

DEFERRING TO FOREIGN COURTS

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ABSTRACT

Federal judges have too many options for deferring to foreign courts, none of them particularly good. Not only have judges developed at least five different bases for declining to hear transnational cases, but the use of these bases also varies significantly from circuit to circuit. The courts of appeals have split over whether to recognize foreign relations abstention or prudential exhaustion, and they have developed different tests for assessing foreign parallel proceedings. Even with forum non conveniens, where the Supreme Court has provided clearer guidance, circuit practice has diverged. Thus in two recent transnational tort cases stemming from the Fukushima nuclear disaster in Japan, a district court in the First Circuit dismissed on a discretionary basis that a district court in the Ninth Circuit had rejected, while the district court in the Ninth Circuit dismissed on a discretionary basis not yet recognized by the First Circuit.

This Article uses the Fukushima cases as an opportunity to step back and assess the full range of federal judge-made doctrines for deferring to foreign courts. Its primary aim is to provide a practical roadmap for judges and litigants, one that surveys inter-circuit variation, identifies best practices, and suggests doctrinal refinements. It proposes an updated and simplified rubric for forum non conveniens, a consolidated approach to foreign parallel proceedings, and a distinct doctrine for deference to foreign bankruptcies. It also argues for rejecting prudential exhaustion and abstention based on foreign relations concerns, and it encourages judges to analyze questions of judgment recognition and the extraterritorial application of federal statutes without resorting to loose invocations of “abstention” or “international comity.” Judicial deference to foreign courts is sometimes necessary, but it need not be muddled or haphazard.

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INTRODUCTION

In the spring of 2020, both the First Circuit and the Ninth Circuit affirmed dismissals of tort cases arising out of the 2011 Fukushima Daiichi Nuclear Power Plant disaster in Japan. Though the outcome was the same, the courts got there by invoking different, highly discretionary doctrines. In the First Circuit case, *Imamura v. General Electric Co.*, Japanese plaintiffs who lived near the Fukushima power plant sued General Electric, which had designed, constructed, and helped maintain the plant’s boiling water reactors, in General Electric’s home state of Massachusetts.¹ That case was dismissed for forum non conveniens, a doctrine focused on “considerations of [party] convenience and judicial efficiency.”² In the Ninth Circuit case, *Cooper v. Tokyo Electric Power Co. Holdings*, U.S. servicemembers who were serving in a humanitarian mission at the time of the meltdown sued Tokyo Electric Power Company (TEPCO), the operator of the plant.³ That case, brought in California where many of the plaintiffs were stationed, was dismissed for “[i]nternational comity . . . abstention,” a new Ninth Circuit doctrine that

¹ *Imamura v. Gen. Elec. Co. (Imamura II)*, 957 F.3d 98, 101 (1st Cir. 2020).

² *Imamura v. Gen. Elec. Co. (Imamura I)*, 371 F. Supp. 3d 1, 15 (D. Mass. 2019) (quoting *Iragorri v. Int’l Elevator, Inc.*, 203 F.3d 8, 12 (1st Cir. 2000)).

³ *Cooper v. Tokyo Elec. Power Co. (Cooper V)*, 960 F.3d 549, 554 (9th Cir. 2020).

permits abstention “where the issues to be resolved are ‘entangled in international relations.’”⁴

But these dismissals were not really about defendant inconvenience or international relations: General Electric was sued in its home forum in *Imamura*,⁵ while *Cooper* was dismissed despite the Executive Branch’s preference for retaining jurisdiction.⁶ Rather, what appeared to motivate the judges in both cases was Japan’s decision to channel all liability to a single defendant (TEPCO), which it had made strictly liable for the disaster and for which it was largely footing the bill.⁷ In other words, Japan had particularly strong interests in adjudicating these cases: not only was the disaster a matter of major national importance, implicating government decisionmakers and primarily impacting Japanese citizens, and not only would Japanese law apply even if the cases were heard in California or Massachusetts,⁸ but Japan was also bankrolling an effort to resolve millions of claims as part of a trade-off it had made decades earlier to further a particular governmental policy (that of promoting nuclear power).⁹ The framing of both forum non conveniens and international comity abstention forced the U.S. judges to address these valid adjudicatory interests indirectly, channeled through factors that shifted emphasis to convenience or politics and required some creative justifications.

This Article uses the Fukushima cases as an opportunity to step back and take stock of the grounds on which federal courts may decline their jurisdiction in transnational cases.¹⁰ For simplicity, I refer to these doctrines

4 *Cooper v. Tokyo Elec. Power Co. (Cooper IV)*, No. 12cv3032, 2019 WL 1017266, at *13 (S.D. Cal. Mar. 4, 2019) (quoting *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237 (11th Cir. 2004)).

5 See *Imamura II*, 957 F.3d at 104 (“GE maintains its corporate headquarters and principal place of business in Boston, Massachusetts.”).

6 See *Cooper IV*, 2019 WL 1017266, at *14 (noting the U.S. State Department submitted an amicus brief supporting the U.S. court retaining jurisdiction).

7 See, e.g., *Imamura II*, 957 F.3d at 102–03 (explaining Japan’s Act on Compensation for Nuclear Damage and the channels of relief for victims of the Fukushima disaster). As of early 2019, TEPCO—with the significant assistance of the Japanese Government—had already paid more than \$75 billion to resolve claims through mediation, settlement, and litigation. See *id.* at 103 (noting TEPCO paid out ¥8.721 trillion to victims).

8 *Cooper IV*, 2019 WL 1017266, at *12; *Imamura I*, 371 F. Supp. 3d at 14; see also *infra* note 103 (discussing Massachusetts choice of law).

9 *Imamura I*, 371 F. Supp. 3d 1, 14 (D. Mass. 2019) (noting this plan was “key for ensuring that companies are willing to enter the nuclear power business in Japan and citizens are adequately compensated when something goes wrong”).

10 My focus is entirely on the federal courts. My arguments draw on the limited scope of the Article III judicial power, as well as federal interests in providing forums for foreign parties and promoting international cooperation. State courts have developed their own doctrines regarding the management of transnational cases. See, e.g., William S. Dodge, *Presumptions Against Extraterritoriality*

of negative adjudicative comity as forms of transnational abstention given that they are all “judicially created doctrines under which federal courts may choose to decline to exercise their jurisdiction over cases otherwise appropriately before them.”¹¹ This category includes the doctrine of forum non conveniens, the various tests employed by the federal circuits to defer to foreign parallel proceedings,¹² deference to foreign bankruptcy proceedings, prudential exhaustion requirements, and foreign relations abstention. The use of these abstention doctrines varies significantly across the federal circuits, which have developed different tests for forum non conveniens and foreign parallel proceedings, as well as different understandings of what exactly “international comity abstention” means.¹³ The version of international comity abstention applied in *Cooper*, for example, has only been recognized by the Ninth and Eleventh Circuits, while the Third Circuit has rejected it;¹⁴ the Supreme Court seemed poised to resolve that circuit split last Term, but then managed to avoid the question (again).¹⁵

in State Law, 53 U.C. DAVIS L. REV. 1389, 1401–13 (2020) (charting differences in how states address extraterritorial application of state law).

11 William P. Marshall, *Abstention, Separation of Powers, and Recasting the Meaning of Judicial Restraint*, 107 NW. U. L. REV. 881, 883 (2013).

12 The Supreme Court has at times suggested that the label of “abstention” is limited to just a handful of domestic doctrines (which does not include *Colorado River*). See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 722–23 (1996) (distinguishing forum non conveniens from the formal abstention doctrines even though they share the “similar premise” of federal courts “relinquish[ing] their jurisdiction in favor of another forum”). I am purposefully invoking “abstention” to refer more broadly to a type of procedural move—the “relinquish[ing]” of the federal courts’ otherwise valid jurisdiction “in favor of another forum”—that is common across the formal abstention doctrines, *Colorado River* deference, and the transnational doctrines gathered here. I do so because the separation of powers concern that underlays *Quackenbush* and motivates this Article’s reform proposals applies whenever federal courts voluntarily abdicate their jurisdiction, regardless of the lines of precedent on which they rely.

13 See Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 312 (2002) (noting variation across federal courts in their treatment of forum non conveniens); Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63, 96–108 (2019) (discussing variation in how the federal circuits define international comity abstention and address foreign parallel proceedings); see also *infra* Part II (discussing intercircuit variation).

14 Compare *Mujica v. Aircan Inc.*, 771 F.3d 580, 615 (9th Cir. 2014) (abstaining in a suit brought against two U.S. corporations over civilian bombings in Columbia), and *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1240 (11th Cir. 2004) (abstaining in a Holocaust restitution case), with *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 394 (3d Cir. 2006) (declining to follow *Ungardo-Benages* in another Holocaust restitution case).

15 See *Federal Republic of Germany v. Philipp*, No. 19-351, slip op. at 15–16 (Feb. 3, 2021) (“We do not address Germany’s argument that the District Court was obligated to abstain from deciding the case on international comity grounds.”). This was not the first time the Court has avoided addressing the existence (much less the contours) of international comity abstention. See Gardner, *supra* note 13, at 65 & n.2 (discussing *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018), and *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993)).

In short, federal doctrines of transnational abstention remain uncertain and undertheorized twenty years after Professor Stephen Burbank published the article on which this *festschrift* contribution builds. In *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in International Law*, Professor Burbank used the ill-fated negotiations over a judgments-and-jurisdiction treaty to propose domestic reforms for forum non conveniens, *lis alibi pendens*, and antisuit injunctions.¹⁶ Particularly given the context of treaty negotiations, his focus was on legislative reform. But Congress continues to show little interest in legislating transnational procedure, perhaps dissuaded by cries of state prerogatives or distracted by the more exciting business of unilaterally undermining sovereign immunity for a select set of transnational cases.¹⁷ And while a judgments convention has now been achieved, paving the way for renewed negotiations regarding a jurisdictional addendum,¹⁸ it is hard to imagine Congress turning to such relatively low-profile issues in the near term. For now, any salvation (to borrow Professor Kevin Clermont's contemporaneous turn of phrase) will have to come from the courts themselves, working through the fragmented, gradual and imperfect process of common law decisionmaking.¹⁹ In updating Professor Burbank's prescriptions for doctrines of jurisdictional equilibration, then, this Article focuses on what the lower federal courts can and are doing on their own. It treats the federal circuits as true laboratories of innovation, with some experiments that have failed, but also some that have worked. Its practical

¹⁶ Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMPAR. L. 203 (2001) [hereinafter Burbank, *Jurisdictional Equilibration*]. This Article also draws on Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 HOUS. J. INT'L L. 385 (2004) [hereinafter Burbank, *Paths to a Via Media*], and owes a significant debt to Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89 (1999) (arguing that negotiations over the original judgments convention could inspire much-needed reform within domestic U.S. procedure).

¹⁷ On Congress's support of terrorism-related transnational litigation, see Aaron D. Simowitz, *Defining Daimler's Domain: Consent, Jurisdiction, and the Regulation of Terrorism*, 55 WILLAMETTE L. REV. 576, 586–88 (2020). On misdirected invocations of federalism as blocking national legislation, see Stephen B. Burbank, *A Tea Party at The Hague?*, 18 SW. J. INT'L L. 629, 642–43 (2012) and Stephen B. Burbank, *Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States*, 2 J. PRIV. INT'L L. 287, 287 (2006) (discussing possible implementation of the Hague Choice of Courts Convention).

¹⁸ A judgments treaty was achieved in part by setting aside the jurisdictional questions, which would include Professor Burbank's doctrines of jurisdictional equilibration. Those questions are now the subject of renewed negotiations. See generally Eva Jueptner, *The Hague Jurisdiction Project—What Options for The Hague Conference?*, 16 J. PRIV. INT'L L. 247 (2020).

¹⁹ Indeed, the one piece of jurisdictional salvation to emerge from the last round of negotiations in the Hague was arguably Justice Ginsburg's opinion in *Daimler AG v. Bauman*, 571 U.S. 117, 137–38 (2014), in which the Court laid to rest the U.S. practice of “doing business” jurisdiction.

goal is to help identify the successful experiments and to defend the wider adoption of those experiments in lieu of more problematic ones.

In building that roadmap, I start from the understanding that abstention is generally disfavored because it impinges on Congress's authority to define the jurisdiction of the federal courts.²⁰ That initial presumption is critical because the judicial power to decline jurisdiction, if widely invoked or loosely applied, can impede Congress's efforts to provide forums for certain litigants or to provide relief for particular wrongs. In an era of judge-led procedural retrenchment,²¹ federal judges should be wary of further restricting Congress's powers via discretionary judge-made doctrines. Yet instead of narrowing those safety valves, the lower federal courts have been creating new bases for abstention in transnational cases. From the perspective of Congress and state legislators, this expanding discretion in the lower courts further displaces their ability to decide what rights can be vindicated and by whom.²²

To the extent that forum non conveniens reflects abstention from personal jurisdiction rather than (or in addition to) subject matter jurisdiction,²³ the need for such equilibration has decreased significantly since *Gulf Oil Co. v. Gilbert*.²⁴ Since it first recognized the doctrine of forum non conveniens in *Gulf Oil*, the Supreme Court has curtailed the use of attachment jurisdiction²⁵ and "doing business" jurisdiction.²⁶ It has also added reasonableness factors to the personal jurisdiction analysis²⁷ and

²⁰ See, e.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (noting the federal courts' "strict duty to exercise the jurisdiction that is conferred upon them by Congress"); *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358 (1989) ("Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred."); *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.").

²¹ See, e.g., Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1580 (2014) (observing the Supreme Court has had "greater success in the enterprise of litigation reform" than Congress).

²² Congress has shown recent interest, for example, in encouraging transnational litigation. See, e.g., Aaron D. Simowitz, *The Private Law of Terror*, 125 PENN ST. L. REV. 159, 194–96 (2021) (describing several congressional statutes adopted over the last five years aimed at enabling terrorism-related lawsuits brought by private parties).

²³ Professor William Dodge has brought this possible distinction to my attention.

²⁴ 330 U.S. 501 (1947).

²⁵ *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977).

²⁶ *Daimler AG v. Bauman*, 571 U.S. 117, 138–39 (2014) (limiting general, or all-purpose, jurisdiction to the forum in which the defendant is "at home").

²⁷ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985).

signaled in recent years an interest in cabining specific jurisdiction.²⁸ As the Court narrows the constitutionally permissible scope of personal jurisdiction (for better or for worse), there should be less need for jurisdictional safety valves like *forum non conveniens* that enable case-by-case correction for exorbitant jurisdictional claims.²⁹

In gathering best practices and potential reforms, I also favor simpler tests for two reasons. First, in practical terms, unnecessarily complex tests can make the work of judging harder as judges strain to interpret and apply unhelpful or repetitive factors. Second, that practical difficulty in applying needlessly complex or outdated tests can encourage heuristics to accumulate within a doctrine, leading to distortions in the doctrine and thus in case outcomes over time.³⁰ Favoring simpler tests means excising redundant factors, updating anachronistic factors, specifying vague factors, and clarifying (or dropping) ill-fitting factors.

Tests are also easier to apply when they address directly the questions that judges are struggling to answer. The Fukushima cases illustrate that current doctrines of transnational abstention inadequately address the problem of competing adjudicatory interests.³¹ I purposefully use the term “adjudicatory interests” in contrast to the more familiar term of “regulatory interests.” Regulatory (or prescriptive) interests relate to a sovereign’s interest in having its law applied to the parties’ conduct. Regulatory interests are already addressed through choice of law and various related doctrines (including the presumption against extraterritoriality,³² the admittedly vague

²⁸ See, e.g., *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1781 (2017) (rejecting a sliding scale approach to determining minimum contacts).

²⁹ See, e.g., Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 431 (2017) (“Eliminate exorbitant bases of jurisdiction, and the need for *forum non conveniens* . . . is largely eliminated as well.”); see also Clermont, *supra* note 16, at 120 (“The main function of *forum non conveniens* is to mitigate the abuses of exorbitant jurisdiction . . .”). For a fuller discussion of exorbitant jurisdiction, see generally Kevin M. Clermont & John R. B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 474–82 (2006).

³⁰ Cf. Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941, 958–67 (2017) (describing process by which heuristics can develop in and distort procedural doctrines).

³¹ Cf. CAMPBELL MCLACHLAN, *LIS PENDENS IN INTERNATIONAL LITIGATION* 89 (2009) (arguing for greater attention to “conflict of litigation” as distinct from “conflict of laws”); Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 569 (2007) (arguing that *forum non conveniens* should “focus on adjudicatory rather than regulatory interests”).

³² See generally William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582 (2020) (describing recent developments in the Supreme Court’s treatment of the presumption).

concept of “unreasonable interference,”³³ and the now-outdated Section 403 factors,³⁴ which were based on the *Timberlane* factors³⁵). But just because a sovereign has a greater interest in regulating conduct or having its law applied to a dispute does not always mean it has a greater interest in itself doing the applying.³⁶ Because federal courts are able and willing to apply foreign law when appropriate, they should abstain in favor of foreign courts primarily when the foreign sovereign has a greater interest in itself *adjudicating* the dispute. Thus this Article’s roadmap to transnational abstention highlights potential reforms that would help shift the focus of these doctrines away from party or judicial convenience and towards the evaluation of specific adjudicatory interests.

What, then, are specific adjudicatory interests? All else being equal, sovereigns have adjudicatory interests in resolving disputes involving their citizens or residents and in applying their own laws. If those connections are entirely absent in the United States but exist for another sovereign, that sovereign most likely has a greater interest in adjudicating the dispute. Sovereigns also have an adjudicatory interest in protecting the exercise of jurisdiction by their courts. This protective interest might arise in a range of circumstances: in maintaining exclusive jurisdiction over a particular *res*, for example, or in avoiding duplicative litigation in other forums, or in consolidating interrelated claims (like in bankruptcy) before one decisionmaker. This protective interest might also arise when a sovereign is attempting to resolve many similar claims consistently if that effort would be

³³ See *F. Hoffmann-La Roche Ltd. v. Empagran S. A.*, 542 U.S. 155, 164 (2004) (“[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.”).

³⁴ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (AM. L. INST. 1987) (listing eight factors to consider when determining whether a state’s exercise of jurisdiction over a person or activity is unreasonable). The new *Restatement (Fourth) of the Foreign Relations Law of the United States* has retired § 403. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 405 rep. n.6 (AM. L. INST. 2018) (noting that § 403 has been replaced with the concept of “unreasonable inference” as a tool of statutory interpretation).

³⁵ See *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614–15 (9th Cir. 1976) (identifying seven factors for evaluating when “the contacts and interests of the United States are sufficient to support” the extraterritorial application of U.S. law).

³⁶ Nevertheless, courts and commentators have at times elided the difference between the two ideas. See, e.g., *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 184–85 (2d Cir. 2016) (invoking “abstention” to consider whether Chinese and U.S. law conflict), *vacated on other grounds sub nom.* *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018); Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 16 & n.18 (2010) (arguing for resituating abstention in transnational cases around conflicts of law principles). But Professor Childress agrees that adjudicative comity analysis should focus on governmental interests and should start with a strong presumption in favor of U.S. adjudication. *Id.* at 66.

undermined by piecemeal litigation in other forums. This was the animating concern in the Fukushima cases, and perhaps also in other transnational cases in which federal courts have struggled to explain their abstention decisions under current doctrine.³⁷

Part I uses the dismissals in *Imamura* and *Cooper* to illustrate how two doctrines of transnational abstention—forum non conveniens and international comity abstention—are not asking the right questions. As a result, judges are tempted to expand the scope of these doctrines to accommodate the cases they are confronting, an expansion that is in tension with the courts’ “virtually unflagging obligation” to exercise their jurisdiction. Turning from critique to prescription, Part II provides a practical roadmap to transnational abstention for judges and litigants. It draws on the work of the lower federal courts to highlight best practices while also proposing some additional reforms. In particular, it maps an updated and refined doctrine of forum non conveniens³⁸ and articulates a uniform doctrine for deferring to foreign parallel proceedings. It also recommends rejecting abstention based on foreign relations concerns or prudential exhaustion, and it warns against invoking “abstention” to address issues of preclusion or statutory interpretation. The roadmap also describes the use of abstention to defer to foreign insolvency proceedings but notes that such use has been largely displaced by Congress’s adoption of a multilateral model law.

Such multilateral coordination, implemented through national legislation, should continue to be the end goal for other doctrines of transnational abstention. In the meantime, the federal courts can lay the groundwork for future treaties and legislative compromises by working to rationalize and simplify the many judge-made doctrines of transnational abstention. In doing so, they will also demonstrate greater fealty to the choices Congress makes regarding the work assigned to the federal courts.

³⁷ See *infra* subsection II.A.3 (discussing cases). Note there is some overlap between these protective factors and the factors federal judges consider when weighing antisuit injunctions. See GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 561–71 (6th ed. 2018) (summarizing federal caselaw on antisuit injunctions). In other words, if federal courts might need to enjoin foreign litigation in order to protect their own jurisdiction, they may wish to recognize—and defer to—the similar interests of foreign tribunals.

³⁸ I have previously argued for forum non conveniens to be retired. See Gardner, *supra* note 29. As I acknowledged there, however, that option is not a feasible one for the lower courts. See *id.* at 444–60 (describing intermediate reforms). Updating the doctrine’s focus and factors would make the doctrine much more useful. Cf. Burbank, *Jurisdictional Equilibration*, *supra* note 16, at 236 (acknowledging the need for a doctrine like forum non conveniens but arguing for an updated and simplified version).

I. A TALE OF TWO DISMISSALS

On March 11, 2011, a 9.0-magnitude earthquake struck Japan, triggering a 45-foot tsunami and a humanitarian disaster.³⁹ The tsunami “flooded the [Fukushima Daiichi] plant, disabled the generators, and destroyed the emergency cooling pumps,” such that the plant’s cooling systems could no longer work properly.⁴⁰ The plant started leaking radiation that same day;⁴¹ four days after the tsunami, the plant’s nuclear reactors exploded.⁴² Although the Japanese Government had evacuated those near the plant, the nuclear disaster made the surrounding communities uninhabitable, forcing more than 1700 businesses to close and contaminating the soil and fish stock of the region.⁴³ A commission investigating the meltdown on behalf of the Japanese Government “determined that the meltdown was foreseeable in light of the known tsunami risks in the region,” making it a “manmade” disaster.⁴⁴

Japan’s 1961 Act on Compensation for Nuclear Damage limits liability to just the plant’s operator (in this case, TEPCO), but it also makes the operator strictly liable for all damages proximately caused by the disaster, with no upper limit.⁴⁵ Claimants may choose among three avenues of redress: seeking reimbursement for loss directly from TEPCO, for which payment is based on uniform guidelines; mediating claims through the Nuclear Damage Claim Dispute Resolution Center; or filing a lawsuit against TEPCO in the Japanese courts.⁴⁶ These avenues are not mutually exclusive; a claimant might submit a direct claim to TEPCO and request mediation at the same

³⁹ *Imamura I*, 371 F. Supp. 3d 1, 4 (D. Mass. 2019). More than 15,000 people died from the initial earthquake and tsunami. *Cooper v. Tokyo Elec. Power Co. (Cooper III)*, 860 F.3d 1193, 1197 (9th Cir. 2017). The account that follows is drawn from the judicial decisions, which were themselves careful to note that they were relying on the allegations in the plaintiffs’ complaints, which must be taken as true at the motion to dismiss stage. *See, e.g., Cooper III*, 860 F.3d at 1197 n.1; *Imamura I*, 371 F. Supp. 3d at 3. As I have myself argued, one should tread carefully when relying on judicial opinions to establish facts, Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1638–45 (2020), especially when those judicial opinions did not themselves purport to determine those facts. *See* Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 652–57 (2015) (urging attention to the standards of review employed in judicial opinions). The following account, however, is generally not in dispute, and the analysis that follows does not turn on factual circumstances other than the parameters of the dispute resolution procedures in Japan, which are set by Japanese law.

⁴⁰ *Imamura I*, 371 F. Supp. 3d at 4.

⁴¹ *Cooper III*, 860 F.3d at 1197.

⁴² *Imamura II*, 957 F.3d 98, 102 (1st Cir. 2020).

⁴³ *Imamura I*, 371 F. Supp. 3d at 4–5.

⁴⁴ *Cooper III*, 860 F.3d at 1198.

⁴⁵ *Imamura II*, 957 F.3d at 102. There is a ten-year statute of limitations, however, which ran in 2021. *Id.*

⁴⁶ *Imamura I*, 371 F. Supp. 3d at 5; *Imamura II*, 957 F.3d at 102.

time, or might pursue a direct claim first and, if unsatisfied with the result, pursue litigation after.⁴⁷ By early 2019, TEPCO had paid approximately ¥8.721 trillion (or roughly \$83.5 billion) to claimants, dwarfing its mandated ¥120 billion insurance policy.⁴⁸ The Japanese Government, through direct aid and government bonds, has already provided TEPCO with more than ¥8 trillion to pay claims.⁴⁹ More than 400 lawsuits, 24,000 mediations, and 2,000,000 direct claims were filed in Japan by 2019.⁵⁰ Some individuals and businesses harmed by the disaster, however, brought their claims in U.S. courts instead.

In *Imamura*, Japanese individuals and businesses from Fukushima Prefecture sought to represent “classes includ[ing] as many as 150,000 citizens and hundreds of businesses” that suffered property damage and economic harm from the disaster.⁵¹ They sued General Electric in its home jurisdiction of Massachusetts, alleging negligence, property damage, and other tort claims under both Massachusetts and Japanese law.⁵² Judge Patti Saris of the District of Massachusetts dismissed their complaint for forum non conveniens in April 2019,⁵³ which the First Circuit affirmed a year later in an opinion written by Judge Juan Torruella.⁵⁴

In *Cooper*, hundreds of U.S. servicemembers who had participated in a humanitarian relief effort after the earthquake and tsunami sued TEPCO in the Southern District of California.⁵⁵ They initially alleged that TEPCO had mislead the public and the U.S. military regarding radiation risks,⁵⁶ but Judge Janis Sammartino dismissed the complaint as raising a nonjusticiable political question.⁵⁷ The plaintiffs then recast their claims as asserting TEPCO’s negligence “in the siting, design, construction, and operation” of the plant.⁵⁸ That reframing, the court concluded, avoided the political

47 *Imamura I*, 371 F. Supp. 3d at 5–6.

48 *Imamura II*, 957 F.3d at 103.

49 *Id.*

50 *Id.* In October 2020, a Japanese court awarded nearly 3,600 Japanese plaintiffs \$9.6 million in a suit against both TEPCO and the Japanese Government. Anthony Kuhn, *Landmark Court Ruling in Japan Holds Government Accountable for 2011 Nuclear Meltdown*, NPR, (Oct. 15, 2020, 4:06 PM), <https://www.npr.org/transcripts/924150284> [<https://perma.cc/VNV3-4ULE>].

51 *Imamura II*, 957 F.3d at 104. The complaint was filed in November 2017. *Id.*

52 *Imamura I*, 371 F. Supp. 3d at 6.

53 *Id.* at 15.

54 *Imamura II*, 957 F.3d at 101. Judges Lynch and Kayatta joined the unanimous decision. *Id.*

55 *Cooper V*, 960 F.3d 549, 554 (9th Cir. 2020).

56 *Cooper III*, 860 F.3d 1193, 1197 (9th Cir. 2017); *Cooper v. Tokyo Elec. Power Co. (Cooper I)*, 990 F. Supp. 2d 1035, 1037 (S.D. Cal. 2013).

57 *Cooper I*, 990 F. Supp. 2d at 1040, 1042.

58 *Cooper v. Tokyo Elec. Power Co. (Cooper II)*, 166 F. Supp. 3d 1103, 1114 (S.D. Cal. 2015).

question problem.⁵⁹ The court also declined to dismiss the amended complaint for forum non conveniens or international comity abstention,⁶⁰ and the Ninth Circuit affirmed on interlocutory appeal.⁶¹ When the case returned to the district court, Judge Sammartino dismissed newly added claims against General Electric, reasoning that Japanese law applied and barred any claims against General Electric arising out of the disaster.⁶² She then reconsidered her prior ruling, as the Ninth Circuit had invited her to do, and ultimately dismissed the claims against TEPCO based on international comity abstention.⁶³ In May 2020, the Ninth Circuit affirmed.⁶⁴

I do not take issue with the dismissals, as sympathetic as I find the plaintiffs, but I do take issue with the doctrinal tools available to the judges for reaching that outcome. This Part critiques the doctrines of forum non conveniens and international comity abstention as they are currently framed and as they were applied in these cases. While both doctrines provide judges with ample discretion to dismiss cases like these, they lack good analytical guidelines for justifying those decisions. As the next Part will argue, the lower federal courts could refine these and other doctrines for transnational cases to make them fit better the questions that judges are confronting.

A. *The Forum Non Conveniens Dismissal*

Forum non conveniens, as used by the federal courts, has come to focus primarily on private interests and party convenience. Between changing technology and changing personal jurisdiction doctrine, however, that focus is increasingly out-of-date.⁶⁵ Instead, the public interest factors—interests that are more keyed to sovereigns’ adjudicatory interests—should now be driving the analysis. Yet those public interest factors are so poorly articulated that courts have not been sure what to make of them, resulting in divergent understandings of what interests should be included. That divergence is illustrated by the contrast between the forum non conveniens analyses in *Imamura* and *Cooper*.⁶⁶

⁵⁹ *Id.* at 1115.

⁶⁰ *Id.*

⁶¹ *Cooper III*, 860 F.3d at 1217.

⁶² *Cooper IV*, No. 12cv3032, 2019 WL 1017266, at *1, 9–10 (S.D. Cal. Mar. 4, 2019).

⁶³ *Id.* at *13–15.

⁶⁴ *Cooper V*, 960 F.3d 549, 569 (9th Cir. 2020).

⁶⁵ I sketch this argument in subsection I.A.1, but I develop it at greater length in Gardner, *supra* note 29.

⁶⁶ See *infra* subsection I.A.2.

1. The Evolution of Forum Non Conveniens

Understanding why the federal test for forum non conveniens is out of step with its current use requires a brief review of the doctrine's evolution. The Scottish and English courts developed the doctrine in the late 1800s and early 1900s to prevent extreme hardship for defendants who were ensnared by exorbitant bases of jurisdiction,⁶⁷ such as the attachment of property unrelated to the dispute⁶⁸ or the fleeting presence of a defendant who lived on the other side of the world⁶⁹ and who would be required to travel insuperable distances in an era when they had to physically haul their evidence with them.⁷⁰ When the Supreme Court adopted forum non conveniens in 1947, it was focused on a different problem: that of federal venue selection in the absence of a mechanism for transferring cases between federal courts. The Court thus articulated a test that drew on the Scottish experience but added concerns for internal judicial administration, like docket congestion and the challenge of “untangl[ing] problems in conflict of laws.”⁷¹

All of these problems—exorbitant jurisdiction, the infeasibility of long-distance litigation, the need for venue transfer within the federal system—have now either been solved⁷² or significantly ameliorated.⁷³ When the Court returned to forum non conveniens in *Piper Aircraft Co. v. Reyno* in 1981, its decision was not about the vexation of distant defendants or the division of

⁶⁷ See Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 909–11 (1947) (chronicling the development of the doctrine by Scottish courts).

⁶⁸ See, e.g., *Williamson v. Ne. Ry. Co.* (1884) 11 R 596, 599 (Scot.) (opinion of Lord Young) (worrying about “actions by domiciled citizens against foreigners . . . founded on arrestments of small sums of money or articles of small value, when the circumstances out of which the action has arisen have no connection whatever with this country”); ANDREW DEWAR GIBB, *THE INTERNATIONAL LAW OF JURISDICTION IN ENGLAND AND SCOTLAND* 224–25 (1926) (asserting that the Scottish courts were more amenable to pleas of forum non conveniens when jurisdiction was founded on attachment).

⁶⁹ See, e.g., *Egbert v. Short* [1907] 2 Ch 205 at 210, 212 (Eng.) (granting dismissal for forum non conveniens while emphasizing that defendant was served while on vacation in England, shortly before his return to India).

⁷⁰ *Id.* at 211–12 (worrying about the “grievous injustice” that would befall the defendant if he were required to defend in England); *Logan v. Bank of Scot.* (No. 2) [1906] 1 KB 141 at 152–53 (Eng.) (worrying about harassment of defendant bank if “their officials [are] dragged up to London for a lengthy trial, . . . and when together with their officials they would have to bring up here, and keep away from their business, numerous other witnesses with a mass of books, papers and documents”).

⁷¹ See *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508–09 (1947).

⁷² See 28 USC § 1404 (providing for venue transfer).

⁷³ See *supra* text accompanying notes 25–29 (discussing *Shaffer* and *Daimler* as curtailing exorbitant jurisdiction); see also, e.g., Davies, *supra* note 13, at 324–51 (noting how advances in technology have reduced the difficulties of international litigation); Gardner, *supra* note 29, at 408–15 (noting the same).

labor among the federal courts; to the contrary, the case had already been transferred under 28 U.S.C. § 1404 to one of the defendants' home forum.⁷⁴

Rather, *Piper* used forum non conveniens as a tool for policing plaintiff-side forum shopping.⁷⁵ In doing so, it broke from the original understanding of forum non conveniens in two important ways: first, the Scottish courts had used the doctrine to prevent injustice, not just to make litigation easier.⁷⁶ “Forum non conveniens” does not translate to “inconvenient forum,” but to “‘inappropriate’ or ‘unsuitable’ forum.”⁷⁷ *Piper*, however, leaned into the *faux ami* by identifying “the central purpose” of forum non conveniens as “ensur[ing] that the trial is convenient.”⁷⁸ Second, the original doctrine of forum non conveniens—whether applied by Scottish or English courts, U.S. state courts, or federal courts sitting in admiralty—was limited to cases involving nonresident defendants.⁷⁹ That again reflected the early use of the doctrine as a safety valve for exorbitant bases of personal jurisdiction, a concern that does not arise with local residents. Yet *Piper* applied forum non conveniens to dismiss a case involving just such a local defendant.⁸⁰

I am not a fan of *Piper*'s framing of forum non conveniens. But even accepting that framing, there is a mismatch between the doctrine's current use to police plaintiff-side forum shopping in transnational cases, on the one hand, and the *Gulf Oil* factors that federal courts still dutifully recite, on the other.

⁷⁴ 454 U.S. 235, 240–41 (1981); *cf. id.* at 262 (Stevens, J., dissenting) (characterizing the question as “whether the District Court correctly decided that Pennsylvania was not a convenient forum in which to litigate a claim against a Pennsylvania company that a plane was defectively designed and manufactured in Pennsylvania”).

⁷⁵ *See id.* at 252 n.18 (majority opinion) (listing reasons why foreign plaintiffs would prefer to litigate in U.S. courts). The Court was explicit that its concern about forum-shopping applied only to plaintiffs. *See id.* at 252 n.19 (“We recognize, of course, that [defendants] Piper and Hartzell may be engaged in reverse forum-shopping. However, this possibility ordinarily should not enter into a trial court's analysis of the private interests.”).

⁷⁶ *See, e.g.,* La Société du Gaz de Paris v. La Société Anonyme de Navigation “Les Armateurs Français” [1926] SC 13 (HL) 19 (appeal taken from Scot.) (opinion of Lord Shaw of Dunfermline) (stressing that “the mere balance of convenience is not enough” to justify dismissal). Just the year before it decided *Gulf Oil*, the Supreme Court had rejected the application of forum non conveniens in another diversity jurisdiction case because the case was not “vexatious or oppressive” in the sense emphasized by the English and Scottish authorities. *See Williams v. Green Bay & W.R. Co.*, 326 U.S. 549, 554 & n.4, 559 (1946).

⁷⁷ Gardner, *supra* note 29, at 414.

⁷⁸ *Piper*, 454 U.S. at 256. On the dangers posed by *faux amis*, see *Bodum USA, Inc., v. La Cafetière, Inc.*, 621 F.3d 624, 638–39 (7th Cir. 2010) (Wood, J., concurring).

⁷⁹ *See* Gardner, *supra* note 29, at 415–16. In rejecting an application of forum non conveniens shortly before *Gulf Oil*, the Court linked the necessary vexation and oppression to “[m]aintenance of a suit away from the domicile of the defendant” *Williams*, 326 U.S. at 554.

⁸⁰ *Piper*, 454 U.S. at 239.

2. *Application in Imamura v. General Electric Co.*

The need to update the *Gulf Oil* test is illustrated by the contrast between the forum non conveniens analyses in *Imamura* and *Cooper*. That *Imamura* was dismissed for forum non conveniens while *Cooper* was not is not in itself surprising, given the current state of the doctrine. First, the Supreme Court in *Piper* approved a lesser degree of deference to foreign plaintiffs' choice of a U.S. forum.⁸¹ That made it easier to dismiss *Imamura*, which was brought by foreign plaintiffs, than *Cooper*, which was brought by U.S. residents.⁸² Second, while *Gulf Oil*'s private interest factors are not particularly helpful in weighing modern-day inconveniences, they will ironically place greater emphasis on the burden that such discovery imposes on U.S. defendants like General Electric as compared to foreign defendants like TEPCO. When the defendant is based in the proposed alternative forum, like TEPCO was in *Cooper*, the court can require that defendant to produce the "foreign" evidence in its possession, a requirement made less burdensome by "the prevalence of electronic documents and current technology."⁸³ In contrast, when U.S. defendants like General Electric assert the need for transnational discovery, the evidence is less likely to be in the control of a party and thus will appear more burdensome to the court.⁸⁴

But the two district courts also applied the public interest factors differently, even though the public interests should have been similar in the two cases. The problem is the test: *Gulf Oil*'s list of public interest factors were not entirely clear in their original context and were not formulated with transnational litigation in mind. They thus require a fair amount of adaption to fit today's cases, leading to variation among lower courts. The factors

⁸¹ *Gulf Oil* starts from the premise that "unless the balance [of interests] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508 (1947). *Piper* suggested "that the presumption applies with less force when the plaintiff or real parties in interest are foreign." *Piper*, 454 U.S. at 255.

⁸² As the Ninth Circuit declared when affirming *Cooper II*, "Plaintiffs are U.S. citizens, and their decision to sue in the United States must be respected." *Cooper III*, 860 F.3d 1193, 1211 (9th Cir. 2017). That statement may sacrifice some accuracy for rhetorical flair: the relevant distinction is typically residency, not citizenship, see Maggie Gardner, "Foreignness", 69 DEPAUL L. REV. 469, 477 (2020), and the deference due U.S. residents is strong but not absolute, see *Piper*, 454 U.S. at 255 n.23.

⁸³ *Cooper II*, 166 F. Supp. 3d 1103, 1133–34 (S.D. Cal. 2015).

⁸⁴ See, e.g., *Imamura I*, 371 F. Supp. 3d 1, 12 (D. Mass. 2019) (finding the private interest factors favor granting General Electric's motion to dismiss because "many important documents relating to TEPCO's maintenance of the plant and the Japanese government's response to the disaster are not in the control of either party and are outside the reach of the Court" and because "[m]ost witnesses would be current and former TEPCO employees and officers, Japanese government officials, and Plaintiffs and their associates").

break down into three sets of considerations: administrative difficulties, choice of law, and local interest.⁸⁵ Taking those considerations in turn, *Imamura* applied the administrative difficulties factors fairly literally, focusing on “court congestion and burden” and finding that the proposed transnational class action would impose a “heavy burden” on the U.S. court.⁸⁶ *Cooper* instead found these factors to be “neutral” in part because it took a more comparative approach, noting that “litigating in Japan would [likewise] impose significant costs on the Japanese judicial system.”⁸⁷

Regarding choice of law, *Imamura* emphasized the difficulty of applying Japanese law; though it acknowledged that the “factor is not dispositive, as American courts often apply foreign law, it nevertheless points to dismissal.”⁸⁸ In *Cooper*, “the parties d[id] not address this factor,”⁸⁹ which is not surprising given the factor’s uncertain relevance in modern forum non conveniens caselaw. Reflecting that lack of attention, the court assumed that U.S. law would apply, a conclusion it would later reverse.⁹⁰

Finally, the courts interpreted the “local interest” factors differently.⁹¹ *Imamura* focused on what I would term the adjudicatory interests of Japan: the location of the disaster in Japan and its primary impact on Japanese citizens and businesses; Japan’s extensive investigation and criminal charges against TEPCO executives; Japan’s demonstrated “interest in determining how to allocate liability and compensation for [nuclear] disasters,” an “allocation [that] is key for ensuring that companies are willing to enter the nuclear power business in Japan and citizens are adequately compensated when something goes wrong”; and the “international consensus that a dispute over liability from nuclear disasters should be adjudicated in the country where it occurs,” as reflected in the Convention on Supplementary Compensation for Nuclear Disaster, which the United States has ratified and which Japan ratified after the Fukushima disaster.⁹² In short, the court

⁸⁵ For further discussion of the public interest factors, see subsection II.A.3 below.

⁸⁶ *Imamura I*, 371 F. Supp. 3d at 14–15.

⁸⁷ *Cooper II*, 166 F. Supp. 3d at 1136.

⁸⁸ *Imamura I*, 371 F. Supp. 3d at 14.

⁸⁹ *Cooper II*, 166 F. Supp. 3d at 1136. I explore further the courts’ different approaches to choice-of-law considerations in subsection II.A.3 below.

⁹⁰ *See id.* (“In all likelihood, the Court would be applying some version of U.S. law, be it maritime law, federal common law, or California state law.”); *see also Cooper IV*, No. 12cv3032, 2019 WL 1017266, at *11–12 (S.D. Cal. Mar. 4, 2019) (concluding instead that Japanese law would apply to the dispute).

⁹¹ *Compare Cooper II*, 166 F. Supp. 3d at 1135–36 (focusing on interests of the United States as dispositive), *with Imamura I*, 371 F. Supp. 3d at 14 (focusing on Japan’s interests as dispositive).

⁹² *Imamura I*, 371 F. Supp. 3d at 14.

recognized that “[a]djudicating this lawsuit in the United States would interfere with the system Japan has set up for handling nuclear disasters.”⁹³ In *Cooper*, by contrast, the court found Japan’s interests to be offset by the U.S. interest “in seeing that its service members are compensated for their injuries,” “[e]specially as it is the V.A. system and the U.S. taxpayers who will ultimately pay for the injuries to Plaintiffs.”⁹⁴ This emphasis on U.S. interests reflects Ninth Circuit precedent, which has cast the local interest factors as asking “only if there is an identifiable local interest in the controversy, not whether another forum also has an interest.”⁹⁵

The difference in how these courts understood the public interest factors may well have mattered. On remand from the Ninth Circuit, the district court in *Cooper* altered two of its underlying findings: First, once its attention was focused on the choice-of-law question, it concluded that Japanese law *would* apply.⁹⁶ And second, it reassessed Japan’s interests in the case, placing greater weight on Japan’s adjudicatory interest in corraling Fukushima-related cases into its remedial processes.⁹⁷ In particular, it noted “Japan’s interest in ensuring there is consistency in how plaintiffs are treated to guarantee there are ample funds to maintain [that] system.”⁹⁸ Note that these two findings—the applicability of Japanese law and Japan’s interest in a coordinated and consolidated response to the disaster—drove *Imamura*’s analysis of the public interest factors. Clearer guidance on how to apply the public interest factors might thus have altered *Cooper*’s forum non conveniens analysis in the first instance. Instead of revisiting that analysis, however, *Cooper* revisited its analysis of international comity abstention and ultimately dismissed the claims against TEPCO on that basis.⁹⁹

⁹³ *Id.*

⁹⁴ *Cooper II*, 166 F. Supp. 3d at 1136.

⁹⁵ *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1182 (9th Cir. 2006).

⁹⁶ *Cooper IV*, No. 12cv3032, 2019 WL 1017266, at *9 (S.D. Cal. Mar. 4, 2019). The district court applied California’s governmental interest analysis and concluded that Japan and California each had a legitimate but conflicting interest in having its law applied. *Id.* at *7. But Japan’s interest would be “more impaired” if its law was not applied: California’s primary interest was compensating resident victims, an interest that could still be achieved through the application of Japanese law; in contrast, Japan’s interest in allocating liability for nuclear accidents depended on the “uniform applicability” of its Act on Nuclear Compensation. *Id.* at *3–9; *see also Cooper V*, 960 F.3d 549, 560–64 (9th Cir. 2020) (affirming the district court’s reasoning).

⁹⁷ *See Cooper IV*, 2019 WL 1017266, at *14 (noting the Ninth Circuit’s identification of Japan’s “undeniably strong interest in centralizing jurisdiction over [Fukushima]-related claims” (quoting *Cooper III*, 860 F.3d 1193, 1209 (9th Cir. 2017))).

⁹⁸ *Id.*

⁹⁹ *Id.* at *14–15 (citing these two updated considerations as now justifying international comity abstention); *see also Cooper V*, 960 F.3d at 556 & n.3 (describing procedural posture).

I will argue shortly that *Cooper's* reliance on international comity abstention was ill-advised; if the court were going to dismiss the case, it should have done so on the basis of forum non conveniens. But that does not necessarily mean that forum non conveniens was the best grounds on which to dismiss *Imamura*. Unlike *Cooper*, *Imamura* was not really about identifying the more appropriate forum in which the plaintiffs could sue the defendant. Rather, it was about whether the plaintiffs could sue their chosen defendant at all in light of Japanese law shielding that defendant from liability. The *Imamura* decision effectively enforced Japanese law by requiring the plaintiffs to refile in Japan, where (everyone agreed) the plaintiffs would not be able to sue General Electric.¹⁰⁰ *Imamura* could have addressed that question of regulatory interests more directly, and better justified its conclusion, if it had instead dismissed the case under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. Indeed, that was the basis on which the district court in *Cooper* dismissed similar claims against General Electric.¹⁰¹ General Electric had asked the district court in *Imamura* to do the same,¹⁰² and as the district court noted, Massachusetts' choice-of-law rules did point to the application of Japanese law.¹⁰³

¹⁰⁰ *Imamura I*, 371 F. Supp. 3d 1, 8 (D. Mass. 2019); see also *Imamura II*, 957 F.3d 98, 110 (1st Cir. 2020) (acknowledging that Japanese law “may inevitably require the dismissal of the case from Plaintiffs’ chosen forum”).

¹⁰¹ *Cooper IV*, 2019 WL 1017266, at *9-10.

¹⁰² See *Imamura I*, 371 F. Supp. at 6 (listing the grounds for dismissal asserted by General Electric). The *Imamura* court was also aware of the Rule 12(b)(6) dismissal in *Cooper*. *Id.* at 14 (citing *Cooper IV*, 2019 WL 1017266, at *9).

¹⁰³ In tort cases, Massachusetts typically applies the law of the forum where the harm occurred. *Id.* at 14 (citing *Cosme v. Whitin Mach. Works, Inc.*, 632 N.E.2d 832, 834 (1994)). Nonetheless, Massachusetts no longer recognizes a strict *lex locus delicti* rule, having adopted a more “functional” approach to choice of law. See *Choate, Hall & Stewart v. SCA Servs., Inc.*, 392 N.E.2d 1045, 1048-49 (Mass. 1979) (noting a trend toward a “functional approach” in choice of law, including for Massachusetts tort law); *Pevoski v. Pevoski*, 358 N.E.2d 416, 417 (Mass. 1976) (“But we recognize that there also may be particular issues on which the interests of *lex loci delicti* are not so strong.”); see also *Bushkin Assocs., Inc. v. Raytheon Co.*, 473 N.E.2d 662, 668-69 (Mass. 1985) (describing Massachusetts’ approach to choice of law as not “tie[d] . . . to any specific choice-of-law doctrine” and as “respond[ing] to the interests of the parties, the States involved, and the interstate system as a whole”). When engaging in this more functional analysis, Massachusetts courts often use the considerations identified by the *Restatement (Second) of Conflict of Laws*, but other sets of factors—like Professor Leflar’s five choice-influencing considerations—may also be used. See Joseph W. Glannon & Gabriel Teninbaum, *Conflict of Laws in Massachusetts Part I: Current Choice-of-Law Theory*, 92 MASS. L. REV. 12, 14–15 & n.28 (2009) (“As recent cases have confirmed, the current approach in Massachusetts remains a ‘functional approach’ that is guided by, but not limited to, the *Second Restatement*.”). Such considerations would only have reinforced the district court’s conclusion that Japanese law would apply to the *Imamura* plaintiffs’ claims.

Many different considerations enter into a judge's decision to resolve a dispute on one ground versus another. In *Imamura*, General Electric had raised multiple grounds for dismissal, including a subject-matter jurisdiction argument based on the Convention on Supplementary Compensation for Nuclear Damage.¹⁰⁴ The Ninth Circuit in *Cooper III* had previously rejected the argument that the Convention, which entered into force after the Fukushima disaster, stripped U.S. courts of jurisdiction over claims regarding nuclear accidents in other countries.¹⁰⁵ It had, however, acknowledged that the defendants' argument was "plausible."¹⁰⁶ The district court in *Imamura* would have had to first resolve this jurisdictional question for itself in order to reach the Rule 12(b)(6) argument, which entailed a merits determination. Dismissing for forum non conveniens, in contrast, allowed the district court to avoid that jurisdictional question.¹⁰⁷

Nonetheless, there would have been several benefits to using choice of law instead of forum non conveniens to dismiss *Imamura*. First, dismissing the case on the merits would have entailed the district court exercising its general personal jurisdiction over the defendant, in keeping with *Daimler's* promise of providing "at least one clear and certain forum in which a corporate defendant may be sued on any and all claims."¹⁰⁸ Second, it would also mean weighing governmental interests through the lens of state choice-of-law rules rather than through a judicially constructed doctrine. Third, it would have avoided the *Imamura* courts' strained analysis of the adequacy of the Japanese forum, which could become a problematic precedent. The *Imamura* plaintiffs argued that Japan was an inadequate forum because they would be forced in Japan to switch from suing General Electric to suing TEPCO.¹⁰⁹ The district court and First Circuit dismissed this concern because TEPCO was both strictly liable under Japanese law and financially backed by the Japanese government.¹¹⁰ Thus being forced to sue TEPCO instead of GE would not

¹⁰⁴ *Imamura I*, 371 F. Supp. 3d at 6.

¹⁰⁵ *Cooper III*, 860 F.3d 1193, 1200–05 (9th Cir. 2017).

¹⁰⁶ *Id.* at 1202.

¹⁰⁷ See *Imamura I*, 371 F. Supp. 3d at 6–7 (citing *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007)). Another potential benefit to dismissing on the basis of forum non conveniens rather than Rule 12(b)(6) is that the former is reviewed only for abuse of discretion and may thus be easier to sustain on appeal. But that difference only underscores the potentially problematic nature of the Supreme Court's invitation in *Sinochem* to invoke a discretionary judge-made doctrine that is shielded from meaningful appellate review in order to avoid addressing important jurisdictional questions.

¹⁰⁸ *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014).

¹⁰⁹ *Imamura I*, 371 F. Supp. 3d at 8.

¹¹⁰ See *Imamura II*, 957 F.3d 98, 109 (1st Cir. 2020) (noting that the alternative forum "channels liability for [the exact same] injuries to a third party who is not the same defendant in the U.S. case");

alter the *Imamura* plaintiffs' ability to establish liability or obtain compensation. But the language that the courts used to explain this equivalency was at times quite broad, for example emphasizing that Japan still provided "adequate remedies for the exact same injuries," just against a different party.¹¹¹ Such language is worrisome because the concept of an "adequate remedy" in the forum non conveniens context has already been set as a low bar, requiring only that the remedy is not "so clearly inadequate or unsatisfactory that it is no remedy at all."¹¹² If the link to strict liability and financial solvency is not maintained, then future decisions might misapply *Imamura* as only requiring *some* relief to be available against *some* defendant, even if that alternative defendant is less responsible, liable for a lesser amount, or less capable of paying any resulting judgment than the plaintiff's preferred defendant.

In sum, the use of forum non conveniens in *Imamura* to address what at root was a choice-of-law problem may encourage more expansive application of forum non conveniens in future cases, while the difference in application of forum non conveniens in *Imamura* and *Cooper* illustrates the current inadequacy of the doctrine's public interest factors.

B. The "International Comity Abstention" Dismissal

Instead of dismissing for forum non conveniens, the Southern District of California in *Cooper* ultimately dismissed the claims against TEPCO on the basis of international comity abstention.¹¹³ The version of international comity abstention it used is both novel and highly discretionary. This Section distinguishes that version from other versions of "international comity abstention" before arguing that its application in *Cooper* expanded even further the scope of federal judges' discretion to rid themselves of transnational cases.

Imamura I, 371 F. Supp. 3d at 9 ("TEPCO's unlimited liability and the financial support of the Japanese government ensure that TEPCO will continue to be able to pay compensation via judicial and administrative mechanisms.").

¹¹¹ *Imamura II*, 957 F.3d at 109; *see also Imamura I*, 371 F. Supp. 3d at 8–9 (suggesting that the foreign forum need not "permit a remedy against the specific defendant" chosen by the plaintiff so long as it provides "an adequate remedy from another party or entity").

¹¹² *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981); *see also* Kevin M. Clermont, *The Story of Piper: Forum Matters*, in *CIVIL PROCEDURE STORIES* 199, 215–16 (Kevin M. Clermont ed., 2d ed. 2008) (explaining why this language is illogical and ill-advised).

¹¹³ *Cooper IV*, No. 12cv3032, 2019 WL 1017266, at *15 (S.D. Cal. Mar. 4, 2019).

1. *The Many Doctrines of “International Comity Abstention”*

“International comity abstention” has been invoked by federal courts to address at least five different questions: whether to defer to foreign parallel proceedings, whether to defer to foreign bankruptcy proceedings, whether to recognize and enforce foreign judgments, how to interpret the geographic reach of federal statutes, and whether to abstain in light of foreign relations concerns.¹¹⁴ It is a problem that all of these analyses are at times referred to as international comity abstention or close variants thereof,¹¹⁵ as the courts do not always distinguish carefully among them. This doctrinal confusion seems to have originated with the Eleventh Circuit and its 1994 decision in *Turner Entertainment v. Degeto Film GmbH*, which coined the label of “international comity . . . abstention.”¹¹⁶ In defining this new concept, *Turner* mixed together what had previously been two distinct lines of precedent: the enforcement of foreign judgments and deference to foreign parallel proceedings.¹¹⁷ After *Turner*, other circuits applied the new label to existing lines of precedent. The Second Circuit, for example, has adopted the label of “international comity abstention” when discussing deference to foreign parallel proceedings,¹¹⁸ deference to foreign bankruptcy proceedings,¹¹⁹ and the interpretation of statutes.¹²⁰ The bulk of the federal appellate decisions discussing comity-based abstention focus on similar questions.¹²¹

Two circuits, however, have invoked “international comity abstention” to dismiss cases based on foreign relations concerns. In *Ungaro-Benages v. Dresdner Bank AG*, the Eleventh Circuit in 2004 distinguished *Turner*’s “retrospective[]” comity analysis from a concern for what it termed “prospective[]” comity.¹²² “When applied prospectively,” the Eleventh Circuit explained, international comity abstention allows courts to stay or dismiss a case “based on the interests of our government, the foreign government and the international community in resolving the dispute in a foreign forum.”¹²³ *Ungaro-Benages* was a Holocaust restitution case brought in

¹¹⁴ For further discussion and examples of each, see below Part II.

¹¹⁵ See Gardner, *supra* note 13, at 69 n.26 (gathering variations in labels).

¹¹⁶ 25 F.3d 1512, 1519 (11th Cir. 1994) (referring to “international comity, in the abstention context”).

¹¹⁷ *Id.* at 1519–22.

¹¹⁸ Royal & Sun All. Ins. Co. of Can. v. Century Int’l Arms, Inc., 466 F.3d 88, 92 (2d Cir. 2006).

¹¹⁹ JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V., 412 F.3d 418, 422, 425 (2d Cir. 2005).

¹²⁰ *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 182 (2d Cir. 2016), *vacated on other grounds sub nom.* Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865 (2018).

¹²¹ William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2112 (2015).

¹²² 379 F.3d 1227, 1238 (11th Cir. 2004).

¹²³ *Id.* at 1238.

a U.S. court against two German banks, despite an agreement between Germany and the United States meant to channel such claims through an alternative dispute resolution mechanism established by Germany.¹²⁴ The district court held that the bilateral agreement rendered the case a nonjusticiable political question, but the Eleventh Circuit disagreed, emphasizing *Baker v. Carr*'s warning that "not all issues that could potentially have consequences to our foreign relations are political questions."¹²⁵ Yet the appellate court was still uneasy about allowing the case to go forward, especially in light of the German interest in having an "exclusive forum for these claims in its efforts to achieve lasting legal peace . . ."¹²⁶ Expanding *Turner*'s conception of comity-based abstention to encompass foreign relations concerns provided the Eleventh Circuit with a way out of that conundrum.

Ten years later, the Eleventh Circuit acknowledged that *Ungaro-Benages* was basically *sui generis*, and it "reserved prospective international comity abstention for rare (indeed often calamitous) cases in which powerful diplomatic interests of the United States and foreign sovereigns [are] aligned in supporting dismissal."¹²⁷ In doing so, it stressed that none of the three Second Circuit decisions on which *Ungaro-Benages* relied had actually applied such "prospective international comity" to dismiss a case.¹²⁸ Meanwhile, the Third Circuit in another Holocaust restitution case specifically rejected *Ungaro-Benages*'s solution, pointing out that the federal courts' duty to exercise their congressionally granted jurisdiction "is not diminished simply because foreign relations might be involved."¹²⁹ The Supreme Court recently avoided addressing that circuit split in yet another Holocaust restitution case.¹³⁰

Only the Ninth Circuit has followed *Ungaro-Benages*, which it did in the 2014 case of *Mujica v. Airscan Inc.*¹³¹ As *Mujica* abstention is growing in prominence,¹³² it is important to chart that case's questionable procedural

¹²⁴ See *id.* at 1231.

¹²⁵ *Id.* at 1235.

¹²⁶ *Id.* at 1239.

¹²⁷ *GDG Acquisitions, LLC v. Gov't of Belize*, 749 F.3d 1024, 1030–31, 1034 (11th Cir. 2014).

¹²⁸ *Id.* at 1031.

¹²⁹ *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 394 (3d Cir. 2006).

¹³⁰ See *Federal Republic of Germany v. Philipp*, No. 19-351, slip op. at 15–16 (Feb. 3, 2021) ("We do not address Germany's argument that the District Court was obligated to abstain from deciding the case on international comity grounds.").

¹³¹ 771 F.3d 580, 615 (9th Cir. 2014).

¹³² It was effectively *Mujica*'s version of abstention that the Supreme Court was being asked to recognize in *Philipp*. See Pet. Br. at 43, *Federal Republic of Germany v. Philipp*, No. 19-351 (invoking *Mujica* and *Ungaro-Benages*).

progression. In *Mujica*, Colombian plaintiffs sued two American corporations over their involvement in a bombing and armed attack by government forces on the plaintiffs' town.¹³³ The U.S. companies moved to dismiss for forum non conveniens and "[i]nternational [c]omity,"¹³⁴ among other grounds. Judge William Rea of the Central District of California reasoned that Colombia was not an available alternative forum because the plaintiffs, having successfully pursued an administrative remedy against the government, would be barred from bringing a separate suit against the U.S. defendants.¹³⁵ Even if Colombia could provide an adequate forum, the court also concluded that the balance of factors weighed in favor of the plaintiffs and would additionally prevent dismissal for forum non conveniens.¹³⁶ The district court considered and rejected application of the Ninth Circuit's existing "international abstention" doctrine, which it correctly identified as being limited to foreign parallel proceedings.¹³⁷ It even considered *Ungaro-Benages*'s three-part test for abstention and acknowledged that both the United States and Colombia had expressed an interest in the case being dismissed, but it reasoned that the availability of an adequate forum was also a prerequisite for such foreign relations-based abstention.¹³⁸ Nonetheless, the district court dismissed all of the plaintiffs' claims under the political question doctrine.¹³⁹

On appeal, the Ninth Circuit initially remanded the case solely to determine whether the plaintiffs' Alien Tort Statute ("ATS") claims required exhaustion.¹⁴⁰ Because Judge Rea had died in the interim, a new judge, Judge George Wu, was assigned the case on remand.¹⁴¹ While noting that the appellate court had not yet addressed the district court's ruling of non-judiciability, Judge Wu concluded that prudential exhaustion was *not* required for the plaintiffs' ATS claims.¹⁴² But if it were, he continued doubly hypothetically, the plaintiffs had not demonstrated that pursuing local remedies would be futile.¹⁴³

¹³³ *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134, 1138 (C.D. Cal. 2005).

¹³⁴ *Id.* at 1138.

¹³⁵ *Id.* at 1147–48.

¹³⁶ *Id.* at 1154.

¹³⁷ *See id.* at 1157–59 (applying *Colorado River* framework).

¹³⁸ *Id.* at 1161–63.

¹³⁹ *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1194–95 (C.D. Cal. 2005).

¹⁴⁰ *Mujica v. Airscan Inc.*, 564 F.3d 1190, 1192 (9th Cir. 2009).

¹⁴¹ *Mujica v. Airscan Inc.*, 771 F.3d 580, 588 (9th Cir. 2014).

¹⁴² *Mujica v. Occidental Petroleum*, No. 03-2860, 2010 WL 11586833, at *2–3, *8 (C.D. Cal. Mar. 8, 2010).

¹⁴³ *Id.* at *9–10.

The parties returned to the Ninth Circuit, which dismissed the ATS claims—regardless of any exhaustion requirement—based on its reading of the Supreme Court’s intervening decision in *Kiobel v. Royal Dutch Petroleum Co.*¹⁴⁴ It then skipped over Judge Rea’s forum non conveniens and political question determinations, which is telling: given the thoroughness of Judge Rea’s forum non conveniens analysis and his close adherence to Ninth Circuit precedent, the panel would have been hard-pressed to identify any abuse of discretion. But if forum non conveniens did not provide an avenue to dismissal, neither did the political question doctrine. Judge Rea based his political question determination primarily on a concern for a “lack of respect for coordinate branches,” given the Executive’s statement of interest that it would prefer that the court not hear the case.¹⁴⁵ The Executive’s preference, however, does not alone make the question non-justiciable.¹⁴⁶ Caught between the district court’s careful exercise of discretion under an updated forum non conveniens framework and the Supreme Court’s direction not to use the political question doctrine to avoid foreign relations entanglements,¹⁴⁷ the *Mujica* majority created a new discretionary doctrine to do precisely that.

In an opinion authored by Judge Jay Bybee, the panel majority adopted *Ungaro-Benages*’s tripartite framework but expanded it to include numerous subfactors,¹⁴⁸ which it then applied to dismiss the plaintiffs’ remaining state-law claims. Notably, the appellate court did not remand to the district court to apply this expanded test in the first instance. To work around Judge Rea’s prior finding that the defendants had not established an available alternative forum, the panel majority held that Judge Rea’s finding of unavailability had been replaced by Judge Wu’s conclusion—for purposes of a hypothetical ATS exhaustion requirement—that the plaintiffs had not demonstrated the

¹⁴⁴ *Mujica*, 771 F.3d at 591 (citing *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013)).

¹⁴⁵ *See Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1194–95 (C.D. Cal. 2005) (“[T]his case involves foreign relations, an area over which the Executive has a great deal of responsibility,” such that “proceeding with the litigation would indicate a ‘lack of respect’ for the Executive’s preferred approach” to handling the incident).

¹⁴⁶ *See Mujica*, 771 F.3d at 616 n.4 (Zilly, J., concurring in part and dissenting in part) (identifying how the case implicated none of the factors of *Baker v. Carr*, 369 U.S. 186 (1962)).

¹⁴⁷ *See Baker v. Carr*, 369 U.S. 186, 211 (1962) (“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”).

¹⁴⁸ *See Mujica*, 771 F.3d at 603–08 (considering the location of the conduct; the nationality of the parties; the character of the conduct in question; the foreign policy interests of the United States; any public policy interests; U.S. state interests; the activity’s effects; the interests of the foreign state; whether the judgment was rendered via fraud; whether the judgment was rendered by a competent court utilizing proceedings consistent with civilized jurisprudence; and whether the foreign judgment is prejudicial and repugnant to fundamental principles of what is decent and just).

futility of pursuing relief in Colombian courts.¹⁴⁹ As the dissent pointed out, this was “dictum that was uttered for an entirely different purpose, concerning a wholly separate legal doctrine”—and applying an opposite burden of proof.¹⁵⁰

In sum, while other circuits have rejected or moved away from foreign relations-based abstention, the Ninth Circuit alone has embraced it as a means for increasing judicial discretion to decline jurisdiction beyond that already provided by *forum non conveniens* and the political question doctrine. That story would repeat itself in *Cooper*.

2. Application in *Cooper v. TEPCO*

Cooper provided the Ninth Circuit with its first opportunity to apply its new version of international comity abstention after *Mujica*. Initially, Judge Sammartino declined to dismiss *Cooper* for *forum non conveniens* or international comity abstention, noting that neither Japan nor the United States had “expressed interest in the location of this litigation.”¹⁵¹ When that decision was appealed to the Ninth Circuit, however, Japan did weigh in, prompting the appellate court to solicit the views of the United States as well.¹⁵² As summarized by the Ninth Circuit, Japan “present[ed] a compelling case that [Fukushima]-related claims brought outside of Japan threaten the viability of Japan’s [Fukushima] compensation scheme,”¹⁵³ with litigation outside of Japan potentially leading to “different outcomes for similarly situated victims” and “[j]udgments . . . inconsistent with the overall administration of Japan’s compensation fund.”¹⁵⁴ The United States was more ambivalent; while it supported those efforts by Japan, it also worried about discouraging additional countries from ratifying the Convention on Supplementary Compensation for Nuclear Damage,¹⁵⁵ which guarantees that litigation will be funneled to the country in which a nuclear accident occurred. Because Japan did not join the agreement until after the Fukushima disaster, the United States questioned whether Japan should

¹⁴⁹ *Id.* at 612–13.

¹⁵⁰ *Id.* at 622 (Zilly, J., concurring in part and dissenting in part); *cf.* *Simon v. Republic of Hungary*, 911 F.3d 1172, 1184–85 (D.C. Cir. 2018) (concluding that the district court committed error when it applied its finding of *forum non conveniens* to its *forum non conveniens* analysis, given that the two questions bear opposite burdens of proof).

¹⁵¹ *Cooper II*, 166 F. Supp. 3d 1103, 1137–40 (S.D. Cal. 2015).

¹⁵² *Cooper III*, 860 F.3d 1193, 1199 (9th Cir. 2017).

¹⁵³ *Id.* at 1206.

¹⁵⁴ *Id.* at 1207.

¹⁵⁵ *Id.* at 1207–08.

receive the benefit of the agreement without having borne its costs beforehand.¹⁵⁶

Notwithstanding these interventions, the Ninth Circuit affirmed the district court's decision not to dismiss. But in an opinion authored by Judge Bybee, it emphasized that international comity abstention "is a more fluid doctrine, one that may change in the course of the litigation."¹⁵⁷ "Should either the facts or the interests of the governments change—particularly the interests of the United States—the district court would be free to revisit this question,"¹⁵⁸ it encouraged. Back before the district court, TEPCO did not wait long to argue for reconsideration.¹⁵⁹ The district court agreed that two circumstances had changed: First, it undertook a full choice-of-law analysis and concluded Japanese law would apply to the dispute.¹⁶⁰ And second, it now had statements from both Japan and the United States regarding their interest in the litigation.¹⁶¹ Between the applicability of Japanese law and the strength of the newly elucidated interests of Japan, the district court determined that "the factors now weigh in favor of dismissal" on the basis of international comity abstention.¹⁶² The Ninth Circuit, in another opinion authored by Judge Bybee, affirmed.¹⁶³

Two aspects of this exercise of judicial discretion are worth highlighting. First, the district court's initial analysis of forum non conveniens and international comity abstention overlapped significantly, so much so that the two grounds on which it reconsidered its international comity abstention decision applied equally to its prior analysis of the public interest factors under forum non conveniens.¹⁶⁴ In other words, forum non conveniens is largely redundant with the Ninth Circuit's version of international comity abstention. The difference is that *Mujica's* version of international comity abstention excises any deference to the plaintiff's choice of forum. If the

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1210. The panel also included Judges Tashima and Wardlaw.

¹⁵⁸ *Id.* at 1210 (footnote omitted). The Ninth Circuit repeated the message at the beginning and end of its opinion as well. *See id.* at 1197 ("Further developments, however, may require the district court to revisit some of the issues that TEPCO raised in its motion to dismiss."); *id.* at 1218 ("As the case develops more fully, . . . the district may reconsider dismissal as a matter of comity . . .").

¹⁵⁹ *Cooper IV*, No. 12cv3032, 2019 WL 1017266, at *10 (S.D. Cal. Mar. 4, 2019).

¹⁶⁰ *See id.* at *11–14 ("Japan has an overwhelmingly strong interest in applying its laws in this case, and because those interests would be more impaired than California's, the Court determines that Japanese law applies to the issue of TEPCO's liability.").

¹⁶¹ *See id.* at *14 (discussing government interventions).

¹⁶² *Id.* at *15. As previously discussed, the court also dismissed newly added claims against General Electric for failure to state a claim under Japanese law.

¹⁶³ *Cooper V*, 960 F.3d 549, 569 (9th Cir. 2020). The panel was the same as the first appeal.

¹⁶⁴ *See supra* text accompanying notes 91–99 (discussing *Cooper's* analysis of the public interest factors).

district court had instead revisited its *forum non conveniens* holding in light of these two changed considerations, that would have forced a direct confrontation of the two major intuitions competing in *Cooper*: sympathy for local servicemembers and the strong adjudicatory interests of Japan in consolidating Fukushima-related claims.¹⁶⁵ I think reasonable minds could differ as to which set of interests should have won out in *Cooper*, but it would have been beneficial for the court to address that trade-off directly, as *forum non conveniens* would have required it to do.

Second, *Cooper* appears to be the first time that a federal court has dismissed a case for foreign relations abstention absent a request from the Executive Branch.¹⁶⁶ In contrast, both *Mujica* and *Ungaro-Benages* relied on U.S. statements of interest that urged dismissal.¹⁶⁷ *Cooper*, then, suggests a more expansive doctrine, one that allows federal judges to dismiss cases assigned to them by Congress and against the wishes of the Executive.

Cooper also illustrates how the need for such expansive judicial discretion is in fact decreasing as the case could instead have been dismissed for lack of personal jurisdiction. TEPCO's contacts with California were limited to its registration to do business within the state between 2003 and 2006,¹⁶⁸ contacts that have no obvious relationship to the management of the Fukushima plant and its 2011 meltdown. While *Cooper* was pending on interlocutory appeal in 2017, the plaintiffs' attorneys filed a new action, styled *Bartel v. Tokyo Electric Power Co., Inc.*, with different named plaintiffs.¹⁶⁹ TEPCO moved to dismiss *Bartel* for lack of personal jurisdiction in light of the Supreme Court's recent decision in *Bristol-Myers Squibb v. Superior Court of California*.¹⁷⁰ Judge Sammartino granted the motion, reasoning that the plaintiffs' injuries did not arise out of or relate to TEPCO's limited contacts with California.¹⁷¹ TEPCO then raised the same personal jurisdiction defense in *Cooper*, arguing that the defense was not available before the Supreme Court's decision in *Bristol-Myers Squibb*.¹⁷² But Judge Sammartino

¹⁶⁵ It does not appear, however, that TEPCO requested reconsideration of the *forum non conveniens* determination. See *Cooper IV*, 2019 WL 1017266, at *10 (describing the grounds included in TEPCO's motion to dismiss).

¹⁶⁶ See *Cooper III*, 860 F.3d 1193, 1207–09 & 1210 n.13 (9th Cir. 2017) (noting the ambivalent position of the United States).

¹⁶⁷ *Mujica v. Airscan Inc.*, 771 F.3d 580, 609–10 (9th Cir. 2014); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1240 (11th Cir. 2004).

¹⁶⁸ *Bartel v. Tokyo Elec. Power Co.*, No. 17-1671, 2018 WL 312701, at *6 (S.D. Cal. Jan. 5, 2018).

¹⁶⁹ *Id.*

¹⁷⁰ 137 S. Ct. 1773 (2017).

¹⁷¹ *Bartel*, 2018 WL 312701, at *7.

¹⁷² *Cooper IV*, No. 12cv3032, 2019 WL 1017266, at *10 (S.D. Cal. Mar. 4, 2019).

reasonably held that the defense was waived, explaining that TEPCO's connection with California was so tenuous, a personal jurisdiction defense was viable even under the Ninth Circuit's pre-*Bristol-Myers Squibb* "sliding scale" approach.¹⁷³ TEPCO, in other words, missed the easiest route to dismissal. International comity abstention thus served in *Cooper* to address adjudicative comity concerns that existing personal jurisdiction doctrine already works to avoid.

II. A Roadmap to Transnational Abstention

As the Fukushima cases suggest, these doctrines are in flux, providing opportunities for reform and refinement. This Part draws on developments across the lower federal courts to clarify the different bases for transnational abstention and to suggest how judges can improve those abstention doctrines in concrete terms. Given this practical perspective, it starts with the frameworks that currently govern and identifies possible modifications to them. In general, the roadmap favors simpler tests, clear and current factors, and tractable considerations, all of which will encourage the exercise of discretion in a manner that is transparent, manageable, and less prone to expansion.¹⁷⁴ The Fukushima cases also illustrate how a greater emphasis on adjudicatory interests may better guide discretion and justify its exercise. In particular, as the federal courts' experience with cross-border bankruptcies illustrates,¹⁷⁵ there is sometimes a need to accommodate the interests of foreign states in consolidating interdependent claims within one forum. Even if one is not persuaded by the need for greater attention to adjudicatory interests, however, the roadmap's efforts to disentangle and clarify lower federal courts' invocations of abstention should still be of use.

A. *Forum Non Conveniens*

I have argued before that the federal doctrine of forum non conveniens¹⁷⁶ has outlived its usefulness and should enter a phased retirement: on the one

¹⁷³ *Id.* at *11. The Ninth Circuit did not reach this issue on appeal. *Cooper V*, 960 F.3d 549, 569 n.15 (9th Cir. 2020).

¹⁷⁴ See Gardner, *supra* note 30, at 1006–09 (discussing procedural design considerations); Gardner, *supra* note 13, at 90–93 (same).

¹⁷⁵ See *infra* Section II.C.

¹⁷⁶ My focus in my prior work, as well as here, is on the use of forum non conveniens by federal courts to dismiss cases in favor of foreign forums. State courts have a greater need than federal courts to dismiss cases they believe should be brought in other U.S. states, a lesser duty to provide forums for foreign litigants, and no constitutional presumption in favor of exercising legislative grants of jurisdiction. See Gardner, *supra* note 29, at 400 (noting differences between state and federal uses of

hand, the Supreme Court has limited the scope of modern transnational litigation by curtailing exorbitant assertions of attachment and “doing business” jurisdiction, circumscribing specific jurisdiction, reining in the Alien Tort Statute, and redeploying the presumption against extraterritoriality; on the other hand, transportation and communication technologies have fundamentally altered the calculus of long-distance litigation burdens.¹⁷⁷ Radically altering or retiring forum non conveniens, however, will require Supreme Court or congressional intervention. As the focus here is on what the lower federal courts can do, this discussion centers instead on how to improve the current federal doctrine.¹⁷⁸

The lower courts have already modified the *Gulf Oil* test, though their approach varies by circuit.¹⁷⁹ Given developments in technology and personal jurisdiction doctrine, courts may find the private interest factors playing a less dominant role in the analysis. That will increase the importance of the public interest factors, which need clarification and refinement.¹⁸⁰ Ideally that clarification and refinement will help focus the public interest factors on comparing adjudicative interests. This Section gathers lower court developments and maps a modern test for forum non conveniens that has

forum non conveniens). To the extent that states have adopted *Gulf Oil*'s framework, however, state court judges may be interested in how federal judges have been updating that test.

Particularly after *Atlantic Marine Construction Co. v. U.S. District Court*, 571 U.S. 49 (2013), federal courts also use forum non conveniens to enforce forum selection clauses that point to U.S. state courts. As *Atlantic Marine* suggests, however, that use of forum non conveniens is more automatic, depending less on case-by-case application of the *Gulf Oil* factors. See Robin Effron, *Atlantic Marine and the Future of Forum Non Conveniens*, 66 HASTINGS L.J. 693, 713–18 (2015) (critiquing *Atlantic Marine* on this basis). Reforms to the federal doctrine can thus focus on its use in transnational litigation.

¹⁷⁷ See generally Gardner, *supra* note 29, at 405–15, 429–42 (making these arguments). For additional thoughtful critiques and reforms, see Clermont, *supra* note 112; Davies, *supra* note 13; Lear, *supra* note 31; Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781 (1985).

¹⁷⁸ Cf. Burbank, *Jurisdictional Equilibration*, *supra* note 16, at 236 (acknowledging that a doctrine like forum non conveniens is needed but suggesting reforms to the current doctrine).

¹⁷⁹ Many of these variations are discussed further below. For a few preliminary examples, consider that the Ninth Circuit has added two additional private interest factors, see *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1145 (9th Cir. 2001) (listing “the residence of the parties and the witnesses” and “the forum’s convenience to the litigants”); that the Tenth Circuit has added a threshold requirement that dismissal is only proper if foreign law will apply to the dispute, see, e.g., *Fireman’s Fund Ins. v. Thyssen Mining Constr. of Can. Ltd.*, 703 F.3d 488, 495 (10th Cir. 2012); and that the Eleventh Circuit at times has considered a simplified set of public interest factors, see, e.g., *Otto Candies, LLC v. Citigroup, Inc.*, 963 F.3d 1331, 1338 (11th Cir. 2020) (“Public interests include a sovereign’s interests in deciding the dispute, the administrative burdens posed by trial, and the need to apply foreign law.”).

¹⁸⁰ See *supra* subsection I.A.2 (comparing the public interest analysis in *Imamura* and *Cooper*).

simpler presumptions, updated private interest factors, and public interest factors that are easier to apply.

1. Simplifying the Threshold Inquiries

The federal doctrine of forum non conveniens is currently understood to include two threshold inquiries: whether there is an adequate and available alternative forum and whether the plaintiff's choice of forum should receive less deference because the plaintiff is "foreign."¹⁸¹ Both of these inquiries have grown complex, yet that complexity is not adding value. The problem is the inquiries' binary format, which does not allow judges to provide nuanced answers. The solution is to shift many of these considerations to the weighing of private interests, returning both threshold inquiries to the simplicity of their original formulations: *Piper*'s minimalist identification of an alternative forum and *Gulf Oil*'s strong default presumption in favor of the plaintiff's choice of forum.

Piper required that there be an available alternative forum not as a protection for plaintiffs, but as a reminder to lower courts to ignore substantive changes in law between the two forums.¹⁸² *Piper* thus defined an available forum as one where (i) the defendant is subject to personal jurisdiction and (ii) "where the remedy offered" is not "clearly unsatisfactory," for example because the "alternative forum does not permit litigation of the subject matter of the dispute" or because it "amounts to no remedy at all."¹⁸³ Despite the minimalist framing of this inquiry, plaintiffs have identified a range of reasons why foreign forums may not be adequate or meaningfully available, including evidence of corruption, bias, safety concerns, delay, lack of contingency fees or jury trials, lack of comparable causes of action, or—as in *Imamura*—the inability to sue the plaintiffs' chosen defendant.¹⁸⁴ But the inquiry is not structured as a case-specific analysis; rather, judges worry they are being asked to declare the entire court system of another country "inadequate," which they are understandably unwilling to do.¹⁸⁵

A simpler approach is to consider the plaintiff's concerns about the alternative forum as part of the private interest analysis, as the Second Circuit

¹⁸¹ See, e.g., *Imamura I*, 371 F. Supp. 3d 1, 7, 11 (D. Mass. 2019).

¹⁸² See Clermont, *supra* note 112, at 215–18.

¹⁸³ *Piper*, 454 U.S. 235, 254 & n.22 (1981).

¹⁸⁴ See BORN & RUTLEDGE, *supra* note 37, at 423–27 (gathering examples of concerns raised about the adequacy of foreign forums).

¹⁸⁵ See Gardner, *supra* note 30, at 989 n.250 (collecting cases).

has done.¹⁸⁶ Doing so allows judges to take such concerns seriously without casting broad aspersions on the legal systems of other countries.¹⁸⁷ The alternative forum inquiry would then revert to serving a practical but minimal purpose: identifying the forum whose adjudicatory interests the remainder of the analysis will contrast to those of the United States.

Piper also complicated *Gulf Oil's* strong default presumption in favor of the plaintiff's choice of forum by suggesting that a foreign plaintiff's choice of a U.S. forum should receive "less deference."¹⁸⁸ This differential presumption has been the subject of extensive criticism, which will not be repeated here.¹⁸⁹ But of particular relevance is the criticism that the differential presumption is simply not practical, as the binary distinction between "foreign" and "local" plaintiffs falls apart on closer inspection.¹⁹⁰ In an attempt to avoid this false dichotomy, the Second Circuit has adopted a sliding scale approach, under which "[t]he more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice."¹⁹¹ Other federal circuits have followed suit.¹⁹² While an improvement to *Piper's* oversimplified line-drawing, however, the sliding scale approach effectively

¹⁸⁶ See, e.g., *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 75 (2d Cir. 2001) (directing courts within the private interest factors to "consider how great would be the inconvenience and difficulty imposed on the plaintiffs were they forced to litigate in" the alternative forum, in particular the plaintiffs' "fear for their safety" there).

¹⁸⁷ This difference in locating plaintiff concerns explains "how judges have reached seemingly inconsistent conclusions about whether it is too dangerous or emotionally fraught to send plaintiffs to litigate in Pakistan, in Egypt, and in Cali, Colombia." Gardner, *supra* note 29, at 447 (footnotes omitted) (collecting cases).

¹⁸⁸ *Piper*, 454 U.S. at 255–56.

¹⁸⁹ For Professor Burbank's criticisms, see for example Burbank, *Paths to a Via Media?*, *supra* note 16, at 395 (emphasizing perception among allies that U.S. doctrine discriminates against foreign parties). For mine, see Gardner, *supra* note 30, at 990–94.

¹⁹⁰ See Gardner, *supra* note 30, at 991–92 (gathering cases considering whether U.S. plaintiffs should receive regular or decreased deference when they sue alongside foreign plaintiffs, do significant business in foreign countries, are only nominally incorporated in the United States, or initially brought suit in the foreign forum); Gardner, *supra* note 82, at 477–78 (noting cases where lawful permanent residents or naturalized citizens received decreased deference); see also Clermont, *supra* note 112, at 219 ("It is difficult to mesh a bifurcated . . . presumption with a flexible balancing doctrine. Bifurcation is an on/off switch that will create discontinuities in result.").

¹⁹¹ *Iragorri*, 274 F.3d at 71–72.

¹⁹² See, e.g., *Hefferan v. Ethicon Endo-Surgery Inc.*, 828 F.3d 488, 493–94 (6th Cir. 2016); *Shi v. New Mighty U.S. Trust*, 918 F.3d 944, 949–50 (D.C. Cir. 2019) (noting that "certain considerations may make litigation in a U.S. court the most convenient choice even for foreign plaintiffs" and applying *Iragorri's* reasoning in adopting an intermediate level of deference to foreign plaintiff's decision to sue in D.C.).

moves the weighing of the private interest factors into a threshold inquiry.¹⁹³ That risks a circular analysis, with the starting presumption turning on the strength of the private interest factors, which are supposed to be weighed in light of the starting presumption.

The better solution is to revert to the simple, strong presumption of *Gulf Oil* and to account for the plaintiff's foreign residency or forum-shopping motives when weighing the private interest factors. A strong threshold presumption in favor of exercising jurisdiction, regardless of where the plaintiff resides, recognizes the federal courts' virtually unflagging obligation to exercise their subject matter jurisdiction; it also acknowledges that the United States will almost always have an adjudicatory interest in cases in which a federal court has personal jurisdiction under today's personal jurisdiction doctrine.¹⁹⁴ The private interest factors, meanwhile, can better accommodate the infinite variation in plaintiffs' degree of connection to the forum and their motivations for choosing it.

Even if lower courts are not able to disregard entirely *Piper's* differential presumption, they can shift their discussion of the plaintiffs' residency and convenience to the private interest factors, as some circuits have already done.¹⁹⁵ Doing so simplifies the threshold inquiries, allows for a more nuanced evaluation of plaintiffs' concerns, and enables a direct comparison of plaintiff and defendant interests.

2. Updating the Private Interest Factors

Three sets of reforms are already helping to update and streamline the private interest factors. First, as noted above, courts are integrating consideration of plaintiffs' interests more explicitly into the private interest analysis. The Second,¹⁹⁶

¹⁹³ See *Iragorri*, 274 F.3d at 72 (noting as relevant to the sliding scale approach considerations like "the availability of witnesses or evidence" and "the inconvenience or expense to the defendant," which echo the private interest factors); see also Gardner, *supra* note 29, at 480–81 (critiquing sliding scale approach on this basis).

¹⁹⁴ While federal courts can dismiss for forum non conveniens before resolving questions of subject matter or personal jurisdiction, see *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007), such dismissals are still based on the assumption that the court has proper jurisdiction over the dispute. See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999) (explaining hypothetical jurisdiction).

¹⁹⁵ See *infra* subsection II.A.2.

¹⁹⁶ See, e.g., *Iragorri*, 274 F.3d at 75 (citing plaintiff's safety-based fears of litigating in the foreign jurisdiction as a factor to be considered when "assessing where the greater convenience lies"); *Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142, 145 (2d Cir. 2000) (weighing the "emotional burden on Plaintiffs of returning to the country where they or their loved ones were shot in an act of religious terrorism").

Fourth,¹⁹⁷ Sixth,¹⁹⁸ Eighth¹⁹⁹, and Ninth Circuits,²⁰⁰ for example, have directed courts to weigh plaintiffs' residency, safety concerns, and practical considerations alongside defendants' interests.

Second, courts are decreasing the weight of the discovery-related factors. *Gulf Oil* defined private interests almost entirely in terms of evidence: the "relative ease of access to sources of proof," the "availability of compulsory process" for unwilling witnesses, the "cost of obtaining attendance of willing" witnesses, and the "possibility of view of premises."²⁰¹ Multiple factors addressing one issue are not only unnecessary, but they can also unduly increase the weight placed on the issue.²⁰² The jury view factor is often not mentioned at all²⁰³ and should be dropped as a distinct factor, particularly given how rarely jury views are used by federal courts.²⁰⁴ Courts have also downplayed concerns about cross-border discovery and travel for willing witnesses, given modern communication and transportation technology,²⁰⁵ and they have noted that such concerns will often be a wash in today's transnational cases, given that litigation will be inconvenient no matter where the case is tried.²⁰⁶ The district court in *Cooper*, for example, noted that

¹⁹⁷ See, e.g., *DiFederico v. Marriott Int'l, Inc.*, 714 F.3d 796, 804 (4th Cir. 2013) (crediting, among other factors, "risks facing Americans who travel anywhere in Pakistan").

¹⁹⁸ See, e.g., *Hefferan v. Ethicon Endo-Surgery Inc.*, 828 F.3d 488, 499 (6th Cir. 2016) (holding that "a plaintiff's financial ability to practicably bring suit in the alternative forum" is a relevant consideration).

¹⁹⁹ See, e.g., *Reid-Walen v. Hansen*, 933 F.2d 1390, 1398–1400 (8th Cir. 1991) (addressing "practical problems likely to be encountered by plaintiffs in litigating their claim . . . in a foreign country" within the private interest factors).

²⁰⁰ See, e.g., *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1145 (9th Cir. 2001) (considering the residence and convenience of all parties within the private interest factors).

²⁰¹ *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508 (1947).

²⁰² See *Gardner*, *supra* note 29, at 420–21 (describing how the effects of salience and satisficing combine to overweight these evidentiary factors).

²⁰³ E.g., *Simon v. Republic of Hungary*, 911 F.3d 1172, 1186 (D.C. Cir. 2018); *Lueck*, 236 F.3d at 1145.

²⁰⁴ See *Reid-Walen*, 933 F.2d at 1399 (questioning why a jury view would be needed, given photographic evidence); *DiFederico v. Marriott Int'l, Inc.*, 714 F.3d 796, 806 (4th Cir. 2013) (similar).

²⁰⁵ *Shi v. New Mighty U.S. Trust*, 918 F.3d 944, 951 (D.C. Cir. 2019) ("Logistical hurdles to obtaining evidence and voluntary testimony in the United States present less of a problem than they used to in light of technological advances and the ease of international travel."); *Simon*, 911 F.3d at 1186 ("At best, the location-of-the-evidence factor is in equipoise."); *Reid-Walen*, 933 F.2d at 1397 ("[T]he time and expense of obtaining the presence or testimony of foreign witnesses is greatly reduced by commonplace modes of communication and travel.").

²⁰⁶ See, e.g., *Shi*, 918 F.3d at 951 ("To the extent translation is considered a significant obstacle in this day and age, that obstacle will exist regardless of where this case is tried."); *Simon*, 911 F.3d at 1186 (similar); *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1230–31 (9th Cir. 2011) (noting neutrality of convenience considerations when logistical challenges would be present in either forum); *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1181 (9th Cir. 2006) ("Any court, whether in the United States or in the Philippines, will necessarily face some difficulty in securing

“[b]ecause of the nature of international litigation, each side would incur expenses related to traveling and procuring witnesses in either forum” and “many of the obstacles” of transnational discovery will “be present no matter where the litigation takes place.”²⁰⁷

The one evidentiary challenge that modern technology cannot solve is that of unwilling witnesses, as courts can only compel attendance by individuals within their jurisdiction. Defendants thus have an incentive to assert categories of potential witnesses who are in other countries and outside of their control.²⁰⁸ To counter that incentive, at least six circuits have required defendants to provide some degree of specificity to support such assertions, whether by identifying specific non-willing witnesses, providing some indication that they are in fact unwilling to appear voluntarily, or demonstrating that the alternative forum will not face the same difficulty in reverse.²⁰⁹ Similar care should be taken when evaluating defendants’ assertions that they cannot implead third-party defendants in the U.S. forum.²¹⁰

Third, at least six circuits have indicated that the plaintiff’s choice of the defendant’s home forum weighs heavily against forum non conveniens

evidence from abroad.”); *Reid-Walen*, 933 F.2d at 1397 (“In whichever forum the case is tried, witnesses will have to travel or testify by deposition.”).

²⁰⁷ *Cooper II*, 166 F. Supp. 3d 1103, 1134–35 (S.D. Cal. 2015).

²⁰⁸ *Cf. Gardner*, *supra* note 30, at 987–88 (explaining why judges may be tempted to rely on defendants’ general assertions regarding evidentiary burdens).

²⁰⁹ *Otto Candies, LLC v. Citigroup, Inc.*, 963 F.3d 1331, 1348–49 (11th Cir. 2020) (“[The defendant’s] contentions about the location of key evidence and witnesses may well be plausible. They may even be correct. But [the defendant] failed to support those contentions with positive evidence . . . , and therefore failed to carry its burden.”); *Simon*, 911 F.3d at 1186 (faulting the defendant for not identifying “a single witness in Hungary that would need to testify at trial”); *Hefferan v. Ethicon Endo-Surgery Inc.*, 828 F.3d 488, 498–99 (6th Cir. 2016) (requiring a searching inquiry into what evidence, including non-willing witnesses, will actually be needed); *Shi*, 918 F.3d at 951 (noting that the greater problem is the number of unwilling witnesses in the United States that the plaintiff would need to call); *Carijano*, 643 F.3d at 1231 (requiring more than the mere assertion of unwilling witnesses); *DiFederico*, 714 F.3d at 806 (noting that the factor of unwillingness of witnesses “should be given little weight . . . when the defendant has not shown that any witness is actually unwilling to testify”); *Reid-Walen*, 933 F.2d at 1396–97 (similar). While *Piper* cautioned that affidavits identifying specific witnesses and their proposed testimony should not be required, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 258 (1981), circuit courts have reasoned that they can still require at least as much information as the defendants in *Piper* in fact provided. *E.g.*, *Otto Candies*, 963 F.3d at 1347.

²¹⁰ *See Simon*, 911 F.3d at 1187 (stressing that the ability to implead third-party defendants is only relevant if they will be “crucial” to the presentation of the defense or the shifting of liability); *Reid-Walen*, 933 F.2d at 1398 (rejecting defendant’s argument that it needed to implead the person allegedly responsible for the accident because the plaintiffs’ claims turned on the defendant’s duty to provide a safe environment regardless of fault for the underlying accident).

dismissal.²¹¹ This makes sense for a number of reasons. First, suing a defendant in its home forum significantly ameliorates fairness and convenience concerns: local defendants are not “vexed” or “harassed” by the assertion of their home forum’s jurisdiction,²¹² and they do not face the insuperable challenges of litigating far from home that originally motivated Scottish courts to formulate *forum non conveniens*.²¹³ Second, sovereigns have an interest in adjudicating cases brought against their citizens and residents. Indeed, for civil law countries and the European Union, defendant domicile is the presumptive basis for exercising adjudicative authority.²¹⁴ Third, a strong local defendant presumption is in keeping with *Daimler*’s promise of one clear and certain forum “in which a corporate defendant may be sued on any and all claims.”²¹⁵

The Ninth Circuit’s approach to the private interest factors provides a possible model for consolidating these developments. For twenty years now, courts in the Ninth Circuit have started the private interest analysis with two unique factors: “the residence of the parties and the witnesses” and “the forum’s convenience to the litigants.”²¹⁶ Although they continue through *Gulf Oil*’s other private interest factors, they need not. These two factors

²¹¹ See *Shi*, 918 F.3d at 950 (“[T]he Trusts were sued in their home jurisdiction, which weighs heavily against dismissal.”); *Reid-Walen*, 933 F.2d at 1400 (“The defendant’s home forum always has a strong interest in providing a forum for redress of injuries caused by its citizens.”); *Peregrine Myan Ltd. v. Sega*, 89 F.3d 41, 46 (2d Cir. 1996) (applying heightened presumption in favor of retaining jurisdiction “if the defendant resides in the chosen forum”); *Lony v. E.U. Du Pont de Nemours & Co.*, 886 F.2d 628, 634 (3d Cir. 1989) (giving “considerable weight” to the plaintiff’s choice of forum when the defendant was being sued in its “home forum where [its] corporate headquarters . . . and research laboratories” were located); *Galustian v. Peter*, 591 F.3d 724, 732 (4th Cir. 2010) (“While we do not suggest that [Defendant’s] place of residence is dispositive, the district court should have examined this fact more closely in its *forum non conveniens* analysis”); *Carjano*, 643 F.3d at 1229 (“Concerns about forum shopping, while appropriately considered in the *forum non conveniens* analysis, are muted in a case such as this where Plaintiffs’ chosen forum is both the defendant’s home jurisdiction, and a forum with a strong connection to the subject matter of the case.”); cf. *Otto Candies*, 963 F.3d at 1343 (“When an American plaintiff sues an American defendant for conduct allegedly occurring in the United States, it should not be easy for the defendant to obtain a *forum non conveniens* dismissal.”).

²¹² See *Piper*, 454 U.S. at 508 (“It is often said [about *forum non conveniens*] that the plaintiff may not, by choice of an inconvenient forum, ‘vex,’ ‘harass,’ or ‘oppress’ the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.”).

²¹³ See *supra* subsection I.A.1.

²¹⁴ See, e.g., *Clermont*, *supra* note 16, at 91 (describing the civil law’s jurisdictional system as a “plaintiff follows the defendant’s forum” schema).

²¹⁵ *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014).

²¹⁶ The revised list first appeared in *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1145 (9th Cir. 2001). Its use has not been entirely consistent, see, e.g., *Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656, 664 (9th Cir. 2009), but it was the list used in *Cooper*. See *Cooper III*, 860 F.3d 1193, 1211 (9th Cir. 2017).

adequately address concerns for fairness and nexus in a manner that allows for a comparison of plaintiffs' and defendants' interests.

That leaves *Gulf Oil's* final private interest consideration: that "[t]here may also be questions as to the enforceability of a judgment if one is obtained."²¹⁷ Because that phrasing is vague, courts have not always known what to make of this factor and have, perhaps consequently, often omitted it.²¹⁸ Judgment enforceability was not addressed, for example, in either *Cooper* or *Imamura*.²¹⁹

There are two situations, however, in which the enforceability of the resulting judgment is relevant. First, the U.S. court should retain jurisdiction if the plaintiff is seeking to recover specific property located in the United States or if the plaintiff is otherwise seeking non-monetary relief that is only within the power of a U.S. court to order.²²⁰ Second and more commonly, if the plaintiff is hoping to recover against defendant's assets that are located in the United States,²²¹ the defendant should have to demonstrate that a judgment from the alternative forum will likely be enforceable by a U.S. court—in other words, that the proceeding in the alternative forum will be adequately fair and will not conflict with U.S. public policy.²²²

Ultimately, however, the private interest factors may be of fading importance. As judges account for changes in modern discovery practice and recognize that other forums will face equal difficulties in managing cross-border cases, they may increasingly find that the private interest factors do not point clearly in either direction.

²¹⁷ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

²¹⁸ See Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1496 & n.272 (2011) (noting that only nineteen percent of U.S. district courts in a random sample of forum non conveniens decisions accounted for the enforceability of the foreign judgment).

²¹⁹ *Imamura I*, 371 F. Supp. 3d 1, 11 (D. Mass. 2019) (omitting judgment enforcement from the list of private interest factors); *Cooper II*, 166 F. Supp. 3d 1103, 1133 (S.D. Cal. 2015) (same).

²²⁰ The Supreme Court has recognized that similar doubts as to whether a plaintiff can obtain the requested relief from a state court may weigh against surrendering federal jurisdiction in favor of parallel state litigation. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26–27 (1983).

²²¹ See, e.g., *Shi v. New Mighty U.S. Trust*, 918 F.3d 944, 952 (D.C. Cir. 2019) (emphasizing the importance of the judgment enforceability factor when the trust funds to which the plaintiff sought access were located in the United States).

²²² See Whytock & Robertson, *supra* note 218, at 1494–98 (describing the due process and public policy grounds on which a U.S. court may decline to enforce a foreign judgment). As Professors Whytock and Robertson acknowledge, it may be impossible to tell in advance which U.S. state's law will apply to the question of judgment recognition and enforcement, but as those laws do not vary significantly, the Uniform Foreign Money-Judgment Recognition Act (or the *Restatement (Fourth) of the Foreign Relation Law of the United States*) provides an adequate baseline. See *id.* at 1498 (noting that state practice with respect to enforcing foreign judgments is "largely uniform") (internal quotation marks omitted).

3. Clarifying the Public Interest Factors

That may in turn increase the importance of the public interest factors in the forum non conveniens analysis. These factors, however, are not ready for prime time. The specific considerations identified in *Gulf Oil* are both oddly narrow and ambiguous about what or whose interests, exactly, they are aiming to protect. Part of the problem is that *all* of the factors, as phrased in *Gulf Oil*, are variations on a single theme: a case that is localized elsewhere and has no real nexus to the invoked forum.²²³

Efforts to analyze *Gulf Oil*'s public interest factors as distinct considerations have led courts away from that original understanding, but without adding much value. The first factor—that “administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin”—is often shortened to a consideration of the court’s own docket congestion or costs.²²⁴ Judges in turn may feel awkward about asserting their own administrative convenience in telling other countries to take on difficult cases.²²⁵ Indeed, the factor was never intended to do so; it instead reflects *Gulf Oil*'s concern for the division of labor *within* the federal court system, a problem that Congress solved with 28 U.S.C. § 1404. This factor should be dropped.

Gulf Oil's second concern—that “[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”—is largely moot today. Setting aside how rarely federal civil juries are in fact empaneled, current personal jurisdiction doctrine will almost always require a substantial connection between the forum and the

²²³ *Gulf Oil* described relevant public interest considerations as follows:

[i] Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. [ii] Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. [iii] In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. [iv] There is a local interest in having localized controversies decided at home. [v] There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

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

²²⁴ See, e.g., *Imamura I*, 371 F. Supp. 3d at 11, 14–15 (listing the factor of “administrative difficulties of docket congestion” and evaluating it only in terms of the U.S. court); *Cooper II*, 166 F. Supp. 3d at 1131 (listing the factors of “congestion in the courts” and “costs of resolving a dispute unrelated to this forum”).

²²⁵ See, e.g., *Cooper II*, 166 F. Supp. at 1136 (finding the factors related to court congestion and costs to be “neutral” because of the equal burden on Japanese courts).

dispute, either through the domicile of the defendant or because the alleged harm otherwise arises out of or relates to the defendant's in-forum contacts.²²⁶ This concern should be reconfigured as a check to ensure that the case has *some* nexus to the United States in circumstances where personal jurisdiction remains broad, for example, when the court is exercising admiralty or tag jurisdiction.

The third factor—"[i]n cases that touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only"—is repetitive of the fourth factor and perhaps for that reason is rarely noted.²²⁷ Meanwhile, courts have simplified the fourth factor—that "[t]here is a local interest in having localized controversies decided at home"—into just an inquiry into "local interest." Stripped of the connection to "localized controversies," an inquiry into "local interests" can go in many different directions. The Ninth Circuit has interpreted that abbreviated inquiry as asking only whether the *present* forum has a local interest in the dispute.²²⁸ The Sixth Circuit, in contrast, has emphasized whether the wrong occurred in the alternative forum, explaining that "[t]he country where a product is sold, used, and regulated has a strong interest, often an insurmountably strong interest, in litigation involving that product."²²⁹ That reasoning, however, conflates regulatory interests with adjudicatory interests: the country "where a product is sold, used, and regulated" may have an interest in seeing its law applied to the dispute, but not necessarily in being the one to do the applying.²³⁰ Indeed, the Sixth Circuit's approach overlooks that many countries consider the defendant's home forum to be the presumptively appropriate one.²³¹

²²⁶ See, e.g., Gardner, *supra* note 29, at 432–34 (describing recent developments in personal jurisdiction doctrine).

²²⁷ See, e.g., *Shi*, 918 F.3d at 952 (D.C. Cir. 2019) (quoting *Gulf Oil* for the public interest factors but omitting reference to "cases which touch the affairs of many persons").

²²⁸ See *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1232–33 & n.3 (9th Cir. 2011) (describing the local interest factor as "determining if the forum in which the lawsuit was filed has its own identifiable interest in the litigation which can justify proceeding"); *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1182 (9th Cir. 2006) ("[W]ith this interest factor, we ask only if there is an identifiable local interest in the controversy, not whether another forum also has an interest."); see also *Carijano*, 643 F.3d at 1233 n.3 (acknowledging the "difference of opinion [across federal circuits] about whether it is appropriate to compare the state interests, or whether this factor is solely concerned with the forum where the lawsuit was filed").

²²⁹ See, e.g., *Hefferan v. Ethicon Endo-Surgery Inc.*, 828 F.3d 488, 500 (6th Cir. 2016).

²³⁰ Such regulatory interests are accounted for through choice-of-law analysis, with federal courts applying state choice of law rules in diversity cases. In fact, the Sixth Circuit's emphasis on the forum where the harm occurred could be seen as a backdoor imposition of *lex loci delicti* on U.S. states that have abandoned the strict formalism of the *Restatement (First) of Conflicts of Laws*.

²³¹ See *supra* note 214 and accompanying text.

What is missing from both the Ninth and Sixth Circuits' approaches is *Gulf Oil's* emphasis on *localized* controversies—disputes in which the alternative forum has the primary nexus. A lot of transnational cases are not localized in any jurisdiction; the parties may have many nationalities, the relevant conduct might spread across multiple jurisdictions, or the harm might be dispersed. The third and fourth factor, as articulated by *Gulf Oil*, do not have much to say about such cases. They are more helpful in cases that *do* involve localized controversies, in which circumstance they give weight to the adjudicatory interest of the forum where the controversy arose.

The Fukushima cases provide an example of such a localized dispute. While there were U.S. parties in both *Imamura* and *Cooper*, the underlying incident occurred in Japan, primarily harmed Japanese citizens, and was a matter of national importance that “touch[ed] the affairs of many persons.”²³² Further, Japan had established a comprehensive remedial scheme to handle claims arising out of this incident, and it had an adjudicatory interest in ensuring that such efforts were not undermined by piecemeal litigation in other forums.²³³

Such comprehensive remedial schemes could be treated as a particular type of localized controversy that weighs in favor of deference to the foreign court system. Indeed, the Fukushima cases were not the first time that federal courts have struggled to account for foreign comprehensive remedial schemes and the need to guard against spoilers. In *Ungaro-Benages*, for example, the Eleventh Circuit redefined international comity abstention to account for Germany's “significant interest in having the Foundation [it created] be the *exclusive* forum for [Holocaust] claims in its efforts to achieve lasting legal peace,” efforts that would “affect thousands of other victims of the Nazi regime.”²³⁴ The Second Circuit in *Bi v. Union Carbide Chemicals & Plastics Co. Inc.*²³⁵ dismissed a challenge brought by survivors of the Bhopal gas disaster in opposition to the settlement negotiated by the Indian

²³² *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

²³³ In the domestic context, the very rough analogy would be to *Burford* abstention, which allows federal courts to decline their jurisdiction when determination of a state-law issue would “disrupt the State's attempt to ensure uniformity in the treatment of an ‘essentially local problem.’” *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 362 (1989) (quoting *Ala. Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 347 (1951)). As Professor Burbank would be the first to point out, we should be wary of transplanting domestic doctrines of federalism to the international sphere. The connection is drawn simply to underscore the validity of a sovereign's adjudicatory interest in protecting interdependent remedial systems.

²³⁴ *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1239–40 (11th Cir. 2004).

²³⁵ 984 F.2d 582 (2d Cir. 1993). The appellate court was not entirely clear, however, as to the doctrinal basis for that dismissal, though it framed the discussion in terms of the plaintiffs' lack of standing.

government because the court was worried the challenge would “frustrate India’s efforts” to negotiate on behalf of all victims.²³⁶ In *Pravin Banker Associates v. Banco Popular del Peru*,²³⁷ the Second Circuit acknowledged concerns about allowing a creditor holdout to jeopardize Peru’s efforts to restructure its sovereign debt, though it ultimately allowed the suit to proceed.²³⁸ And in *Lueck v. Sundstrand Corp.*,²³⁹ the Ninth Circuit used forum non conveniens to defer to New Zealand’s national compensation scheme that “provides coverage, on a no-fault basis, for those who suffer personal injury arising from accidents,”²⁴⁰ a system that only works because New Zealand has barred civil tort claims for such damages.

This interest in not enabling spoilers has already been addressed in the context of cross-border insolvencies, to which we will turn shortly.²⁴¹ But though the problem arises often in the bankruptcy context, it can arise in other contexts as well. Making space for it within forum non conveniens would allow courts to acknowledge and give weight to the concern within a doctrinal context that can help evaluate the fairness and reliability of the foreign remedial scheme. Under the reformed private interests factors, for example, plaintiffs can argue that the foreign sovereign’s claim processing scheme is insufficient because it reflects capture by powerful defendants, or because it will drag on for decades, or because it lacks the funds to adequately compensate victims.²⁴² Meanwhile, other public interest factors—like the applicability of U.S. law or non-localization of the dispute in the foreign forum—can help flag when deference to a foreign comprehensive remedial scheme may not be appropriate.

That leaves the fifth factor from *Gulf Oil*: that “[t]here is an appropriateness . . . in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.”²⁴³ Some federal judges are quick to point out that it is their job to

²³⁶ *Id.* at 586.

²³⁷ 109 F.3d 850 (2d Cir. 1997).

²³⁸ *See id.* at 852–55. The procedural vehicle used in that case was most akin to the bankruptcy abstention cases discussed below in Section II.C. *See id.* (citing bankruptcy cases).

²³⁹ 36 F.3d 1137 (9th Cir. 2001).

²⁴⁰ *Id.* at 1141.

²⁴¹ *See infra* Section II.C.

²⁴² *Cf. Simon v. Republic of Hungary*, 911 F.3d 1172, 1187 (D.C. Cir. 2018) (discounting Hungary’s interest in resolving the asserted Holocaust restitution claims given that it “had over seventy years to vindicate its interests in addressing its role in the Holocaust”).

²⁴³ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

apply foreign law,²⁴⁴ just as it is their job to apply “uncertain or difficult to determine” state law.²⁴⁵ Yet other federal courts have interpreted this factor as strongly favoring dismissal whenever foreign law will apply.²⁴⁶ It is not the *difficulty* of applying foreign law, however, that should favor dismissal. Rather, choice of law is relevant because, all else being equal, sovereigns have an interest in applying their own law—especially for common law jurisdictions in which the process of application shapes the contours of the law. Recognizing this interest, the Tenth Circuit has elevated the choice-of-law question to a threshold inquiry: if the court determines that U.S. law will apply to the dispute, it should exercise its jurisdiction.²⁴⁷ At the very least, given the starting presumption in favor of exercising jurisdiction, the applicability of U.S. law should weigh strongly against dismissal.²⁴⁸ Conversely, in light of the same starting presumption, the applicability of the alternative forum’s law would weigh in favor of declining jurisdiction, but something more—like the localization of the dispute in the alternative forum or the lack of a meaningful U.S. nexus—would still be needed.²⁴⁹

* * *

In sum, an updated forum non conveniens doctrine would start with a strong presumption in favor of retaining jurisdiction. Once an alternative forum that could hear the dispute has been identified, the court should consider the habitual residence of the parties, assess both parties’ particularized litigation concerns either here or abroad, and determine whether a U.S. forum is necessary for the plaintiff to secure an enforceable judgment. The local domicile of the defendant or the applicability of U.S. law should weigh strongly against dismissal; a lack of meaningful nexus to the

²⁴⁴ See, e.g., *DiFederico v. Marriott Int’l, Inc.*, 714 F.3d 796, 807–08 (4th Cir. 2013) (stating that interpreting foreign law “is precisely the kind of work American judges perform on a daily basis”).

²⁴⁵ *Meredith v. Winter Haven*, 320 U.S. 228, 234–37 (1943) (emphasizing that federal courts should not decline to exercise their diversity jurisdiction due to the difficulty of a question of state law); see also *Williams v. Green Bay & W. R. Co.*, 326 U.S. 549, 554 (1946) (warning that in diversity cases, “the parties may not be remitted to a state court merely because of the difficulty of making a decision in the federal court”).

²⁴⁶ See, e.g., *Jiali Tang v. Syntura Int’l, Inc.*, 656 F.3d 242, 252 (4th Cir. 2011) (“[T]he district court would likely encounter complex issues of Chinese law. The forum non conveniens doctrine exists largely to avoid such comparative law problems.”).

²⁴⁷ See, e.g., *Rivendell Forest Prods. v. Canadian Pac. Ltd.*, 2 F.3d 990, 994 (10th Cir. 1993) (“[F]orum non conveniens is not applicable if American law controls.”).

²⁴⁸ Cf. *Burbank*, *Jurisdictional Equilibration*, *supra* note 16, at 245 n.197 (noting particular appropriateness of a presumption against dismissal for cases arising under federal regulatory statutes).

²⁴⁹ See, e.g., *Shi v. New Mighty U.S. Trust*, 918 F.3d 944, 953 (D.C. Cir. 2019) (stressing that the applicability of foreign law is not dispositive for forum non conveniens); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1401 (8th Cir. 1991) (similar).

United States or the “localization” of the dispute in the alternative forum would point in favor of dismissal. The court might also give weight to the alternative forum’s effort to resolve interconnected claims in a comprehensive manner.

Note that even this reformed rubric would not have generated an obvious answer in the Fukushima cases. But it might have helped distill more clearly the competing adjudicatory interests in both cases: on the one side, the U.S. interest in adjudicating disputes involving U.S. citizens and residents, and on the other side, the applicability of Japanese law, the localized nature of the disaster, and the interdependent features of Japan’s compensation scheme, all of which indicated Japan’s significant adjudicatory interests in the disputes.

B. Foreign Parallel Proceedings

Commentators have long complained that the federal courts need a clear doctrine for addressing parallel proceedings in foreign forums. Some courts have used *forum non conveniens* for this purpose.²⁵⁰ But *forum non conveniens* is not an appropriate framework as it may overweight the plaintiff’s choice of forum and underweight other considerations that are particularly relevant in the context of parallel proceedings, like the degree of similarity between the two lawsuits or the degree of progress in the foreign forum.²⁵¹ Meanwhile, the Supreme Court has provided clear guidance in terms of parallel proceedings in domestic courts. In *Landis v. North American Co.*, the Court held that federal courts have inherent authority to defer to parallel proceedings in other federal courts²⁵² and suggested that they should generally do so in order to avoid the wastefulness of duplicative litigation.²⁵³ In *Colorado River Water Conservation District v. United States*, the Court affirmed that federal courts have the inherent authority to defer to parallel proceedings in state courts as well, but it warned that federal courts should only defer to state courts in exceptional circumstances given the federal courts’ “virtually unflagging obligation” to exercise the diversity jurisdiction that Congress has

²⁵⁰ See, e.g., BORN & RUTLEDGE, *supra* note 37, at 532 n.3 (6th ed. 2018) (gathering cases); N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT’L ECON. L. 601, 671–72 (2006) (gathering cases but critiquing their analysis).

²⁵¹ Cf. *Adelson v. Hananel*, 510 F.3d 43, 54 (1st Cir. 2007) (stressing the difference in defendant’s burden between the two inquiries).

²⁵² 299 U.S. 248, 254–55 (1936).

²⁵³ See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (“[T]he general principle is to avoid duplicative litigation [across federal courts.]”).

assigned them.²⁵⁴ The Court has provided no guidance, however, on when federal courts should defer to parallel proceedings in other countries.

1. Current Approaches

In the gap, the lower federal courts have developed three approaches to foreign parallel proceedings. First, a number of circuits have applied *Colorado River* directly to transnational cases. The Seventh Circuit was an early and clear leader in this regard,²⁵⁵ and the Fourth, Sixth, and Ninth Circuit have followed suit.²⁵⁶

Second, district courts in circuits without controlling precedent have developed an approach that is also based on an analogy to federal-state parallel litigation but has a provenance distinct from the *Colorado River* framework. The Southern District of New York initially developed this approach in cases like *Ronar, Inc. v. Wallace*²⁵⁷ and *Continental Time Corp. v. Swiss Credit Bank*.²⁵⁸ In doing so, it drew on a test that pre-dated *Colorado River* but was similarly designed to evaluate federal-state parallel litigation;²⁵⁹ over time, however, the Southern District modified that test slightly to account for

²⁵⁴ See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15, 19 (1983) (citing *Colorado River*'s "exceptional circumstances" test).

²⁵⁵ See *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 685 (7th Cir. 1987) (applying the *Colorado River* framework to a parallel proceeding in Belgian courts); see also *AAR Int'l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 518 (7th Cir. 2001) (same with a parallel Greek proceeding); *Finova Cap. Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 898–99 (7th Cir. 1999) (same with a parallel proceeding in St. Lucia).

²⁵⁶ *Answers in Genesis of Ky., Inc. v. Creation Ministries Int'l, Ltd.*, 556 F.3d 459, 467 (6th Cir. 2009) (applying the *Colorado River* test); *Al-Abood v. El-Shamari*, 217 F.3d 225, 232 (4th Cir. 2000) (same); *Neuchatel Swiss Gen. Ins. Co. v. Lufthansa Airlines*, 925 F.2d 1193, 1195 (9th Cir. 1991) ("[T]he fact that the parallel proceedings are pending in a foreign jurisdiction rather than in a state court is immaterial. We reject the notion that a federal court owes greater deference to foreign courts than to our own state courts."). Note that there may be some variation across the circuits to the extent that the circuits' application of *Colorado River* differs. But the general contours of the framework are the same.

²⁵⁷ 649 F. Supp. 310 (S.D.N.Y. 1986).

²⁵⁸ 543 F. Supp. 408 (S.D.N.Y. 1982).

²⁵⁹ See *Cont'l Time Corp.*, 543 F. Supp. at 410 (citing *I.J.A., Inc. v. Marine Holdings, Ltd., Inc.*, 524 F. Supp. 197, 198 (E.D. Pa. 1981) (citing *Nigro v. Blumberg*, 373 F. Supp. 1206, 1213 (E.D. Pa. 1974) (developing a test for when federal courts should defer to parallel proceedings in state courts)); see also, e.g., *Ronar*, 649 F. Supp. at 318 (citing *Continental Time* and *I.J.A.*); *Caspian Invs., Ltd. v. Vicom Holdings, Ltd.*, 770 F. Supp. 880, 884 (S.D.N.Y. 1991) (citing *Ronar* and *Continental Time*). The reasoning of *Nigro* foreshadowed that of *Colorado River*: It recognized that parallel litigation in federal and state courts is generally tolerated and that the federal courts typically have a duty to exercise the jurisdiction they have been given. *Nigro*, 373 F. Supp. at 1209. But like *Colorado River*, *Nigro* also recognized that the federal courts have discretion to stay or dismiss suits in some circumstances, *id.* at 1209 & n.6, and it identified factors for exercising that discretion that overlap significantly with those of *Colorado River*. *Id.* at 1212–13.

the international context of foreign parallel proceedings.²⁶⁰ The Southern District's framework proved influential: it has been adopted verbatim by leading district court opinions in the Eighth,²⁶¹ First,²⁶² and Tenth Circuits,²⁶³ and it informed the development of the third approach to foreign parallel proceedings—that of “international comity abstention.”

The Eleventh Circuit developed the concept of international comity abstention in *Turner* as a combination of the *Colorado River* and district court approaches to foreign parallel proceedings; it also mixed in factors related to the enforcement of foreign judgments.²⁶⁴ Subsequently, the Second Circuit in *Royal & Sun Alliance Insurance Co. v. Century International*²⁶⁵ mixed the Southern District of New York's approach with some of *Turner*'s considerations and adopted *Turner*'s label of “international comity abstention.”²⁶⁶

2. A Consolidated Approach

These three approaches—that of *Colorado River*, the district court framework, and international comity abstention—are more alike than they are different. The factors they consider overlap significantly.²⁶⁷

²⁶⁰ See, e.g., *Evergreen Marine Corp. v. Welgrow Int'l Inc.*, 954 F. Supp. 101, 103 n.1 (S.D.N.Y. 1997) (“While *Colorado River* and its progeny may be instructive in the present context, the considerations involved in deferring to state court proceedings are different from those involved in deferring to foreign proceedings, where concerns of international comity arise and issues of federalism and federal supremacy are not in play.”).

²⁶¹ See, e.g., *Abdullah Sayid Rajab Al-Rifai & Sons W.L.L. v. McDonnell Douglas Foreign Sales Corp.*, 988 F. Supp. 1285, 1291 (E.D. Mo. 1997) (citing *Boushel v. Toro Co.*, 985 F.2d 406, 410 n.2 (8th Cir. 1993) (citing *Caspian Investments*)).

²⁶² See, e.g., *Goldhammer v. Dunkin' Donuts, Inc.*, 59 F. Supp. 2d 248, 252–53 (D. Mass. 1999) (citing *Evergreen Marine*, *Caspian Investments*, *Continental Time*, *Boushel*, and *Abdullah Sayid Rajab Al-Rifai & Sons*).

²⁶³ See, e.g., *Nat'l Union Fire Ins. Co. of Pittsburgh, v. Kozeny*, 115 F. Supp. 2d 1243, 1247 (D. Colo. 2000) (citing *Evergreen*, *Boushel*, and *Abdullah Sayid Rajab Al-Rifai & Sons*).

²⁶⁴ *Turner Ent. Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1518 (11th Cir. 1994). The *Turner* court's incorporation of judgment enforcement factors reflected the unusual posture of that case, which involved a parallel foreign proceeding that had already resulted in a judgment. *Id.* at 1517. It may also have reflected the Eleventh Circuit's reliance on *Hilton v. Guyot*, 159 U.S. 113 (1895), for its definition of international comity. See *id.* at 1519 (quoting *Hilton*). While *Hilton* provides the Supreme Court's most emphatic and well-known invocation of international comity, it defined international comity in the context of the recognition and enforcement of foreign judgments. Courts should be careful not to conflate *Hilton*'s discussion of judgment enforcement factors with the concept of international comity more broadly.

²⁶⁵ 466 F.3d 88 (2d Cir. 2006).

²⁶⁶ See *id.* at 92–94 (citing *Turner*'s three principles of “the proper respect for litigation in and the courts of a sovereign nation, fairness to litigants, and judicial efficiency.”).

²⁶⁷ The *Colorado River* approach requires first a determination that the suits are in fact parallel and then balances such factors as “the relative inconvenience of the federal forum, the relative order of the

Notably, they also all start from an analogy to the treatment of federal-state parallel litigation.²⁶⁸

The lower courts are correct that foreign parallel proceedings are more akin to federal-state parallel proceedings than they are to federal-federal parallel proceedings. When a federal court defers under *Landis* to parallel litigation in another federal court, the federal courts as a whole are still exercising the jurisdiction granted by Congress. In contrast, the federal courts abdicate that jurisdiction when they defer to parallel proceedings in the courts of another sovereign, whether that of a U.S. state or that of a

two suits, the source of law in the case, and the relative progress of the two proceedings.” *Al-Abood ex rel. Al-Abood v. El-Shamari*, 217 F.3d 225, 232 (4th Cir. 2000). The district court approaches considers the “(1) similarity of parties and issues . . . ; (2) the promotion of judicial efficiency; (3) adequacy of relief available in the alternative forum; (4) issues of fairness to and convenience of the parties, counsel, and witnesses; (5) the possibility of prejudice to any of the parties; and (6) the temporal sequence of the filing of the actions.” *Goldhammer v. Dunkin’ Donuts, Inc.*, 59 F. Supp. 2d 248, 252–53 (D. Mass. 1999). The Second Circuit’s version of international comity abstention weighs “the similarity of the parties, the similarity of the issues, the order in which the actions were filed, the adequacy of the alternate forum, the potential prejudice to either party, the convenience of the parties, the connection between the litigation and the United States, and the connection between the litigation and the foreign jurisdiction.” *Royal & Sun All. Ins. Co. of Can. v. Century Int’l Arms, Inc.*, 466 F.3d 88, 94 (2d Cir. 2006).

²⁶⁸ A few district court cases have instead analogized to federal-federal parallel litigation under *Landis*. The most notable example is *Brinco Mining Ltd. v. Federal Ins. Co.*, 552 F. Supp. 1233, 1240 (D.D.C. 1982) (“This Court is of the view that the standard should be the same as that between two federal courts” for reasons particular to that case, namely that the plaintiff had already instituted proceedings in its home country of Canada, “a country that shares the same common law roots as our jurisprudence”); *see also* *St. Clair Intell. Prop. Consultants v. Fujifilm Holdings Corp.*, No. 08-373-JJF-LPS, 2009 WL 192457 at *2 (D. Del. Jan. 27, 2009) (invoking *Landis*). But these outliers have been overtaken by the three dominant approaches. More recent decisions from the District of D.C., for example, have followed the Second Circuit’s international comity abstention approach. *See* *Detroit Int’l Bridge Co. v. Gov’t of Canada*, 78 F. Supp. 3d 117, 120 (D.D.C. 2015) (quoting *Royal & Sun*, 466 F.3d at 94); *LG Display Co. Ltd. v. Obayashi Seikou Co., Ltd.*, 919 F. Supp. 2d 17, 24 (D.D.C. 2013) (same).

Similarly, some earlier Southern District of New York cases cited *Brinco* when giving priority to the first-filed case. *See* *Caspian Invs., Ltd. v. Vicom Holdings, Ltd.*, 770 F. Supp. 880, 885 (S.D.N.Y. 1991) (citing *Brinco*); *Ronar, Inc. v. Wallace*, 649 F. Supp. 310, 318 (S.D.N.Y. 1986) (“When . . . the foreign action is pending rather than decided, comity counsels that priority generally goes to the suit first filed.”). But more recent cases using the Southern District’s framework have uniformly started from a presumption in favor of retaining jurisdiction, regardless of which suit was filed first. *See, e.g., Nat’l Union Fire Ins. Co.*, 115 F. Supp. 2d at 1246 (invoking *Colorado River*’s exceptional circumstances standard); *Evergreen Marine Corp. v. Welgrow Int’l Inc.*, 954 F. Supp. 101, 103 (S.D.N.Y. 1997) (“Federal courts are reluctant to decline jurisdiction solely on the basis of concurrent proceedings in another jurisdiction.”). To the extent commentators have identified a fourth approach to foreign parallel proceedings based on *Landis*, those categorizations thus appear to be outdated. *See, e.g.,* BORN & RUTLEDGE, *supra* note 37, at 535-35, 541 (distinguishing between *Colorado River* and *Landis* approaches to foreign parallel proceedings); Jocelyn H. Bush, *To Abstain or Not To Abstain: A New Framework for Application of the Abstention Doctrine in International Parallel Proceedings*, 58 AM. U. L. REV. 127, 141 & n.84 (2008) (similar); Calamita, *supra* note 250, at 666 & n.201 (similar).

foreign nation. If anything, the separation-of-powers concern will be greater when a federal court declines its jurisdiction in favor of a foreign court than when it declines its jurisdiction in favor of a state court, given that the state courts operate within the same common law context as the federal courts and are bound by the same constitutional and federal statutory constraints.

Nonetheless, some minor differences remain across the three lower court approaches. Those differences can be grouped into three questions: first, what should the doctrine be called? Second, how strong should the starting presumption be? And third, what specific considerations should judges take into account?

The first question is actually quite important. The lower federal courts, in particular the Second and Eleventh Circuits, should stop calling deference to foreign parallel proceedings “international comity abstention.” The vagueness and breadth of that label has invited conflation between what should be distinct lines of precedent.²⁶⁹ Referring simply to *Colorado River* is also a bit misleading, as deference to foreign parallel proceedings raises different questions and concerns than deference to state parallel proceedings.²⁷⁰ Scholars tend to prefer the label *lis alibi pendens*, or “litigation pending elsewhere.” But the federal courts have so far not embraced the terminology in relation to foreign parallel proceedings.²⁷¹ Further, the term’s connection to the European approach to parallel proceedings could prove a new source of confusion, at least to the extent that the U.S. practice continues to differ from the European practice in significant respects.²⁷²

The key difference between the European approach and the current U.S. approach is the starting presumption: while Europe follows a fairly strict rule of deferring to the first-filed case akin to the *Landis* approach for federal-federal parallel litigation, the consensus in the federal courts is that duplicative litigation across sovereigns is generally tolerated.²⁷³ If the federal courts were to adopt something closer to a first-filed approach in order to align more closely with the practice and expectations of European allies, then

²⁶⁹ For further description of such conflation, see subsection I.B.1 above and Section II.D below.

²⁷⁰ See, e.g., Burbank, *Jurisdictional Equilibration*, *supra* note 16, at 213 (commenting that equating interstate and international instances of parallel proceedings is “indefensible”); Calamita, *supra* note 250, at 655 (criticizing the use of domestic doctrines for parallel proceedings in the international context).

²⁷¹ For a rare exception, see *Seguros del Estado, S.A. v. Sci. Games, Inc.*, 262 F.3d 1164 (11th Cir. 2001) (referring to *lis alibi pendens* in the context of foreign parallel proceedings).

²⁷² For a description of the European approach to parallel proceedings in foreign courts, see for example Burbank, *Jurisdictional Equilibration*, *supra* note 16, at 215–19.

²⁷³ See *supra* note 267 and accompanying text.

referencing *lis alibi pendens* could helpfully distinguish between that approach and the more restrictive *Colorado River* approach to federal-state parallel litigation. Given separation-of-powers concerns, however, the adoption of a first-filed presumption should ideally be implemented by Congress, and preferably in the context of a multilateral agreement that would help ensure reciprocal treatment by foreign courts.²⁷⁴ For now, it is best to refer explicitly to the problem of foreign parallel proceedings, at least until a consolidated and rationalized approach comes to be associated with a specific precedent.

But just because the federal courts are wary of a European-style first-filed approach does not mean they must apply the exact same standard as *Colorado River*. Indeed, although the three dominant approaches all analogize to federal-state parallel litigation, the strength of their starting presumptions differ slightly. At one end of the spectrum, *Turner* appears to apply no presumption either in favor of keeping jurisdiction or in favor of deferring to parallel litigation; its analysis moves straight into balancing.²⁷⁵ At the other end of the spectrum, the Second Circuit has interpreted *Colorado River*'s reference to exceptional circumstances as requiring "additional circumstances" beyond those "that routinely exist in connection with parallel litigation" in foreign courts.²⁷⁶

The better approach is to start with a *Colorado River*-like presumption in favor of retaining jurisdiction but to recognize, as some of the district courts have done, that "the considerations involved in deferring to state court proceedings are different from those involved in deferring to foreign proceedings, where concerns of international comity arise and issues of federalism and federal supremacy are not in play."²⁷⁷ When foreign litigation is truly duplicative and the case is significantly advanced in the foreign forum, that may be sufficiently "exceptional" to warrant deference. At the same time, federal courts might be more sensitive to parties' access-to-justice

²⁷⁴ See Burbank, *Jurisdictional Equilibration*, *supra* note 16, at 215 ("[I]n the absence of the unifying influences of a treaty, [the 'federal-federal model'] is not obviously more appropriate for international cases"); *id.* at 229–34 ("It is time to implement . . . legislation that provides federal *lis pendens* standards, binding in state and federal courts alike.").

²⁷⁵ See *Turner Ent. Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1518 (11th Cir. 1994) (not discussing any starting presumption).

²⁷⁶ *Royal & Sun All. Ins. Co. of Can. v. Century Int'l Arms, Inc.*, 466 F.3d 88, 95 (2d Cir. 2006); see also *id.* at 93 (insisting on, for the purposes of exceptional circumstances, "considerations which are not generally present as a result of parallel litigation").

²⁷⁷ *E.g.*, *EFCO Corp. v. Aluma Sys., USA, Inc.*, 983 F. Supp. 816, 824 n.5 (S.D. Iowa 1997) (quoting *Evergreen Marine Corp. v. Welgrow Int'l Inc.*, 954 F. Supp. 101, 103 n.1 (S.D.N.Y. 1997)).

concerns should federal jurisdiction be declined than they would be in the context of federal-state parallel litigation.

Turning to the factors to be considered, though there is substantial overlap between the three approaches, there are also some differences. The goal here is to map a consolidated set of factors that reflects the best of each of the existing approaches while better accounting for the international context. Identifying the relevant factors requires some agreement on what the purpose of the doctrine is. In this regard, *Turner* correctly enumerated “three readily identifiable goals” in navigating “concurrent international jurisdiction”: “(1) . . . international comity; (2) fairness to litigants; and (3) efficient use of scarce judicial resources.”²⁷⁸ These goals are not themselves factors; rather, they inform what the relevant factors should be.²⁷⁹

For example, a stay or dismissal of a U.S. action will only further comity, protect fairness, and achieve efficiency if the foreign proceedings are actually parallel, meaning that the parties and the issues are the same.²⁸⁰ Not surprisingly, then, all three current approaches agree that there should be substantial similarity between the parties and the issues, though only the *Colorado River* approach makes substantial similarity a threshold requirement.²⁸¹ The *Colorado River* approach is correct in this regard. Given the centrality of similarity to all three of the doctrine’s underlying goals, it should be treated as a necessary condition. Further, substantial similarity is what sets this doctrine apart from other doctrines of transnational abstention. Tools like forum non conveniens and deference to foreign bankruptcy proceedings can address situations in which there is meaningful overlap between cases but no potential for the judgment in one case to foreclose relitigation in the other.

²⁷⁸ See *Turner*, 25 F.3d at 1518; see also, e.g., *Royal & Sun*, 466 F.3d at 94 (“In the context of parallel proceedings in a foreign court, a district court should be guided by the principles upon which international comity is based: the proper respect for litigation in and the courts of a sovereign nation, fairness to litigants, and judicial efficiency.”).

²⁷⁹ Thus courts might consider dropping from their balancing tests such factors as “the promotion of judicial efficiency” or “issues of fairness,” e.g., *Goldhammer v. Dunkin’ Donuts, Inc.*, 59 F. Supp. 2d 248, 252–53 (D. Mass. 1999), which restate the question that needs to be answered.

²⁸⁰ See BORN & RUTLEDGE, *supra* note 37, at 545 (gathering cases analyzing similarity in light of such concerns).

²⁸¹ Compare *Al-Abood ex rel. Al-Abood v. El-Shamari*, 217 F.3d 225, 232 (4th Cir. 2000) (describing similarity as a threshold question under the *Colorado River* framework), with *Royal & Sun*, 466 F.3d at 94 (“[P]roper consideration . . . will no doubt require an evaluation of various factors, such as the similarity of the parties, [and] the similarity of the issues . . .”).

All three goals—comity, fairness, and efficiency—also depend on there being “a recognizable judgment . . . in prospect.”²⁸² In the context of federal-state parallel litigation, federal courts can presume that state court litigation will result in a recognizable judgment. The state courts are applying the same constitutional limits on the exercise of personal jurisdiction and the same constitutional requirements of due process as would the federal courts. Further, federal courts must give full faith and credit to state court judgments,²⁸³ and the law of preclusion is roughly the same, even if not identical, across U.S. jurisdictions. Those preconditions do not exist in the context of foreign parallel proceedings.

Ensuring that a recognizable judgment is in prospect means “inquiring whether the basis of jurisdiction in the foreign court me[ets] minimum standards and, ex ante, that there [i]s no systemic or insuperable situational barrier to the fair conduct of proceedings abroad and no likelihood of a judgment manifestly incompatible with American public policy.”²⁸⁴ Foreign judgments are not recognizable in U.S. courts if the foreign court lacks personal jurisdiction over the parties, for example, or if its “judicial system . . . does not provide impartial tribunals or procedures compatible with the requirements of due process of law.”²⁸⁵ Nonetheless, this threshold question can be a minimal check rather than a rigorous inquiry. U.S. courts are generally willing to recognize foreign judgments; further, because the present court cannot be certain how a later court will assess the yet-to-be-rendered foreign judgment, any prospective problems would have to be fairly obvious.

None of the current approaches to foreign parallel proceedings treat the potential validity of the foreign judgment as a threshold issue. Within the broader set of factors, however, the Second Circuit does consider the “adequacy of the alternate forum,”²⁸⁶ while the Eleventh Circuit considers the competence of the foreign court and its general use of “fair and just proceedings.”²⁸⁷ Factors like these could be clarified to address, at the outset, whether the foreign court is capable of rendering a judgment that could be recognized by a U.S. court.

²⁸² Burbank, *Jurisdictional Equilibration*, *supra* note 16, at 234 (noting that this check ensures “that the expense and delay of parallel litigation can be avoided, and that it would be fair to do so”).

²⁸³ 28 U.S.C. § 1738.

²⁸⁴ Burbank, *Jurisdictional Equilibration*, *supra* note 16, at 234.

²⁸⁵ UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(b)(1) (NAT’L CONF. COMM’RS ON UNIF. STATE L. 2005).

²⁸⁶ *E.g.*, *Royal & Sun*, 466 F.3d at 94.

²⁸⁷ *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1224 (11th Cir. 1999); *see also* *Turner Ent. Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1520 (11th Cir. 1994) (similar).

Another factor that furthers all three goals is whether the foreign suit was filed first and how far it has progressed. All of the current approaches already consider the order in which the cases are filed.²⁸⁸ This has the benefit of being an easily ascertainable fact, but by itself it will likely not be enough to overcome the starting presumption of tolerating duplicative litigation. Weightier is evidence of significant progress in the foreign proceedings, a factor that the *Colorado River* courts in particular have emphasized.²⁸⁹ The further advanced the foreign proceeding, the greater the comity, fairness, and efficiency gains in deferring to it.

Most of the remaining factors considered by each of the three current approaches relate to the connection between the forums and the dispute,²⁹⁰ the source of law to be applied,²⁹¹ and the convenience of the parties, which typically means the location of evidence and witnesses.²⁹² These factors are all variations on the question of nexus: does one forum have a significantly greater connection to the dispute than the other? Speaking in terms of nexus or connection may be more helpful than referring to party convenience, which risks devolving into the private interest factor analysis of forum non conveniens.²⁹³ The relevant question in the context of foreign parallel

²⁸⁸ See, e.g., *Royal & Sun*, 466 F.3d at 94 (considering “the order in which the actions were filed”); *Finova Cap. Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 898 (7th Cir. 1999) (same); *Nat’l Union Fire Ins. Co. of Pittsburgh v. Kozeny*, 115 F. Supp. 2d 1243, 1247 (D. Colo. 2000) (considering “the temporal sequence of the filing of the actions”).

²⁸⁹ See, e.g., *Answers in Genesis of Ky., Inc. v. Creation Ministries Int’l, Ltd.*, 556 F.3d 458, 467 (6th Cir. 2009) (“Additional factors include how far the parallel proceeding has advanced”); *Al-Abood ex rel. Al-Abood v. El-Shamari*, 217 F.3d 225, 232 (4th Cir. 2000) (noting “the relative progress of the two proceedings”); *Finova*, 180 F.3d at 898 (considering “the relative progress of the federal and foreign proceedings”). *Accord*, e.g., *Turner Ent. Co.*, 25 F.3d at 1522 (considering “the alternative forum is likely to render a prompt disposition”); *Abdullah Sayid Rajab Al-Rifai & Sons W.L.L. v. McDonnell Douglas Foreign Sales Corp.*, 988 F. Supp. 1285, 1291 (E.D. Mo. 1997) (considering “the degree of process already made in the [foreign] action”).

²⁹⁰ See, e.g., *Royal & Sun*, 466 F.3d at 94 (considering “the connection between the litigation and the United States, and the connection between the litigation and the foreign jurisdiction”); *Turner Ent.*, 25 F.3d at 1521 (considering “the relative strengths of the American and German interests” in the litigation).

²⁹¹ See, e.g., *Al-Abood*, 217 F.3d at 232 (considering “the source of the law in the case”); *Finova*, 180 F.3d at 898 (considering “whether federal or foreign law provides the rule of decision”).

²⁹² See, e.g., *Answers in Genesis*, 556 F.3d at 467, 469 (considering “the convenience of the parties,” which the court assessed in terms of the location of witnesses); *Royal & Sun*, 466 F.3d at 94 (same); *IBC Advanced Techs., Inc. v. Ucore Rare Metals Inc.*, 415 F. Supp. 3d 1028, 1032–33 (D. Utah 2019) (analyzing “issues of fairness to and convenience of the parties, counsel, and witnesses” in terms of the location of evidence and witnesses (quoting *Nat’l Union Fire Ins.*, 115 F. Supp. at 1247)).

²⁹³ Cf. *Evergreen Marine Corp. v. Welgrow Int’l Inc.*, 954 F. Supp. 101, 105 n.2 (S.D.N.Y. 1997) (noting that much of the defendant’s arguments were “couched in forum non conveniens terms” but emphasizing the distinction between that doctrine and deference to foreign parallel proceedings).

proceedings is not convenience, but whether the connection between the dispute and the foreign forum is so much more significant that it merits overriding the default presumption in favor of duplicative litigation.

Finally, both the district court approach and the international comity abstention approach separately consider “the possibility of prejudice to any of the parties.”²⁹⁴ That factor could serve as a backstop to allow courts to consider more unusual circumstances that may weigh against abstention. Care should be taken, however, to avoid repeating considerations already accounted for through the prior factors, all of which also relate to party fairness. One such unusual circumstance might be the potential inadequacy of relief available in the alternative forum;²⁹⁵ a party might be meaningfully prejudiced by the granting or denial of a stay if either the U.S. court or the foreign court is uniquely able to provide the relief sought, for example because the plaintiff is seeking an injunction pertaining to parties or property located within one of the forums.

* * *

In sum, a unified and refined approach to foreign parallel litigation would start with a presumption in favor of retaining jurisdiction, but one that can be overcome without one-of-a-kind circumstances. The federal court should first ensure that the parties and issues are substantially similar and that the foreign court is capable of rendering a recognizable judgment and providing the requested relief. In then deciding whether to exercise its discretion to defer to the foreign proceedings, the U.S. federal court should primarily consider how far the foreign suit has progressed and whether the foreign forum has a significantly greater nexus to the dispute.

Finally, courts should effectuate this deference through stays rather than dismissals. In addition to alleviating (albeit only slightly) the separation-of-powers concerns, a stay recognizes that “ex ante predictions about recognition and delay are more difficult in the international context”²⁹⁶ and reserves the federal judge’s ability to ensure that the parties are not unduly prejudiced by the court’s exercise of discretion.

²⁹⁴ *Nat’l Union Fire Ins. Co.*, 115 F. Supp. at 1247; *see also, e.g., Royal & Sun*, 466 F.3d at 94 (similar); *Turner Ent.*, 25 F.3d at 1522 (similar).

²⁹⁵ The district court approach currently includes such a factor in addition to a factor regarding party prejudice. *E.g., Goldhammer v. Dunkin’ Donuts, Inc.*, 59 F. Supp. 2d 248, 253 (D. Mass. 1999).

²⁹⁶ Burbank, *Jurisdictional Equilibration*, *supra* note 16, at 234.

C. Cross-Border Bankruptcies

Federal courts have developed a separate abstention doctrine to address deference to foreign bankruptcy proceedings.²⁹⁷ Deference to foreign adjudication of primary bankruptcy proceedings has a broader sweep than deference to parallel litigation because it encompasses a concern for merely overlapping or related claims. As the Second Circuit has put it, “[t]he 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.”²⁹⁸

That difference in underlying rationale leads to differences in the applicable frameworks. First, the parties and issues need not be substantially similar; U.S. courts may need to stay or dismiss litigation that is related to foreign bankruptcy proceedings in order to avoid undermining the work of foreign courts in administering bankruptcy estates.²⁹⁹ Second, the starting presumption is that U.S. courts *should* defer to primary bankruptcy proceedings in foreign courts, a presumption opposite the one currently used by any circuit that has addressed foreign parallel proceedings more generally.³⁰⁰ That strong presumption in favor of deference reflects not only the pragmatic need to consolidate insolvency proceedings in one jurisdiction, but also Congress’s direction to cooperate with foreign jurisdictions regarding cross-border bankruptcies. In its 1978 reform of the bankruptcy

²⁹⁷ The most significant line of such cases comes from the Second Circuit. *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) (“We have repeatedly held that U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding.”); *Finanz AG Zurich v. Banco Economica S.A.*, 192 F.3d 240, 246 (2d Cir. 1999) (“We have repeatedly noted the importance of extending comity to foreign bankruptcy proceedings.”); *Allstate Life Ins. Co. v. Linter Grp. Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993) (“[C]omity is particularly appropriate where . . . the court is confronted with foreign bankruptcy proceedings.”); *Victrix S.S. Co. S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 714 (2d Cir. 1987) (“Under general principles of comity . . . , federal courts will recognize foreign bankruptcy proceedings provided the foreign laws comport with due process and fairly treat claims of local creditors.”); *Cunard S.S. Co. Ltd. v. Salen Reefer Servs., AB*, 773 F.2d 452, 456 (2d Cir. 1985) (“We hold that . . . the district court properly extended comity to the Swedish adjudication of bankruptcy and stay of creditor actions.”); *see also Remington Rand Corp.-Del. v. Bus. Sys., Inc.*, 830 F.2d 1260, 1266 (3d Cir. 1987) (recognizing the practice of granting comity to foreign bankruptcy proceedings).

²⁹⁸ *Victrix*, 825 F.2d at 713–14; *see also Cunard*, 773 F.2d at 458 (“The granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion.”).

²⁹⁹ *See, e.g., JP Morgan*, 412 F.3d at 427 (“Inasmuch as the bank’s claim is really that of a creditor seeking payment of a debt, the only issue for us to decide is whether the *debt* is the subject of a parallel foreign bankruptcy proceeding[.]”).

³⁰⁰ *See supra* Section II.B (describing how lower federal courts treat foreign parallel proceedings similarly to parallel litigation in state courts).

code, Congress adopted 11 U.S.C. § 304, which allowed a “foreign representative” to file a bankruptcy petition in U.S. court that was “ancillary to a foreign proceeding.”³⁰¹ Section 304 granted the U.S. court broad authority to assist the foreign primary proceeding by, inter alia, enjoining actions in U.S. courts or ordering the turnover of property to the foreign representative.³⁰² And it directed that, in considering such relief, the U.S. court “shall be guided by what will best assure an economical and expeditious administration” of the bankruptcy estate, taking into consideration fairness, public policy, and “comity.”³⁰³ This statutory direction, as well as the cooperative spirit behind it, encouraged the courts to defer to foreign bankruptcy proceedings or to cooperate directly with them³⁰⁴ while also relieving the separation-of-powers concerns that accompany abstention.

The need for such a common law abstention doctrine to effectuate bankruptcy cooperation decreased significantly, however, with the adoption in 2005 of Chapter 15 of the Bankruptcy Code, which implemented the UNCITRAL Model Law on Cross Border Insolvency.³⁰⁵ While § 304 had “provided a structure for cooperation and coordination” in cross-border bankruptcies, it also left judges with broad discretion as to whether and how to assist foreign proceedings, and that discretion was not always applied consistently.³⁰⁶ Section 304 had also been a unilateral effort on the part of the United States to improve cooperation in bankruptcy matters; in contrast, the Model Law was a multilateral effort and thus had greater “potential to harmonize the treatment of cross-border insolvency.”³⁰⁷ Chapter 15, in replacing § 304 and implementing that Model Law, established a stronger deference regime for foreign bankruptcy because it “begins with the instruction to U.S. bankruptcy judges that cooperation and coordination are the rule and not the exception and then provides a structure within which judges can operate.”³⁰⁸ Because of this clearer statutory framework, the federal appellate courts appear no longer to need the judge-made deference doctrine; instead, since 2005 they have invoked the “doctrine of international

³⁰¹ 11 U.S.C. § 304(a) (repealed 2005).

³⁰² 11 U.S.C. § 304(b) (repealed 2005).

³⁰³ See 11 U.S.C. § 304(c) (repealed 2005).

³⁰⁴ See, e.g., *Gitlin v. Societe Generale (In re Maxwell Commc'n Corp.)*, 93 F.3d 1036, 1048 (2d Cir. 1996) (“Congress explicitly recognized the importance of the principles of international comity in transnational insolvency situations when it revised the bankruptcy laws” to add § 304).

³⁰⁵ Edward S. Adams & Jason K. Fincke, *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism*, 15 COLUM.J. EUR. L. 43, 46 (2008). Congress repealed § 304 at the same time.

³⁰⁶ *Id.* at 80.

³⁰⁷ *Id.* at 75.

³⁰⁸ *Id.* at 80.

comity” in the bankruptcy context not to determine whether to decline their jurisdiction, but rather to identify the reach of U.S. bankruptcy laws.³⁰⁹ That is an application of prescriptive comity, not the adjudicative comity of abstention. Going forward, then, the primary takeaway from this category of abstention is that courts considering deference to foreign parallel proceedings should avoid relying on cases addressing cross-border bankruptcies, as those cases have applied different presumptions and considerations.

D. Inappropriate Bases for Transnational Abstention

The broad label of “international comity abstention” has encouraged courts to use it beyond the context of forum non conveniens, foreign parallel proceedings, and cross-border bankruptcies. These experiments are ill-advised. There is no requirement of or need for prudential exhaustion in transnational cases. Abstention is a dangerous tool for analyzing foreign relations concerns. And it is not the right lens for analyzing issues of preclusion or statutory interpretation.

1. Rejecting Prudential Exhaustion

Two circuits have invoked the concept of prudential exhaustion to decline jurisdiction over particular sets of claims: the Seventh Circuit in regards to Foreign Sovereign Immunity Act (FSIA) cases and the Ninth Circuit in regards to Alien Tort Statute (ATS) cases.³¹⁰ Requiring prudential exhaustion for transnational cases is a mistake, though one that has luckily not spread to other circuits.³¹¹ Indeed, the Seventh Circuit has cast doubt on

³⁰⁹ See, e.g., *In re Picard*, 917 F.3d 85, 103–05 (2d Cir. 2019) (invoking “prescriptive comity” in evaluating “when and why the Bankruptcy Code should give way to foreign law”); *French v. Liebman* (*In re French*), 440 F.3d 145, 153 (4th Cir. 2006) (considering “whether to forego application of our own [bankruptcy] law under the doctrine of international comity” in deference to Bahamian bankruptcy law).

³¹⁰ See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 424 rep. n. 10 (AM. LAW INST. 2018) (citing *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 856–59 (7th Cir. 2015), and *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 828–32 (9th Cir. 2008) (en banc) (plurality opinion), *vacated on other grounds*, 569 U.S. 945 (2013)).

³¹¹ See, e.g., *Simon v. Republic of Hungary*, 911 F.3d 1172, 1180–81 (D.C. Cir. 2018), *rev'd on other grounds*, 141 S. Ct. 691 (2021) (rejecting prudential exhaustion for FSIA claims); *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005) (rejecting prudential exhaustion for ATS claims).

the applicability of prudential exhaustion for ATS claims,³¹² while the Ninth Circuit has cast doubt on the applicability of exhaustion for FSIA claims.³¹³

Extending prudential exhaustion to transnational cases is ill-advised as both a legal and a practical matter. First, contrary to the reasoning of the Seventh Circuit,³¹⁴ there is no requirement under international law that *private parties* exhaust claims locally before suing in the domestic courts of another country.³¹⁵ Second, ATS or FSIA exhaustion differs significantly from the concept of administrative exhaustion: while administrative exhaustion leaves open the possibility of subsequent judicial review, judicial resolution of claims in another sovereign's courts—including the summary rejection of those claims—will typically bar subsequent judicial review under principles of *res judicata*. Requiring prudential exhaustion of claims in a foreign court, in other words, is equivalent to denying the plaintiff a U.S. forum.³¹⁶ Third, not only is a prudential exhaustion requirement unnecessary and impractical, it is also redundant with *forum non conveniens*, which can address the foreign forum's superior interest in a dispute through the public interest factors. Particularly with an updated doctrine of *forum non conveniens*, the concept of prudential exhaustion for transnational cases should be interred as a failed experiment.

2. *Rejecting Foreign Relations Abstention*

Courts should also reject the use of abstention to address foreign relations concerns—the version of “international comity abstention” applied in *Cooper*. It is noteworthy that this use of “international comity abstention” emerged in two cases (*Ungaro-Benages* and *Mujica*) in which the closely related doctrines of act of state, political question, and *forum non conveniens* were held not to apply. Foreign relations abstention is effectively an end run around the legitimate constraints of these other doctrines.

³¹² See *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1025 (7th Cir. 2011) (noting in dicta that “[t]he implications of the argument border on the ridiculous; imagine having been required to file suit in a court in Nazi Germany complaining about genocide, before being able to sue under the [ATS]”).

³¹³ See *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1034–37 (9th Cir. 2010) (en banc) (rejecting requirement of exhaustion for FSIA cases without addressing whether exhaustion could be directed in individual cases).

³¹⁴ See *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 679–80 (7th Cir. 2012) (referencing customary international law regarding claims that can be raised by states or before international bodies).

³¹⁵ See *Dodge*, *supra* note 121, at 2010–11 n.243.

³¹⁶ See *Simon v. Republic of Hungary*, 911 F.3d 1172, 1180 (D.D.C. 2020) (“[T]here is a substantial risk that the Survivors’ exhaustion of any Hungarian remedy could preclude them by operation of *res judicata* from ever bringing their claims in the United States.”).

In both *Ungaro-Benages* and *Mujica*, the district courts initially relied on the political question doctrine to dismiss the case.³¹⁷ But as the Eleventh Circuit explained in *Ungaro-Benages*, “not all issues that could potentially have consequences to our foreign relations are political questions.”³¹⁸ Nor does Executive Branch support for dismissal alone render a case nonjusticiable: courts may not “decline to resolve a controversy within their traditional competence and proper jurisdiction simply because the question is difficult, the consequences weighty, or the potential real for conflict with the policy preferences of the political branches.”³¹⁹ Yet the circuit courts in *Ungaro-Benages* and *Mujica* were left with a sense that these cases did not belong in U.S. courts. In articulating a new basis to justify the dismissal of those cases, the Eleventh and Ninth Circuits created precisely the sort of “vague doctrine of abstention” that the Supreme Court warned against when it curtailed the use of the act of state doctrine to dismiss cases simply because they “may embarrass foreign governments.”³²⁰

And foreign relations abstention is indeed vague. *Ungaro-Benages* defined the factors to be considered as “the strength of the United States’ interest in using a foreign forum, the strength of the foreign government’s interests, and the adequacy of the alternative forum.”³²¹ As the Ninth Circuit in *Mujica* acknowledged, *Ungaro-Benages* “offers no substantive standards for assessing its three factors.”³²² In trying to add specificity, *Mujica* suggested considering nexus and regulatory interests along with “the foreign policy interests of the United States,” “any public policy interests,” and “the interests of the foreign state.”³²³ That elaboration does not provide the needed guidance, devolving

³¹⁷ See *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d at 1229 (11th Cir. 2004); *Mujica v. Airscan Inc.*, 381 F. Supp. 2d 1164, 1194–95 (C.D. Cal. 2005).

³¹⁸ *Ungaro-Benages*, 379 F.3d at 1235 (holding that the political question doctrine did not apply); see also *Mujica v. Airscan Inc.*, 771 F.3d 580, 616 n.4 (9th Cir. 2014) (Zilly, J., concurring in part and dissenting in part) (explaining why he would have reversed the district court’s political question ruling, which the majority avoided addressing by invoking international comity abstention instead).

³¹⁹ *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 205 (2012) (Sotomayor, J., concurring in part and concurring in the judgment); see also *id.* at 194–95 (decision of the Court) (emphasizing narrowness of the political question doctrine); *Baker v. Carr*, 369 U.S. 186, 211 (1962) (“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”).

³²⁰ *W. S. Kirkpatrick & Co. v. Env’tl Tectonics Corp.*, 493 U.S. 400, 406, 409 (1990).

³²¹ *Ungaro-Benages*, 379 F.3d at 1238.

³²² *Mujica*, 771 F.3d at 603.

³²³ *Id.* at 604, 607.

again into a free-ranging inquiry regarding state interests³²⁴—precisely what the Supreme Court has warned against in other contexts.

Mujica's procedural history also highlights how foreign relations abstention expands the scope of judicial discretion already exercised through forum non conveniens.³²⁵ The overlap between the two doctrines is significant, as illustrated by the largely identical analysis by the district court in *Cooper*.³²⁶ But foreign relations abstention lacks both the history and the constraints of forum non conveniens. Most significantly, foreign relations abstention has no starting presumption in favor of retaining jurisdiction—no acknowledgement, that is, of the separation-of-powers concern that always arises when federal judges voluntarily decline to hear cases. As the Supreme Court has repeatedly warned, political sensitivity is not a reason to refuse to hear a case; if there are specific adjudicatory interests that merit deference, judges can articulate a public interest factor within the forum non conveniens analysis to account for them.

3. Distinguishing Preclusion and Statutory Interpretation

Finally, vague labels like the “doctrine of international comity” have led some courts to invoke international comity abstention to address matters of preclusion and statutory interpretation. Abstention is a doctrine of negative adjudicative comity (or adjudicative comity acting as a principle of restraint); preclusion, in contrast, is a matter of *positive* adjudicative comity (or adjudicative comity acting as a principle of recognition), and statutory interpretation is a matter of negative *prescriptive* comity.³²⁷ “[I]t is important to stay inside the box” of each of these categories, as the “different valences and purposes of comity [reflected in each category] can confuse judicial

³²⁴ As others have noted, comity doctrines are most problematic when they remain at such a high level of generality. See Calamita, *supra* note 250, at 627 n.71 (“Comity’s unpredictable side emerges when courts fail to use its principles to construct rules of meaningful specificity. Comity has been used to justify schemes of ad hoc interest balancing that leave parties and lower courts with bewilderingly little guidance.”); Dodge, *supra* note 121, at 2083 (noting that most comity-based doctrines take the form of rules, with only doctrines of negative adjudicative comity—namely, transnational abstention—being phrased in terms of broad standards).

³²⁵ See *supra* subsection I.B.1 (describing *Mujica*'s procedural history).

³²⁶ See *Cooper II*, 166 F. Supp. 3d 1103, 1132–40 (S.D. Cal. 2015) (in evaluating both doctrines, considering similar facts and noting that the “standards for evaluating the adequacy of a forum are the same”).

³²⁷ Gardner, *supra* note 13, at 94–95 & n.166; see also Dodge, *supra* note 121, at 2099–2109 (defining prescriptive and adjudicative comity and dividing comity-based doctrines between those applying comity as a “principle of recognition” and those applying it as a “principle of restraint”).

analysis and potentially lead to erroneous outcomes.”³²⁸ Unlike abstention, for example, doctrines of positive adjudicative comity and negative prescriptive comity result in decisions on the merits. And they draw on different sources of law: while abstention doctrines are created by federal judges, the recognition of foreign judgments is typically determined by state law and statutory interpretation is meant to give effect to legislative intentions. The lines between these inquiries should be firmly maintained.

First, abstention is not the right vehicle for enforcing foreign judgments or giving them preclusive effect in U.S. proceedings. Judgment enforcement and preclusion first require recognition of the foreign judgment, which in turn requires a final judgment.³²⁹ In contrast, a non-final judgment may still be relevant for weighing deference to foreign parallel proceedings as it indicates the advanced stage of proceedings in the foreign court.³³⁰ The Eleventh Circuit in *Turner* thus put weight on a non-final German judgment when deferring to German proceedings, but it perhaps unwisely used the language of judgment enforcement when doing so.³³¹ That mixing of language may in turn have encouraged later Eleventh Circuit panels to invoke *Turner’s* international comity abstention as a shortcut for giving preclusive effect to foreign judgments.³³² Good examples of opinions that analyze these questions distinctly, in contrast, include *Ingersoll Milling Machinery Co. v. Granger*, which separately analyzed judgment enforcement and foreign parallel proceedings,³³³ and *Remington Rand Corp. v. Business Systems Inc.*,³³⁴ which separately analyzed questions of issue preclusion, claim preclusion, and foreign parallel proceedings, although without using those precise labels.

One reason this distinction matters is because the source of law differs. Abstention is a doctrine devised by federal judges; in contrast, state law

³²⁸ Gardner, *supra* note 13, at 95.

³²⁹ RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. d (AM. L. INST. 2018).

³³⁰ See *supra* subsection II.B.2 (discussing foreign parallel proceedings).

³³¹ *Turner Ent. Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1519–220 (11th Cir. 1994).

³³² See *Daewoo Motor Am., Inc. v. Gen. Motors Corp.*, 459 F.3d 1249, 1255, 1259 (11th Cir. 2006) (invoking abstention to dismiss the plaintiff’s “collateral[] attack” on a Korean bankruptcy proceeding in which the plaintiff had participated as an unsecured creditor); *Belize Telecom, Ltd. v. Gov’t of Belize*, 528 F.3d 1298, 1303–09, 1305 n.9, 1308 n.12 (11th Cir. 2008) (invoking abstention to give issue preclusive effect to a non-final Belize judgment).

³³³ 833 F.2d 680, 685–90 (7th Cir. 1987) (applying separately the factors of *Colorado River* and Illinois’s foreign judgments enforcement statute).

³³⁴ 830 F.2d 1260 (3d Cir. 1987).

applies to the recognition of foreign judgments.³³⁵ For many states, that law is typically statutory, often reflecting uniform acts;³³⁶ the state law applied in *Ingersoll*, for instance, was such a statute.³³⁷ A possible source of confusion arises when states rely instead on common law for the enforcement of foreign judgments, which in turn may draw on federal sources. In *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*,³³⁸ for example, the federal court applied Pennsylvania state law, which at the time reflected the old common law of foreign judgment enforcement described by the Supreme Court in *Hilton v. Guyot*.³³⁹ *Somportex*'s references to *Hilton* do not imply that *Hilton* should guide analysis of all judgment enforcement actions; to the contrary, such actions remain governed by state law.

Giving effect to foreign judgments also requires an inquiry into foreign law. To be recognized for either enforcement or preclusion purposes, the foreign judgment must be final and conclusive under the rendering court's law.³⁴⁰ A foreign judgment also "ordinarily has no greater [preclusive] effect in the United States than in the country where the judgment was rendered."³⁴¹ This inquiry into foreign preclusion law is potentially an onerous undertaking, despite Federal Rule of Civil Procedure 44.1's flexibility regarding permissible sources for determining the content of foreign law and the invoking party bearing the burden of establishing the preclusion law of the foreign state.³⁴² It is understandable, then, why courts may be tempted to invoke abstention to short-circuit this full analysis, but they do so at the risk of real unfairness to parties who may find themselves effectively bound by non-final judgments or by judgments that the issuing court did not intend to have preclusive effect.

Second, abstention is not the right vehicle for determining the geographic reach of federal laws or deciding whether to apply U.S. or foreign law. Those

³³⁵ RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. a (AM. L. INST. 2018).

³³⁶ *Id.*

³³⁷ *Ingersoll*, 833 F.2d at 686.

³³⁸ 453 F.2d 435 (3d Cir. 1971).

³³⁹ *Id.* at 440 (citing *Hilton v. Guyot*, 159 U.S. 113 (1895)).

³⁴⁰ RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 487 cmt. d & rep. n.4 (AM. L. INST. 2018).

³⁴¹ *Id.* § 487 cmt. d.

³⁴² The *Restatement (Fourth)* includes a rather significant loophole, however, in that it acknowledges that if the party seeking preclusion does not carry the burden of establishing the preclusion law of the issuing forum, then the U.S. court can presume that law to be the same as the law of the forum. *Id.* § 487 rep. n.4. That does not seem to provide a very significant incentive to the party seeking preclusion as U.S. preclusion law tends to be broader than that of other countries. *See, e.g., id.* cmt. a (noting that issue preclusion is "not universally accepted outside the United States").

questions are instead questions of *prescriptive* comity. Like with transnational preclusion, however, doctrinal and theoretical ambiguity around the limits of prescriptive comity has encouraged elision between these questions of statutory interpretation and the comforting vagueness of “international comity abstention.” This much is clear: If a plaintiff has invoked state law causes of action, a federal court should generally apply its forum state’s choice of law rules to determine whether U.S. or foreign law should apply.³⁴³ If the plaintiff has invoked a federal statute, the judge will need to determine whether the case involves a domestic application of the statute or, if not, whether the statute rebuts the presumption against extraterritoriality.³⁴⁴ That analysis, unlike abstention, is a determination on the merits.³⁴⁵

For federal statutes that *do* rebut the presumption against extraterritoriality, however, the Supreme Court has not clarified how judges are to determine the outer limits of those statutes’ reach beyond the vague direction that such statutes should be interpreted not to cause “unreasonable interference” with foreign law.³⁴⁶ In the absence of clearer guidance from the Supreme Court, some lower federal courts have continued to use the *Timberlane* factors to determine what constitutes “unreasonable interference.”³⁴⁷ Judges and litigants researching transnational abstention should thus avoid relying on cases that invoke *Timberlane*, the similar test of *Mannington Mills*,³⁴⁸ or the now-obsolete Section 403 factors.³⁴⁹ These are all flags that the prior decision was evaluating a question of prescriptive, not adjudicative, comity. Likewise, decisions involving cross-border bankruptcies have at times invoked “the doctrine of international comity”³⁵⁰ or

³⁴³ See Zachary Clopton, *Horizontal Choice of Law in Federal Court*, 169 U. PA. L. REV. 2191 (2021).

³⁴⁴ *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 253–54 (2010). To be clear, the federal presumption against extraterritoriality does not apply to state statutes. See generally Dodge, *supra* note 10 (describing variation in state approaches to extraterritoriality).

³⁴⁵ See *Morrison*, 561 U.S. at 253–54 (addressing extraterritoriality as a question of whether the complaint stated a claim upon which relief could be granted).

³⁴⁶ See *F. Hoffmann-La Roche Ltd. v. Empagran S. A.*, 542 U.S. 155, 164 (2004); see also Maggie Gardner, *Minding the Empagran Gap*, 55 WILLAMETTE L. REV. 509 (2019) (describing this gap and worrying about the practical consequences of the resulting uncertainty).

³⁴⁷ These factors derive from *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976). For recent invocations, see *Trader Joe’s Co. v. Hallatt*, 835 F.3d 960, 969–75 (9th Cir. 2016) (Lanham Act); *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 184–85 (2d Cir. 2016), *vacated on other grounds sub nom.* *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018) (antitrust).

³⁴⁸ *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297–98 (3d Cir. 1979).

³⁴⁹ See *supra* note 34.

³⁵⁰ *French v. Liebman (In re French)*, 440 F.3d 145, 152 (4th Cir. 2006); *Gitlin v. Societe Generale (In re Maxwell Commc’n Corp.)*, 93 F.3d 1036, 1040 (2d Cir. 1996).

“international comity principles”³⁵¹ when determining whether U.S. law should apply to a bankruptcy-related dispute. Unlike decisions *deferring* to related foreign bankruptcy proceedings,³⁵² these decisions are not about abstention; rather, they are about choice of law and statutory interpretation.

For the most part, the circuit courts have been clear that they are exercising prescriptive comity when they consider whether U.S. law should apply to foreign conduct.³⁵³ But the vagueness of labels like the “doctrine of international comity” can encourage courts to characterize prescriptive comity analyses as exercises of transnational abstention.³⁵⁴ The most important step federal courts could take to prevent further conflation is to stop using the terms like “international comity abstention,” which is unhelpfully vague, and the “doctrine of international comity,” which does not exist. There are many doctrines of international comity, and there are multiple doctrines of transnational abstention. Distinguishing clearly among them is critical for keeping in check the assertion of the federal judicial power to refuse to hear cases.

CONCLUSION

As the Fukushima cases illustrate, current doctrines of transnational abstention are not helping judges answer the questions they are confronting. Mismatched doctrines can in turn create pressures to expand the scope of judicial discretion to decline jurisdiction. By encouraging federal courts to reject cases based on subjective or unguided evaluations of which cases “belong” in U.S. courts, loose doctrines of abstention risk overriding congressional grants of federal jurisdiction, U.S. states’ efforts to protect their residents, and the foreign policy preferences of the political branches.

Every jurisdictional system will require some equilibration devices. But those devices need not be free-ranging. The roadmap offered here is intended to help federal courts gradually refine *forum non conveniens*, consolidate a distinct doctrine for addressing federal-foreign parallel

³⁵¹ *In re Picard*, 917 F.3d 85, 91 (2d Cir. 2019).

³⁵² *See supra* Section II.C (listing such cases).

³⁵³ *See, e.g., In re Picard*, 917 F.3d at 101 (correctly characterizing *In re Maxwell* as a case involving prescriptive comity, in contrast to *Royal & Sun*, which applied adjudicative comity).

³⁵⁴ *See In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 184, 192 (2d Cir. 2016) (labeling prescriptive comity analysis as one of abstention), *vacated on other grounds sub nom. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018). Perhaps because of this labeling, the Second Circuit subsequently—but I believe mistakenly—categorized *Vitamin C* as a decision applying adjudicative comity. *See In re Picard*, 917 F.3d at 101 n.12.

litigation, reject abstention based on foreign relations concerns or prudential exhaustion requirements, and analyze questions of transnational preclusion and extraterritorial application of federal statutes without resorting to loose invocations of “abstention” or “international comity.” The goal is not perfection, but a striving for constant improvement based on lived experience, in the hope that congressional—and international—progress may still be forthcoming.