

STICKY BELIEFS ABOUT TRANSNATIONAL LITIGATION

Christopher A. Whytock*

I.	INTRODUCTION.....	284
II.	BIAS AGAINST FOREIGN LITIGANTS	286
III.	BIAS IN FAVOR OF DOMESTIC LAW	288
IV.	TRANSNATIONAL FORUM SHOPPING.....	289
V.	FORUM NON CONVENIENS	292
VI.	CONCLUSION: WHY STICKY BELIEFS AND WHAT CAN BE DONE?	295

I. INTRODUCTION

Transnational litigation is an increasingly active field of scholarship,¹ teaching,² and legal practice.³ So far, however, scholars have devoted

* Professor of Law and Vice Dean, University of California, Irvine School of Law. I thank Professor Bob Lutz for his many important contributions to the study and practice of transnational litigation and arbitration, for his interest in my early work, and for his warmth and mentorship. I am grateful to the Editors for the opportunity to participate in this special issue honoring him.

1. See, e.g., Samuel P. Baumgartner, *Transnational Litigation in the United States: The Emergence of a New Field of Law*, 55 AM. J. COMP. L. 793 (2007); Pamela Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015); Donald E. Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of International Law Litigation*, 100 GEO. L.J. 709 (2012); William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205 (2018); Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63 (2019); ROBERT E. LUTZ, A LAWYER'S HANDBOOK FOR ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND ABROAD (2007); Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?*, 91 N.Y.U. L. REV. 344 (2016); Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444 (2011).

2. See, e.g., GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (6th ed. 2018); DONALD EARL CHILDRESS III, MICHAEL D. RAMSEY & CHRISTOPHER A. WHYTOCK, TRANSNATIONAL LAW & PRACTICE (2d. ed. 2020); MATHIAS W. REIMANN, JAMES C. HATHAWAY, TIMOTHY L. DICKINSON & JOEL H. SAMUELS,

relatively little effort to the empirical study of transnational litigation.⁴ As a result, we have a limited understanding of—and a limited ability to assess claims about—transnational litigation in action.⁵

This state of affairs is fertile ground for what one might call “sticky beliefs” about transnational litigation—beliefs that begin with assertions, which are often intuitive or commonsensical but made without empirical support, and then uncritically repeated by courts, lawyers, and scholars until they become entrenched conventional wisdom. The problem is that even though sticky beliefs are often unreliable, they can influence the decisions of courts, the development of law and policy, and transnational litigation scholars’ understanding of their object of study.

In this essay, I offer a small sampling of sticky beliefs about transnational litigation that were eventually subjected to empirical evaluation and found to have shaky evidentiary foundations. I first discuss two types of supposed bias in the U.S. legal system: bias against foreign litigants and bias in favor of domestic law. I next discuss the so-called transnational forum shopping claim—the claim that levels of transnational litigation in U.S. courts are high and increasing, largely due to forum shopping by foreign plaintiffs—as well as a variety of claims about the forum non conveniens doctrine. I conclude with some conjectures about

TRANSNATIONAL LAW: CASES AND MATERIALS (2013); JOACHIM ZEKOLL, , MICHAEL G. COLLINS & GEORGE RUTHERGLEN., TRANSNATIONAL CIVIL LITIGATION (2013).

3. See CHILDRESS ET AL., *supra* note 2, at xxix-xxx (describing trends in transnational practice); ZEKOLL ET AL., *supra* note 2, at v (“Globalization has turned transnational civil litigation—once a niche topic—into a burgeoning field that has become an integral part of the practice of U.S. lawyers.”). As used in this Essay, “transnational litigation” refers to litigation that has connections—personal or territorial—to more than one country. A personal connection is an affiliation between a State and a person involved in, or affected by, a dispute. Examples of personal connections include nationality, citizenship, habitual residence, domicile, statutory seat, or principal place of business. A territorial connection is a connection between a dispute being litigated and a country’s territory. For example, a territorial connection exists with the country where an event giving rise to the dispute occurred; where a person or thing that is a subject of, or affected by, the dispute is located; or where the court adjudicating the dispute is located. From the perspective of the United States, litigation is transnational if it has a personal or territorial connection to at least one foreign country (for example, at least one foreign party).

4. See Paul R. Dubinsky, *The Future of Transnational Litigation in U.S. Courts: Distinct Field or Footnote?*, 101 AM. SOC’Y INT’L L. PROC. 365, 366 n.10 (2007) (“Surprisingly, little has been done by the Federal Judicial Center, the National Center for State Courts, or the Judicial Conference of the United States to provide Congress or the public with hard data on the number and kind of suits in the system with a transnational component, however that may be defined.”).

5. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910) (“[I]f we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man and those that in fact govern them, will appear, and it will be found that today also the distinction between legal theory and judicial administration is often a very real and a very deep one.”).

why there are sticky beliefs about transnational litigation, and what should be done about them.

II. BIAS AGAINST FOREIGN LITIGANTS

In a 1996 study, Kevin Clermont and Theodore Eisenberg noted the conventional wisdom that “non-Americans fare badly in American courts. Foreigners believe this. Even Americans believe this.”⁶ Using statistical analysis of a dataset of more than 90,000 civil actions filed in the U.S. District Courts, they found that “[i]n actions between an American and a non-American, non-Americans win 63% of the cases, whereas, inversely, Americans win only 37%.”⁷ Even after controlling for other factors, they found that foreign citizenship of a party increased the likelihood of winning and that this effect was substantively large and statistically significant.⁸ They acknowledged that “[a]n explanation for these significant differences is not obvious,”⁹ but they did offer some conjectures. They firmly rejected the notion that U.S. courts are biased in favor of foreign parties.¹⁰ Instead they proposed an explanation based on the selection of cases by parties:

[T]he most plausible and powerful explanation for the foreigner effect is that foreigners are reluctant to litigate in America for a variety of reasons, including the apprehension that American courts exhibit xenophobic bias and the pecuniary and nonpecuniary distastes for litigating in a distant place. Foreigners abandon or satisfy most claims and, presumably, persist in the cases that they are most likely to win. Thus, cases involving a foreign litigant, as plaintiff or defendant, are usually cases in which the foreigner has the stronger hand.¹¹

In a follow-up study in 2007, Clermont and Eisenberg found the win rates of domestic and foreign plaintiffs had converged and leveled out by 2001; after 2001, the foreign plaintiff win rate again rose relative to domestic plaintiffs; and the win rates thereafter began converging again.¹²

6. Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1120 (1996) [hereinafter Clermont & Eisenberg, *Xenophilia*].

7. *Id.* at 1123.

8. *Id.* at 1131.

9. *Id.* at 1123.

10. *See id.* at 1132.

11. *Id.* at 1133-34.

12. Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11*, 4 J. OF EMPIRICAL LEGAL STUD. 441, 457 (2007) [hereinafter *Before and After*]. In this article, the authors also critically evaluate two empirical studies that suggested xenophobia, or a perceived “home court advantage” in some contexts. *See* Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1519 (2003); *see also* Utpal

Arguing that these findings were consistent with their case selection theory, they conjectured that during the 1980s, litigants assumed xenophobia prevailed, leading foreign plaintiffs to pursue only relatively strong cases. With the end of the Cold War and increasing globalization, this perception declined, thus gradually reducing the case selection effect. Then, after the 9/11 attacks, foreign parties again—albeit temporarily—feared litigating in U.S. courts, thus producing briefly renewed divergence.¹³ In other words, “case selection drives the outcomes for foreigners.”¹⁴

Overall, Clermont and Eisenberg reject the conventional wisdom that foreign parties face systematic xenophobia in U.S. courts. Instead, they argue, “[f]oreigners’ aversion to a U.S. forum, an aversion that waxes and wanes over the years, can elevate the foreigners’ success rates. Consequently, researchers should be wary of drawing structural or cultural explanations from the changeable pattern of outcome data.”¹⁵ More broadly, they point out the danger of sticky beliefs about the legal system:

[T]hese findings about foreigners in American courts reveal a deeper problem with knowledge of the legal system. Most observers probably have believed that judgments run against foreigners in American courts. As usual, even basic descriptive data about the functioning of American courts was lacking. [There is a] need to verify, notwithstanding compelling anecdotal evidence, deeply held beliefs about how the legal system works.¹⁶

Consistent with Clermont and Eisenberg’s study, my own empirical analysis of choice-of-law decisions by U.S. District Courts in transnational tort cases did not reveal bias in favor of domestic parties.¹⁷ Using multivariate logit analysis controlling for a variety of factors that may influence international choice-of-law decision-making, I found that a U.S. party’s preference for domestic law did not increase the probability that a judge applied domestic law.¹⁸ However, these findings do not imply that

Bhattacharya, Neal Galpin & Bruce Haslem, *The Home Court Advantage in International Corporate Litigation*, 50 J.L. & ECON. 625 (2007).

13. *Before and After*, *supra* note 12, at 457-59.

14. *Id.* at 464.

15. *Id.*

16. Clermont & Eisenberg, *Xenophilia*, *supra* note 6, at 1143.

17. Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719 (2009) [hereinafter Whytock, *Myth of Mess*].

18. *Id.* My findings in international tort cases were consistent with a study by Symeonides that examined 100 choice-of-law decisions by state and federal courts in product liability cases (not focusing on transnational cases) and found that “[d]espite impressions to the contrary, ... courts do not favor local over non-local litigants.” SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* 338 (2006).

U.S. courts are never biased against foreign parties. As discussed below, there is evidence of bias in forum non conveniens decision-making.¹⁹

III. BIAS IN FAVOR OF DOMESTIC LAW

Another sticky belief about transnational litigation is that American courts are biased in favor of the application of domestic law when they make international choice-of-law decisions.²⁰ As one leading choice-of-law scholar argued, the modern approaches have an “inherent forum law preference.”²¹ As another put it, “if [plaintiffs’ attorneys] are competent they will at least be generally aware that the U.S. court selected will apply a modern conflicts approach that has... pro-forum... tendencies....”²² This pro-domestic-law bias purportedly encourages transnational forum shopping into U.S. courts by raising plaintiffs’ expectations that judges will apply plaintiff-favoring U.S. substantive law in transnational litigation.²³

The belief that choice-of-law decision-making is biased in favor of domestic law is not entirely unsupported by evidence. Indeed, several studies seemed to reveal such bias.²⁴ However, none of them focused specifically on transnational litigation. Nor did any of them attempt to control for the merits of pro-domestic law arguments under choice-of-law

19. See *infra* Part V.

20. See, e.g., EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 107 (4TH ED. 2004) (noting “homeward trend” in American choice of law); Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 HARV. L. REV. 1137, 1137 (2007) (“[C]ompared to the *lex loci* rule, the modern rules have one unmistakable consequence: they make it more likely that the forum court will apply local tort law to wrongs that occurred in another jurisdiction.”); Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT’L L.J. 559, 560 (2002) (arguing that “[b]oth the empirical evidence and the existing scholarly consensus... indicate that there is a strong tendency under all modern conflicts systems to apply forum law”); see also SYMEONIDES, *supra* note 18, at 334 (noting “widely held assumption” that courts applying modern methods have strong pro-forum-law bias).

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

22. Whitten, *supra* note 20, at 568.

23. See Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 558 (1989) (arguing that modern choice-of-law methods’ forum-law tendency “present[s] yet another incentive to the forum shopper”); Whitten, *supra* note 20 (describing the impact of pro-domestic-law bias on transnational forum shopping).

24. See Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989); Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357 (1992); Stuart E. Thiel, *Choice of Law and the Home-Court Advantage: Evidence*, 2 AM. L. & ECON. REV. 291 (2000). But see SYMEONIDES, *supra* note 18, at 338 (in empirical study of choice-of-law decisions in product liability cases, finding that “[d]espite impressions to the contrary,... courts do not unduly favor the law of the forum”).

doctrine.²⁵ The problem is that one cannot reliably interpret pro-domestic law decision rates without controlling for factors associated with the merits of choice-of-law decisions. After all, if, in the aggregate, the merits of litigants' pro-domestic law arguments are systematically stronger than the merits of their pro-foreign law arguments under the applicable choice-of-law rules, then a high pro-domestic law decision rate may merely reflect the impartial application of those rules to the facts of each case rather than bias in favor of domestic law. Because prior studies did not attempt to control for the merits, it is unclear whether they provide evidence of actual pro-domestic law bias.

In a 2009 study, I attempted to mitigate this problem by analyzing the choice-of-law decisions of U.S. District Courts in transnational tort cases using multivariate statistical analysis.²⁶ I found that U.S. District Court judges decided that domestic law should apply at an estimated rate of only 37.1%, which for the reasons given above does not demonstrate lack of pro-domestic law bias. However, I also found that the likelihood that a court applied domestic law depended largely on two factors generally associated with the merits of a decision to apply domestic law: the nationality of the parties and the location of the conduct and injury. When these were all or mostly domestic, U.S. District Court judges applied domestic law at an estimated rate of almost 90%, but when they were mostly or all foreign they did so at an estimated rate of only 15%.²⁷ Moreover, I found that the nationality of the parties and the location of the conduct and injury were the most important predictors of choice-of-law decisions,²⁸ and that a choice-of-law method often linked by commentators to pro-domestic law bias—the Second Restatement method—actually reduced the likelihood of pro-domestic law decisions compared to other methods.²⁹ Together, these findings suggest that the choice-of-law decisions of the U.S. District Courts in transnational tort cases are driven largely by factors that are generally relevant under choice-of-law doctrine rather than by pro-domestic law bias.

IV. TRANSNATIONAL FORUM SHOPPING

Another sticky belief is that the level of transnational litigation in U.S. courts is high and increasing, due largely to forum shopping by foreign

25. See Whytock, *Myth of Mess*, *supra* note 17, at 751-53.

26. *See id.*

27. *Id.* at 768-69.

28. *Id.*

29. *Id.* at 771-73.

plaintiffs.³⁰ Perhaps the most memorable version of this transnational forum shopping claim is Lord Denning's famous quip: "As a moth is drawn to the light, so is a litigant drawn to the United States."³¹ Litigants invoke this claim when moving to dismiss transnational litigation,³² and judges do so when granting or affirming dismissals.³³ In addition to using the transnational forum shopping claim to argue for case-specific outcomes, some litigants use it to argue for doctrinal changes intended to discourage plaintiffs from bringing transnational claims to U.S. courts and protect business defendants from such claims. Although it would be difficult to demonstrate a cause-and-effect relationship between these advocacy efforts and the Supreme Court's adoption of anti-forum shopping measures, litigants using this strategy have a track record of success.³⁴ Moreover, in

30. See, e.g., HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS v (2008) (asserting that there has been a "growing torrent" of transnational cases in the last thirty years); Paul R. Dubinsky, *The Future of Transnational Litigation in U.S. Courts: Distinct Field or Footnote?*, 101 AM. SOC'Y INT'L L. PROC. 365, 366 (2007) (arguing that "certain facts on the ground are clear: [i]n recent decades, litigation in U.S. courts with a foreign or international component has been growing in volume...."); *Radeljak v. Daimlerchrysler Corp.*, 719 N.W.2d 40, 50 n.1 (Mich. 2006) (Markman, J., concurring) (claiming "an increasing number of foreign citizens are being injured by, and bringing lawsuits against, [American] companies"); Ángel R. Oquendo, *Justice for All: Certifying Global Class Actions*, 16 WASH. U. GLOBAL STUD. L. REV. 71, 72 (2017) ("Ever more often, the U.S. judiciary has had to adjudicate claims staked by foreigners, who may or may not reside in the United States...."); Jeremy Ostrander, *The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgments*, 22 BERKELEY J. INT'L L. 541, 582 (2004) (claiming an "increasing presence of foreign plaintiffs in U.S. courts").

31. *Smith Kline & French Laboratories Ltd and others v. Bloch* [1983] 1 WLR 730, CA.

32. See, e.g., Brief of Defendant-Appellee at 35, *Imamura v. Gen. Elec. Co.*, 957 F.3d 98 (1st Cir. 2020) (No. 19-1457), 2019 WL 3714644, at *35 (arguing successfully that Court of Appeals should affirm lower court's forum non conveniens dismissal; asserting that "[t]he American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts"); Brief for Defendants-Appellees at 19-20, *Giglio Sub S.N.C. v. Carnival Corp.*, 523 F. App'x 651 (11th Cir. 2013) (No. 12-15533-CC), 2013 WL 1399472, at *19-20.

33. See, e.g., *Rolls-Royce Commercial Marine, Inc. v. New Hampshire Ins. Co.*, No. 09-61329-CIV. 2010 WL 5067608, at *7 (S.D. Fla. 2010) (granting motion to dismiss on forum non conveniens grounds; stating that "[w]ithout the doctrine of forum non conveniens, 'American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.'"); *Auxer v. Alcoa, Inc.*, Nos. 2:09cv995, 2:09cv1429, 2:09cv1430, 2:09cv1431, 2:09cv1438, 2010 WL 1337725, at *4 (W.D. Pa. 2010) (granting motion to dismiss on forum non conveniens grounds and stating that "Courts are suspicious that a foreign plaintiff's decision to bring suit in the United States is motivated by a search for a jurisdiction with laws that would be the most favorable for the claim").

34. See, e.g., Brief for Petitioners at 44, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) (No. 10-76), 2010 WL 4624153 at *44, (arguing successfully the Supreme Court should hold that claim against foreign subsidiaries of U.S. corporation should narrow the scope of general jurisdiction over corporations; asserting that "[m]any foreign corporations view

Piper Aircraft Co. v. Reyno, the Court expressly relied on the transnational forum shopping claim to justify its endorsement and invigoration of the forum non conveniens doctrine as a measure to reduce transnational litigation in U.S. courts.³⁵

In a recent article, I theoretically assessed and empirically evaluated the transnational forum shopping claim.³⁶ Theoretically, I argued that there are reasons to doubt the claim: changes in U.S. law have made the U.S. legal system less attractive to plaintiffs than it may once have been, and meanwhile legal changes abroad have made other legal systems more attractive.³⁷ Empirically, using data on approximately 8 million civil actions filed in the U.S. District Courts since 1988, I showed that transnational diversity cases represent only a small portion of overall litigation in the

the potential for liability in the American legal system as a considerable deterrent, taking the view that ‘[a]s a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.’”); Brief for Petitioner at 32, *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422 (2007) (No. 06-102) 2006 WL 3203257, at *32 (arguing successfully that the Supreme Court should hold that district courts may grant forum non conveniens dismissals without first determining whether it has jurisdiction; arguing that “allowing forum non conveniens to be decided at the outset will ensure that the doctrine does not become an illusory protection for foreign litigants. Compared with the jurisdictional rules that prevail in most other countries, the bases for jurisdiction in United States courts are exceedingly generous to plaintiffs. Forum non conveniens has thus properly been regarded in the international arena as a flexible tool for limiting the risk that essentially foreign disputes would nonetheless be drawn to United States courts.”); Brief for Petitioners at 26, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724), 2004 WL 226391, at *26 (arguing successfully that the Supreme Court should dismiss Sherman Act claims based on harm suffered abroad by price-fixing conduct that allegedly raised prices in the United States and foreign countries; arguing that “[t]he interpretation adopted by the court of appeals would flood the federal courts with foreign claims by all persons who can allege injury from conduct that also injured ‘someone’ in U.S. commerce. With the globalization of economic activity, foreign harms can almost always be linked to some domestic harm. There is every reason to expect that foreign claimants will attempt to assert claims under U.S. law in federal court to obtain the treble damages, liberal discovery rules, jury trials and class action procedures not available in many of their own jurisdictions.... As the Solicitor General has noted, foreign plaintiffs are bringing antitrust claims to recover for injuries arising from purely foreign transactions with ‘increasing frequency.’”).

35. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250, 252 (1981) (“[I]f conclusive or substantial weight were given to the possibility of a change in law, the forum non conveniens doctrine would become virtually useless. Jurisdiction and venue requirements [in U.S. courts] are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous.... The American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.”).

36. See generally Christopher A. Whytock, *Transnational Litigation in U.S. Courts: A Theoretical and Empirical Reassessment*, J. OF EMPIRICAL LEGAL STUD. (2022) (<https://onlinelibrary.wiley.com/doi/10.1111/jels.12306>) [hereinafter *Transnational Litigation*].

37. See *id.* at Part II.

district courts, their level has decreased overall, and U.S., not foreign, plaintiffs file most of them.³⁸ The data also revealed that federal question filings by foreign resident plaintiffs are not extensive or increasing either.³⁹ These findings challenge the transnational forum shopping claim and law reforms based on it, and suggest that lawyers, judges, scholars and policymakers should no longer rely on it.⁴⁰

V. FORUM NON CONVENIENS

There are also a variety of sticky beliefs about the forum non conveniens doctrine, which gives courts discretion to dismiss transnational litigation if there is an available and adequate alternative forum.⁴¹ It is sometimes assumed that the alternative forum requirement makes forum non conveniens more akin to a transfer doctrine than a dismissal doctrine, the premise being that a plaintiff will refile the claim in the defendant's proposed foreign court.⁴² A 1987 study by David Robertson empirically challenged that belief.⁴³ Based on a survey of lawyers representing plaintiffs in suits dismissed on forum non conveniens grounds, he found

38. *See id.* at Part III.B.

39. *Id.* at Part IV.C.

40. These findings build on the older and less systematic analysis in, Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) [hereinafter *Forum Shopping System*] (identifying downward trend in transnational diversity litigation in the U.S. District Courts during the period studied), which were also reported in this journal in 2011 in connection with a conference organized by Professor Lutz. *See generally* Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT'L L 31 (2011). The findings also build on those of Clermont and Eisenberg focusing on win rates of U.S. and foreign litigants but also identifying decline of judgments in transnational diversity cases. *See* Clermont & Eisenberg, *Xenophilia*, *supra* note 6; *Before and After*, *supra* note 12. Some have speculated that transnational litigation in state courts may be increasing. *See, e.g.*, Childress, *supra* note 1; Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 B.U. L. REV. 397 (2018). So far, however, this conjecture has not been empirically evaluated, due to limited available state court data.

41. *Piper Aircraft Co.*, 454 U.S. at 254 n.22 (1981) (“At the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is ‘amenable to process’ in the other jurisdiction. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied.”).

42. *See* David W. Robertson, *Forum Non Conveniens in America and England: “A Rather Fantastic Fiction,”* 103 L. Q. REV. 398, 417 (1987) (noting the “impression that dismissing a transnational case for forum non conveniens is little more drastic than transfer of a case to another federal court”).

43. *Id.* at 417.

that “these cases hardly ever make it to trial in a foreign forum.”⁴⁴ “Pretending that such dismissals are not outcome-determinative,” he argued, “is ‘a rather fantastic fiction.’”⁴⁵

An empirical study by Joel Samuels posed a different challenge to this belief.⁴⁶ He examined every published forum non conveniens decision by U.S. federal courts since 1982, and found that the alternative forum requirement is often treated as discretionary, not meaningfully analyzed, or bypassed altogether.⁴⁷ Another empirical study, by Michael Lii, reinforced Samuels’ conclusion.⁴⁸ Based on an analysis of 692 federal forum non conveniens decisions, he found that courts decide that an available and adequate alternative forum is lacking in only 18% of cases.⁴⁹ Although he found that foreign countries with the lowest tier of rule-of-law ratings were more likely to be deemed inadequate than those with the highest, they were nevertheless found adequate most of the time (67%).⁵⁰ These studies suggest the forum non conveniens doctrine as actually applied is unlikely to ensure that suits will only be dismissed if an adequate alternative forum is available for the plaintiff.

Despite these findings, courts sometimes persist in thinking of the forum non conveniens doctrine as a transfer doctrine.⁵¹ This sticky belief may make courts more willing to grant forum non conveniens motions than if they confronted the likelihood that in some cases dismissal may deny the plaintiff a meaningful opportunity to seek a remedy.

Another sticky belief is related to the federal forum non conveniens doctrine’s distinction between domestic and foreign plaintiffs. While there is “ordinarily a strong presumption in favor of the plaintiff’s choice of

44. *Id.*

45. *Id.* at 418.

46. See generally Joel H. Samuels, *When is an Alternative Forum Available - Rethinking the Forum Non Conveniens Analysis*, 85 IND. L.J. 1059 (2010).

47. *Id.* at 1061.

48. See generally Michael T. Lii, *An Empirical Examination of the Adequate Alternative Forum in the Doctrine of Forum Non Conveniens*, 8 RICH. J. GLOBAL L. & BUS. 513 (2009).

49. *Id.* at 526, tbl. 4.

50. *Id.* at 542, tbl. 19.

51. See, e.g., *Conflict Kinetics, Inc. v. Goldfus*, No. 1:21-cv-010912021 2021 WL 6133790, at *2 (E.D. Va. 2021) (referring to “transfer under forum non conveniens”); *Nippon Shinyaku Co., Ltd. v. Sarepta Therapeutics, Inc.*, No. 21-1015-LPS, 2021 WL 4989489, at *3 (D. Del. 2021) (stating that “cases in federal court may be transferred for forum non conveniens”); *Perusahaan Umum Listrik v. M/V Tel Aviv*, 711 F. 2d 1231, 1239 (5th Cir. 1983) (referring to forum non conveniens dismissal as “effectively transferring” the action to the alternative forum); *In Re Union Carbide Gas Plant Disaster at Bhopal, India* in Dec., 1984, 634 F. Supp. 842, 845 (S.D.N.Y. 1986) (referring to forum non conveniens doctrine as allowing an action “to be transferred to a more convenient forum”); *Syndicate 420 at Lloyd’s London v. Early Am. Ins.*, 796 F. 2d 821, 830 n.11 (5th Cir. 1986) (referring to “transfer under forum non conveniens”).

forum,” a foreign plaintiff’s choice “deserves less deference” than that of a U.S. plaintiff.⁵² In *Piper Aircraft Co. v. Reyno*, the U.S. Supreme Court explained:

When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff’s choice deserves less deference.⁵³

In other words, the plaintiff’s citizenship is believed to be a proxy for convenience rather than a basis for discrimination.

However, my own empirical study of federal forum non conveniens decisions, which used logistic regression analysis to control for multiple factors that may influence those decisions, raises doubts about the belief that the lesser deference standard is merely a nondiscriminatory proxy for convenience. If the plaintiff’s citizenship were indeed merely a proxy for convenience, then after controlling for other factors affecting convenience—such as the defendant’s citizenship (which generally should be correlated with how convenient it would be for the defendant to litigate in a U.S. court) and the place of the plaintiff’s injury and the defendant’s conduct (which generally should be correlated with the location of evidence and witnesses)—the plaintiff’s citizenship should not have a major independent effect on forum non conveniens decisions.⁵⁴ Yet it does: other things being equal, U.S. district court judges are approximately 25% more likely to dismiss on forum non conveniens grounds when the plaintiff is foreign than when the plaintiff is a U.S. citizen.⁵⁵ Moreover, if convenience were driving decisions, then the defendant’s citizenship should have an impact—but this does not appear to be the case.⁵⁶

Although further analysis would be necessary to reach a more definitive conclusion, this finding suggests that *Piper*’s distinction between U.S. and foreign plaintiffs, as applied by the U.S. District Courts, is not merely a proxy for convenience, but instead may discriminate against foreign plaintiffs as such. Some lower courts have noted that the distinction

52. *Piper Aircraft Co.*, 454 U.S. at 265-66.

53. *Id.* at 256.

54. Cf. Paula K. Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul*, 18 J. MAR. L. & COM. 185, 194 (1987) (“[A] court should not grant an FNC dismissal to a defendant who has shown only slight inconvenience, merely because the opposite party is not a U.S. citizen or resident. Such a doctrine would place foreigners in an unfavorable position *qua* foreigners, and they should be able to successfully counter it by appealing to a treaty designed to protect them in such situations.”).

55. See Whytock, *Forum Shopping System*, *supra* note 40, at 524 tbl. 6.

56. *Id.* at tbl. 5.

between foreign and domestic plaintiffs may violate the guarantee of equal access in bilateral friendship, commerce, and navigation treaties, which require each signatory to give the other signatory's citizens access to its courts equal to that given to its own citizens.⁵⁷ My findings may lend support to that conclusion.

Interestingly, my study indicated that the plaintiff's citizenship does not have a statistically significant effect on decisions by judges nominated by Democratic presidents, whereas it does have a substantively large (an estimated 32.6%) and statistically significant effect on decisions by judges nominated by Republican presidents.⁵⁸ This, too, suggests that the lesser deference standard does not genuinely operate as a proxy for convenience. Rather, it suggests that it may have more to do about normative views about "forum shopping" and the appropriateness of allowing foreign plaintiffs to seek remedies in U.S. courts.⁵⁹

VI. CONCLUSION: WHY STICKY BELIEFS AND WHAT CAN BE DONE?

What explains sticky beliefs about transnational litigation? I will venture a few conjectures. First, empirically evaluating propositions about transnational litigation is laborious. Thus, it is unsurprising that claims are so often made without first empirically testing them. Second, in the abstract, the sticky beliefs surveyed here are generally plausible, based on reasonable intuitions, and sometimes combined with apt anecdotes. When assertions have these qualities, they are easy to believe and prone to become sticky even if they lack sound empirical support. Third, in some cases, sticky beliefs are instrumental in the sense that their content is intended—explicitly or implicitly—to serve a particular end, and for that reason they may sometimes be deliberately cultivated. For example, the transnational forum shopping claim is used by interest groups to argue for law reforms that limit the litigation exposure of multinational corporations

57. See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 380 (4th ed. 2007) (discussing cases holding that courts must treat foreign plaintiffs as U.S. citizens for forum non conveniens purposes if they are citizens of signatories of treaties with equal-access provisions); RUSSELL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 281–82 (5th ed. 2006) (noting approximately twenty-five such treaties and arguing that discrimination in forum non conveniens decision making could violate them). See generally Allan Jay Stevenson, *Forum Non Conveniens and Equal Access Under Friendship, Commerce, and Navigation Treaties: A Foreign Plaintiff's Rights*, 13 *HASTINGS INT'L & COMP. L. REV.* 267 (1990) (analyzing the relationship between the forum non conveniens doctrine and equal-access provisions).

58. Whytock, *Forum Shopping System*, *supra* note 40, at 524 tbl. 6.

59. *Id.* at 526.

by increasing restrictions on court access,⁶⁰ and the characterization of the U.S. Supreme Court's lesser deference standard for *forum non conveniens* as a proxy for convenience offers a convenient mask for a rule that might otherwise be considered xenophobic.⁶¹

The best response to sticky beliefs is to subject them to more rigorous scrutiny. If they do not have a basis in empirical evidence, they should not be stated as established facts and repeated uncritically. For those beliefs that seem most consequential for law or policy or the most interesting from a scholarly perspective, resources can be invested to subject them to empirical testing. Although this takes time, and such resources are scarce, the empirical assessment of sticky beliefs offers a promising avenue for future transnational litigation scholarship.

The studies surveyed in this essay raised doubts about the beliefs they assessed, but this will not always be the case. Sticky beliefs that survive empirical testing can be relied upon with greater confidence by judges, lawyers, policymakers and scholars. That said, empirical support for a conclusion should not turn that conclusion into a sticky belief of its own. In general, empirical analysis is less about proof than about assessing how much certainty one can have in a proposition. Moreover, as transnational litigation evolves, prior empirical studies may no longer reflect realities as closely as they might have when they were undertaken; and future studies that use different data or methods may reach different conclusions. For all these reasons, it is important to critically evaluate sticky beliefs, while taking care not to produce new ones in the process.

60. Whytock, *Transnational Litigation*, *supra* note 36, Part I.

61. See *Myers v. Boeing Co.*, 794 P.2d 1272, 1280-81 (Wash. 1990) (criticizing and rejecting *Piper*'s lesser deference standard; reasoning that "[t]he Court's reference to the attractiveness of United States courts to foreigners, combined with a holding that, in application, gives less deference to foreign plaintiffs based on their status as foreigners, raises concerns about xenophobia").