# ADMIRALTY, ABSTENTION, AND THE ALLURE OF OLD CASES

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*The current Supreme Court has made clear that history matters. But doing history well is hard. There is thus an allure to old cases because they provide a link to the past that is more accessible for nonhistorian lawyers. This Article warns against that allure by showing how the use of old cases also poses methodological challenges. The Article uses as a case study the emerging doctrine of foreign relations abstention. Before the Supreme Court, advocates argued that this new doctrine is in fact rooted in early admiralty cases. Those advocates did not, however, canvass the early admiralty practice, relying instead on just a few citations and cherry-picked quotations. And even if they had correctly identified the historical admiralty practice, they did not explain their logic for linking that practice to today's doctrinal landscape.*

*This Article tackles both problems. It draws on around 130 admiralty cases to paint a more complete picture of the admiralty courts' jurisdictional discretion. Of greatest relevance to today's debates, the discretion to dismiss admiralty cases was limited to disputes involving no U.S. parties, and the views of foreign states were not dispositive. The Article then considers how advocates and judges could make use of those admiralty cases today. Old cases might be precedent that directly supports foreign relations abstention, original law that permits foreign relations abstention, or lived experience that helps justify foreign relations abstention. Proponents seem to have in mind the first two uses of the historical admiralty practice, but only the third lends support to*

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*the emerging doctrine of foreign relations abstention. Forthrightly embracing that third approach, however, would put foreign relations abstention at odds with the Supreme Court's efforts to constrain prudential discretion in other contexts.*

*The Article does not try to choose among these different logics, nor does it critique the Court's antiprudential turn. Rather, it uses the debate over foreign relations abstention to illustrate how different approaches to historical caselaw can result in vastly different legal conclusions, and it warns against deploying a patina of doctrinal history to hide the very same judicial lawmaking that the Supreme Court has elsewhere carefully disclaimed.*

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## INTRODUCTION

The past has become a potent legal argument, particularly before the Supreme Court.[1] In addition to historical gloss[2] and the different permutations of originalism,[3] the Court's recent reliance on "history and tradition" has sparked significant debate over what, exactly, "history and tradition" entails, how its use might be methodologically defensible, and whether it can be accurately identified.[4] Those attempting to theorize a methodology of "history and tradition," however, have largely carved out the use of old cases as a different (and presumably simpler) question.[5] The implication is that using old cases is a form of everyday lawyering and thus does not require the same sort of methodological justification that other uses of history have provoked.[6] This assumption is particularly important for the field of procedure,

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1 For a helpful typology of the different uses of history in legal argument, including the use of old cases, see Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753 (2015).

2 *See generally* Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59 (2017) (exploring the relevance of history for different approaches to gloss); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012) (arguing for a more institutionally sensitive approach to gloss); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1 (2020) (distinguishing gloss from liquidation).

3 On the variants of originalism, see, for example, Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023). On the different types of history that may be relevant to originalist analysis (e.g., political, intellectual, linguistic, and cultural), see *id.* at 436 (discussing historical sources relevant to public-meaning originalism); and Fallon, *supra* note 1, at 1760–75 (discussing linguistic and cultural history, drafting history, and early practice as liquidation).

4 For a sampling of the methodological debate, see Barnett & Solum, *supra* note 2; Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9 (2023); Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477 (2023); Adam M. Samaha, *Is* Bruen *Constitutional? On the Methodology That Saved Most Gun Licensing*, 98 N.Y.U. L. REV. 1928 (2023); Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127 (2023); and Aaron Tang, *After* Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091 (2023).

5 *See* Barnett & Solum, *supra* note 3, at 435–36 (setting aside "historical doctrines" as distinct from "tradition"); DeGirolami, *supra* note 4, at 14–15 (defining traditionalism as excluding "precedents" and "judicial outputs"); Girgis, *supra* note 4, at 1488 (excluding "judicial precedents" from definition of "living traditionalism"). For an exception, see Fallon, *supra* note 1, at 1788–91 (addressing "[p]rior [j]udicial [d]ecisions and [t]heir [h]istorical [m]eanings," *id.* at 1788, as including the meaning of precedent within its historical context).

6 *Cf.* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 810 (2019) (arguing that their positivist approach to originalism "demands no more of the past than ordinary lawyering does" as it "looks to legal doctrines and instruments specifically, rather than to intellectual movements more generally").

where debates over the import of history are growing[7] and where a significant historical source brought to bear on those debates has been old cases.[8]

The use of old cases, however, is neither easy nor self-explanatory. Like using new cases, using old cases requires more than just a Lexis search and a few choice quotations.[9] Indeed, using legal databases and cherry-picking quotations becomes even more fraught the further back in time one goes: opinions are more likely to be missing from or misindexed in legal reporters,[10] while legal reasoning is more likely to reflect procedural or substantive assumptions that have since changed and are thus easy for modern readers to miss.[11] And even with thorough research (and careful reading), using old cases also requires a logic for how those cases bear on today's legal questions. Is the caselaw simply still "good law"—and what precisely does that mean? Is it evidence of original intent or original public meaning, of tradition, or of lived experience to which helpful analogies can be drawn despite changing legal and political contexts?

This Article explores the use of old cases through the lens of a particular doctrinal dispute. The Supreme Court was recently asked to recognize a new form of abstention that would permit federal judges to dismiss complaints that might cause foreign relations frictions.[12]

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7 *See, e.g.*, Mila Sohoni, *The Puzzle of Procedural Originalism*, 72 DUKE L.J. 941 (2023) (discussing current and potential originalist critiques of procedural doctrines).

8 On the appropriateness of universal injunctions in light of historical practice, see, for example, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); and Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020). For judicial reliance on old cases in defining the scope of personal jurisdiction, see, for example, *Burnham v. Superior Ct.*, 495 U.S. 604, 608–22 (1990) (opinion of Scalia, J.); and *Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2033–37 (2023) (Gorsuch, J.) (plurality opinion).

9 For scholarship critiquing incomplete or uncareful legal research, see, for example, William Baude, Adam S. Chilton & Anup Malani, *Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews*, 84 U. CHI. L. REV. 37 (2017); Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619 (2020); Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643 (2015).

10 By "misindexed," I mean that the cases might not have been categorized by indexers the way that they would be categorized under current legal doctrines and frameworks. *See* Gardner, *supra* note 9, at 1651–52 (discussing the role of categorization in legal indexing).

11 On the challenge of using old admiralty decisions in particular, see Eugene Kontorovich, *Originalism and the Difficulties of History in Foreign Affairs*, 53 ST. LOUIS U. L.J. 39, 46 (2008) ("The admiralty nature of a proceeding can make such a difference that applying admiralty cases outside of an admiralty context may be nonsensical.").

12 *See, e.g.*, Brief for Petitioners at 23, Republic of Hungary v. Simon, 141 S. Ct. 691 (2021) (No. 18-1447) (describing abstention "in deference to foreign sovereign interests or to ensure that U.S. litigation does not cause international friction"); *id.* at 15–17 (arguing that international comity abstention would "ensure that U.S. litigation does not entangle

This idea of foreign relations abstention is fairly new and as yet only adopted by the Ninth and Eleventh Circuits.[13] But in two Holocaust restitution cases, *Republic of Hungary v. Simon*[14] and *Federal Republic of Germany v. Philipp*,[15] the governments of Hungary, Germany, and the United States urged the Supreme Court to recognize foreign relations abstention based on its purported historical roots in nineteenth-century admiralty cases.[16]

Notably absent from the Supreme Court briefing, however, were nineteenth-century admiralty cases. To establish the historical bona fides of foreign relations abstention, the advocates relied primarily on two Supreme Court admiralty decisions, *The Belgenland*[17] and *Canada Malting Co. v. Paterson Steamships, Ltd.*[18] But the Supreme Court itself has repeatedly characterized both *The Belgenland* and *Canada Malting* as forum non conveniens decisions, not abstention cases.[19] In its reply brief, Hungary added citations to just two old district court admiralty decisions.[20] Beyond those citations, the advocates relied for their historical argument on a law review article written by Professors Samuel Estreicher and Thomas H. Lee.[21] Estreicher and Lee analogize to nineteenth-century admiralty practice to support a modern doctrine of

federal courts in foreign relations" by allowing judges to decline to exercise jurisdiction "over cases with particular foreign-policy sensitivities," *id.* at 15, or that "present[] a risk of international strife," *id.* at 17).

13 *See infra* Section I.B (describing the emergence of foreign relations abstention). On the use of foreign relations abstention in the district courts, see cases gathered below at note 45.

14 141 S. Ct. 691.

15 141 S. Ct. 703 (2021).

16 *See* Reply Brief for Petitioners at 2–6, *Simon*, 141 S. Ct. 691 (No. 18-1447); Brief for the United States as Amicus Curiae Supporting Petitioners at 11–13, *Simon*, 141 S. Ct. 691 (No. 18-1447).

17 114 U.S. 355 (1885); *see, e.g.*, Transcript of Oral Argument at 8, *Simon*, 141 S. Ct. 691 (No. 18-1447) (statement of Hungary's counsel) (citing *The Belgenland*); *id.* at 40 (statement of the United States' counsel) ("The Belgenland is the best case on this.").

18 285 U.S. 413 (1932); *see, e.g.*, Reply Brief for Petitioners, *supra* note 16, at iii, v (citing both *The Belgenland* and *Canada Malting* "*passim*").

19 *See, e.g.*, Am. Dredging Co. v. Miller, 510 U.S. 443, 449 (1994) (citing *The Belgenland* as a forum non conveniens case); Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247, 248 n.13 (1981) (referring to *Canada Malting* as a forum non conveniens case); *see also* Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 16, at 12 n.2 (acknowledging that *The Belgenland* and *Canada Malting* have traditionally been viewed as forum non conveniens cases). The doctrine of forum non conveniens allows judges to dismiss cases they believe would be more appropriately heard in the courts of another sovereign. *See infra* Section I.C (describing forum non conveniens and noting its significant overlap with the doctrine of foreign relations abstention).

20 *See* Reply Brief for Petitioners, *supra* note 16, at 5–6 (discussing The Carolina, 14 F. 424 (D. La. 1876); and The Infanta, 13 F. Cas. 37 (S.D.N.Y. 1848) (No. 7,030)).

21 *See* Brief for Petitioners, *supra* note 12, at xi, 23, 31–32.

foreign relations abstention,[22] but their article—as well as the amicus brief they filed in the *Simon* and *Philipp* cases—in turn cites only one nineteenth-century admiralty case: *The Schooner Exchange v. McFaddon*.[23] And as they acknowledge, *Schooner Exchange* is foremost a case about sovereign immunity.[24] In *Schooner Exchange*, Chief Justice Marshall did not identify a judicial discretion to decline jurisdiction; rather, *Schooner Exchange* held that federal courts lack the authority to hear cases involving the public property of foreign sovereigns.[25]

In short, the Supreme Court advocates of foreign relations abstention pointed to historical practice to legitimate their claims, but without fully identifying what that historical practice actually was, much less explaining how precisely it would support a doctrine of foreign relations abstention today. This Article attempts to answer both questions.

It first fills in the missing caselaw. Drawing on nearly 130 admiralty decisions stretching from 1788 to 1932,[26] this Article maps how federal courts sitting in admiralty understood and applied their discretion to decline jurisdiction (what the Article will refer to as "the historical admiralty practice," or more simply "admiralty discretion").[27] Two lessons stand out. First, the discretion to decline jurisdiction was limited to admiralty disputes brought by foreign parties against foreign parties involving claims that arose outside of the United States,[28] cases

22 *See* Samuel Estreicher & Thomas H. Lee, *In Defense of International Comity*, 93 S. CAL. L. REV. 169, 190–97 (2020).

23 11 U.S. (7 Cranch) 116 (1812); *see* Estreicher & Lee, *supra* note 22, at 195 (citing *Schooner Exchange*); Brief of Professors Samuel Estreicher & Thomas H. Lee as *Amici Curiae* in Support of Neither Party at vi, Republic of Hungary v. Simon, 141 S. Ct. 691 (2021) (Nos. 18-1447 & 19-351) (same). In a different portion of the article that discusses the presumption against extraterritoriality, they also cite *The Apollon*, 22 U.S. (9 Wheat.) 362 (1824), a case about the evasion of U.S. customs. Estreicher & Lee, *supra* note 22, at 180 n.33.

24 *See, e.g.*, Estreicher & Lee, *supra* note 22, at 178 n.23.

25 *See Schooner Exchange*, 11 U.S. (7 Cranch) at 147.

26 I use 1932 as an end date because that is the year of the Supreme Court's *Canada Malting* decision. Although the practice of discretionary dismissals in admiralty never disappeared, some end date before *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), was needed, and *Canada Malting* represented a turning point in the practice as it permitted dismissal of claims between foreign parties that arose within U.S. territory. *See* Can. Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413, 423–24 (1932).

27 For earlier surveys, see Alexander M. Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty: An Object Lesson in Uncontrolled Discretion*, 35 CORNELL L.Q. 12 (1949); and Hobart Coffey, *Jurisdiction over Foreigners in Admiralty Courts*, 13 CALIF. L. REV. 93 (1925). For a more recent (but more limited) discussion of jurisdictional discretion in admiralty, see David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973 (2008).

28 *See infra* Section II.B. Indeed, the question presented in *Canada Malting* was whether admiralty discretion was limited to disputes between foreign parties regarding claims that arose outside of the United States, or whether it also extended to disputes

that today might be labeled "foreign-cubed."[29] Second, the analysis was a flexible one, and no one factor was dispositive.[30] Of particular relevance to modern debates, judges sitting in admiralty did not consider themselves bound by the preferences of foreign governments, at times exercising jurisdiction over "foreign-cubed" disputes despite the protests of foreign consuls.[31]

The Article then considers how one might make use of this historical admiralty practice today. The most obvious possibility is that the old caselaw is simply still good law. But such precedential use of old cases requires a longitudinal perspective to understand if and how the law has developed in the interim. The advocates of foreign relations abstention seem to assume that the historical admiralty practice fell into disuse, only to be rediscovered and redeployed in the twenty-first century as foreign relations abstention. That is incorrect. The federal courts never stopped applying jurisdictional discretion in admiralty; it's just that they started calling it "forum non conveniens" after the Supreme Court adopted that label for cases at law in *Gulf Oil Corp. v. Gilbert*.[32] By the 1980s, the two versions of forum non conveniens—the law/equity version of *Gulf Oil* and the admiralty version of *The Belgenland* and *Canada Malting*—had fully merged.[33] As precedent, the old admiralty cases lead directly to today's doctrine of forum non conveniens; they do not provide support for a separate doctrine of abstention.[34]

Second, old cases might be invoked as evidence of original law. Decisions recognizing admiralty courts' discretion to decline jurisdiction date from the turn of the nineteenth century[35] and thus may bear

between foreign parties regarding claims that arose within U.S. territory. *See Can. Malting*, 285 U.S. at 418 (adopting the latter approach).

29 On the problematic and imprecise rhetoric of the label "foreign-cubed," see generally Maggie Gardner, *"Foreignness,"* 69 DEPAUL L. REV. 469 (2020).

30 *See infra* Section II.C.

31 *See infra* subsection II.C.6.

32 330 U.S. 501 (1947).

33 *See infra* Section III.A. This is not a new revelation. *See* Marcus, *supra* note 27, at 996–1002 (tracing the transformation of admiralty discretion into forum non conveniens).

34 While foreign relations abstention has been framed as an entirely distinct doctrine from forum non conveniens, there is nevertheless substantial overlap between them; the key difference is that foreign relations abstention has a looser test and thus would appear to sweep more broadly. *See infra* Section I.C (comparing forum non conveniens and foreign relations abstention).

35 *See* Mason v. Ship Blaireau, 6 U.S. (2 Cranch) 240, 264 (1804); Willendson v. Forsoket, 29 F. Cas. 1283, 1284 (D. Pa. 1801) (No. 17,682); Thompson v. The Catharina, 23 F. Cas. 1028, 1028 (D. Pa. 1795) (No. 13,949). Other early decisions, however, exercised jurisdiction over admiralty disputes between foreigners without describing their jurisdiction as discretionary. *See* Ellison v. The Bellona, 8 F. Cas. 559 (D.S.C. 1798) (No. 4,407); Weiberg v. The St. Oloff, 29 F. Cas. 591 (D. Pa. 1790) (No. 17,357).

on the original understanding of federal judges' discretion to decline congressionally granted jurisdiction.[36] This use of old cases, however, requires sensitivity to the legal ecosystem in which old cases were decided.[37] The historical practice mapped in this Article, for example, was self-consciously limited to the federal courts' admiralty jurisdiction. The distinction between admiralty, law, and equity was meaningful in the eighteenth and nineteenth centuries, even if it is considered less meaningful today. In particular, the nature of judicial power in admiralty differed from that of judges deciding cases at law, just as the power of judges sitting at law differed from their powers in equity.[38]

Some originalists might accept that the historical admiralty discretion expanded over time as long as those changes reflect methods that "can be traced back to the law of the Founding."[39] Such "positivist" originalism, however, would still stumble on the gap between admiralty and law. The bridge between them runs through *Gulf Oil*, but *Gulf Oil* did not identify any direct precedential or historical support for its jurisdictional leap.[40] *Gulf Oil*, that is, lacks a clear "chain of title."[41] Far from supporting foreign relations abstention as a permissible form of jurisdictional discretion, an originalist approach might instead draw into question the validity of forum non conveniens itself.

Third, old cases might be invoked not as authority, but as a source of experience from which we can draw practical lessons.[42] Old cases may reveal collective wisdom accumulated over time, for example, or they may demonstrate the institutional competency of judges to engage in particular types of inquiries. Such uses of old cases can indeed

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36 *See, e.g.*, Barnett & Solum, *supra* note 3, at 440 ("Judicial decisions are part of history and can shed light on constitutional meaning and purpose that is distinct from their precedential (stare decisis) effect."); *cf.* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 4 (2019) (describing relevance of early practice in liquidating indeterminate constitutional text).

37 For a recent reminder of the need for such legal contextual sensitivity, see Tang, *supra* note 4, at 1128–32, 1135–40.

38 *See infra* Section III.B (exploring this distinction).

39 *See* Baude & Sachs, *supra* note 6, at 812; *see also* William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019); William Baude & Stephen E. Sachs, *Originalism's Bite*, 20 GREEN BAG 2D 103, 104 (2016); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 874–887 (2015). For critiques of the theory underlying positivist originalism, see, for example, Charles L. Barzun, *Constructing Originalism or: Why Professors Baude and Sachs Should Learn to Stop Worrying and Love Ronald Dworkin*, 105 VA. L. REV. ONLINE 128 (2019); and Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323 (2017). This Article sets aside the theoretical debate to consider how the approach might be applied in practice to one particular doctrine.

40 *See infra* Section III.B.

41 Baude & Sachs, *supra* note 6, at 812.

42 *Cf.* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 575 (1987) (distinguishing arguments from precedent from arguments from experience).

help justify modern doctrines, but they raise additional questions. First are questions of generality and perspective: How do we know *which* is the right lesson to draw? The historical admiralty practice, for example, might tell us as much about when U.S. courts should hear transnational cases as when they should avoid them. Second is the question of judicial power to craft new procedural doctrines, particularly those related to jurisdictional discretion. Invoking old cases to justify a new form of abstention requires grappling with the Supreme Court's recent efforts to cabin such judicial discretion across other doctrines.[43]

The Article's aim is not to choose among these different logics or to take a position on the propriety of prudential discretion writ large. Indeed, there may be other logics for using old cases, and one might draw in practice on multiple logics at the same time. Rather, the Article's real aim is to counter the aesthetic of historical citations devoid of methodological rigor. The invocation of old cases should not be allowed to distract from what is in truth an exercise of prudential lawmaking that should be defended, if it is to be defended at all, on that basis.

Ultimately the Supreme Court ducked the question of foreign relations abstention in *Simon* and *Philipp*, instead remanding the cases for reconsideration in light of its interpretation of the Foreign Sovereign Immunities Act (FSIA).[44] The propriety of foreign relations abstention is still very much a live issue in the lower federal courts, however, where corporate defendants continue to advocate for greater adoption and application of the doctrine.[45] Given the Justices'

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43 *See infra* Section III.C (describing this trend).

44 *See* Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 715–16 (2021).

45 An interlocutory appeal on this question is currently pending before the Eighth Circuit, in which Professor William S. Dodge and I have filed an amicus brief. *See* Brief of *Amici Curiae* Professors William S. Dodge & Maggie Gardner in Support of Plaintiffs-Appellees & Affirmance, Reid v. Doe Run Res. Corp., No. 23-1625 (8th Cir. Sept. 7, 2023). In their reply brief, the defendants-appellants have again equated the old admiralty practice with foreign relations abstention. *See* Reply Brief of Defendants-Appellants at 33–35, *Reid*, No. 23-1625 (Oct. 23, 2023).

While only the Ninth and Eleventh Circuits have adopted foreign relations abstention, only the Third Circuit has firmly rejected it. *See* Gross v. German Found. Indus. Initiative, 456 F.3d 363, 394 (3d Cir. 2006). The Second Circuit seems open to the idea, though it has never fully articulated or applied a comity abstention doctrine based on foreign relations concerns. *See* Jota v. Texaco Inc., 157 F.3d 153, 155 (2d Cir. 1998) (rejecting the lower court's dismissal "on the ground of comity" without rejecting the concept); Pravin Banker Assocs. v. Banco Popular del Peru, 109 F.3d 850, 855 (2d Cir. 1997) (analogizing to deference to foreign bankruptcy proceedings); Bi v. Union Carbide Chems. & Plastics Co., 984 F.2d 582, 586 (2d Cir. 1993) (framing basis for dismissal as a lack of standing).

For examples of recent district court decisions dismissing cases on the basis of foreign relations abstention, see Elliott v. PubMatic, Inc., No. 21-cv-01497, 2021 WL 3616768, at *1 (N.D. Cal. Aug. 16, 2021) (dismissing case brought by British citizen against U.S. company

openness to the historical admiralty argument[46] (and their general hostility to transnational litigation),[47] it is only a matter of time before the question returns to the Supreme Court. When it does, the allure of historical citations should not be allowed to obscure the degree of judicial power the Court is being asked to endorse.

The Article proceeds as follows. Part I describes the idea of foreign relations abstention and how it differs from related doctrines. There are already a lot of doctrines that help U.S. courts manage international comity, including doctrines that allow U.S. courts to defer to foreign courts and doctrines that allow U.S. courts to address foreign relations concerns. Notably, Congress and the Supreme Court have put limits on these other foreign relations doctrines—limits that the new doctrine of foreign relations abstention would effectively override.

Part II turns to the historical admiralty practice invoked in the *Simon* and *Philipp* arguments. This Part begins with a brief primer on admiralty in the federal courts before describing the scope of jurisdictional discretion in admiralty and the factors that judges considered when applying it. The historical admiralty practice was flexible, with judges weighing a shifting range of factors. In particular, the federal courts not infrequently chose to hear "foreign-cubed" cases, sometimes at the behest of foreign consuls,[48] sometimes over the protests of

on basis of both foreign relations abstention and forum non conveniens); and Lawson v. Klondex Mines Ltd., 450 F. Supp. 3d 1057, 1066, 1074 (D. Nev. 2020) (dismissing shareholder derivative suit against Canadian mining corporation with a principal place of business in Nevada). For examples of recent district court cases rejecting defendants' motions to dismiss on the basis of foreign relations abstention, see Boniface v. Viliena, No. 17-cv-10477, 2023 WL 1797760, at *1 (D. Mass. Feb. 7, 2023) (concerning Torture Victim Protection Act claims against Haitian defendant); Stoyas v. Toshiba Corp., 424 F. Supp. 3d 821, 823 (C.D. Cal. 2020) (concerning a securities class action against Japanese corporation); Ryanair DAC v. Expedia Inc., No. C17-1789, 2018 WL 3727599, at *1 (W.D. Wash. Aug. 6, 2018) (concerning Computer Fraud and Abuse Act claims against U.S. corporation); and Updateme Inc. v. Axel Springer SE, No. 17-cv-05054, 2017 WL 5665669, at *1–2 (N.D. Cal. Nov. 27, 2017) (concerning trademark-infringement and breach-of-contract claims against German companies).

46 *See, e.g.*, Transcript of Oral Argument, *supra* note 17, at 67 (statement of Sotomayor, J.) (noting that the admiralty cases cited by Hungary "suggest some equity principles or—or comity principles that have guided courts in the common law"); *see also id.* at 75 (statement of Kavanaugh, J.) (trying to distill historical admiralty practice into a bright-line rule for abstention).

47 *See, e.g.*, Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1084–85 (2015).

48 *See, e.g.*, The Sirius, 47 F. 825, 827–28 (N.D. Cal. 1891).

foreign consuls,[49] and sometimes out of concern that a *failure* to hear the case would harm international comity.[50]

Part III then considers how scholars, advocates, and judges might use these old cases to defend the modern doctrine of foreign relations abstention. Using the old cases as precedent leads not to a new doctrine, but to potential reforms to the existing doctrine of forum non conveniens. Using the old cases as original law requires additional explanation for why discretion to decline jurisdiction should extend beyond admiralty disputes between foreign parties; it might even call into doubt the permissibility of forum non conveniens itself. Using the old cases as experiential justification for an independent doctrine of foreign relations abstention, on the other hand, could work—but it would also require confronting the Supreme Court's curtailment of other prudential doctrines. Part IV concludes.

## I. DEFINING FOREIGN RELATIONS ABSTENTION

By "foreign relations abstention," this Article means declining jurisdiction out of concern that a case will cause political frictions with another country. As adopted by the Eleventh and Ninth Circuits, it involves weighing "the strength of our government's interests in using [a foreign forum], the strength of the [foreign] government's interests, and the adequacy of the . . . alternative forum."[51]

To be clear, "foreign relations abstention" is not a label that the courts have themselves used. The Eleventh Circuit has called it "prospective[]" comity[52] while the Ninth Circuit refers to it as "adjudicative comity";[53] before the Supreme Court, Hungary called it "[a]bstention on the ground of international comity."[54] The problem is that all of these labels could refer to other doctrines or concepts as well. Given this imprecision, it is helpful to start by clarifying what exactly "comity" means and to distinguish the concept of "foreign relations abstention" from other comity doctrines that permit or require federal judges to dismiss transnational cases. Section A outlines

49 *See, e.g.*, Weiberg v. The St. Oloff, 29 F. Cas. 591, 591–92 (D. Pa. 1790) (No. 17,357).

50 *See, e.g.*, The Jerusalem, 13 F. Cas. 559, 562 (Story, Circuit Justice, C.C.D. Mass. 1814) (No. 7,293).

51 Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1239 (11th Cir. 2004); *see also* Cooper v. Tokyo Elec. Power Co., 860 F.3d 1193, 1205 (9th Cir. 2017).

52 *Ungaro-Benages*, 379 F.3d at 1238.

53 *See* Mujica v. AirScan Inc., 771 F.3d 580, 621–22 (9th Cir. 2014); *Cooper*, 860 F.3d at 1205.

54 Brief for Petitioners, *supra* note 12, at 15.

different types of comity doctrines.[55] Section B then narrows in on abstention, distinguishing foreign relations abstention from other doctrines for declining jurisdiction that federal appellate courts have loosely referred to as "international comity abstention." Finally, Section C explains how the emerging doctrine of foreign relations abstention differs from existing doctrinal tools that address foreign relations concerns. That comparison makes clear how foreign relations abstention is reclaiming judicial discretion that Congress and the Supreme Court have curtailed elsewhere.

### A. *The Concept of Comity*

A preliminary source of confusion is that courts and scholars continue to refer to "the doctrine of comity" even though there is no such thing. Rather, comity is a principle that informs many doctrines. "International comity" refers broadly to the willingness of courts in one country to recognize the laws, litigants, and sovereign interests of another country in expectation that other countries will do the same.[56] In the words of Justice Blackmun, comity "is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill."[57] International comity is not just—or even primarily—about maintaining good relations among sovereign states; its original purpose was to enable international trade in a decentralized global order.[58]

Today comity is often thought of in *negative* terms: as requiring U.S. courts to restrain themselves in order to make space for other sovereigns' interests.[59] Abstention doctrines are doctrines of negative comity, as are doctrines like the presumption against extraterritoriality and foreign sovereign immunity. But comity can also operate in a *positive* sense by calling on U.S. courts "to step temporarily *into* the

55 In doing so, it draws heavily on the work of Professor William Dodge. *See generally* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015) (disambiguating comity doctrines).

56 *See* Hilton v. Guyot, 159 U.S. 113, 164 (1895) (defining comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation"); Dodge, *supra* note 55, at 2078 (defining comity as "deference to foreign government actors that is not required by international law but is incorporated in domestic law" (emphasis omitted)).

57 Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct., 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part).

58 *See, e.g.*, Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941, 949–51 (2017) (describing commercial roots of international comity).

59 Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 392–93 (2017). Dodge refers instead to comity operating as a "principle of restraint." Dodge, *supra* note 55, at 2078–79.

shoes of foreign sovereigns to protect those sovereigns' interests."[60] Positive comity informs U.S. courts' willingness to apply the laws of foreign countries and to recognize and enforce the judgments of foreign courts; it is also the principle on which foreign sovereigns are permitted to access U.S. courts as plaintiffs.[61]

In addition to the difference between positive and negative comity doctrines, it is also helpful to distinguish between *prescriptive comity* doctrines and *adjudicative comity* doctrines.[62] Prescriptive comity doctrines accommodate the legislative and regulatory interests of other countries, while adjudicative comity doctrines address the work of foreign courts.[63]

Combining these two sets of distinctions, *positive prescriptive comity* doctrines involve affirmatively applying foreign regulatory preferences, for example through choice of law rules that lead U.S. courts to apply foreign law. *Negative prescriptive comity* doctrines involve limiting the reach of U.S. law to avoid interference with foreign regulatory preferences. For example, the presumption against extraterritoriality furthers negative prescriptive comity by limiting the application of U.S. law to foreign conduct.[64] *Positive adjudicative comity* doctrines support the work of foreign courts. For example, U.S. courts assist foreign courts by facilitating cross-border discovery requests[65] and by recognizing and enforcing foreign judgments.[66] *Negative adjudicative comity* doctrines involve staying or dismissing cases in U.S. courts to make space

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60 Gardner, *supra* note 59, at 393. Dodge refers instead to comity operating as a "principle of recognition." Dodge, *supra* note 55, at 2078–79.

61 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408–09 (1964) ("Under principles of comity governing this country's relations with other nations, sovereign states are allowed to sue in the courts of the United States . . . ."). On foreign sovereigns in U.S. courts, see generally Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against "Judicial Imperialism,"* 73 WASH. & LEE L. REV. 653 (2016) (highlighting the commonality of foreign sovereigns appearing as plaintiffs in U.S. courts); Zachary D. Clopton, *Diagonal Public Enforcement*, 70 STAN. L. REV. 1077 (2018) (identifying how foreign governments use U.S. courts in order to invoke U.S. federal law); Diego A. Zambrano, *Foreign Dictators in U.S. Court*, 89 U. CHI. L. REV. 157 (2022) (critiquing the uncritical assumption that nondemocratic governments should be allowed to use U.S. courts to target dissidents); and Kristen E. Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 VA. L. REV. 289 (2016) (describing interventions of foreign states as amici in U.S. Supreme Court cases).

62 I borrow here again from Dodge's clear and helpful categorization of comity-based doctrines. *See* Dodge, *supra* note 55, at 2078–79.

63 *See id.* at 2078.

64 For more on the presumption against extraterritoriality, see, for example, William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582 (2020).

65 On U.S. courts' willingness to facilitate discovery for use in foreign tribunals, see Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. CHI. L. REV. 2089 (2020).

66 For an introduction to the enforcement of foreign judgments in U.S. courts, see William S. Dodge, *A Primer on Foreign Judgments*, TRANSNAT'L LITIG. BLOG (Mar. 25, 2022), https://tlblog.org/a-primer-on-foreign-judgments/ [https://perma.cc/PWX8-S7JZ].

for the work of foreign courts. Foreign relations abstention is one form of negative adjudicative comity, as are doctrines like forum non conveniens, deference to foreign parallel proceedings, and the political question doctrine as applied to transnational cases.[67]

It is thus confusing for the Ninth Circuit to speak of abstention as "adjudicative comity" because not all adjudicative comity doctrines operate as a restraint on U.S. judicial action. It is similarly confusing to invoke "comity abstention" because there are a number of different *types* of comity-based abstention. Thus even if we narrow in on doctrines of negative adjudicative comity—and even if we narrow further down to abstention as a particular form of negative adjudicative comity—further disambiguation is required.

### *B. Distinguishing Other Versions of Comity-Based Abstention*

The federal courts of appeals have used the label of "comity abstention" to refer to at least six different bases for declining jurisdiction in transnational cases. Not all of these bases are created equal. While abstention in light of parallel litigation or bankruptcy is legitimate and valuable, the imprecision of doctrinal labels has led some circuits to experiment with more questionable forms of comity-based abstention, including the emergence of foreign relations abstention.

*Parallel Proceedings.* When litigation in two different court systems involves substantially similar parties and issues, continuing with both proceedings at the same time might be inefficient and unfair. The Supreme Court has addressed this problem in the domestic federal context through *Colorado River* abstention,[68] but it has not given similar guidance on how to address the problem of parallel proceedings in the transnational context, leaving the lower federal courts to develop circuit-specific approaches.[69] Most of them use some variation of *Colorado River*, but the Second and Eleventh Circuits refer to deference to foreign parallel proceedings as "international comity abstention."[70]

This parallel litigation version of "international comity abstention," which serves an important purpose, should not be conflated with the foreign relations version of "international comity abstention." As a practical matter, abstention in light of parallel proceedings requires

67 For in-depth looks at these particular doctrines, see, for example, Gardner, *supra* note 59; Maggie Gardner, *Deferring to Foreign Courts*, 169 U. PA. L. REV. 2291 (2021); and Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 STAN. L. REV. 1031 (2023).

68 *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817–20 (1976).

69 *See* Gardner, *supra* note 67, at 2331–33 (describing different approaches).

70 *See* Royal & Sun All. Ins. Co. of Can. v. Century Int'l Arms, Inc., 466 F.3d 88, 92 (2d Cir. 2006); Turner Ent. Co. v. Degeto Film GmbH, 25 F.3d 1512, 1518 (11th Cir. 1994).

parallel proceedings in a foreign forum; foreign relations abstention does not. Foreign relations abstention thus has a much broader potential applicability. The values that the two doctrines promote also differ: deference to foreign parallel proceedings is motivated by judicial efficiency and fairness concerns, while foreign relations abstention is—at least ostensibly—motivated by more political concerns about avoiding interference with foreign sovereign interests. Cases analyzing deference to foreign parallel litigation should not be used to justify or guide the application of foreign relations abstention.

*Cross-Border Bankruptcies.* Closely related to parallel litigation are foreign bankruptcy proceedings, which have spawned another line of appellate precedents.[71] These cases are often cited as international comity abstention cases,[72] but their reasoning is specific to the cross-border insolvency context.[73] The driving concern in these cases is avoiding piecemeal litigation that could undermine the initial bankruptcy court's efforts to dispose fairly of the bankruptcy estate.[74] U.S. courts confronting cases related to foreign bankruptcy proceedings, then, are even more likely to abstain in favor of foreign courts than they are in the context of foreign parallel litigation.[75] Again, however, that deference is less political than practical, focused on ensuring the efficacy of the bankruptcy court's decisions and protecting its disposition of the bankruptcy estate. It is also backed by a congressional statute adopting a multilateral model law.[76] Like with parallel litigation, this version of "international comity abstention" should not be applied beyond the bankruptcy context that justified its development.

*Prudential Exhaustion.* A couple circuits require foreign plaintiffs bringing certain types of transnational cases to first exhaust any

71 *See, e.g.*, JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V., 412 F.3d 418, 424 (2d Cir. 2005); Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 246 (2d Cir. 1999); Remington Rand Corp.-Del. v. Bus. Sys. Inc., 830 F.2d 1260, 1266 (3d Cir. 1987); Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 456 (2d Cir. 1985).

72 *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 16, at 17 n.3.

73 *See* Gardner, *supra* note 67, at 2340–41 (describing the difference between deference to foreign insolvency proceedings and deference to foreign parallel litigation).

74 *See, e.g.*, Victrix S.S. Co. v. Salen Dry Cargo A.B., 825 F.2d 709, 713–14 (2d Cir. 1987) ("The equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding; if all creditors could not be bound, a plan of reorganization would fail.").

75 *See* Gardner, *supra* note 67, at 2340–42 (discussing abstention in the bankruptcy context).

76 *See* 11 U.S.C. § 1501 (2018) (describing the purpose of chapter 15 of the Bankruptcy Code as implementing the Model Law on Cross-Border Insolvency to further cooperation between U.S. and foreign courts).

recourse available before their home courts.[77] When the defendants in *Simon* and *Philipp* invoked "international comity abstention" before the D.C. Circuit, they meant the Seventh Circuit's version of prudential exhaustion.[78] The D.C. Circuit rightly rejected such a requirement of prudential exhaustion,[79] which problematically transplants an administrative law concept to a litigation context in which it could have unanticipated preclusive effects.[80] At the very least, this idea of prudential exhaustion is distinct from the more open-ended concept of foreign relations abstention.

*"Retrospective Comity."* The Eleventh Circuit appears to have coined the term "international comity . . . abstention"[81] in a case that involved what it calls "retrospective[]" comity,[82] by which it meant abstention in light of what foreign courts have already done. According to the Eleventh Circuit, "retrospective comity" involves "domestic courts consider[ing] whether to respect the judgment of a foreign tribunal or to defer to parallel foreign proceedings,"[83] yet it is distinct from both of those doctrines. Unlike deference to foreign parallel proceedings, the Eleventh Circuit's "retrospective comity" does not actually require there to be substantially similar parallel litigation. And unlike the recognition of foreign judgments,[84] "retrospective comity" does not actually require there to be a final foreign judgment. Instead, it mixes together elements of these two different doctrines and applies them to a broader array of circumstances.

That is problematic. The Eleventh Circuit has used "retrospective comity" to effectively give res judicata effect to the rulings of foreign

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77 The Seventh Circuit requires prudential exhaustion in FSIA cases, while the Ninth Circuit requires prudential exhaustion in Alien Tort Statute (ATS) cases. *See* Fischer v. Magyar Államvasutak Zrt., 777 F.3d 847, 856–59 (7th Cir. 2015); Sarei v. Rio Tinto, PLC, 550 F.3d 822, 828–32 (9th Cir. 2008) (en banc) (plurality opinion). Notably, however, "the Seventh Circuit has cast doubt on the applicability of prudential exhaustion for ATS claims, while the Ninth Circuit has cast doubt on the applicability of exhaustion for FSIA claims." Gardner, *supra* note 67, at 2342–43 (footnote omitted) (first citing Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1025 (7th Cir. 2011); and then citing Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1034–37 (9th Cir. 2010) (en banc)); *see also* Jean v. Dorélien, 431 F.3d 776, 781 (11th Cir. 2005) (rejecting prudential exhaustion for ATS claims).

78 *See* Simon v. Republic of Hungary, 911 F.3d 1172, 1180 (D.C. Cir. 2018), *vacated and remanded*, 141 S. Ct. 691 (2021); Philipp v. Federal Republic of Germany, 894 F.3d 406, 414–15 (D.C. Cir. 2018), *vacated and remanded*, 141 S. Ct. 703 (2021).

79 *See Simon*, 911 F.3d at 1180; *Philipp*, 894 F.3d at 415.

80 *See* Brief of Professors William S. Dodge & Maggie Gardner as *Amici Curiae* in Support of Respondents at 24–26, *Simon*, 141 S. Ct. 691 (Nos. 18-1447 & 19-351).

81 *See* Turner Ent. Co. v. Degeto Film GmbH, 25 F.3d 1512, 1519 (11th Cir. 1994).

82 *See* Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1238 (11th Cir. 2004).

83 *Id.*

84 For an overview of the highly developed doctrine around the recognition and enforcement of foreign judgments, see Dodge, *supra* note 66.

courts that do not satisfy the requirements of preclusion.[85] Likewise, the Eleventh Circuit's test allows a U.S. court to refuse to hear a case even though the foreign proceedings involve different parties or issues and thus will not settle the questions raised by the U.S. litigation. Like prudential exhaustion as applied to transnational litigation, this idea of "retrospective comity" should be discarded. Courts should instead analyze questions of parallel proceedings and preclusion separately from one another.

*Statutory Interpretation.* Also problematically, the Second Circuit has called abstention "on international comity grounds" what is really a question of statutory interpretation.[86] When a U.S. statute has extraterritorial reach, courts must determine when the statute's extraterritorial application impermissibly infringes on the regulatory interests of another country. This is a matter of prescriptive, not adjudicative, comity: the question is not whether the dispute is best heard by a U.S. or a foreign court, but whether U.S. law should govern. Resolving that question may still lead to dismissal of the case, but on a different basis. Unlike abstention, the question of the reach of U.S. law is a merits determination and is properly categorized as a Rule 12(b)(6) dismissal for failure to state a claim upon which relief could be granted.[87] That difference matters: as a merits determination, dismissal based on the inapplicability of the invoked U.S. law may have greater preclusive effect. The Second Circuit should correct its labeling, and other circuits should avoid repeating the same mistake.

*Foreign Relations Abstention.* That leaves the sixth variation of comity abstention: the version adopted by the Ninth and Eleventh Circuits that this Article terms "foreign relations abstention" because of its focus on avoiding offense to foreign sovereigns.

The Eleventh Circuit first articulated a version of abstention based on foreign relations concerns in *Ungaro-Benages v. Dresdner Bank AG* in 2004.[88] *Ungaro-Benages* affirmed dismissal of a Holocaust restitution

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85 *See* Belize Telecom, Ltd. v. Gov't of Belize, 528 F.3d 1298, 1303–09, 1305 n.9, 1308 n.12 (11th Cir. 2008) (invoking retrospective comity to give issue-preclusive effect to a non-final Belize judgment); Daewoo Motor Am., Inc. v. Gen. Motors Corp., 459 F.3d 1249, 1255, 1259 (11th Cir. 2006) (invoking retrospective comity to dismiss the plaintiff's "collateral[] attack," *id.* at 1255, on a Korean bankruptcy proceeding).

86 *See, e.g.*, *In re* Vitamin C Antitrust Litig., 837 F.3d 175, 182, 184 (2d. Cir. 2016), *vacated and remanded on other grounds sub nom.* Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865 (2018).

87 *Cf.* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 254 (2010) (clarifying that whether a U.S. statute reaches foreign conduct is a merits question addressed through Rule 12(b)(6) rather than a jurisdictional question addressed through Rule 12(b)(1)). *See generally* Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63, 94–95 (2019) (describing differences between prescriptive and adjudicative comity doctrines).

88 379 F.3d 1227 (11th Cir. 2004).

case brought by a U.S. citizen against a German bank in light of Germany's alternative dispute mechanism for resolving Holocaust claims (the "Foundation").[89] In doing so, the Eleventh Circuit distinguished its doctrine of "retrospective comity" from an idea of "prospective comity."[90] Prospective comity, the Eleventh Circuit explained, asks "federal courts [to] evaluate . . . the strength of [our government's] interest[s] . . . , the strength of the foreign governments' interests, and the adequacy of the alternative forum."[91] In *Ungaro-Benages*, the court was concerned that allowing litigation to proceeded despite a U.S.-German agreement to promote the Foundation as the primary means for resolving Holocaust claims would undermine the work of the Foundation and undercut U.S. foreign policy.[92]

The Ninth Circuit adopted *Ungaro-Benages*'s approach in 2014 in *Mujica v. AirScan Inc.*[93] In *Mujica*, the Ninth Circuit used this new form of abstention to dismiss a lawsuit brought by Colombian plaintiffs against two U.S. companies for aiding the Colombian government's bombing of their village.[94] In applying the *Ungaro-Benages* framework, *Mujica* emphasized the U.S. State Department's statement that allowing the litigation to proceed would harm U.S. foreign policy interests, as well as two démarches from the Colombian government suggesting that it would prefer the case be dismissed.[95]

Since *Ungaro-Benages*, the Eleventh Circuit has limited its idea of prospective comity to "rare (indeed often calamitous) cases in which powerful diplomatic interests of the United States and foreign sovereigns aligned in supporting dismissal."[96] The Ninth Circuit, however, seems to view it as a more workaday doctrine of docket control. In *Cooper v. Tokyo Electric Power Co. Holdings*,[97] for example, the Ninth Circuit affirmed the use of *Mujica*'s test to dismiss claims brought by U.S. servicemembers against a Japanese utility company for their exposure to radiation and resulting illnesses following the Fukushima nuclear disaster.[98] While the Japanese government had requested the district court dismiss the case, the U.S. State Department affirmatively did not.[99]

89 *See id.* at 1229–31.

90 *See id.* at 1238.

91 *Id.*

92 *See id.* at 1239.

93 771 F.3d 580 (9th Cir. 2014).

94 *See id.* at 584.

95 *See id.* at 610–11.

96 GDG Acquisitions, LLC v. Gov't of Belize, 749 F.3d 1024, 1034 (11th Cir. 2014).

97 960 F.3d 549 (9th Cir. 2020).

98 *See id.* at 554.

99 *See id.* at 568–69. For further discussion of the *Cooper* litigation, see Gardner, *supra* note 67, at 2314–17.

Notably, in all three of these cases, the federal courts had considered and rejected the application of other negative comity doctrines, like forum non conveniens and the political question doctrine.[100] To understand what work this new idea of foreign relations abstention is doing, then, it is necessary to understand the limits of other doctrines that already help avoid foreign relations frictions.

### *C. Distinguishing Other Foreign Relations Doctrines*

Other doctrinal tools already address the potential foreign relations implications of transnational litigation. Congress and the Supreme Court, however, have carefully cabined the application of these other doctrines. Foreign relations abstention allows the lower courts to reexpand the scope of their discretion. That move is at odds with the doctrinal limits described here, as well as the Supreme Court's more general wariness of prudential tools of docket control.[101]

*Sovereign immunity*. Foreign sovereign immunity significantly limits plaintiffs' ability to sue foreign governments or their officials in U.S. courts. The Supreme Court first recognized foreign sovereign immunity in *The Schooner Exchange v. McFaddon*.[102] There, Chief Justice Marshall noted an international practice of limiting jurisdiction over foreign sovereigns for some types of claims; acting on the suggestion of the Executive Branch, he concluded that U.S. courts could not resolve an ownership dispute over "a national armed vessel" claimed by France.[103] After *Schooner Exchange*, the federal courts typically deferred to the executive branch on questions of foreign sovereign immunity.[104] As the law of sovereign immunity developed more and more exceptions, the State Department was subject to greater lobbying from foreign countries seeking statements of immunity.[105]

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100 *See* Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1235–37 (11th Cir. 2004) (rejecting the political question doctrine as a basis for decision); *Mujica*, 771 F.3d at 597 & n.13 (rejecting the political question doctrine and the federal foreign affairs doctrine as bases for decision). In *Cooper*, the Ninth Circuit had earlier affirmed the district court's denial of the defendant's motion to dismiss on the bases of forum non conveniens and the political question doctrine. *See* Cooper v. Tokyo Elec. Power Co., 860 F.3d 1193, 1210, 1215 (9th Cir. 2017).

101 *See infra* Section III.C (describing this Supreme Court trend away from prudential discretion).

102 11 U.S. (7 Cranch) 116 (1812).

103 *See id.* at 146, 134, 137, 145–46; *see also* Republic of Austria v. Altmann, 541 U.S. 677, 688 (2004) ("Chief Justice Marshall's opinion in *Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812), is generally viewed as the source of our foreign sovereign immunity jurisprudence.").

104 *Altmann*, 541 U.S. at 689.

105 *See, e.g.*, Opati v. Republic of Sudan, 140 S. Ct. 1601, 1605 (2020) (discussing *Schooner Exchange* and subsequent developments in foreign sovereign immunity).

Congress stepped in with the Foreign Sovereign Immunities Act of 1976 (FSIA),[106] which replaced case-by-case consideration of sovereign immunity with a "comprehensive framework."[107] Determining whether a defendant government is protected by sovereign immunity is now a question of statutory interpretation. Notably, the FSIA contains a number of exceptions to sovereign immunity, for example, when the lawsuit involves the commercial activities of the foreign government or its agency or instrumentality[108] or when it involves "property taken in violation of international law."[109] In codifying foreign sovereign immunity, in other words, Congress explicitly limited its application—and it has continued to add new exceptions to sovereign immunity over time.[110]

The immunities of foreign officials are admittedly less systematic. Congress has codified the immunities of diplomatic and consular officials through the Diplomatic Relations Act[111] and self-executing treaties.[112] Congress has not codified head-of-state immunity or conduct-based immunities for other foreign officials,[113] but such immunities are recognized by federal common law, with courts typically deferring to executive branch determinations.[114] Like the immunity of foreign governments, foreign official immunity is also limited by a number of exceptions, whether by operation of codified law or by federal common law.[115]

In short, all three branches of the U.S. government (as well as international law) recognize that foreign governments and their officials need not be absolutely immune from all court proceedings that could affect their pocketbook or cause them discomfort or embarrassment.

106 Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

107 Republic of Argentina v. NML Cap., Ltd., 573 U.S. 134, 141 (2014) (quoting *Altmann*, 541 U.S. at 699).

108 *See* 28 U.S.C. § 1605(a)(2) (2018).

109 *Id.* § 1605(a)(3).

110 *See, e.g.*, Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 3, 130 Stat. 852, 853 (2016) (codified at 28 U.S.C. § 1605B (2018)).

111 Pub. L. No. 95-393, 92 Stat. 808 (1978) (codified as amended in scattered sections of 22 & 28 U.S.C.). In addition to this codification, U.S. courts are particularly deferential to State Department assessments of diplomatic immunity. *See, e.g.*, United States v. Al-Hamdi, 356 F.3d 564, 573 (4th Cir. 2004).

112 *See* William S. Dodge, *A Primer on Foreign Official Immunity*, TRANSNAT'L LITIG. BLOG (May 23, 2022), https://tlblog.org/a-primer-on-foreign-official-immunity/ [https://perma.cc/K3ZQ-7EUR] (discussing the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations).

113 *See* Samantar v. Yousuf, 560 U.S. 305, 319 (2010) (holding that foreign official immunity is not governed by the FSIA).

114 *See* Dodge, *supra* note 112.

115 *See id.*

Thus foreign state-owned enterprises are often subject to significant litigation in U.S. courts, as are foreign governments as bond issuers[116] and former diplomatic officers accused of abusing their domestic staff.[117] The law of immunities addresses many of the concerns about treading on sensitive foreign relations matters while recognizing that sensitivity does not require complete avoidance.

*Political Questions.* A case presents a political question and is therefore nonjusticiable when "the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights."[118] As the Supreme Court recognized in *Baker v. Carr*,[119] cases touching on foreign relations may present political questions because foreign relations issues "frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature," or may "demand single-voiced statement of the Government's views."[120] Nonetheless, the Court warned in *Baker* that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[121]

The Supreme Court also signaled a narrowing of the political question doctrine in recent cases, including a case implicating foreign affairs.[122] In these decisions, the Court has framed the doctrine not as a prudential tool, but as a constitutional limit,[123] and it has emphasized the federal courts' general "responsibility to decide cases properly before [them]."[124] Perhaps most tellingly, recent decisions have focused on just the first two of *Baker v. Carr*'s six factors for identifying political questions: whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and whether there is "a lack of judicially discoverable and manageable

116 *See, e.g.*, Republic of Argentina v. NML Cap., Ltd., 573 U.S. 134 (2014).

117 *See* Ravelombonjy v. Zinsou-Fatimabay, 632 F. Supp. 3d 239 (S.D.N.Y. 2022).

118 Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (Scalia, J.) (plurality opinion).

119 369 U.S. 186 (1962).

120 *Id.* at 211.

121 *Id.*; *see also* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 229–30 (1986) (rejecting application of the political question doctrine in a case implicating Japan's sovereign interests).

122 *See* Zivotofsky v. Clinton, 566 U.S. 189, 194–95 (2012) (emphasizing that the political question doctrine is but a "narrow exception," *id.* at 195, to the rule that "the Judiciary has a responsibility to decide cases properly before it," *id.* at 194, and omitting the doctrine's more prudential factors).

123 *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2493–94 (2019).

124 *Zivotofsky*, 566 U.S. at 194.

standards for resolving it."[125] *Baker v. Carr*'s other, more prudential factors—like "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government" or "the potentiality of embarrassment from multifarious pronouncements by various departments on one question"[126]—have appeared only in the separate opinions of Justices who disagree with the Court's political question analysis.[127]

A recent study by Professors Curt Bradley and Eric Posner found that lower courts do use *Baker v. Carr*'s prudential factors to dismiss cases implicating military affairs or foreign relations.[128] Most of the cases they identified, however, involved challenges to the U.S. government; while a few related to foreign countries' sovereign prerogatives,[129] those cases predate the Supreme Court's most recent pronouncements on the political question doctrine.

In short, the consistent message from the Supreme Court has been that the political question doctrine does not allow dismissal of cases just because they might offend or trouble foreign governments. Notably, the district courts in *Ungaro-Benages*, *Mujica*, and *Cooper* all initially dismissed those cases based on the political question doctrine. It was only after the judges later revised their political question determinations or were overturned on appeal that the courts invoked foreign relations abstention to reach the same result.[130]

*Act-of-State Doctrine.* The closely related act-of-state doctrine shields the official acts of foreign sovereigns taken within their own territory from review in U.S. courts.[131] Significantly, the act-of-state

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125 *Baker*, 369 U.S. at 217; *see* Nixon v. United States, 506 U.S. 224, 228 (1993) (quoting first two factors but no others); *Zivotofsky*, 566 U.S. at 195 (quoting *Nixon* quoting only the first two factors); *Rucho*, 139 S. Ct. at 2494, 2496 (quoting only the second factor).

126 *Baker*, 369 U.S. at 217.

127 *See Nixon*, 506 U.S. at 252 (Souter, J., concurring in judgment); *Zivotofsky*, 566 U.S. at 202–03 (Sotomayor, J., concurring in part and concurring in judgment); *see also id.* at 204 (characterizing the missing *Baker v. Carr* factors as prudential).

128 *See* Bradley & Posner, *supra* note 67, at 1051–52 (reporting that 39% of their eighty-two-case sample covering 1962–2022 addressed military affairs or foreign relations); *id.* at 1054–55 (reporting that 72% of their eighty-one-case sample covering 1987–2019 addressed military affairs or foreign relations).

129 *See id.* at 1065–66 (discussing Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196, 1203 (5th Cir. 1978), and Spectrum Stores, Inc. v. Citgo Petroleum Corp., 632 F.3d 938, 943 (5th Cir. 2011)).

130 *See* Gardner, *supra* note 67, at 2301, 2311–13 (describing the procedural history of all three cases). In overturning the political question holding in *Ungaro-Benages*, the Eleventh Circuit cited to *Baker v. Carr*'s explicit caveat regarding transnational cases, emphasizing that "not all issues that could potentially have consequences to our foreign relations are [nonjusticiable] political questions." Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1235 (11th Cir. 2004). Yet the court went on to order abstention regardless.

131 *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964).

doctrine is not a basis for dismissing a case, but rather serves as a "special choice-of-law rule" that directs U.S. courts to give effect to foreign governments' official acts even if those acts run counter to U.S. public policy.[132] The Supreme Court's seminal decision in *Banco Nacional de Cuba v. Sabbatino* justified the act-of-state doctrine by emphasizing the risk of causing friction or otherwise trespassing on the foreign relations powers of the political branches.[133] Lower courts then invoked that language to apply the act-of-state doctrine loosely to cases that could cast doubt on the propriety of foreign governments' actions.[134] The Supreme Court firmly rejected that trend, however, in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International.*[135] There the unanimous Court, in an opinion written by Justice Scalia, insisted that the act-of-state doctrine is not some "vague doctrine of abstention" for avoiding cases "that may embarrass foreign governments"[136]—precisely what the emergent doctrine of foreign relations abstention purports to be. It may also not be a coincidence, then, that the idea of foreign relations abstention emerged shortly after the Supreme Court's decision in *W.S. Kirkpatrick* strictly cabining the act-of-state doctrine.

*Forum Non Conveniens.* Then there is forum non conveniens, a doctrine that allows judges to voluntarily dismiss cases on the grounds that the cases would more appropriately be heard in another sovereign's courts.[137] Forum non conveniens is used by U.S. state courts, for example, to dismiss cases in favor of other U.S. states' courts.[138] The Supreme Court adopted the doctrine for use by federal courts in 1947 in *Gulf Oil.* Under *Gulf Oil*'s approach, courts weigh private and public

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132 RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 441 cmt. a (AM. L. INST. 2018) (explaining that the act-of-state doctrine "precludes a court from denying effect to an official act on the ground that the act violates the public policy of the forum").

133 *See Sabbatino*, 376 U.S. at 423 (explaining that the act-of-state doctrine "expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole").

134 *See, e.g.*, Steven R. Swanson, *A Threshold Test for Validity: The Supreme Court Narrows the Act of State Doctrine*, 23 VAND. J. TRANSNAT'L L. 889, 892, 905–08 (1991) (describing federal appellate caselaw after *Sabbatino*).

135 493 U.S. 400 (1990).

136 *Id.* at 406, 409. As Justice Scalia summed up for the unanimous Court, "The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *Id.* at 409.

137 For an introduction to the doctrine of forum non conveniens, see Maggie Gardner, *A Primer on Forum Non Conveniens*, TRANSNAT'L LITIG. BLOG (Aug. 10, 2022), https://tlblog.org/a-primer-on-forum-non-conveniens/ [https://perma.cc/FRF4-WQLM].

138 For an overview of state court use of forum non conveniens, see generally William S. Dodge, Maggie Gardner & Christopher A. Whytock, *The Many State Doctrines of Forum Non Conveniens*, 72 DUKE L.J. 1163 (2023).

interests to decide whether to decline jurisdiction over a case.[139] *Gulf Oil*'s private interest factors include the ease of access to evidence, most notably the ability to compel witnesses to attend trial; the enforceability of the eventual judgment; "and all other practical problems that make trial of a case easy, expeditious and inexpensive."[140] Its public interest factors include the difficulty of applying unfamiliar law, the public's interest in having important cases tried close to home, the burden of jury duty on a community "which has no relation to the litigation," and the "[a]dministrative difficulties [that] follow for courts when litigation is piled up in congested centers instead of being handled at its origin."[141]

Notably absent from this set of public interest factors is international comity. That absence is not particularly surprising given that *Gulf Oil* was a purely domestic case in which a federal court in New York exercised its discretion to dismiss a case that it thought should have been filed in federal court in Virginia.[142] Congress quickly obsoleted that particular use of forum non conveniens by adopting the venue transfer statute, 28 U.S.C. § 1404, the following year.[143] As a result, federal courts have used forum non conveniens primarily to dismiss cases in favor of foreign courts.[144] Even in the absence of an explicit factor regarding international comity, then, the *Gulf Oil* framework gives trial judges broad discretion to dismiss transnational cases, subject only to abuse-of-discretion review by appellate courts.[145]

While forum non conveniens is more flexible and discretionary than the law of sovereign immunity, the political question doctrine, and the act-of-state doctrine, there are still some limits to its applications. There is a presumption in favor of the plaintiff's choice of forum, although that presumption is weaker when the plaintiff is not a U.S. resident.[146] There is also a threshold requirement of an adequate and available alternative forum.[147] In the Tenth Circuit, courts cannot dismiss cases for forum non conveniens if U.S. law would apply to the dispute.[148] In half of the federal circuits, dismissal for forum non

139 *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947).

140 *Id.* at 508.

141 *Id.* at 508–09.

142 *See id.* at 503.

143 *See* Act of June 25, 1948, ch. 646, § 1, 62 Stat. 869, 937.

144 *See, e.g.*, Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422 (2007).

145 *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 750–52 (1982) (critiquing this insulation from review of the district judge's already broad discretion).

146 *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255–56 (1981).

147 *See id.* at 254 & n.22.

148 *See, e.g.*, Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd., 2 F.3d 990, 994 (10th Cir. 1993) ("[*F*]*orum non conveniens* is not applicable if American law controls.").

conveniens is disfavored in cases involving local defendants.[149] These limits are all missing from the Ninth and Eleventh Circuits' test for foreign relations abstention—indeed, these limits are about the only thing distinguishing the two doctrines.

Once again, in both of the Ninth Circuit decisions that have applied foreign relations abstention, the district court first considered and rejected the application of forum non conveniens. In *Mujica*, the trial judge refused to dismiss the case for forum non conveniens, an exercise of discretion that is hard to overturn on appeal; instead, the Ninth Circuit adopted foreign relations abstention and dismissed the case on that basis.[150] In *Cooper*, the district court first concluded that dismissal for forum non conveniens would be inappropriate in a case brought in a U.S. court by members of the U.S. armed forces, but the court then dismissed their suit on the basis of foreign relations abstention instead.[151]

In short, there are already multiple doctrines for preventing conflict with foreign sovereign interests, but all of those doctrines have limits or exceptions meant to ensure that they do not sweep more broadly than absolutely necessary. The new concept of foreign relations abstention, by contrast, sweeps very broadly. It is a doctrinal sledgehammer that can—and has—rendered irrelevant the more circumscribed approach of these other doctrines.

To be clear, in developing the idea of foreign relations abstention, the Ninth and Eleventh Circuits cast it as prudential tool.[152] The invocation of old admiralty cases to ground foreign relations abstention came later, when advocates before the Supreme Court turned to admiralty to identify a legitimating historical pedigree.

## II. THE HISTORICAL ADMIRALTY PRACTICE

This Part provides a descriptive account of just what that historical admiralty practice entailed. The description is based on a synthesis of nearly 130 federal opinions[153] stretching from 1788 to 1932, the year the Supreme Court decided *Canada Malting*.[154] I did not rely on keyword or index searching to identify cases because of the risk that early cases could have been improperly categorized or used erratic or

149 *See* Gardner, *supra* note 67, at 2323 n.211 (gathering citations from six circuits).

150 *See id.* at 2312–14 (describing the procedural progress of the *Mujica* case).

151 *See id.* at 2314–16 (describing the procedural progress of the *Cooper* litigation).

152 *See* Mujica v. AirScan Inc., 771 F.3d 580, 598 (9th Cir. 2014) ("International comity is a doctrine of prudential abstention . . . ."); Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1237 n.13 (11th Cir. 2004) ("Abstention doctrines are prudential doctrines . . . .").

153 The full list of consulted cases is gathered in the Appendix.

154 *See supra* note 26.

unfamiliar terminology. Instead I started with the dozens of cases cited in *Canada Malting* and contemporaneous law review articles[155] and then followed citation chains forward and backward until I had a fairly closed universe of cases. In reviewing citations, I looked for federal cases discussing jurisdictional discretion whether or not the judge thought such discretion was applicable to the case before him.[156] I did not limit the cases by geography or nationality of parties. As the goal was to produce a qualitative description of the scope of jurisdictional discretion during this time period, I did not worry about finding every possible case in which jurisdictional discretion was described or applied, and I have not tried to quantify the consistency with which certain factors were or were not considered. Rather, Section II.B focuses on the parameters from which I found no deviation among the cases I reviewed, while Section II.C describes factors that were considered in more than a few of the cases.

The bottom line is that federal courts have long considered their jurisdiction over admiralty disputes between foreign parties to be discretionary. Section II.B describes how the scope of that discretion was limited to admiralty disputes that involved no U.S. parties. Section II.C describes how courts applied that discretion through a flexible analysis that considered a varying set of factors, none of which was dispositive and some of which might surprise the proponents of foreign relations abstention today. First, however, Section II.A begins with a brief primer to assist readers unfamiliar with admiralty.

### A. *Foreigners in U.S. Admiralty Courts*

"Admiralty" can refer to a court, a body of substantive law, or a head of subject matter jurisdiction. In each regard, it is helpful to distinguish admiralty from more common variants: law and equity for procedure, other bodies of common law for substance, and diversity and federal question for subject matter jurisdiction.

Into the twentieth century, the federal courts kept separate dockets for law, equity, and admiralty, with each "side" of the court following separate procedural rules.[157] Admiralty had its own procedural language, with plaintiffs called "libellants," their complaints called "libels," and defendants called "respondents."[158] It was not until 1966

155 *See* Bickel, *supra* note 27; Coffey, *supra* note 27.

156 As a result, I have included only a few prize cases, as courts in prize cases did not consider their jurisdiction to be discretionary.

157 *See* FRANK L. MARAIST, THOMAS C. GALLIGAN, JR. & CATHERINE M. MARAIST, ADMIRALTY IN A NUTSHELL 11 (6th ed. 2010).

158 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 10 (6th ed. 2019).

that admiralty was merged with law and equity, and some procedural distinctions remain.[159]

Admiralty law, like admiralty procedure, is also distinct. It is based on the "general maritime law," a global common law of seafaring nations that is domesticated and developed by the federal courts.[160] Thus early in the republic, federal admiralty judges frequently looked to the admiralty decisions of foreign courts, particularly those of Great Britain.[161] While a number of federal statutes today govern aspects of admiralty law, large swaths of admiralty claims are still governed by this general maritime law.[162] State courts must follow the general maritime law as identified by the federal courts, but the general maritime law is distinct from federal common law in that it does not independently give rise to federal question jurisdiction.[163] Note that this self-consciously transnational enterprise of identifying and developing the general maritime law requires admiralty courts to exercise a lawmaking authority of a different texture than that of law courts, especially after *Erie Railroad Co. v. Tompkins*.[164] As a result, the standard separation of powers arguments about the division of labor between Congress and the courts apply differently in admiralty.

In terms of subject matter jurisdiction, Congress has always granted the lower federal courts authority to hear "[a]ny civil case of admiralty or maritime jurisdiction."[165] That grant of jurisdiction involves no limit on the applicable law (as with federal question jurisdiction) nor a citizenship precondition (as with diversity jurisdiction)—all that is required is that the case involve a maritime claim. Further, Congress has historically placed no limits on the federal venues in which admiralty claims could be heard.[166]

The primary limit, then, on what maritime claims could be brought before federal courts sitting in admiralty was what we would today call personal jurisdiction, or the authority to adjudicate. But that

159 *See* MARAIST ET AL., *supra* note 157, at 11. For example, there are supplemental rules for admiralty or maritime claims brought specifically under the federal courts' admiralty jurisdiction. SUPP. RS. FOR ADMIRALTY OR MAR. CLAIMS & ASSET FORFEITURE ACTIONS A–G. Jury trials are also not available in admiralty. *See* MARAIST ET AL., *supra* note 157, at 11.

160 *See* MARAIST ET AL., *supra* note 157, at 3.

161 *See, e.g.*, Thompson v. The Catharina, 23 F. Cas. 1028, 1029 (D. Pa. 1795) (No. 13,949); Bucker v. Klorkgeter, 4 F. Cas. 555, 557–58 (S.D.N.Y. 1849) (No. 2,083); The Becherdass Ambaidass, 3 F. Cas. 13, 15 (D. Mass. 1871) (No. 1,203); The Belgenland, 114 U.S. 355, 366–67 (1885).

162 *See* MARAIST ET AL., *supra* note 157, at 12.

163 *See id.* at 12–13.

164 304 U.S. 64 (1938).

165 MARAIST ET AL., *supra* note 157, at 10 (quoting 28 U.S.C. § 1333 (2006)).

166 *See* MARAIST ET AL., supra note 157, at 408.

limitation was also minimal in practice given the physical presence of ships and crew in U.S. ports: in-hand service sufficed to establish in personam jurisdiction over individuals, and the arrest of a vessel in port sufficed to establish in rem authority.[167] The ease of establishing in rem jurisdiction is important in admiralty because many admiralty claims create implied liens on the vessel, including claims for seamen's wages, salvage, collision, personal injury, repairs, and the provision of necessaries.[168] Libellants can thus bring in rem proceedings to determine ownership of the vessel in light of the lien created by their claims, with the court seizing the vessel and—if the claims are sustained—ultimately selling it to compensate holders of the liens.[169]

Admiralty, then, is distinct from law or equity, with procedural differences rooted in history and still recognized in the federal rules today. It is partly composed of a globally harmonized common law that is distinct from the state common law typically applied in diversity cases and the interstitial federal common law applied in federal question cases. Most importantly for present purposes, the federal jurisdictional power over admiralty disputes is potentially global in scope, limited only by the ability to establish jurisdiction over the defendant, which in turn was (and is) frequently enabled by the physical presence of a ship in port.

### *B. The Scope of Admiralty Discretion*

Given this breadth of the admiralty jurisdiction, federal courts from the earliest years of the republic recognized that they had the authority to hear maritime disputes involving no U.S. parties, even if those disputes arose outside of the United States.[170] It was this breadth

167 *See id.* at 402–03.

168 *See id.* at 99–102 (describing types of implied maritime liens); *see also* SCHOENBAUM, *supra* note 158, at 10 (explaining how a maritime lien is a "special security interest recognized only in admiralty" and enforced through a special in rem process).

169 These in rem proceedings must be brought in federal court. SCHOENBAUM, *supra* note 158, at 6. So must salvage and general average suits, in addition to prize or any other claim specified by statute. *See id.* However, other admiralty or maritime claims for which the common law provides a remedy can be brought in state courts. *See id.* (explaining the "saving to suitors" clause of 28 U.S.C. § 1333, which otherwise purports to grant exclusive jurisdiction over admiralty and maritime claims to the federal courts).

170 *See, e.g.*, Mason v. Ship Blaireau, 6 U.S. (2 Cranch) 240, 240 (1804) (exercising jurisdiction over a dispute involving salvage of a foreign ship by another foreign ship in international waters); Moran v. Baudin, 17 F. Cas. 721, 722 (D. Pa. 1788) (No. 9,785) (applying French law to grant relief to French sailor on French ship); Weiberg v. The St. Oloff, 29 F. Cas. 591, 593 (D. Pa. 1790) (No. 17,357) (ordering Swedish ship sold, over protest of Swedish consul, to pay presumably Swedish sailors released by the court from their service in light of the "cruel and unwarrantable" treatment of the Swedish master); Ellison v. The Bellona, 8 F. Cas. 559, 559 (D.S.C. 1798) (No. 4,407) ("Courts of admiralty have a general

of jurisdiction that created the need for a discretion to decline jurisdiction—and the distinctive nature of admiralty as a global legal project that justified its exercise. As the Supreme Court summarized in 1869,

> [I]t seems to be settled that our admiralty courts have full jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature, but the question is one of discretion in every case, and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.[171]

This Section describes the general contours of this admiralty discretion, while the next Section describes its application.

### 1. Limitation to Admiralty

The discretion to decline jurisdiction was consistently described as an admiralty-specific doctrine, and I did not find any extension of it to cases at law or in equity.[172] This is not particularly surprising as courts of the nineteenth century generally thought of their jurisdiction as mandatory. Indeed, as late as 1863, Massachusetts rejected any discretion to decline jurisdiction even in maritime disputes between foreigners, citing colonial legislation dating back to 1650 that intentionally opened the state courts to foreign parties.[173] Despite the myth of forum non conveniens being deeply rooted in the common law, the Supreme Court did not permit discretionary dismissals of cases at law in federal courts until 1947.[174] The earliest state court decisions that permitted discretionary dismissals of cases at law or in equity date back

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jurisdiction in causes civil and maritime; and the 9th section of the judiciary act of congress vests that power in this court. The case of seamen's wages comes within this description of causes; and this jurisdiction has been uniformly exercised by me, as regards foreigners generally.").

171 The Maggie Hammond, 76 U.S. (9 Wall.) 435, 457 (1870); *accord, e.g.*, Thomassen v. Whitwell, 23 F. Cas. 1003, 1004 (E.D.N.Y. 1877) (No. 13,928) ("There is therefore no room to question the power of the court to determine the matter in controversy. The most that can be claimed is that the court has power to decline to proceed in the cause upon being informed that the controversy is one between aliens.").

172 One could perhaps view it as a narrowing interpretation of Congress's statutory grant of admiralty jurisdiction, today found at 28 U.S.C. § 1333, much as the Court would interpret Congress's grant of diversity and federal question jurisdiction as similarly not extending to the full scope of Article III's heads of jurisdiction. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (interpreting jurisdictional statute as requiring federal question to appear on the face of the plaintiff's complaint); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (interpreting jurisdictional statute as requiring complete diversity).

173 *See* Roberts v. Knights, 89 Mass. (7 Allen) 449, 451 (1863).

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

only to the late nineteenth century.[175] Thus when federal judges in the 1800s discussed their discretion to decline jurisdiction, they often linked it explicitly to their admiralty powers.[176]

Only in 1932 in *Canada Malting* (another admiralty dispute between foreign parties) did the Supreme Court assert in dicta that "[c]ourts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal."[177] Even then, the Court did not cite any federal caselaw to support that claim.[178] The whole point of the Court's 1947 decision in *Gulf Oil* was to establish that federal courts had the discretion to decline jurisdiction in cases at law.[179]

### 2. Variable Presumptions

At oral argument in *Simon*, Justice Kavanaugh proposed a summary rule based on the historical caselaw: "[I]f foreign defendants harm foreign parties in a foreign country and remedies are available in the foreign country, then American courts should usually abstain."[180] He was right that the discretion was limited to "foreign-cubed" cases, but there was not a default presumption of dismissal. Instead, early admiralty courts often refused to dismiss "foreign-cubed" cases, hearing disputes with only the slightest connection to the United

175 *See* Dodge et al., *supra* note 138, at 1165, 1179.

176 *See, e.g.*, *The Maggie Hammond*, 76 U.S. (9 Wall.) at 457 ("[*O*]*ur admiralty courts* have full jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature, but the question is one of discretion in every case . . . ." (emphasis added)); The Topsy, 44 F. 631, 635 (D.S.C. 1890) ("The uniform current of decisions in the courts of the United States is that *courts of admiralty* can, and, except in special circumstances, will, forbear to exercise the jurisdiction in suits for wages by seamen serving under a foreign flag against a foreign vessel." (emphasis added)); Muir v. The Brisk, 17 F. Cas. 954, 955 (E.D.N.Y. 1870) (No. 9,901) ("The right *of the court of admiralty*, to decline to entertain jurisdiction, when all the parties are foreigners residing abroad, has been often declared." (emphasis added)).

177 Can. Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413, 423 (1932).

178 It cited instead to law review articles and foreign cases. *Id.* at 423 n.6. The one U.S. case it did cite was *Davis v. Farmers Co-op. Equity Co.*, 262 U.S. 312 (1923), but that case invoked the dormant Commerce Clause doctrine to limit U.S. states' ability to hear cases that they *wanted* to hear, *see id.* at 315.

179 *See Gulf Oil*, 330 U.S. at 513–14 (Black, J., dissenting) (criticizing majority for expanding the discretion to decline jurisdiction beyond its historical use in admiralty).

180 Transcript of Oral Argument, *supra* note 17, at 75.

States[181] or even *no* connection to the United States other than the temporary presence of the merchant ship.[182]

This willingness to hear such cases was informed by positive comity: U.S. courts provided forums for maritime disputes in order to ensure the smooth operation of global maritime trade. Ships and their crews were absent from their home ports for years at a time; some disputes could not wait that long for resolution. And many maritime claims were connected by implied or explicit liens to the physical control of the ship itself, requiring the presence of the ship—at least temporarily—within the jurisdiction of the adjudicating court. As Justice Story explained, "To [the] guardian care [of the U.S. tribunal where the ship is found], I may without rashness affirm, the whole commercial world look[s] for security and redress, and without its summary interference, maritime loans would, in all probability, become obsolete."[183] Thus, according to Story, *refusing* to hear such cases "might indeed well be deemed a disregard of national comity, inasmuch as it would be withholding from a party the only effectual means of obtaining his right."[184]

Thus for some types of maritime claims, there was a strong presumption in favor of exercising jurisdiction over "foreign-cubed" disputes. A significant category of such cases was that pertaining to collision or salvage outside of U.S. waters. As the Supreme Court explained in *The Belgenland*, "[T]here has been but one opinion expressed, namely, that [U.S. admiralty courts] have jurisdiction in such cases [of salvage and collision involving foreign parties], and that they *will*

181 For example, the Eighth Circuit found no reason to decline jurisdiction over a subrogation claim of a British insurer of a Canadian ship for a collision involving another Canadian ship in Canada; the link to the United States was merely that the insurance policy was issued in Chicago. Fairgrieve v. Marine Ins. Co. of London, 94 F. 686, 686–87 (8th Cir. 1899).

182 The Supreme Court famously summarized the admiralty practice, including various presumptions in favor of retaining jurisdiction, in a case regarding the collision in international waters of two foreign vessels in which "no American citizen was interested." The Belgenland, 114 U.S. 355, 357, 362–63 (1885).

183 The Jerusalem, 13 F. Cas. 559, 561 (Story, Circuit Justice, C.C.D. Mass. 1814) (No. 7,293).

184 *Id.* at 562. Similarly, Justice McLean, in a dispute over quantum meruit for a failed attempt at salvage, invoked Justice Story's reasoning to conclude that exercising jurisdiction over foreigners would not "clash[] with any principles of public policy"; rather, comity would be undermined by the *refusal* to exercise jurisdiction. The Sailor's Bride, 21 F. Cas. 159, 160, 159–60 (McLean, Circuit Justice, C.C.D. Mich. 1859) (No. 12,220) (awarding quantum meruit to a tug based in Michigan but that Justice McLean treated as a foreign party because the dispute related to its attempt to help a grounded Canadian vessel in Canadian waters).

exercise it unless special circumstances exist to show that justice would be better subserved by declining it."[185]

Also meriting special solicitude were the claims of seamen.[186] Their work was arduous and perilous, and they were at the complete mercy of their "masters" for months at a time,[187] yet the global economy relied on their labor. For this reason, "[t]he common seaman has ever been the ward of admiralty tribunals the world around."[188] Seamen's claims for wages thus gave rise to implied maritime liens on the ships on which they served, liens that took precedence over all other claims except for the court's own costs.[189] As the Southern District of New York explained in 1879, while the punishment of desertion by seamen is important, "it is equally the duty of the courts to secure to the seamen fair and just treatment and to protect them against practices . . . which are often the means adopted to deprive them of their fairly earned wages."[190]

Nonetheless, admiralty's jurisdictional overbreadth could encourage rent-seeking behavior by seamen that could undermine maritime trade. U.S. courts were particularly wary of foreign seamen seeking to leave their foreign ships while in U.S. ports in order to secure higher wages.[191] As Judge Betts of the Southern District of New York repeatedly emphasized, if sailors could abandon their vessels midvoyage, merchants and masters would have to scramble to find new crew at great expense, delaying departures and draining profits.[192] Thus as a federal

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185 114 U.S. at 367 (emphasis added). *The Belgenland* quoted an English decision to the same effect:

> In cases of collision it has been the practice of this country, and, so far as I know, of the European States and of the United States of America, to allow a party alleging grievance by a collision to proceed *in rem* against the ship wherever found, and this practice, it is manifest, is most conducive to justice, because in very many cases a remedy *in personam* would be impracticable.

*Id.* (quoting The "Griefswald" (1859) 166 Eng. Rep. 1200, 1203; Swab. 430, 435).

186 *See* SCHOENBAUM, *supra* note 158, at 198–99. "Seamen" is a technical term in admiralty law referring to just about everyone who works on a vessel. *See id.* at 203.

187 *See id.* at 198–99 (elaborating on these concerns).

188 The August Belmont, 153 F. 639, 641 (S.D. Ga. 1907).

189 *See* MARAIST ET AL., *supra* note 157, at 113.

190 The Lilian M. Vigus, 15 F. Cas. 520, 525 (S.D.N.Y. 1879) (No. 8,346); *see also* Elman v. Moller, 11 F.2d 55, 57 (4th Cir. 1926) ("The courts should act promptly and vigorously to vindicate all the rights of seamen . . . . We doubt not that even now they will often need all the protection that can be given them.").

191 *See, e.g.*, Thompson v. The Catharina, 23 F. Cas. 1028, 1031 n.10 (D. Pa. 1795) (No. 13,949) (declining jurisdiction over claims of foreign seamen bound to return with their ship who had "endeavored on pretext of deviation, to obtain their discharge" "with a view to sail out of our port, at our high wages").

192 *See, e.g.*, Lynch v. Crowder, 15 F. Cas. 1172, 1172 (S.D.N.Y. 1849) (No. 8,637) ("It would be pernicious to the interests of trade and commerce to encourage seamen in suits for wages in foreign ports, as the master or vessel, and frequently both, must in that way be

judge explained in 1801, "It is my duty, from motives of justice, and reciprocal policy, to discourage foreign seamen under engagements to perform their voyage, from breaking their contracts . . . . Reciprocal policy, and the justice due from one friendly nation to another, calls for such [cautious] conduct in the courts of either country."[193] For disputes over seamen's wages, then, there was a presumption *against* exercising jurisdiction over "foreign-cubed" disputes.

But even that rule of thumb was complicated. The federal courts would still intervene to help "protect [foreign seamen] against oppression and injustice"[194] or if the ship's voyage had been broken up or ended.[195] Thus an admiralty court in 1790 awarded foreign seamen their discharge and wages when they had been subject to cruel treatment by their foreign master,[196] and a 1788 decision did the same when the ship's voyage had been prolonged and subject to significant deviations.[197] Judges in such cases were concerned about preventing a "failure of justice," particularly for disputes in which the seamen had rightfully separated from their ship (whether because they were injured,

interrupted in the business of the voyage, and the general adventure be subjected to embarrassing delays and losses."); The Infanta, 13 F. Cas. 37, 39 (S.D.N.Y. 1848) (No. 7,030) ("This court has repeatedly discountenanced actions by foreign seamen against foreign vessels not terminating their voyages at this port, as being calculated to embarrass commercial transactions and relations between this country and others in friendly relations with it."); Davis v. Leslie, 7 F. Cas. 134, 137 (S.D.N.Y. 1848) (No. 3,639) ("[A]s this class of actions tend to embarrass and interrupt the navigation and business of foreign vessels visiting our ports, I fully recognize the right and duty of the court, upon general grounds of propriety and expediency, to decline such jurisdiction, where not induced to its exercise by a clear necessity."); The Pacific, 18 F. Cas. 942, 943 (S.D.N.Y. 1830) (No. 10,644) ("[U]pon high considerations of policy affecting the trade and navigation of all commercial communities, an action calculated to impede or break up a voyage, and probably cause the sale of the ship abroad, will not be entertained in favor of a seaman whilst he is connected with his vessel, except in most urgent cases.").

193 Willendson v. Forsoket, 29 F. Cas. 1283, 1284 (D. Pa. 1801) (No. 17,682).

194 *Id.* For example, in *The Amalia*, the court was concerned that the master had undersupplied provisions and nearly starved the crew; it exercised its jurisdiction and discharged the crew with wages to protect them from similar treatment on their return voyage. *See* 3 F. 652, 659–61 (D. Me. 1880). In *The Noddleburn*, the court declared a seaman's contract effectively rescinded when the master sent him to a hospital in Portland for belated treatment of a serious wound that the master had neglected to care for during the voyage. *See* 28 F. 855, 856, 860 (D. Or. 1886), *aff'd*, 30 F. 142 (C.C.D. Or. 1887).

195 *See Thompson*, 23 F. Cas. at 1028; *see also* Burckle v. The Tapperheten, 4 F. Cas. 692, 695 (S.D.N.Y. 1826) (No. 2,141) ("Where, however, by accident or from necessity, the voyage is broken up or terminated here, we entertain [foreign seamen's] complaints . . . .").

196 *See* Weiberg v. The St. Oloff, 29 F. Cas. 591, 593 (D. Pa. 1790) (No. 17,357).

197 *See* Moran v. Baudin, 17 F. Cas. 721, 722 (D. Pa. 1788) (No. 9,785).

underage, or exploited by their master) and had no means of returning to the ship's home port.[198]

Indeed, some of these decisions went beyond positive comity concerns, expressing moral outrage at the conduct of the ship masters. In *The City of Carlisle*, for example, Judge Deady of the District of Oregon heard the claim of a British apprentice who was partially paralyzed due to a severe head injury during a monthslong voyage. The ship's master had failed to provide any medical care, instead abusing the apprentice with continued maltreatment.[199] Only when the British ship reached Portland was the apprentice able to seek medical care with the help of a local boardinghouse keeper and lawyer.[200] "[I]t is shocking to think," Judge Deady wrote, "of turning this poor helpless boy out of court in a civilized country without redress for a grievous wrong."[201] In *The Karoo*, the captain was accused of kidnapping sailors from Rio de Janiero and then denying them adequate provisions on the long voyage to Tacoma, Washington.[202] Judge Hanford of the District of Washington roundly rejected the argument that intervening in the dispute between captain and crew would undermine international commerce: to the contrary, Judge Hanford stressed, "[T]he commerce of the country cannot suffer by protecting the rights of mariners."[203] He did not mince words: "[I]t is only necessary to sanction or permit the

198 *See* Thomson v. The Nanny, 23 F. Cas. 1104, 1107 (D.S.C. 1805) (No. 13,984) (noting that jurisdiction should be exercised "where it may appear proper or necessary to prevent a failure of justice"); *accord* The Lilian M. Vigus, 15 F. Cas. 520, 521 (S.D.N.Y. 1879) (No. 8,346) (stating that refusing to rehear the case would be a "denial of justice"); The Hermine, 12 F. Cas. 24, 26 (D. Or. 1874) (No. 6,409) ("[I]t would be mere mockery and a denial of justice to remit the libellants to the forums of Great Britain, for, being discharged in this port, they are practically denied the means of access to such forums.").

199 *See* 39 F. 807, 809–12 (D. Or. 1889) (describing the apprentice as being "left in an unconscious or delirious state, sweltering and rolling in his own excrement," such that he developed bed sores that were left untreated and thus "got proud flesh in them," the treatment of which required the master to burn them with caustic, for which the master "made the [apprentice] let down his trousers, while on the poop, and needlessly expose his private parts, at the same time making brutal and indecent remarks to him on the subject," *id.* at 811).

200 *See id.* at 811–12.

201 *Id.* at 815.

202 49 F. 651, 653–55 (D. Wash. 1892).

203 *Id.* at 656. A few years later, Judge Hanford wrote another strongly worded opinion condemning the "torture" of a Black U.S. sailor who was serving on a Chilean vessel. *See* Bolden v. Jensen, 70 F. 505, 505 (D. Wash. 1895). He described in excruciating detail how the sailor was roughly bound and left in such a painful posture that he permanently lost the use of his hands. *Id.* at 506–08. "[E]ven if the libelant were an alien," Judge Hanford concluded, "it would be the duty of this court, which for such cases is a court of the world, to administer justice." *Id.* at 509.

practice of kidnapping seamen to be carried on, to reduce the shipping interests in a very short time to a dependency upon slave labor."[204]

In sum, there was no blanket presumption in favor of dismissing "foreign-cubed" admiralty cases. The more precise rule of thumb for actions by foreign seamen against foreign masters was that U.S. courts would generally not hear their claims except

> where the voyage ends here by its own terms, and the wages are due here; where it has been wholly broken up by a sale of the ship, whether voluntarily or under legal process; where the ship is so unseaworthy that the crew are not bound to go in her; [or] where they have been forced to leave her by the cruelty of the master."[205]

Beyond seamen's claims, jurisdiction was presumptively exercised in cases of collision and salvage, as well as for in rem proceedings to enforce maritime contracts when the vessel was present in a U.S. port.[206]

### 3. Limitation to Disputes with No U.S. Parties

Finally, the discretion to decline admiralty jurisdiction was limited to cases involving only foreign parties. As summarized by a district judge at the turn of the twentieth century, "The rule of comity which should be observed in dealing with controversies between alien seamen and masters of foreign ships . . . is not applicable where a party to the controversy is a citizen of the United States."[207] Thus if a case

204 *The Karoo*, 49 F. at 656.

205 The Becherdass Ambaidass, 3 F. Cas. 13, 14 (D. Mass. 1871) (No. 1,203); *accord, e.g.*, Elder Dempster Shipping Co. v. Pouppirt, 125 F. 732, 735 (4th Cir. 1903) ("[W]here the voyage is ended, or the seamen have been dismissed, or treated with great cruelty, [the court] *will* entertain jurisdiction even against the protest of the consul." (emphasis added)); Bucker v. Klorkgeter, 4 F. Cas. 555, 557 (S.D.N.Y. 1849) (No. 2,083) ("The English and American tribunals, however, *never decline jurisdiction* in these cases, when the voyage is broken up, or the seamen discharged, or other emergency has occurred, entitling them clearly to their wages." (emphasis added)); *cf.* The Jerusalem, 13 F. Cas. 559, 562 (Story, Circuit Justice, C.C.D. Mass. 1814) (No. 7,293) (noting in dicta that "where the contract has been dissolved by the regular termination of the voyage, or by the wrongful act of the other party, the cases are not unfrequent, in which foreign courts have sustained the claim for mariners' wages").

206 *See* The Belgenland, 114 U.S. 355, 362, 366 (1885).

207 The Falls of Keltie, 114 F. 357, 358 (D. Wash. 1902); *accord, e.g.*, Pan. R.R. Co. v. Napier Shipping Co., 166 U.S. 280, 285 (1897) (noting, in a case involving a U.S. party, that "[h]ad both parties to the libel been foreigners, it might have been within the discretion of the court to decline jurisdiction of the case"); The Sailor's Bride, 21 F. Cas. 159, 160 (McLean, Circuit Justice, C.C.D. Mich. 1859) (No. 12,220) (noting that "though the admiralty courts of this country are not bound to take jurisdiction of controversies growing out of maritime contracts between foreigners having a domicile in this country, *as they are between parties citizens or residents here*, yet that they may lawfully exercise it, and ought to do so, in obedience to the demands of justice" (emphasis added)); *Bolden*, 70 F. at 510 (denying the power to decline jurisdiction when the libelant "is an American citizen, and entitled to

involved both U.S. and foreign seamen seeking wages for service on a foreign ship, judges would analyze the jurisdictional question separately, considering whether to decline jurisdiction only over the claims brought by the foreign seamen.[208]

There were two exceptions to this limitation, but they further prove the general rule. First, in a couple twentieth-century cases, admiralty courts refused to give weight to the assignment of a claim to a nominal U.S. plaintiff.[209] In *Goldman v. Furness, Withy & Co.*, for example, the Southern District of New York had already declined jurisdiction in a maritime contract dispute between foreign parties involving

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obtain redress for his injuries in a court of his own country"); *The Karoo*, 49 F. at 652 ("[T]he case is not one which could be taken out of the jurisdiction of the United States court, properly. Two of the libelants are American citizens, and entitled to sue in the courts of their own country for the determination and adjudication of their rights."); The Napoleon, 17 F. Cas. 1157, 1160 (S.D.N.Y. 1845) (No. 10,015) (rejecting discretion to decline case where "[i]t has not been proved that the libellant is an alien"); The Bee, 3 F. Cas. 41, 42 (D. Me. 1836) (No. 1,219) ("The courts of the United States are not bound to take cognizance of the controversies of strangers having their domicil in a foreign country, *as they are of suits which are brought before them by our own citizens* . . . ." (emphasis added)); 1 ALFRED CONKLING, THE ADMIRALTY JURISDICTION, LAW AND PRACTICE OF THE COURTS OF THE UNITED STATES 47 (Albany, W.C. Little & Co. 2d ed. 1857) ("[T]hough the admiralty courts of this country are not bound to take jurisdiction of controversies growing out of maritime contracts, between foreigners having no domicile in this country, *as they are when the parties are citizens or resident here*, yet that they may lawfully exercise it, and ought to do so in obedience to the demands of justice." (emphasis added) (footnote omitted)); HENRY FLANDERS, A TREATISE ON MARITIME LAW 318–19 (Boston, Little, Brown & Co. 1852) ("It is true, the courts of this country are not bound to take jurisdiction of controversies between foreigners who have no domicil here, *as they are in the case of citizens, or residents*, who are entitled to claim of right the benefit of our laws." (emphasis added)).

208 *See, e.g.*, The Topsy, 44 F. 631, 635 (D.S.C. 1890) (discussing discretion to decline jurisdiction only for claims of non-U.S. seamen); Thompson v. The Catharina, 23 F. Cas. 1028, 1030 n.10 (D. Pa. 1795) (No. 13,949) (dismissing claims of foreign seamen while reaching the merits of the claims of U.S. seamen).

Estreicher and Lee put significant weight on *Schooner Exchange v. McFaddon*, presumably because it involved a U.S. plaintiff. *See* Estreicher & Lee, *supra* note 22, at 195–97. But *Schooner Exchange* says nothing about what jurisdiction the federal courts considered to be discretionary. Rather, *Schooner Exchange* held that the jurisdiction of U.S. courts did not extend to disputes regarding the public ships of a foreign power. *See* The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 145–46 (1812) ("[N]ational ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."). Estreicher and Lee's reliance on a sovereign immunity case illustrates the difficulty of their analogy: when the exercise of jurisdiction was otherwise proper, admiralty courts did not feel they *had* discretion to dismiss disputes with U.S. parties.

209 This refusal to allow parties to manufacture mandatory jurisdiction through assignment of claims echoes the assignee clause of the first Judiciary Act, which removed assigned claims from the federal courts' diversity jurisdiction. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79; *see also* Sheldon v. Sill, 49 U.S. (8 How.) 441, 448–49 (1850) (upholding the constitutionality of the assignee exception to diversity jurisdiction).

the shipment of cargo between foreign ports; when the foreign plaintiff then assigned its claim to its U.S. agent, the court rejected what it saw as a ploy to "remove one of the grounds upon which the former libel was dismissed."[210] In contrast, the Western District of Washington accepted as valid an assignment of a claim to a U.S. party because that party had a real interest in cargo that had passed through the ports of San Francisco and Portland.[211] That is, admiralty courts understood their jurisdiction to be mandatory as long as the assignment of a claim to a U.S. party was not solely to generate the only significant connection between the United States and the dispute—and even when it was, some courts still felt compelled to hear the resulting case.[212]

Second, admiralty courts were bound by treaties that sometimes could require dismissing claims by U.S. seamen serving on foreign ships. These treaties with major maritime powers like Norway and Germany granted exclusive jurisdiction to the foreign sovereign's consul over all disputes between masters, officers, and crews of ships flying the flag of the foreign sovereign.[213] Federal courts largely adhered to these treaty commitments, concluding that they lacked jurisdiction over the covered seamen's claims for wages or workplace injuries.[214] Because

210 Goldman v. Furness, Withy & Co., 101 F. 467, 468, 467–68 (S.D.N.Y. 1900); *accord* The Tricolor, 1 F. Supp. 934, 936 (S.D.N.Y. 1932) (treating U.S. insurer as a foreign party because "the nationality of the insured rather than that of the insurer is to be considered in determining jurisdiction"), *aff'd sub nom.* U.S. Merchs.' & Shippers' Ins. Co. v. A/S Den Norske Afrika Og Australie Line, 65 F.2d 392 (2nd Cir. 1933); The Beaverbrae, 60 F.2d 363, 364 (E.D.N.Y. 1931) (refusing to credit the consignment of a Belgium company's interest in damaged cargo to U.S. libellant).

211 *See* The Eemdyjk, 286 F. 385, 386 (W.D. Wash. 1923).

212 *See* Chubb v. Hamburg-Am. Packet Co., 39 F. 431, 432 (E.D.N.Y. 1889) ("[T]he libelant is an American citizen, and if, as contended in behalf of the defendant, the cause of action was assigned to him for the mere purpose of facilitating a resort to the courts of the United States, still the fact remains that the party seeking the intervention of this court is an American citizen. That fact alone seems sufficient to require the court to retain the cause.").

213 *See, e.g.*, Convention Respecting Consuls and Trade-Marks, Ger.-U.S., art. XIII, Dec. 11, 1871, 17 Stat. 921; Treaty of Commerce and Navigation, Swed. & Nor.–U.S., art. XIII, July 4, 1827, 8 Stat. 346.

214 *See, e.g.*, The Ester, 190 F. 216, 219 (E.D.S.C. 1911) (finding lack of jurisdiction due to treaty with Sweden); *Ex parte* Anderson, 184 F. 114, 118 (D. Me. 1910) (finding lack of jurisdiction due to treaty with Norway); The Bound Brook, 146 F. 160, 165 (D. Mass. 1906) (finding lack of jurisdiction due to treaty with Germany); The Salomoni, 29 F. 534, 538 (S.D. Ga. 1886) (finding lack of jurisdiction due to treaty with Italy). Nonetheless, judges sometimes interpreted their way around these provisions in order to retain jurisdiction over what they saw as particularly meritorious claims. *See* The Baker, 157 F. 485, 486 (E.D.N.Y. 1907) (concluding treaty did not cover claims of negligence); *The Salomoni*, 29 F. at 537 (dismissing case in light of treaty but noting that "notwithstanding the treaty, there are occasions when the courts should take jurisdiction of suits prosecuted by foreign seamen against foreign vessels," although "[s]uch cases are . . . of rare occurrence"); The Amalia,

sailors took on the nationality of the ship on which they served,[215] these treaties sometimes required courts to dismiss claims by U.S. citizens who had signed on to foreign ships.[216] Like foreign sovereign immunity, these treaty-based dismissals are best understood as legally mandated.

### *C. The Historical Exercise of Admiralty Discretion*

In sum, then, the federal courts treated as discretionary only their jurisdiction over admiralty disputes between foreign parties. Sometimes judges exercised that discretion to decline jurisdiction.[217] Other times, however, they heard cases that involved no U.S. parties and no

3 F. 652, 654–55 (D. Me. 1880) (reasoning the court was not bound by the treaty where the closest consul was in Boston and the ship's captain had nearly starved the crew).

215 *E.g.*, The Albergen, 223 F. 443, 445 (S.D. Ga. 1915) ("[T]he law is clear that, when a seaman enters the crew of a merchant vessel of a foreign nation, he assumes a temporary allegiance to the flag borne by this vessel, and for the time being belongs to the nationality of his vessel."); Robin v. The Cacique, 20 F. Cas. 958, 959 (E.D. Pa. 1823) (No. 11,931) (stating "[s]eamen, by the laws and usages of all countries, belong to the nation" of their vessel).

216 *See, e.g.*, *The Albergen*, 223 F. at 445 ("The court realizes the hardship of [the U.S.] libelant's position, but he comes within the express terms of the above-quoted provision of the treaty . . . ."); The Welhaven, 55 F. 80, 81 (S.D. Ala. 1892) (expressing sympathy for U.S. sailor but concluding in light of treaty with Norway that the court was "constrained . . . to order that the libel be dismissed"); The Marie, 49 F. 286, 288 (D. Or. 1892) (applying treaty with Norway); The Burchard, 42 F. 608, 608 (S.D. Ala. 1890) (applying treaty with Germany to dismiss case brought by U.S. seaman). Even then, judges sometimes worked interpretive gymnastics to avoid application of the treaties and reach the merits of U.S. seamen's claims. *See* The Neck, 138 F. 144, 145–46 (W.D. Wash. 1905) (interpreting treaty with Germany to hold that it did not bar court from hearing U.S. seaman's claim).

217 *See, e.g.*, The Walter D. Wallet, 66 F. 1011, 1012–13 (S.D. Ala. 1895) (deferring to British consul's plan to return injured British sailor via British ship to the United Kingdom); Camille v. Couch, 40 F. 176, 176 (E.D.S.C. 1889) (declining to interfere when the British and French consuls had already resolved the dispute); The Carolina, 14 F. 424, 426 (D. La. 1876) (deferring to British consul's objection to jurisdiction over a British sailor's allegation of assault and battery while on the high seas); The Infanta, 13 F. Cas. 37, 38–39 (S.D.N.Y. 1848) (No. 7,030) (declining jurisdiction over claim by British seamen serving on a British vessel for work performed in a British port).

nexus to the United States.[218] These cases ranged from the egregious[219] to the mundane.[220]

In deciding whether to hear these admiralty disputes between foreigners, courts considered a range of factors, none of which was treated as necessary or dispositive. Even by the turn of the twentieth century, courts would remark that "these decisions disclose[] no uniform rule for the guidance of the court."[221] This Section explores some of the common considerations discussed by the admiralty courts: the source of the applicable law, whether the parties shared a common nationality, the existence of a forum selection clause, the location of evidence, the practical ability of plaintiffs to refile in a foreign forum, and the intervention of foreign consuls.[222]

### 1. Applicable Law

The applicability of another country's law to the dispute sometimes weighed in favor of dismissal.[223] Other times courts retained

218 *See, e.g.*, The Maggie Hammond, 76 U.S. (9 Wall.) 435 (1870); Mason v. Ship Blaireau, 6 U.S. (2 Cranch) 240 (1804); The Sirius, 47 F. 825 (N.D. Cal. 1891); The Noddleburn, 28 F. 855 (D. Or. 1886), *aff'd*, 30 F. 142 (C.C.D. Or. 1887); Boult v. Ship Naval Rsrv., 5 F. 209 (D. Md. 1881); The Lilian M. Vigus, 15 F. Cas. 520 (S.D.N.Y. 1879) (No. 8,346); Bernhard v. Creene, 3 F. Cas. 279 (D. Or. 1874) (No. 1,349); The Pawashick, 19 F. Cas. 5 (D. Mass. 1872) (No. 10,851); Davis v. Leslie, 7 F. Cas. 134 (S.D.N.Y. 1848) (No. 3,639); The Bee, 3 F. Cas. 41 (D. Me. 1836) (No. 1,219); Weiberg v. The St. Oloff, 29 F. Cas. 591 (D. Pa. 1790) (No. 17,357).

219 *See, e.g.*, The City of Carlisle, 39 F. 807 (D. Or. 1889) (exercising jurisdiction over claim by British minor severely injured and then neglected while in service on a British ship in international waters); The Amalia, 3 F. 652 (D. Me. 1880) (hearing dispute between Swedish master and his crew given that master had nearly starved the crew during the international voyage).

220 *See, e.g.*, Dominion Combing Mills, Ltd. v. Canadian Pac. Ry. Co., 300 F. 992 (E.D.N.Y. 1924) (hearing dispute between two Canadian corporations over cargo damaged in transit between the United Kingdom and Canada); The Jupiter, 14 F. Cas. 54 (S.D.N.Y. 1867) (No. 7,585) (hearing dispute about Dutch ship colliding with a German-owned Russian ship in the North Sea).

221 The Ester, 190 F. 216, 223 (E.D.S.C. 1911); *accord, e.g.*, The Becherdass Ambaidass, 3 F. Cas. 13, 14 (D. Mass. 1871) (No. 1,203) ("It is not possible, of course, to lay down a precise rule to govern even the sound and judicial discretion of a court in future cases.").

222 While the analysis was flexible and varied from case to case, it nonetheless bears markedly little resemblance to the four-part test that Estreicher and Lee claim to have "drawn from historical practice from the Founding until the early twentieth century": deference to U.S. Government interventions, consideration of reciprocal treatment by other nations, attention to "U.S. statutes or treaties indicating strong U.S. national interests," and the existence of parallel proceedings in the alternative foreign forum. Estreicher & Lee, *supra* note 22, at 171–72.

223 *See, e.g.*, The Walter D. Wallet, 66 F. 1011, 1013 (S.D. Ala. 1895) (concluding that British law would apply to employment dispute and reasoning that such law "can better be determined by the courts of Great Britain, to which country the parties belong"); The

their jurisdiction and applied the foreign law.[224] As Justice Story put it when choosing to exercise jurisdiction even though it would require applying the law of the Ottoman Empire, "I am not aware, that the inconvenience is so great as has been represented."[225]

Courts were even more willing to hear cases that involved customary international law or general maritime law. When the collective law of nations (rather than the law of any one nation) was at stake, U.S. courts recognized that they were equally equipped to apply that law as compared to any other nation's courts.[226] Indeed, there was a presumption in favor of retaining jurisdiction over claims like salvage and collision in large part because they turned on customary international law.[227]

### 2. Multiple Nationalities

Admiralty courts were more willing to dismiss disputes between foreign parties when the parties all shared the same nationality because the U.S. court would simply be sending the parties back to their

Topsy, 44 F. 631, 635–36 (D.S.C. 1890) (explaining that when foreign law was involved and "the tribunals of their own country are open and accessible to them, the court withholds its hand, remitting the parties to their own courts, in which their own laws are better understood, and the means of enforcing them possibly more complete"); Thomson v. The Nanny, 23 F. Cas. 1104, 1106 (D.S.C. 1805) (No. 13,984) (noting "it was [generally] proper to refer [seamen] to the tribunals of their own country, where the lex loci being better understood, more complete justice could be done than in a foreign court, at a distance, and not thoroughly acquainted with the rules obtaining in the country of the parties").

224 *See, e.g.*, The Lilian M. Vigus, 15 F. Cas. 520, 522 (S.D.N.Y. 1879) (No. 8,346) (applying British law to reach conclusion that differed from that of the British consul); The Havana, 11 F. Cas. 844, 844 (D. Mass. 1858) (No. 6,226) (exercising jurisdiction despite the applicability of a British statute); Davis v. Leslie, 7 F. Cas. 134, 136 (S.D.N.Y. 1848) (No. 3,639) (applying British law even though it differed from the general maritime law); Moran v. Baudin, 17 F. Cas. 721, 722 (D. Pa. 1788) (No. 9,785) (applying French statutory law).

225 The Jerusalem, 13 F. Cas. 559, 562 (Story, Circuit Justice, C.C.D. Mass. 1814) (No. 7,293).

226 *See, e.g.*, The Kaiser Wilhelm der Grosse, 175 F. 215, 216–17 (S.D.N.Y. 1909) (exercising jurisdiction over a collision within French waters between a German vessel and a British vessel in light of the applicability of customary international law); The Russ., 21 F. Cas. 86, 88–89 (S.D.N.Y. 1869) (No. 12,168) (noting that the general common law, which applies in cases of collision, can be equally applied by all courts).

227 *See, e.g.*, *The Topsy*, 44 F. at 635 (noting that if the common law of nations applies to a claim, "special grounds should appear to induce the court to refuse jurisdiction"); One Hundred & Ninety-Four Shawls, 18 F. Cas. 703, 704–05 (S.D.N.Y. 1848) (No. 10,521) (noting in light of the applicability of jus gentium to salvage cases that "[t]he courts will take cognizance of those cases as matters of course, if either party is territorially within the jurisdiction of the court").

mutual home court.[228] When the parties had different nationalities, however, admiralty courts were hesitant to dismiss because they could not remit such parties to a "forum that will not be foreign to one of them," reasoning that at least the U.S. court could provide a neutral forum for the parties' cross-border dispute.[229] As one judge put it, "[J]urisdiction will not be declined where the suit is between foreigners who are subjects of different governments, and therefore have no common forum."[230]

Seamen were a special case because they were considered nationals of the flag under which they sailed during their time of service.[231] Thus admiralty courts often treated seamen's disputes as "localized" in their vessel's home nation.[232] But even with seamen's claims, the courts at times gave weight to the differing nationality of the mariners.[233]

### 3. Forum Selection Clauses

Even though U.S. courts were generally skeptical of forum selection clauses in the nineteenth century because they ousted the courts of their otherwise mandatory jurisdiction, U.S. admiralty courts were willing to consider them.[234] Such clauses sometimes appeared in

228 *See, e.g.*, *One Hundred & Ninety-Four Shawls*, 18 F. Cas. at 704 ("As a general principle, the citizens or subjects of the same nation have no right to invoke a foreign tribunal to adjudicate between them . . . ."); *see also* cases collected in note 223, *supra*.

229 *See* Thomassen v. Whitwell, 23 F. Cas. 1003, 1004, 1005 (E.D.N.Y. 1877) (No. 13,928); *accord, e.g.*, The Fredensbro, 18 F.2d 983, 984 (E.D. Pa. 1927) (declining to dismiss when "[t]he parties are of different nationality, [and] have no common forum").

230 The City of Carlisle, 39 F. 807, 815 (D. Or. 1889).

231 *See supra* note 215.

232 *See, e.g.*, Lynch v. Crowder, 15 F. Cas. 1172, 1173 (S.D.N.Y. 1849) (No. 8,637) (stating that "[e]verything touching the validity of the supposed discharge [of the seamen] belongs most properly to the courts where the litigants and this ship belong" and whose law would apply); The Infanta, 13 F. Cas. 37, 38 (S.D.N.Y. 1848) (No. 7,030); Thomson v. The Nanny, 23 F. Cas. 1104, 1107 (D.S.C. 1805) (No. 13,984).

233 *See, e.g.*, The Lilian M. Vigus, 15 F. Cas. 520, 521 (S.D.N.Y. 1879) (No. 8,346) (noting, in refusing to decline jurisdiction, that the seamen of the British vessel were not all British); Bernhard v. Creene, 3 F. Cas. 279, 281 (D. Or. 1874) (No. 1,349) (rejecting consul's request to send the seamen to their "home" court, "for being subjects of different governments there is no such tribunal").

234 For a discussion of admiralty's openness to forum selection clauses, see Marcus, *supra* note 27, at 996–99. For an early example of openness to such contractual arrangements, see Thompson v. The Catharina, 23 F. Cas. 1028, 1028 (D. Pa. 1795) (No. 13,949) ("On several occasions, I have seen it part of the contract, that the mariners should not sue in any other than their own courts;—and I consider such a contract lawful.").

commercial contracts,[235] but they were most common in shipping articles signed by seamen at the outset of their voyage.[236]

As Professor David Marcus has pointed out, however, the admiralty courts did not treat such contractual clauses as inviolable.[237] To take one oft-cited example, the crew in *Bucker v. Klorkgeter* refused to sail with their ship, which they claimed was unseaworthy; as a result, they forfeited their wages. The ship sailed with a new crew but was forced to turn back because it was leaking and was ultimately scrapped as unsalvageable.[238] Given that the ship truly was unseaworthy, the original crew should have been paid their forfeited wages. The master nonetheless argued that the seamen's contracts committed them to bringing any claims for their unpaid wages only in the courts of Bremen (in modern-day Germany).[239] Judge Betts of the Southern District of New York disagreed, explaining that

> while, in general, our courts will respect and enforce a stipulation between a foreign master and his crew, which limits them to suing in their own country, they have frequently asserted both the power and the willingness to grant relief to a seaman, notwithstanding such an agreement, whenever the interests of justice demand that they should do so.[240]

Given that the master had made no provision for the seamen's wages or passage home, the court overlooked the forum selection clause and ordered payment to the crew.[241]

### 4. Location of Evidence

Though not a common consideration, the location of evidence in the United States sometimes weighed in favor of retaining jurisdiction.[242] That evidence was often linked to the ship, whose future

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235 *See, e.g.*, The Tricolor, 1 F. Supp. 934, 936 (S.D.N.Y. 1932) ("[B]ecause the controversy is between aliens, arises out of a contract made abroad and governed by foreign law, and relates to transactions in foreign territory where all the evidence must be gathered, to say nothing of the stipulation that the parties would litigate only in the courts of Oslo, I decline to entertain jurisdiction . . . ."), *aff'd sub nom.* U.S. Merchs.' & Shippers' Ins. Co. v. A/S Den Norske Afrika Og Australie Line, 65 F.2d 392 (2nd Cir. 1933).

236 *See, e.g.*, The Iquitos, 286 F. 383, 384 (W.D. Wash. 1921); The Carolina, 14 F. 424, 426 (D. La. 1876); *Thompson*, 23 F. Cas. at 1028.

237 *See* Marcus, *supra* note 27, at 999–1001.

238 *See Bucker v. Klorkgeter*, 4 F. Cas. 555, 556 (S.D.N.Y. 1849) (No. 2,083).

239 *See id.*

240 *Id.* at 558.

241 *See id.* at 559.

242 *See, e.g.*, The Sneland I, 19 F.2d 528, 529 (E.D. La. 1927) (emphasizing that "all the witnesses" to the seaman's medical treatment resided in the United States); Thomassen v. Whitwell, 23 F. Cas. 1003, 1005 (E.D.N.Y. 1877) (No. 13,928) (noting that the damaged vessel had been taken to New York City for repairs, so "this is therefore the natural and

whereabouts were uncertain; even if libellants could locate the ship in another port in the future, the crew may have turned over, memories would have faded, and any paper trail might be lost.[243]

On the other hand, judges sometimes noted the location of evidence abroad as a reason for declining jurisdiction, though typically in conjunction with other factors pointing to dismissal. Thus the Southern District of New York dismissed a complicated salvage case for which further evidence would need to be gathered in the United Kingdom; in addition, all the parties were British, British law controlled, the British consul had objected to the court's jurisdiction, and the salvaged cargo was "comparatively unsalable in the American market" as compared to the British market.[244] Likewise, the Western District of Washington dismissed a case in which the "convenience of evidence would not be served" because the witnesses were in Peru and British Columbia;[245] in addition, all the parties were Peruvian, the Peruvian consul requested the court decline jurisdiction, and the contract included a forum selection clause pointing to Peru.[246]

### 5. Meaningful Ability to Refile in a Foreign Court

Admiralty judges were sensitive to the practical implications of sending libellants to foreign courts. While federal courts were willing to decline jurisdiction when the libellant was set to sail directly to the relevant foreign jurisdiction,[247] they tended to retain jurisdiction when injured or underage sailors were left behind in the United States.[248] As the Ninth Circuit explained in *The Troop*,

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proper place for an investigation" into the extent of the damage from the collision, and also noting that the libellants should not be required to retake testimony in another forum or be "put to the hazard of losing the evidence as it stands"); The Russ., 21 F. Cas. 86, 88–89 (S.D.N.Y. 1869) (No. 12,168) (finding it "eminently proper and conducive to justice" for the court to exercise jurisdiction, *id.* at 89, given that, among other reasons, the witnesses to the collision were in the United States).

243 *See, e.g.*, The Sirius, 47 F. 825, 828 (N.D. Cal. 1891) (describing such concerns); The Topsy, 44 F. 631, 633 (D.S.C. 1890) (similar); The City of Carlisle, 39 F. 807, 815 (D. Or. 1889) (expressing concern that witnesses and evidence would dissipate if apprentice were returned to his home forum).

244 *See* One Hundred & Ninety-Four Shawls, 18 F. Cas. 703, 706, 703, 705–06 (S.D.N.Y. 1848) (No. 10,521).

245 The Iquitos, 286 F. 383, 384 (W.D. Wash. 1921).

246 *See id.* at 383–84.

247 *See, e.g.*, The Walter D. Wallet, 66 F. 1011, 1012 (S.D. Ala. 1895) (dismissing case involving injured seaman because the consul had arranged his transport back to the United Kingdom and had asked the U.S. court not to intervene).

248 *See The Topsy*, 44 F. at 634–36 (exercising jurisdiction over claims of minors despite protests of consul); *The City of Carlisle*, 39 F. at 808, 815 (exercising jurisdiction over claims of injured minor); The Noddleburn, 28 F. 855, 860 (D. Or. 1886) (exercising jurisdiction over claims of injured seaman), *aff'd*, 30 F. 142 (C.C.D. Or. 1887); The Lilian M. Vigus, 15

> To have relegated the [sailor] to an English court would almost certainly have been to deny him any remedy. He, a German, was left on American soil, crippled and without means. He has prosecuted his suit in forma pauperis. If he had been able to go to England, he could not know when the Troop would be there, or that she would ever be there, or that, if she were, any of his witnesses would be on board or within his reach.[249]

Such concerns were not limited to seamen, either. After World War I, a district court concluded that forcing the admittedly "foreign-cubed" case regarding a collision to be heard in Belgium (where the collision occurred) would work an "injustice" because the depreciation of the Belgian franc meant that limits on liability under Belgian law were "unfortunately so inadequate as to be unjust and unfair."[250] Note that the courts never doubted in these cases that the courts of England, Belgium, or other countries were technically available; rather, they worried that the libellants could not meaningfully access them due to poor health, inevitable delay, or cost, or that the available remedies would be insufficient.

#### 6. Views of Foreign Consuls

Admiralty courts also considered the views of foreign consuls, with some judges affirmatively seeking out those views.[251] The support of a foreign consul was not necessary for the exercise of jurisdiction,[252] however, and the opposition of a foreign consul did not require declining jurisdiction.[253] For seamen's claims in particular, the Supreme Court explained that admiralty courts "will require the foreign consul to be

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F. Cas. 520, 521 (S.D.N.Y. 1879) (No. 8,346) ("In view of the fact, therefore, that the connection of these seamen with the ship has been actually severed, and that the destination of the vessel was wholly uncertain, and that they have no certainty of relief, if remitted to the foreign jurisdiction, and have not their domicile there, I think it clear that this court should determine this controversy . . . .").

249 The Troop, 128 F. 856, 862–63 (9th Cir. 1904).

250 Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd Brasileiro, 27 F.2d 1002, 1004, 1003–04 (E.D.N.Y. 1928).

251 *See, e.g.*, The Infanta, 13 F. Cas. 37, 39 (S.D.N.Y. 1848) (No. 7,030) ("It is expected that a foreign seaman seeking to prosecute an action of this description in the courts of this country, will procure the official sanction of the commercial or political representative of the country to which he belongs, or that good reason will be shown for allowing his suit in the absence of such approval.").

252 *See, e.g.*, *Ex parte* Newman, 81 U.S. (14 Wall.) 152, 169 (1872) (noting that the consul's consent "is not a condition of jurisdiction, but is regarded as a material fact to aid the court in determining the question of discretion, whether jurisdiction in the case ought or ought not to be exercised"); Davis v. Leslie, 7 F. Cas. 134, 137 (S.D.N.Y. 1848) (No. 3,639) (noting that jurisdiction does not depend on the consent of foreign consul).

253 *See, e.g.*, The Walter D. Wallet, 66 F. 1011, 1012 (S.D. Ala. 1895).

notified, and, though not absolutely bound by, will always pay due respect to, his wishes as to taking jurisdiction,"[254] though in extenuating circumstances they "will entertain jurisdiction even against the protest of the consul."[255]

Sometimes foreign consuls asked the U.S. admiralty courts to exercise jurisdiction, and the courts obliged as a gesture of positive comity.[256] In *The Sirius*, for example, the British consul agreed with a British ship's crew that the ship's master had violated British regulations by overloading his ship while in San Francisco; the consul thus directed the master to discharge the crew with their wages.[257] When the master refused to do so, "[t]he British consul thereupon requested [the U.S. district] court to entertain a suit on behalf of the crew."[258] In light of that consular request, as well as the merits of the claim, the federal judge concluded that it was "the duty of the court to entertain and adjudicate the dispute between the [British] parties."[259]

More often, however, foreign consuls asked the admiralty courts to decline their jurisdiction over foreign disputes. Sometimes the admiralty courts yielded to these requests,[260] particularly when a foreign

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254 The Belgenland, 114 U.S. 355, 364 (1885). The full quote reads,

> On general principles of comity, Admiralty Courts of other countries will not interfere between the parties in such cases [involving foreign seamen] unless there is special reason for doing so, and will require the foreign consul to be notified, and, though not absolutely bound by, will always pay due respect to, his wishes as to taking jurisdiction.

*Id.* On the admiralty courts' greater reticence to hear employment disputes as compared to other types of "foreign-cubed" admiralty disputes, see above subsection II.B.2.

255 *The Belgenland*, 114 U.S. at 364; *accord, e.g.*, Elder Dempster Shipping Co. v. Pouppirt, 125 F. 732, 735 (4th Cir. 1903) (noting in dicta that "where the voyage is ended, or the seamen have been dismissed, or treated with great cruelty, it will entertain jurisdiction even against the protest of the consul").

256 *See, e.g.*, The Gazelle, 10 F. Cas. 127, 127 (D. Mass. 1858) (No. 5,289) (exercising jurisdiction in accordance with the consul's request); *see also* The Havana, 11 F. Cas. 844, 844 (D. Mass. 1858) (No. 6,226) (invoking the aid of the British consul in assessing, pursuant to British law, how much the new owner of the ship should pay the former British master of the ship). Indeed, consuls often appeared before U.S. admiralty courts as litigants, seeking to use the U.S. courts to protect the interests of foreign merchants. *See* Kevin Arlyck, *Plaintiffs v. Privateers: Litigation and Foreign Affairs in the Federal Courts, 1816–1822*, 30 LAW & HIST. REV. 245 (2012).

257 *See* 47 F. 825, 826–27 (N.D. Cal. 1891).

258 *Id.* at 827.

259 *Id.* at 828.

260 *See, e.g.*, The Thorgerd, 11 F.2d 971, 971 (E.D.N.Y. 1926) (concluding in light of the Norwegian consul's objection that "there would seem to be no good reason here why this court should assume jurisdiction" over a Norwegian sailor's claim of injury on a Norwegian vessel while in a Canadian port); The Iquitos, 286 F. 383, 383–84 (W.D. Wash. 1921) (declining jurisdiction over contract dispute between Peruvian parties in light of objection by Peruvian consul, as well as forum selection clause pointing to Peru); The Walter D.

consul had already heard the dispute.[261] Other times they did not.[262] In *The Lilian M. Vigus*, for example, the British consul had already addressed the seamen's dispute. The federal court took jurisdiction regardless, over the consul's protest, and applied British law to reach a conclusion different from that of the consul.[263] In *The Topsy*, the District of South Carolina heard the claim of a British cabin boy despite the objection of the British consul because "[i]f no decision is made here, [the cabin boy] would either be without remedy, or without the means or ability, or perhaps the opportunity, of enforcing it."[264] As the District of Pennsylvania put it in 1790, in exercising jurisdiction over claims of abuse by seamen on a Swedish vessel despite a treaty with Sweden and the objections of Swedish consul, "the rights of humanity [are] superior to the specific laws and customs of any nation."[265]

That said, the consuls in U.S. ports were not always diplomats, but local businessmen hired to represent foreign commercial interests.[266] Whether U.S. judges deferred to them, then, might not paint a full picture of early admiralty courts' wariness of disputes implicating foreign relations. In *The Ester*, for example, not just the Swedish consul but the Swedish minister in Washington, D.C., intervened to insist that the U.S. treaty with Sweden gave Sweden exclusive jurisdiction over the

Wallet, 66 F. 1011, 1012 (S.D. Ala. 1895) (declining jurisdiction in light of British consul's objection); The Carolina, 14 F. 424, 426 (D. La. 1876) (same); The Becherdass Ambaidass, 3 F. Cas. 13, 15 (D. Mass. 1871) (No. 1,203) (declining jurisdiction over British seamen's wage dispute in light of British consul's objections); Saunders v. The Victoria, 21 F. Cas. 539 (E.D. Pa. 1854) (No. 12,377) (deferring, on reconsideration, to objections of the British consul); Lynch v. Crowder, 15 F. Cas. 1172, 1173 (S.D.N.Y. 1849) (No. 8,637) (emphasizing importance of foreign consul's objection to jurisdiction).

261 *See, e.g.*, The New City, 47 F. 328, 329 (D. Wash. 1891) ("The object in each case is to prevent a failure of justice, and [the court] will not officiously interfere in any case after a fair hearing and decision of the matter in controversy has been given by an authorized agency of the government of the country to which the vessel belongs, as in this case."); Camille v. Couch, 40 F. 176 (E.D.S.C. 1889) (deferring to the prior resolution of claims by foreign consul); Robin v. The Cacique, 20 F. Cas. 958, 959–60 (E.D. Pa. 1823) (No. 11,931) (same). Note, however, that the consuls' decisions did not have the same res judicata effect (that is, the same finality) that a foreign judgment would.

262 *See, e.g.*, The Sneland I, 19 F.2d 528, 528 (E.D. La. 1927) (retaining jurisdiction over seaman's claim despite Norwegian consul's objection); The Seirstad, 12 F.2d 133, 133 (E.D.N.Y. 1926) (same, in light of seaman's interest in obtaining U.S. citizenship); The Kentigern, 99 F. 443 (E.D.N.Y. 1900) (retaining jurisdiction over alleged assault while in New York harbor despite British consul's objections); The Lady Furness, 84 F. 679, 680–81 (E.D.N.Y. 1897) (retaining jurisdiction but ruling against seamen on merits); Bernhard v. Creene, 3 F. Cas. 279, 279 (D. Or. 1874) (No. 1,349) (rejecting British vice-consul's request to leave seamen's dispute to the consular court).

263 *See* The Lilian M. Vigus, 15 F. Cas. 520, 521–23 (S.D.N.Y. 1879) (No. 8,346).

264 The Topsy, 44 F. 631, 636, 634–36 (D.S.C. 1890).

265 Weiberg v. The St. Oloff, 29 F. Cas. 591, 593, 591 (D. Pa. 1790) (No. 17,357).

266 *See* Arlyck, *supra* note 256, at 248.

injury of an underage German sailor while in port (the German consul disagreed).[267] After concluding that the treaty deprived the court of jurisdiction, the judge added that, "[i]n the face of this request of the Kingdom of Sweden itself, as transmitted in the request of its minister, and of the circumstances of this case, the court holds that, if it *has* discretionary power to take jurisdiction of this case, such discretion should not be exercised."[268]

Similarly, during the neutrality crisis of the 1790s, some district courts expressed grave concern about adjudicating disputes between French privateers and English owners of captured ships for fear of getting pulled into the war between those major powers.[269] As Judge Peters of the District of Pennsylvania framed the dilemma, "it depends much on the interest, the convenience, or the good temper of governments, whether a neutral [like the United States] shall or shall not be engaged in war. A prudent and just conduct, on the part of the neutral particularly, is the surest preventive."[270] How to walk that line, he suggested, was a problem for the political branches to solve.[271] Thus while he framed his dismissal of the prize dispute as compelled by a lack of authority (rather than an exercise of discretion), it is difficult to separate that reasoning from his prudential concerns about foreign relations.

There are thus some examples of early admiralty courts taking foreign relations concerns into account when concluding that they should not hear particular claims. There are also, however, examples of courts retaining jurisdiction despite the risk of foreign relations frictions. Shortly after Judge Peters's decision, the Supreme Court made clear in *Glass v. The Sloop Betsey* that admiralty courts did have jurisdiction over prize disputes between foreign powers,[272] at least when the prize may have been taken in a manner that violated U.S. neutrality.[273] Though the courts struggled to work out just how broad this jurisdictional holding was, their reasoning was expressed in terms of authority

267 190 F. 216, 218–19 (E.D.S.C. 1911).

268 *Id.* at 228 (emphasis added).

269 *See* Kevin Arlyck, *The Courts and Foreign Affairs at the Founding*, 2017 BYU L. REV. 1, 28–29 (discussing cases like Findlay v. The William, 9 F. Cas. 57 (D. Pa. 1793) (No. 4,790)).

270 *Findlay*, 9 F. Cas. at 59.

271 *See id.* at 61 (concluding that the court was not "authorized to decide in a matter growing out of the contests between belligerent powers"); *accord* Moxon v. The Fanny, 17 F. Cas. 942, 947 (D. Pa. 1793) (No. 9,895).

272 3 U.S. (3 Dall.) 6, 16 (1794).

273 *See* The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 338–40 (1822) (suggesting this distinction); The Invincible, 13 F. Cas. 72, 74–75 (Story, Circuit Justice, C.C.D. Mass. 1814) (No. 7,054) (summarizing the law of nations to this effect), *aff'd sub nom.* L'Invincible, 14 U.S. (1 Wheat.) 238 (1816); Arlyck, *supra* note 269, at 41–42 (summarizing cases to this effect).

(or lack thereof) rather than discretion.[274] Ultimately, the courts did adjudicate some of these very politically sensitive cases.[275]

There are later examples as well of admiralty disputes that implicated the sovereign interests of foreign governments but that U.S. courts nonetheless refused to dismiss. In *The Jerusalem*, for example, the U.S. district attorney appeared on behalf of the foreign defendants to argue that the ship at issue

> is the first Greek ship that has visited our shores. To compel a sale of her would be received as a declaration of war. It would be highly impolitic to interfere in a case like the present, where the ship is of considerable value, and the owner a man of some note and consequence among his countrymen.[276]

Justice Story nonetheless exercised jurisdiction.[277] In an 1826 case involving a merchant ship that allegedly belonged to the Colombian government, the Southern District of New York exercised jurisdiction despite the Colombian consul's protest, ordering the ship sold to pay the wages and passage home for the 400-member crew.[278] And after the outbreak of World War I, Judge Neterer of the Western District of Washington discharged from service a U.S. seaman on a British merchant ship due to the wartime dangers faced by such vessels, overriding the protests of the British consul who had already refused the request for release.[279] In short, some judges took concerns about foreign relations frictions into account, but even such concerns were not a trump card for declining jurisdiction in admiralty.

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There was no firm set of factors that judges considered when deciding whether to hear admiralty disputes between foreigners, and no one factor was consistently dispositive. Thus one can find cases that did or did not defer to a foreign consul, that did or did not defer to forum selection clauses, and that did or did not consider the

274 For more on these early prize cases and the degree to which they embroiled federal courts in sensitive foreign affairs, see generally Arlyck, *supra* note 269; and David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145 (2008).

275 *See, e.g.*, Arlyck, *supra* note 269, at 41–42 (gathering cases); Sloss, *supra* note 274, at 147–49 (using these cases to argue that foreign affairs were not considered the sole province of the executive at the time of the Founding); *cf.* Arlyck, *supra* note 256, at 278 ("By placing the federal courts at the nexus of war, revolution, and commerce, Iberian consuls [in the early 1800s] insured that the [federal] courts would play a significant role in structuring the United States' relationship with its neighbors around the Atlantic . . . .").

276 13 F. Cas. 559, 560 (Story, Circuit Justice, C.C.D. Mass. 1814) (No. 7,293).

277 *Id.* at 563.

278 *See* Burckle v. The Tapperheten, 4 F. Cas. 692, 693–95 (S.D.N.Y. 1826) (No. 2,141).

279 The Epsom, 227 F. 158, 158–59, 164 (W.D. Wash. 1915). There was jurisdictional discretion in this case because the U.S. seaman was treated as a British national while in service on the British ship. *Id.* at 160–61.

availability of evidence either in the United States or abroad. Sometimes the admiralty courts exercised their discretion to dismiss these cases; sometimes they exercised their discretion to hear them. What *was* consistent was the limitation of this discretion to admiralty disputes between foreign parties.

## III. USING OLD CASES

Based on this description of the admiralty courts' discretion to decline jurisdiction over disputes between foreigners, this Part considers how today's judges (and scholars) might make use of this historical admiralty practice. One could treat the old cases simply as precedent, to be applied as any other precedent is applied; as original law that controls today, perhaps as it has been "lawfully altered" by intervening developments;[280] or as analogical examples that, in the absence of more directly controlling precedent, can help justify new solutions to modern problems.

The goal of this Part is threefold. Its most general aim is a warning against loose invocation of old cases to provide a patina of "history and tradition" without linking that caselaw to a legal logic—and then following through with it. This point should be unremarkable. The second goal, then, is to use the example of the debate over foreign relations abstention to explore the use of old cases in practice. The three approaches explored here lead in different doctrinal directions. Using these old cases as precedent leads directly to forum non conveniens, leaving no foundation for a separate doctrine of foreign relations abstention.[281] Treating them instead as original law not only fails to support a broad doctrine of foreign relations abstention, but it also casts doubt on forum non conveniens as applied to cases at law. Only the third approach provides support for foreign relations abstention. But that approach, which involves judicial creativity in formulating new prudential tools, is currently out of favor with the Supreme Court. In short, for those who disclaim the power or propriety of federal judges to make law or expand prudential doctrines, there is a fundamental mismatch between the invocation of these old cases and the embrace of foreign relations abstention.

The third goal of this Part is more prescriptive: to identify possible doctrinal insights under each legal logic as more rigorously applied to

280 *See* Baude & Sachs, *supra* note 39, at 107.

281 *See* Transcript of Oral Argument, *supra* note 17, at 32 (statement of the United States' counsel) (arguing that *The Belgenland* "took account [of] both questions of convenience and also questions of international comity . . . [and so] those are distinct strands"); *id.* at 16 (statement of Hungary's counsel) (arguing that *The Belgenland* had in mind two different doctrines).

the old admiralty cases. For those interested in old caselaw as precedent, the first Section collects ideas for interpreting the framework of forum non conveniens in light of its admiralty roots. For those interested in old caselaw as indicative of original law, the second Section flags overlooked shortcomings in the logic of *Gulf Oil* that draw the legitimacy of forum non conveniens itself into doubt. And for those open to using old caselaw as justification for new doctrines, the third Section suggests some possible lessons those old cases could provide.

### A. *Old Cases as Precedent*

The most obvious way to use old caselaw is as caselaw: precedent that is still good law today, as long as it has not been overturned, abrogated, or otherwise rendered obsolete in the interim. The old admiralty cases are still good law in the sense that they have not been overturned or abrogated. But the missing link in the advocates' logic is that deploying old cases as precedent requires understanding how that precedent has evolved in the interim. The historical admiralty practice never fell into disuse; rather, it was applied in an "unbroken line of decisions"[282] until it became known as forum non conveniens.

The continuity between the historical admiralty practice and forum non conveniens is easier to understand once one realizes that the label of "forum non conveniens" is itself a recent invention. The term was coined by Scottish courts in the later 1800s[283] and introduced to U.S. audiences by a 1929 law review article written by a New York lawyer named Paxton Blair.[284] Blair applied the label to a preexisting New York doctrine that permitted New York state courts to dismiss claims brought by non–New York residents against non–New York residents for torts (and only torts) that arose outside of New York.[285] New York

282 Can. Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413, 421 (1932) (describing "[t]he rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners").

283 *See* Edward L. Barrett, Jr., *The Doctrine of* Forum Non Conveniens, 35 CALIF. L. REV. 380, 386–87, 387 n.35 (1947).

284 *See* Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929). As Blair noted, by 1929 only a few U.S. decisions had invoked the term "forum non conveniens," even though admiralty courts and some state courts (like those of New York) had been permitting discretionary dismissals. *See id.* at 2 & n.6.

285 *See id.* at 12–13, 21–25, 30–31; *see also, e.g.*, Wertheim v. Clergue, 65 N.Y.S. 750, 751–52 (N.Y. App. Div. 1900) ("It has become the settled law of this state that its courts will not entertain certain actions of tort between nonresidents where the cause of action arose outside of the territorial jurisdiction of the state, unless special reasons are shown why it should do so . . . ."); De la Bouillerie v. De Vienne, 89 N.E.2d 15, 15–16 (N.Y. 1949) ("It is only when an action is brought by one nonresident against another for a tort committed outside the State that our courts may refuse to take cognizance of the controversy."), *overruled by* Silver v. Great Am. Ins. Co., 278 N.E.2d 619 (1972).

was the first state to develop such a doctrine of discretionary dismissals,[286] which influenced the emergence of a similar doctrine in half a dozen other states by the time of Blair's article.[287] Blair's identification and labelling of this emerging state court practice as "forum non conveniens" helped speed the practice's spread across other states and ultimately its adoption by the Supreme Court in 1947 in *Gulf Oil*.[288]

What Blair did not note was that the New York practice itself traces back to admiralty. New York state courts first permitted discretionary dismissals in a pair of maritime disputes between foreign parties, in keeping with the federal admiralty practice of jurisdictional discretion. In the 1817 case of *Gardner v. Thomas*, New York's high court declined to exercise jurisdiction over a "foreign-cubed" maritime dispute,[289] while in the 1823 case of *Johnson v. Dalton*, the same court retained jurisdiction over a "foreign-cubed" maritime dispute.[290] New York state courts later relied on *Gardner* and *Johnson* when extending the idea of discretionary dismissals to nonmaritime cases,[291] as did the courts of other states.[292] Those cases were then cited by the U.S. Supreme Court in *Gulf Oil* as the common law basis for forum non conveniens.[293] There is thus a strong argument that forum non conveniens's purported "deep roots in the common law"[294] are actually planted in admiralty.[295]

But regardless of whether *Gulf Oil*'s version of forum non conveniens is fully or only partly derived from admiralty,[296] there is no doubt that the preexisting federal admiralty practice merged with *Gulf Oil*'s

286 *See* Dodge et al., *supra* note 138, at 1167 n.15.

287 *See* Maggie Gardner, *Admiralty's Influence*, 91 GEO. WASH. L. REV. 1585, 1596–99 (2023) (tracing the influence of New York's doctrine); Dodge et al., *supra* note 138, at 1179–80 (gathering state cases recognizing forum non conveniens before 1929).

288 *See* Maggie Gardner, *Throwback Thursday: The Legacy of Paxton Blair*, TRANSNAT'L LITIG. BLOG (June 30, 2022), https://tlblog.org/throwback-thursday-the-legacy-of-paxton-blair/ [https://perma.cc/XN66-65AW].

289 *See* 14 Johns. 134, 137–38 (N.Y. Sup. Ct. 1817).

290 *See* 1 Cow. 543, 550 (N.Y. Sup. Ct. 1823).

291 *See, e.g.*, Burdick v. Freeman, 24 N.E. 949, 950 (N.Y. 1890) (citing *Gardner* and *Johnson*); Ferguson v. Neilson, 11 N.Y.S. 524, 524 (N.Y. Gen. Term 1890) (citing *Burdick*); Collard v. Beach, 81 N.Y.S. 619, 621 (N.Y. App. Div. 1903) (citing *Ferguson*).

292 *See, e.g.*, Morris v. Mo. Pac. Ry. Co., 14 S.W. 228, 230 (Tex. 1890) (citing *Gardner*); Morisette v. Canadian Pac. Ry. Co., 56 A. 1102, 1103 (Vt. 1904) (citing *Gardner*).

293 *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 505 n.4, 507 n.6 (1947) (citing New York cases like *Collard* along with cases from Massachusetts, Michigan, and New Hampshire).

294 *E.g.*, *In re* Pirelli Tire, L.L.C., 247 S.W.3d 670, 675 (Tex. 2007).

295 *See* Gardner, *supra* note 287, at 1596–99 (developing this argument).

296 *See, e.g.*, Am. Dredging Co. v. Miller, 510 U.S. 443, 449 (1994) (asserting forum non conveniens did not originate in admiralty but acknowledging that "within federal courts it may have been given its earliest and most frequent expression in admiralty cases" and citing *The Belgenland* and *The Maggie Hammond*).

test for forum non conveniens. That evolution occurred in two steps. First, after *Gulf Oil*, federal courts sitting in admiralty began to refer to the admiralty discretion as "a form of the doctrine of *forum non conveniens*,"[297] even though they continued to analyze it using the old admiralty framework (as described in Part II and articulated in cases like *The Belgenland* and *The Maggie Hammond*).[298] Then, around the time that admiralty was merged with law and equity in 1966, federal courts also began applying the *Gulf Oil* framework to admiralty cases.[299]

A tipping point was the Second Circuit's 1980 en banc decision in *Alcoa Steamship Co. v. M/V Nordic Regent*,[300] which asserted that the federal courts had "consistently . . . applied the [*Gulf Oil*] standard in reviewing dismissals on the ground of forum non conveniens in admiralty cases."[301] This was an exaggeration: the opinion cited admiralty cases dating back only to 1967,[302] and it did not mention the other decisions from the same time period that had disregarded *Gulf Oil*'s framework and continued to apply the older admiralty framework instead.[303] But regardless of the accuracy of the Second Circuit's assertion in *Alcoa*, after *Alcoa* the merger of admiralty discretion and *Gulf*

297 Metallgesellschaft, A.G. v. M/V Larry L., Civil Action No. 72-1228, 1973 WL 6392541 (D.S.C. June 14, 1973); *accord, e.g.*, Mobil Tankers Co., S. A. v. Mene Grande Oil Co., 363 F.2d 611, 613 (3d Cir. 1966).

For admiralty decisions during this time period that analyzed jurisdictional discretion without using the label "forum non conveniens," see, for example, *Motor Distribs., Ltd. v. Olaf Pedersen's Rederi A/S*, 239 F.2d 463 (5th Cir. 1956); *Kloeckner Reederei und Kohlenhandel, G.M.B.H. v. A/S Hakedal*, 210 F.2d 754 (2d Cir. 1954); *The Fletero v. Arias*, 206 F.2d 267 (4th Cir. 1953); and *Anglo-Am. Grain Co. v. The S/T Mina D'Amico*, 169 F. Supp. 908 (E.D. Va. 1959).

298 *See, e.g.*, Gkiafis v. S.S. Yiosonas, 387 F.2d 460, 462 (4th Cir. 1967); Anastasiadis v. S.S. Little John, 346 F.2d 281, 282–83 (5th Cir. 1965); Conte v. Flota Mercante del Estado, 277 F.2d 664, 667 (2d Cir. 1960); Nestle's Prods. (Malaya) Ltd. v. Osaka Shosen Kaisha, 175 F. Supp. 876, 876 (S.D.N.Y. 1959).

299 *See, e.g.*, Paper Operations Consultants Int'l, Ltd. v. SS Hong Kong Amber, 513 F.2d 667, 671 (9th Cir. 1975) ("Although *Gulf Oil Corp.* was a non-admiralty case and did not involve foreign nationals, its reasoning has been applied in admiralty cases . . . ."); *Mobil Tankers Co.*, 363 F.2d at 613 (citing *Canada Malting* for discretion to decline admiralty jurisdiction and noting that *Gulf Oil* "is relevant insofar as it provides . . . criteria" for its application); *see also* 1 ROBERT FORCE & MARTIN J. NORRIS, THE LAW OF SEAMEN, 5TH § 1:32 (2023–2024 ed.) ("[T]his 'discretion' to entertain suits brought by aliens against aliens has been channeled into the more formal doctrine of forum non conveniens.").

300 654 F.2d 147 (2d Cir. 1980) (en banc).

301 *Id.* at 153.

302 *Id.*

303 *See* Philippine Packing Corp. v. Mar. Co. of the Phil., 519 F.2d 811 (9th Cir. 1975); Poseidon Schiffahrt, G.M.B.H. v. The M/S Netuno, 474 F.2d 203 (5th Cir. 1973); *Gkiafis*, 387 F.2d 460; Metallgesellschaft, A.G. v. M/V Larry L., Civil Action No. 72-1228, 1973 WL 6392541 (D.S.C. June 14, 1973).

*Oil*'s framework for forum non conveniens appears to have been complete.

Indeed, since 1980 the Supreme Court has itself repeatedly treated admiralty discretion and forum non conveniens as one and the same.[304] It has consistently characterized decisions like *The Belgenland*, *The Maggie Hammond*, and *Canada Malting* as forum non conveniens cases, even though they predated *Gulf Oil*.[305] And in 2007, when the Court considered an admiralty dispute between a Chinese company and a Malaysian company regarding cargo on a ship that had been arrested in Asia, it simply applied the *Gulf Oil* forum non conveniens framework without further discussion,[306] and it did not limit its holding (that a federal court may dismiss for forum non conveniens before considering other jurisdictional questions) to admiralty cases.

In short, there is a straight line of precedent from the nineteenth-century admiralty cases like *The Belgenland* to today's doctrine of forum non conveniens. The historical practice of admiralty discretion arguably sparked the general doctrine of forum non conveniens within the United States,[307] and it has inarguably merged back with that doctrine as set forth in *Gulf Oil*. The old admiralty cases may still be good law, but they do not support a judicial power to decline jurisdiction that is distinct from forum non conveniens.

Nonetheless, when invoked as precedent, the old admiralty cases might still be useful in improving our understanding of the doctrine of forum non conveniens today. In particular, the historical admiralty practice lends support to four clarifying interpretations of the *Gulf Oil* framework.

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304 For examples of the Supreme Court applying *Gulf Oil*'s forum non conveniens framework to admiralty disputes without addressing the potential distinction, see *Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007); *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); and *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988).

305 *See Am. Dredging*, 510 U.S. at 499 (citing *The Belgenland* and *The Maggie Hammond* to illustrate that "within federal courts [forum non conveniens] may have been given its earliest and most frequent expression in admiralty cases"); Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247–48 (1981) (citing *Canada Malting* as a forum non conveniens case); Williams v. Green Bay & W. R.R. Co., 326 U.S. 549, 555 n.4 (1946) (treating *Canada Malting* as a forum non conveniens case); *see also* Swift & Co. Packers v. Compania Colombiana del Caribe, S.A., 339 U.S. 684, 697 (1950) (describing forum non conveniens as a doctrine "of long standing in admiralty" and subsequently citing *Canada Malting*).

306 *See Sinochem Int'l*, 549 U.S. at 426–27, 429–30 (relying on *Piper Aircraft*, 454 U.S. 235).

307 *See* Gardner, *supra* note 287, at 1592–1602 (developing this argument in greater detail).

First, *Gulf Oil* did not purport to establish a rigid set of private and public interest factors.[308] The admiralty roots of the doctrine could be used to support adding back into the list of public interest factors the explicit consideration of international comity, including the views of foreign sovereigns.[309] Doing so might alleviate much of the felt need for a tool like foreign relations abstention.

Second, the historical admiralty practice helps clarify the public interest factors that *Gulf Oil* did include, which have proven rather cryptic in practice. Courts have struggled to interpret statements in *Gulf Oil* like "[t]here is a local interest in having localized controversies decided at home"[310] and "[j]ury duty is a burden that ought not to be imposed upon the people of a community which has *no* relation to the litigation,"[311] leading to divergent understandings among the lower courts.[312] The historical admiralty practice can shed new light on what exactly the *Gulf Oil* Court might have had in mind when phrasing these considerations. Consider in particular admiralty's distinction between suits involving parties from different countries versus suits involving parties from a single country, with the latter being more suitable for dismissal.[313] Perhaps *Gulf Oil*'s "localized" controversies are those that are in fact localized: where the parties and applicable law are all from a single country. Similarly, the jury duty factor may not be a question of degree; instead it might mean to single out only those cases with *no* U.S. connection.

Third and relatedly, the historical admiralty practice lends support to limiting forum non conveniens dismissals to cases involving no U.S. parties. At least through *Canada Malting* in 1932, the Supreme Court assumed that the federal courts' discretion to decline jurisdiction over admiralty suits was limited to disputes between foreign parties. That matches the evolution of forum non conveniens in the state courts, which did not permit dismissal of cases brought against in-state defendants until the 1950s (or, in the case of New York and California,

308 *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) ("Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts . . . ."); *see also id.* (ending its list of private interest factors with "all other practical problems that make trial of a case easy, expeditious and inexpensive").

309 *See* Gardner, *supra* note 59, at 405–08 (developing a similar argument).

310 *Gulf Oil*, 330 U.S. at 509.

311 *Id.* at 508–09 (emphasis added).

312 *See* Gardner, *supra* note 67, at 2326–27 (describing different interpretations).

313 *See id.* at 2325–28 (explaining how most of *Gulf Oil*'s public interest factors are variations on the idea of "localized" disputes).

the 1970s and the 1980s, respectively).[314] When the Supreme Court assumed in *Piper Aircraft Co. v. Reyno* in 1981 that a lawsuit transferred to a defendant's home forum could nonetheless be dismissed for forum non conveniens,[315] it was engaging in a more significant doctrinal move than the Court likely realized.[316] But since that move was made in *Piper*, lower federal courts cannot outright prohibit the invocation of forum non conveniens in cases brought in a defendant's home forum. Nonetheless, the admiralty practice supports a growing trend among the federal circuits that strongly disfavors forum non conveniens dismissals in cases involving U.S. defendants.[317]

Fourth and finally, the historical admiralty practice casts a different light on what might make a foreign forum "unavailable" for purposes of forum non conveniens. In the old admiralty cases, the question was not whether the courts of another country were technically open to the plaintiffs or able to hear the dispute.[318] Rather, the concern was often whether the plaintiff had a realistic possibility of using those alternative courts, given the plaintiff's limited means and the great distance they would have to travel at their own expense.[319] Granted, some of the difficulties discussed in the old admiralty cases have been alleviated by modern transportation and technology. But those same developments have decreased the burden of cross-border litigation on defendants as well.[320] At the very least, today's courts might take the practical concerns of plaintiffs into account when weighing the private interest factors under *Gulf Oil*, as some federal courts have already begun to do.[321]

### *B. Old Cases as Original Law*

Old cases might instead be invoked as primary source material, revealing what contemporaries understood the law to be. For example, the early admiralty decisions might bear on the Founding

314 *See* Dodge et al., *supra* note 138, at 1164, 1168; *see also* Gardner, *supra* note 59, at 414–16 (describing how forum non conveniens originally did not apply to cases brought against in-forum defendants).

315 *See* 454 U.S. 235, 238 (1981).

316 *See generally* Dodge et al., *supra* note 138 (tracing this development across state courts).

317 *See* Gardner, *supra* note 67, at 2323 & n.211 (collecting cases from Second, Third, Fourth, Eighth, Ninth, Eleventh, and D.C. Circuits).

318 *Cf. Piper Aircraft*, 454 U.S. at 254 n.22 (discussing the low bar for establishing an adequate alternative forum under the modern doctrine of forum non conveniens).

319 *See supra* subsection II.C.5.

320 *See* Gardner, *supra* note 59, at 408–15 (criticizing *Gulf Oil*'s private interest factors for being outdated).

321 *See* Gardner, *supra* note 67, at 2321–22 (gathering examples from federal circuits).

generation's understanding of the scope of judicial power vested by Article III or the division of labor between Congress (which grants federal jurisdiction) and the courts (which apply it).[322] Positivist originalists might further invoke the legal evolution of the admiralty practice over the intervening years, but unlike a purely precedential analysis, they would accept only those developments that accorded with an originalist rule of change.[323]

The challenge with using old cases as evidence of original law is ensuring that one is reading those cases in historical legal context. "Historical context" here does not mean the political and social environment of the time—though that is certainly relevant. Rather, it refers to the legal ecosystem in which the opinion was written. Contemporaneous procedural rules and institutional structure limit what lessons can be drawn from old cases, yet those limitations can slip by the modern lawyer not expert in equity or admiralty, or choice of law, or writ pleading. Selective research and excised quotations are insufficient; accuracy requires a broad and deep reading of old cases to identify the operating assumptions or procedural restrictions left implicit in the opinions themselves.

This may seem like an obvious statement. But as just one example, consider that Hungary argued in *Simon* that *The Belgenland*'s reference to "matters of contract or tort" meant that the early courts' jurisdictional discretion extended to *common law* contract or tort.[324] Hungary appears to have assumed that all "matters of contract or tort" related to the general common law, but that is not true: maritime law encompasses some contract and tort claims. And *The Belgenland* was clearly referring to *maritime* "contract or tort" because, as a case involving no U.S. parties, it could not have been brought under the federal courts' diversity jurisdiction.[325]

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322 Estreicher and Lee, who disclaim an originalist argument, nonetheless assert that "judicial discretion to manage international comity as a federal common law matter was the original position and historical practice for centuries," such that "avoid[ing] seemingly mandatory subject-matter jurisdiction was the norm, not the exception." Estreicher & Lee, *supra* note 22, at 191; *see also id.* at 193 ("The upshot is that the constitutional text of Article III and the Founding-era framework statute evince a clear original meaning of vesting federal judges with considerable discretion to manage foreign relations cases."). That "original position and historical practice," however, was limited to admiralty, which was a meaningful limit that either must be addressed in originalist terms—as this Section attempts to do—or else be forthrightly deployed in an analogical fashion, as explored in the next Section.

323 *See* Baude & Sachs, *supra* note 6, at 811–12.

324 *See* Reply Brief for Petitioners, *supra* note 16, at 8 (emphasis omitted) (quoting The Belgenland, 114 U.S. 355, 365 (1885)).

325 A U.S. party is required for diversity jurisdiction as defined under both Article III and 28 U.S.C. § 1332. U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 1332(a) (2018); *accord* Cunard S.S. Co. v. Smith, 255 F. 846, 848–49 (2d Cir. 1918) (dismissing longshoreman's

What, then, might the historical admiralty practice reveal about the power of federal judges to decline their jurisdiction? It is significant that this power to abstain was historically exercised only in admiralty.[326] That distinction may not seem to matter much today (more than fifty years after the merger of admiralty with law and equity), but it mattered quite a lot in the 1700s and 1800s. Admiralty differed from law and equity not just in procedural terms, but also in the nature of the judicial power applied.[327] Admiralty was a cooperative transnational judicial project, with judges self-consciously drawing on the work of foreign jurists and attempting to formulate and apply a body of global common law.[328] With that understanding, the Court could have seen Congress's grant of admiralty jurisdiction as more collaborative or delegative than its other jurisdictional grants.

We know this distinction mattered because the whole point of *Gulf Oil* and its companion case, *Koster v. (American) Lumbermens Mutual Casualty Co.*,[329] was to justify the discretion to decline jurisdiction over legal and equitable disputes despite the long-standing discretion to decline jurisdiction in admiralty.[330] Indeed, Justice Black dissented in *Gulf Oil* precisely on the grounds that the Court was expanding to law what had theretofore only been permitted in admiralty and, perhaps, in equity.[331] If one is looking at old admiralty cases to establish what the law was in the early years of the republic, that original law did not include the power of federal judges to dismiss cases outside of admiralty.

For positivist originalists, however, it might not pose a problem that admiralty discretion expanded to law and equity only in the twentieth century so long as that development itself was pursuant to an

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tort claim for lack of subject matter jurisdiction and noting that diversity jurisdiction does not extend to disputes between aliens even though admiralty jurisdiction does). The federal courts also had jurisdiction to hear claims brought by "an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," 28 U.S.C. § 1350 (2018), which could encompass suits solely between foreigners.

326 *See supra* subsection II.B.1.

327 *See, e.g.*, The Pawashick, 19 F. Cas. 5, 8 (D. Mass. 1872) (No. 10,851) (noting "that the admiralty has, or at least uses, somewhat greater control over the conduct of causes than is usual in other courts").

328 *See, e.g.*, Thompson v. The Catharina, 23 F. Cas. 1028, 1030 (D. Pa. 1795) (No. 13,949) (suggesting that the new nation did not need a maritime code as "[b]y the general laws of nations we certainly are bound" not just in prize but also "on the instance or civil side of the court"); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 1003 (2010).

329 330 U.S. 518 (1947).

330 *See, e.g.*, Can. Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413, 418–23 (1932) (summarizing admiralty doctrine).

331 *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 513–14 (1947) (Black, J., dissenting).

acceptable "rule of change." But such originalists might still stumble on *Gulf Oil.* In approving the use of forum non conveniens to dismiss cases falling under the federal courts' diversity jurisdiction, *Gulf Oil* struggled to identify any precedent permitting *federal* courts to decline to hear cases at law.[332] The opinion notes prior Supreme Court decisions that permitted *state* courts to decline to hear federal law cases,[333] and it collected a few examples of state courts invoking forum non conveniens to dismiss cases at law.[334] But whether state courts (or the courts of other countries) have the power to dismiss cases at law does not resolve whether *federal* courts do, given that federal courts generally have an obligation to exercise the jurisdiction that Congress has seen fit to grant them.[335] Similarly, the Court's holding in *Davis v. Farmers Co-operative Equity Co.*,[336] a dormant Commerce Clause case that *Gulf Oil* also invoked,[337] only described a constitutional check on exorbitant *state* court jurisdiction.[338] Whether the dormant Commerce Clause doctrine limits the reach of state courts does not bear on whether *Congress* can direct the federal courts to exercise equally broad jurisdiction (or whether, conversely, federal courts have the inherent power to refuse to hear cases falling within that congressional grant).

*Gulf Oil* cited two other Supreme Court precedents, neither of which is likely to satisfy a positivist originalist's "rule of change." First, *Gulf Oil* quotes a dictum from *Canada Malting*—a case about the discretion to decline admiralty jurisdiction—that "[c]ourts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal."[339] But *Canada Malting* supported that assertion with citations only to *Davis*, English decisions, and law review

332 While *Pullman* abstention predated *Gulf Oil*, the Court granted abstention in *Pullman* as an exercise of its equitable powers. *See* R.R. Comm'n v. Pullman Co., 312 U.S. 496, 500–01 (1941).

333 *Gulf Oil*, 330 U.S. at 504.

334 *Id.* at 505 n.4; *see also id.* at 507 n.6 (gathering U.S. state court and English decisions).

335 *See, e.g.*, Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 72 (2013) ("In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction."); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

336 262 U.S. 312 (1923).

337 *See Gulf Oil*, 330 U.S. at 505.

338 *See Davis*, 262 U.S. at 317.

339 *Gulf Oil*, 330 U.S. at 504 (quoting Can. Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413, 423 (1932)).

articles.[340] That dictum falls prey, in other words, to the same precedential shortcomings as *Gulf Oil* itself.

Second, *Gulf Oil* pointed out that "[o]n substantially *forum non conveniens* grounds[,] we have required federal courts to relinquish decision of cases within their jurisdiction where the court would have to participate in the administrative policy of a state."[341] That point at least addresses the jurisdictional duty of federal courts. *Gulf Oil*'s authorities for that proposition, however, were two cases involving suits in equity: *Burford v. Sun Oil*[342] and a related case.[343] Perhaps the *Gulf Oil* Court presumed that *Burford* abstention would be extended to cases at law—but that possibility was specifically disclaimed by the Supreme Court fifty years later in *Quackenbush v. Allstate Insurance Co.*[344] In reviewing an application of *Burford* abstention, *Quackenbush* declared that "federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary."[345] In an intriguing circularity, *Quackenbush* distinguished forum non conveniens from abstention on the basis that forum non conveniens historically has permitted dismissals of cases seeking legal relief[346]—even though *Gulf Oil* could point to nothing better than *Burford* itself to justify such a power.

In short, *Gulf Oil* points to no federal precedent permitting federal courts to decline congressional grants of jurisdiction over cases at law. Perhaps, however, *Gulf Oil*'s invocation of state court and English decisions was meant to suggest instead that forum non conveniens was inherent in the judicial power of common law courts. If so, that power was not inherent at the Founding. New York was the first state to permit discretionary dismissals, which it did in *Gardner* and *Johnson*, the maritime disputes decided in 1817 and 1823.[347] New York does not appear to have applied such discretion to nonmaritime disputes until

340 *Can. Malting*, 285 U.S. at 423 n.6.

341 *Gulf Oil*, 330 U.S. at 505.

342 Burford v. Sun Oil Co., 319 U.S. 315 (1943).

343 R.R. Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940).

344 517 U.S. 706 (1996).

345 *Id.* at 731. Cases seeking legal, nondiscretionary relief could still, however, be stayed. *Id.* The distinction between a stay and a dismissal is admittedly a fine one. *See, e.g.*, Daniel J. Meltzer, Jurisdiction and Discretion *Revisited*, 79 NOTRE DAME L. REV. 1891, 1898–1900 (2004) (criticizing the Court's reasoning in *Quackenbush*).

346 *See Quackenbush*, 517 U.S. at 721–23.

347 *See* Gardner v. Thomas, 14 Johns. 134, 137–38 (N.Y. Sup. Ct. 1817) (exercising discretion to decline jurisdiction in a maritime dispute between foreign parties); Johnson v. Dalton, 1 Cow. 543, 550 (N.Y. Sup. Ct. 1823) (refusing to decline jurisdiction in a maritime dispute between foreign parties); *see also* Dodge et al., *supra* note 138, at 1178–79 (concluding that *Gardner* and *Johnson* are the earliest state court decisions recognizing discretion to decline jurisdiction).

the 1860s.[348] The high court of Massachusetts first exercised discretion to dismiss a suit in equity in 1896, based on dicta tracing back to the 1860s.[349] But it did not extend that discretionary power to cases at law until the 1930s.[350] The next earliest state adopters of discretionary dismissals were Texas in 1890, New Hampshire in 1902, and Vermont in 1904.[351] For U.S. states, forum non conveniens is a twentieth-century phenomenon.[352] Nor are the doctrine's roots much deeper in the United Kingdom. English courts did not adopt forum non conveniens until 1905 (citing New York cases when doing so),[353] while the Scottish practice dates back to the mid-nineteenth century.[354] *Gulf Oil* could not rely, then, on an inherent power of common law courts at the time of the Founding to decline jurisdiction over cases at law. If it instead had in mind (and positivist originalists would accept) the inherent power of common law courts as it had developed by 1947, that claim was still a difficult argument to make: by the time of *Gulf Oil*, only ten

348 *See* Dewitt v. Buchanan, 54 Barb. 31, 33 (N.Y. Sup. Ct. 1868) (recognizing the court's discretion to dismiss a claim for assault and battery involving only Canadian citizens); *see also* McIvor v. McCabe, 26 How. Pr. 257 (N.Y. Super. Ct. 1863) (exercising jurisdiction over tort claim between New Jersey parties but suggesting there might be discretion to decline it).

349 *See* Nat'l Tel. Manuf'g Co. v. Dubois, 42 N.E. 510, 510–11 (Mass. 1896) (citing Pierce v. Equitable Life Assur. Soc. of U.S., 12 N.E. 858 (Mass. 1887)). *Pierce* cited *Smith v. Mutual Life Insurance Co. of New York*, 96 Mass. (14 Allen) 336 (1867).

350 *See* Universal Adjustment Corp. v. Midland Bank, Ltd., 184 N.E. 152, 160 (Mass. 1933).

351 *See* Morris v. Mo. Pac. Ry. Co., 14 S.W. 228, 230 (Tex. 1890); Driscoll v. Portsmouth, K. & Y. St. Ry., 51 A. 898 (N.H. 1902); Morisette v. Canadian Pac. Ry. Co., 56 A. 1102, 1103 (Vt. 1904). Michigan courts famously expressed openness to the idea of discretionary dismissals of suits between foreign parties in a pair of early cases. *See* Great W. Ry. Co. of Can. v. Miller, 19 Mich. 305, 315–16 (1869); Cofrode v. Gartner, 44 N.W. 623, 625 (Mich. 1890). But Michigan did not formally adopt such a doctrine until 1973. *See* Cray v. Gen. Motors Corp., 207 N.W.2d 393, 395–96, 399 (Mich. 1973) (describing *Cofrode* as not resolving the question of discretion).

352 *See* Dodge et al., *supra* note 138 (summarizing the development of forum non conveniens across the fifty states and the District of Columbia). Indeed, five states did not adopt forum non conveniens until the twenty-*first* century—and Idaho still has not done so. *Id.* at 1167 (noting recent adoption by Georgia, Montana, Oregon, Rhode Island, and South Dakota).

353 *See* Logan v. Bank of Scot. [1906] 1 KB 141 at 148, 150.

354 *See, e.g.*, Ardavan Arzandeh, *The Origins of the Scottish* Forum Non Conveniens *Doctrine*, 13 J. PRIV. INT'L L. 130, 147 (2017) (concluding that the discretionary doctrine of forum non conveniens was first recognized in Scottish courts in 1845).

states and the District of Columbia had recognized some form of discretionary dismissals[355]—and six states had affirmatively rejected it.[356]

In short, *Gulf Oil* was an act of judicial lawmaking that leaves unanswered the source of federal judicial power to decline jurisdiction over cases at law. As Baude and Sachs describe, "Originalism is a commitment to follow our original law, as lawfully altered; that commitment can and almost surely will require rejecting some contemporary practice."[357] That might include not just the nascent doctrine of foreign relations abstention, but also the more venerable one of forum non conveniens.

### *C. Old Cases as Experience*

A third option is to treat old cases as practical experience from which to draw by analogy when confronting new manifestations of old problems. The underlying challenges that the admiralty courts were trying to address remain familiar: How should courts respond when their jurisdiction over a particular set of cases is excessive, sweeping in disputes with minimal connection to the United States? On the one hand, hearing all such cases would tax court resources, create perverse incentives for potential litigants, and possibly conflict with the preferences of trading partners. On the other hand, hearing some of those cases might *further* the interests of trading partners, better align incentives for international commerce, and prevent de facto denials of justice. When similar trade-offs appear today, judges might draw on past experience to identify an appropriate doctrinal response.

355 *See* Melvin v. Melvin, 129 F.2d 39, 40 (D.C. Cir. 1942); Hagen v. Viney, 169 So. 391, 392–93 (Fla. 1936); Stewart v. Litchenberg, 86 So. 734, 736 (La. 1920), *overruled by* Fox v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll., 576 So. 2d 978, 990 (La. 1991); Foss v. Richards, 139 A. 313, 314–15 (Me. 1927); *Universal Adjustment Corp.*, 184 N.E. at 160; Strickland v. Humble Oil & Refin. Co., 11 So. 2d 820, 822–23 (Miss. 1943); Jackson & Sons v. Lumbermen's Mut. Cas. Co., 168 A. 895, 896–97 (N.H. 1933); Carnegie v. Laughlin, 28 A.2d 506, 506–07 (N.J. 1942); Gregonis v. Phila. & Reading Coal & Iron Co., 139 N.E. 223, 226 (N.Y. 1923), *overruled on other grounds by* Silver v. Great Am. Ins. Co., 278 N.E.2d 619 (N.Y. 1972); *Morris*, 14 S.W. at 230; *Morisette*, 56 A. at 1103 (dicta).

356 *See* Leet v. Union Pac. R. Co., 155 P.2d 42, 44 (Cal. 1944); Boright v. Chi., R.I. & P.R. Co., 230 N.W. 457, 459–60 (Minn. 1930), *overruled by* Johnson v. Chi., Burlington & Quincy R.R. Co., 66 N.W.2d 763, 776 (Minn. 1954); Bright v. Wheelock, 20 S.W.2d 684, 700 (Mo. 1929); Herrmann v. Franklin Ice Cream Co., 208 N.W. 141, 143 (Neb. 1926), *overruled by* Qualley v. Chrysler Credit Corp., 217 N.W.2d 914, 915 (Neb. 1974); Mattone v. Argentina, 175 N.E. 603, 606 (Ohio 1931); State *ex rel.* Smith v. Belden, 236 N.W. 542, 543 (Wis. 1931).

357 Baude & Sachs, *supra* note 39, at 107–08.

Pluralists and pragmatists might deploy old cases as one potential input among many.[358] This is not an entirely unconstrained mode of analysis, though it is a very flexible one. Consider in this light Estreicher and Lee's invocation of the historical admiralty practice: In emphasizing that the center of global commerce has shifted from admiralty to law, they may be drawing a practical analogy that links the purpose behind admiralty discretion to the needs of law courts today.[359] Or in arguing that the historical admiralty practice demonstrates that district court judges are competent to weigh foreign relations concerns, they may be drawing a practical lesson about institutional capacity.[360] Such analogical deployments of old cases can then be triangulated with other sources.[361]

The flexibility of this approach requires in turn addressing two choices. First is the question of generality and perspective. How, for example, should one characterize the challenges posed by global commerce? Estreicher and Lee appear to limit the problem to disputes that touch the commercial or political interests of a foreign government, even if the dispute involves a U.S. party or U.S.-based conduct.[362] An equally if not more defensible analogy would be limited to the problem of exorbitant jurisdiction, meaning jurisdiction that lacks a "significant connection between the sovereign and either the parties or the dispute."[363] The early admiralty courts struggled with whether to hear cases that involved purely private interests: they were concerned with disputes that had no nexus to the United States and no systemic need for resolution in U.S. courts, whether or not the interests of foreign governments were directly involved. How would that problem translate to today? The Supreme Court has significantly reduced exorbitant jurisdiction by retiring the "doing business" version of general personal jurisdiction in *Daimler AG v. Bauman*.[364] Cases involving solely

358 *Cf.* Barnett & Solum, *supra* note 3, at 478 (describing the Court's recent turn to "history and tradition" as a form of "[c]onservative [c]onstitutional [p]luralism" that emphasizes "backward-looking modalities of constitutional argument").

359 *See* Estreicher & Lee, *supra* note 22, at 194–95, 197.

360 *See, e.g.*, *id.* at 191–92.

361 For example, the need for judicial discretion to manage concerns for cross-border commerce is further supported by similarly motivated doctrines like forum non conveniens and interest analysis for choice of law. The institutional capacity of federal judges to manage sensitive foreign affairs could be bolstered by reference to other historical examples, such as how the early federal courts managed high-stakes prize cases. *See* Arlyck, *supra* note 269, at 28; Daniel J. Hulsebosch, *The Founders' Foreign Affairs Constitution: Improvising Among Empires*, 53 ST. LOUIS U. L.J. 209, 211 (2008); Sloss, *supra* note 274, at 160.

362 *See* Estreicher & Lee, *supra* note 22, at 173–75 (describing situations of concern).

363 Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 474 (2006).

364 *See* Daimler AG v. Bauman, 571 U.S. 117, 136–39 (2014).

foreign parties and foreign harms have also been limited by the modern presumption against extraterritoriality,[365] restrictive interpretations of federal statutes,[366] and the narrowing of the Alien Tort Statute in particular.[367] The few remaining pockets of potentially exorbitant jurisdiction include tag jurisdiction, suits against foreign states pursuant to the FSIA, and admiralty. If the right framing of the problem is one of exorbitant jurisdiction, then the application of an analogous modern doctrine of abstention would be fairly limited.

Or consider Estreicher and Lee's suggestion that the admiralty courts' experience demonstrates the institutional capacity of the federal courts to decline jurisdiction in light of foreign relations frictions.[368] That invocation of the old admiralty cases focuses on disputes that the courts refused to hear. A glass-half-full perspective, however, might emphasize instead the cases that the admiralty courts *did* hear. The historical admiralty practice could equally be used to tell a story of cosmopolitan courts whose judges were attuned to global systemic needs of both commercial reliability and justice—and who were thus willing to adjudicate "foreign-cubed" disputes.[369]

The point here is that using old cases as an experiential dataset gives the translator much flexibility as to which lessons to draw and at what level of generality. The flipside of that flexibility is that analogizing to old cases cannot lead to predetermined answers; it is inherently an act of judicial creativity.[370] If this is the register in which one is invoking old caselaw, then, one must accept the assertion of judicial power that it entails.

Acknowledging that move is particularly important in the context of foreign relations abstention because it is in tension with the Supreme Court's thirty-year campaign to *limit* abstention and other prudential doctrines.[371] As Justice Scalia wrote in 1989, it is an

365 *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010).

366 *See* F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155, 164 (2004).

367 *See, e.g.*, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1397–99 (2018).

368 *See* Estreicher & Lee, *supra* note 22, at 191–92.

369 *Cf.* Golove & Hulsebosch, *supra* note 328, at 934–35, 1001–03 (arguing that the Framers expected the federal courts to employ the law of nations, including maritime law, to help secure the position of the United States as part of the civilized world).

370 *Cf.* Schauer, *supra* note 42, at 575 ("When the choice whether to rely on a prior decisionmaker is entirely in the hands of the present decisionmaker, the prior decision does not *constrain* the present decision, and the present decisionmaker violates no norm by disregarding it.").

371 *See* Gardner, *supra* note 87, at 74–80 (describing the trend towards limiting abstention and related doctrines); Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845 (2017) (describing and critiquing the trend towards limiting abstention and related doctrines); *see also* Richard H. Fallon, Jr., *Why Abstention Is Not Illegitimate: An Essay on the Distinction Between "Legitimate" and "Illegitimate" Statutory Interpretation and Judicial Lawmaking*,

"undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction."[372] Soon after, a unanimous Court in *Quackenbush* appeared to limit any dismissal based on abstention principles to requests for discretionary relief.[373] More recently, a unanimous Court echoed the same refrain when refusing to extend *Younger* abstention to new circumstances.[374]

The Court has also moved to reduce prudential discretion in justiciability doctrines. Prudential limits on standing have been recharacterized as either constitutional or statutory in nature.[375] Doubt has been cast on the prudential nature of ripeness.[376] As described in Section I.C, the political question doctrine has been applied solely in light of *Baker v. Carr*'s first two factors, which speak in terms of constitutional structure,[377] without reference to *Baker*'s more prudential factors.[378] And the act-of-state doctrine—once again under Justice Scalia's guiding hand on behalf of a unanimous Court—has been scaled back from a "vague doctrine of abstention" to a sharply limited rule of decision.[379] Acknowledging judicial formulation of a new basis for abstention would run counter to this trend and in particular would need to be reconciled with *Quackenbush*'s seeming prohibition on dismissals of cases seeking nondiscretionary relief.

A potential middle ground might be to invoke old cases as a Burkean traditionalist would: as a pool of collective wisdom that can

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107 NW. U. L. REV. 847, 850 (2013) ("Since the 1980s, the Supreme Court has not only arrested the expansion of abstention doctrine, but also pruned some of its branches.").

372 New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989).

373 *See supra* Section III.B. Indeed, *Quackenbush* sets up an odd conundrum for proponents of foreign relations abstention: if foreign relations abstention is distinct from forum non conveniens, then *Quackenbush* would seem to require its limitation to nonlegal remedies. *See* Brief for Petitioners, *supra* note 12, at 22 n.17 (pointing to *Quackenbush* as proof that abstention is distinct from forum non conveniens but without addressing *Quackenbush*'s limitation of dismissals based on abstention to claims for nonlegal remedies).

374 *See* Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 72 (2013) ("In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction.").

375 *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 & n.3 (2014) (holding that the zone-of-interests test is a matter of statutory interpretation and asserting in dicta that the bar on generalized grievances is an aspect of Article III's injury-in-fact requirement).

376 *See* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014) (flagging the issue but noting "we need not resolve the continuing vitality of the prudential ripeness doctrine in this case").

377 Those two factors are "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and "a lack of judicially discoverable and manageable standards for resolving it." Baker v. Carr, 369 U.S. 186, 217 (1962).

378 *See supra* Section I.C (describing recent decisions applying the political question doctrine).

379 *See* W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l, 493 U.S. 400, 406 (1990).

justify incremental change to the law.[380] That approach would put some limits on the selection of old cases, the lessons that could be drawn from them, and the degree of judicial creativity entailed. First, one would need a sufficient number of consistent decisions—a requirement that the historical admiralty practice assuredly meets. Second, the focus would be on incremental developments from that pool of past practice, even if those developments require some small leaps. Thus Burkean traditionalists might be comfortable with *Gulf Oil*'s advance from admiralty discretion to a more broadly applicable doctrine of forum non conveniens, supported as it was by indirect precedent reflecting the experience of other courts and analogous problems of judicial federalism.[381] Third, the incremental nature of the development and the pool of experience behind it may help ameliorate concerns about judicial lawmaking and discretion.

A Burkean traditionalist, however, would be hard-pressed to describe any jump from the historical admiralty practice straight to foreign relations abstention as "incremental." The incremental development of admiralty discretion leads straight through forum non conveniens.[382] And even if one were to argue that foreign relations abstention is just a further incremental development from forum non conveniens, the test articulated by the Ninth and Eleventh Circuits is itself too normative and open-ended—with its broad direction to identify and weigh national and foreign interests—to fit within a Burkean approach.[383]

The only way to connect the old admiralty cases to today's foreign relations abstention, in short, is to invoke the old cases as an experiential analogue in a looser, more pragmatic sense. And that move in turn

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380 *See* Fallon, *supra* note 1, at 1814 (describing Burkean "respect for the accreted wisdom implicit in longstanding but organically evolving structures of law and categories of legal analysis"); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891–92 (1996) (describing "rational traditionalism" as taking seriously traditional doctrines as manifestations of "the accumulated wisdom of many generations" that has been vetted through real-world application, which he calls "a kind of rough empiricism"); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 368 (2006) ("Burkeans might stress not social practices but the slow evolution of judicial doctrine over time—and might therefore reject sharp breaks from the judiciary's own past.").

381 *See supra* Section III.B (describing sources on which *Gulf Oil* relied). Further, even if the judicial leap in *Gulf Oil* might exceed the speed of doctrinal development with which a Burkean traditionalist might be comfortable, the consistent application of forum non conveniens over the last eighty years would provide additional reassurance. *See* Strauss, *supra* note 380, at 892 (explaining that "the age of a practice alone does not warrant its value," with consistency in application mattering more).

382 *See supra* Section III.A.

383 *Cf.* Sunstein, *supra* note 380, at 356 (describing Burkean minimalists as "avoid[ing] independent moral and political arguments of any kind").

entails judicial creativity and an embrace of prudential discretion, contrary to broader trends at the Supreme Court.

## IV. CONCLUSION

This Article has used the debate over foreign relations abstention to highlight the need for analytical rigor when invoking old cases. As the federal courts place greater emphasis on history in all its forms, advocates may be enticed to cite old cases without considering the procedural ecosystem in which they were issued or linking their invocation to the advocate's own professed method of analysis. The danger is that such looseness can cloak underconsidered expansions of judicial power behind the rhetoric of judicial restraint.

As Part II showed, the old caselaw permitting discretionary dismissals was limited to admiralty disputes between foreign parties that arose outside of the United States. Within those parameters, judicial discretion was flexible, with variable presumptions and factors depending on the type of claim and the equities of the case. That flexible admiralty practice evolved through a steady line of decisions until it merged fully with *Gulf Oil*'s framework for forum non conveniens dismissals. For those committed to identifying and applying original law, the old cases support only a narrow discretion within admiralty, the expansion of which to cases at law has never been fully justified. For those interested in old cases as still-applicable precedent, the old admiralty cases are inextricably linked with today's doctrine of forum non conveniens.

That leaves the easiest, but also the most malleable, use of old cases: as a source of justification for new doctrinal development. But using the old admiralty cases in this way involves the sort of judicial lawmaking and prudential discretion that the Supreme Court has disparaged and minimized. My own view is that there is a useful role for prudence, but that it should be carefully circumscribed. As Part I explained, the new idea of foreign relations abstention is instead dangerously broad, exceeding the limits that Congress and the Supreme Court have placed on other foreign relations doctrines. Hiding behind old cases allows advocates, and potentially courts, to avoid addressing that breadth of judicial power and how it is in tension with other jurisprudential trends.[384] Ultimately, the Article aims not to pick among the potential approaches to using old cases, but to show how the different approaches may lead to different results—and to urge greater honesty about the path chosen.

384 *Cf.* Siegel, *supra* note 4, at 1183 ("A judge's turn to the historical record can just as easily disguise judicial discretion as constrain it.").

## APPENDIX

| | Case Name and Citation | Year | Court | Judge (if identified) |
|---|---|---|---|---|
| 1 | Moran v. Baudin, 17 F. Cas. 721 (No. 9,785) | 1788 | D. Pa. | |
| 2 | Weiberg v. The St. Oloff, 29 F. Cas. 591 (No. 17,357) | 1790 | D. Pa. | |
| 3 | Findlay v. The William, 9 F. Cas. 57 (No. 4,790) | 1793 | D. Pa. | Peters |
| 4 | Moxon v. The Fanny, 17 F. Cas. 942 (No. 9,895) | 1793 | D. Pa. | |
| 5 | Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6 | 1794 | U.S. | Jay |
| 6 | Moodie v. The Betty Carthcart, 17 F. Cas. 651 (No. 9,742) | 1795 | D.S.C. | Bee |
| 7 | Talbot v. Janson, 3 U.S. (3 Dall.) 133[385] | 1795 | U.S. | (seriatim) |
| 8 | Thompson v. The Catharina, 23 F. Cas. 1028 (No. 13,949) | 1795 | D. Pa. | |
| 9 | Ellison v. The Bellona, 8 F. Cas. 559 (No. 4,407) | 1798 | D.S.C. | Bee |
| 10 | Aertsen v. The Aurora, 1 F. Cas. 206 (No. 95) | 1800 | D.S.C. | Bee |
| 11 | Willendson v. Forsoket, 29 F. Cas. 1283 (No. 17,682) | 1801 | D. Pa. | |
| 12 | Mason v. Ship Blaireau, 6 U.S. (2 Cranch) 240 | 1804 | U.S. | Marshall |
| 13 | Thomson v. The Nanny, 23 F. Cas. 1104 (No. 13,984) | 1805 | D.S.C. | Bee |
| 14 | The Jerusalem, 13 F. Cas. 559 (No. 7,293) | 1814 | C.C.D. Mass. | Story |
| 15 | Robin v. The Cacique, 20 F. Cas. 958 (No. 11,931) | 1823 | E.D. Pa. | Peters |
| 16 | Burckle v. The Tapperheten, 4 F. Cas. 692 (No. 2,141) | 1826 | S.D.N.Y. | |

385 With cases that involved appeals, only one opinion is included in the Appendix, even if the lower court (or higher court) also discussed discretion to decline jurisdiction.

| | **Case Name and Citation** | **Year** | **Court** | **Judge (if identified)** |
|---|---|---|---|---|
| 17 | The Pacific, 18 F. Cas. 942 (No. 10,644) | 1830 | S.D.N.Y. | Betts |
| 18 | The Bee, 3 F. Cas. 41 (No. 1,219) | 1836 | D. Me. | Ware |
| 19 | The Napoleon, 17 F. Cas. 1157 (No. 10,015) | 1845 | S.D.N.Y. | Betts |
| 20 | Graham v. Hoskins, 10 F. Cas. 924 (No. 5,669) | 1845 | S.D.N.Y. | Betts |
| 21 | Davis v. Leslie, 7 F. Cas. 134 (No. 3,639) | 1848 | S.D.N.Y. | Betts |
| 22 | One Hundred & Ninety-Four Shawls, 18 F. Cas. 703 (No. 10,521) | 1848 | S.D.N.Y. | Betts |
| 23 | The Infanta, 13 F. Cas. 37 (No. 7,030) | 1848 | S.D.N.Y. | Betts |
| 24 | Bucker v. Klorkgeter, 4 F. Cas. 555 (No. 2,083) | 1849 | S.D.N.Y. | Betts |
| 25 | Lynch v. Crowder, 15 F. Cas. 1172 (No. 8,637) | 1849 | S.D.N.Y. | Betts |
| 26 | The Ada, 1 F. Cas. 72 (No. 38) | 1849 | D. Me. | Ware |
| 27 | Gonzales v. Minor, 10 F. Cas. 575 (No. 5,530) | 1852 | C.C.E.D. Pa. | Grier |
| 28 | Patch v. Marshall, 18 F. Cas. 1288 (No. 10,793) | 1853 | C.C.D. Mass. | Curtis |
| 29 | Saunders v. The Victoria, 21 F. Cas. 539 (No. 12,377) | 1854 | E.D. Pa. | |
| 30 | The Gazelle, 10 F. Cas. 127 (No. 5,289) | 1858 | D. Mass. | Sprague |
| 31 | The Havana, 11 F. Cas. 844 (No. 6,226) | 1858 | D. Mass. | Sprague |
| 32 | The Sailor's Bride, 21 F. Cas. 159 (No. 12,220) | 1859 | C.C.D. Mich. | McLean |
| 33 | The Jupiter, 14 F. Cas. 54 (No. 7,585) | 1867 | S.D.N.Y. | Blatchford |
| 34 | The Russia, 21 F. Cas. 86 (No. 12,168) | 1869 | S.D.N.Y. | Blatchford |

| | Case Name and Citation | Year | Court | Judge (if identified) |
|---|---|---|---|---|
| 35 | The Maggie Hammond, 76 U.S. (9 Wall.) 435 | 1870 | U.S. | Clifford |
| 36 | Muir v. The Brisk, 17 F. Cas. 954 (No. 9,901) | 1870 | E.D.N.Y. | Benedict |
| 37 | The Becherdass Ambaidass, 3 F. Cas. 13 (No. 1,203) | 1871 | D. Mass. | Lowell |
| 38 | *Ex parte* Newman, 81 U.S. (14 Wall.) 152 | 1872 | U.S. | Clifford |
| 39 | The Pawashick, 19 F. Cas. 5 (No. 10,851) | 1872 | D. Mass. | Lowell |
| 40 | The Hermine, 12 F. Cas. 24 (No. 6,409) | 1874 | D. Or. | Deady |
| 41 | The Hotspur, 12 F. Cas. 562 (No. 6,720) | 1874 | D. Or. | Deady |
| 42 | Bernhard v. Creene, 3 F. Cas. 279 (No. 1,349) | 1874 | D. Or. | Deady |
| 43 | The Carolina, 14 F. 424 | 1876 | D. La. | Billings |
| 44 | Thomassen v. Whitwell, 23 F. Cas. 1003 (No. 13,928) | 1877 | E.D.N.Y. | Benedict |
| 45 | The Lilian M. Vigus, 15 F. Cas. 520 (No. 8,346) | 1879 | S.D.NY. | Choate |
| 46 | Covert v. The British Brig Wexford, 3 F. 577 | 1880 | S.D.N.Y. | Choate |
| 47 | The Amalia, 3 F. 652 | 1880 | D. Me. | Fox |
| 48 | Boult v. Ship Naval Reserve, 5 F. 209 | 1881 | D. Md. | Morris |
| 49 | The Montapedia, 14 F. 427 | 1882 | E.D. La. | Billings |
| 50 | The Belgenland, 114 U.S. 355 | 1885 | U.S. | Bradley |
| 51 | The Noddleburn, 28 F. 855[386] | 1886 | D. Or. | Deady |
| 52 | The Salomoni, 29 F. 534 | 1886 | S.D. Ga. | Speer |

386 *Aff'd*, 30 F. 142 (C.C.D. Or. 1887).

| | **Case Name and Citation** | **Year** | **Court** | **Judge (if identified)** |
|---|---|---|---|---|
| 53 | Wilson v. The John Ritson, 35 F. 663 | 1888 | D.S.C. | Simonton |
| 54 | Chubb v. Hamburg-American Packet Co., 39 F. 431 | 1889 | E.D.N.Y. | Benedict |
| 55 | The City of Carlisle, 39 F. 807 | 1889 | D. Or. | Deady |
| 56 | Camille v. Couch, 40 F. 176 | 1889 | E.D.S.C. | Simonton |
| 57 | Slocum v. Western Assur. Co., 42 F. 235 | 1890 | S.D.N.Y. | Brown |
| 58 | The Burchard, 42 F. 608 | 1890 | S.D. Ala. | Toulmin |
| 59 | Waitshoair v. The Craigend, 42 F. 175 | 1890 | D. Wash. | Hanford |
| 60 | The Topsy, 44 F. 631 | 1890 | D.S.C. | Simonton |
| 61 | The New City, 47 F. 328 | 1891 | D. Wash. | Hanford |
| 62 | The Sirius, 47 F. 825 | 1891 | N.D. Cal. | Ross |
| 63 | The Marie, 49 F. 286 | 1892 | D. Or. | Deady |
| 64 | The Karoo, 49 F. 651 | 1892 | D. Wash. | Hanford |
| 65 | The Welhaven, 55 F. 80 | 1892 | S.D. Ala. | Toulmin |
| 66 | The Walter D. Wallet, 66 F. 1011 | 1895 | S.D. Ala. | Toulmin |
| 67 | Bolden v. Jensen, 70 F. 505 | 1895 | D. Wash. | Hanford |
| 68 | Panama Railroad Co. v. Napier Shipping Co., 166 U.S. 280 | 1897 | U.S. | Brown |
| 69 | The Lady Furness, 84 F. 679 | 1897 | E.D.N.Y. | Tenney |
| 70 | The Lamington, 87 F. 752 | 1898 | E.D.N.Y. | Thomas |

| | Case Name and Citation | Year | Court | Judge (if identified) |
|---|---|---|---|---|
| 71 | The Belvidere, 90 F. 106 | 1898 | S.D. Ala. | Toulmin |
| 72 | Fairgrieve v. Marine Ins. Co. of London, 94 F. 686 | 1899 | 8th Cir. | Caldwell |
| 73 | The Kentigern, 99 F. 443 | 1900 | E.D.N.Y. | Thomas |
| 74 | Goldman v. Furness, Withy & Co., 101 F. 467 | 1900 | S.D.N.Y. | Brown |
| 75 | The Falls of Keltie, 114 F. 357 | 1902 | D. Wash. | Hanford |
| 76 | Elder Dempster Shipping Co. v. Pouppirt, 125 F. 732 | 1903 | 4th Cir. | Simonton |
| 77 | The Troop, 128 F. 856 | 1904 | 9th Cir. | Gilbert |
| 78 | The Alnwick, 132 F. 117 | 1904 | S.D.N.Y. | Adams |
| 79 | The Neck, 138 F. 144 | 1905 | W.D. Wash. | Hanford |
| 80 | The Bound Brook, 146 F. 160 | 1906 | D. Mass. | Dodge |
| 81 | The August Belmont, 153 F. 639 | 1907 | S.D. Ga. | Speer |
| 82 | The Baker, 157 F. 485 | 1907 | E.D.N.Y. | Chatfield |
| 83 | Gough v. Hamburg Amerikanische Packetfahrt Aktiengesellschaft, 158 F. 174 | 1907 | S.D.N.Y. | Adams |
| 84 | The Ucayali, 164 F. 897 | 1908 | E.D.N.Y. | Chatfield |
| 85 | The Albani, 169 F. 220 | 1909 | E.D. Pa. | Holland |
| 86 | The Kaiser Wilhelm der Grosse, 175 F. 215 | 1909 | S.D.N.Y. | Hough |
| 87 | *Ex parte* Anderson, 184 F. 114 | 1910 | D. Me. | Hale |
| 88 | The Koenigin Luise, 184 F. 170 | 1910 | D.N.J. | Rellstab |

| | **Case Name and Citation** | **Year** | **Court** | **Judge (if identified)** |
|---|---|---|---|---|
| 89 | The Gloria de Larrinaga, 196 F. 590 | 1911 | S.D.N.Y. | Hough |
| 90 | The Ester, 190 F. 216 | 1911 | E.D.S.C. | Smith |
| 91 | The Albergen, 223 F. 443 | 1915 | S.D. Ga. | Lambdin |
| 92 | The Epsom, 227 F. 158 | 1915 | W.D. Wash. | Neterer |
| 93 | The Appam, 234 F. 389[387] | 1916 | E.D. Va. | Waddill |
| 94 | The Kaiser Wilhelm II, 246 F. 786 | 1917 | 3d Cir. | Buffington |
| 95 | The Kongsli, 252 F. 267 | 1918 | D. Me. | Hale |
| 96 | Watts, Watts & Co. v. Unione Austriaca di Navigazione, 248 U.S. 9 | 1918 | U.S. | Brandeis |
| 97 | The Rindjani, 254 F. 913 | 1919 | 9th Cir. | Ross |
| 98 | The Hanna Nielsen, 273 F. 171 | 1921 | 2d Cir. | Hough |
| 99 | The Iquitos, 286 F. 383 | 1921 | W.D. Wash. | Neterer |
| 100 | The City of Norwich, 279 F. 687 | 1922 | 2d Cir. | Rogers |
| 101 | José Taya's Sons Co., of New Orleans v. Compania Arrendataria de Tobacos de Espana, 280 F. 825 | 1922 | 2d Cir. | Mayer |
| 102 | The Eemdyjk, 286 F. 385 | 1923 | W.D. Wash. | Neterer |
| 103 | The Gunny, 1923 A.M.C. 425 | 1923 | E.D. La. | Foster |
| 104 | The Sarpfos, 1924 A.M.C. 347 | 1923 | E.D.N.Y. | Campbell |

387 *Aff'd sub nom.* The Steamship Appam, 243 U.S. 124 (1917).

| | **Case Name and Citation** | **Year** | **Court** | **Judge (if identified)** |
|---|---|---|---|---|
| 105 | Dominion Combing Mills, Ltd. v. Canadian Pac. Ry. Co., 300 F. 992 | 1924 | E.D.N.Y. | Garvin |
| 106 | The Hallgrim, 1924 A.M.C. 1401 | 1924 | E.D.N.Y. | Campbell |
| 107 | The Bifrost, 8 F.2d 361 | 1925 | E.D. La. | Burns |
| 108 | Compagnie Francaise de Navigation a Vapeur v. Bonnasse, 15 F.2d 202 | 1925 | S.D.N.Y. | A. Hand |
| 109 | Elman v. Moller, 11 F.2d 55 | 1926 | 4th Cir. | Rose |
| 110 | The Thorgerd, 11 F.2d 971 | 1926 | E.D.N.Y. | Inch |
| 111 | Christie v. Carlisle, 11 F.2d 659 | 1926 | E.D. La. | Hale |
| 112 | The Seirstad, 12 F.2d 133 | 1926 | E.D.N.Y. | Moscowitz |
| 113 | Heredia v. Davies, 12 F.2d 500 | 1926 | 4th Cir. | Parker |
| 114 | The Cambitsis, 14 F.2d 236 | 1926 | E.D. Pa. | Thompson |
| 115 | The Ferm, 15 F.2d 887 | 1926 | E.D.N.Y. | Moscowitz |
| 116 | The Fredensbro, 18 F.2d 983 | 1927 | E.D. Pa. | Thompson |
| 117 | The Sneland I, 19 F.2d 528 | 1927 | E.D. La. | Burns |
| 118 | The Falco, 20 F.2d 362 | 1927 | 2d Cir. | L. Hand |
| 119 | Danielsen v. Entre Rios Rys. Co., 22 F.2d 326 | 1927 | D. Md. | Coleman |
| 120 | The Hanna Nielsen, 25 F.2d 984 | 1928 | W.D. Wash. | Cushman |
| 121 | The Knappingsborg, 26 F.2d 935 | 1928 | E.D.N.Y. | Campbell |

| | **Case Name and Citation** | **Year** | **Court** | **Judge (if identified)** |
|---|---|---|---|---|
| 122 | Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd Brasileiro, 27 F.2d 1002 | 1928 | E.D.N.Y. | Inch |
| 123 | Charter Shipping Co. v. Bowring, Jones & Tidy, Ltd., 281 U.S. 515 | 1930 | U.S. | Stone |
| 124 | The Canadian Commander, 43 F.2d 857 | 1930 | E.D.N.Y. | Moscowitz |
| 125 | The Sonderborg, 47 F.2d 723 | 1931 | 4th Cir. | Northcott |
| 126 | The Beaverbrae, 60 F.2d 363 | 1931 | E.D.N.Y. | Campbell |
| 127 | Wittig v. Canada S.S. Lines, Ltd., 59 F.2d 428 | 1932 | W.D.N.Y. | Knight |
| 128 | The Tricolor, 1 F. Supp. 934[388] | 1932 | S.D.N.Y. | Goddard |

388 *Aff'd sub nom.* U.S. Merchs.' & Shippers' Ins. Co. v. A/S Den Norske Afrika Og Australie Line, 65 F.2d 392 (2nd Cir. 1933).