

# ARTICLES

## RETIRING FORUM NON CONVENIENS

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*When it comes to transnational litigation in the federal courts, it is time to retire the doctrine of forum non conveniens. The doctrine, which allows judges to decline jurisdiction in cases they believe would be better heard in foreign courts, is meant to promote international comity and protect defendant fairness. But it was never well designed for the former purpose, and given recent developments at the Supreme Court, it is dangerously redundant when it comes to the latter. This Article seeks to demythologize forum non conveniens, to question its continuing relevance, and to encourage the courts and Congress to narrow its scope of application so that, when the time is right, it may be fully interred.*

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INTRODUCTION

When it comes to transnational litigation in the federal courts, it is time to retire the doctrine of forum non conveniens. Forum non conveniens allows judges to dismiss, on a discretionary basis, cases they believe would be better heard by another country’s courts.<sup>1</sup> In transnational cases (or cases involving foreign parties, foreign harms, or foreign law), it is thought to further international comity and protect defendant fairness. But it is not well suited for the former purpose,<sup>2</sup> and given recent developments at the Supreme Court, it is dangerously redundant when it comes to the latter.<sup>3</sup> This Article aims to demythologize forum non conveniens as a tool for managing transnational litigation and to encourage the courts and Congress to narrow its scope of application so that, when the time is right, it may be fully interred.<sup>4</sup>

How to manage transnational litigation efficiently and fairly is a pressing concern for the federal courts.<sup>5</sup> Given the modern global economy, a growing number of cases will have transnational elements; there are already thousands of cases filed under the federal courts’ alienage jurisdiction every year.<sup>6</sup> Indeed, a global economy depends on the ability of individuals and companies to access courts, whether

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<sup>1</sup> *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 425 (2007).

<sup>2</sup> See *infra* Section II.B.

<sup>3</sup> See *infra* Part III.

<sup>4</sup> On possible routes to retirement, see *infra* Part IV.

<sup>5</sup> Cf. STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 4 (2015) (arguing that, given “an ever more interdependent world—a world of instant communications and commerce, and shared problems of (for example) security, the environment, health, and trade, all of which ever more pervasively link individuals without regard to national boundaries . . . , it has become clear that, even in ordinary matters, judicial awareness can no longer stop at the border”).

<sup>6</sup> See Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1495 (2013) (noting roughly 120,000 alienage cases had been filed in federal courts since 1986); cf. Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 510, 515–16 (2011) (noting that alienage jurisdiction cases may be declining, but that transnational

here or in other countries, in order to resolve the cross-border disputes that will inevitably arise.<sup>7</sup> This is not a new concern. The rules of private international law developed in the eighteenth and nineteenth centuries precisely to help those engaged in international commerce enforce their rights outside their home jurisdictions.<sup>8</sup> This system of private international law depended largely on *comity*, or the willingness of courts in one country to recognize the laws, citizens, and interests of another country on the understanding that the foreign country's courts would provide the same recognition in turn.<sup>9</sup> Comity, in other words, is rooted in reciprocity.

Yet comity is not itself a doctrine; it is instead a complex value that may point in different directions depending on the context. To understand the role of *forum non conveniens* as a comity doctrine requires disentangling these different notions of comity. As Professor William Dodge has recently shown, doctrines meant to further comity can be categorized along two different dimensions.<sup>10</sup> Along one dimension are different types of foreign government power that a court may want to accommodate: *Prescriptive* comity doctrines manage the overlap in states' power to establish laws and regulate behavior, while *adjudicative* comity doctrines speak to which sovereign should resolve a particular dispute.<sup>11</sup> Along the other dimension, there is the method by which a court might pursue comity: *Negative*

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litigation also arises under federal question, admiralty, bankruptcy, or general diversity jurisdiction).

<sup>7</sup> See, e.g., Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 506 (2003) (noting that international trade requires "a functioning system for cooperative resolution of disputes across borders" that nonetheless allows "each nation to protect its national, democratically determined interests").

<sup>8</sup> See, e.g., Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 17–43 (2010) (describing the origins and evolution of comity as the foundation for private international law); see also *id.* at 14 ("In that comity helps maintain amicable working relationships between nations, it facilitates the transnational exchange of peoples, services, and goods, and supports private and international interests.").

<sup>9</sup> Comity is a notoriously slippery term. See, e.g., Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 3–4 (1991); Michael D. Ramsey, *Escaping "International Comity,"* 83 IOWA L. REV. 893, 893 (1998); see also N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT'L ECON. L. 601, 605 n.7 (2006) (gathering criticisms of the vagueness of the concept of "comity"). For a recent, admirable effort to clarify the concept of comity, see William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2078 (2015) (defining comity as "deference to foreign government actors that is not required by international law but is incorporated in domestic law").

<sup>10</sup> Dodge, *supra* note 9, at 2078–79.

<sup>11</sup> Though I draw heavily on Dodge's careful synthesis of comity in U.S. law, I fold his category of "sovereign party comity" (encompassing the privilege of sovereigns to bring suit, foreign state immunity, and foreign official immunity) into adjudicative comity. See *id.* at 2079 tbl.1.

comity doctrines call for restraint on the part of courts to avoid stepping *on* the toes of foreign states, while *positive* comity doctrines call on courts to step temporarily *into* the shoes of foreign sovereigns to protect those sovereigns' interests.<sup>12</sup> Negative comity informs, for example, immunity and abstention doctrines, while positive comity underlies choice of law and the enforcement of foreign judgments.

When people speak of forum non conveniens as a comity doctrine, they usually have in mind *negative adjudicative comity*—of restraining the U.S. court's exercise of jurisdiction to avoid infringing on the judicial interests of another country.<sup>13</sup> From this perspective, dismissals for forum non conveniens are meant to demonstrate respect for foreign legal systems. But such dismissals can run counter to *positive* comity commitments as well: either the *positive adjudicative comity* commitment to allow foreigners access to U.S. courts,<sup>14</sup> or the *positive prescriptive comity* commitment to apply foreign law when appropriate.

Too little sensitivity to these positive comity commitments in transnational litigation can undermine reciprocity between countries, which in turn jeopardizes the interests of private parties.<sup>15</sup> Consider,

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<sup>12</sup> Dodge divides comity doctrines along this dimension into the “principle of recognition” and the “principle of restraint.” *Id.* at 2078–79, 2079 tbl.1.

<sup>13</sup> *See, e.g., Reid-Walen v. Hansen*, 933 F.2d 1390, 1403 (8th Cir. 1991) (Timbers, J., dissenting) (“American courts’ continuing refusal to dismiss when events so warrant is based on our paternalistic attitude toward United States citizens and our condescending view of foreign courts.”); *see also* Dodge, *supra* note 9, at 2109–10.

<sup>14</sup> *See, e.g., Rasul v. Bush*, 542 U.S. 466, 484 (2004) (“The courts of the United States have traditionally been open to nonresident aliens.”); *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578 (1908) (“Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights.”); GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 366 (5th ed. 2011) (“It was long settled that neither foreign citizens nor foreign residents were barred from access to U.S. courts, including in actions arising abroad under foreign law. This rule rested on principles of international law, and was uniformly acknowledged by commentators.”); Annotation, *Power of Court, in Exercise of Discretion, to Refuse to Entertain Action for Non-statutory Tort Occurring in Another State or Country*, 32 A.L.R. 6, 8 (1924) (observing that “the courts have generally accorded to alien friends the same privileges of suit as they have extended to citizens or subjects of the forum,” not as a matter of right, but as a matter of comity).

<sup>15</sup> *Cf. Hannah L. Buxbaum, Foreign Governments as Plaintiffs in U.S. Courts and the Case Against “Judicial Imperialism,”* 73 WASH. & LEE L. REV. 653, 656–58 (2016) (warning against overemphasizing negative comity concerns at the expense of acknowledging positive comity commitments). Commentators have thus argued that the greater comity risk with forum non conveniens comes not from the retention of transnational cases, but from the dismissal of cases involving U.S. defendants and foreign plaintiffs in particular. *See, e.g., Elizabeth T. Lear, National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 563 (2007); Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1491–92 (2011). Similar arguments have

for example, the DBCP litigation: In the 1990s, farm workers from a dozen developing countries attempted to sue Dow Chemical Company and other U.S. defendants in U.S. courts for cancers and infertility that they alleged were caused by their exposure to dibromochloropropane (DBCP), a chemical whose use in pesticides was banned in the United States in 1977 but that Dow and others continued to manufacture for export.<sup>16</sup> When a federal court dismissed those cases for forum non conveniens,<sup>17</sup> the plaintiffs' home countries viewed those dismissals not as an expression of comity, but rather as an expression of protectionism.<sup>18</sup> When Costa Rican plaintiffs refiled suit against Dow in a Costa Rican court, for example, a judge dismissed the claims on the basis that the U.S. court had had proper jurisdiction over the case and was thus obliged to hear it.<sup>19</sup> Other Latin American countries adopted laws to express similar concerns.<sup>20</sup> In particular, Nicaragua adopted retaliatory legislation that specifically targeted DBCP claims, making liability easier for plaintiffs

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been raised against the overapplication of other negative comity doctrines, particularly the presumption against extraterritoriality. *See, e.g.*, *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2115–16 (2016) (Ginsburg, J., concurring in part and dissenting in part and from the judgment) (“Making such litigation available to domestic but not foreign plaintiffs is hardly solicitous of international comity or respectful of foreign interests.”); Maggie Gardner, *Essay, RJR Nabisco and the Runaway Canon*, 102 VA. L. REV. ONLINE 134, 144 & n.75 (2016) (noting that overuse of the presumption against extraterritoriality can cause positive comity problems and gathering sources raising similar concerns).

<sup>16</sup> Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 KAN. L. REV. 609, 620 (2008).

<sup>17</sup> *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1373 (S.D. Tex. 1995).

<sup>18</sup> *See* Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 26–27 (2003–2004) (describing the perception in Latin America that forum non conveniens is “a type of ‘blocking statute’” that contravenes plaintiff’s right to bring suit in defendant’s domicile).

<sup>19</sup> *See* Dante Figueroa, *Conflicts of Jurisdiction Between the United States and Latin America in the Context of Forum Non Conveniens Dismissals*, 37 U. MIAMI INTER-AM. L. REV. 119, 155–56 (2005). Indeed, forum non conveniens may be at odds in particular types of cases with existing treaty commitments to provide a forum to other countries’ citizens. *See* Int’l Arbitration Club of N.Y., *Application of the Doctrine of Forum Non Conveniens in Summary Proceedings for the Recognition and Enforcement of Awards Governed by the New York and Panama Conventions*, 24 AM. REV. INT’L ARB. 1, 20–22 (2013) (expressing concern about compliance with the New York Convention); Peter B. Rutledge, *With Apologies to Paxton Blair*, 45 N.Y.U. J. INT’L L. & POL. 1063, 1079 (2013) (same); *cf.* Melinda R. Lewis, *The “Lawfare” of Forum Non Conveniens: Suits by Foreigners in U.S. Courts for Air Accidents Occurring Abroad*, 78 J. AIR L. & COM. 319, 329–33 (2013) (describing disagreements among courts over the permissibility of forum non conveniens dismissals under the Warsaw Convention).

<sup>20</sup> *See, e.g.*, Ronald A. Brand, *Challenges to Forum Non Conveniens*, 45 N.Y.U. J. INT’L L. & POL. 1003, 1020–21 & nn.56–59 (2013) (surveying responses); Figueroa, *supra* note 19, at 156–59 (surveying Latin American “blocking statutes” and suggesting that they have “contributed to aggravate the current [forum non conveniens] impasse”).

to establish in Nicaraguan courts while imposing onerous burdens on defendants and instituting U.S.-sized damages awards.<sup>21</sup> This law led to over \$2 billion in judgments against Dow from Nicaraguan courts alone, the enforcement of which Dow has since fought to block in U.S. courts.<sup>22</sup>

Such examples have provided new fuel to an already extensive literature criticizing forum non conveniens.<sup>23</sup> Three strands of critique stand out. First, based on cases like the DBCP litigation, scholars have argued that forum non conveniens dismissals are unfair to plaintiffs and cause other countries to retaliate, hurting defendants and long-term U.S. interests as well.<sup>24</sup> This strand of criticism encompasses access-to-justice concerns: Even if plaintiffs are not barred by retaliatory legislation from refiling their case in the foreign forum, the practical effect of a forum non conveniens dismissal may be the same, given the cost and difficulty of starting over in a distant court.<sup>25</sup> And even when plaintiffs do succeed in relitigating the case in a foreign forum, defendants may find their fair trial rights compromised, as in the DBCP litigation—which means successful plaintiffs may nonetheless experience an “enforcement gap” when U.S. courts prove unwilling to enforce the resulting foreign judgments.<sup>26</sup>

Second, scholars and judges alike have critiqued the doctrine for its poor design and overbroad discretion, the combination of which provides too little guidance for judges and thus too little predictability for parties. As Justice Black foresaw when the Supreme Court first

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<sup>21</sup> See Figueroa, *supra* note 19, at 158–59; Heiser, *supra* note 16, at 631–32.

<sup>22</sup> See Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1083 (2015); see also *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1352 (S.D. Fla. 2009) (refusing to enforce Nicaraguan DBCP judgment).

<sup>23</sup> For some highlights of the critical literature on forum non conveniens, see generally MICHAEL KARAYANNI, *FORUM NON CONVENIENS IN THE MODERN AGE* (2004); Bookman, *supra* note 22; Kevin M. Clermont, *The Story of Piper: Forum Matters*, in *CIVIL PROCEDURE STORIES* 199 (Kevin M. Clermont ed., 2d ed. 2008); Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309 (2002); Simona Grossi, *Forum Non Conveniens as a Jurisdictional Doctrine*, 75 U. PITT. L. REV. 1 (2013); Lear, *supra* note 15; Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081 (2010); Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781 (1985); Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CALIF. L. REV. 1259 (1986); see also Rutledge, *supra* note 19, at 1064 n.5 (gathering literature).

<sup>24</sup> See, e.g., Bookman, *supra* note 22, at 1121–29 (arguing that forum non conveniens, as well as other litigation avoidance doctrines, undermines U.S. interests in the long term); Lear, *supra* note 15, at 602 (“[F]ederal forum non conveniens dismissals subvert American interests in a majority of cases.”).

<sup>25</sup> See, e.g., Heiser, *supra* note 16, at 609–10, 623 (describing practical challenges to refiling complaints in foreign courts). *But see* Bookman, *supra* note 22, at 1109 (suggesting that other countries may be becoming more hospitable to transnational litigation).

<sup>26</sup> Whytock & Robertson, *supra* note 15, at 1450.

adopted forum non conveniens, that test's "welter of factors" and broad grant of discretion mean that it can be invoked today in just about every transnational case.<sup>27</sup> Further, that welter of factors—many of them outdated or otherwise ill suited for transnational cases<sup>28</sup>—does not help judges balance the competing comity concerns at play and may instead obscure judges' true reasons for dismissing cases. That lack of transparency in reasoning, combined with the doctrine's highly discretionary nature,<sup>29</sup> can make forum non conveniens seem unpredictable,<sup>30</sup> which in turn prevents businesses from relying upon it when "making decisions about primary conduct—how to manage their business and what precautions to take."<sup>31</sup> Indeed, even though the Supreme Court intended the doctrine to be applied "rarely,"<sup>32</sup> federal judges grant roughly half of motions to dismiss for forum non conveniens, at least in written opinions.<sup>33</sup>

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<sup>27</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 516 (1947) (Black, J., dissenting); see also, e.g., Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1150–51 (2006) ("[V]irtually no case involving a transnational event is immune from a forum non conveniens battle.").

<sup>28</sup> See Davies, *supra* note 23, at 324–46; see also *infra* Sections I.B, II.B.

<sup>29</sup> For criticisms of the scope of judicial discretion in forum non conveniens, see, for example, Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 750–54 (1982); Stein, *supra* note 23, at 784–85.

<sup>30</sup> See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) ("The discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application . . . make uniformity and predictability of outcome almost impossible."); *Gilbert*, 330 U.S. at 516 (Black, J., dissenting) (anticipating that the Court's test "will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible"); Clermont, *supra* note 23, at 221 (arguing that the doctrine's inconsistency is "an indictment of forum non conveniens itself"). For a contrary perspective on the doctrine's predictability, see Whytock, *supra* note 6, at 485 (finding that "judges' forum non conveniens decisions do a better job distinguishing between appropriate and inappropriate forum shopping, are more predictable, and are less influenced by caseload and ideology than the doctrine's critics indicate").

<sup>31</sup> *Am. Dredging*, 510 U.S. at 454. *But see* Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891, 1904–05 (2004) (questioning the need for predictability in jurisdictional doctrines as opposed to primary conduct rules given the difficulty of conforming conduct to account for the former).

<sup>32</sup> *Gilbert*, 330 U.S. at 508 (majority opinion) (under forum non conveniens, "the plaintiff's choice of forum should rarely be disturbed").

<sup>33</sup> See Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT'L L. 157, 169 (2012) (finding motions to dismiss for forum non conveniens were granted in forty-eight percent of reported federal cases between 2007 and 2012); Joel H. Samuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis*, 85 IND. L.J. 1059, 1077 n.108 (2010) (finding, on average, a forty-one percent dismissal rate in published federal cases between 1982 and 2007); Whytock, *supra* note 6, at 502 (estimating a forty-seven percent dismissal rate in published federal forum non conveniens decisions between 1990 and 2005). There are dozens of written district court opinions (both reported and unreported) analyzing forum non conveniens each year. See Childress, *supra*, at 168–70.

Third, others argue that this unguided exercise of judicial discretion intrudes too far upon congressional power,<sup>34</sup> particularly Congress's authority to define the federal courts' jurisdiction and ensure the vindication of federal statutory rights.<sup>35</sup> These scholars question whether an individual judge is the best institutional actor to define court-access policy<sup>36</sup> or to broadly balance comity considerations.<sup>37</sup> More fundamentally, it is not clear where the power to dismiss for forum non conveniens comes from: Though the Supreme Court has technically reserved the question of whether the state law of forum non conveniens governs in diversity cases,<sup>38</sup> the overwhelming consensus has been that the federal courts are applying a federal doctrine

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These studies have all relied, however, on published decisions (meaning decisions available through the major databases). It is likely that many forum non conveniens motions are resolved without a published opinion. See David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1208–09, 1209 n.24, 1214–17 (2013) (discussing selection bias stemming from reliance on Westlaw and Lexis). Further, it is unclear in what percentage of transnational cases the motion is raised, how often it is a subsidiary ground for dismissal, or how the rate of dismissal compares to the rate at which cases are dismissed on other grounds. Indeed, it may be that the grant rate for forum non conveniens motions is similar to (or even less than) the rate at which Rule 12(b)(6) motions are granted. See, e.g., Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 JUDICATURE 127, 132 tbl.2 (2012) (finding that, even before *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), Rule 12(b)(6) motions were granted more than seventy percent of the time). These studies thus provide only a partial picture of forum non conveniens practice in federal courts, but they nonetheless indicate that the doctrine's invocation is not uncommon, despite the Supreme Court's admonition to the contrary.

<sup>34</sup> See *Lear*, *supra* note 27, at 1152–53 (arguing that forum non conveniens is in fact “an unconstitutional usurpation of congressional power”); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 855 (2001) (arguing that the “power to dismiss suits” on the basis that they are “better brought in state or foreign courts” belongs to Congress, not federal judges); cf. Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 HOUS. J. INT'L L. 385, 399–400 (2004) (arguing forum non conveniens should not be applied in statutory cases because it undermines domestic regulatory interests).

<sup>35</sup> Forum non conveniens is effectively an abstention doctrine. See William P. Marshall, *Abstention, Separation of Powers, and Recasting the Meaning of Judicial Restraint*, 107 NW. U. L. REV. 881, 883 (2013) (defining abstention as “a set of judicially created doctrines under which federal courts may choose to decline to exercise their jurisdiction over cases otherwise appropriately before them”). Even if abstention doctrines are not unconstitutional, as Professor Martin Redish once argued, see Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984), they still raise concerns about the appropriate balance of power between Congress and the courts, see, e.g., Marshall, *supra*, at 898.

<sup>36</sup> See Robertson, *supra* note 23 (applying institutional choice theory to conclude that Congress and the Executive should have the leading role in defining court-access policy).

<sup>37</sup> Cf. Paul, *supra* note 9, at 75 (arguing that reciprocity is better achieved through multilateral treaties negotiated by the political branches than through broad judicial weighing).

<sup>38</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 n.13 (1981) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947)).



in all cases.<sup>39</sup> Yet the doctrine is not federal common law in the traditional sense, nor is it derived from the federal rules.<sup>40</sup> The Court has suggested it is an inherent power<sup>41</sup> (despite its relatively recent provenance<sup>42</sup>), but it has not considered or supported the ramifications of such a claim.<sup>43</sup>

Given all of these concerns, critics of the doctrine have unsurprisingly suggested myriad reforms.<sup>44</sup> But reform will not be enough: The problems in the structure and history of the doctrine run too deep. This Article challenges the assumption that reforming forum non conveniens is either feasible or sufficient. First, Part I aims to demythologize the doctrine: Forum non conveniens does not have the deep historical roots that many—including the Supreme Court—seem to have assumed.<sup>45</sup> Further, what historical pedigree the doctrine does

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<sup>39</sup> RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 304 cmt. b & reporters' note 2 (AM. LAW INST., Tentative Draft No. 2, 2016); 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3828.5, at 727 n.10 (4th ed. 2013) (collecting cases); see also, e.g., BORN & RUTLEDGE, *supra* note 14, at 453–54 (reading *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), as suggesting that forum non conveniens is a matter of federal law). This Article assumes that the federal doctrine of forum non conveniens is a matter of federal procedural law (though not necessarily federal common law) in both federal question and diversity cases.

<sup>40</sup> See Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 826–27 (2008) (noting uncertain authority for forum non conveniens).

<sup>41</sup> See, e.g., *Dietz v. Bouldin*, 136 S. Ct. 1885, 1891 (2016). For a critique of the invocation of inherent power to justify forum non conveniens, see Lear, *supra* note 27. On the interplay between the courts' inherent powers and their common law-making authority in the area of federal procedure, see Barrett, *supra* note 40.

<sup>42</sup> See *infra* Part I.

<sup>43</sup> See Pushaw, *supra* note 34, at 743 (urging repudiation of the “practice of exercising beneficial [inherent] powers without congressional authorization,” including forum non conveniens).

<sup>44</sup> The most thorough critiques of forum non conveniens to date have focused on reforming or narrowing the doctrine. See, e.g., KARAYANNI, *supra* note 23, at 199–232; Davies, *supra* note 23; Stein, *supra* note 23, 842–46. The most common proposed reform, to which the following analysis lends support, is the addition of a strong presumption for retaining jurisdiction if the case is brought in the defendant's home forum. See, e.g., Bookman, *supra* note 22, at 1122–23, 1140–41. Other proposals include, *inter alia*, reinvigorating the inquiry into whether an adequate and available alternative forum in fact exists, see Samuels, *supra* note 33; updating the private and public interests enumerated by the Court, see Davies, *supra* note 23, at 323–64; and favoring the retention of transnational cases if U.S. law applies, if the applicable foreign law is easily ascertainable, or if the resulting judgment would be enforced here, see Childress, *supra* note 33, at 177–79.

<sup>45</sup> Others have raised doubts about the doctrine's historical pedigree. See David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 948 n.68 (1990); Stein, *supra* note 23, at 796 & n.43; see also Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 909–18 (1947) (tracing the limited history of the doctrine). Part I of this Article builds on this literature to show how the limited history of forum non conveniens also explains why the current test is such a poor fit for transnational litigation today.

have does not match how it is being used today. Once we understand the doctrine's recent, pragmatic origins, the conversation need no longer be limited to questions of reform; we can start asking instead whether the doctrine has simply outlived its purpose. Second, Part II explains why reforming forum non conveniens is unlikely to work—and may even backfire.<sup>46</sup> This Part draws on arguments I have made elsewhere regarding the design of procedural inquiries in transnational litigation.<sup>47</sup> It explains that the needed reforms for forum non conveniens would increase its complexity while asking judges to undertake inquiries that stretch the limits of judicial capacity. That is a recipe for worse, not better, decisionmaking.<sup>48</sup>

Third, in light of recent Supreme Court developments, Part III suggests that the need for forum non conveniens is fading away. Over the last thirty years, shifts in personal jurisdiction doctrine, the presumption against extraterritoriality, and the enforceability of forum selection clauses have vastly circumscribed the scope of transnational litigation in U.S. courts.<sup>49</sup> When combined with other comity doctrines and court management tools already at judges' disposal, these shifts suggest that judges no longer need forum non conveniens to address defendant fairness and international comity concerns.<sup>50</sup>

Instead of trying to fix the doctrine, then, this Article urges its retirement.<sup>51</sup> Part IV describes what that path to retirement might

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<sup>46</sup> See *infra* Part II.

<sup>47</sup> See Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941 (2017).

<sup>48</sup> See Ronald A. Heiner, *The Origin of Predictable Behavior*, 73 AM. ECON. REV. 560, 563–65 (1983) (explaining that “when genuine uncertainty exists [in terms of either the reliability of an agent’s perceptual abilities or the complexity of the environment], allowing greater flexibility to react to more information or administer a more complex repertoire of actions will not necessarily enhance an agent’s performance”).

<sup>49</sup> See *infra* Part III; see also Bookman, *supra* note 22 (discussing such developments as part of a broader trend towards avoiding transnational litigation in U.S. courts).

<sup>50</sup> For similar discussions of how recent Supreme Court developments may reduce the need for forum non conveniens, see Stephen B. Burbank, *International Civil Litigation in U.S. Courts: Becoming a Paper Tiger?*, 33 U. PA. J. INT’L L. 663 (2012) (discussing personal jurisdiction, class actions, and discovery reform); Rutledge, *supra* note 19, at 1069–71 (discussing personal jurisdiction and the presumption against extraterritoriality).

<sup>51</sup> Despite the range of criticisms, only a few scholars have suggested abandoning the doctrine. See Lear, *supra* note 27, at 1152 (stating that forum non conveniens should be abandoned as “an unconstitutional usurpation of congressional power”); Stewart, *supra* note 23, at 1263 (arguing that, given its redundancy with personal and prescriptive jurisdiction doctrines, forum non conveniens “has outlived its usefulness”). Some scholars have suggested, however, that its retirement is only a matter of time. See Clermont, *supra* note 23, at 226 (observing that if jurisdictional doctrines were rationalized, “[m]aybe we do not need [forum non conveniens] at all”); Rutledge, *supra* note 19, at 1065 (“While it is most certainly not the case that the underlying justification for the *forum non conveniens* doctrine has disappeared entirely, other doctrines may potentially better serve those residual functions. At bottom, then, we are entering an era where the *forum non conveniens* doctrine is ripe for radical reexamination.”).

look like. The easiest steps include consolidating doctrinal reform in the lower courts and reducing the courts' use of the doctrine.<sup>52</sup> While I am skeptical that such an insurgency approach will be sufficient on its own, it can be a helpful—even a critical—first step. Meanwhile, the Supreme Court and Congress should continue to develop more helpful, alternative doctrines that will further displace the need for forum non conveniens,<sup>53</sup> and they should explicitly narrow the category of transnational cases in which the doctrine can be used.<sup>54</sup> These reforms will ensure that the United States is prepared at the negotiating table, when the time is right, to let go of forum non conveniens once and for all in exchange for a new treaty on jurisdiction and the mutual enforcement of judgments.<sup>55</sup> Such a treaty will do more to further U.S. interests, party fairness, and international comity than will the outdated and muddled judge-made doctrine of forum non conveniens.

Before beginning, however, a critical caveat on the scope of this project is in order: The Article is focused on forum non conveniens as a doctrine of federal law used by the federal courts to manage transnational litigation. Though most U.S. states also recognize a version of forum non conveniens, state doctrines are diverse,<sup>56</sup> and state courts often use forum non conveniens to dismiss cases in favor of courts in sister states, a context for which the doctrine is more appropriate.<sup>57</sup> Because state use of forum non conveniens involves a different set of issues and considerations, the following analysis by necessity is limited to the federal doctrine of forum non conveniens.

## I THE WRONG TEST

Though the Supreme Court has asserted forum non conveniens is a doctrine with a “long history,”<sup>58</sup> that history is more limited and

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<sup>52</sup> See *infra* Sections IV.A, IV.B.

<sup>53</sup> See *infra* Section IV.C.

<sup>54</sup> See *infra* Section IV.D.

<sup>55</sup> See *infra* Section IV.E.

<sup>56</sup> On the diversity of state doctrines, see, for example, Robertson & Speck, *supra* note 45, at 950–51; Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L. 327, 341 (2004) (noting that “courts in some states reject or limit [forum non conveniens’s] application in various ways”).

<sup>57</sup> In particular, the domestic context avoids some of the problems that can arise in transnational cases. For example, state courts dismissing cases in favor of sister-state courts can assume that the alternative forum will apply similar procedures, *cf. infra* text accompanying notes 316–18, and that any resulting judgment will warrant full faith and credit, *cf. supra* text accompanying notes 22, 26.

<sup>58</sup> Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 n.13 (1981).

contingent than the Court has perhaps realized. This Part aims to demythologize forum non conveniens by reviewing the doctrine's fairly recent provenance and by laying bare the discontinuities between the uses for which the doctrine was created and the uses to which it is put today.

This Part starts by describing the history of forum non conveniens as that of three separate doctrines which developed in the 1800s and early 1900s.<sup>59</sup> In 1947, the Supreme Court amalgamated two of those doctrines into a new doctrine for use within the federal judicial system.<sup>60</sup> It then extended that domestic test to transnational cases in 1981 without significant modifications.<sup>61</sup> The rest of the Part explains why that 1947 test is the wrong test for transnational litigation today. First, as a test designed for a domestic context, it does not directly account for the international comity concerns that arise in transnational cases. Second, its focus on the availability of evidence reflects an era when long-distance litigation was not just expensive, but infeasible. That emphasis on evidence gathering is increasingly anachronistic. And third, it presumes the defendant is a nonresident of the forum with minimal connections to it, in keeping with all three of the original doctrines of forum non conveniens. Yet forum non conveniens is often used today to dismiss cases brought against local defendants. Whatever historical pedigree forum non conveniens can legitimately claim, it does not extend that far.

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<sup>59</sup> On the nineteenth and early twentieth century origins of forum non conveniens, see, for example, BORN & RUTLEDGE, *supra* note 14, at 366–68; Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 387 n.35 (1947). Barrett did find a few isolated Scottish cases from the seventeenth century in which the court declined jurisdiction because the parties were nonresidents and trial in Scotland would be inappropriate. Barrett, *supra*, at 387. Those cases might be considered early progenitors of a practice that did not otherwise develop in Scotland until the nineteenth century. *See id.* Another scholar has suggested that venue transfers within England during the seventeenth through early nineteenth centuries provide an early analogue for modern forum non conveniens practice. *See* Roger S. Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 HARV. L. REV. 41, 43–45 (1930). That English venue practice, however, involved transferring cases within a single sovereign system; in contrast, forum non conveniens has primarily involved dismissing cases in favor of separate sovereigns. The English venue practice does not speak to the power of the courts to engage in the latter practice, which English courts did not recognize until the twentieth century—and when they did so, they looked not to these domestic venue transfer cases, but to the Scottish (and American) practice of forum non conveniens. *See* Barrett, *supra*, at 387–88.

<sup>60</sup> *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947).

<sup>61</sup> *See* *Piper*, 454 U.S. 235.

### A. *The Rise of Forum Non Conveniens*

Over the course of the nineteenth and early twentieth centuries, revolutions in transportation and trade meant individuals and businesses had connections that were both further ranging and more transitory than ever before. At the same time and for similar reasons, conceptions of jurisdiction were expanding beyond strict territoriality.<sup>62</sup> The jurisdictional reach of domestic courts was becoming both wider and shallower,<sup>63</sup> and courts inside and outside the United States were developing rationales for declining cases that reached too far.<sup>64</sup>

First, the Scottish courts developed a practice in the 1800s of declining jurisdiction against foreign defendants when its exercise would be unjust.<sup>65</sup> The English courts adopted a similar practice after the turn of the century.<sup>66</sup> Second, U.S. courts sitting in admiralty occasionally exercised their discretion to dismiss suits involving foreign plaintiffs and foreign defendants<sup>67</sup> based in part on considerations of international comity.<sup>68</sup>

Then there were the U.S. state courts of general jurisdiction. Few U.S. states had adopted a practice like *forum non conveniens* by 1947, and more had rejected it.<sup>69</sup> New York was an outlier, both because it had embraced the power to decline jurisdiction most fully and because that power was based on a third rationale<sup>70</sup>: Rather than emphasizing either international comity or unfairness to defendants, New York courts focused almost exclusively on the burdens imposed on local

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<sup>62</sup> On the decoupling of territory and jurisdiction, see generally KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* (2009).

<sup>63</sup> See, e.g., Rutledge, *supra* note 19, at 1066–67 (describing the loosening of jurisdictional rules at the turn of the last century).

<sup>64</sup> For a detailed account of the evolution of court-access policies in the United States in this period, see generally EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958* (1992).

<sup>65</sup> See Braucher, *supra* note 45, at 909–11.

<sup>66</sup> See *id.*

<sup>67</sup> See, e.g., *Can. Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413, 421 (1932) (“The rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower federal courts.”).

<sup>68</sup> See *infra* text accompanying notes 99–101.

<sup>69</sup> Barrett, *supra* note 59, at 388–89; see also PURCELL, *supra* note 64, at 188 (“Prior to 1910 the doctrine of *forum non conveniens* was largely unknown to American courts outside admiralty, but after World War I a few state courts began to discuss the doctrine and to give it effect.”).

<sup>70</sup> See BORN & RUTLEDGE, *supra* note 14, at 367 (noting New York’s early and hearty adoption of *forum non conveniens*); Barrett, *supra* note 59, at 404 (similar).

courts and communities by cases that involved out-of-state plaintiffs, out-of-state defendants, and out-of-state harms.<sup>71</sup>

In 1947, the Supreme Court affirmed the use of forum non conveniens in federal courts, articulating as it did so a new test for the doctrine that combined the Scottish and New York rationales. *Gulf Oil Co. v. Gilbert*<sup>72</sup> was a domestic, interstate dispute: It involved a Virginian suing a Pennsylvanian corporation over a warehouse fire in Virginia, yet the Virginian had brought his claims in federal court in New York.<sup>73</sup> In approving the New York court's dismissal of that case for forum non conveniens, the Supreme Court established the test still used by federal courts today.<sup>74</sup>

That test starts from the premise that “the plaintiff’s choice of forum should rarely be disturbed” unless the balance of interests “is strongly in favor of the defendant.”<sup>75</sup> The *Gilbert* Court then articulated a nonexhaustive list of private and public interest factors to be weighed.<sup>76</sup> The private interest factors, which reflect the Scottish practice,<sup>77</sup> include:

[1] the relative ease of access to sources of proof; [2] availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; [3] possibility of view of premises, if view would be appropriate to the action; and [4] all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to [5] the enforceability [sic] of a judgment if one is obtained.<sup>78</sup>

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<sup>71</sup> See, e.g., *Pietrarroia v. N.J. & H.R. Ry. & Ferry Co.*, 91 N.E. 120, 122 (N.Y. 1910) (“[I]t is intolerable that our courts should be impeded in their administration of justice, and that the people of the state should be burdened with expense, in redressing wrongs committed in another state, for the benefit, solely, of its citizens, and where the remedy is in the enforcement of its statutes.”); *Collard v. Beach*, 87 N.Y.S. 884, 885–86 (N.Y. App. Div. 1904) (emphasizing docket congestion as a reason for declining to adjudicate out-of-state cases).

<sup>72</sup> 330 U.S. 501, 508–09 (1947). While *Gilbert* approved the use of forum non conveniens for cases at law, a companion case, *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 522, 531–32 (1947), approved the doctrine’s use for equitable claims.

<sup>73</sup> *Gilbert*, 330 U.S. at 502–03.

<sup>74</sup> See, e.g., *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 581 n.6 (2013).

<sup>75</sup> *Gilbert*, 330 U.S. at 508.

<sup>76</sup> *Id.* at 508–09.

<sup>77</sup> As the Supreme Court has since recognized, the real roots of *Gilbert* and *Koster* are in the Scottish practice. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449–50 (1994). On the influence of Scottish law on the federal judiciary more broadly, see generally James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613 (2011).

<sup>78</sup> *Gilbert*, 330 U.S. at 508.

The public interest factors, on the other hand, reflect the New York state court practice.<sup>79</sup> They include [1] the “[a]dministrative difficulties [that] follow for courts when litigation is piled up in congested centers instead of being handled at its origin”; [2] the “appropriateness . . . in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself”; and [3] the undue burden of jury duty on a community “which has no relation to the litigation” versus the “local interest in having localized controversies decided at home.”<sup>80</sup>

The *Gilbert* test was a pragmatic solution for a particular house-keeping problem faced by the federal courts in the years following *International Shoe Co. v. Washington*,<sup>81</sup> as the expansion of available forums enabled greater forum shopping by plaintiffs.<sup>82</sup> Forum non conveniens was not the only possible solution,<sup>83</sup> nor was it designed to be a universal solution.<sup>84</sup> Indeed, soon after *Gilbert* was decided, Congress adopted a slightly different solution in the form of the venue transfer statute, 28 U.S.C. § 1404, which allows federal courts to transfer (rather than dismiss) cases more properly heard in another federal district.<sup>85</sup> But Congress and the Court did not develop similar solutions for managing jurisdictional excess in transnational cases.<sup>86</sup>

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<sup>79</sup> This is not surprising, given that the most influential article written on forum non conveniens leading up to *Gilbert* was authored by a New York lawyer. See BORN & RUTLEDGE, *supra* note 14, at 367–69 (discussing the influence of Paxton Blair’s article, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929)); Stein, *supra* note 23, at 811 (“Blair’s article was met with the kind of judicial reception that law professors dream of.”).

<sup>80</sup> *Gilbert*, 330 U.S. at 508–09. Similarly, the Court acknowledged that “[i]n cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only.” *Id.* at 509.

<sup>81</sup> 326 U.S. 310 (1945).

<sup>82</sup> See, e.g., Alexander M. Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty: An Object Lesson in Uncontrolled Discretion*, 35 CORNELL L.Q. 12, 14 (1949) (noting the need for forum non conveniens at that time in light of expanding personal jurisdiction and venue provisions); Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 210–11 (2001) (linking the adoption of forum non conveniens to *International Shoe*); Stein, *supra* note 23, at 801–02 (same).

<sup>83</sup> See Stein, *supra* note 23, at 808–12 (describing alternative solutions explored by the Supreme Court prior to *Gilbert*).

<sup>84</sup> See, e.g., Grossi, *supra* note 23, at 16 (“*Gilbert* was, in essence, a venue-transfer case, and the standards there developed [were] those appropriate to a change of venue motion” within a single judicial system.).

<sup>85</sup> See *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 430 (2007).

<sup>86</sup> See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 & n.18 (1981) (fretting that U.S. courts were too attractive to foreign plaintiffs and listing reasons—presumptively illegitimate—for why foreign plaintiffs would prefer U.S. forums). Part of the argument of

Then in 1981, in *Piper Aircraft Co. v. Reyno*,<sup>87</sup> the Supreme Court extended *Gilbert*'s domestic test to transnational cases.<sup>88</sup> In *Piper*, the British heirs of British victims of an airplane crash in Scotland sued the U.S. manufacturers of the airplane and its propellers in U.S. court.<sup>89</sup> The district court applied the *Gilbert* test to dismiss the case for forum non conveniens, reasoning that it belonged in the Scottish courts.<sup>90</sup> In affirming, the Supreme Court did not adapt the *Gilbert* test or update its factors despite the transnational context. It did, however, add two glosses to the test's initial presumption. First, the *Piper* Court held that a foreign plaintiff's choice of forum should receive less deference than that of a domestic plaintiff.<sup>91</sup> Second, it clarified that there must be an adequate and available alternative forum before a case can be dismissed for forum non conveniens,<sup>92</sup> but it set that bar very low: The requirement will generally be satisfied as long as "the defendant is 'amenable to process' in the other jurisdiction" and the plaintiff has access to *some* remedy, even if significantly limited.<sup>93</sup> The current test, as articulated in *Gilbert* and modified slightly by *Piper*, is summarized in Table 1.

The rest of this Part describes why this test is not the right test for evaluating the appropriateness of U.S. jurisdiction in transnational cases today.

### B. *The Absence of Comity*

Both courts and commentators today treat forum non conveniens as, at least in part, a comity doctrine.<sup>94</sup> Yet the Supreme Court in *Gilbert* was concerned about judicial administration within the federal

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this Article is that these background conditions have changed: Since *Piper*, the Court has been developing other solutions for determining how to draw the line between cases that belong in U.S. courts and cases that do not. *See infra* Part III.

<sup>87</sup> 454 U.S. 235 (1981).

<sup>88</sup> *See id.* at 241 n.6, 257–61 (applying the *Gilbert* factors).

<sup>89</sup> *Id.* at 238–39. The legal secretary of the heirs' U.S. attorney initially brought suit in California state court after California appointed her the administratrix of the passengers' estates. *Id.* at 239–40. On the defendants' motions, the case was removed to federal court and then transferred to Pennsylvania, where one of the defendants was based. *Id.* at 240.

<sup>90</sup> *Id.* at 241–44. The plaintiffs, who admitted they sought a U.S. forum for its more favorable tort law, were unable to secure affordable counsel in Scotland, and the suit was never refiled. Clermont, *supra* note 23, at 207, 222.

<sup>91</sup> *Piper*, 454 U.S. at 255–56. The rationale was that a foreigner's choice of a U.S. forum presumably would not reflect that plaintiff's personal convenience. *Id.*

<sup>92</sup> *Id.* at 254 & n.22.

<sup>93</sup> *Id.* (quoting *Gilbert v. Gulf Oil Co.*, 330 U.S. 501, 506–07 (1947)).

<sup>94</sup> *See, e.g.*, *Ford v. Brown*, 319 F.3d 1302, 1307, 1309–10, 1309 n.22 (11th Cir. 2003) (basing forum non conveniens dismissal in part on considerations of comity); Dodge, *supra* note 9, at 2109–10 (listing forum non conveniens as a comity doctrine while acknowledging that the test does not explicitly mention comity).



TABLE 1: FEDERAL FORUM NON CONVENIENS ANALYSIS

Threshold Inquiries <i>(Piper)</i>	Private Interest Factors <i>(Gilbert)</i>	Public Interest Factors <i>(Gilbert)</i>
1. Presumption in favor of plaintiff’s choice of forum (but foreign plaintiffs receive less deference)  2. Requirement of an adequate, available alternative forum	1. “[R]elative ease of access to sources of proof”  2. “[A]vailability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses”  3. The “possibility of view of premises, if view would be appropriate to the action”  4. “[A]ll other practical problems that make trial of a case easy, expeditious and inexpensive” (e.g., joinder, translation costs)  5. “[T]he enforceability [sic] of a judgment if one is obtained”	1. “Administrative difficulties [that] follow for courts when litigation is piled up in congested centers instead of being handled at its origin”  2. Preference for “having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself”  3. Undue burden of jury duty on a community “which has no relation to the litigation” versus the “local interest in having localized controversies decided at home”

system, not competing sovereign interests. Even in *Piper*, the Court did not identify international comity as a distinct consideration.<sup>95</sup> This absence of comity is explained in part by *Gilbert*’s domestic context, but it also reflects the *Gilbert* Court’s choice not to draw on admiralty cases when constructing its test for forum non conveniens.

Because admiralty jurisdiction lacked the territorial requirements or venue restrictions placed on the law courts,<sup>96</sup> it was not uncommon for admiralty courts in the 1800s to confront suits between foreigners,

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<sup>95</sup> The *Piper* majority did note that Scotland had “a very strong interest” in the case because the controversy was centered there, but it did not clearly identify that concern as distinct from concerns about judicial resources; instead, it emphasized in the same breath that the case’s retention would waste the resources of U.S. courts. See *Piper*, 454 U.S. at 260–61 (“The American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here.”).

<sup>96</sup> See, e.g., Calamita, *supra* note 9, at 634 (describing the role of forum non conveniens in constraining admiralty courts’ expansive jurisdictional scope).

including for conduct that occurred outside of U.S. territorial waters.<sup>97</sup> To keep that jurisdictional reach in check, U.S. courts sitting in admiralty would occasionally decline to exercise jurisdiction over such cases.<sup>98</sup> Often among the factors courts considered was a concern for international comity.<sup>99</sup> Thus, for example, a judge might weigh the desire for reciprocal protection of seamen in foreign courts (a positive adjudicative comity concern) against a concern that hearing a case would disrupt the free movement of commerce (a negative adjudicative comity concern).<sup>100</sup> Admiralty courts also gave great weight to the protests of foreign consuls, though such protests were not in themselves determinative.<sup>101</sup>

Given that these admiralty cases provided the strongest *federal* precedent for forum non conveniens,<sup>102</sup> it is notable that the *Gilbert* Court avoided relying on them.<sup>103</sup> That was in part a strategic decision, as the *Gilbert* majority had to establish that the power to decline jurisdiction was not limited to equity and admiralty, but could extend to cases at law as well.<sup>104</sup> That only underscores, however, that *Gilbert*

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<sup>97</sup> See GUSTAVUS H. ROBINSON, HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES 14–15 (1939) (describing the breadth of admiralty jurisdiction, which extends to causes of action “involving wholly foreign litigants and a foreign situs”).

<sup>98</sup> Cf. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 513 (1947) (Black, J., dissenting) (asserting that forum non conveniens was used in maritime cases “[f]or reasons peculiar to the special problems of admiralty”).

<sup>99</sup> See, e.g., *Am. Dredging Co. v. Miller*, 510 U.S. 443, 463–65 (1994) (Kennedy, J., dissenting) (collecting admiralty cases from this era that emphasized comity concerns).

<sup>100</sup> See *Bickel*, *supra* note 82, at 20–21; see also *Rutledge*, *supra* note 19, at 1065–66 (noting U.S. admiralty courts “would abstain from reaching the suit [between foreign parties] in order to avoid aggravating a foreign sovereign that might reasonably lay a superior claim to resolving the parties’ liabilities”); *Stein*, *supra* note 23, at 810 (noting that admiralty courts needed overbroad jurisdiction to ensure foreign seamen would have access to remedies and that forum non conveniens allowed them to check that jurisdiction when it reached too far).

<sup>101</sup> See *Hobart Coffey*, *Jurisdiction over Foreigners in Admiralty Courts*, 13 CALIF. L. REV. 93, 96 (1925).

<sup>102</sup> As Edward Barrett, Jr., concluded in 1947, “Only in admiralty cases has there been any considerable body of experience with a rule giving trial courts discretion to refuse to assume jurisdiction of causes, and that experience has been for the most part ignored in the application of the doctrine in other types of cases.” Barrett, *supra* note 59, at 419 (footnote omitted); see also ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 123 (1962) (“Admiralty courts have administered what in effect has been a doctrine of forum non conveniens much longer than land courts.”); Braucher, *supra* note 45, at 919 (“[I]t was in admiralty cases . . . that the federal courts first developed their discretionary power to decline jurisdiction.”).

<sup>103</sup> *Gilbert* cited the Court’s admiralty jurisprudence only once, and only to emphasize the dictum in that precedent that “[c]ourts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction . . . .” *Gilbert*, 330 U.S. at 504 (emphasis added) (quoting *Can. Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413, 423 (1932)).

<sup>104</sup> See *Gilbert*, 330 U.S. at 513–14 (Black, J., dissenting) (castigating the majority for extending the discretionary power to dismiss cases beyond admiralty and equity).

was not a consolidation of forum non conveniens doctrine across law, equity, and admiralty. Rather, *Gilbert* and its companion case, *Koster v. (American) Lumbermens Mutual Casualty Co.*,<sup>105</sup> defined a test for suits at law or in equity while arguably leaving distinct the separate practice of the admiralty courts. Not surprisingly, then, admiralty's concern for the maintenance of international comity makes no appearance in *Gilbert*'s private or public interest factors.

There is some irony in courts today analyzing forum non conveniens motions in admiralty cases by applying *Gilbert*'s private and public interest factors, which do not account for the international comity concerns addressed by many of the old admiralty cases.<sup>106</sup> A second irony is that, because these admiralty suits between foreigners tend to be the easiest cases for forum non conveniens dismissals, they reinforce the sense that the doctrine is still needed across the courts' dockets.<sup>107</sup> But there is a third irony as well. *Gilbert*'s public interest factors, far from incorporating admiralty's comity concerns, instead reflect the version of forum non conveniens used by the New York state courts, which focused on the local court's administrative concerns. That means *Gilbert*'s public interest factors do not simply lack an explicit negative comity consideration; they are inherently inward looking, asking only whether *this* forum would be inconvenienced by hearing the case, an orientation which runs counter to positive comity commitments as well.

### C. *An Anachronistic Focus on Evidence*

Unlike the admiralty precedent, the *Gilbert* Court did draw on Scottish and English practice in articulating *Gilbert*'s private interest factors. But the concerns motivating that Scottish and English practice have largely been resolved by legal and technological developments since *Gilbert* was decided.

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<sup>105</sup> 330 U.S. 518 (1947).

<sup>106</sup> Thus fifty years later, Justice Scalia writing for the Court in an admiralty case would state that the roots of forum non conveniens were not in admiralty but in Scottish precedent. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 (1994). While Justice Scalia was correct to the extent he was talking about the doctrine of forum non conveniens as articulated in *Gilbert*, Justice Kennedy was also correct in his dissent when he countered that forum non conveniens has a lengthy pedigree in admiralty, complete with its own set of justifications centered around international comity and commerce. *Id.* at 464–66 (Kennedy, J., dissenting).

<sup>107</sup> For example, the Court's suggestion that courts apply forum non conveniens to resolve easy cases in lieu of addressing difficult jurisdictional questions, see *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007), was based on an admiralty case that involved foreign plaintiffs, foreign defendants, and foreign harms, as well as parallel proceedings in a foreign forum—an easy case under the original admiralty practice that belies the difficulties forum non conveniens can raise in nonadmiralty cases.

At the turn of the last century, it could be “insuperable”<sup>108</sup> to try a case in a distant forum. Requiring businesses or professionals to travel long distances for trial, bringing with them the books and papers needed to run their companies, could fundamentally disrupt defendants’ livelihoods.<sup>109</sup> In contrast, long-distance litigation today poses a much lower risk of injustice to defendants. As Professor Martin Davies has shown, the private interests factors’ focus on access to evidence is increasingly anachronistic.<sup>110</sup>

Consider the first private interest factor, the ease of access to documents. *Gilbert* and *Piper* reflect an era of physical document production, of conference rooms filled with bankers boxes.<sup>111</sup> Today, however, when litigators complain about the cost of discovery, they have in mind the cost not of transportation or even of reproduction, but of compiling and sifting through thousands of electronic documents.<sup>112</sup> That work can be (and increasingly is) conducted remotely, regardless of where any resulting trial would take place.<sup>113</sup> Further,

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<sup>108</sup> See *Pierce v. Equitable Life Assurance Soc’y of U.S.*, 12 N.E. 858, 863 (Mass. 1887) (noting concern but not finding it applicable).

<sup>109</sup> See *Logan v. Bank of Scot.* (No. 2) [1906] 1 KB 141 at 152–53 (Eng.) (“[I]t is difficult to conceive anything more harassing to the defendant bank than to have their officials dragged up to London for a lengthy trial, . . . and when together with their officials they would have to bring up here, and keep away from their business, numerous other witnesses with a mass of books, papers and documents . . . .”); see also *Egbert v. Short* [1907] 2 Ch 205 at 211–12 (Eng.) (expressing concern about irreparable disruption to defendants’ professions in India if required to defend in England); *In re Norton’s Settlement* [1908] 1 Ch 471 at 486–87 (Eng.) (same).

As one American commentator in the 1940s put it:

Witnesses may be unwilling to travel; and when they do, the expenses involved are considerable. Documents also may have to be transported, and dispensed with for lengthy periods of time, as well as subjected to the risk of loss. In the case of a corporation, the witnesses may be key employees whose time is valuable to the defendant, and who, if the trial is at a distant place, will have to be away from their jobs for long periods of time . . . .

Bickel, *supra* note 82, at 14 n.15; see also Barrett, *supra* note 59, at 381–82 (similar). Each of these concerns, as this Section will explain, has been significantly ameliorated since the 1940s.

<sup>110</sup> See Davies, *supra* note 23, at 324–25; see also BORN & RUTLEDGE, *supra* note 14, at 415–16.

<sup>111</sup> In 1947, the best evidence rule still required the production of original documents. Davies, *supra* note 23, at 336. And while the advisory committee in 1970 clarified that the production of documents might include “electronic data compilations,” it had in mind the physical printouts of computer data. FED. R. CIV. P. 34 advisory committee’s note to 1970 amendment.

<sup>112</sup> See, e.g., Richard Marcus, “Looking Backward” to 1938, 162 U. PA. L. REV. 1691, 1724–25 (2014) (noting concerns about the growing cost and complexity of electronic discovery, as well as the rise of predictive algorithms to manage it).

<sup>113</sup> See, e.g., Debra Cassens Weiss, *E-discovery Rule Changes Boost Legal Outsourcing to India*, ABA J. (Apr. 4, 2008, 2:37 PM), [http://www.abajournal.com/news/article/e\\_discovery\\_rule\\_changes\\_boost\\_legal\\_outsourcing\\_to\\_india](http://www.abajournal.com/news/article/e_discovery_rule_changes_boost_legal_outsourcing_to_india).

the *legal* difference between here and there is also diminishing. When foreign documents are in the hands of a party or a party's affiliate, federal judges consistently compel the production of that evidence pursuant to the Federal Rules, even in the face of potentially conflicting foreign laws.<sup>114</sup>

Today borders pose serious legal challenges only when documents are held by third parties not subject to the personal jurisdiction of the U.S. court—a category that will admittedly grow now that the Supreme Court has reduced the scope of general jurisdiction.<sup>115</sup> In those situations, however, two international conventions organized by the Hague Conference on Private International Law have helped make the collection of such documents increasingly feasible.<sup>116</sup> The Apostille Convention<sup>117</sup> has simplified the process of obtaining public documents from foreign countries—a category of evidence that includes family records, land titles, patents, court judgments, and notarized signatures. More than 100 countries now belong to the Apostille Convention, and the Federal Rules of Civil Procedure were amended in 1991 to incorporate the Apostille Convention as a much-simplified method for certifying foreign attestations.<sup>118</sup> Meanwhile, the Evidence Convention<sup>119</sup> has significantly reduced U.S. courts' reliance on letters rogatory, or ad hoc requests that other countries fulfilled (if at all) only as a matter of diplomatic grace. Though the

<sup>114</sup> See Gardner, *supra* note 47, at 968–83 (criticizing the practice).

<sup>115</sup> See Cassandra Burke Robertson & Charles W. “Rocky” Rhodes, *A Shifting Equilibrium: Personal Jurisdiction, Transnational Litigation, and the Problem of Nonparties*, 19 LEWIS & CLARK L. REV. 643, 647–49 (2015) (discussing the impact of *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), on transnational evidence collection).

<sup>116</sup> As a point of comparison, in 1947, the Hague Conference had not adopted a convention since 1904; all of those antiquated conventions have since been replaced by thirty-eight modern conventions. See *About HCCH*, HAGUE CONFERENCE ON PRIVATE INT’L LAW, <https://www.hcch.net/en/about> (last visited Jan. 22, 2017).

<sup>117</sup> Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, *opened for signature* Oct. 5, 1961, 33 U.S.T. 883, 527 U.N.T.S. 189.

<sup>118</sup> FED. R. CIV. P. 44 advisory committee’s note to 1991 amendment. In 2011 alone, just a handful of U.S. states and the federal government reported issuing more than 300,000 apostilles for use in other countries, a number that is proportional to those reported by other member countries. See U.S., PART B - QUESTIONS FOR CONTRACTING STATES, at B-3, [https://assets.hcch.net/upload/wop/apostille2012\\_usa.pdf](https://assets.hcch.net/upload/wop/apostille2012_usa.pdf) (last visited Jan. 22, 2017) (providing the United States’ response to a January 2012 questionnaire regarding the Apostille Convention); PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT’L LAW, SYNOPSIS OF RESPONSES TO THE QUESTIONNAIRE OF JANUARY 2012 RELATING TO THE HAGUE CONVENTION OF 5 OCTOBER 1961 ABOLISHING THE REQUIREMENT OF LEGALISATION FOR FOREIGN PUBLIC DOCUMENTS (Apostille Convention) 16–17 (rev. 2013), [https://assets.hcch.net/upload/wop/2012apostille\\_pd03.pdf](https://assets.hcch.net/upload/wop/2012apostille_pd03.pdf). There is no easy way to identify how many apostilles are issued each year to parties in U.S. litigation.

<sup>119</sup> Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter Evidence Convention].

Evidence Convention's membership is more limited, it includes major U.S. trading partners like most European Union member states, Mexico, and China.<sup>120</sup> Those countries are now obliged to help execute requests for gathering evidence within their territory to the greatest extent possible.<sup>121</sup> While the Evidence Convention is an imperfect solution,<sup>122</sup> the process is getting easier;<sup>123</sup> at the very least, it is troubling that judges overlook the Evidence Convention when treating foreign evidence in the hands of third parties as an insurmountable obstacle.<sup>124</sup>

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<sup>120</sup> *Status Table 20: Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, HAGUE CONFERENCE ON PRIVATE INT'L LAW, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=82> (last updated Jan. 12, 2017) (listing fifty-nine member states).

<sup>121</sup> See Evidence Convention, *supra* note 119, arts. 2, 3, 10 (outlining procedure for responding to requests). For exceptions, see *id.* art. 12.

<sup>122</sup> See, e.g., Stephen B. Burbank, *A Tea Party at The Hague?*, 18 SW. J. INT'L L. 629, 633–34 (2012) (suggesting “we would be better off starting over from scratch” given changes in member states’ approaches to discovery since the convention’s negotiation in the 1960s). Member states report that most requests for assistance are now processed within four months, though some still take more than a year. See PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, SYNOPSIS OF RESPONSES TO THE QUESTIONNAIRE OF NOVEMBER 2013 RELATING TO THE HAGUE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS (Evidence Convention) 18 (rev. 2014), <https://assets.hcch.net/docs/2bdf80df-bde5-48c9-935f-55e82db4bc1c.pdf> (documenting self-reported responses to letters of requests received in 2012). For its part, the United States reported taking six months or more to resolve most incoming letters of request. See *id.*

Some countries also remain wary of assisting broad, U.S.-style discovery and have adopted reservations under the convention’s Article 23 that they will not execute letters of request “for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.” Evidence Convention, *supra* note 119, art. 23. Article 23 reflects a misunderstanding of what pretrial discovery entails, however, and the Permanent Bureau has called on member states to narrow their Article 23 reservations so as to exclude only genuine “fishing expeditions.” See PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRACTICAL HANDBOOK ON THE OPERATION OF THE EVIDENCE CONVENTION 113–20 (2016).

<sup>123</sup> For example, the Hague Conference consolidates information about each member state’s central authority and preferences on its website, see *Authorities: 20: Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, HAGUE CONFERENCE ON PRIVATE INT'L LAW, <https://www.hcch.net/en/instruments/conventions/authorities1/?cid=82> (last visited Jan. 23, 2017); provides a standard form for requesting evidence, see HAGUE CONFERENCE ON PRIVATE INT'L LAW, MODEL FOR LETTERS OF REQUEST RECOMMENDED FOR USE IN APPLYING THE HAGUE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS (1985), <https://assets.hcch.net/docs/e7b6b267-49e9-4e02-b814-c0780e5b65e3.pdf>; and encourages the electronic transmission of requests and responses, see HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONCLUSIONS AND RECOMMENDATIONS OF THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE SERVICE, EVIDENCE AND ACCESS TO JUSTICE CONVENTIONS ¶ 39 (2014), <https://assets.hcch.net/docs/eb709b9a-5692-4cc8-a660-e406bc6075c2.pdf>.

<sup>124</sup> See, e.g., *Abad v. Bayer Corp.*, 563 F.3d 663, 672 (7th Cir. 2009) (weighing third-party evidence in Argentina as favoring dismissal without mentioning availability of the

The Evidence Convention also helps ameliorate the second private interest factor: the “availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses.”<sup>125</sup> For unwilling witnesses located in other countries, the Evidence Convention requires foreign governments to examine witnesses upon request, subject to the same measures of compulsion they would use for domestic proceedings.<sup>126</sup> True, these examinations may be more limited than typical U.S.-style depositions: Questions may be restricted, judges may do all the questioning, and a verbatim transcript may not be prepared.<sup>127</sup> As far back as 1963, however, the advisory committee has encouraged federal judges not to exclude foreign testimony on this basis.<sup>128</sup>

As for securing the testimony of willing witnesses located abroad, technology and rule amendments have greatly reduced those costs over the last few decades. Global air travel is increasingly cheap and abundant.<sup>129</sup> And to the extent courts were traditionally concerned about disrupting businesses and professions through lengthy absences of key employees,<sup>130</sup> modern technology—laptops, smart phones, data plans, and ubiquitous wi-fi—enables those employees to continue their work remotely. Second, foreign witnesses no longer have to travel to the United States to appear at trial. Federal courthouses are now equipped to enable teleconferences and video-linked testimony,<sup>131</sup> and since 1996, courts may “permit testimony in open court

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Evidence Convention); *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 672–73 (5th Cir. 2003) (dismissing for forum non conveniens without mentioning Mexico’s adherence to the Evidence Convention).

<sup>125</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

<sup>126</sup> See Evidence Convention, *supra* note 119, arts. 3, 9, 10 (requiring that the receiving country to apply “appropriate measures of compulsion” to the extent required by domestic law); see also *id.* art. 12 (permitting refusal only where execution “does not fall within the functions of the judiciary” or would impinge state sovereignty or security).

<sup>127</sup> FED. R. CIV. P. 28 advisory committee’s note to 1963 amendment. The Evidence Convention, however, instructs countries to follow requested procedures unless practically difficult or incompatible with domestic law. Evidence Convention, *supra* note 119, art. 9.

<sup>128</sup> FED. R. CIV. P. 28 advisory committee’s note to 1963 amendment.

<sup>129</sup> Derek Thompson, *How Airline Ticket Prices Fell 50% in 30 Years (and Why Nobody Noticed)*, ATLANTIC (Feb. 28, 2013), <http://www.theatlantic.com/business/archive/2013/02/how-airline-ticket-prices-fell-50-in-30-years-and-why-nobody-noticed/273506> (explaining that the price of domestic airfare fell by fifty percent between 1979 and 2011 while the number of passengers tripled).

<sup>130</sup> See *supra* note 109.

<sup>131</sup> FED. JUDICIAL CTR. & NAT’L INST. FOR TRIAL ADVOCACY, EFFECTIVE USE OF COURTROOM TECHNOLOGY: A JUDGE’S GUIDE TO PRETRIAL AND TRIAL 129, 168–74 (2001), [http://www.fjc.gov/public/pdf.nsf/lookup/CTtech00.pdf/\\$file/CTtech00.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CTtech00.pdf/$file/CTtech00.pdf) (suggesting how judges might use the technology); *id.* at 287–90 (listing courthouses equipped with technology as of mid-2001). That is not to suggest this technology is a cure-all, however. See, e.g., *Iragorri v. Int’l Elevator, Inc.*, 203 F.3d 8, 17 (1st Cir. 2000) (voicing

by contemporaneous transmission from a different location.”<sup>132</sup> Thanks to changes in technology and the rules, it is also easier and cheaper to record depositions for later use at trial in lieu of live testimony.<sup>133</sup> Further, those depositions can be conducted remotely, without the cost of counsel from both sides traveling to the witness’s location, as parties can now stipulate to the taking of depositions through cheap videoconferencing platforms like Skype.<sup>134</sup>

The third private interest factor—the “possibility of [a] view of [the] premises”<sup>135</sup>—is the least concerning. The need for a jury view seldom arises in practice,<sup>136</sup> and the ability to videotape evidence cheaply and reliably has reduced that need even further.<sup>137</sup> Indeed, videotaping such evidence has additional benefits that make it potentially preferable even when the evidence *is* local.<sup>138</sup>

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concern that use of such technology could prevent factfinders from observing nuance in witnesses’ demeanor).

<sup>132</sup> FED. R. CIV. P. 43(a). The advisory committee’s embrace of this technology was admittedly tentative: It prefers use of recorded depositions at trial over live transmissions, and it did not want courts to fall back on such technology just to avoid inconveniencing witnesses. FED. R. CIV. P. 43 advisory committee’s note to 1996 amendment. Still, the advisory committee suggested courts should allow long-distance testimony when parties agree to its use, *id.*, and courts have done so when witnesses were located outside the forum state, *see* Davies, *supra* note 23, at 327–28 (collecting cases).

<sup>133</sup> *See, e.g.*, Bohn v. Bartels, 620 F. Supp. 2d 418, 432 (S.D.N.Y. 2007) (discounting inability to compel some foreign witnesses to appear as a reason to dismiss because of the availability of “alternatives to live testimony”); Davies, *supra* note 23, at 329–30, 330 n.83 (collecting cases). Though the Federal Rules first permitted the recording of depositions in the 1970s, parties were not allowed to videotape depositions for later use at trial as a matter of course until 1993. *See* FED. R. CIV. P. 30 advisory committee’s note to 1993 amendment.

<sup>134</sup> While parties could stipulate to the taking of depositions by telephone as early as 1980, the advisory committee broadened that permission in 1993 to cover depositions taken by “other remote electronic means,” by which it meant “satellite television” (which now sounds quaintly antiquated). FED. R. CIV. P. 30 advisory committee’s note to 1993 amendment. For examples of current practice, *see, for example, United States v. One Gulfstream G–V Jet Aircraft Displaying Tail Number VPCE5*, 304 F.R.D. 10, 17–18 (D.D.C. 2014) (“Ample case law recognizes that a videoconference deposition can be an adequate substitute for an in-person deposition, particularly when significant expenses are at issue . . .”), and *Hernandez v. Hendrix Produce, Inc.*, 297 F.R.D. 538, 541 (S.D. Ga. 2014) (ordering parties to “negotiate Skype-based depositions”).

<sup>135</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

<sup>136</sup> *See, e.g.*, *Kantakevich v. Del., L. & W.R. Co.*, 10 A.2d 651, 653 (N.J. Cir. Ct. 1940) (discounting the relevance of jury views, even before *Gilbert*, as “a matter of discretion which is seldom exercised or necessary”).

<sup>137</sup> *See DiFederico v. Marriott Int’l, Inc.*, 714 F.3d 796, 806 (4th Cir. 2013) (declining to dismiss for forum non conveniens even though the physical site of a terrorist attack in Pakistan could be relevant, given that the parties could use aerial photographs, floor plans of the hotel, and other demonstrative aids to assist the U.S. jury); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1398 (8th Cir. 1991) (reasoning similarly).

<sup>138</sup> Recording preserves the evidence and allows it to become part of the record, which means juries can review it during deliberations and appellate courts can consider it on



On all fronts, then, transnational evidence collection is far less burdensome today than it was even at the time of *Piper*. At the same time that such evidence collection has gotten easier, however, so has the defendant's burden for establishing hardship under these factors. Here is another irony. The Scottish and English practices from which these private interest factors derive were emphatic that *forum non conveniens* was not about mere inconvenience, but actual injustice.<sup>139</sup> Scottish courts first coined the term "forum non conveniens" in the late 1800s in reference to the longstanding concept of *forum non competens*, or the lack of competence (jurisdiction) to hear a case.<sup>140</sup> "Forum non conveniens" never meant "inconvenient forum"; it translates more correctly to "inappropriate" or "unsuitable" forum.<sup>141</sup> As an early supporter of *forum non conveniens* in U.S. courts explained, "[m]ere general allegations that witnesses and documents must be transported from a distant state should not suffice [for dismissal], since individuals and corporations who choose to do business in many states will probably be put to such inconvenience wherever suit is brought . . . ." <sup>142</sup> Here and abroad, something more than additional

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review. See Davies, *supra* note 23, at 345. It also allows the judge and counsel to focus the jury on relevant evidence while excluding extraneous information, *id.*, helping ensure that jurors' analysis will not be colored by circumstantial factors like the cold of the warehouse or the tedium of the drive.

<sup>139</sup> See *La Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs Français"* [1926] SC 13 (HL) 19 (appeal taken from Scot.) (opinion of Lord Shaw of Dunfermline) (stating that "the mere balance of convenience is not enough"); *Logan v. Bank of Scot. (No. 2)* [1906] 1 KB 141 at 151 (Eng.) ("[T]he inconvenience of trying a case in a particular tribunal may be such as practically to work a serious injustice upon a defendant and be vexatious," though "[t]his would probably not be so if the difference of trying in one country rather than in another were merely measured by some extra expense . . . ."); see also Barrett, *supra* note 59, at 406–07; Stein, *supra* note 23, at 796 n.46 (comparing Scottish and English standards).

<sup>140</sup> Barrett, *supra* note 59, at 386–87, 387 n.35; Braucher, *supra* note 45, at 909.

<sup>141</sup> See, e.g., ANDREW DEWAR GIBB, *THE INTERNATIONAL LAW OF JURISDICTION IN ENGLAND AND SCOTLAND* 212 (1926) ("The forum is then said to be *inconveniens*, or unsuitable."); WILLIAM MURRAY GLOAG & ROBERT CANDLISH HENDERSON, *INTRODUCTION TO THE LAW OF SCOTLAND* 20 (1st ed. 1927) (stating that "[t]he proper English equivalent" of *conveniens* is "appropriate").

<sup>142</sup> Barrett, *supra* note 59, at 412–13, 421 (collecting U.S. state court cases finding long-distance litigation to be not so burdensome as to necessitate dismissal); see also *Pierce v. Equitable Life Assurance Soc'y of U.S.*, 12 N.E. 858, 863 (Mass. 1887) (reasoning that a business presumably "anticipates that the profits of the business will compensate for the inconvenience of being held to answer" in the courts of a state where it does business); *Kantakevich v. Del., L. & W.R. Co.*, 10 A.2d 651, 653 (N.J. Cir. Ct. 1940) (stressing, in refusing to dismiss case, that the "present day conveniences for travel" and the "[a]dvances in the art of photography and the skill of engineers furnish[] ample facilities for a fair presentation of the place of the occurrence").

expense or trouble was required to sustain a plea of forum non conveniens.<sup>143</sup>

Not so today. *Piper* repeatedly emphasized that “the central focus of the *forum non conveniens* inquiry is convenience.”<sup>144</sup> That evolution was perhaps inevitable given the doctrine’s unfortunate choice of name, which has proven a *faux ami*. Regardless of the source of the error, reverting back to the original standard of actual injustice now would require overcoming decades of habit as well as the intuitive (but erroneous) translation of “conveniens.” The result is that the burden for defendants has effectively been lightened at the same time that the primary source of injustice—the infeasibility of securing foreign evidence and testimony for use at trial—has all but disappeared.

#### D. *An Expectation of Foreign Defendants*

That leaves *Gilbert*’s public interest factors, which reflect the New York state courts’ focus on the administrative burdens imposed by cases with minimal connection to the state. That public fisc rationale was limited, however, to cases where the plaintiff, defendant, and harm were all located outside of New York—what today might be called “foreign-cubed” cases.<sup>145</sup> In fact, the New York courts did not *have* discretion to dismiss cases that involved either a New York plaintiff, a New York defendant, or a non-tort cause of action: In those cases, the New York courts reasoned, the expense and burden of a local trial was justified.<sup>146</sup> Shortly before *Gilbert* was decided, for example, a New York state court refused to dismiss a case against a New York company even though it involved more than a thousand Cuban plaintiffs suing under Cuban law for unpaid wages in Cuba.<sup>147</sup>

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<sup>143</sup> See *In re Norton’s Settlement* [1908] 1 Ch 471 at 479, 482 (Eng.) (opinion of Vaughan Williams, L.J.) (stating dismissal requires more than the “mere fact of increased expense of trial”); GIBB, *supra* note 141, at 212 (“The inconvenience, then, must amount to actual hardship . . .”).

<sup>144</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981); see also *id.* at 256 (“[T]he central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient . . .”).

<sup>145</sup> This limitation is reflected in the phrasing of *Gilbert*’s public interest factors, to which I will return in Section II.B.

<sup>146</sup> See, e.g., *Gregonis v. Phila. & Reading Coal & Iron Co.*, 139 N.E. 223, 226 (N.Y. 1923) (reversing dismissal where plaintiff was a resident of New York); *Vigil v. Cayuga Constr. Corp.*, 54 N.Y.S.2d 94, 97–98 (N.Y. City Ct. 1945) (holding that a domestic corporation was subject to suit in New York even though the plaintiffs were Cuban citizens and the cause of action arose in Cuba); Barrett, *supra* note 59, at 410 (noting that “New York courts . . . will hear contract actions regardless of the residence of the parties”); Roscoe B. Gaither, *Jurisdiction of Foreign Causes of Action*, 66 U.S. L. REV. 303, 303–04, 308–09 (1932).

<sup>147</sup> *Vigil*, 54 N.Y.S.2d at 95, 98.

Indeed, far from considering this a close case, the court found the New York defendant's argument for dismissal "difficult to follow" given the well-established rule that local defendants could not invoke *forum non conveniens*.<sup>148</sup>

The Scottish and admiralty practices were not as strictly limited to foreign-cubed cases, but they similarly applied only to cases involving foreign defendants. Indeed, that was the whole point: Although the courts of Scotland and England rejected the administrative concerns relied on by the New York courts,<sup>149</sup> their focus on crippling unfairness to defendants was similarly tied to the defendant's residency. Given that local defendants were not burdened by having to defend themselves locally, the Scottish and English courts only dismissed cases brought against non-resident defendants.<sup>150</sup> In U.S. admiralty practice, meanwhile, the comity and fairness concerns justifying discretionary dismissals only arose in suits involving foreign parties.<sup>151</sup>

In short, when *Gilbert* was decided, *forum non conveniens* was limited in practice and justification to cases involving out-of-forum defendants.<sup>152</sup> When *Piper* applied *forum non conveniens* to dismiss a

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<sup>148</sup> *Id.* at 97; see also Gaither, *supra* note 146, at 308 (remarking on the author's inability, in 1932, to find a New York state court case invoking *forum non conveniens* to dismiss a suit against a New York defendant).

<sup>149</sup> The Scottish, for instance, thought it "[o]bvious[ ]" that "the Court cannot allege its own convenience, or the amount of its own business, or its distaste for trying actions which involve taking evidence in [another language], as a ground for refusal." *La Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs Français"* [1926] SC 13 (HL) 21 (appeal taken from Scot.) (opinion of Sumner, L.); see also *Logan v. Bank of Scot.* (No. 2) [1906] 1 KB 141 at 148–49 (Eng.) (contrasting Scottish and New York approaches to *forum non conveniens*).

<sup>150</sup> See Grossi, *supra* note 23, at 10 (noting that the Scottish doctrine was not applied to domestic defendants until the late 1970s); Robertson & Speck, *supra* note 45, at 949 n.68 (similar). For borderline cases, see *Logan*, [1906] 1 KB at 142 (reporting counsel's argument that the plaintiff had manufactured jurisdiction by naming local but nominal defendants, specifically an individual who was judgment-proof and a local bank branch that was not involved in the dispute); *In re Norton's Settlement* [1908] 1 Ch 471 at 480 (Eng.) (opinion of Vaughan Williams, L.J.) (distinguishing between domicile and residence in staying a case brought against an Englishman who resided and worked in India); *Tulloch v. Williams* (1846) 8 D 657, 657 (Scot.) (treating Scotsman who lived and worked in Jamaica as a nonlocal defendant).

<sup>151</sup> In 1947, for example, Robert Braucher could find no example of a court declining jurisdiction in an admiralty case "brought by an American citizen in his own right." Braucher, *supra* note 45, at 920–21; see also ROBINSON, *supra* note 97, at 18 ("The question [of *forum non conveniens*] has most frequently been presented in suits by foreign seamen against masters or owners of foreign vessels . . ."); Bickel, *supra* note 82, at 46 (finding no examples of *forum non conveniens*-type discretion being asserted in admiralty suits between U.S. citizens).

<sup>152</sup> See, e.g., Barrett, *supra* note 59, at 419 ("It is clear that it would be held an abuse of discretion for a trial court to refuse to hear a suit brought in the state . . . where the defendant has his actual domicile."); Braucher, *supra* note 45, at 914 (summarizing U.S.

case against a *local* defendant, it broke from whatever historical roots the doctrine could claim.

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Forum non conveniens is not intrinsic to the common law. Rather, the *Gilbert* Court articulated a new test woven together from disparate practices that were themselves of fairly recent provenance. *Gilbert* was a product of its time and its circumstances, a domestic foreign-cubed case at the dawn of deterritorialized jurisdiction. There is a chasm between *Gilbert* and *Piper* that makes the *Gilbert* test poorly suited for *Piper*'s transnational context—much less for the context of transnational litigation today. At the very least, the *Gilbert* test should be reformed to exclude its application in cases involving local defendants,<sup>153</sup> and the use of forum non conveniens in admiralty should be broken off and returned to its pre-*Gilbert* roots.<sup>154</sup> But those would be the “easy” reforms. More difficult will be the incorporation of comity considerations for transnational cases, as well as the downplaying of the evidentiary factors and a return to the doctrine's original focus on injustice beyond mere inconvenience. Indeed, as the next Part argues, those reforms may prove infeasible.<sup>155</sup>

## II

### THE LIMITS OF REFORM

The federal doctrine of forum non conveniens is thus poorly designed for the transnational cases for which it is primarily used today. But revising the test to fit transnational cases better is no simple task. It will not be as easy as telling judges to focus less on access to evidence, for example, or to add a new factor to address international comity concerns. As I have developed more fully in a companion article, complex and open-ended tests like the forum non conveniens analysis are prone to distortion due to the accumulation of cognitive shortcuts within the common law.<sup>156</sup> In the context of trans-

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state court practice as focused on “actions between aliens, nonresidents, and foreign corporations and in suits involving the ‘internal affairs’ of foreign corporations”); Joseph Dainow, *The Inappropriate Forum*, 29 ILL. L. REV. 867, 881 (1935) (summarizing forum non conveniens as historically applying to suits involving “foreign parties and foreign cause[s] of action”).

<sup>153</sup> See *infra* Section IV.D.

<sup>154</sup> That doctrine may, however, need to be updated and refined. See Bickel, *supra* note 82, at 13 (urging reform of the admiralty doctrine).

<sup>155</sup> Though I am skeptical that piecemeal reforms will on their own fix the shortcomings of forum non conveniens, I nonetheless summarize what such reforms might look like below. See *infra* Section IV.A.

<sup>156</sup> See Gardner, *supra* note 47.

national litigation, that distortion tends to favor local interests and disfavor foreign or systemic concerns, creating unintended parochial tilts within procedural doctrines. I have argued that such “parochial pressures” are indeed apparent within the lower courts’ application of *forum non conveniens*, which could explain the perception that the federal courts are invoking *forum non conveniens* too often.<sup>157</sup> At root, the problem is that *forum non conveniens* tries to do too much, and it does so shrouded within a double layer of judicial discretion that allows parochial pressures more space to grow. Those fundamental design flaws will not be fixed—indeed, they may be exaggerated—by reforms that add further complexity or fight against engrained habit. That is, the very structure of *forum non conveniens* invites its overapplication, and superficial reforms will do little to help.

This Part begins by summarizing a theory for why complex and open-ended doctrines like *forum non conveniens* develop parochial tilts over time. It then considers the specific challenge of adding comity back into the *forum non conveniens* analysis, concluding that efforts to do so have not worked and perhaps have made matters worse. The Part concludes by considering how a complex concept like comity may be best effectuated through procedural doctrines.

### A. *Doctrinal Design and Parochial Pressures*

Transnational litigation is complex, both factually and legally. Judges face institutional constraints in trying to identify, for example, how much discovery a foreign court would permit or what a foreign sovereign’s interests are in a particular case. Those institutional constraints—of time and resources and information—are particularly acute in the context of threshold procedural questions.<sup>158</sup> Yet *forum non conveniens*, a threshold procedural inquiry, asks judges to make a whole series of complex evaluations about the availability of foreign evidence, the level of foreign interest in a case, and the content of foreign law. Further, those determinations are left to the judge’s broad discretion and are subject only to highly deferential review. That fundamental combination of complexity, institutional constraints, and discretion will pressure the doctrine to evolve towards excluding too many cases from U.S. courts. Such parochial pressures can be divided into five categories.

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<sup>157</sup> See *id.* at 983–94 (evaluating federal practice of *forum non conveniens*).

<sup>158</sup> Cf. Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1986–2001 (2007) (critiquing open-ended discretion in procedural doctrines in light of bounded rationality, information access obstacles, and strategic interaction effects).

First is the pressure to “*rulify*.”<sup>159</sup> There is a limit on how much complexity even a dedicated decisionmaker can process.<sup>160</sup> A natural reaction to complexity is to seek out rubrics that can make open-ended standards feel more manageable and their application more legitimate.<sup>161</sup> Thus even though the *Gilbert* Court insisted its list of factors was not meant to be a definitive “catalogue” of considerations,<sup>162</sup> those factors have been treated as such ever since, and judges and litigants are unlikely to stray from that list even when it proves unhelpful.<sup>163</sup> Further, that same *Gilbert* test exemplifies the difficulty of identifying rubrics for use in transnational cases. As Part I described, the *Gilbert* test is poorly suited for use in modern transnational litigation: It was developed for a domestic context, its private interest factors are outdated, and its public interest factors reflect a rationale that no longer matches how the doctrine is used today. Yet because that test was already familiar and in use when *Piper* was decided, it would have taken much more judicial initiative (and risk) to develop a better alternative.<sup>164</sup> That is, the path of least resistance in transnational procedure will typically be the use of a domestic analogue, yet domestic tests will often overlook considerations that might be critical in a transnational context.<sup>165</sup>

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<sup>159</sup> See, e.g., Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 654–55, 654 n.26 (2014) (discussing the inherent pressure of “rulification” in common-law decisionmaking).

<sup>160</sup> See, e.g., Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1601–02, 1601 n.88 (2006) (noting empirical studies showing that decisionmakers, including judges, “make a decision after considering a remarkably low number of decision-relevant factors”).

<sup>161</sup> See Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 811–12 (2005) (“[H]aving too many options is frustrating and suboptimal, and . . . when faced with too much choice people will seek to narrow the range of choices by quick heuristics. We want decisional guidance, we want a smaller number of options, and we want to have our decisional processes structured.”).

<sup>162</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

<sup>163</sup> See *Abad v. Bayer Corp.*, 563 F.3d 663, 668 (7th Cir. 2009) (observing that, with *forum non conveniens*, “because there *is* a list, and a list sponsored by the Supreme Court, albeit in a case more than half a century old, parties find it difficult to resist trying to make their case correspond to the items in the list, however violent a dislocation of reality results”). This *rulification* of the *Gilbert* factors is perhaps a necessary consequence of the doctrine’s abuse of discretion review, discussed further *infra*. Appellate courts must have some legal framework by which to measure trial judges’ exercise of their discretion, and the *Gilbert* factors provide such a checklist.

<sup>164</sup> Cf. Bone, *supra* note 158, at 1990 n.122 (“[I]n the absence of strong feedback, a combination of framing, the escalating commitment effect, and the egocentric bias can cause a judge to lock into a routine set of practices even when those practices are suboptimal or flawed.”).

<sup>165</sup> See Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1459–73 (1991) (critiquing such transplantation of domestic rubrics to transnational litigation, and vice versa); cf. BRAINERD CURRIE, *On the Displacement of the Law of the Forum*

A poor choice of rubric can exaggerate the problem of *miscalibration*, the second source of parochial pressure. Miscalibration stems from another human reaction to complexity: the use of heuristics, or decisionmaking shortcuts. Two sets of heuristics in particular can distort broad balancing tests towards unintentionally lopsided inquiries. First, when confronting a litany of factors, decisionmakers may “satisfice,” or “consider a finite amount of information, maybe as few as two or three factors, to reach a good enough approximation of ‘correct’ outcomes.”<sup>166</sup> In a test with ten factors, for example, it is unlikely that all factors will be fully considered and weighed.<sup>167</sup> Rather, a test with many factors may lead to *less* optimal answers than a test with just a few factors because judges using the complex test may focus first on the least important factors.<sup>168</sup> Second, the choice of which factors to focus on first will be influenced by salience, “a heuristic that causes decisionmakers to overweight the importance of vivid, concrete foreground information and to underweight the importance of abstract, aggregated background information.”<sup>169</sup> It is human, in other words, to start with the most familiar or concrete factors, which will in turn have an outsized influence on the outcome.<sup>170</sup>

The difficulty with forum non conveniens is that the most concrete and familiar factors—those regarding the difficulty of obtaining evidence—are also the least relevant today.<sup>171</sup> Yet the attention of judges is directed first and foremost to evidentiary considerations, which comprise the first three factors of the *Gilbert* test.<sup>172</sup> It is not surprising, then, that the analysis of forum non conveniens has grown to emphasize party convenience, meaning primarily the ease by which

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(critiquing the U.S. approach to conflict of laws because “[i]t requires lawyers and judges to think and act in ways different from those to which they are disposed by training, habit and inclination”), in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 3, 9–10 (1963).

<sup>166</sup> Gardner, *supra* note 47, at 959.

<sup>167</sup> See Beebe, *supra* note 160, at 1601–04 (discussing empirical studies).

<sup>168</sup> Cf. Heiner, *supra* note 48, at 563, 565 (explaining that “allowing greater flexibility to react to more information or administer a more complex repertoire of actions will not necessarily enhance an agent’s performance”).

<sup>169</sup> ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 38 (2006).

<sup>170</sup> See Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 894–96 (2006) (discussing the distorting effect of salience on common law rulemaking).

<sup>171</sup> See *supra* Section I.C.

<sup>172</sup> See, e.g., *Seguros Universales, S.A. v. Microsoft Corp.*, 32 F. Supp. 3d 1242, 1250 (S.D. Fla. 2014) (stating that the most important private interest is the question of access to evidence); *RIGroup LLC v. Trefonisco Mgmt. Ltd.*, 949 F. Supp. 2d 546, 556 (S.D.N.Y. 2013) (“The first three factors are especially significant.”). Indeed, in the Eleventh Circuit, judges are required to consider the public interest factors *only if* the private interest factors are in equipoise, see, e.g., *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1290, 1298 (11th Cir. 2009), with the effect that defendants’ inconvenience may well be the beginning and the end of the analysis.

defendants can obtain discovery of foreign evidence, even as long distance evidence collection and the preservation of witness testimony has gotten easier.<sup>173</sup> And an emphasis on the location of evidence will favor dismissing cases, particularly those brought by foreign plaintiffs against U.S. defendants: At the outset of a case, it is difficult to forecast what evidence will be relevant to nascent claims, which means defendants in transnational cases can often point to some evidence abroad that might be helpful for their defense. Judges can presume that plaintiffs, in choosing the forum, have already taken into account the difficulty of obtaining evidence from abroad, but they may harbor due process-type concerns about defendants' access to evidence, leading them to overweight defendants' vague or unsubstantiated assertions of potential discovery problems. Further, because the alternative forum in *Gilbert* was another federal district court that would apply equivalent procedures, the *Gilbert* factors do not ask judges to consider whether the foreign forum will in fact resolve the defendant's discovery concerns.<sup>174</sup>

If miscalibration involves the overemphasis of salient factors, its flipside would be the marginalization of factors that are less familiar or more difficult to ascertain. This *ossification* of difficult factors is the third source of parochial pressure. When the assessment of abstract or foreign factors strain judicial capacity, judges may instead rely on dicta in prior opinions,<sup>175</sup> leading to string citations that can lock in those factors.<sup>176</sup> Between miscalibration and ossification, reforms to tests like forum non conveniens that add more complexity—particularly more factors that are difficult to ascertain, like an evaluation of comity interests—will not necessarily improve decisionmaking. The focus will remain on the salient evidentiary factors, and the difficult new factors will be addressed in general terms that will be copied from case to case until they become rote.

That process points to the fourth source of parochial pressure: the *path dependence* of the common law.<sup>177</sup> The use of heuristics is not

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<sup>173</sup> See *supra* Section I.C.

<sup>174</sup> See Davies, *supra* note 23, at 384 (critiquing the *Gilbert* factors for presupposing “the interdistrict, intra-American context in which *Gilbert* and *Koster* were decided”).

<sup>175</sup> Cf. Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 117 (2002) (“Under conditions of complexity and uncertainty, actors who perceive themselves as having limited information and can observe the actions of presumptively better-informed persons may attempt to free ride by following the latter’s decisions.”).

<sup>176</sup> Cf. BORN & RUTLEDGE, *supra* note 14, at 419 (noting this pattern in the context of the public interest factors).

<sup>177</sup> See generally Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001).



inherently problematic,<sup>178</sup> but the process of the common law means that a poor choice of rubric or miscalibration in one case can become amplified and entrenched across cases. This learning effect is not limited to hierarchical authority, either; district court judges routinely consider how other district court judges have handled similar cases, whether out of efficiency concerns, habit, reputational effects, or a professional commitment to the consistent development of the common law.<sup>179</sup> This path dependence is the vehicle through which the choice of rubrics, the miscalibration of tests, and the ossification of difficult factors become baked into the doctrine itself.

Take, for example, *Piper's* caution that cases only be dismissed for forum non conveniens when there is an adequate and available alternative forum.<sup>180</sup> In objective terms, gathering the relevant information about a foreign legal system can be challenging. In subjective terms, evaluating that information is also dicey: Judges are wary of declaring another country's courts inadequate.<sup>181</sup> Thus judges at times fall back on generalized assertions of the adequacy of foreign courts, relying in part on similar assertions made in prior decisions.<sup>182</sup> More

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<sup>178</sup> See Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 5, 29–30 (2007) (noting the importance of intuition in efficient judicial decisionmaking).

<sup>179</sup> As I have explained elsewhere:

Judges may follow nonbinding precedent even if it is suboptimal for any number of reasons. First, and most fundamentally, our legal culture is deeply committed to consistency across cases; all lawyers, including judges (and their clerks), are trained to distill the law from prior opinions. . . . In social terms, judges may overdefer to their peers' prior work because of a professional interest in avoiding conflict with colleagues, minimizing the risk of reversal on appeal, and conforming more broadly to the judicial consensus. Behavioral psychology suggests that judges may stick with suboptimal prior practice due to commitment effects, egocentric bias, or the weight of habit. In institutional terms, judges also conserve scarce resources when they avoid reinventing the wheel. And to the extent that precedent *is* binding, . . . the order in which cases arise can meaningfully constrain the future development of the law . . . .

Gardner, *supra* note 47, at 960 (footnotes omitted).

<sup>180</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).

<sup>181</sup> See, e.g., *Carijano v. Occidental Petrol. Corp.*, 643 F.3d 1216, 1226 (9th Cir. 2011) (voicing concern about U.S. judges appearing to condemn the sufficiency of other countries' legal systems); *Niv v. Hilton Hotels Corp.*, 710 F. Supp. 2d 328, 337–38 (S.D.N.Y. 2008) (emphasizing that “[c]ourts must be cautious before finding incompetence or corruption by other nation’s [sic] judicial systems” and collecting cases to same effect); Heiser, *supra* note 16, at 616 (noting the hesitancy of courts “to label the court system of another country procedurally ‘inadequate’”); Rutledge, *supra* note 19, at 1078–79 (arguing that instead of “minimiz[ing] jurisdictional competition . . . , the adequacy analysis simply worsens matters by miring courts in value-laden judgments about the acceptability or unacceptability of a foreign forum”).

<sup>182</sup> See, e.g., *Seguros Universales, S.A. v. Microsoft Corp.*, 32 F. Supp. 3d 1242, 1249–50 (S.D. Fla. 2014) (deeming Guatemala an adequate alternate forum); *In re Air Crash near Peixoto de Azeveda, Braz.*, on Sept. 29, 2006, 574 F. Supp. 2d 272, 283–85 (E.D.N.Y. 2008)

often, judges rely on defendant waivers and stipulations to ensure that a foreign court will be available and adequate for the plaintiff. Defendants may, for example, consent to personal jurisdiction before the foreign court, agree to accept foreign service of process, waive any statutes of limitation defenses, and promise to provide U.S.-style discovery to the plaintiff over and beyond what the foreign court might require.<sup>183</sup> As Professor Thomas Main has argued, those conditions may do more to reassure the court than to protect the plaintiff, who will have difficulty enforcing them before the foreign tribunal or else returning to a U.S. court for further litigation if those efforts fail.<sup>184</sup> The use of waivers, that is, allows judges to avoid assessing difficult questions about foreign legal systems, while their widespread use has helped to ossify the alternative forum inquiry, under which foreign forums are almost never found to be either inadequate or unavailable.<sup>185</sup>

Finally, there is the added pressure created by *deferential review*. The other four pressures can mount more easily within doctrines when there is no meaningful appellate check on the development and application of decisionmaking rubrics. In the case of forum non conveniens, as Judge Henry Friendly noted shortly after *Piper*, the Supreme Court has shielded trial court discretion with a highly deferential standard of appellate review.<sup>186</sup> That doubled discretion hinders doctrinal corrections that might help relieve the other parochial pressures.

### B. *The Problem of Comity*

As an illustration of these pressures, consider, for example, how judges applying forum non conveniens have tried to address comity more explicitly through the existing public interest factors. These factors were not designed to weigh positive and negative adjudicative comity concerns, and when pressed into that service, they encourage

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(same as to Brazil); see also Davies, *supra* note 23, at 322 (noting that some courts base their adequacy finding on their own consideration of publicly available material).

<sup>183</sup> See, e.g., Heiser, *supra* note 16, at 614–17, 615 nn.36–37, 616 n.45 (collecting cases and commentary regarding the use of conditions); Thomas Orin Main, *Toward a Law of “Lovely Parting Gifts”: Conditioning Forum Non Conveniens Dismissals*, 18 SW. J. INT’L L. 475, 480–84, 480 nn.22–23 (2012) (identifying categories of conditions, waivers, and stipulations, and collecting cases where they have been applied).

<sup>184</sup> See Main, *supra* note 183, at 479.

<sup>185</sup> See, e.g., Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1172–73 (2005); Whytock & Robertson, *supra* note 15, at 1457–60. For a thorough discussion of the shortcomings in the courts’ analysis of the alternative forum requirement, see generally Samuels, *supra* note 33.

<sup>186</sup> See Friendly, *supra* note 29, at 751–55.

ossification that undermines any potential comity benefits. That is, squeezing comity into the existing structure has not solved the problem, and in some instances might make matters worse.

One possible route for addressing comity through the existing factors is *Gilbert's* choice-of-law consideration: the preference for “having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.”<sup>187</sup> This factor, however, is not a helpful framework for analyzing adjudicative comity. First, choice-of-law analysis is a matter of *prescriptive* comity: It asks which country has the greater interest in seeing its laws applied.<sup>188</sup> That is a different question from the question of *adjudicative* comity that judges are trying to answer through *forum non conveniens*: which country has the greater interest in trying the case. Put differently, just because another sovereign’s law applies does not always mean that the sovereign would prefer the case be heard in its own courts.<sup>189</sup>

Second, neither of these comity questions is actually the question addressed by the *Gilbert* factor. Rather, the factor asks only how burdensome the choice-of-law analysis and resulting application of unfamiliar law would be for *this* forum. That is not a matter of comity, but of administrative convenience. It is possible that prescriptive comity, adjudicative comity, and administrative convenience may all point in the same direction: For example, when a case presents a novel question of foreign law that is sensitive or particularly thorny, it may be hard for a U.S. court to discern and apply that law, and the foreign sovereign may prefer its own courts to resolve any ambiguity.<sup>190</sup> But that will be the rare case. More typically, administrative concerns will be at odds with positive comity commitments: It is a normal task of the courts to apply foreign law as an expression of positive prescrip-

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<sup>187</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

<sup>188</sup> Given the diversity of approaches to choice-of-law analysis in the United States, this question of prescriptive comity can be phrased in different ways: for example, in terms of which state has the most significant contacts or relationship with the dispute, or the relative strength of each state’s interest in having its laws applied, or the application of default rules that presume state interests in regulating certain categories of conduct. *See generally, e.g.*, Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 724–28 (2009) (summarizing choice-of-law methodologies).

<sup>189</sup> *Lear, supra* note 15, at 569–70 (“[F]orum non conveniens presents a choice of forum, not a choice of law, problem. We are not talking about prescriptive jurisdiction, which is the exercise of regulatory power; we are talking about the exercise of adjudicatory power. . . . [A]pproaching the public interest analysis from a choice of law perspective obscures the significant American interests at stake in the adjudication of foreign injury claims.”).

<sup>190</sup> *See, e.g., Abad v. Bayer Corp.*, 563 F.3d 663, 671 (7th Cir. 2009).

tive comity,<sup>191</sup> yet the effort required will almost always be greater than applying U.S. law.<sup>192</sup> That greater effort in itself is not a reason to dismiss cases involving foreign law—yet that is precisely how this factor has developed in many circuits.<sup>193</sup> If judges are worried about the comity implications of keeping or dismissing a case, they would be better served to downplay this factor altogether.

A similar poor fit occurs when courts try to use *Gilbert*'s local interest factors to address comity considerations. Note that those factors are phrased quite narrowly: *Gilbert* was concerned about the burden of jury duty for “a community which has *no* relation to the litigation”; the “local interest in having *localized* controversies decided at home”; and the need for trials that “touch the affairs of many persons” to be held “in their view and reach rather than in remote parts of the country where they can learn of it by report only.”<sup>194</sup> These factors assume that a case is centralized in a particular (foreign) jurisdiction and that it has no meaningful nexus to the chosen forum. That matches the origins of forum non conveniens and *Gilbert* itself, which were focused on “foreign-cubed” cases.<sup>195</sup> But most cases dismissed today for forum non conveniens are not foreign-cubed cases; rather, transnational cases will often have meaningful connections to multiple forums, including the United States. For those

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<sup>191</sup> See *DiFederico v. Marriott Int'l, Inc.*, 714 F.3d 796, 807–08 (4th Cir. 2013) (emphasizing that U.S. courts apply foreign law all the time and have the tools to do so); see also *Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990, 994 (10th Cir. 1993) (pointing out that *Piper*'s balancing test would be “functionally meaningless” if the applicability of foreign law were alone sufficient to justify dismissal).

<sup>192</sup> See *CURRIE*, *supra* note 165, at 9 (observing that, because “[l]awyers and judges are ordinarily schooled in their own domestic law,” “[t]he intrusion of foreign law is an unsettling departure from routine, involving even under ideal conditions some encounter with the unfamiliar, some departure from usual procedures, some additional burden; and there are situations in which the degree of unfamiliarity and the burden of understanding can become oppressive”).

<sup>193</sup> See, e.g., *Ford v. Brown*, 319 F.3d 1302, 1307, 1310 & n.24 (11th Cir. 2003) (noting that applicability of foreign law militates heavily in favor of the foreign forum); *Logan Int'l Inc. v. SureTech Completions (USA), Inc.*, No. 4:13-cv-00492, 2013 WL 3005592, at \*5 (S.D. Tex. June 10, 2013) (same); *Harp v. Airblue Ltd.*, 879 F. Supp. 2d 1069, 1078 (C.D. Cal. 2012) (same); see also *Bohn v. Bartels*, 620 F. Supp. 2d 418, 434 (S.D.N.Y. 2007) (suggesting the very question that foreign law *might* apply weighs in favor of dismissal); cf. *Whytock*, *supra* note 188, at 756 (finding that only half of forum non conveniens opinions discuss choice of law, but that when they do, they are more likely both to find that foreign law applies and to dismiss the case).

<sup>194</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947) (emphases added).

<sup>195</sup> See *supra* Section I.D. As an interesting point of comparison, the admiralty courts were traditionally more willing to dismiss suits between foreigners when both parties shared “a common national forum,” *ROBINSON*, *supra* note 97, at 14, meaning the dispute was localized within a single foreign jurisdiction.

cases, the local interest factors do not help judges determine when a forum's connections to the case outweigh those of another forum.

Given the poor fit of these factors to transnational cases, judges do not apply them literally. Instead, they have treated these factors as a general inquiry into the countries' interests in the case. It is hard for judges in individual cases to weigh sovereign interests,<sup>196</sup> however, and an unguided yet capacity-straining inquiry invites generalizations. Thus under these factors, courts have invoked, for example, the Swiss interest "in ensuring that conduct occurring within its borders" is resolved by its own courts,<sup>197</sup> or the U.S. interest "in preventing forum shopping."<sup>198</sup> Such overgeneralized interests are easy to assert but lack analytical rigor, and the *Gilbert* factors provide no guidance on how to evaluate or weigh what may well be incommensurate values.<sup>199</sup> Rather, such generalized sovereign interests should be accounted for ex ante in the framing of the test itself: If a governmental interest would be true across many cases, there is no need for it to be precisely calibrated in each case.<sup>200</sup> By using the local interest factors to instead query what foreign sovereigns would prefer in run-of-the-mill disputes, judges have turned what were very narrow grounds for dismissal into an overbroad inquiry that allows for dismissal whenever generalized foreign interests may be implicated—as they will be in most transnational cases.

Indeed, the local interest factors might do more to promote international comity if limited to their original, narrow phrasing. That narrow phrasing recognizes that foreign-cubed cases with minimal connections to the chosen forum can raise negative adjudicative comity concerns. By applying those factors more broadly, judges have made the factors less determinate, which in turn increases judges' discretionary power to choose which generalized state interests to

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<sup>196</sup> See, e.g., Davies, *supra* note 23, at 374; Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1415–17 (1999); Paul, *supra* note 9, at 70.

<sup>197</sup> *Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1181 (10th Cir. 2009).

<sup>198</sup> *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1298 (11th Cir. 2009).

<sup>199</sup> *Compare Reid-Walen v. Hansen*, 933 F.2d 1390, 1400 (8th Cir. 1991) (asserting the strong interest of U.S. defendant's home forum in providing "redress of injuries caused by its citizens" and discounting Jamaica's interest in a minor tort case involving non-citizens), *with id.* at 1409–10 (Timbers, J., dissenting) (emphasizing Jamaica's interest in its tourist economy).

<sup>200</sup> See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 573, 577, 585 (1992) (explaining that a complex consideration that is nonetheless fairly consistent across cases is a prototypical example of when ex ante decisionmaking (i.e., rules) will be most efficient).

emphasize in individual cases.<sup>201</sup> The result may be an undermining of positive adjudicative comity (the willingness to hear transnational cases) and positive prescriptive comity (the willingness to apply foreign law when appropriate) without any real benefit for negative adjudicative comity.

The existing factors, in short, do not provide the right vehicle for assessing international comity (specifically, negative adjudicative comity). And adding a new factor will require fighting the greater salience of the evidentiary factors as well as decades of judicial habit. Forum non conveniens may simply not be the right vehicle for assessing when U.S. jurisdiction reaches too far.

### C. *The Pursuit of Precision*

To review, parochial pressures grow within doctrines that combine complex or difficult inquiries (like comity) with simpler, concrete ones (like access to evidence). Further, those pressures will be exaggerated by institutional constraints, which are greatest when judges must make quick decisions based on less information—as with procedural decisions. Forum non conveniens is the perfect storm of complex inquiries, institutional constraints, and judicial discretion, which means it is highly susceptible to distortion.

This story runs counter to the general assumption that flexible standards can achieve greater precision in jurisdictional doctrines than can rules. There is a recognized tradeoff in the design of such doctrines between efficiency and accuracy: Strict rules are easier to apply and more predictable but risk over- or underinclusion, while flexible standards are more difficult to apply and less predictable but allow for closer calibration in individual cases.<sup>202</sup> Professor David Shapiro, in famously defending such flexible standards, emphasized the need for “*principled discretion*”—meaning clearly articulated criteria the application of which would encourage “the development of effective guidelines,” all backed by a strong “principle of preference” that courts

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<sup>201</sup> Cf. Stein, *supra* note 23, at 821–22 (“[T]o the extent that the evaluation of public factors under [Gilbert] does constitute a substantive judgment about the extent of the respective forums’ stakes in the controversy, that judgment should be formalized and subjected to full appellate review . . .”).

<sup>202</sup> See Brand, *supra* note 20, at 1010–11 (describing forum non conveniens’ preference for precision over efficiency); Clermont, *supra* note 23, at 228 (arguing that pursuit of the ideal forum is too costly and ultimately infeasible). Outside of academic debate, however, jurisdictional doctrines may be inherently flexible even when phrased in terms of absolutes. Frederic M. Bloom, *Jurisdiction’s Noble Lie*, 61 STAN. L. REV. 971, 1006–07 (2009).

would hear cases falling within their grant of jurisdiction.<sup>203</sup> From Shapiro's perspective, *forum non conveniens* is supposed to help calibrate jurisdiction more precisely in individual cases, narrowing in on the optimal jurisdictional line. But that presumes judges are able to effectively apply the given criteria<sup>204</sup> and that the standard does not evolve lopsidedly over time.<sup>205</sup> Simply put, *forum non conveniens* does not provide the needed guidance that allows for the principled exercise of discretion.

A more effective approach might be to disaggregate a doctrine like *forum non conveniens* into a series of distinct inquiries that separate the challenging considerations from the more prosaic ones—and that subject the challenging considerations in particular to meaningful appellate review. This series of distinct inquiries does not need to be comprised solely of rules. It matters most that each inquiry is simple, at least as applied to the majority of cases.<sup>206</sup> That is, either a simple rule or a simple standard might effectively sort eighty percent of cases without straining judicial capacity. For the smaller subset of cases that defy sorting under that initial rule of thumb, there might be a second-stage determination that allows for more complexity or case-by-case balancing.<sup>207</sup> By cabining that more complex determination to a second stage of inquiry that is only reached in marginal or unusual cases, judges can prevent those marginal or unusual cases from distorting the primary inquiry in the typical case.

Put another way, instead of relying on an overarching safety valve like *forum non conveniens*, we might have a series of inquiries each with its own safety valve built into a second stage of inquiry that judges need only reach in harder cases. By disaggregating concerns into separate, more focused doctrines, judges are more easily able to

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<sup>203</sup> David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545, 575, 578 (1985) (emphasis added).

<sup>204</sup> See Meltzer, *supra* note 31, at 1912–13, 1913 n.125 (noting that “Shapiro may at times be just a little too sanguine that judicial discretion will be exercised in a fashion that will be conducive to predictable, stable, and relatively expeditious and efficient decisionmaking” and voicing concern about judges’ capacity to “establish a coherent framework for the boundaries of subject matter jurisdiction” under 28 U.S.C. § 1331 in particular). For a more optimistic view of judges’ ability to apply malleable jurisdictional doctrines, see Bloom, *supra* note 202, at 1011–12.

<sup>205</sup> See generally Schauer, *supra* note 161, at 805–06 (describing how standards “rulify” over time).

<sup>206</sup> Cf. Kaplow, *supra* note 200, at 590 (discussing tradeoffs between complexity and simplicity as distinct from tradeoffs between rules and standards).

<sup>207</sup> For a fuller discussion of the design of procedural inquiries, see Gardner, *supra* note 47, at 1006–10.

check their intuitions in individual cases<sup>208</sup> while avoiding the miscalibration and ossification that can build up within complex tests. The result may be more accurate line-drawing in determining which transnational cases to keep in U.S. courts, even if it requires sacrificing the ideal of precise calibration. The next Part considers what some of those discrete tests might look like.

### III

#### THE CIRCUMSCRIPTION OF TRANSNATIONAL LITIGATION

In the years since *Piper*, the Supreme Court has been drawing a sharper line between cases that belong in U.S. courts and cases that do not. From personal jurisdiction to the presumption against extraterritoriality to the enforceability of forum selection clauses, defendants now have multiple avenues for avoiding U.S. courts,<sup>209</sup> and forum non conveniens is becoming dangerously redundant. One solution might be to keep forum non conveniens and to roll back the other developments. In practical terms, however, such wholesale retrenchment seems unlikely, given the Court's broader turn towards limiting litigation.<sup>210</sup> Forum non conveniens may be the more vulnerable target.<sup>211</sup> But I also think it is the right target.

I start from the premise that there are (or were) cases that do not belong in U.S. courts: cases where the defendant has only transitory connections to the forum,<sup>212</sup> for instance, or where the assertion of jurisdiction stretches the limits of international law. Such jurisdictional overreach is not conducive to building the reciprocity and cooperation

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<sup>208</sup> Cf. Guthrie et al., *supra* note 178, at 3, 33 (advocating an “intuitive-override” approach to judging, under which “judges should use deliberation as a verification mechanism especially in those cases where intuition is apt to be unreliable”).

<sup>209</sup> See Bookman, *supra* note 22 (describing the rise in transnational litigation avoidance doctrines); Burbank, *supra* note 50, at 664 (arguing that, based on developments in class actions, pleading, and personal jurisdiction, “the need of foreign companies for protection against litigation in U.S. courts is less today than it has been in decades”); Rutledge, *supra* note 19, at 1070–71 (similar).

<sup>210</sup> For descriptions and critiques of this trend, see, for example, Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014); Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777 (2015); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014).

<sup>211</sup> In particular, forum non conveniens is out of step with the Court's increasing skepticism of abstention and prudential doctrines. See *infra* Section IV.D.

<sup>212</sup> Defendants accused of gross human rights violations or other conduct subject to prosecute-or-extradite treaty obligations are an exception to this general assertion. In such cases, universal prohibitions and multilateral treaties indicate that the exercise of jurisdiction over transient defendants would be neither exorbitant nor unfair.



on which private international law relies. Indeed, most other legal systems eschew the U.S. approach of overbroad jurisdiction that relies on ad hoc, ex post, discretionary decisions to determine its actual boundaries.<sup>213</sup> Placing some limits on the reach of U.S. laws and courts in transnational cases can avoid retaliatory measures by other countries and can encourage cooperation in the creation of new private law treaties, both of which should improve private litigants' abilities to resolve cross-border disputes overall. The question is what limits are needed, and how best to help judges identify them.

The doctrinal developments surveyed in this Part are imperfect; I have joined others in critiquing their excesses.<sup>214</sup> But the initial impulse behind these developments has been (in part) a concern for international comity, and the resulting inquiries hold potential for helping judges identify appropriate jurisdictional limits.<sup>215</sup> In particular, they disaggregate the comity considerations currently comingled in forum non conveniens, which will encourage judges to analyze those questions distinctly. Relatedly, these doctrines' more narrow scope encourages judges to be more specific about their reasons for dismissing transnational cases. Especially when judges are declining to exercise their congressionally granted jurisdiction, there is value in candor and transparency,<sup>216</sup> something which forum non conveniens lacks.<sup>217</sup>

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<sup>213</sup> See, e.g., Kevin M. Clermont, *The Role of Private International Law in the United States: Beating the Not-Quite-Dead Horse of Jurisdiction* (contrasting European and U.S. approaches to precision in jurisdictional doctrines), in *PRIVATE LAW, PRIVATE INTERNATIONAL LAW, & JUDICIAL COOPERATION IN THE EU-US RELATIONSHIP* 75, 103–05 (Ronald A. Brand & Mark Walter eds., 2005).

<sup>214</sup> See generally Gardner, *supra* note 15 (critiquing the Court's most recent application of the presumption against extraterritoriality); Anthony J. Colangelo, *The Frankenstein's Monster of Extraterritoriality Law*, 110 *AJIL UNBOUND* 51 (2016) (same); Robin Effron, *Atlantic Marine and the Future of Forum Non Conveniens*, 66 *HASTINGS L.J.* 693 (2015) (critiquing the Court's insistence on the enforcement of forum selection clauses).

<sup>215</sup> As Professor Pamela Bookman put it in her critique of the courts' litigation isolationism, some of these recent developments have helped align U.S. practice with international norms, “[b]ut the other half”—specifically, forum non conveniens—“get in their way.” See Bookman, *supra* note 22, at 1137–38.

<sup>216</sup> See, e.g., Childress, *supra* note 6, at 1508 (contending judicial transparency would promote democratic accountability); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 *YALE L.J.* 2347, 2381–82 (1991) (voicing concern that broad doctrines allow judges to dismiss cases too easily without having to articulate their true reasons for doing so); Shapiro, *supra* note 203, at 578–79 (arguing that clear articulation of the criteria on which judicial decisions rest permits principled judicial decisionmaking as well as principled criticism of it).

<sup>217</sup> See, e.g., Stein, *supra* note 23, at 795 (observing that under current doctrine of forum non conveniens, “[d]ifficult and important choices about court access and governmental interests are thus made in an informal, arbitrary, and inconsistent fashion”).

The following is a survey of major doctrinal developments that are displacing the need for forum non conveniens as a general safety valve. To the extent those alternative inquiries provide a better structure for limiting jurisdictional excesses—or at least are here to stay—forum non conveniens increasingly provides defendants with an unjustified second (or third or fourth) bite at the apple of dismissal.

### A. Personal Jurisdiction

To the extent forum non conveniens traces its roots to the Scottish practice, as the Supreme Court has suggested,<sup>218</sup> that history reflects a concern about exorbitant jurisdiction—meaning “those classes of jurisdiction, although exercised validly under a country’s rules, that nonetheless are unfair to the defendant because of a lack of significant connection between the sovereign and either the parties or the dispute.”<sup>219</sup> From this perspective, forum non conveniens was used to dismiss cases against nonresident defendants when jurisdiction was based on the attachment of assets unrelated to the cause of action,<sup>220</sup> or on transient presence,<sup>221</sup> or on other tenuous territorial connections.<sup>222</sup> Eliminate exorbitant bases of jurisdiction, and the need for forum non conveniens—at least as derived from the Scottish tradition—is largely eliminated as well.<sup>223</sup>

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<sup>218</sup> Am. Dredging Co. v. Miller, 510 U.S. 443, 449 (1994).

<sup>219</sup> Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 473, 474 (2006).

<sup>220</sup> See, e.g., Williamson v. Ne. Ry. Co. (1884) 11 R 596, 599 (Scot.) (opinion of Lord Young) (expressing concerns about “actions by domiciled citizens against foreigners, or even by foreigners against foreigners, founded on arrestments of small sums of money or articles of small value, when the circumstances out of which the action has arisen have no connection whatever with this country”); see also GIBB, *supra* note 141, at 224–25 (noting the Scottish courts were more open to pleas of forum non conveniens when jurisdiction was founded on attachment).

<sup>221</sup> See, e.g., Union City Transfer v. Fields, 199 So. 206, 207–08 (La. Ct. App. 1940) (noting the court’s power to decline jurisdiction in foreign-cubed cases where jurisdiction was based on personal service on defendant while temporarily in the state); Egbert v. Short [1907] 2 Ch 205 at 210, 212 (Eng.) (stressing when dismissing action that defendant was served while on vacation in England and on the eve of his return to India).

<sup>222</sup> See, e.g., Pietrarroia v. N.J. & H.R. Ry. & Ferry Co., 91 N.E. 120, 121 (N.Y. 1910) (excoriating plaintiff for “fraud or collusion” in using partial proceeds of a bank account to create a merely “technical, or colorable, right to maintain the action” in New York courts); Logan v. Bank of Scot. [1906] 1 KB 141 at 145, 148 (Eng.) (refusing to take into account a nominal local defendant who was a bankrupt or a local bank branch that had no connection to the dispute).

<sup>223</sup> A case currently pending before the Supreme Court may further remove the historical need for forum non conveniens. The rise of forum non conveniens in both state and federal courts was linked to plaintiff-side forum shopping in cases under the Federal Employers’ Liability Act (FELA), which was long interpreted as allowing plaintiffs a broad choice of state or federal forum in which to bring their suits. See PURCELL, *supra* note 64, at 223, 235–36. If the Court were to side with petitioners in *BNSF Ry. Co. v.*

When the Supreme Court decided *Piper* in 1981, exorbitant exercises of jurisdiction were still very possible,<sup>224</sup> and “*forum non conveniens*” became the vehicle by which [the Court] could trim back excessive assertions of jurisdiction by United States courts in cases against foreign companies” in particular.<sup>225</sup> Since then, however, the Court has significantly circumscribed the scope of general jurisdiction and clarified the limits on specific jurisdiction as well.

Most notably, in *Goodyear Dunlop Tires Operations, S.A. v. Brown*<sup>226</sup> and *Daimler AG v. Bauman*,<sup>227</sup> the Court narrowed general jurisdiction to the one (or very few) districts where a defendant is “essentially at home.”<sup>228</sup> For many corporate defendants, this has reduced their susceptibility to suit from just about everywhere<sup>229</sup> to only the forums where they are incorporated and perhaps where they have their principal place of business.<sup>230</sup> In particular, foreign corporations may no longer be susceptible to the general jurisdiction of any U.S. court.<sup>231</sup> While *Goodyear* and *Daimler* assuredly make it harder for plaintiffs to establish personal jurisdiction over foreign corporations,<sup>232</sup> they also addressed one of the few remaining bases of exorbitant jurisdiction in U.S. law.<sup>233</sup> Indeed, the Court in *Daimler* was self-conscious about the systemic implications of its decision for transnational litigation. Justice Ginsburg, writing for a nearly unanimous Court, emphasized the “risks to international comity” that arise when

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*Tyrrell*, 137 S. Ct. 810 (2017) (No. 16-405), the number of forums in which plaintiffs could bring FELA claims may be dramatically reduced, obviating a major historical impetus for the recognition of *forum non conveniens*.

<sup>224</sup> To put the timing into context, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), had been decided just the year before, and the reigning case on general jurisdiction was still *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952).

<sup>225</sup> Rutledge, *supra* note 19, at 1068.

<sup>226</sup> 564 U.S. 915 (2011).

<sup>227</sup> 134 S. Ct. 746 (2014).

<sup>228</sup> *Goodyear*, 564 U.S. at 919.

<sup>229</sup> See Linda J. Silberman, “*Two Cheers*” for International Shoe (*and None for Asahi*): *An Essay on the Fiftieth Anniversary of International Shoe*, 28 U.C. DAVIS L. REV. 755, 765 (1995) (describing how, in the mid-1990s, “[n]ationwide corporations with general operations in all states are suable everywhere”).

<sup>230</sup> See *Daimler*, 134 S. Ct. at 760.

<sup>231</sup> See Burbank, *supra* note 50, at 671 & n.35 (noting differential impact of *Goodyear* on U.S. versus foreign corporations); Rutledge, *supra* note 19, at 1074 (concluding that *forum non conveniens* “would [now] appear to be of limited use to foreign defendants who already have firmer protections as a result of *Goodyear* and *Nicastro*”).

<sup>232</sup> See Bookman, *supra* note 22, at 1092 & n.63 (collecting cases).

<sup>233</sup> See Clermont & Palmer, *supra* note 219, at 477 (listing “doing business” general jurisdiction, along with transient (“tag”) jurisdiction and attachment jurisdiction, as exorbitant bases of jurisdiction under U.S. law); see also, e.g., OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT 526–27 (Oscar G. Chase & Helen Hershkoff eds., 2007) (critiquing general jurisdiction doctrine pre-*Goodyear* and pre-*Daimler* as broader and more indeterminate than that recognized by any other country).

other allies, particularly the European Union, “do not share the [same] uninhibited approach to personal jurisdiction,” and she worried that an open-ended understanding of general jurisdiction had hindered negotiations for a new treaty on reciprocal enforcement of judgments, discouraged foreign investors, and generated international friction.<sup>234</sup>

In addition to the comity benefits of circumscribing general jurisdiction, the design of the inquiry set forth in *Daimler* is also preferable to the more wide-ranging approach it replaced. First, the initial question judges are now to ask—where is an individual domiciled, or where is a company incorporated or where is its principal place of business<sup>235</sup>—usually has an “easily ascertainable” answer.<sup>236</sup> Second, the Court did leave open an exception (albeit a very narrow one) allowing for the possibility that “a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.”<sup>237</sup> That exception retains a role for judicial discretion in extraordinary cases. By framing that exception so narrowly, however, the Court may succeed in preventing those extraordinary cases from re-expanding the primary inquiry. Finally, in exchange for this restrictive move, the Court could insist that general jurisdiction “afford[s] plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.”<sup>238</sup> In other words, when a plaintiff sues a corporate defendant in its home forum, that defendant should not be able to argue via forum non conveniens that a local trial would nonetheless be unfair.

In contrast, the Court’s jurisprudence on specific jurisdiction remains more muddled. Still, developments since 1981 have checked exorbitant invocations of specific jurisdiction as well. The Court has signaled, for instance, that defendants should not be swept up into the jurisdiction of a U.S. court (whether state or federal) simply because they participate in the global economy. In *Walden v. Fiore*,<sup>239</sup> the Court unanimously reaffirmed that a forum does not have jurisdiction over a defendant based solely on the plaintiff’s residency,<sup>240</sup> the defendant himself must do something to establish contacts within the state. What constitutes sufficient contacts is still a source of division at

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<sup>234</sup> *Daimler*, 134 S. Ct. at 763.

<sup>235</sup> *Id.* at 760–61.

<sup>236</sup> *Id.* at 760.

<sup>237</sup> *Id.* at 761 n.19.

<sup>238</sup> *Id.* at 760.

<sup>239</sup> 134 S. Ct. 1115 (2014).

<sup>240</sup> *Id.* at 1119.

the Court, as the fractured set of opinions in *J. McIntyre Machinery, Ltd. v. Nicastro*<sup>241</sup> demonstrates. But after *Nicastro*, it seems that a majority of the Court will not accept a pure stream-of-commerce theory of personal jurisdiction, at least in transnational cases.<sup>242</sup>

Further, the Court has emphasized, again in the context of transnational cases, that whatever constitutes minimum contacts with a forum must also be reasonable in a given case. In *Asahi Metal Industry Co. v. Superior Court*,<sup>243</sup> Justice O'Connor's opinion for the Court delineated a set of fairness factors meant to ensure the reasonableness of assertions of jurisdiction over foreign defendants in particular.<sup>244</sup> These fairness factors—which include concerns like the “unique burdens placed upon one who must defend oneself in a foreign legal system” and “the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction”<sup>245</sup>—overlap significantly with forum non conveniens.<sup>246</sup> And like forum non conveniens, they have been criticized by courts and commentators alike for being too difficult to apply, too uncertain, and too malleable.<sup>247</sup> To the extent these fairness factors overlap with the forum non conveniens inquiry, it does not make sense to evaluate them twice.<sup>248</sup> The better path forward might be to scrap the forum non conveniens approach and to focus instead on updating and narrowing *Asahi*'s fairness factors, a move which the Court may be ready to consider.<sup>249</sup>

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<sup>241</sup> 564 U.S. 873 (2011).

<sup>242</sup> See *Nicastro*, 564 U.S. at 888–89 (Breyer, J., concurring); *id.* at 908 (Ginsburg, J., dissenting).

<sup>243</sup> 480 U.S. 102 (1987).

<sup>244</sup> See *Asahi*, 480 U.S. at 113.

<sup>245</sup> *Id.* at 114–15 (emphasis omitted).

<sup>246</sup> See, e.g., Bloom, *supra* note 202, at 986; Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301, 324 (2008).

<sup>247</sup> See, e.g., Leslie W. Abramson, *Clarifying “Fair Play and Substantial Justice”: How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441, 446 (1991) (referring to lower courts' criticism of the fairness factors for lack of direction or predictability); Dubinsky, *supra* note 246, at 327 (arguing that the *Asahi* factors devolve into “intuition, [other] easy-to-measure variables, and a preoccupation with whether the defendant will be unduly burdened by having to defend litigation in the forum”). This development is not surprising, as the fairness factors are susceptible to many of the parochial pressures discussed above. See *supra* Section II.A.

<sup>248</sup> See Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 119 (1999) (contending forum non conveniens adds “[n]ot much” to the reasonableness test).

<sup>249</sup> Eight justices in *Daimler* rejected the importation of the fairness factors into the general jurisdiction inquiry because “[i]mposing such a checklist in cases of general jurisdiction would hardly promote the efficient disposition of an issue that should be

From the perspective of procedural design, that approach could have several benefits. First, unlike forum non conveniens, the specific jurisdiction inquiry is subjected to meaningful appellate review.<sup>250</sup> Second, the fairness factors are typically addressed at a second stage of inquiry<sup>251</sup>: Most questions of personal jurisdiction can be largely resolved based on minimum contacts, and only in the marginal cases do decisions turn on this more open-ended balancing test. That contrasts with the initial wide-ranging inquiry of forum non conveniens, the breadth of which enables parochial pressures to distort the doctrine more easily. Third, the personal jurisdiction inquiry focuses judges' attention on the question of defendant fairness. That focus is preferable to the amalgamated inquiry of forum non conveniens, which weakens judges' focus on any one question and thus has allowed the inquiry into defendant fairness to become diluted into a concern for mere inconvenience.

Still, to the extent that personal jurisdiction inquiries are rooted in constitutional doctrine, there is always a risk that any distortion of the fairness factors due to parochial pressures will become entrenched beyond the reach of legislative correction. The preferable approach, then, might be two-fold: revise and simplify the fairness factors to better match judges' institutional capacity while encouraging legislatures to adopt jurisdictional statutes that stop short of constitutional limits.<sup>252</sup> If determining the scope of personal jurisdiction in transnational cases based on statutory language, judges need not go looking for safety valves for excessive jurisdiction either in constitutional doctrines or amorphous powers like forum non conveniens.

### B. *The Presumption Against Extraterritoriality*

Personal jurisdiction doctrine, then, is starting to set some clearer limits on the reach of U.S. adjudicative jurisdiction. Meanwhile, the Court has set clearer limits on the reach of U.S. prescriptive jurisdic-

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resolved expeditiously at the outset of litigation," suggesting a general discomfort with the unwieldiness of the factors. *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 n.20 (2014).

<sup>250</sup> See, e.g., Clermont, *supra* note 248, at 119 (critiquing forum non conveniens as redundant with personal jurisdiction yet subject only to "nondeferential appellate review" on top of "various presumptions and weights that can skew that [trial court] discretion away from fairness").

<sup>251</sup> Although *Asahi* demonstrates that these two steps need not always be addressed in sequential order, the Court nonetheless conceives of specific jurisdiction as a two-stage inquiry where the reasonableness assessment follows after a determination of minimum contacts has been made. See *Daimler*, 134 S. Ct. at 762 n.20.

<sup>252</sup> See Clermont, *supra* note 213, at 100–01, 107 (explaining the benefits of a legislative approach). One vehicle for spurring such legislation would be an international treaty on jurisdiction and judgment enforcement, which is discussed below in Section IV.E.

tion through its reinvigoration of the presumption against extraterritoriality.

The presumption against extraterritoriality did not exist in its modern form when *Piper* was decided in 1981. Though considered a “longstanding principle of American law,”<sup>253</sup> the presumption had fallen into disuse after the 1940s; the *Restatement (Third) of Foreign Relations Law*, published in 1987, did not even bother to include it.<sup>254</sup> The Court rediscovered the presumption in the 1990s, however, and has since invoked it repeatedly in transnational cases to limit the reach of U.S. statutes.<sup>255</sup> This modern presumption is not the same as its progenitor; it was reborn a stricter and more structured inquiry.<sup>256</sup>

Under the modern presumption, judges engage in a two-step inquiry to evaluate the geographic scope of federal statutes.<sup>257</sup> At step one, the judge looks for Congress’s “clear indication of [the statute’s] extraterritorial effect.”<sup>258</sup> If the judge does not find such an indication, then the judge continues to step two, in which she determines the “focus” of the statute.<sup>259</sup> Just because a case has some domestic aspects, the Court has cautioned, does not mean the nonextraterritorial statute will apply to it.<sup>260</sup> Rather, the domestic elements must align with the statute’s “focus” for the case to fall within the domestic statute’s ambit.

The benefit of the modern presumption is that it provides a structured method for evaluating the reach of U.S. statutes—a method that, at least in part, is rooted in a concern for negative prescriptive

<sup>253</sup> EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991).

<sup>254</sup> See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 203 reporters’ note 1, at 27 (AM. LAW INST., Tentative Draft No. 2, 2016) (noting its prior omission).

<sup>255</sup> See, e.g., *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016) (RICO); *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013) (Alien Tort Statute); *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010) (§ 10(b) of the Securities Exchange Act); *Aramco*, 499 U.S. 244 (Title VII).

<sup>256</sup> See, e.g., John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351, 374 (2010) (“In the early 1990s, the Court dramatically strengthened the presumption against extraterritoriality, applying it more broadly and more strictly than before.”).

<sup>257</sup> See *Morrison*, 561 U.S. at 255, 266; see also *RJR Nabisco*, 136 S. Ct. at 2101 (reiterating and applying *Morrison*’s two-step inquiry). For further discussion of the two-step framework, see generally William S. Dodge, *The Presumption Against Extraterritoriality in Two Steps*, 110 AJIL UNBOUND 45 (2016).

<sup>258</sup> *RJR Nabisco*, 136 S. Ct. at 2100.

<sup>259</sup> *Id.* at 2101.

<sup>260</sup> See *Morrison*, 561 U.S. at 266–67 (“[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case.”).

comity.<sup>261</sup> But the modern presumption is plagued by its unfinished business. So far the Court has only articulated what judges should do when they determine at step one that a statute does *not* apply extraterritorially. But how are judges to interpret statutes that *do* include a “clear indication of extraterritorial effect”?<sup>262</sup> The majorities in *Kiobel v. Royal Dutch Petroleum Co.*<sup>263</sup> and *RJR Nabisco, Inc. v. European Community*<sup>264</sup> avoided this harder question by applying the presumption too strictly, engaging in interpretive acrobatics to find that the statutes at issue did not apply extraterritorially.<sup>265</sup> As I have argued elsewhere, this insistence on answering the step one inquiry in the negative—on finding that statutes do not apply extraterritorially—ends up eviscerating the presumption’s justification as a search for congressional intent.<sup>266</sup> As a result, even when Congress does intend statutes to apply extraterritorially,<sup>267</sup> the courts may be wary of recognizing that intent because the Supreme Court has not yet articulated how to interpret the scope of such statutes.

Just because a statute applies extraterritorially does not mean that its reach is boundless, however. There are at least two possible limits on extraterritorial laws that the courts could develop further. The clearest outer limit, as both Justice Breyer and Justice Scalia have suggested, is the constraint on prescriptive jurisdiction set by international law.<sup>268</sup> Under international law, a nation’s lawmaking powers

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<sup>261</sup> See, e.g., *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454–55 (2007) (describing the presumption as recognizing that “United States law governs domestically but does not rule the world”). It is possible to recognize this general benefit without agreeing with the Court’s application of the presumption in individual cases.

<sup>262</sup> The *RJR Nabisco* Court clearly rejected the use of *Morrison*’s step-two “focus” inquiry for this distinct question, but it did not indicate how the question should be analyzed instead. See *RJR Nabisco*, 136 S. Ct. at 2101 (“The scope of an extraterritorial statute thus turns on the limits Congress has (or has not) imposed on the statute’s foreign application, and not on the statute’s ‘focus.’”).

<sup>263</sup> 133 S. Ct. 1659 (2013).

<sup>264</sup> 136 S. Ct. 2090 (2016).

<sup>265</sup> See, e.g., Gardner, *supra* note 15, at 138–41 (critiquing the *RJR Nabisco* majority’s strained interpretation of RICO).

<sup>266</sup> See *id.* at 139–43 (arguing that *RJR Nabisco*’s presumption is not earnestly calculated to give effect to congressional intent); see also Colangelo, *supra* note 214, at 51–55 (raising similar concerns); Pamela K. Bookman, *Doubling Down on Litigation Isolationism*, 110 *AJIL UNBOUND* 57, 61 (2016) (“[I]t is . . . hard to argue that the presumption tracks congressional intent when it keeps raising the hurdle that Congress must clear in order to rebut it.”); Lea Brilmayer, *The New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 *Sw. L. REV.* 655, 664 (2011) (raising similar concern after *Morrison*).

<sup>267</sup> Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 *B.U. L. REV.* 1, 14–15 (2014) (discussing congressional overrides of *Morrison* and *Aramco*, among others).

<sup>268</sup> See *Kiobel*, 133 S. Ct. at 1673–74 (Breyer, J., concurring in the judgment); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815–18 (1993) (Scalia, J., dissenting).



are limited to five jurisdictional bases: conduct that takes place on its territory (or on ships flying its flag), conduct that is committed by its citizens, conduct that harms its citizens, conduct that harms its security interests, or conduct that contravenes universal prohibitions.<sup>269</sup> Under the *Charming Betsy* canon,<sup>270</sup> unless Congress clearly indicates its intent to legislate beyond these international limits, judges should treat those limits as hard stops on the reach of U.S. laws.<sup>271</sup>

Even if the exercise of lawmaking power is permissible under international law, however, it may still provoke controversy: The closer one approaches to the international legal limits on lawmaking power, the more likely one will cause consternation among nations whose core jurisdictional prerogatives—such as their own territorial jurisdiction—are affected.<sup>272</sup> Enter the Court’s admittedly vague guidance in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*<sup>273</sup> that judges should construe an extraterritorial statute’s reach “to avoid unreasonable interference with the sovereign authority of other nations.”<sup>274</sup> One way to read *Empagran* is as suggesting an intermediate canon of interpretation, short of *Charming Betsy*’s clear statement requirement, that warns judges to be wary of interpreting statutes as reaching right up to jurisdictional limits under international law. That is, when the exercise of U.S. prescriptive jurisdiction becomes attenuated under international law and when it overlaps significantly with other countries’ core jurisdictional prerogatives, judges should look more searchingly for clues from Congress about the statute’s intended scope.<sup>275</sup>

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<sup>269</sup> For the standard account, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 404 (AM. LAW INST. 1987).

<sup>270</sup> See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .”); see also RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 205 (AM. LAW INST., Tentative Draft No. 2, 2016) (describing canon as directing courts, “[w]here fairly possible,” to “construe federal statutes to avoid conflict with international law governing jurisdiction to prescribe”).

<sup>271</sup> Cf. Clopton, *supra* note 267, at 22–29 (arguing that the presumption against extraterritoriality should be replaced in civil litigation by an emphasis on the *Charming Betsy* canon).

<sup>272</sup> See Maggie Gardner, *Channeling Unilateralism*, 56 HARV. INT’L L.J. 297, 303–06 (2015) (describing controversial margins of traditional bases of jurisdiction).

<sup>273</sup> 542 U.S. 155 (2004).

<sup>274</sup> *Id.* at 164.

<sup>275</sup> I develop this argument more fully in Gardner, *supra* note 15, at 145–50. Cf. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 204 (AM. LAW INST., Tentative Draft No. 2, 2016) (proposing, in addition to the presumption against extraterritoriality, that “U.S. courts may interpret federal statutory provisions to include other limitations on their applicability as a matter of prescriptive comity” in order “[t]o avoid unreasonable interference with the legitimate

There is a middle ground, then, between the *Kiobel* and *RJR Nabisco* majorities' cramped interpretations of statutes based on an overly strict presumption, on the one hand, and a litigation free-for-all that requires forum non conveniens as an ad hoc safety valve, on the other.<sup>276</sup> If the presumption is refined,<sup>277</sup> it may be a more promising tool than forum non conveniens for analyzing questions of prescriptive comity. Compared to forum non conveniens's amorphous, undirected, and unaccountable inquiry,<sup>278</sup> the presumption provides analytical structure, meaningful routes of review, and the potential for a more focused and nuanced consideration of prescriptive comity. But if the presumption is not refined, its current strictness still makes forum non conveniens dangerously redundant. After last Term's *RJR Nabisco*, the presumption is poised to exclude more transnational cases than is necessary to implement negative prescriptive comity.<sup>279</sup> This overcorrection displaces the need for an ad hoc safety valve like forum non conveniens, which only risks closing the courthouse door further without providing any additional benefit.

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sovereign authority of other states"); Knox, *supra* note 256, at 353 (suggesting a similar approach pre-*Morrison*, though he would interweave this inquiry with the initial presumption against extraterritoriality, a route which *Morrison* may not have left open).

<sup>276</sup> While the minority opinions in *RJR Nabisco* and *Kiobel* offered more reasonable interpretations of the statutes at issue in those cases (concluding that they *did* apply extraterritorially), they also invoked forum non conveniens to ensure that the extraterritorial statutes would not have unlimited scope. See *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2115 (2016) (Ginsburg, J., concurring in part, dissenting in part, and dissenting from the judgment); *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1674 (2013) (Breyer, J., concurring in the judgment); see also *Daimler AG v. Bauman*, 134 S. Ct. 746, 771 (2014) (Sotomayor, J., concurring in the judgment) (similarly invoking forum non conveniens as an alternative to the narrowing of general jurisdiction).

<sup>277</sup> On the need for refinement, see, for example, William S. Dodge, *Loose Canons: International Law and Statutory Interpretation in the Twenty-First Century* ("The Court's extraterritoriality jurisprudence seems likely to remain a mess for some time."), in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT* 547, 551 (David L. Sloss et al. eds., 2011); Anthony J. Colangelo, *Kiobel: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction*, 28 MD. J. INT'L L. 65, 66–67 (2013) (arguing that *Kiobel* made the law on the presumption against extraterritoriality "contradictory and, thus, incoherent").

<sup>278</sup> Cf. Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents at 36, *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010) (suggesting forum non conveniens is inadequate to address prescriptive comity because its "ad hoc, case-by-case approach generates too much unpredictability of outcome to provide the reasonable certainty that capital markets need and to protect a sovereign's right to decide what legal and regulatory regime should apply to actions and consequences within its territory").

<sup>279</sup> Indeed, the foreign states who were the plaintiffs in *RJR Nabisco* saw no negative prescriptive comity problem in that case, but rather a positive adjudicative comity concern that they have access to U.S. courts to stop U.S. companies from engaging in conduct on U.S. territory that was causing them harm abroad.

### C. Forum Selection Clauses

When *Gilbert* was decided, both federal and state courts generally considered forum selection clauses to be unenforceable.<sup>280</sup> The Supreme Court in 1972 marked the beginning of a sea change in U.S. law when it encouraged federal courts sitting in admiralty to enforce forum selection clauses in contracts between sophisticated parties.<sup>281</sup> Notably, the Court in *The Bremen v. Zapata Off-Shore Co.*<sup>282</sup> framed this shift in doctrine as a matter of international commerce and cooperation—in other words, of comity. As the Court explained, “[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.”<sup>283</sup>

When *Piper* was decided, however, it was not yet clear how far the enforceability of such clauses extended beyond the facts of *The Bremen*. The answer, it turns out, is “very far.” The Court has expressed a similar solicitude for forum selection clauses that arise in diversity cases<sup>284</sup> and clauses included in contracts of adhesion.<sup>285</sup> Indeed, under the Court’s most recent holding in *Atlantic Marine Construction Co. v. U.S. District Court*,<sup>286</sup> forum selection clauses presumptively require federal courts to send cases to the party-selected forum, whether federal, state, or foreign.<sup>287</sup> Enforcing such clauses, the Court has explained, protects party autonomy and avoids disrupting “parties’ settled expectations.”<sup>288</sup>

These cases have gone further than necessary; the interests the Court identified in *The Bremen*—both party fairness and international comity—can be achieved without enforcing forum selection clauses in contracts of adhesion, for example. Nonetheless, some willingness to

<sup>280</sup> See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (“Forum-selection clauses have historically not been favored by American courts.”); Kurt H. Nadelmann, Comment, *Choice-of-Court Clauses in the United States: The Road to Zapata*, 21 AM. J. COMP. L. 124, 124 (1973) (heralding *The Bremen* as a significant shift in doctrine).

<sup>281</sup> See *The Bremen*, 407 U.S. at 10, 12–13, 15.

<sup>282</sup> 407 U.S. 1 (1972).

<sup>283</sup> *Id.* at 9.

<sup>284</sup> See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 28–29 (1988) (interpreting § 1404(a) as requiring district courts to take forum selection clauses into account in diversity cases even if the local state court would not).

<sup>285</sup> See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593, 597 (1991) (holding forum selection clauses in contracts of adhesion are not per se unenforceable).

<sup>286</sup> 134 S. Ct. 568 (2013).

<sup>287</sup> *Id.* at 575, 580. The Court has shown similar solicitude for arbitration agreements, urging enforcement of class arbitration waivers even in contracts of adhesion, see *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011), and even when such waivers make the enforcement of federal statutory rights impossible, see *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (citing *Concepcion*, 563 U.S. at 344).

<sup>288</sup> *Atl. Marine*, 134 S. Ct. at 583.

enforce parties' choice of forum agreements, at least in arm's-length negotiations, does help ensure fairness to defendants and reciprocal respect for foreign courts without the need for forum non conveniens.

The difficulty, however, is that the Court has linked the general enforceability of forum selection clauses with the use of forum non conveniens. In *Atlantic Marine*, the Supreme Court unanimously held that forum selection clauses pointing to another federal district should almost always be enforced and that the proper vehicle for doing so is 28 U.S.C. § 1404(a), the venue transfer statute.<sup>289</sup> For forum selection clauses pointing to a nonfederal forum (whether state or foreign), the Court indicated judges should use forum non conveniens instead.<sup>290</sup> There are (at least) two problems with this approach.<sup>291</sup>

First, it raises significant questions about the source of federal judicial power to enforce forum selection clauses. The Supreme Court had previously held that state laws blocking the enforcement of forum selection clauses were displaced by § 1404(a) *because* such a strict state rule would conflict with § 1404(a)'s "flexible and multifaceted analysis" for venue transfer.<sup>292</sup> That is, the congressional directive of § 1404(a) requires federal judges to be able to at least consider the presence of a forum selection clause when evaluating a motion to transfer venue.<sup>293</sup> As Professor Robin Effron has argued, however, the *Atlantic Marine* Court went much further when it insisted that forum selection clauses should presumptively be enforced, even in diversity cases, via § 1404(a), which overrides § 1404(a)'s "flexible and multifaceted analysis" that was the very basis for displacing state law in the first place.<sup>294</sup> As a result, the Court's current insistence on enforcing forum selection clauses exists in a twilight space between state law and congressional policy; it is, in other words, a judicial fiat. Worse, when forum selection clauses point to a different sovereign's courts, *Atlantic Marine* told judges to enforce such clauses through invocation of forum non conveniens, which lacks § 1404(a)'s legislative pedigree. In the transnational context, then, forum selection clauses are being enforced through an unacknowledged federal common law of contracts via a judge-made doctrine that itself lacks a clear source of authority.

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<sup>289</sup> *Id.* at 575.

<sup>290</sup> *Id.* at 580.

<sup>291</sup> The following discussion leans heavily on Professor Robin Effron's insightful analysis of *Atlantic Marine*. See Effron, *supra* note 214.

<sup>292</sup> See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988).

<sup>293</sup> See *id.* ("The forum-selection clause . . . should receive neither dispositive consideration . . . nor no consideration.").

<sup>294</sup> See Effron, *supra* note 214, at 697–702, 713–15; see also *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

Second, the Court effectively rewrote both the § 1404(a) analysis and forum non conveniens in order to ensure the consistent enforcement of forum selection clauses.<sup>295</sup> Under the *Atlantic Marine* approach to both § 1404(a) and forum non conveniens, there is no presumption in favor of the plaintiff's choice of forum, and the forum selection clause overrides any other private interest factor.<sup>296</sup> In Effron's words, this results in "balancing tests in which nothing is being balanced, multifactor tests in which the 'practical result' is that courts may consider only one factor, and authorizations of judicial discretion in which the district judge has the discretion to come to but one conclusion: enforcing the forum-selection clause."<sup>297</sup>

Congress could fix this problem by ratifying and implementing the new Hague Convention on Choice of Court Agreements,<sup>298</sup> which is now in force.<sup>299</sup> That congressional move would provide the federal courts with both a procedural and a substantive basis for enforcing forum selection clauses in many transnational cases.<sup>300</sup> Efforts to ratify the convention have stalled, rather ironically, on the insistence of the Uniform Law Commission that the convention not be implemented solely through federal legislation<sup>301</sup>—but that federalism-based critique may be missing that the status quo is no better for state interests, and might well be worse.

#### D. *Managing Transnational Litigation*

Beyond these larger doctrinal developments, judges have always had other tools for addressing party fairness and international comity concerns in individual cases without needing to resort to forum non conveniens. Foreign sovereign interests, for example, can be accounted for through immunity doctrines and the act of state doc-

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<sup>295</sup> See Effron, *supra* note 214, at 717–18. This collapsing of the doctrine is in addition to the Court's elision of the differences it had previously recognized between the § 1404(a) analysis and forum non conveniens. See *id.* at 702–05.

<sup>296</sup> See *Atl. Marine*, 134 S. Ct. at 583 n.8.

<sup>297</sup> Effron, *supra* note 214, at 718 (quoting *Atl. Marine*, 134 S. Ct. at 582).

<sup>298</sup> Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294.

<sup>299</sup> See *Status Table 37: Convention of 30 June 2005 on Choice of Court Agreements*, HAGUE CONFERENCE ON PRIVATE INT'L LAW, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> (last updated June 2, 2016).

<sup>300</sup> Notably, the convention excludes contracts related to family law, employment law, and consumer law. Hague Convention on Choice of Court Agreements, *supra* note 298, art. 2. Thus, for example, it would likely not require the enforcement of forum selection clauses in contracts of adhesion.

<sup>301</sup> For a critical account of such a "cooperative federalism" approach to implementing the convention, see, for example, Burbank, *supra* note 122, at 639–44.

trine.<sup>302</sup> And even before *Bell Atlantic Corp. v. Twombly*<sup>303</sup> and *Ashcroft v. Iqbal*,<sup>304</sup> Federal Rule of Civil Procedure 12(b)(6) provided judges with means to address frivolous or harassing claims.<sup>305</sup>

Further, in addition to all of these threshold determinations, the ability of district court judges to control the scope, shape, and progress of litigation should not be underestimated. From scheduling conferences to discovery management, more mundane procedural tools allow judges flexibility to address concerns currently lumped into the forum non conveniens analysis, particularly those related to defendant convenience and docket congestion. For example, consider a judge who is concerned that a U.S. defendant will be disadvantaged by the amount of the plaintiff's evidence located abroad. Rather than dismiss the case outright for forum non conveniens, she might require the plaintiff to bear the cost of translation, or provide the defendant with more time to seek discovery under the Evidence Convention, or leverage the threat of sanctions if the plaintiff does not make a good faith effort to make the foreign evidence available. Similarly, from the perspective of judicial administration, the Ninth Circuit long ago recognized that “[t]he *forum non conveniens* doctrine should not be used as a solution to court congestion; other remedies, such as placing reasonable limitations on the amount of time each side may have to present evidence, are more appropriate.”<sup>306</sup> Such pragmatic uses of procedure can make complex cases more manageable and burdens on parties easier to bear.

In sum, federal judges today have a range of inquiries that address comity and fairness concerns more directly and more thoughtfully than forum non conveniens. The need for such a rough tool for checking excessive jurisdictional reach has passed.

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<sup>302</sup> See Koh, *supra* note 216, at 2392–93 (listing “foreign sovereign immunity, head-of-state immunity, diplomatic immunity, [and] the foreign sovereign compulsion defense” as well as the act of state doctrine as more tailored doctrinal avenues for addressing comity than “blanket deference to foreign sovereignty”).

<sup>303</sup> 550 U.S. 544, 555 (2007).

<sup>304</sup> 556 U.S. 662, 679 (2009).

<sup>305</sup> See Dodson, *supra* note 33, at 134 (suggesting, based on empirical research, that *Twombly* and *Iqbal* “may be legitimizing a practice by some district judges to dismiss claims that, while not technically legally insufficient, struck the judge as so doubtful or unlikely that the judge thought justice might be served by dismissing them anyway”); cf. Koh, *supra* note 216, at 2383 (invoking Rule 12(b)(6), even before *Twombly* and *Iqbal*, to address judicial concerns in lieu of overbroad avoidance doctrines).

<sup>306</sup> *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1337 (9th Cir. 1984).

#### IV ROUTES TO RETIREMENT

The last three Parts have argued that *forum non conveniens* is detached from its historical roots, poorly designed for its current purpose, and increasingly redundant. Meanwhile, scholarly critiques have mapped the doctrine's costs, from a breakdown in international reciprocity to access-to-justice gaps, uncertainty for businesses, and the aggrandizement of judicial power.<sup>307</sup> The doctrine has become more trouble than it is worth. There remains, however, the practical question of how to bring its era to a close. Realistically, the current Supreme Court is not poised to jettison any doctrine that helps limit litigation.<sup>308</sup> Rather, if anything, the Court has been embedding the myth of *forum non conveniens* more deeply into federal practice, categorizing it as an inherent judicial power as recently as last Term.<sup>309</sup>

The retirement of *forum non conveniens* will instead be gradual; it will end not with a bang but with a whimper. This Part, in a mix of prediction and prescription, maps five routes for easing *forum non conveniens* into retirement. First, it describes doctrinal reforms that judges can adopt in the short term to make *forum non conveniens* a more limited and useful tool. While I am skeptical that reform efforts on their own will fix the problems of the current test, they provide an interim option for concerned judges. Second, it calls on the courts, including the Supreme Court, to avoid invoking *forum non conveniens* too lightly, a shift that may open more space for the reasoned elaboration of other critical doctrines. Third, it encourages the courts and Congress to continue developing alternative tools that can better help judges divine the appropriate dividing line between cases that belong in U.S. courts and cases that do not. Fourth, it encourages the Supreme Court and Congress to restrict the application of *forum non conveniens* in the federal courts, specifically by excluding its use in cases arising under federal question jurisdiction and in cases involving U.S. defendants. Fifth, it considers the most likely impetus for the doctrine's ultimate retirement: the negotiation of a new Hague treaty on the reciprocal enforcement of judgments.

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<sup>307</sup> See sources cited *supra* notes 23–37.

<sup>308</sup> See sources cited *supra* note 210.

<sup>309</sup> See *Dietz v. Bouldin*, 136 S. Ct. 1885, 1891 (2016) (listing *forum non conveniens* as among the district courts' "inherent powers").

### A. Consolidating Doctrinal Reform

Though lower court judges remain bound by *Piper*, they can nonetheless nudge forum non conveniens toward a more modern and helpful design.<sup>310</sup>

First, judges can reinvigorate the initial presumption in favor of exercising jurisdiction by requiring defendants to show that the foreign forum would be demonstrably better suited to hear the case.<sup>311</sup> While they cannot fully displace *Piper*'s unhelpful call to give less deference to foreign plaintiffs' choice of forum, judges can still ask defendants to point with some specificity to the evidence, witnesses, or third-party defendants the defendants cannot reach through U.S. process that they could (at least theoretically) obtain in a foreign court.<sup>312</sup> Vague assertions of difficulty should not be sufficient, particularly given the greater ease of gathering foreign evidence today.<sup>313</sup> If invoking the need for compulsory process, for example, defendants should be able to identify at least one material unwilling witness who is likely beyond the U.S. court's personal jurisdiction and the reach of the Evidence Convention.<sup>314</sup> Courts should also be skeptical of motions brought by U.S. defendants, particularly those sued in their home districts.<sup>315</sup>

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<sup>310</sup> Cf. Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 951–56 (2016) (identifying how lower courts can narrow obsolete Supreme Court precedent in order to update it).

<sup>311</sup> This is what the language of *Gilbert* and *Piper* would seem to require, though as I have argued elsewhere, that presumption has become weaker over time. See Gardner, *supra* note 47, at 993–94.

<sup>312</sup> While the Supreme Court warned against requiring defendants to submit detailed affidavits identifying specific witnesses, see *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 258 (1981), this more basic showing should not require “extensive investigation” in advance, *id.*

<sup>313</sup> See, e.g., *Reid-Walen v. Hansen*, 933 F.2d 1390, 1397 (8th Cir. 1991) (emphasizing how travel and communication developments since 1947 have reduced inconveniences for defendants); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1336 (9th Cir. 1984) (same).

<sup>314</sup> See, e.g., *DiFederico v. Marriott Int'l, Inc.*, 714 F.3d 796, 806–07 (4th Cir. 2013) (refusing to give this factor weight “when the defendant has not shown that any witness is actually unwilling to testify”); *Carijano v. Occidental Petrol. Corp.*, 643 F.3d 1216, 1231 (9th Cir. 2011) (collecting cases to similar effect); see also *supra* notes 119–28 and accompanying text (discussing the Evidence Convention). Given that courts have not consistently considered the Evidence Convention in evaluating the availability of foreign witnesses, see, e.g., *Alpine Atl. Asset Mgmt. AG v. Comstock*, 552 F. Supp. 2d 1268, 1281 (D. Kan. 2008) (stressing that a U.S. court would be unable to compel unwilling Swiss and U.K. citizens to testify without noting that both countries are parties to the Evidence Convention), plaintiffs may wish to bring the convention to the court's attention when appropriate.

<sup>315</sup> See *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 609 (10th Cir. 1998) (asserting that a “forum resident should have to make a stronger case than others for dismissal based on *forum non conveniens*”); *Reid-Walen*, 933 F.2d at 1395 (“[W]here the forum resident seeks dismissal, this fact should weigh strongly against dismissal.”); see also *Galustian v. Peter*, 591 F.3d 724, 732 (4th Cir. 2010) (raising same observation in dicta).



Second, judges can take seriously plaintiffs' concerns about how the change in forum will affect their own access to evidence, witnesses, and joinder. Even though courts at times acknowledge that transnational cases can be difficult to litigate in *any* forum,<sup>316</sup> it is still hard for U.S. judges to evaluate whether the foreign court applying its own procedures will in fact have greater access to evidence or a greater ability to try the case efficiently. Judges have thus relied on defendants' stipulations that they will provide, for example, U.S.-style discovery to plaintiffs in the alternative (foreign) forum,<sup>317</sup> but it is uncertain whether such stipulations are enforceable.<sup>318</sup>

Instead of relying on stipulations, courts should explicitly consider plaintiffs' interests within the analysis of private interests. Some circuits have suggested that judges should take plaintiffs' interests into account,<sup>319</sup> but it is not always clear whether such considerations are to be weighed within the existing private interest factors, as a new private interest factor, as part of the adequate alternative forum

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<sup>316</sup> See, e.g., *Bos. Telecomms. Grp., Inc. v. Wood*, 588 F.3d 1201, 1210 (9th Cir. 2009) ("This is a case in which witnesses are scattered around the globe. Whether the case is tried in Slovakia or California, both parties will likely be forced to depend on deposition testimony in lieu of live testimony for at least some witnesses."); *Baxter Int'l Inc. v. AXA Versicherung AG*, 908 F. Supp. 2d 920, 926 (N.D. Ill. 2012) (recognizing that one party or the other would have to travel under either scenario); *Klyszcz v. Cloward H2O LLC*, No. 11-23023-Civ., 2012 WL 4468345, at \*4 (S.D. Fla. Sept. 26, 2012) (similar); *In re Air Crash at Madrid, Spain*, on Aug. 20, 2008, 893 F. Supp. 2d 1020, 1033 (C.D. Cal. 2011) ("[N]o matter where these suits are tried, one side will face difficulty in gathering evidence and presenting witnesses for its case. . . . In either situation, the out-of-country evidence will be central to one party's case."); *Bohn v. Bartels*, 620 F. Supp. 2d 418, 431 (S.D.N.Y. 2007) ("Regardless of where this case is tried, it likely will be inconvenient and costly for those involved.").

<sup>317</sup> See, e.g., *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1330 (11th Cir. 2011); *Giglio Sub S.N.C. v. Carnival Corp.*, 2012 A.M.C. 2705, 2734 (S.D. Fla. 2012).

<sup>318</sup> See Main, *supra* note 183, at 479; see also *Effron*, *supra* note 214, at 710 ("Try as they might, however, judges cannot use conditional dismissals to transform forum non conveniens dismissals into a de facto system of international transfer.").

<sup>319</sup> Some circuits have focused on practical impediments for plaintiffs, like the lack of a contingent fee system in the alternate forum, see, e.g., *Reid-Walen*, 933 F.2d at 1399, or the financial burden that foreign litigation would impose on "impecunious plaintiffs," *Wiwa v. Royal Dutch Petrol. Co.*, 226 F.3d 88, 108 n.13 (2d Cir. 2000) (finding error in the magistrate judge's "focusing his consideration of the convenience factors almost entirely on the convenience of the defendants"); see also *Iragorri v. Int'l Elevator, Inc.*, 203 F.3d 8, 17 (1st Cir. 2000) (noting that the relative financial resources of the parties might be taken into consideration); *Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990, 994 n.7 (10th Cir. 1993) (same). Others have focused on the emotional trauma or safety concerns for plaintiffs litigating before a particular foreign forum. See *DiFederico*, 714 F.3d at 805 ("[I]t would be a perversion of justice to force a widow and her children to place themselves in the same risk-laden situation that led to the death of a family member."); *Guidi v. Inter-Cont'l Hotels Corp.*, 224 F.3d 142, 147 (2d Cir. 2000) (citing, in declining to dismiss case, "the substantial and unusual emotional burden on [p]laintiffs" in traveling to the country of the terrorist attack that gave rise to their claims).

inquiry, or as an overarching gestalt assessment.<sup>320</sup> It turns out that this choice matters. If the judge considers the plaintiffs' interests as part of the adequate alternative forum inquiry, for example, the plaintiffs' interests will rarely overcome that inquiry's high bar. In fact, the decision to site plaintiffs' interests within the adequate alternative forum inquiry or within the private interest analysis can explain how judges have reached seemingly inconsistent conclusions about whether it is too dangerous or emotionally fraught to send plaintiffs to litigate in Pakistan,<sup>321</sup> in Egypt,<sup>322</sup> and in Cali, Colombia.<sup>323</sup> If judges wish to consider plaintiffs' interests as part of the forum non conveniens analysis, then, they should do so within the balancing of private interests.

Third, the public interest factors should be applied literally and narrowly; the existing factors are not the place to attempt the weighing of generic state interests.<sup>324</sup> If a case is truly localized in another country, with few or no ties to the United States, or if the dispute is a high profile case that "touch[es] the affairs of many per-

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<sup>320</sup> The Fourth Circuit has "declin[e]d to categorize [plaintiffs' interests] within any one factor and instead treat[ed] it as a general consideration of convenience." *DiFederico*, 714 F.3d at 804 n.7 (recognizing that the plaintiffs' safety concerns could be analyzed as part of the available alternative forum inquiry, under specific private interest factors, or as a separate private interest factor). The Ninth Circuit has instead added two private interest factors to the standard list: "the residence of the parties and the witnesses" and "the forum's convenience to the litigants." *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1145 (9th Cir. 2001). The Second Circuit has characterized the entire private interest analysis as "a comparison between the hardships defendant would suffer through the retention of jurisdiction and the hardships the plaintiff would suffer as the result of dismissal and the obligation to bring suit in another country." *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 74 (2d Cir. 2001). Meanwhile, the Eleventh Circuit has declined to recognize any plaintiff-specific factor at all. *See Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1295 (11th Cir. 2009) (declining to recognize a plaintiff-specific factor to account for plaintiffs' safety concerns in attending trial in the alternative forum).

<sup>321</sup> *Compare Harp v. Airblue Ltd.*, 879 F. Supp. 2d 1069, 1075 (C.D. Cal. 2012) (rejecting plaintiff's concerns about terrorism and kidnapping directed against U.S. citizens in Pakistan in holding that Pakistan was an adequate alternative forum), *with DiFederico*, 714 F.3d at 804 & nn.7–8 (accepting the same State Department warnings of terrorism in Pakistan as showing that the balance of private interest factors favored plaintiffs' choice of U.S. forum).

<sup>322</sup> *Compare Niv v. Hilton Hotels Corp.*, 710 F. Supp. 2d 328, 336–37, 347 (S.D.N.Y. 2008) (rejecting the safety and emotional trauma concerns of foreign survivors of a terrorist attack in Egypt in dismissing their case based on Egypt being an adequate alternative forum), *with Guidi*, 224 F.3d at 147 (giving weight in the private interest analysis to the safety and emotional trauma concerns of U.S. survivors of a terrorist attack in Egypt when declining to dismiss the case).

<sup>323</sup> *Compare Iragorri v. Int'l Elevator, Inc.*, 203 F.3d at 13 (affirming the district court's finding that Cali, Colombia, was an adequate alternative forum despite plaintiffs' safety concerns), *with Iragorri v. United Techs. Corp.*, 274 F.3d at 75 (remanding for further consideration of the same plaintiffs' fears about returning to Cali).

<sup>324</sup> *See supra* Section II.B.

sons”<sup>325</sup> in another country, that might weigh heavily in favor of declining jurisdiction—at least unless Congress has specifically expressed an interest in adjudicating such cases. But for the many cases where the United States has *some* connection to or interest in the dispute, the “local interest” factors should be treated as largely irrelevant.

Similarly, the choice-of-laws factor should be interpreted narrowly so as to avoid undermining the positive prescriptive comity interest in applying foreign law when appropriate. Specifically, the choice-of-laws factor should primarily be invoked when it is clear that U.S. law will apply, in which case it should weigh heavily (if not presumptively) in favor of retaining jurisdiction.<sup>326</sup> On the other hand, the applicability of foreign law should not be a reason to dismiss a case otherwise properly in a U.S. court. Finally, judges should downplay or ignore entirely *Gilbert’s* docket congestion factor.<sup>327</sup> That factor reflects *Gilbert’s* concern about the distribution of workload within a single judicial system, a concern that does not translate to the transnational context. Besides which, comparing docket congestion across court systems is a much more difficult inquiry.<sup>328</sup> And even if it were feasible, commenting on the workflow or capacity of foreign courts carries too much risk of condescension or error, which has led some courts to wisely refuse to take the factor into account.<sup>329</sup>

Fourth, courts can also talk about the doctrine differently, even if they cannot change the name. The question should not be one of mun-

<sup>325</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

<sup>326</sup> This is the approach taken, for example, by the Tenth Circuit. *See Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1178 (10th Cir. 2009) (“If domestic law is applicable to the case, the *forum non conveniens* doctrine is inapplicable.”).

<sup>327</sup> *Gilbert*, 330 U.S. at 508 (considering the “difficulties [that] follow for courts when litigation is piled up in congested centers instead of being handled at its origin”).

<sup>328</sup> *See, e.g., Davies, supra* note 23, at 374–75.

<sup>329</sup> *See, e.g., Guidi v. Inter-Cont’l Hotels Corp.*, 224 F.3d 142, 146 n.5 (2d Cir. 2000) (“[T]he recent filling of all judicial vacancies and the resulting full complement of judges for the District makes this concern of little or no present significance.”); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1337 (9th Cir. 1984) (“The *forum non conveniens* doctrine should not be used as a solution to court congestion . . . .”); *Logan Int’l Inc. v. SureTech Completions (USA), Inc.*, No. 4:13-cv-00492, 2013 WL 3005592, at \*5 (S.D. Tex. June 10, 2013) (“[A]ll courts are busy.”).

Some courts have instead reoriented the factor towards private interests, asking if the case would proceed more quickly to trial in one forum or the other. *See, e.g., In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 484 F.3d 951, 958 (7th Cir. 2007); *Gates Learjet*, 743 F.2d at 1337. That solution eases the tenor problem but introduces a methodological one: It is hard for judges to evaluate correctly (and diplomatically) the pace of litigation in foreign courts. *See Abad v. Bayer Corp.*, 563 F.3d 663, 672 (7th Cir. 2009) (rejecting evidence of delay in Argentine courts because the evidence of delay was outdated). The better approach may be to ignore the factor entirely.

dane inconvenience but of real unfairness.<sup>330</sup> Shifts in tone and language might help over time to limit forum non conveniens to the rare, rather than the median, case.

### B. Reducing Reliance

Even if doctrinal reforms are slow or uneven, judges can also help ease forum non conveniens into retirement simply by reducing reliance upon it. In particular, trial court judges can avoid applying forum non conveniens in the first place if other threshold inquiries already point to a case's dismissal.<sup>331</sup> Indeed, as a practical matter—given the recent Supreme Court developments canvassed in Part III—these other threshold inquiries may now be easier to assess than forum non conveniens. Alternatively, *defendants* may become more cautious about invoking forum non conveniens after some high-profile cases that were dismissed from U.S. courts were in fact refiled in foreign courts, resulting in generous plaintiff judgments.<sup>332</sup> That is, as foreign courts become more receptive to U.S.-style litigation, the forum shopping calculus of defendants (especially U.S. defendants) may shift away from automatic invocation of forum non conveniens.<sup>333</sup>

The Supreme Court might follow suit in its own way. A demythologized forum non conveniens lacks the history or the breadth to serve as a “get out of jail free” card for resolving (or avoiding) doctrinal conundrums. In turn, the Court's analyses should be more thorough or else its decisions more limited, both of which outcomes would be conducive to the reasoned elaboration needed to build interdoctrinal coherence. By treating forum non conveniens as a doctrine of last resort, the courts and the Court can encourage the development of other doctrines that might, in turn, further displace any remaining need for forum non conveniens.

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<sup>330</sup> See Clermont, *supra* note 248, at 119 (“Forum non conveniens should not expand into a doctrine of inconvenience, but instead should be a doctrine of abuse. The courts should dismiss a suit only when the plaintiff has so abused the privilege of forum selection that, all things considered, exercising jurisdiction would be a miscarriage of justice.”).

<sup>331</sup> Although courts may dismiss for forum non conveniens before considering other threshold inquiries, *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007), they are not required to do so.

<sup>332</sup> In addition to the DBCP litigation described in the introduction, the enormous Ecuadorian verdict against Chevron in the Lago Agrio litigation—and Chevron's legal costs to block enforcement of that judgment—has garnered much attention. See, e.g., Manuel A. Gómez, *The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador*, 1 STAN. J. COMPLEX LITIG. 429, 430–33 (2013) (describing the Lago Agrio litigation).

<sup>333</sup> See Bookman, *supra* note 22, at 1124–27.

Consider, for example, the Court's 2007 decision in *Sinochem International Co. v. Malaysia International Shipping Corp.*,<sup>334</sup> where the Court held that district courts "may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant."<sup>335</sup> That decision was not incorrect either doctrinally or pragmatically.<sup>336</sup> *Sinochem* was—as the Supreme Court acknowledged—"a textbook case for immediate *forum non conveniens* dismissal,"<sup>337</sup> which made *forum non conveniens* the most straightforward basis for resolving the case. But what made it an easy case also made it a missed opportunity to develop other, more helpful inquiries. First, it was a foreign-cubed admiralty case and thus a good vehicle for rejuvenating a separate admiralty doctrine focused more explicitly on comity.<sup>338</sup> Second, there were parallel proceedings already underway in China,<sup>339</sup> which meant the case could have been stayed pending resolution of those proceedings under a doctrine of *lis alibi pendens*. Either would have been a more narrow (and equally straightforward) ground for dismissing that suit; indeed, these are just two examples of alternative inquiries the courts should be developing.

### C. Developing Alternatives

The doctrinal developments traced in Part III have reduced the need for *forum non conveniens*, but additional developments would further obsolete any remaining purpose. *Sinochem* points to two significant possibilities: First, the courts could resurrect a separate doctrine of *forum non conveniens* specifically for use in admiralty cases.<sup>340</sup> Such a doctrine would be limited to cases involving foreign litigants, and it would be focused on balancing positive and negative aspects of adjudicative comity. Second, the Supreme Court could articulate a set of standards for managing the problem of *lis alibi pendens*, or parallel proceedings in foreign forums involving the same

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<sup>334</sup> 549 U.S. 422 (2007).

<sup>335</sup> *Id.* at 432.

<sup>336</sup> If the Court were willing to reverse *Sinochem*, however, that would help further marginalize *forum non conveniens* while promoting the development of other inquiries, an insight for which I thank Professor Pamela Bookman.

<sup>337</sup> *Sinochem*, 549 U.S. at 435.

<sup>338</sup> See *supra* text accompanying notes 96–106.

<sup>339</sup> *Sinochem*, 549 U.S. at 426–27.

<sup>340</sup> This move may require revisiting *American Dredging's* holding that there is no admiralty-specific doctrine of *forum non conveniens*. See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449–50 (1994).

parties and issues.<sup>341</sup> Parallel proceedings raise concerns about efficiency and comity, particularly the waste of judicial resources when a foreign court is already expending resources on a case.<sup>342</sup> Civil law countries address this problem through *lis alibi pendens*, under which they typically stay second-filed cases pending resolution in the first-filed forum.<sup>343</sup> In contrast, the federal courts do not currently have a distinct doctrine for handling foreign parallel litigation.<sup>344</sup>

Though the lower courts at times have invoked the concept of *lis alibi pendens*, they have treated it primarily as an extension of domestic abstention doctrines.<sup>345</sup> But domestic abstention doctrines do not translate well to the transnational context as they are based on federalism concerns, not international comity.<sup>346</sup> While a few courts have instead invoked “international comity abstention” to address parallel proceedings, international comity abstention is more a label than a doctrine—it is so undertheorized that no one really knows what

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<sup>341</sup> See Calamita, *supra* note 9, at 603 (noting that “[t]he treatment of international parallel proceedings remains one of the most unsettled areas of the law of federal jurisdiction in the United States” and that “the Supreme Court has never spoken to the appropriate framework to be employed”); Austen L. Parrish, *Duplicative Foreign Litigation*, 78 GEO. WASH. L. REV. 237, 241 (2010) (similar).

<sup>342</sup> See, e.g., Calamita, *supra* note 9, at 610–11 (noting the lack of any benefit that would offset the significant costs and concerns attendant to parallel proceedings).

<sup>343</sup> CHASE ET AL., *supra* note 233, at 530; see also Brand, *supra* note 20, at 1008–11 (comparing common law and civil law approaches to parallel litigation); Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT’L L. 1003, 1008 (2006) (similar). For a cogent and nuanced account of different approaches to the problem of parallel proceedings, see generally CAMPBELL McLACHLAN, *LIS PENDENS IN INTERNATIONAL LITIGATION* (2009).

<sup>344</sup> See Burbank, *supra* note 122, at 638–39 (excoriating the Court for failing to address this gap).

<sup>345</sup> See McLACHLAN, *supra* note 343, at 102–11 (“[T]he approach to international cases has been fashioned by [federal] judges by analogy from the principles of internal civil procedure.”); Calamita, *supra* note 9, at 613–14 (discussing the lower courts’ invocation of *Colorado River* and *Landis* in order to address foreign parallel proceedings); Parrish, *supra* note 341, at 247–51 (same).

<sup>346</sup> See Calamita, *supra* note 9, at 656–62 (discussing the theoretical dissonance resulting from reliance on federal-state abstention doctrines); Parrish, *supra* note 341, at 242 (asserting that “much of the existing analysis of foreign parallel proceedings is drawn from domestic theory, without any serious consideration as to whether the domestic can be so easily grafted onto the international, or whether the two situations are comparable at all”). And even if the rationales were comparable, these federal-state abstention doctrines would still not serve as useful models to the extent that they are incoherent on their own terms. See, e.g., Burbank, *supra* note 82, at 215, 232.

it means.<sup>347</sup> Indeed, that undertheorization makes it equally susceptible to parochial distortion.<sup>348</sup>

Forum non conveniens may seem capacious enough to be able to fill this void<sup>349</sup>—but it is not the right vehicle for this analysis. For one thing, forum non conveniens approaches the question from the wrong direction: It starts with the presumption (at least nominally) that the court *should* exercise its jurisdiction, but the starting presumption of a *lis alibi pendens* inquiry is typically that a court should *not* exercise its jurisdiction if proceedings are already underway elsewhere.<sup>350</sup> In addition, the *Gilbert* test does not already incorporate consideration of parallel proceedings, and for the reasons I outlined above,<sup>351</sup> adding such an additional consideration is unlikely to work. It would require a new factor, the weight of which might differ from the other factors, adding complexity while fighting against thirty-five years of habitual application of the existing *Gilbert* test in transnational cases. Simply put, “it is probably too late in the day” to add such a consideration and expect courts to reliably “draw the kind of distinctions in analysis” that would be required.<sup>352</sup>

The exact contours of what a new doctrine of *lis alibi pendens* would entail are beyond the scope of this Article, but it bears noting that such a doctrine would not necessarily require the continued use of forum non conveniens.<sup>353</sup> In particular, the new doctrine (whether legislated or judge made) could include exceptions geared to keeping in check the dreaded “race to the courthouse” of a strict first-filed rule. For example, the strong presumption that courts should stay

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<sup>347</sup> See, e.g., Bookman, *supra* note 22, at 1096–97 (describing international comity as “a sort of intercourt diplomacy” that “can mean practically anything or nothing”); Calamita, *supra* note 9, at 667 (similar); Parrish, *supra* note 341, at 260; Silberman, *supra* note 56, at 340–41; see also Dodge, *supra* note 9, at 2112–14 (giving examples of the various and unpredictable results of its invocation).

<sup>348</sup> A full exploration of what courts might mean by international comity abstention—and the risk such a broad and undertheorized doctrine poses for transnational litigation—must, however, be saved for another day.

<sup>349</sup> See McLACHLAN, *supra* note 343, at 146 (noting that consideration of parallel proceedings is often subsumed within the analysis of forum non conveniens).

<sup>350</sup> See Calamita, *supra* note 9, at 672–73; Parrish, *supra* note 341, at 270–72; see also Calamita, *supra* note 9, at 651 (noting that all state courts that have addressed this question have treated forum non conveniens separately from *lis alibi pendens* because the initial presumption would need to be reversed).

<sup>351</sup> See *supra* Section II.A.

<sup>352</sup> Calamita, *supra* note 9, at 672.

<sup>353</sup> While others have assumed that *lis alibi pendens* requires continued use of forum non conveniens, those proposals are functionally similar to this approach. See Burbank, *supra* note 82, at 230 & n.132 (suggesting codified exceptions within a *lis alibi pendens* statute); Calamita, *supra* note 9, at 677–78 (suggesting forum non conveniens be used where a first-filed case is not brought by the natural plaintiff).

cases when there is parallel litigation abroad might be overcome if the foreign case was not brought by the natural plaintiff, or if the foreign proceeding has been significantly delayed, or if the foreign court is unable to provide the plaintiff with a fair trial or a meaningful remedy. That is, *lis alibi pendens* need not be a strict rule that requires the mediating influence of a separate, more flexible standard like *forum non conveniens*; it could instead incorporate some standard-like inquiries within its more rule-like structure.

Another significant alternative to *forum non conveniens* waiting to be developed is a more appropriate vehicle for enforcing forum selection clauses. Currently, based on the Supreme Court's strong dicta, the federal district courts are using *forum non conveniens* to enforce these clauses in transnational cases, which obscures the lack of legislative authority for that policy.<sup>354</sup> If Congress were to ratify and implement the Hague Convention on Choice of Court Agreements, the federal courts would have a more legitimate basis—and better procedural vehicle—for enforcing forum selection clauses in transnational cases. At the same time, one of the few remaining (albeit questionable) uses of *forum non conveniens* would also be obviated.

In short, *forum non conveniens* is not an all-encompassing cure-all for any problem that arises in transnational litigation. Demythologizing *forum non conveniens* can instead help us to see more clearly what needs fixing in the first place.

#### D. Narrowing Application

Either Congress or the Court could also affirmatively pare back the application of *forum non conveniens*, limiting its use to narrower categories of cases. In particular, neither history nor comity nor due process justify the use of *forum non conveniens* to dismiss cases brought against U.S. defendants.<sup>355</sup> Indeed, allies are unlikely to see U.S. courts exercising their jurisdiction over U.S. defendants as any sort of impingement on the allies' sovereign prerogatives. To the contrary, in civil law jurisdictions, a plaintiff must traditionally go to the defendant's forum to pursue an action, regardless of where the cause of action arose; thus, for example, the defendant's domicile is the presumptively preferred forum under the European Union's Brussels regime.<sup>356</sup> The defendant's home forum being the proper place for suit, or at least a fair forum for the defendant, is embedded within the U.S. system as well. Under the federal removal statute, after all,

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<sup>354</sup> See *supra* text accompanying notes 291–94.

<sup>355</sup> See *supra* Section I.D.

<sup>356</sup> See, e.g., Clermont, *supra* note 248, at 91–92.



defendants cannot remove cases filed in the courts of the home state of any properly served defendant.<sup>357</sup> Or consider the Supreme Court's recent promise that *Daimler's* constriction of general jurisdiction still ensures "plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims."<sup>358</sup> If Congress were to codify a narrowed doctrine of forum non conveniens, then, it should be limited to cases involving non-local defendants.<sup>359</sup>

Further, either Congress or the Court could clarify that forum non conveniens is not applicable in federal question cases. When jurisdiction is based on a federal statute (28 U.S.C. § 1331) directing the courts to hear cases arising under other federal statutes, the separation-of-powers concerns raised by abstention doctrines are at their zenith.<sup>360</sup>

Even if it appears unlikely that the Supreme Court would abandon forum non conveniens entirely in the short term, this sort of retrenchment would in fact be in keeping with broader trends at the Court. The Court is growing warier of abstention and prudential doctrines<sup>361</sup>—that is, of doctrines that are exceptions to the "strict duty to exercise the jurisdiction that is conferred upon [the federal courts] by Congress."<sup>362</sup> Such reasoning would seem to extend to forum non conveniens. But in *Quackenbush v. Allstate Insurance Co.*,<sup>363</sup> an early instantiation of the trend, the Court distinguished forum non conveniens from other abstention doctrines in part because of its "distinct

<sup>357</sup> 28 U.S.C. § 1441(b)(2) (2012). My thanks to Professor John Coyle for this insight.

<sup>358</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014).

<sup>359</sup> It would be harder for the Supreme Court to do so, given that *Piper* involved two U.S. defendants, one of which was at home in the district of the federal court that dismissed the case for forum non conveniens.

<sup>360</sup> *Cf. Burbank*, *supra* note 34, at 399–400 (arguing forum non conveniens should not be applied in statutory cases because it undermines domestic regulatory interests); *Lear*, *supra* note 27, at 1164 ("Each time a court dismisses a case on forum non conveniens grounds, it displaces the congressional value judgment that the dispute may conveniently be heard by the federal courts."). On the constitutional concerns potentially raised by abstention doctrines, see generally *Redish*, *supra* note 35.

<sup>361</sup> See *The Supreme Court, 2013 Term — Leading Cases*, 128 HARV. L. REV. 191, 326–30 (2014) (noting the Court's growing "discomfort with prudential justiciability doctrines and [its] effort to bring greater discipline to jurisdictional rulings" as illustrated by cases like *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) (standing); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014) (ripeness); and *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584 (2013) (abstention)); see also John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 73 n.415 (2014). For a more critical view of this trend, see Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845 (2017).

<sup>362</sup> *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

<sup>363</sup> *Id.*

historical pedigree.”<sup>364</sup> Yet those roots are not nearly as deep nor as distinct as the *Quackenbush* Court seemed to assume. *Quackenbush*’s holding that courts should not apply *Burford* abstention<sup>365</sup> to dismiss or remand cases seeking legal remedies<sup>366</sup> in fact undermined what limited pedigree forum non conveniens can claim in federal practice. When the *Gilbert* Court adopted forum non conveniens in 1947, it pointed to *Burford* to suggest that courts *do* have the discretion to dismiss cases at law.<sup>367</sup> That reliance mattered because the *Gilbert* Court labored hard to justify the application of forum non conveniens outside of equity and admiralty. A demythologized forum non conveniens casts serious doubt on the distinction drawn in *Quackenbush* between *Burford* abstention and forum non conveniens; if the courts’ power under one is rightly circumscribed, so should it be under the other.

Relatedly, the Court seems increasingly skeptical of prudential arguments about the judiciary’s inability to adjudicate cases touching on foreign relations.<sup>368</sup> Those standard prudential arguments, perhaps because they are so easy to invoke, helped abstention-type doctrines to grow in foreign relations law over the course of the twentieth century.<sup>369</sup> That growth in the discretion to avoid foreign relations cases was, in a way, a growth in judicial power, even though cloaked in the language of judicial deference.<sup>370</sup> The Court has now reined some of

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<sup>364</sup> *Id.* at 722.

<sup>365</sup> *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

<sup>366</sup> See *Quackenbush*, 517 U.S. at 730–31 (holding that courts can only dismiss or remand cases under *Burford* “where the relief being sought is equitable or otherwise discretionary”).

<sup>367</sup> See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 505 (1947) (discussing *Burford* as resting “[o]n substantially *forum non conveniens* grounds”).

<sup>368</sup> See Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 384–87 (2015) (describing how “the Roberts Court has jettisoned its traditional functionalism in favor of formalism” in foreign affairs cases).

<sup>369</sup> See Goldsmith, *supra* note 196, at 1400–10 (describing the growth of functional abstention doctrines during the Cold War); see also *id.* at 1414–15 (questioning the ability of courts to apply such doctrines in a disciplined manner).

<sup>370</sup> See *id.* at 1396; Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1959–73 (2015); cf. Cohen, *supra* note 368, at 436 (describing the Court’s apparent worry that “[f]oreign affairs functionalism, . . . like the keys to the family car or no curfew, might just be too much of a temptation”); Koh, *supra* note 216, at 2356–58, 2362–64, 2377, 2382 (criticizing the blanket invocation of comity, separation of powers, and judicial incompetence rationales as excusing judicial abdication in transnational cases). There are echoes here, of course, of Professor Martin Redish’s critique of abstention doctrines as “judicial usurpation of legislative authority.” Redish, *supra* note 35, at 76; see also Marshall, *supra* note 35, at 898 (noting that Redish’s article succeeded in revealing abstention to be a form of judicial activism rather than judicial restraint).

those doctrines back in, encouraging judges to retain and resolve more cases even if they implicate the political interests of other countries.<sup>371</sup> In particular, the Court has tightened the act of state doctrine<sup>372</sup> from “a sort of balancing approach” that considered broad-ranging prudential concerns into a narrow, rule-like threshold determination of whether the case turns on the validity of an “official action by a foreign sovereign.”<sup>373</sup> More recently, the Court has signaled that the political question doctrine<sup>374</sup> is but “a narrow exception” to the judiciary’s “responsibility to decide cases properly before it.”<sup>375</sup> In doing so, it cast doubt on the continuing validity of the doctrine’s more prudential factors, like “the potentiality of embarrassment” from many voices addressing one question.<sup>376</sup>

Given the interconnectedness of today’s world, where the lines between here and there and public and private are blurred, foreign sovereign interests could plausibly be implicated in almost all transnational cases,<sup>377</sup> and not every case touching on foreign relations, foreign interests, or foreign law can be off limits. Yet *forum non conveniens* asks judges to broadly consider sovereign interests and

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<sup>371</sup> Cf. David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 1017–32, 1041–44 (2014) (critiquing functionalist justifications of judicial abdication in foreign relations cases based on the need for the United States to speak with one voice); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1935–49 (2015) (questioning functionalist rationales for foreign affairs exceptionalism).

<sup>372</sup> “The act of state doctrine provides, in broad outline, that U.S. courts will not sit in judgment on the validity of the public acts of foreign sovereigns within their own territory.” BORN & RUTLEDGE, *supra* note 14, at 797.

<sup>373</sup> *W.S. Kirkpatrick & Co. v. Evtl. Tectonics Corp., Int’l*, 493 U.S. 400, 406, 408–09 (1990). “Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them,” Justice Scalia wrote for the unanimous Court. *Id.* at 409. “The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.” *Id.*

<sup>374</sup> The political question doctrine “bars federal courts from resolving cases that raise issues more appropriately committed to other branches of government.” BORN & RUTLEDGE, *supra* note 14, at 20.

<sup>375</sup> *Zivotofsky ex rel. Zivotofsky v. Clinton (Zivotofsky I)*, 132 S. Ct. 1421, 1427 (2012).

<sup>376</sup> See *id.* at 1427 (citing only the first two factors of *Baker v. Carr*, 369 U.S. 186, 217 (1962)); see also *id.* at 1431–34 (Sotomayor, J., concurring in part and concurring in the judgment) (describing the last three *Baker* factors, omitted by the majority, as addressing prudential concerns). It is not clear, however, if the lower courts have heeded this signal. See Alex Loomis, *Why Are the Lower Courts (Mostly) Ignoring Zivotofsky I’s Political Question Analysis?*, LAWFARE (May 19, 2016, 4:23 PM), <https://www.lawfareblog.com/why-are-lower-courts-mostly-ignoring-zivotofsky-political-question-analysis> (suggesting that district courts have continued to apply all of the *Baker* factors notwithstanding *Zivotofsky I*).

<sup>377</sup> Cf. Cohen, *supra* note 368, at 389 (describing the ubiquity of foreign elements in cases); Sitaraman & Wuerth, *supra* note 371, at 1942–43 (describing the ubiquity of transnational connections).

comity implications—precisely the type of general inquiry that invites judges to assert incompetence, embarrassment, or political delicacy as a reason for avoiding cases. Both descriptively and normatively, that is the wrong direction for the federal courts to be heading.

### E. Harmonization Through Legislation

The most promising route for finally retiring forum non conveniens, however, would be through a new private law treaty. The United States has pushed for a new Hague convention on the recognition of judgments.<sup>378</sup> Such a treaty would ensure the enforceability of judgments and their res judicata effect across countries, in turn improving predictability and efficiency for both courts and businesses.<sup>379</sup> That project is ambitious, however, as it also requires agreement on the bases of jurisdiction, the assertion of which would result in presumptively valid judgments.<sup>380</sup> The efforts to establish such a treaty failed in the early 2000s<sup>381</sup> in part because, as Justice Ginsburg noted in *Daimler*,<sup>382</sup> the United States still continues to assert some exorbitant bases of jurisdiction that its allies are hesitant to accept (though to be fair, it is not alone in that regard).<sup>383</sup> By distilling general jurisdiction into a more rule-like form, the *Daimler* Court was self-consciously bringing U.S. practice closer into alignment with European allies,<sup>384</sup> making future harmonization efforts more plausible.

There is similarly space for reconsidering transient presence (“tag”) jurisdiction in transnational cases.<sup>385</sup> When it comes to

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<sup>378</sup> On the strong U.S. interest in such a treaty, see Clermont, *supra* note 248, at 94.

<sup>379</sup> For differing views on the value of harmonization more generally, see, for example, CHASE ET AL., *supra* note 233, at 562–78.

<sup>380</sup> See Michaels, *supra* note 343, at 1065–66 (discussing the different preferences of U.S. and European negotiators regarding the scope of jurisdictional agreement).

<sup>381</sup> See Patrick J. Borchers, *One Step Forward and Two Back: Missed Opportunities in Refining the United States Minimum Contacts Test and the European Union Brussels I Regulation*, 31 ARIZ. J. INT’L & COMP. L. 1, 18 (2014); Michaels, *supra* note 343, at 1009–10. The Hague Convention on Choice of Court Agreements, however, was salvaged from these failed negotiations. Borchers, *supra*, at 18.

<sup>382</sup> See *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014) (noting the international tension caused by exorbitant bases of jurisdiction).

<sup>383</sup> See Clermont & Palmer, *supra* note 219, at 477–81 (noting the exorbitant nature of transient and attachment jurisdiction under U.S. law); *id.* at 482–504 (describing exorbitant bases of jurisdiction in France and other European countries).

<sup>384</sup> See *Daimler*, 134 S. Ct. at 763 (chiding the Ninth Circuit for failing to consider the comity implications of its expansive view of general jurisdiction and remarking on the narrower view taken by other nations).

<sup>385</sup> See, e.g., Clermont, *supra* note 248, at 111–12 (noting that to achieve agreement on a judgments treaty, the United States would likely have to abandon transient jurisdiction); John T. Parry, *Rethinking Personal Jurisdiction After Bauman and Walden*, 19 LEWIS &

asserting jurisdiction over foreign defendants based on their temporary physical presence,<sup>386</sup> justifications based on either history or fairness are at their lowest ebb.<sup>387</sup> Eliminating or at least narrowing tag jurisdiction over foreign defendants would further help harmonize U.S. procedure with that of major trading partners;<sup>388</sup> it would also have the added benefit of reducing one of the few remaining needs for forum non conveniens as a safety valve for unfair applications of tag jurisdiction.<sup>389</sup>

Meanwhile, negotiations for a judgments treaty have resumed in The Hague.<sup>390</sup> That effort has not yet revisited the question of jurisdiction, but when it does, the issue of forum non conveniens will surely arise again. Only a handful of other common law countries recognize such a doctrine, and “the trend internationally has been to jettison the doctrine altogether.”<sup>391</sup> Last time around, negotiators were able to reach a tentative compromise on a narrowed version of forum non conveniens that reflects many of the design criteria I have argued for here.<sup>392</sup> First, it would set a strong default in favor of exercising jurisdiction, limiting forum non conveniens to “exceptional circumstances” and ending the use of *Piper*’s different treatment of foreign plaintiffs’ choice of forum.<sup>393</sup> Second, it would drop all the public interest factors currently cited by the federal courts, relying instead on the political decisions embodied in the convention itself as the appropriate balance of comity and administrative concerns. Third, it would turn the private interest factors into a comparative analysis that compares plaintiffs’ and defendants’ interests as well as the two forums’

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CLARK L. REV. 607, 614–15 (2015) (suggesting *Daimler* may open space to reconsider the presumptive validity of tag jurisdiction).

<sup>386</sup> Specifically individual defendants, as corporations are not subject to transitory process. See, e.g., Clermont & Palmer, *supra* note 219, at 478.

<sup>387</sup> See *Burnham v. Superior Court*, 495 U.S. 604, 610–19 (1990) (Scalia, J.) (plurality opinion) (emphasizing the historical tradition of transient jurisdiction); *id.* at 629–32 (Brennan, J., concurring in the judgment) (emphasizing the fairness of the practice of transient jurisdiction).

<sup>388</sup> See, e.g., Clermont & Palmer, *supra* note 219, at 478 & n.20 (noting that allies view the U.S. practice of tag jurisdiction as an exorbitant basis of jurisdiction).

<sup>389</sup> See, e.g., *Burnham*, 495 U.S. at 639 & n.13 (Brennan, J., concurring in the judgment) (referencing state court use of forum non conveniens as one of several procedural devices available to ameliorate the unfairness of tag jurisdiction in individual cases); EHRENZWEIG, *supra* note 102, at 122 (linking the rise of tag jurisdiction with the rise of forum non conveniens as a means for checking tag jurisdiction’s potential unfairness).

<sup>390</sup> See *The Judgments Project*, HAGUE CONFERENCE ON PRIVATE INT’L LAW, <https://www.hcch.net/en/projects/legislative-projects/judgments> (last visited Mar. 10, 2017).

<sup>391</sup> Rutledge, *supra* note 19, at 1071; see also Bookman, *supra* note 22, at 1096 (“Few other nations recognize forum non conveniens, and those that do tend to permit it more sparingly.”).

<sup>392</sup> See Brand, *supra* note 20, at 1030–34 (quoting interim draft text).

<sup>393</sup> See *id.* at 1032–33.

relative ability to obtain the needed evidence. That comparative approach is a better fit for the transnational context, and its specific and ascertainable bases of comparison provide clearer and more realistic guidance for judges, both of which should help alleviate parochial pressures.

Such a compromise, even if it retains some narrowed existence for forum non conveniens, would thus alleviate many of the concerns raised in this Article. As part of a negotiated treaty, its invocation should enhance—or at least not undermine—international comity, particularly if judges hew closely to the convention’s strong default presumption in favor of exercising jurisdiction. The broader context of the convention should also ensure that such dismissals do not result in access-to-justice gaps, as the convention’s structure would guarantee the availability of another forum as well as the enforceability of any resulting judgment. And it would turn (what remains of) forum non conveniens into a legislated compromise rather than a judge-made doctrine. That relieves any separation-of-powers concerns and excuses the modern doctrine’s limited historical pedigree. It would also make it harder to invoke forum non conveniens as a malleable stopgap measure for other doctrinal shortcomings.

Even better, though, the United States could approach this new round of negotiations ready to let forum non conveniens go.<sup>394</sup> Negotiating such a treaty has proved a challenge for the United States since it already has a more generous policy towards enforcing foreign judgments than most of its allies.<sup>395</sup> Thus the United States must be willing to part with some other prerogative in order to encourage its European allies to increase their willingness to recognize U.S. judgments.<sup>396</sup> Forum non conveniens can be that bargaining chip.<sup>397</sup> U.S. courts no longer have a great need for forum non conveniens in transnational cases,<sup>398</sup> and as Professor Kevin Clermont has noted, the judgments treaty itself would help further rationalize U.S. jurisdictional doctrines in a manner that would eliminate any need that remains.<sup>399</sup> And if the other routes mapped here have already been

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<sup>394</sup> See Clermont, *supra* note 248, at 120 (proposing as much).

<sup>395</sup> See *id.* at 93–94.

<sup>396</sup> See Burbank, *supra* note 122, at 635 (noting the difficult negotiating position of the United States regarding an enforcement treaty).

<sup>397</sup> I thank Professor Paul Dubinsky for this insight.

<sup>398</sup> See *supra* Part III.

<sup>399</sup> See Clermont, *supra* note 248, at 120. While some have argued that a forum non conveniens–like provision is needed in the judgments treaty to ensure U.S. courts do not get caught between treaty obligations to exercise jurisdiction and minimal due process requirements under the Constitution, see Burbank, *supra* note 82, at 237, a better

pursued, letting go of *forum non conveniens* when the time is right will be all the easier.

### CONCLUSION

However quickly or slowly *forum non conveniens* is retired, there will still be pressures on judges at times to avoid cases that feel too complex, too foreign, or too sensitive. Without *forum non conveniens*, judges will turn to other doctrines, stretching and possibly distorting those in turn. That is, with or without *forum non conveniens*, there will be times when judges' true motives are masked behind the recitation of doctrines that do not directly address those concerns.

There is no obvious best answer to this paradox. Nonetheless, I see more benefit in removing *forum non conveniens* as a doctrine that legitimates such avoidance. As a broad standard that invites judges to avoid cases they find potentially problematic, *forum non conveniens* does not challenge judges to think through the real sources of their discomfort, which in turn can encourage the same sort of oversimplified prudential arguments the Court has rejected in other doctrines.<sup>400</sup> The breadth of the standard combined with its double layer of discretion also allows greater scope for distortion of the doctrine over time.<sup>401</sup> A series of more narrowly tailored inquiries, on the other hand, could provide more helpful frameworks for guiding analysis while checking the distorting effect of exceptional cases.<sup>402</sup> My hope is that the retirement of *forum non conveniens* would correlate with the further refinement of these more narrowly tailored frameworks as well as the development of additional inquiries, the sum total of which should do a better job addressing the range of concerns judges might confront in transnational cases.

Ultimately, the goal is not to limit judicial discretion, but to channel it to its most effective applications. Generalized prudential concerns, like the risk of embarrassment or friction in foreign relations, can encourage too much abdication in transnational cases. Cabining discretion in threshold questions to second-stage inquiries reached only in exceptional cases can help counteract that pressure. Federal judges are often quite capable of handling difficult cases, particularly when they leverage their discretion to develop pragmatic pro-

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alternative might be to negotiate a provision that allows a court to refuse jurisdiction when its exercise would be constitutionally impermissible, see Clermont, *supra* note 248, at 121.

<sup>400</sup> See *supra* Section IV.D.

<sup>401</sup> See *supra* Section II.A.

<sup>402</sup> See *supra* Section II.C.

cedural solutions for handling sensitive or complex matters.<sup>403</sup> That sort of problem-solving management is a more constructive use of judicial discretion in transnational litigation than is the outdated, ill-fitting, overbroad, increasingly redundant, and doctrinally disruptive tool of forum non conveniens.

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<sup>403</sup> Cf. Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. (forthcoming Oct. 2017) (manuscript at 1–3, 6–8) (on file with New York University Law Review); Shirin Sinnar, *National Security Experimentalism in the Courts* (June 24, 2016) (unpublished manuscript) (on file with author) (evaluating the procedural experimentation of federal courts in complex national security cases).