities).

264 Reyno, 454 US at 255 (1981); Wright et al, 15 Federal Practice and Procedure § 3828 at 291–92 (cited in note 238) (collecting cases). The presumption is less strong when the plaintiff is not an American citizen. See id § 3828 at 292 & n 40 (collecting cases). This discrimination has been criticized. See Juenger, Forum Non Conveniens at 365 (cited in note 263).

265 See American Dredging Co v Miller, 510 US 443, 455 (1994) ("[F]orum non conveniens cannot really be relied upon in making decisions about secondary conduct—in deciding, for example, where to sue or where to be sued.") (Scalia).
alone, the cost of litigating up to a forum non conveniens dismissal is relatively low. Therefore, it is not clear that ruling out forum non conveniens will lead to many more suits.

Capital Currency Exchange exemplifies this uncertainty. In the district court, the banks moved to dismiss for both forum non conveniens and failure to state a claim. The district court completely avoided the conflict between forum non conveniens and § 12 by noting that “[plaintiffs] do not assert section 12 as a basis of venue in the complaint.” To the district court, this made forum non conveniens dismissal easy. However, the Second Circuit’s opinion suggests that the court of appeals also would have affirmed a dismissal for either failure to state a claim or want of subject matter jurisdiction. The Second Circuit regarded the case as arising out of allegedly anticompetitive conduct abroad that did not implicate U.S. interests. The court even described the plaintiffs’ attempt “to morphose this case in case into a dispute that concerns the United States” as a “red herring.” On this view, it seems likely that either alternative dismissal would have met the Southern District’s need for docket control just as well as the forum non conveniens dismissal did. Whether the Southern District needed to resort to forum non conveniens is unclear.

Also unclear is whether U.S. courts need fear a tsunami of antitrust suits striking our shores given that other nations’ antitrust standards are approaching our own. For example, the European Court of Justice has held that Article 85 of the EEC Treaty and the principle of territoriality permit the European Commission to enforce the Treaty’s antitrust provisions against defendants who agreed outside of the Community to sell wood pulp at fixed prices to customers inside the Community. Judge Wood

266 See Alcoa Steamship Co v M/V Nordic Regent, 654 F2d 147, 149 (2d Cir 1980).
267 Capital Currency Exchange, 155 F3d 603.
268 Capital Currency Exchange, petition for cert at 19a (cited in note 3).
269 Id. Nevertheless, the Second Circuit stated blithely that the district court “found that [ ] antitrust suits are subject to the forum non conveniens doctrine.” Capital Currency Exchange, 155 F3d at 606.
270 Capital Currency Exchange, 155 F3d at 612. See note 5 and accompanying text.
271 Id.
272 See A. Alström Osakeyhtiö v Commission, 1988 ECR 5193, 5242–44 (holding implementation within the common market of a pricing agreement made without the common market subject to Article 85, now Article 81, of the EEC Treaty); id at 5212 (summarizing, in the report for the hearing, the Commission’s belief that “what is important from the point of view of jurisdiction is where the conduct of the parties which it is the object, or effect of the agreement to influence occurred and not the place where the agreement was made”); id at 5220–24 (summarizing, in the opinion of the Advocate General, U.S. juris-
has concluded that as a result, "the reach of European law is now almost coexistent with its U.S. counterpart."273

Extraterritorial jurisdiction over antitrust violations does private plaintiffs no good if they cannot sue. But the European Court of Justice has recently clarified that the EEC Treaty's competition provisions create a private right of action.274 By elaborating "doctrines of direct effect, supremacy, national remedies, and the Community remedy principle," the European Court of Justice has laid the theoretical groundwork for private antitrust enforcement in Europe: "private antitrust actions for damages under Community antitrust law are required to be available in the national courts"275 of Community members.

Other developments have further decreased plaintiffs' incentives to sue in the United States. In response to the extraterritoriality of U.S. antitrust law, the United Kingdom has enacted a "clawback" statute that deprives plaintiffs of the punitive two-thirds of any threefold damages won in a Clayton Act suit.276 Several governments have enacted "blocking" statutes that limit the ability of their citizens to obey U.S. discovery rules.277 Clawback and blocking statutes reduce the foreign plaintiff's incentive to forum-shop; they therefore tend to obviate concerns that depriving U.S. courts of forum non conveniens will leave them vulnerable to strategic antitrust suits by foreign plaintiffs.

In describing how American courts attract foreign plaintiffs, courts and commentators often repeat Lord Denning's inapt analogy to lights attracting moths.278 With respect to international antitrust litigation, however, the lights may be growing dim.

prudence on antitrust extraterritoriality and discussing Alcoa, Timberlane, and Mannington Mills, Inc v Congoleum Corp, 596 F2d 1287 (3d Cir 1979)).

273 See Wood, 1992 U Chi Legal F at 301 (cited in note 220); Dodge, 39 Harv Intl L J at 155 (cited in note 244) (stating that the European Court of Justice's view of antitrust jurisdiction in Wood Pulp was "almost identical to Justice Souter's approach in Hartford").

274 See Guérin Automobiles v Commission, 1997 ECR I-1503, 1543 ("[A]ny undertaking which considers that it has suffered damage as a result of restrictive practices may rely . . . on the rights conferred on it by Article 85(1) and Article 86 [now Articles 81 and 82] of the Treaty, which produce direct effect in relations between individuals.").

275 Clifford A. Jones, Private Enforcement of Antitrust Law in the EU, UK and USA, 246 (Oxford 1999). See also id at ix ("[I]t is certain that there will be much more private enforcement of Community antitrust law than there has been in the past.").

276 Dodge, 39 Harv Intl L J at 164–65 (cited in note 244).


278 Smith Kline & French Laboratories Ltd v Block, [1983] WLR 730, 733, [1983] 2 All E R 72 ("As a moth is drawn to the light, so is a litigant drawn to the United States."). See also Reyno, 464 US at 252 n 18 (listing reasons why U.S. courts attract foreign plaintiffs).
2. Distinguishing special venue provisions.

Critics of the Fifth Circuit's decision in Mitsui\textsuperscript{279} note that § 12 is one of hundreds of special venue provisions in federal law.\textsuperscript{280} They therefore wonder what will be the effect of interpreting § 12 to rule out forum non conveniens. Does barring forum non conveniens in antitrust require barring it wherever special venue may lie?

Simply put, no. While courts do not always agree on which statutes rule out forum non conveniens, the Fifth Circuit itself has delineated statutes that bar the doctrine from statutes that permit it. For example, the Fifth Circuit, despite Mitsui,\textsuperscript{281} agrees with the Second Circuit's view that forum non conveniens is available to tort defendants despite applicable special venue provisions.\textsuperscript{282} Similarly, the Fifth Circuit and the Second Circuit agree that forum non conveniens applies in RICO litigation, special venue notwithstanding.\textsuperscript{283}

Similarly, the First Circuit distinguished special venue provisions in Howe, a securities case.\textsuperscript{284} There, the plaintiff sued a Canadian corporation, which moved for forum non conveniens dismissal.\textsuperscript{285} On appeal, then—Chief Judge Breyer termed “thoroughly unsound” the notion that every special venue provision on the statute books barred forum non conveniens dismissals.\textsuperscript{286} He argued that this notion would create a

hodge-podge, that would, or would not, bring about American adjudication of an essentially foreign controversy, de-

\textsuperscript{279} Mitsui, 671 F2d 876.

\textsuperscript{280} For the statistic, see Wright et al, 15 Federal Practice and Procedure § 3804 at 28 & n 2 (cited in note 238), citing American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts, Official Draft, 1969, Appendix F, 498–501, as listing 330 special venue provisions outside of Title 28 of the United States Code. That study recommended changes to the federal venue statute, and in light of the proposed change, suggested that “many special venue provisions are a needless duplication and could for that reason be repealed.” ALI, Study of the Division of Jurisdiction Appendix F at 498. However, Congress never enacted the proposed venue reform. Id at 9.

\textsuperscript{281} Mitsui, 671 F2d at 890–91.

\textsuperscript{282} Compare In re Aircrash Disaster Near New Orleans, Louisiana on July 9, 1982, 821 F2d 1147, 1163 n 25 (5th Cir 1987) (recognizing that forum non conveniens applies in Jones Act context) with Cruz, 702 F2d at 47–48 (same).

\textsuperscript{283} Compare Kempe, 876 F2d at 1144 (holding that RICO special venue provision does not obviate forum non conveniens) with Transunion, 811 F2d at 130 (same).

\textsuperscript{284} Howe, 946 F2d 944.

\textsuperscript{285} See id at 950 (holding that the trial court could invoke forum non conveniens and decline to exercise jurisdiction).

\textsuperscript{286} Id.
pending upon the pure happenstance of whether Congress—at some perhaps distant period and likely out of a desire to widen plaintiffs’ venue choices in typical domestic cases—enacted a “special venue” provision.287

Strikingly, however, Justice Breyer shielded antitrust from this analysis, suggesting that the Clayton Act’s unique legislative history meant that §12 had more force than most other special venue provisions, which forum non conveniens overrode.288 Congressional policy has also enabled the Supreme Court to distinguish between antitrust and other areas of law in applying the presumption against extraterritoriality.289

The Second Circuit too has recently drawn a similar line in reversing a forum non conveniens dismissal of a case arising out of torture in Nigeria. That case, **Wiwa v Royal Dutch Petroleum Co**,290 turned on two statutes that the court read as expressing a “policy of U.S. law favoring the adjudication of such suits in U.S. courts.”291 While the **Wiwa** court did not bar forum non conveniens from such torture cases, it did hold that the lower court erred as a matter of law by ignoring congressional policy when weighing the *Gilbert* factors.292

Clearly, then, legislative history and congressional policy enable courts to distinguish areas of law and determine whether defendants may resort to forum non conveniens. Special venue

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287 Id.
288 **Howe**, 946 F2d at 948–50.
289 See Dam, 1993 S Ct Rev at 289 (cited in note 251) (noting that just before deciding to apply antitrust law extraterritorially, **Hartford Fire**, 509 US at 796, the Court declined so to apply immigration law, and had earlier declined so to apply civil rights provisions).
290 **Wiwa v Royal Dutch Petroleum Co**, 226 F3d 88 (2d Cir 2000).
291 Id at 106. The two statutes were the Alien Tort Claims Act, 62 Stat 934 (1948), codified at 28 USC § 1350 (1994), which the **Wiwa** court noted had no formal legislative history at all, **Wiwa**, 226 F3d at 104 n 10, and the Torture Victim Protection Act (“TVPA”), Pub L No 102-256, 106 Stat 73 (1992), codified at 28 USC § 1350 Appendix (1994). The latter’s text and history swayed the **Wiwa** court. **Wiwa**, 228 F3d at 106 (“The statute has [ ] communicated a policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business.”).
292 **Wiwa**, 226 F3d at 106 (“[T]he [district] court failed to count in favor of retention the interest of the United States, as expressed in the TVPA, in providing a forum for the adjudication of claims of torture.”). The lower court also erred in gauging the inconvenience that litigation in the United States would cause the defendant: the issue in **Wiwa** did not require view of premises; nor did presenting the case require the defendant to transport substantial physical evidence other than documents; nor was this expense, combined with that of transporting witnesses, “excessively burdensome” in view of the “vast resources” of the defendant, a multinational corporation. Id at 107. These three practical considerations hold true in suits under §12 as well, but the **Wiwa** court did not discuss any tension with the Second Circuit’s view of forum non conveniens in antitrust.
statutes do not stand or fall together. Therefore there is little danger of courts losing control over the principle that Congress may legislatively bar forum non conveniens.

CONCLUSION

This Comment has shown that the text, structure, interpretation, and history of the antitrust laws in general, and of § 12 of the Clayton Act in particular, bar courts from using forum non conveniens to dismiss international antitrust suits. Regardless of courts' desires to control their dockets, deter forum-shopping, and fend off cases that seem tenuously connected to the United States, Congress has required the judiciary to afford foreign antitrust plaintiffs generous venue treatment.

Therefore, the federal courts should not reach for a common-law doctrine to frustrate congressional policy. It is antidemocratic for courts to deploy a common-law doctrine to dismiss cases arising out of statutory causes of action and satisfying special venue provisions. Rather, courts should retrospectively regard § 12 as a coherent response to concentration and integration in the global economy before World War I. The alternative—using forum non conveniens to respect sovereigns—would change the doctrine beyond recognition.

Someday Congress may determine that the international antitrust regime has developed sufficiently to justify amending § 12. But Congress and the Executive Branch are far better observers of the dynamic international antitrust scene than are the federal courts. Judges should therefore leave this decision to the political branches.

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293 Whether because of docket pressures or because of its exposure to international cases, the Second Circuit has worked in other ways to move cases offshore. Its willingness to honor forum selection clauses is an example, as the court itself has noted. See *Alcoa Steamship Co v M/V Nordic Regent*, 654 F2d 147, 158 (2d Cir 1981) ("In the [ ] area of enforcement of contractual choice of forum clauses which resulted in sending an American plaintiff to a foreign tribunal, this Court was a leader in the federal courts' movement away from the earlier parochial view that such clauses should not be honored.").