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Parochial Procedure

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Abstract. The federal courts are often accused of being too parochial, favoring U.S. parties over foreigners and U.S. law over relevant foreign or international law. According to what this Article terms the “parochial critique,” the courts’ U.S.-centrism generates unnecessary friction with allies, regulatory conflict, and access-to-justice gaps. This parochialism is assumed to reflect the preferences of individual judges: persuade judges to like international law and transnational cases better, the standard story goes, and the courts will reach more cosmopolitan results.

This Article challenges that assumption. I argue instead that parochial doctrines can develop even in the absence of parochial judges. Our sometimes-parochial procedure may be the unintended result of decisionmaking pressures that mount over time within poorly designed doctrines. As such, it reflects not so much the personal views of individual judges but the limits of institutional capacity, the realities of behavioral decisionmaking, and the path dependence of the common law. This Article shows how open-ended decisionmaking in the midst of complexity encourages the use of heuristics that tend to emphasize the local, the familiar, and the concrete. These decisionmaking shortcuts, by disfavoring the foreign, put a parochial thumb on the scale—but that tilt is not limited to individual cases. Rather, it is locked in and amplified through the accumulation of precedent, as later judges rely on existing decisions to resolve new cases. Over time, even judges with positive conceptions of international law and transnational order will find themselves, in applying these doctrines, consistently favoring U.S. litigants over foreigners and U.S. law over foreign or international law.

To explore this theory, this Article traces the evolution of four procedural doctrines: discovery of foreign evidence, *forum non conveniens*, service of process abroad, and the

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recognition of foreign judgments. The decisionmaking pressures outlined here can explain why the first two doctrines (framed as open-ended standards) are often criticized as parochial while the latter two (framed in more rule-like terms) are not. And if that account is at least plausible, it supports the primary claim of this Article: the occasional parochialism of our courts does not necessarily reflect the personal prejudices of our judges. If so, then avoiding the costs of parochialism will require structural, not just personal, solutions.

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Introduction

When it comes to transnational litigation, are the federal courts isolationist or imperialist? Some scholars worry that U.S. courts are shirking cases that involve foreign litigants, foreign laws, or foreign harms.¹ Others worry that the courts are ignoring foreign sovereign interests in the cases they do take, whether by compelling broad extraterritorial discovery, declining to apply foreign or international law, or attempting to block foreign proceedings.² Though drawn from different debates, these perspectives have in common a concern that the federal courts' procedural decisions are problematically biased in favor of U.S. parties and U.S. law. According to what I call the "parochial critique," this bias has provoked retaliation by foreign courts and legislatures, strained foreign relations, created access-to-justice gaps, and increased regulatory conflict.³

Assuming the parochial critique is correct,⁴ determining whether and how to fix parochial procedure requires understanding where it comes from. The standard explanation, whether explicit or implied, has been that we have parochial procedure because we have parochial judges—judges who are dismissive of foreigners and hostile to international or foreign law.⁵ The battle,

1. See, e.g., Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1088-89 (2015); Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1493-94 (2013); John F. Coyle, *The Case for Writing International Law into the U.S. Code*, 56 B.C. L. REV. 433, 434-35 (2015); Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1189, 1192 (2005); Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 600-01 (2007); Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 8-11 (1995); Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1084 (2010); Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 WAKE FOREST L. REV. 887, 890-91 (2011).

2. See, e.g., George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589, 630-31 (1990); Hannah L. Buxbaum, *Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lessons from Aérospatiale*, 38 TEX. INT'L L.J. 87, 93-98 (2003); Coyle, *supra* note 1, at 434, 442-46; Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field?: The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301, 308 (2008); McFadden, *supra* note 1, at 14-15; Jenia Iontcheva, *Case Note, Sovereignty on Our Terms*, 110 YALE L.J. 885, 888-92 (2001).

3. See *infra* Part II.

4. Evaluating the empirical claims of the critique is beyond the scope of this Article.

5. See, e.g., Childress, *supra* note 1, at 1507 (noting that "the courts' treatment of transnational cases is incredibly parochial," with courts either "resisting adjudicating such cases" or else "using a domestic frame of reference" to do so); Heiser, *supra* note 1, at 1189 ("Unfortunately, most courts in the United States currently have a parochial, not a global, perspective when it comes to hearing transnational tort actions. . . . Judges often express discomfort with the prospects of ascertaining and applying foreign law

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then, is for the hearts and minds of U.S. judges. To fix the courts' parochialism, the literature suggests, we must convince individual judges of the value of international law and a smoothly functioning system for resolving transnational disputes.⁶

That standard account is not entirely satisfying. Most notably, it does not explain the courts' selective parochialism.⁷ If judges were the direct source of parochialism, one would expect to see uniformly parochial procedure. But in some areas, like the recognition of foreign judgments, the federal courts are decidedly cosmopolitan.⁸ The mistake in the standard account lies in assuming that the whole (outcomes in the aggregate) reflects its component parts (the views of individual judges). Rather, it is possible for an entire system, like the federal courts, to exhibit an orientation that *differs* from the preferences of its individual members.⁹

This Article explores whether the practice of the courts can be parochial even if individual judges are not. I argue that parochial procedure can result from the accumulation of decisions by trial judges who hold neutral (or even cosmopolitan) views of the transnational order but who operate within well-recognized institutional and behavioral constraints. Given those constraints, reliance on open-ended standards to address complex questions beyond the ken

and are far more concerned about docket control than with some vaguely stated duty to retain jurisdiction based on global responsibilities." (footnotes omitted); Lear, *supra* note 1, at 603 ("[F]orum non conveniens decisions appear to depend more on the individual biases of district court judges than any identifiable legal standard."); McFadden, *supra* note 1, at 6-7 (setting out to demonstrate "the depth and breadth of judicial animosity toward international law" and worrying that "[j]udicial provincialism inevitably migrates from the bench to the bar, and ultimately to the citizens and residents of the United States"); Jonathan I. Charney, Book Review, 91 AM. J. INT'L L. 394, 394-95 (1997) (noting U.S. courts' "increasingly isolationist, if not nihilistic, approach to the relevance of international law to U.S. law," which stems from "the negative attitude of U.S. lawyers, especially the judiciary, toward . . . international law"); see also Dubinsky, *supra* note 2, at 348 (concluding that "it is still unclear" whether the federal judiciary is receptive to the development of transnational procedure).

6. See *infra* notes 79-81 and accompanying text.

7. I thank Tara Grove for this turn of phrase.

8. U.S. courts may be more willing to recognize and enforce foreign money judgments than the courts of any other country. See, e.g., Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 89 (1999); Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L. 327, 351-52 (2004); Paul B. Stephan, *Unjust Legal Systems and the Enforcement of Foreign Judgments*, in FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 84, 94 (Paul B. Stephan ed., 2014). For further discussion, see Part IV.D below.

9. See Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 6-8, 8 n.6 (2009) (describing both fallacies of division, where what is true of the aggregate is assumed to be true of its individual members, and fallacies of composition, where what is true of members is assumed to be true of the whole).

of ordinary judges will encourage the use of heuristics. Those shortcuts will in turn become amplified and ossified as precedents mount, creating path dependence toward consistently parochial outcomes.

In broad strokes, this Article's alternative account goes like this: transnational cases—meaning cases involving parties foreign to the forum—are complex. They typically require judges to deal with unfamiliar law, whether international or foreign; to account for dynamic effects and multiple layers of competing state interests; and to find foreign facts. Yet judges have limited time and resources, and humans cannot process boundless complexity. Given what we know about bounded rationality,¹⁰ institutional capacity,¹¹ and the tradeoffs between rules and standards,¹² it is predictable that in this complex context, open-ended discretion will promote parochial outcomes over time—not because discretion allows judges to exercise their parochial priors but because it enables the evolution of tests that increasingly lock in parochial results.¹³

To demonstrate the plausibility of this alternative account, this Article contrasts district court practice in four areas of transnational procedure. In two of these areas—the use of the Hague Evidence Convention¹⁴ and motions to dismiss for forum non conveniens—federal courts have often been criticized for undervaluing foreign interests.¹⁵ Courts almost never require parties to use the Evidence Convention to resolve transnational discovery disputes,¹⁶ and

10. For other applications of behavioral psychology to judicial decisionmaking, see Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83 (2002); Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581 (2006); and Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006).

11. See, e.g., Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003) (discussing statutory interpretation in light of institutional capacity concerns).

12. For the canonical literature on which this discussion draws, see, for example, FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000); and Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

13. See *infra* Part III.

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

15. See sources cited *infra* notes 163, 219 (discussing the Evidence Convention and forum non conveniens, respectively).

16. See *infra* Part IV.A.

they are more likely to dismiss a case for forum non conveniens if the case involves a foreign plaintiff.¹⁷ In the other two areas—service of process on defendants located abroad under the Hague Service Convention¹⁸ and the recognition of foreign judgments¹⁹—courts have escaped such criticism. Indeed, federal courts consistently require plaintiffs to comply with the Service Convention,²⁰ and they are perhaps more willing than the courts of any other country to recognize and enforce foreign judgments.²¹

This Article proposes that the difference in outcomes between these two sets of doctrines reflects their initial structure. The open-ended discretion of the first two doctrines encourages the development of tests that lock in parochial outcomes, thus undermining the very values that the initial standards sought (or at least proclaimed) to protect.²² The more structured inquiries for judgment recognition and service of process, on the other hand, may have helped to avoid the introduction of heuristics—or at least kept those shortcuts from taking root.

Why these four doctrines? First, the liberality of U.S. courts' recognition of foreign judgments is the hard case for the parochial critique's standard explanation: If the problem is parochial judges, how do we explain the courts' consistent willingness to recognize and enforce the judgments of other countries?²³ Second, forum non conveniens and the Evidence Convention are among the few doctrines where questions of international comity have been

17. See Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 524-27 (2011).

18. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention].

19. The recognition and enforcement of foreign judgments are distinct judicial actions, though the terms are sometimes used interchangeably. Here the focus will be on the recognition of foreign judgments as the preliminary and more procedural step in judgment enforcement.

20. See *infra* Part IV.C.

21. See sources cited *supra* note 8.

22. That is, although these two doctrines are said to promote international comity, see William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2109-10, 2115-16 (2015) (discussing both as comity doctrines), the parochial tilt that has developed over time may be undermining comity instead.

23. Stephen Burbank has argued that this difference in outcomes is due more simply to the variation in domestic doctrines. See Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 209 (2001). For example, “the generous treatment accorded internationally foreign judgments in United States practice” reflects the domestic culture of liberal judgment recognition under the Full Faith and Credit Clause. *Id.* That explanation complements the broader, systemic account developed here, which generalizes the effects of transplanting domestic tests into the transnational context in light of individual and institutional constraints.

phrased as broad balancing tests rather than as more rule-like presumptions.²⁴ Finally, little attention has been paid to district court application of the Evidence Convention and the Service Convention, so a close study of these doctrines may provide new insights into the practice of transnational litigation in U.S. courts.²⁵ Ultimately, however, this Article aims to use these examples not to prove causation but rather to problematize it. For if this account of parochialism-by-aggregation is at least plausible, it supports the primary claim of this Article: winning over judges may not be enough to prevent parochial procedure.

This Article starts in Part I by describing the system of private international law and the role of comity and reciprocity within it. It is this comity and reciprocity that the courts' procedural parochialism is said to undermine. Part II identifies the parochial critique as a unifying theme in the literature on transnational litigation in U.S. courts but questions the critique's incomplete causal story. Part III sets out the primary theoretical contribution of this Article: how the interaction between judicial constraints and the complex context of transnational litigation can encourage the evolution of parochial doctrines. Part IV maps the theoretical argument onto district courts' experience with four doctrines of transnational procedure. Part V moves from the descriptive to the prescriptive, generalizing from the doctrinal examples to identify decisionmaking structures that may prevent, or at least minimize, aggregated parochialism. The solution is not to remove all judicial discretion, as discretion allows judges to be sensitive in individual cases to fairness,

24. See Dodge, *supra* note 22, at 2130.

25. For particularly helpful discussions of the Evidence Convention in light of the Supreme Court's decision in *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522 (1987), see, for example, Gary B. Born & Scott Hoing, *Comity and the Lower Courts: Post-Aérospatiale Applications of the Hague Evidence Convention*, 24 INT'L LAW. 393 (1990); Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1 (1987); Buxbaum, *supra* note 2; and Steven B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1490-97 (1991) (book review). Commentary on the Service Convention has tended to focus on the circuit split over whether the Convention allows service by mail or e-mail. See, e.g., Michael O. Eshleman & Stephen A. Wolaver, Prego Signor Postino: *Using the Mail to Avoid the Hague Service Convention's Central Authorities*, 12 OR. REV. INT'L L. 283, 319-21 (2010); David P. Stewart & Anna Conley, *E-Mail Service on Foreign Defendants: Time for an International Approach?*, 38 GEO. J. INT'L L. 755, 757-58 (2007); Joseph F. Weis, Jr., *Service by Mail—Is the Stamp of Approval from the Hague Convention Always Enough?*, LAW & CONTEMP. PROBS., Summer 1994, at 165, 167-68; Samuel R. Feldman, Note, *Not-So-Great Weight: Treaty Deference and the Article 10(a) Controversy*, 51 B.C. L. REV. 797, 798-800 (2010). For more general commentary on the Service Convention and service of process abroad, see Eric Porterfield, *Too Much Process, Not Enough Service: International Service of Process Under the Hague Service Convention*, 86 TEMP. L. REV. 331 (2014); and Burbank, *supra*, at 1474-90.

efficiency, and equity.²⁶ Rather, greater use of presumptions and sequential decisionmaking can channel judicial discretion to the marginal cases where it provides the most value, without those marginal cases overtaking—and distorting—the doctrine as a whole.

I. The System of Private International Law

The parochial critique, as defined in the next Part, is characterized by a concern that federal courts' parochial orientation is disrupting the reciprocity on which private international law depends. The need for reciprocity is integral to international trade, which requires systems for resolving cross-border disputes.²⁷ The rules of private international law, as they coalesced in the late nineteenth century, have grown into one such system that is based in domestic courts and managed through principles of international comity.²⁸

“Comity” is a notoriously slippery term, taking on different meanings in different contexts.²⁹ This Article understands comity to mean the accommodation of other countries' jurisdictional interests in return for reciprocal treatment over the long run.³⁰ Especially since the communication and

26. Cf. Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PA. L. REV. 1897, 1951-52 (2014) (arguing that judges should retain discretion to deny or limit class certification in response to changing circumstances in order to ensure the continuing vitality of the class action model).

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

28. See, e.g., Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 17-43 (2010) (describing the origins and evolution of comity as the foundation for private international law); Christopher Whytock, *Faith and Scepticism in Private International Law: Trust, Governance, Politics, and Foreign Judgments*, 7 ERASMUS L. REV. 113, 114 (2014) (describing private international law as decentralized, with allocation of governance authority among nations based on “principles of conditional deference”).

29. See, e.g., N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT'L ECON. L. 601, 605 (2006); Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 3-4 (1991); Michael D. Ramsey, *Escaping “International Comity,”* 83 IOWA L. REV. 893, 893 (1998). For a recent, admirable effort to clarify the concept of comity, see Dodge, *supra* note 22, at 2078, which defines comity as “deference to foreign government actors that is not required by international law but is incorporated in domestic law.”

30. Cf. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (defining comity as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws”). A difference between my definition of comity and that of *Hilton* is that *Hilton* called for case-specific reciprocity, which is not necessarily a great way to ensure

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transportation revolutions in the late nineteenth century,³¹ multiple countries may have an interest in adjudicating a given dispute, whether based on the location of the relevant conduct, the nationality of the parties, or some other nexus.³² This is both good and bad from a governance perspective. Overlapping pools of jurisdiction reduce the risk of unintended regulatory gaps. But they increase the risk of conflict between nation-states, as well as uncertainty for private parties as to which rules will govern (and which courts will do the governing). Overreaching by one state can, in turn, prompt the unaccommodated state to retaliate, in particular by refusing to accommodate the overreaching state's interests in future cases.³³ This general concern for reciprocity encourages states and their courts to exercise some restraint in displacing foreign law in transnational disputes, whether in terms of personal jurisdiction, choice of law, or recognition of a foreign court's prior judgment.³⁴

Under this cooperative conception of comity, the institutions of one state may help give effect to the laws or interests of another state.³⁵ It is important to keep this traditional, affirmative conception of comity in mind, as comity in the twentieth century has increasingly come to be associated with restraint or abstention: in the modern era, U.S. courts concerned about their "inability . . . to

systemic reciprocity. *See generally* John F. Coyle, *Rethinking Judgments Reciprocity*, 92 N.C. L. REV. 1109, 1114-16 (2014) (arguing that such a reciprocity requirement is unlikely to achieve its intended purpose of increasing foreign enforcement of U.S. judgments).

31. For the delinking of jurisdiction and territoriality that accompanied these trends, see generally KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* (2009).
32. For the nexuses that can establish adjudicatory jurisdiction, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (AM. LAW INST. 1987). These pools of jurisdiction are even more clearly defined in the context of prescriptive jurisdiction, or the state's power to regulate certain conduct or actors. *See id.* § 402. In that context as well, the margins of those pools—where they overlap with other states' arguable prescriptive authority—can be sites of controversy and conflict. *See* Maggie Gardner, *Channeling Unilateralism*, 56 HARV. INT'L L.J. 297, 303-06 (2015) (describing the controversial margins of prescriptive jurisdiction).
33. For a concrete example, see the retaliatory legislation described in note 67 below. This concern for retaliation also motivated the Supreme Court's decision in 1895 that U.S. courts should presumptively recognize foreign judgments (as long as those foreign courts would do the same for U.S. judgments). *See Hilton*, 159 U.S. at 210, 227-28.
34. For a recent example of such concerns, see the Supreme Court's discussion of international comity when narrowing the scope of general personal jurisdiction in *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014).
35. *See* Buxbaum, *supra* note 2, at 90 (describing "the purpose of comity" as "maintain[ing] a functional international system" that accommodates different sovereign interests); *see also id.* at 88 (describing "positive comity" as affirmative acts to protect the interests of another state (quoting Hannah L. Buxbaum, *Cooperative International Regulatory Enforcement and the Privilege Against Self-Incrimination in the United States*, 43 GER. Y.B. INT'L L. 171, 181 (2000))).

gauge the precise implications of their decisions for the delicate subject of foreign relations” more often invoke comity as a reason to avoid deciding cases with international elements.³⁶ But focusing on comity-as-abstention misses that foreign states’ interests—and thus U.S. foreign relations—are often better protected through judicial accommodation than through judicial abdication.³⁷ Thus, throughout the nineteenth century, U.S. courts routinely invoked and applied foreign law in transnational disputes regarding contracts, property, and corporate organization.³⁸ As early as the 1850s, Congress explicitly authorized the federal courts to assist foreign judicial proceedings, at least in some circumstances, by compelling witness testimony.³⁹ And in 1895, the U.S. Supreme Court famously invoked comity in *Hilton v. Guyot* to justify a presumption in favor of enforcing foreign judgments.⁴⁰

Starting in the late eighteenth century, countries sought to codify aspects of this affirmative comity, first through bilateral agreements⁴¹ and then

36. Michael P. Van Alstine, *Stare Decisis and Foreign Affairs*, 61 DUKE L.J. 941, 970 (2012); cf. Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1402, 1408-09 (1999) (discussing post-World War II foreign relations doctrine as overcorrecting for structural constitutional concerns by encouraging ad hoc judicial abstention).

37. See Marco Basile, *The Long View on Kiobel: A Muted Victory for International Legal Norms in the United States?*, AJIL UNBOUND (Jan. 2014), in AGORA: REFLECTIONS ON KIOBEL, at e-13, e-17 (2014), <https://www.asil.org/sites/default/files/AGORA/201401/AJIL%20Agora-%20Reflections%20on%20Kiobel.pdf> (“But declining to adjudicate a case involving an international issue can affect foreign relations as much as hearing the case.”); Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against “Judicial Imperialism,”* 73 WASH. & LEE L. REV. 653, 656-58 (2016); cf. Dodge, *supra* note 22, at 2078-79 (distinguishing between comity doctrines based on “restraint” and those based on “recognition”); Judith Resnik, *Constructing the ‘Foreign’: American Law’s Relationship to Non-Domestic Sources*, in COURTS AND COMPARATIVE LAW 437, 439 (Mads Andenas & Duncan Fairgrieve eds., 2015) (arguing that the use of “foreign” law does not diminish the legal construction of the United States as a democratic constitutional order); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1113-15 (2000) (predicting a trend away from comity-as-deference due to the demands of global integration).

38. See Dodge, *supra* note 22, at 2088 & nn.92-94 (collecting cases).

39. 1 BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE: CIVIL AND COMMERCIAL § 1-1-1, at 5 (rev. 2000).

40. See 159 U.S. 113, 163-64, 227-28 (1895); see also Louise Ellen Teitz, *The Story of Hilton: From Gloves to Globalization*, in CIVIL PROCEDURE STORIES 445, 447-48 (Kevin M. Clermont ed., 2d ed. 2008) (describing the evolution of the enforcement of foreign judgments over the course of the nineteenth century).

41. See John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT’L L. 302, 307, 314 (2013); Allan Jay Stevenson, *Forum Non Conveniens and Equal Access Under Friendship, Commerce, and Navigation Treaties: A Foreign Plaintiff’s Rights*, 13 HASTINGS INT’L & COMP. L. REV. 267, 282-83 (1990).

through multilateral conferences.⁴² In 1888 and 1889, South American states convened in Montevideo, Uruguay to adopt several conventions on private international law,⁴³ and continental European states gathered for the First Hague Conference on Private International Law in 1893 to discuss standardizing conflict-of-laws rules, family law, and civil procedure for transnational cases.⁴⁴ Today, more than 140 countries across multiple continents are involved in the Hague Conference, which is responsible for thirty-eight multinational private law conventions now in force.⁴⁵ These conventions help regulate comity by formalizing countries' commitments to providing judicial assistance and access to courts in transnational disputes.

The United States, however, did not join the Hague Conference until 1964.⁴⁶ By that time, growing transnational litigation in U.S. courts—reflecting increased global trade after World War II—was becoming a source of international friction. U.S. judges were interpreting U.S. laws, particularly antitrust laws, to reach extraterritorial conduct based on its effects within the United States, triggering rounds of diplomatic protests starting in the 1950s.⁴⁷ And as U.S. courts heard more transnational cases, “[i]t was soon evident that the rest of the world was not willing to accept some of the American legal procedures.”⁴⁸ In particular, U.S. court orders compelling broad American-style discovery from foreign litigants provoked much hostility.⁴⁹ In response, France (followed by other states) adopted “blocking statutes” in the 1970s and 1980s that prohibited the production of certain types of evidence located within its territory for use in U.S. litigation.⁵⁰ As summarized in the

42. See *Draft Convention on Judicial Assistance, with Comment*, 33 AM. J. INT'L L. 26, 27 (Supp. 1939).

43. Comment, *The United States and the Hague Conferences on Private International Law*, 1 AM. J. COMP. L. 268, 270 (1952).

44. RISTAU, *supra* note 39, § 1-1-2, at 9; Georges A.L. Droz, *A Comment on the Role of the Hague Conference on Private International Law*, LAW & CONTEMP. PROBS., Summer 1994, at 3, 3.

45. See *About HCCH*, HCCH, <https://www.hcch.net/en/about> (last visited Apr. 4, 2017).

46. See GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 911 (5th ed. 2011).

47. See, e.g., *id.* at 680-82, 971-72 (describing foreign protests in response to U.S. antitrust investigations of international cartels through the 1980s).

48. Joseph F. Weis, Jr., *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, 50 U. PITT. L. REV. 903, 903 (1989).

49. See, e.g., Born & Hoing, *supra* note 25, at 395.

50. See BORN & RUTLEDGE, *supra* note 46, at 972-73, 972 n.47 (citing Loi 80-538 du 16 juillet 1980 relative à la communication de documents et renseignements d'ordre économique, commercial ou technique à des personnes physiques ou morales étrangères [Law 80-538 of July 16, 1980 on the Disclosure of Documents and Information of an Economic, Commercial, or Technical Nature to Foreign Individuals or Legal Entities], JOURNAL

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Restatement (Third) of the Foreign Relations Law of the United States, “[n]o aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States.”⁵¹

The Service Convention and the Evidence Convention were adopted during this postwar era to ease tensions and improve the efficiency of cross-border cases, in particular by providing some common ground between civil and common law traditions.⁵² For example, in many civil law jurisdictions, “local judicial authorities supervise all evidence-taking.”⁵³ For foreigners to take depositions or gather documents in the territory of such a civil law state, then, can trespass on that state’s exclusive enforcement jurisdiction.⁵⁴ The Evidence Convention sought to address this problem by channeling requests for evidence through a government agency, which allows the concerned government some nominal oversight of the evidence collection.⁵⁵ Similarly, many countries consider service of process a governmental function.⁵⁶ Foreigners thus raise jurisdictional sensitivities when they attempt to serve judicial documents within other countries’ territories.⁵⁷ Like the Evidence Convention, the Service Convention provides a default procedure whereby cross-border service is channeled through a government agency that is in turn obliged to ensure that the service is completed.⁵⁸

The Conventions’ success in reconciling these cultural differences, however, has been mixed.⁵⁹ While some of the fault lies with those who wrote

OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 17, 1980, p. 1799).

“Blocking statutes” refers generally to countries’ efforts to limit the extraterritorial reach of another country’s laws, judicial power, or judgments. *See, e.g., id.* at 447-49 (describing blocking statutes adopted by some Latin American countries to discourage forum non conveniens dismissals by U.S. courts); *id.* at 682 (describing blocking statutes limiting enforcement of U.S. antitrust judgments in foreign courts); *id.* at 972-73 (describing blocking statutes intended to prevent extraterritorial U.S. discovery).

51. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442, reporters’ note 1 (AM. LAW INST. 1987).

52. *See, e.g.,* Philip W. Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651, 651-52 (1969).

53. Born & Hoing, *supra* note 25, at 396.

54. *See* BORN & RUTLEDGE, *supra* note 46, at 969.

55. *See* Hague Evidence Convention, *supra* note 14, ch. I.

56. *See* BORN & RUTLEDGE, *supra* note 46, at 881.

57. *See id.* at 909 (“Several nations have imposed sanctions against U.S. process-servers for attempting to personally deliver U.S. complaints and summonses to foreign defendants.”).

58. *See* Hague Service Convention, *supra* note 18, arts. 2-6.

59. *See infra* Part IV.

and implemented the treaties on behalf of the United States,⁶⁰ judges have largely borne the blame for parochial results in transnational cases. It is the scope and tenor of that blame that I hope to temper.

II. The Parochial Critique

Across a range of debates, scholars have worried that U.S. judges are insufficiently sensitive to the dynamic effects their decisions may have on this system of private international law. These critiques are united by the concern that the courts' myopia is hurting the international order and with it the long-term interests of the United States. For shorthand, I call this common theme the "parochial critique." This Part briefly maps the parochial critique before identifying its incomplete causal story. It is not necessary to agree with all aspects of the parochial critique, however, in order to follow the remainder of the argument: to whatever extent doctrines are problematically parochial in the aggregate, it does not necessarily follow that individual judges are to blame.

The parochial critique surfaces primarily in two lines of scholarship.⁶¹ On the one hand, some scholars have criticized U.S. courts for closing their doors to transnational litigation, particularly through heavy use of *forum non conveniens*⁶² but also through other prudential doctrines like standing, abstention, and act of state.⁶³ Pamela Bookman recently labeled this practice

60. Stephen Burbank has argued that U.S. domestication of the Conventions was hampered by the cultural myopia of diverse institutional actors, from the treaty negotiators to Congress. See Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, LAW & CONTEMP. PROBS., Summer 1994, at 103, 132. He is particularly critical of the Advisory Committee; he sees in the 1993 amendments to Rule 4 of the Federal Rules of Civil Procedure an effort "to recapture unilaterally some of the power that we surrendered in the Service Convention." *Id.* at 137.

61. Some scholars draw on both perspectives. See, e.g., McFadden, *supra* note 1, at 8-15 (critiquing several doctrines as both isolationist and imperialist); Ralf Michaels, *Empagran's Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 533, 544 (David L. Sloss et al. eds., 2011) ("[T]he choice is between two kinds of imperialism: one that comes from imposing U.S. law on the rest of the world, and the other from rejecting access to the courts necessary for protection against Western corporate actors.").

62. See, e.g., Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609, 609 (2008) ("The motion is not only filed, but also granted, in nearly every case."); Robertson, *supra* note 1, at 1084 ("In recent years, federal judges have been taking a lead in limiting access to U.S. courts by aggressively enforcing and expanding the doctrine of *forum non conveniens*.").

63. See, e.g., Bookman, *supra* note 1, at 1091-99; Coyle, *supra* note 1, at 445-46; Jodie A. Kirshner, *Why Is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 BERKELEY J. INT'L L. 259, 261 (2012); McFadden, *supra* note 1, at 8-11.

“litigation isolationism” and tied it to broader antilitigation trends in U.S. courts.⁶⁴ “Isolationists” worry that judges, in declining jurisdiction over transnational cases, are aggravating trading partners⁶⁵ and creating access-to-justice gaps—whether because plaintiffs may not be able to continue litigation in the foreign forum due to mounting litigation costs,⁶⁶ because they may find the foreign forum closed to them due to retaliatory legislation,⁶⁷ or because they may not be able to enforce the resulting foreign judgment in U.S. courts.⁶⁸ Some scholars also argue that dismissals for forum non conveniens run counter to U.S. treaty commitments to provide access to U.S. courts.⁶⁹ Indeed,

64. See Bookman, *supra* note 1, at 1085, 1088. On the broader antilitigation trend, see, for example, Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501 (2012); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353 (2010); and Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014).

65. See, e.g., Lear, *supra* note 1, at 600-01; Robertson, *supra* note 1, at 1092-93, 1113.

66. See, e.g., Heiser, *supra* note 62, at 610.

67. Some Latin American states have adopted laws clarifying that their courts cannot hear cases that were dismissed by the court first seized of the matter on discretionary grounds like forum non conveniens. See Ronald A. Brand, *Challenges to Forum Non Conveniens*, 45 N.Y.U. J. INT'L L. & POL. 1003, 1020 & n.56, 1021 & n.59 (2013); Heiser, *supra* note 62, at 623 (discussing laws in Costa Rica, Honduras, Guatemala, and Venezuela). Some U.S. courts have refused to take these foreign statutes into account when ruling on forum non conveniens, leading to retaliatory cycles that can trap litigants in the middle. See Heiser, *supra* note 62, at 623 & n.86 (collecting cases); Robertson, *supra* note 1, at 1103-04.

68. Two transnational disputes have received extensive attention in this regard: the Lago Agrio litigation, see, e.g., *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), and the DBCP pesticide cases, see, e.g., *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000). In both cases, U.S. district courts dismissed the complaints for forum non conveniens. See *Naranjo*, 667 F.3d at 235 & n.3; *Delgado*, 890 F. Supp. at 1373. At least some of the plaintiffs were nonetheless able to obtain judgments in foreign courts; yet the questionable quality of those foreign proceedings has cast doubt on the enforceability of the resulting judgments back in the United States. See *Chevron Corp. v. Donziger*, 833 F.3d 74, 80-81, 151 (2d Cir. 2016) (affirming the district court's decision to enjoin the defendants from seeking to enforce the Ecuadorian judgment); see also, e.g., Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1447-48, 1476-80 (2011) (describing both cases' procedural histories).

69. For the possibility that forum non conveniens dismissals may conflict with multilateral treaty commitments, see Int'l Arbitration Club of N.Y., *Application of the Doctrine of Forum Non Conveniens in Summary Proceedings for the Recognition and Enforcement of Awards Governed by the New York and Panama Conventions*, 24 AM. REV. INT'L ARB. 1, 20-22 (2013); and Peter B. Rutledge, *With Apologies to Paxton Blair*, 45 N.Y.U. J. INT'L L. & POL. 1063, 1079 (2013). Cf. Melinda R. Lewis, *The "Lawfare" of Forum Non Conveniens: Suits by Foreigners in U.S. Courts for Air Accidents Occurring Abroad*, 78 J. AIR L. & COM. 319, 329-33 (2013) (describing disagreements among courts over the suitability of forum non conveniens dismissals under the Warsaw Convention). For
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commentators have suggested that the courts' overuse of forum non conveniens, along with broad personal jurisdiction doctrines, hampered the United States' negotiating position at the Hague Conference in the early 2000s, which ultimately failed to reach an agreement on a new convention for the recognition and enforcement of judgments.⁷⁰

On the other hand, some scholars worry that when judges *do* keep transnational cases, they are insensitive to conflicts of adjudicative and prescriptive jurisdiction. This judicial imperialism manifests in the courts' willingness to compel discovery located in foreign states despite those states' objections;⁷¹ their general avoidance of foreign or international law;⁷² and their use of antisuit injunctions to prevent parties from initiating cases or seeking conflicting relief in foreign courts—injunctions that, while targeted at private parties, have the effect of encroaching on the adjudicative jurisdiction of foreign states.⁷³

"Imperialists" link this U.S.-centrism to a breakdown in reciprocity that traps litigants in the middle.⁷⁴ In the discovery context, for example, foreign states have enacted "blocking statutes" to counter the perceived overreaching of U.S. courts.⁷⁵ Foreign parties in U.S. litigation often argue that they should not be forced to comply with U.S. discovery orders when doing so would

the less likely possibility that forum non conveniens dismissals may conflict with bilateral treaty commitments, in particular Friendship, Commerce, and Navigation treaties, see RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 300 (6th ed. 2010); and Robertson, *supra* note 1, at 1125-26, which documents a split in judicial opinion on this issue.

70. See, e.g., BORN & RUTLEDGE, *supra* note 46, at 1085; Silberman, *supra* note 8, at 337-38. More broadly, the resistance to treaty enforcement by U.S. courts can undermine U.S. credibility in future treaty negotiations. See, e.g., Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 55 (2012).
71. See, e.g., Patrick J. Borchers, *The Incredible Shrinking Hague Evidence Convention*, 38 TEX. INT'L L.J. 73, 73-74 (2003); Born & Hoing, *supra* note 25, at 403; Buxbaum, *supra* note 2, at 93-97; see also *infra* Part IV.A (describing the extent to which U.S. district courts will compel foreign discovery despite possibly conflicting foreign laws or objections of foreign states).
72. See, e.g., Coyle, *supra* note 1, at 447-48 (collecting literature on U.S. judges' tendency to avoid international law); McFadden, *supra* note 1, at 5 (asserting that there is "a thoroughgoing, deeply rooted provincialism—an institutional, almost reflexive, animosity toward the application of international law in U.S. courts"); Wilson, *supra* note 1, at 898-99.
73. See, e.g., Bermann, *supra* note 2, at 630-31 (listing harms to comity and reciprocity should U.S. courts use antisuit injunctions to protect the convenience and due process interests of litigants); Burbank, *supra* note 23, at 235 (urging restraint in the use of antisuit injunctions given comity concerns).
74. See Childress, *supra* note 1, at 1509; McFadden, *supra* note 1, at 32.
75. See BORN & RUTLEDGE, *supra* note 46, at 972-73 (describing blocking statutes in the context of discovery).

violate those blocking statutes or other foreign laws, such as data privacy or bank secrecy laws, but U.S. courts have been unreceptive to such arguments.⁷⁶ More generally, the reluctance of U.S. courts to apply international or foreign law can undermine the reciprocal recognition of rights, leaving U.S. citizens and corporations at a disadvantage when they need to seek recourse before foreign courts.⁷⁷

In both lines of scholarship, the common assumption has been that this parochialism stems from judges and their provincial views.⁷⁸ The solution, then, is to educate judges to use foreign or international law⁷⁹ or perhaps to show them how parochial procedure hurts U.S. interests in the long run.⁸⁰ Even when scholars take a more structural view, they urge new statutes or rules meant to constrain parochial judges.⁸¹

That story of parochial judges, however, is not a fully satisfying explanation for parochial doctrines. If the problem were judges, we might expect to see consistently parochial outcomes across a range of procedural questions, but we do not. For instance, in addition to the notorious willingness of U.S. courts to

76. See Michael E. Burke, Am. Bar Ass'n Section of Int'l Law, Report to the House of Delegates Supporting Resolution 103, at 9-10 (2012), <https://law.duke.edu/sites/default/files/images/centers/judicialstudies/Resolution103.pdf> (noting and critiquing this lack of receptivity to competing foreign interests); see also *infra* Part IV.A (gathering cases and describing this trend).

77. See Samuel P. Baumgartner, *Understanding the Obstacles to the Recognition and Enforcement of U.S. Judgments Abroad*, 45 N.Y.U. J. INT'L L. & POL. 965, 982-83, 986 (2013) (arguing that U.S. courts, in not taking foreign sovereignty concerns seriously, "unwittingly impose costs on future litigants who attempt to enforce U.S. judgments abroad" and providing an example of growing German reluctance to enforce U.S. judgments); Hathaway et al., *supra* note 70, at 55 (discussing the reciprocal costs of nonenforcement of treaty rights by U.S. courts); Iontcheva, *supra* note 2, at 891 (expressing concerns about a breakdown in reciprocity).

78. See, e.g., sources cited *supra* note 5.

79. See, e.g., McFadden, *supra* note 1, at 8, 63 (urging "the adoption of judicial education programs in international law" because "[j]udges will likely desire change once they see the issues and understand the stakes involved"); see also Charney, *supra* note 5, at 395 (suggesting that judicial aversion to international law could be reduced if judges were to learn about international law).

80. See, e.g., Lear, *supra* note 1, at 562 (arguing that use of forum non conveniens is contrary to U.S. national interests); S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 51 (2014) (urging reform of the U.S. approach to foreign judgment enforcement because ambiguity in the doctrine has economic consequences for the United States and its citizens); see also, e.g., Bookman, *supra* note 1, at 1123-30 (describing how litigation avoidance doctrines do not necessarily benefit U.S. defendants in the long run); Coyle, *supra* note 1, at 435 (noting that U.S. courts, by consistently declining to apply international law, "lose their ability to influence the development of that law").

81. See Coyle, *supra* note 1, at 470-71; Robertson, *supra* note 1, at 1127-30.

enforce foreign money judgments,⁸² federal courts are also not necessarily more likely to apply U.S. law than foreign law in a choice-of-law analysis.⁸³

The next Part proposes a structural story that better explains this pattern of parochial procedure. If this alternative story is at least plausible, it should change how reformers approach the task of fixing parochialism. Greater judicial training and socialization may help, but winning over parochial judges by itself will not be enough. Indeed, strict rules meant to constrain parochial judges could *overcorrect*, removing all judicial discretion when the problem stems only from its excess.

III. Parochial Pressures

This Part explains how parochialism might still result even if most judges hold neutral or positive views about transnational cases, foreign litigants, or international law. Transnational litigation differs from purely domestic litigation in important, if relatively self-evident, respects.⁸⁴ When those differences are set against the constraints within which judges work, unguided discretion will predictably build to parochial results.⁸⁵ This Part identifies how constraints on judging intersect with the transnational context to encourage three doctrinal trends: *the search for rubrics*, as judges seek to structure and simplify decisionmaking in unfamiliar areas of law; *miscalibration*, as judges' focus on the specific and concrete leads them to overemphasize case management concerns while marginalizing more abstract systemic interests;

82. See sources cited *supra* note 8.

83. See Mathias Reimann, *Parochialism in American Conflicts Law*, 49 AM. J. COMP. L. 369, 387 (2001) (“[C]urrent American conflicts law is not nearly as parochial as its reputation in many quarters suggests.”); Christopher A. Whytock, *Myth of Mess?: International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 764 (2009) (finding that district court judges in international choice-of-law decisions determine that domestic law should apply in fewer than half of available opinions and concluding that these decisions “are not biased in favor of domestic law [or] domestic parties”).

84. See *infra* text accompanying notes 102-04.

85. By “discretion,” this Article refers primarily to the use of standards that delegate to decisionmakers the promulgation of legal commands *ex post*. See Kaplow, *supra* note 12, at 561-62. That substantive discretion can be amplified by a secondary rule of discretion: the shielding of district court decisionmaking from meaningful appellate review. See Judge Henry J. Friendly, *Indiscretion About Discretion*, Randolph W. Throrer Lecture in Law and Public Policy (Apr. 14, 1982), in 31 EMORY L.J. 747, 754-55 (1982) (distinguishing between these two types of discretion and critiquing in particular the abuse of discretion standard adopted by the Supreme Court in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)); see also Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1565-66 (2003) (describing the distinction between primary and secondary discretion). The combination of the two forms of discretion, as in the discovery and forum non conveniens contexts, can amplify the parochial pressures described in this Part.

and *ossification*, as judges fill in harder-to-ascertain factors—typically those intended to protect comity interests—by relying on prior judicial opinions. The accumulated weight of these three trends creates path dependence toward parochial outcomes, even in the absence of binding authority.

A. Of Constraints and Aggregated Effects

In identifying constraints on judicial decisionmaking, the following discussion draws on two familiar and increasingly integrated literatures. The first identifies how judges are constrained by institutional capacity. As cases become more complex or esoteric, the courts' limited time and information and their case-specific focus become meaningful constraints that can lead to increased error rates.⁸⁶ The second establishes that judges are prone to the same cognitive shortcuts as the rest of us, though perhaps to a different degree.⁸⁷ As information becomes more complex, we all default to subconscious heuristics, or rules of thumb, in order to process information in an acceptably efficient manner.⁸⁸ These two sets of constraints are interconnected: limits on time and information, for example, increase reliance on subconscious heuristics.⁸⁹ As a result, the pressures imposed by these constraints may be particularly pronounced in the procedural context, where time and information are often limited.

Two categories of heuristics are particularly helpful in explaining the patterns of parochialism in transnational litigation. The first is the use of stopping rules, or simplified decisionmaking strategies for reaching satisfactory rather than optimal decisions.⁹⁰ That is, instead of optimizing every decision, humans “satisfice”: they consider a finite amount of information, maybe as few as two or three factors, to reach a good enough approximation of “correct” outcomes.⁹¹ The second is salience, “a heuristic that causes decisionmakers to overweight the importance of vivid, concrete

86. See, e.g., Peter B. Rutledge, *Toward a Functional Approach to Sovereign Equality*, 53 VA. J. INT'L L. 181, 192 (2012); Sunstein & Vermeule, *supra* note 11, at 922.

87. See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 787-816 (2001) (summarizing survey results that suggest judges are susceptible to common cognitive shortcuts like anchoring, framing, hindsight bias, egocentric biases, and the representativeness heuristic).

88. For an introduction to heuristics in decisionmaking, see generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

89. See, e.g., ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 3 (2006); Guthrie et al., *supra* note 87, at 783.

90. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1077-78 (2000).

91. See *id.* at 1077-79; see also Beebe, *supra* note 10, at 1601 & nn.87-88, 1602 & nn.89-91 (collecting research on stopping rules).

foreground information and to underweight the importance of abstract, aggregated background information.”⁹² Being human, a judge cannot ignore the specifics of a case, its parties, and its impact on her day-to-day work.⁹³

To be clear, heuristics like these are not inherently bad; particularly when the stakes are not high (at least from the perspective of the judge), the over- or underinclusiveness that results from “fast and frugal” heuristics will be tolerable, perhaps even necessary, to prevent decisional gridlock.⁹⁴ But the accumulation of precedent that reflects cognitive shortcuts can lead over time to unintentional—and potentially problematic—developments in the doctrine.

To see why, consider that the common law is inherently path dependent—and not just because of the constraint of binding precedent.⁹⁵ Judges may follow nonbinding precedent even if it is suboptimal for any number of reasons. First, and most fundamentally, our legal culture is deeply committed to consistency across cases; all lawyers, including judges (and their clerks), are trained to distill the law from prior opinions.⁹⁶ What judges write in published opinions thus matters for what future judges do. In social terms, judges may overdefer to their peers’ prior work because of a professional interest in avoiding conflict with colleagues, minimizing the risk of reversal on appeal, and conforming more broadly to the judicial consensus.⁹⁷ Behavioral psychology suggests that judges may stick with suboptimal prior practice due to commitment effects, egocentric bias, or the weight of habit.⁹⁸ In institutional terms, judges also conserve scarce resources when they avoid reinventing the wheel.⁹⁹ And to the extent precedent *is* binding, or at least must be distinguished, the order in which cases arise can meaningfully constrain the future development of the law: in deciding one case, for example,

92. VERMEULE, *supra* note 89, at 38.

93. *See, e.g.*, Schauer, *supra* note 10, at 895 (discussing the distorting effect of salience on common law decisionmaking).

94. While the literature usually associates over- and underinclusiveness with the application of rules, standards can also result in over- and underinclusiveness due to these simplifying heuristics. *See* Bainbridge & Gulati, *supra* note 10, at 90 (predicting that overworked generalist judges will satisfice by using standards to “dispose of a wide variety of cases on simple threshold issues”).

95. *See generally* Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001) (discussing the problem of path dependence in the common law).

96. *See id.* at 627.

97. *See* Bainbridge & Gulati, *supra* note 10, at 116-17; Hathaway, *supra* note 95, at 625.

98. *See* Robert G. Bone, *Who Decides?: A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1990 n.122 (2007); *cf.* Korobkin & Ulen, *supra* note 90, at 1114 (noting that the habit of repeating behaviors is a heuristic individuals use to approximate utility-maximizing behavior).

99. *See* Hathaway, *supra* note 95, at 626.

a court may foreclose an option that would otherwise have been the preferable solution in the next case.¹⁰⁰ Further, all of these pressures toward conformity are compounded as precedent accumulates.¹⁰¹

Building on these background principles, the following discussion explores three ways in which institutional and behavioral constraints on judges can encourage problematic path dependence in the common law toward consistently parochial outcomes.

B. Complexity and the Search for Rubrics

Transnational litigation is complex. The intricacies of international and foreign law are often unfamiliar to U.S. judges, and there are multiple conflicting layers of stakeholders and interests. Routine procedural decisions—often already unwieldy in their complexity¹⁰²—require judges in the transnational context to also weigh possible conflicts with foreign states' laws, police global forum shopping, account for U.S. treaty commitments, and predict the possible reaction of foreign states.¹⁰³ Further, the international dimensions of these procedural questions can be intimidating to the uninitiated. International law is more than a separate substantive field of law; it has its own superstructure for determining when to apply international law and what the content of that law is. The same is true for choice of law across domestic legal regimes. Judges inexperienced with the substance of international law, whether public or private, will still be aware of this heightened degree of complexity when they approach transnational cases.¹⁰⁴

100. See *id.* at 645 (discussing a theory of sequential decisionmaking); Lewis A. Kornhauser, *Modeling Collegial Courts II: Legal Doctrine*, 8 J.L. ECON. & ORG. 441, 444-45 (1992) (identifying how decisional structures and ordering can create path dependence in the evolution of doctrines); see also Hathaway, *supra* note 95, at 638 (analogizing to the evolutionary conception of path dependence to argue that the common law will not necessarily develop toward efficient results).

101. *Cf.* Friendly, *supra* note 85, at 772 (noting how the weight of district court precedent builds over time to narrow the effective scope of judicial discretion).

102. See generally, e.g., Bone, *supra* note 98 (critiquing open-ended discretion in procedural doctrines more generally based on bounded rationality, information access obstacles, and strategic interaction effects).

103. Add to this the reality that federal opinions are often drafted by law clerks, typically recent law school graduates with even less experience in the procedural aspects of transnational litigation, or written by magistrate judges, who operate under similar constraints but with even fewer resources and (often) an even narrower issue-specific focus.

104. See Wilson, *supra* note 1, at 897-98; *cf.* Coyle, *supra* note 1, at 453-55 (collecting literature on judges' inexperience with the methodology and substance of international law and noting its inevitable impact on judicial decisionmaking).

Humans have a limited capacity for complexity; we cannot assess, for instance, an infinite array of permutations.¹⁰⁵ As an environment becomes more complex and a decisionmaker's competence less certain, allowing greater flexibility in decisionmaking can lead to worse, not better, results.¹⁰⁶ Left with broad discretion in the face of an open-ended standard, decisionmakers will thus gravitate toward structure and simplicity, a process some have termed "rulification."¹⁰⁷

There are both strong and weak versions of this rulification phenomenon. At its most basic, rulification is inherent in the common law process, as subsequent decisions narrow the breadth of a standard over time through application to particular facts.¹⁰⁸ The stronger version—and the version invoked here—asserts that judges seek out rubrics in order to make broad standards more manageable.¹⁰⁹ Such rubrics have the additional benefit of lending legitimacy to courts' reasoning and holdings.

The search for rubrics is not itself problematic. The difficulty starts with the choice of rubric. The unfamiliarity and complexity of transnational litigation increases the risk that judges will look for rubrics in the wrong places. For example, courts may import tests from insufficiently similar contexts, particularly domestic analogues that do not translate perfectly to the international law context. Given their domestic origins, these transplanted

105. See Bainbridge & Gulati, *supra* note 10, at 101; Beebe, *supra* note 10, at 1601; Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 61 (2000).

106. See Ronald A. Heiner, *The Origin of Predictable Behavior*, 73 AM. ECON. REV. 560, 563, 565 (1983) (positing that "there is greater uncertainty as either an agent's perceptual abilities become less reliable or the environment becomes more complex" and explaining that "when genuine uncertainty [thus defined] exists, allowing greater flexibility to react to more information or administer a more complex repertoire of actions will not necessarily enhance an agent's performance"); Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 811-12 (2005) ("The basic point is that . . . having too many options is frustrating and suboptimal, and that when faced with too much choice people will seek to narrow the range of choices by quick heuristics. We want decisional guidance, we want a smaller number of options, and we want to have our decisional processes structured."). This insight into the connection between complexity and the limits on human capacity to process information suggests that rational choice theories of common law decisionmaking, *cf.*, *e.g.*, Nicola Gennaioli & Andrei Shleifer, *The Evolution of Common Law*, 115 J. POL. ECON. 43, 62 (2007) (concluding that the common law will evolve under most conditions toward more efficient outcomes as rules become more complex), may be overly optimistic.

107. I am indebted to Michael Coenen's recent article *Rules Against Rulification* for my thinking on this process and for bringing to my attention Frederick Schauer's essay on the same phenomenon. See Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 648 n.13 (2014) (citing Schauer, *supra* note 106).

108. See *id.* at 654-55, 654 n.26.

109. See Schauer, *supra* note 106, at 811-12.

tests will emphasize domestic considerations and may not account explicitly for comity concerns.¹¹⁰

Alternatively, even when Supreme Court opinions expressly decline to establish a test, lower courts may still glean a rubric from those opinions, in effect generalizing factors the Court intended to apply only to the case at hand.¹¹¹ This may lead judges to infer too much from the Court's opinion. For example, if the Court did not find the balancing of sovereign interests previously struck by the political branches (such as through treaties or statutes) to be compelling in one case, future judges may assume that something more—some greater foreign or systemic interest than was present in the Supreme Court case—is always required for the balance to tip in favor of foreign interests.¹¹² This discounting of the political balance is problematic if one thinks the political branches are better equipped than courts to evaluate and weigh competing sovereign interests.

Finally, even when the Supreme Court does acknowledge the relevance of particular factors, the lower courts may still simplify those factors in search of a clearer framework.¹¹³ Such simplification may distort the Court's intended rubric, deemphasizing important but difficult considerations.

Furthermore, whatever the source of error in the choice of rubric, the distortion that error invites will be compounded over time. As more courts apply a certain rubric, path dependence grows and it becomes harder to opt for

110. See *infra* Part IV.B (discussing *forum non conveniens*). For the cross-fertilization between domestic and international inquiries in civil procedure more generally, see Burbank, *supra* note 25, at 1459-73; and Dubinsky, *supra* note 2, at 312, 342. As Burbank has noted, this focus on national uniformity can be explained not only by the draw of the familiar but also by the cult of transsubstantivity, which values national uniformity over international harmony. See Burbank, *supra* note 60, at 135, 138.

Similarly, in the criminal context, some federal circuits have transplanted domestic due process analysis to evaluate the separate question whether the United States may, as a matter of international law, reach criminal conduct beyond its borders. See Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 124-25 (2007) (proposing a reformed due process analysis that incorporates the perspective of international law).

111. Thus, for example, even though the Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), disclaimed any intent to establish a test for *forum non conveniens*, see *id.* at 508, the factors it listed have nonetheless become coterminous with the doctrine, see *infra* Part IV.B (discussing the *Gilbert* test as applied in modern transnational cases).

112. This tendency manifested, for example, in district courts' analysis of the Evidence Convention following the Supreme Court's intervention. See *infra* Part IV.A.

113. Cf. Beebe, *supra* note 10, at 1588 (finding such a pattern in the evolution of a unified multifactor test for trademark infringement from two different multifactor tests in the 1938 *Restatement (First) of Torts*).

a different framework—even if the initial rubric’s shortcomings also become more apparent with each application.¹¹⁴

C. Case Myopia and the Miscalibration of Factors

Whatever rubric judges apply (but particularly if it is an ill-fitting one), the role and weight of different factors within that rubric will become lopsided over time if they are not well considered. This follows from the unavoidable fact that trial courts decide particular cases. Even before the advent of behavioral psychology, scholars recognized that judges’ case-specific focus can have a distorting effect.¹¹⁵

The facts of the case—what is concrete and immediately before the judge—draw the attention of the decisionmaker in a way that abstract or unfamiliar interests do not. In a procedural context, such concrete and immediate facts include concerns like efficiency, delay, docket congestion, gamesmanship, and the short-term interests of sympathetic parties. Especially if judges are trying to make sense of a poorly fitting framework, such case management concerns provide familiar touchstones. Put another way, transnational litigation is a complex field in which the stakes in individual cases may be low but the cost of fully informed decisions would be high. In such a context, judges may (consciously or unconsciously) use extremely abbreviated stopping rules, making “good enough” decisions after considering only one or two factors—and the factors they focus on first are likely to be those most salient and most readily ascertainable.¹¹⁶

Meanwhile, factors that protect systemic interests—like the long-term reciprocity on which private international law depends—may be acknowledged but will remain relatively underdeveloped. It is not that these systemic interests will be ignored entirely. But even though judges are increasingly aware of the insights from behavioral psychology, they may still overestimate

114. See Bainbridge & Gulati, *supra* note 10, at 116-17 (discussing the adoption of decisionmaking heuristics in terms of herd behavior); Bone, *supra* note 98, at 1990 n.122 (“[I]n the absence of strong feedback, a combination of framing, the escalating commitment effect, and the egocentric bias can cause a judge to lock into a routine set of practices even when those practices are suboptimal or flawed.”).

115. See KARL N. LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* 58-59 (Oxford Univ. Press 11th prt. 2008) (1930); Schauer, *supra* note 10, at 899 (discussing the realist insight that the “immediate equities” of a particular case will have a mesmerizing hold on the judicial mind); see also VERMEULE, *supra* note 89, at 3 (asserting that the cognitive constraints experienced by judges “are exacerbated by the case-by-case decisionmaking procedure that defines adjudication—a procedure that emphasises the salience of particulars and hampers judges in discerning the systemic effects” of the decisionmaking structures they adopt).

116. See Beebe, *supra* note 10, at 1601-02; see also Kaplow, *supra* note 12, at 594 (noting that juries, as decisionmakers, often make decisions based on only a few relevant factors).

their ability to discern foreign sovereign interests, find foreign facts, or otherwise account for dynamic effects.¹¹⁷ Thus, even when rubrics acknowledge comity-based factors, the natural tendency to focus on the particular case—on concerns that are concrete and immediate—can lead a decisionmaker to gloss over more abstract, long-term interests.¹¹⁸ For example, consider the district courts’ experience applying the rubric for specific personal jurisdiction that emerged from *Asahi Metal Industry Co. v. Superior Court*,¹¹⁹ which “seemed to require courts to take a serious look at the impact of U.S. procedural rules on the litigants, the internal dynamics of other societies, and good relations between the United States and other countries.”¹²⁰ Rather than focus on those systemic interests, “lower courts have been guided instead by intuition, easy-to-measure variables, and a preoccupation with whether the defendant will be unduly burdened by having to defend litigation in the forum.”¹²¹ The concrete and the familiar are addressed first; the unfamiliar and the difficult tag along at the end, underapplied and thus underdeveloped.

It might be helpful here to distinguish between individual cases and aggregated effects. It is unsurprising, and perhaps not particularly troubling, that judges in individual cases focus on the local and immediate. Judges are, after all, employed to apply law to particular facts. The difficulty is that, repeated across cases, a localized focus means case management factors receive the greatest attention and development and thus have increasing prominence under abbreviated stopping rules. Meanwhile, the less salient factors—those related to abstract systemic or foreign interests—are most at risk of ossification.

D. Uncertain Facts and Ossified Factors

Even when these evolving rubrics acknowledge foreign or systemic interests, those factors are the most likely to turn on facts that are difficult to ascertain. Consider “facts” like the efficiency or fairness of foreign judicial systems or the sovereign interests embodied in foreign legislation. Discerning such facts entails high information costs, and even with good information,

117. See Guthrie et al., *supra* note 87, at 813-15 (finding judges to be susceptible to “egocentric biases,” which lead judges to overestimate their professional ability to reach correct conclusions); Rachlinski, *supra* note 105, at 66 (finding that judges are more likely to overlook cognitive illusions “[w]hen judges both determine the procedural rules that govern fact-finding and decide the facts themselves”).

118. Cf. Schauer, *supra* note 10, at 901 & nn.72-74 (gathering psychological research on the exclusionary effect of focusing on particular tasks and analogizing it to a judge’s focus on a particular case).

119. 480 U.S. 102 (1987).

120. Dubinsky, *supra* note 2, at 327.

121. *Id.*

those findings may still be inherently subjective or uncertain.¹²² These difficulties are further compounded by the ancillary nature of factfinding in the procedural context: these are not facts related to the merits that will be developed through full discovery, much less through trial.

How, then, can judges obtain the information they need to assess these factors? Party submissions, expert declarations, and amicus briefs may provide helpful information. But in an adversarial system, they can be presumed to reflect party bias and routine reliance on them will favor better-funded parties.¹²³ Foreign states may express their views directly in U.S. litigation, but even though courts invite such input in theory,¹²⁴ they may discount it in practice.¹²⁵ Then there is the judge's own factual research or personal intuition, reliance on either of which raises concerns about due process and error rates in an adversarial system.¹²⁶ That leaves prior judicial opinions as the most

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122. Much has been written about the distinction between legislative and adjudicative facts. See, e.g., Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1759 & n.2, 1774 (2014) (summarizing the literature). The foreign facts involved in transnational procedural determinations occupy a middle ground: they are not specific to the case at hand, but neither are they broad facts about the world used to shape prospective rules. Rather, they are general facts required to evaluate the application of law to a given circumstance. Cf. Frederick Schauer, *The Decline of "the Record": A Comment on Posner*, 51 DUQ. L. REV. 51, 59-60 (2013) (identifying a possible middle ground between legislative and adjudicative facts and critiquing judges' ascertainment of these facts through independent research).
123. Cf. Larsen, *supra* note 122, at 1784 (critiquing Supreme Court reliance on amicus briefs for factfinding because "the factual data amici present to the Court . . . are all funneled through an advocacy sieve," which results in "periodic unreliability").
124. See, e.g., *Milliken & Co. v. Bank of China*, 758 F. Supp. 2d 238, 249 (S.D.N.Y. 2010) (noting that a foreign ministry's failure to voice objections to disclosure in a particular case "militates against a finding that strong national interests of the foreign country are at stake" (quoting *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639, at *6 (S.D.N.Y. Mar. 8, 2010))); *Strauss v. Credit Lyonnais, S.A.* (*Strauss I*), 242 F.R.D. 199, 219 (E.D.N.Y. 2007) (reaching a similar conclusion).
125. See, e.g., *Strauss v. Credit Lyonnais, S.A.* (*Strauss II*), 249 F.R.D. 429, 443, 448 (E.D.N.Y. 2008) (finding that a letter from the French Ministry of Justice "merely restate[d] French law, and vaguely note[d] French sovereignty," but did not address the current dispute with adequate particularity); *Benton Graphics v. Uddeholm Corp.*, 118 F.R.D. 386, 391 (D.N.J. 1987) (finding that a declaration of the Swedish Ministry for Foreign Affairs provided "merely general reasons why Sweden prefers civil law discovery procedures").
126. See Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 NW. U. L. REV. 1137, 1139 (2014) ("[T]he ease of accessing factual data now available on the Internet will allow judges and litigants to expand the use of judicial notice in ways that raise significant concerns about admissibility, reliability, and fair process."); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1290-305 (2012); see also Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 322 (2002) (critiquing judicial recourse to publicly available material in the forum non conveniens context as displacing the defendant's onus of persuasion).

accessible and perhaps the most reliable source of information about foreign facts. Particularly if judges perceive prior courts to have had access to superior information, they may turn to those opinions to bolster or replace their own limited factfinding.¹²⁷

This reliance on precedent will in turn have two predictable effects: First, factors based on difficult-to-ascertain facts (such as those related to foreign and systemic interests) will *ossify* as a dictum is repeated until it becomes law in the form of a string citation.¹²⁸ Second, the ossified factors will *generalize* as they are invoked across a broader range of cases, what Allison Orr Larsen has called “imported factual precedents.”¹²⁹ Thus, for example, courts have reduced the evaluation of “U.S. interests” in transnational discovery disputes to the U.S. interest in full and fair adjudication before U.S. courts—an interest so general as to be a truism.¹³⁰ As ossified and generalized factors obviate the need to reassess difficult-to-ascertain facts in each case, the resulting chains of inter- and intradistrict citation also limit the range of plausible findings in future decisions.

In the end, then, judges may think they are applying tests that support the rough reciprocity of private international law, but those tests—as they have evolved over time—may be set up to fail. When trial judges are left with broad discretion to resolve unfamiliar questions of law in complex circumstances, there is a risk they will latch onto rubrics that are a poor fit; that those rubrics will come to overemphasize case management concerns and undervalue systemic interests; and that individual judges’ inability to evaluate foreign facts and systemic interests as part of routine procedural decisions will increasingly ossify, generalize, and ultimately marginalize factors initially meant to protect comity. As time passes and precedent mounts, it becomes increasingly difficult for individual judges to correct course, whether by reverting to the initial broad standard or by proposing an alternative framework.

127. *Cf.* Bainbridge & Gulati, *supra* note 10, at 117 (“Under conditions of complexity and uncertainty, actors who perceive themselves as having limited information and can observe the actions of presumptively better-informed persons may attempt to free ride by following the latter’s decisions.”). *See generally* Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59 (2013) (describing and criticizing lower courts’ reliance on factual findings made by the Supreme Court).

128. *See, e.g., infra* notes 172-74 and accompanying text (documenting the ossification of the judicial finding that conducting discovery through the Evidence Convention would be unduly time consuming).

129. Larsen, *supra* note 127, at 81-83.

130. *See infra* notes 206-08 and accompanying text; *cf.* Dubinsky, *supra* note 2, at 327 (describing similar oversimplification of U.S. interests in the context of personal jurisdiction determinations).

IV. When Is Procedure Parochial?

This Part surveys four common procedural questions that arise in transnational litigation: the use of the Evidence Convention in interparty discovery disputes, motions to dismiss for forum non conveniens, service of process abroad under the Service Convention, and the recognition of foreign judgments. The federal courts have been criticized for parochialism in their handling of the first two issues¹³¹ but not of the latter two. This Part proposes that this difference may be explained by the structure of the doctrines used to decide each issue: the doctrines governing use of the Evidence Convention and forum non conveniens were framed initially as an open-ended standard and a broad balancing test, respectively, while those governing use of the Service Convention and recognition of foreign judgments were framed as strong presumptions with enumerated exceptions.

A. The Hague Evidence Convention

Neither the Evidence Convention itself nor the Supreme Court's interpretation of it in *Société Nationale Industrielle Aérospatiale v. U.S. District Court*¹³² has provided district courts with adequate guidance on when the Evidence Convention should be used to manage cross-border discovery. The parochial pressures described above can explain why district courts have developed an analysis that consistently reaches the same result: the rejection of the Evidence Convention in favor of broader discovery under the Federal Rules of Civil Procedure.¹³³ At least when it comes to managing interparty discovery, the Evidence Convention in U.S. federal courts is a dead letter.

When the Evidence Convention was adopted, a chasm separated how civil and common law countries conducted evidence gathering for private litigation—and even among common law countries, the United States' broad discovery practice was an outlier.¹³⁴ Perhaps because of this cultural distance, the Convention was a limited agreement. It created a clear obligation in one regard only: the country where the evidence is located must help facilitate its collection. Specifically, each member state must establish a Central Authority that can receive and coordinate requests for discovery from other countries;¹³⁵ facilitate all requests made through its Central Authority, subject to a few

131. See sources cited *infra* notes 163, 219.

132. 482 U.S. 522 (1987).

133. See *infra* notes 156-57 and accompanying text.

134. See James A.R. Nafziger, *Another Look at the Hague Evidence Convention After Aérospatiale*, 38 TEX. INT'L L.J. 103, 104-05 (2003).

135. Hague Evidence Convention, *supra* note 14, art. 2.

specified exceptions;¹³⁶ and compel private parties' compliance with those requests to the same extent it would for domestic proceedings.¹³⁷ But beyond the obligation of the receiving state to fulfill discovery requests made through the Central Authority mechanism, the Convention becomes less definite. In particular, the Convention is not clear about when a country *requesting* evidence must use the Central Authority system.¹³⁸ It appears that states did not give this question much thought when negotiating the Convention,¹³⁹ and today member states continue to disagree about whether use of the Convention is mandatory.¹⁴⁰

That murkiness has been compounded by *Aérospatiale*, the U.S. Supreme Court's sole decision interpreting the Evidence Convention. The petitioners in *Aérospatiale* were corporations owned by the French government that had designed, manufactured, and marketed a small aircraft that crashed in Iowa.¹⁴¹ The French petitioners initially engaged in discovery under the Federal Rules of Civil Procedure¹⁴² but then sought a protective order against further discovery.¹⁴³ They argued that the requested evidence was located in France and was covered by the French blocking statute; to avoid running afoul of this French law, they could only respond to discovery requests that complied with the Convention.¹⁴⁴ The Court rejected the petitioners' argument that the Convention provided the exclusive means for obtaining evidence located in a state party to the Convention.¹⁴⁵ Instead, the Court held that the Convention's

136. A Central Authority can object to a request if the request does not comply with the Evidence Convention's requirements, *id.* art. 5, and it can only refuse to execute a request if the execution would prejudice the state's "sovereignty or security" or if the request "does not fall within the functions of [that state's] judiciary," *id.* art. 12. The Convention specifically prohibits a Central Authority from refusing assistance because its government claims exclusive jurisdiction over the action or because its internal law would not recognize such a right of action. *Id.*

137. *Id.* art. 10.

138. See Permanent Bureau of the Hague Conference on Private Int'l Law, *The Mandatory/Non-Mandatory Character of the Evidence Convention* ¶¶ 30-31 (2008), <https://assets.hcch.net/upload/wop/2008pd10e.pdf>.

139. See *id.* ¶ 42 ("[T]he question whether the Convention is mandatory or non-mandatory was not actively considered at the time of negotiation, nor for some time thereafter.").

140. See *id.* ¶ 1.

141. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 524-25 (1987).

142. *Id.* at 525 & n.4.

143. *Id.* at 525.

144. *Id.* at 526 & n.6.

145. *Id.* at 533-34.

procedures are “optional” and “available whenever they will facilitate the gathering of evidence.”¹⁴⁶

But the Court split 5-4 on how district courts are to determine when use of the Evidence Convention is nonetheless appropriate. The majority rejected a rule of first resort to the Convention, whether based on the treaty’s text or as a matter of comity.¹⁴⁷ Instead, it directed courts to undertake a “particularized analysis” of the international comity at stake in each case, and it refused to “articulate specific rules to guide this delicate task of adjudication.”¹⁴⁸

As Justice Blackmun emphasized in partial dissent, this open-ended standard was doomed to fail.¹⁴⁹ Courts, he reasoned, are “ill equipped” to balance foreign interests with U.S. interests and too likely to default to familiar domestic procedures.¹⁵⁰ Instead, judges should defer to the balance already struck by the political branches in negotiating and adopting the Evidence Convention.¹⁵¹ Justice Blackmun thus proposed a “general presumption” that the Convention should apply whenever discovery is located abroad.¹⁵² Only if there were a “true conflict” between foreign and domestic law would courts need to engage in balancing “foreign interests, domestic interests, and the interest in a well-functioning international order.”¹⁵³ Ultimately, Justice Blackmun predicted that the Court’s “case-by-case comity analysis . . . will be performed inadequately and that the somewhat unfamiliar procedures of the Convention will be invoked infrequently.”¹⁵⁴

Justice Blackmun’s prediction, echoed by others,¹⁵⁵ has been borne out by the practice of the district courts. Since *Aérospatiale*, out of 66 written district court opinions that explicitly considered whether parties must use the

146. *Id.* at 541.

147. *Id.* at 542-44.

148. *Id.* at 543-44, 546.

149. *Id.* at 548 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun was joined by Justices Brennan, Marshall, and O’Connor. *Id.* at 547.

150. *Id.* at 552-53.

151. *Id.* at 551-53, 556.

152. *Id.* at 548-49. This presumption would be derived not from the terms of the Evidence Convention but from the principle of comity: namely, that the system of private international law would be best served by initial resort to procedures agreed upon by the affected foreign state. *See id.*

153. *Id.* at 555-56.

154. *Id.* at 548.

155. *See, e.g., In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 306 (3d Cir. 2004) (Roth, J., concurring) (“Unfortunately, I believe the language used in [*Aérospatiale*] has unintentionally compounded the problem inherent with the [Evidence] Convention . . . [R]ather than wade through the mire of a complex set of foreign statutes and case law, judges marginalize the Convention as an unnecessary ‘option.’”).

Evidence Convention to obtain discovery from each other, only 5 have held that they must—and 4 of those decisions were written in the first few years following *Aérospatiale*.¹⁵⁶ In all other cases considering the issue, even in the face of potentially conflicting foreign statutes, the courts have allowed discovery to proceed more broadly under the Federal Rules.¹⁵⁷

Granted, conclusions about district court discovery practice based solely on written opinions must be qualified. As the limited number of available opinions attests, courts rarely write up their discovery orders,¹⁵⁸ few are made

156. In a case decided one week after *Aérospatiale*, for example, the judge thought the foreign defendant's arguments for use of the Evidence Convention "look[ed] persuasive" and, given that the plaintiffs had not challenged those arguments, denied the plaintiffs' motion to compel under the Federal Rules but "without prejudice to its renewal" should plaintiffs wish to respond. *Panara v. Hertz Penske Truck Leasing, Inc.*, Civ. A. No. 86-4358, 1987 WL 12782, at *2 (E.D. Pa. June 22, 1987). In another early case, the court worried that it lacked jurisdiction over the foreign defendant; almost five months after it ordered jurisdictional discovery to proceed under the Evidence Convention, *Jenco v. Martech Int'l, Inc.*, Civ. A. No. 86-4229, 1988 WL 54733, at *1 (E.D. La. May 19, 1988), it dismissed the case for lack of personal jurisdiction over the defendant, *Jenco v. Martech Int'l, Inc.*, CIV. A. No. 86-4229, 1988 WL 106318, at *1-2 (E.D. La. Oct. 7, 1988).

Two other early opinions that required use of the Evidence Convention offered more thorough analysis and are discussed in greater detail below. See *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348, 352-56 (D. Conn. 1991); *Hudson v. Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33, 37-40 (N.D.N.Y. 1987). Since 1991, the only other case I have been able to identify that required use of the Convention for interparty discovery involved a foreign plaintiff seeking to depose the foreign employees of a foreign defendant located in France. See *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ.5571 RJH, 2004 WL 3019766, at *1 (S.D.N.Y. Dec. 30, 2004).

157. My claim here is not empirical but rather an effort to identify a clear trend in the available written opinions. A brief word about methodology, however, may help those interested in district court practice to recreate this set of cases. I searched the Westlaw database of federal district court opinions for cases since *Aérospatiale* that included "Hague" within three words of "convention" and within the same paragraph as "discovery" (to minimize cases discussing other Hague Conventions) or that cited *Aérospatiale* (to capture cases that referred to the Evidence Convention more obliquely). This returned over six hundred cases as of February 24, 2016. Research assistants screened these cases to identify those that discussed the Evidence Convention in the context of interparty discovery, which I then reviewed. I included in the final count those cases where the judge characterized a foreign witness or foreign document custodian as a managing agent of the defendant, which allows the evidence to be compelled under the Federal Rules and thereby obviates the need to use the Convention to reach what would otherwise be third-party discovery. I did not include subsequent opinions in which the judge reaffirmed his or her prior decision, and I did not include magistrate decisions when confirmed by later written district court decisions. I did include, however, Judge Hogan's separate decisions in *In re Vitamins Antitrust Litigation* regarding both jurisdictional and merits discovery. See No. 99-197TFH, 2001 WL 1049433, at *1, *14-15 (D.D.C. June 20, 2001) (regarding merits discovery); 120 F. Supp. 2d 45 (D.D.C. 2000) (regarding jurisdictional discovery).

158. David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 715, 719-21 (2007).

available on the commercial databases,¹⁵⁹ and even fewer are ever subject to review by higher courts.¹⁶⁰ It is possible that courts, in harder-to-observe bench rulings or summary orders, are requiring parties to use Evidence Convention procedures.¹⁶¹ These source limitations are nonetheless offset by two additional considerations: First, given the overwhelming proportion of published decisions that reject application of the Convention, it seems unlikely that courts are routinely reaching the opposite conclusion in unelaborated decisions.¹⁶² Second, and more significantly, the pattern of decisionmaking I am interested in here is informed by the earlier decisions to which trial judges have access, namely those made available through commercial databases. Indeed, the increasing rarity of such written decisions suggests that the uniformity of outcome is deterring at least some foreign parties from invoking the Convention in the first place.

Scholars have criticized this rejection of the Evidence Convention by U.S. courts as parochial.¹⁶³ Even if use of the treaty is not mandatory, it does seem contrary to the spirit of the treaty for courts to consistently ignore its mediating procedures when confronted with conflicting sovereign interests. Yet this trend away from using the Convention in interparty disputes does not necessarily reflect individual judges' dislike or distrust of such treaties. Indeed,

159. For the selection problems posed by reliance on the commercial databases, see, for example, David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1214-15 (2013); and Hoffman et al., *supra* note 158, at 688.

160. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 411, 413 (1982) (describing how district court judges' pretrial decisions regarding case management largely evade appellate review). Indeed, *Aérospatiale* itself only reached the Supreme Court after the French corporations obtained a writ of mandamus from the Eighth Circuit for review of an interlocutory discovery order. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 527-28 (1987).

161. See Hoffman et al., *supra* note 158, at 732-33 (suggesting in particular that judges write opinions about discovery orders precisely when those orders are "black sheep").

162. For a contrary view, reasoning that litigants are using the Evidence Convention voluntarily and that only the "tough cases" are reaching judges, see Nafziger, *supra* note 134, at 114. For example, Judge Scheindlin in *Wultz v. Bank of China Ltd.* initially granted (without written decision) the foreign defendant's request to pursue discovery through the Convention, to which the plaintiffs had consented. See 910 F. Supp. 2d 548, 551 (S.D.N.Y. 2012). But after more than a year passed without the Chinese Central Authority returning any evidence in response to the Convention request, Judge Scheindlin held (in a written decision) that discovery would be compelled under the Federal Rules. *Id.* at 555-61.

163. See, e.g., Borchers, *supra* note 71, at 74; Born & Hoing, *supra* note 25, at 403; Gary B. Born, *The Hague Evidence Convention Revisited: Reflections on Its Role in U.S. Civil Procedure*, LAW & CONTEMP. PROBS., Summer 1994, at 77, 77; Buxbaum, *supra* note 2, at 87-88; James Chalmers, *The Hague Evidence Convention and Discovery Inter Partes: Trial Court Decisions Post-Aérospatiale*, 8 TUL. J. INT'L & COMP. L. 189, 210-14 (2000); Iontcheva, *supra* note 2, at 890-91.

before the Supreme Court's intervention in *Aérospatiale*, the federal courts did apply the Convention to interparty disputes at least occasionally.¹⁶⁴ And since *Aérospatiale*, while eschewing the Convention in interparty disputes, judges continue to require use of the Convention when litigants seek discovery from foreign nonparties, even (albeit more rarely) when the nonparty is within the court's personal jurisdiction and thus its power of compulsion.¹⁶⁵

A review of these available decisions suggests that the consistency of the federal courts' rejection of the Evidence Convention post-*Aérospatiale* is due to the accretion of parochial pressures. One would be hard pressed to recognize in the most recent decisions the broad discretion carved out by the Supreme Court in *Aérospatiale*. Instead, judges apply one of two rubrics—a tripartite standard or a multifactor balancing test, both derived from dicta in *Aérospatiale*—in a manner that has become rote through miscalibration and ossification.

In their initial attempts to apply *Aérospatiale*, federal judges turned to the opinion's most precise articulation of the interests to be balanced: the Court's admonition that judges should consider "the particular facts, sovereign interests, and likelihood that resort to [the Evidence Convention] procedures will prove effective."¹⁶⁶ Indeed, two circuit courts—the Fifth Circuit and the Third Circuit—explicitly adopted this tripartite standard as the relevant test.¹⁶⁷ These three factors, however, do not mean much—except that the facts of *Aérospatiale* were not enough to tip the balance. And because courts assumed that the party invoking the Convention should bear the burden of proof (a question not directly addressed by the *Aérospatiale* Court),¹⁶⁸ the unintelligibility of the factors has weighed against the Convention's applicability.

164. See, e.g., *S & S Screw Mach. Co. v. Cosa Corp.*, 647 F. Supp. 600, 613-18 (M.D. Tenn. 1986) (reasoning that the Evidence Convention does not displace the Federal Rules but that parties must nevertheless use its procedures initially as a matter of comity); *Phila. Gear Corp. v. Am. Pfauter Corp.*, 100 F.R.D. 58, 61 (E.D. Pa. 1983) ("[T]he proper exercise of judicial restraint requires that the avenue of first resort for plaintiff be the Hague Convention."); see also George A. Bermann, *The Hague Evidence Convention in the Supreme Court: A Critique of the Aérospatiale Decision*, 63 TUL. L. REV. 525, 536 n.38 (1989) (collecting district and state court cases).

165. See, e.g., *Tiffany (NJ) LLC v. Qi Andrew*, No. 10 Civ. 9471(KPF)(HBP), 2015 WL 3701602, at *1 n.1 (S.D.N.Y. June 15, 2015) (summarizing the procedural history of the use of the Evidence Convention in that case); *CE Int'l Res. Holdings v. S.A. Minerals Ltd. P'ship*, No. 12-CV-08087 (CM)(SN), 2013 WL 2661037, at *10-14 (S.D.N.Y. June 12, 2013); *SEC v. Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323, 340, 342 (N.D. Tex. 2011); see also Nafziger, *supra* note 134, at 110 & n.51 (collecting additional cases).

166. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 544 (1987).

167. *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 300 (3d Cir. 2004); *In re Anschuetz & Co.*, 838 F.2d 1362, 1364 (5th Cir. 1988) (per curiam).

168. See Born & Hoing, *supra* note 25, at 401-02.

For example, taking the last factor first, it is unclear what would establish the Evidence Convention's "effectiveness." A court might ask simply whether the Convention would allow the requesting party to obtain most of the desired discovery. But the Court in *Aérospatiale* seemed to suggest that getting *some* evidence through Convention procedures was not enough.¹⁶⁹ So courts coalesced instead around a more comparative analysis, inquiring whether the Convention procedures would be *as* effective as the Federal Rules, or perhaps whether they would be *more* effective.¹⁷⁰ In the late 1980s and early 1990s, before the advent of the World Wide Web, U.S. courts did not have access to data about the Convention's global application that would allow them to answer that question.¹⁷¹ Instead, judges typically relied on *Aérospatiale's* unsupported assertion that the Convention procedures would be "unduly time consuming and expensive"¹⁷² and concluded that this factor favored application of the Federal Rules.¹⁷³ Soon, even when the party invoking the Convention could point to indications of efficiency or effectiveness, the consistency of prior opinions combined with the burden of proof made this default assumption impossible to overcome.¹⁷⁴ Further, for some judges, this

169. See *Aérospatiale*, 482 U.S. at 542 (rejecting a rule of first resort to the Evidence Convention procedures because they would often be "less certain to produce needed evidence than direct use of the Federal Rules").

170. See *Schindler Elevator Corp. v. Otis Elevator Co.*, 657 F. Supp. 2d 525, 531 (D.N.J. 2009) (noting that a deposition taken under the Evidence Convention would not use the same procedures as a deposition taken under the Federal Rules); *In re Aircrash Disaster near Roselawn*, 172 F.R.D. 295, 308 (N.D. Ill. 1997) (finding that discovery under the Convention would not be more effective than discovery under the Federal Rules); *Rich v. KIS Cal., Inc.*, 121 F.R.D. 254, 258 (M.D.N.C. 1988) (noting that the defendants failed to show that discovery under the Convention would be more effective than discovery under the Federal Rules).

171. Today the Hague Conference's website does provide judges some access to information about the Evidence Convention's efficiency, albeit based on volunteer survey data from member states. See *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters: Questionnaires & Responses*, HCCH, <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=33&cid=82> (last visited Apr. 4, 2017). Because this factor has already ossified, however, new information is unlikely to shift the weight of precedent that has concluded the Convention is never sufficiently effective.

172. *Aérospatiale*, 482 U.S. at 542.

173. See, e.g., *In re Aircrash Disaster*, 172 F.R.D. at 310; see also *MeadWestvaco Corp. v. Rexam PLC*, No. 1:10cv511 (GBL/TRJ), 2010 WL 5574325, at *2 (E.D. Va. Dec. 14, 2010) (gathering cases to similar effect).

174. See *Autodesk, Inc. v. ZWCAD Software Co.*, No. 5:14-cv-01409-EJD, 2015 WL 1928184, at *6 (N.D. Cal. Mar. 27, 2015) (rejecting evidence that China would honor requests for assistance because the resulting discovery might not be sufficiently broad); *Schindler Elevator*, 657 F. Supp. 2d at 530 (rejecting as inadequate the Swiss government's submission that a deposition could be completed in Switzerland within two months); *Doster v. Schenk A.G.*, 141 F.R.D. 50, 54 nn.6-7 (M.D.N.C. 1991) (invoking the burden of

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ossified factor alone was enough to reject recourse to the Convention because they assumed that the three factors were all necessary conditions.¹⁷⁵

For those judges who instead treated the factors as a balancing test (more likely the Court's intention, if it had one), the "particular facts" factor likewise quickly ossified to favor the Federal Rules. The Supreme Court had not suggested what the relevant "particular facts" of a case would be; based on the concerns that seemed to animate *Aérospatiale*, judges simplified this factor to whether the requested discovery was unduly "intrusive."¹⁷⁶ This inquiry became circular: if the requested discovery was relevant and narrowly tailored, it was not unduly intrusive, and the factor favored the Federal Rules.¹⁷⁷ If, on the other hand, a discovery request *was* intrusive (that is, overbroad, irrelevant, or excessive), the Federal Rules could be used to winnow it down, at least theoretically, until it was no longer intrusive—at which point the factor again favored proceeding under the Federal Rules.¹⁷⁸

That left the "sovereign interests" factor, which fared little better. Courts relied heavily on the Supreme Court's dismissive treatment of the French blocking statute in *Aérospatiale*, extending it (by imperfect analogy) to other states' laws that conflicted with broad U.S. discovery practices.¹⁷⁹ Judges also discounted other countries' interests in controlling the collection of evidence

proof in finding that the defendant failed to establish effectiveness); *Benton Graphics v. Uddeholm Corp.*, 118 F.R.D. 386, 391 (D.N.J. 1987) (finding insufficient a submission that Sweden could process a discovery request in approximately two months).

175. See, e.g., *Benton Graphics*, 118 F.R.D. at 389.

176. See, e.g., *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, No. 89 C 1971, 1990 WL 147066, at *1-2 (N.D. Ill. Sept. 25, 1990); *Rich v. KIS Cal., Inc.*, 121 F.R.D. 254, 257 (M.D.N.C. 1988).

177. See *Rich*, 121 F.R.D. at 257.

178. See *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d 45, 52 & n.10 (D.D.C. 2000) (collecting cases taking this approach); *Benton Graphics*, 118 F.R.D. at 390-91; *Bedford Comput. Corp. v. Isr. Aircraft Indus. Ltd. (In re Bedford Comput. Corp.)*, 114 B.R. 2, 6 (Bankr. D.N.H. 1990) (adopting the reasoning of *Rich* "except that the totality of discovery sought in this case is too extensive, unnecessary and intrusive" and concluding that "[t]he solution is to limit the discovery sought, and still use the F.R.C.P."); see also *Doster*, 141 F.R.D. at 53 (noting that because requests could be narrowed through a discovery conference, the defendant "loses the right to urge use of the Hague Convention" when the defendant "fail[s] to take advantage of the discovery conference procedure").

179. See, e.g., *AccessData Corp. v. ALSTE Techs. GmbH*, No. 2:08cv569, 2010 WL 318477, at *2 (D. Utah Jan. 21, 2010); *In re Aspartame Antitrust Litig.*, No. 2:06-CV-1732-LDD, 2008 WL 2275531, at *4 (E.D. Pa. May 13, 2008); *Rich*, 121 F.R.D. at 258 ("In general, broad blocking statutes, including those which purport to impose criminal sanctions, which have such extraordinary extraterritorial effect, do not warrant much deference."). But see *In re Vitamins Antitrust Litig.*, No. 99-197TFH, 2001 WL 1049433, at *4-5, *9-10 (D.D.C. June 20, 2001) (refusing to require the plaintiffs to seek discovery through the Evidence Convention but allowing the defendants to produce privilege logs identifying documents for which disclosure might violate German or Swiss privacy laws).

in their own territory and any other phrasing of sovereign interests that could arguably be reflected in the Evidence Convention itself. If such interests would be sufficient, judges reasoned, “then there would be an automatic finding of an ‘important sovereign interest’ in every case,” and “[s]urely the Supreme Court did not intend [such a] result when it announced that the presence of an overriding sovereign interest was one of the factors to weigh in the resolution of these cases.”¹⁸⁰ In other words, because the general sovereign interests of France were insufficient in *Aérospatiale*, something more was required to tip the balance to favor the Convention—even though the Convention already represents a balancing of sovereign interests struck by the political branches.¹⁸¹ Foreign parties were hard pressed to identify that something more, given that all statutes regarding discovery, privacy, and disclosure, as well as national legal traditions and the Convention itself, were presumptively insufficient.

The tripartite standard, although ambiguous and poorly designed, is not itself inherently biased against foreign interests, foreign litigants, or the invocation of the Evidence Convention. Notably, two early opinions did try to calibrate the test differently and avoid ossification pressures.¹⁸² In requiring parties to use the Convention, these two judges emphasized the need to be sensitive to foreign and systemic interests over case management concerns.¹⁸³ They also questioned the assumption that the Convention procedures were inadequate, reasoning instead that “the major obstacle to the effective use of the Convention procedures, if one there be, is litigants’ lack of familiarity with them.”¹⁸⁴ To simply assume the procedures’ ineffectiveness, they reasoned,

180. *Great Lakes*, 1990 WL 147066, at *2; see also *Benton Graphics*, 118 F.R.D. at 391 (discounting the Swedish government’s intervention because the sovereign interests expressed by Sweden were “merely general reasons why Sweden prefers civil law discovery procedures to the more liberal discovery permitted under the federal rules”).

181. See Buxbaum, *supra* note 2, at 94-95.

182. See *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348 (D. Conn. 1991); *Hudson v. Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33 (N.D.N.Y. 1987).

183. See *In re Perrier*, 138 F.R.D. at 355 (“The simple fact that, in joining the Convention, France has consented to its procedures is an expression of France’s sovereign interests and weighs heavily in favor of the use of these procedures.”); *Hudson*, 117 F.R.D. at 37-39 (relying on Justice Blackmun’s opinion in *Aérospatiale* in emphasizing West Germany’s interest in its territorial integrity, its constitutional principles of privacy, and systemic concerns for reciprocity); see also *In re Anschuetz & Co.*, 838 F.2d 1362, 1364 (5th Cir. 1988) (per curiam) (emphasizing that “the district court should consider, with due caution, that many foreign countries, particularly civil law countries, do not subscribe to our open-ended views regarding pretrial discovery, and in some cases may even be offended by our pretrial procedures,” and stressing the interests of the international system and foreign states as embodied in the Evidence Convention and endorsed by the political branches).

184. *In re Perrier*, 138 F.R.D. at 355.

“would reflect the same parochial biases that the Convention was designed to overcome.”¹⁸⁵

But these two district court opinions quickly became marginalized. Why? The key reason, I propose, was the power of the particular. First, most early decisions approached the problem from the perspective of the parties, not of the foreign states.¹⁸⁶ Approaching the question through the lens of party interests understandably led courts to emphasize concerns like delay, cost, fairness, and the availability of traditional tools for managing discovery, which obscured the broader systemic interests at stake. Second, it might not be a coincidence that these two opinions, as well as two other early opinions that invoked the Evidence Convention, were the only four decisions during the decade following *Aéropatiale* that were authored by district court judges; all the other available decisions were written by magistrate judges.¹⁸⁷ This is not to suggest that magistrate judges are less cosmopolitan than their Article III peers but rather that they tend to operate within an even narrower case-specific scope: the management of pretrial discovery. Third, some of these early magistrate decisions might be examples of cases making bad law.¹⁸⁸ Judges could not overlook the equities when the parties invoking the Convention had already used the Federal Rules when doing so had served their interests, had refused to confer with opposing counsel, or had reneged on prior discovery agreements.¹⁸⁹ It is not that these individual cases were wrongly decided but rather that their language and reasoning were then applied more broadly to cases that might have had very different equities.

Thus, within ten years of *Aéropatiale*, the weight of district court precedent shaped a standard trajectory of analysis under the tripartite standard:

185. *Hudson*, 117 F.R.D. at 38-39.

186. *See Benton Graphics v. Uddeholm Corp.*, 118 F.R.D. 386, 389 n.2 (D.N.J. 1987) (“In *Aéropatiale*, the majority did not elevate theoretical policy concerns over the effect Convention procedures would have upon particular litigants. Rather, the Court specifically directed district courts to analyze the interests of the parties and the intrusiveness of the discovery sought.”).

187. *See Jenco v. Martech Int’l, Inc.*, CIV. A. No. 86-4229, 1988 WL 44442, at *1 (E.D. La. Apr. 29, 1988) (denying the defendant’s request for jurisdictional discovery to proceed under the Evidence Convention), *rev’d in part*, CIV. A. No. 86-4229, 1988 WL 54733, at *1 (E.D. La. May 19, 1988) (ordering discovery to proceed under the Convention).

188. *See generally* Schauer, *supra* note 10 (considering how the concrete facts of a particular case can distort a judge’s ability to predict the full range of future cases that may be affected by his ruling).

189. *See, e.g.*, *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, No. 89 C 1971, 1990 WL 147066, at *2-3 (N.D. Ill. Sept. 25, 1990); *Rich v. KIS Cal., Inc.*, 121 F.R.D. 254, 257-58 (M.D.N.C. 1988); *Haynes v. Kleinwebers*, 119 F.R.D. 335, 337-38 (E.D.N.Y. 1988); *cf. Hudson*, 117 F.R.D. at 34, 35 & n.2 (requiring use of the Evidence Convention where the invoking party had raised its request early and agreed to provide some discovery under the Federal Rules and where the opposing party’s discovery requests were excessive).

opinions invoked the two ossified factors of the Evidence Convention's ineffectiveness and the lack of sufficient foreign sovereign interests, and then they managed away any overbreadth in the discovery request until the "particular facts" factor was also satisfied.¹⁹⁰ The two outlier cases were distinguished at first in passing and then not at all.¹⁹¹

Nonetheless, some judges were uneasy; they recognized that *Aérospatiale's* tripartite test "is an obtuse, difficult-to-apply standard" for which parties could not provide adequate evidence.¹⁹² Perhaps because this tripartite standard provided so little real guidance, by the early 2000s judges were invoking a more detailed multifactor test.¹⁹³ That test derives from a set of factors mentioned in

190. See, e.g., *MeadWestvaco Corp. v. Rexam PLC*, No. 1:10cv511 (GBL/TRJ), 2010 WL 5574325, at *1-2 (E.D. Va. Dec. 14, 2010) (refusing to determine whether the discovery was excessive because the parties met and conferred to narrow it, discounting the French government's submission and French blocking statute based on prior opinions, and citing prior opinions in asserting that Evidence Convention procedures would be needlessly cumbersome), *aff'd mem.*, No. 1:10cv511, 2011 WL 102675 (E.D. Va. Jan. 10, 2011); *In re Aspartame Antitrust Litig.*, No. 2:06-CV-1732-LDD, 2008 WL 2275531, at *4 (E.D. Pa. May 13, 2008) (reasoning that intrusive discovery can be tempered through protective orders under the Federal Rules and relying on *Aérospatiale* to both discount the Swiss blocking statute and conclude that the Evidence Convention procedures would be ineffective); *Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L.*, No. 04 C 3109, 2005 WL 6246195, at *3-5 (N.D. Ill. Sept. 12, 2005) (reasoning that the discovery was not intrusive because the plaintiff was entitled to it, that Italy's interest in restricting pretrial discovery was an insufficient sovereign interest "as such an outcome would result in finding an important sovereign interest in every case," and that—based primarily on a citation to *Aérospatiale*—use of the Evidence Convention "may be difficult and time consuming"); *Valois of Am., Inc. v. Risdon Corp.*, 183 F.R.D. 344, 346-47, 349 (D. Conn. 1997) (citing precedent to establish the ossified factors and concluding that counsel could confer about narrowing the otherwise intrusive discovery requests before holding that the Evidence Convention need not be used at that time); see also *Madden v. Wyeth*, No. 3-03-CV-0167-BD, 2006 WL 7284528, at *2 (N.D. Tex. Jan. 12, 2006) ("[T]his court agrees with the well-reasoned decisions of other federal courts refusing to give substantial deference to France's preference for the Hague Convention, as expressed in its 'blocking statute,' and recognizing that discovery procedures under the Convention are far more cumbersome than under the federal rules.").

191. Compare *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d 45, 51 (D.D.C. 2000) (disagreeing with *Hudson*), and *Valois*, 183 F.R.D. at 346-49 (discussing *Hudson* and *In re Perrier* and attempting to reconcile them with the other post-*Aérospatiale* case law), with *MeadWestvaco*, 2010 WL 5574325, at *2 (using *In re Perrier* as support for the proposition that the Evidence Convention is cumbersome and inefficient), and *In re Aspartame*, 2008 WL 2275531, at *4 (referring to *In re Perrier's* acknowledgment that most courts have rejected use of the Convention).

192. See, e.g., *Adams v. Unione Mediterranea di Sicurtà*, No. Civ.A. 94-1954, 2002 WL 472252, at *2 (E.D. La. Mar. 28, 2002).

193. See, e.g., *id.* at *3.

an *Aérospatiale* footnote,¹⁹⁴ which were in turn drawn from a draft of the *Restatement (Third) of the Foreign Relations Law of the United States*.¹⁹⁵ Those five factors, as listed in *Aérospatiale*, are

(1) the importance to the . . . litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.¹⁹⁶

But this multifactor test also fell prey to the same evolutionary tendencies.

First, the multifactor test, though appealing in its crisper detail, was still not a good fit for determining when to invoke the Evidence Convention. It was drawn from a section in the *Restatement (Third)* meant to help judges decide whether and to what extent to order parties to turn over documents located in another country, particularly when there is a conflict with that country's law (answer: cautiously and narrowly). That decision overlaps with, but is distinct from, the choice between applying the Federal Rules or the Convention to manage transnational discovery.¹⁹⁷

194. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 544 n.28 (1987) (noting that this set of factors “suggested” the “nature of the concerns that guide a comity analysis”).

195. These factors were later codified in the *Restatement (Third)*. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(c) (AM. LAW. INST. 1987). For an example of a court applying these factors, see *In re Air Cargo Shipping Servs. Antitrust Litig.*, 278 F.R.D. 51, 52-54 (E.D.N.Y. 2010). A minority of judges have invoked similar factors from the *Restatement (Second) of Foreign Relations Law of the United States* that were used in *Minpeco, S.A. v. Conticommodity Services, Inc.*, 116 F.R.D. 517, 522 (S.D.N.Y. 1987), a case about foreign discovery that did not actually involve the Evidence Convention, *id.* at 519. See also RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (AM. LAW INST. 1965). Most notably, the Second Circuit approved the *Minpeco* factors for application in Convention disputes in *First American Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 22 (2d Cir. 1998). These factors are:

(i) the competing interests of the nations whose laws are in conflict; (ii) the hardship that compliance would impose on the party or witness from whom discovery is sought; (iii) the importance to the litigation of the information and documents requested; and (iv) the good faith of the party resisting discovery.

Id.

196. *Aérospatiale*, 482 U.S. at 544 n.28 (alteration in original) (quoting RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 437(1)(c) (AM. LAW INST., Tentative Draft No. 7, 1986)).

197. Indeed, the factors cited in *Aérospatiale* were eventually codified at section 442, while the *Restatement (Third)* explicitly addresses the applicability of the Evidence Convention at section 473. Compare RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 473 & cmt. i, with *id.* § 442(c). The *Minpeco* factors are an even more imperfect fit, as they were drawn from a test for resolving conflicts of enforce-
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Unsurprisingly, given this imperfect fit, the factors from the *Restatement (Third)* were, in practice, simplified and ossified much along the same lines as the tripartite standard. Take, for example, the consideration of “the degree of specificity of the request.”¹⁹⁸ As with the “particular facts” factor from the tripartite standard, courts have concluded that this factor weighs in favor of applying the Federal Rules both when requests are specific¹⁹⁹ and when they are not.²⁰⁰ Likewise, the “availability of alternative means of securing the information” factor²⁰¹ is ambiguous. Judges have considered whether substantially similar information could be obtained domestically,²⁰² for example, or whether discovery could be obtained as efficiently under the Evidence Convention.²⁰³ For courts that took the latter route, the question of efficiency quickly ossified against application of the Convention for the same reasons it had under the tripartite standard.²⁰⁴

Second, in adding more factors for courts to consider, the multifactor test only increased the salience of case management considerations, which will often favor the application of the more familiar Federal Rules. Under the tripartite standard, foreign sovereign interests are weighed against two case

ment jurisdiction more generally. *Minpeco*, 116 F.R.D. at 522 (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40). Some of those factors—like “the extent to which enforcement [of a state’s laws] by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state,” *id.* (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40(e))—simply do not translate to the discovery context.

198. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(c).

199. *See, e.g.*, *Milliken & Co. v. Bank of China*, 758 F. Supp. 2d 238, 247 (S.D.N.Y. 2010); *In re Air Cargo Shipping Servs.*, 278 F.R.D. at 53.

200. *See* *Tansey v. Cochlear Ltd.*, No. 13-CV-4628 (SJF)(SIL), 2014 WL 4676588, at *3 (E.D.N.Y. Sept. 18, 2014) (finding the discovery requests insufficiently specific for the Federal Rules of Civil Procedure); *Wultz v. Bank of China Ltd.*, 910 F. Supp. 2d 548, 556 (S.D.N.Y. 2012) (“At present, the lack of specificity of some of plaintiffs’ discovery requests weighs against granting plaintiffs’ motion. But once plaintiffs’ discovery requests have been narrowed . . . , the specificity factor will weigh in plaintiffs’ favor as well.”).

201. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(c).

202. *Pershing Pac. W., LLC v. MarineMax, Inc.*, No. 10-cv-1345-L (DHB), 2013 WL 941617, at *8 (S.D. Cal. Mar. 11, 2013), *amended by* No. 10cv1345-L (DHB), 2013 WL 1628938 (S.D. Cal. Apr. 16, 2013).

203. *See Milliken*, 758 F. Supp. 2d at 247-48; *In re Air Cargo Shipping Servs.*, 278 F.R.D. at 53.

204. *See, e.g.*, *TruePosition, Inc. v. LM Ericsson Tel. Co.*, No. 11-4574, 2012 WL 707012, at *5 (E.D. Pa. Mar. 6, 2012); *see also In re Air Cargo Shipping Servs.*, 278 F.R.D. at 53 (“[T]he outcome of a request pursuant to the Convention is by no means certain, and making the request will undeniably result in delays of unknown, and perhaps considerable, duration.”).

management factors. But under the multifactor test, depending on how it is articulated, foreign sovereign interests are weighed against four to six case management factors.²⁰⁵ If the case management factors point toward the Federal Rules, as they are prone to do, it is nearly impossible for one factor related to sovereign interests to tip the balance back toward the Evidence Convention.

Third, the lone sovereign interest factor again ossified and generalized over time. Under the *Restatement (Third)* approach, the weighing of sovereign interests is meant to incorporate the U.S. interest in reciprocity with other nations.²⁰⁶ But given that courts are not well positioned to account for such systemic interests as part of a case-specific analysis, the *Restatement (Third)* commentary's gloss has been lost in practice. In weighing this factor, courts have instead emphasized purely domestic U.S. interests, phrased in increasingly generic terms, that would apply to all cases: for example, the U.S. interest in applying its own rules of procedure,²⁰⁷ or in vindicating the rights of U.S. plaintiffs,²⁰⁸ or in ensuring full and fair adjudication before U.S. courts.²⁰⁹

Meanwhile, courts have struggled to identify the relevant foreign interests on the other side of the scale. The *Restatement (Third)* commentary urges courts to look beyond the foreign state's general sovereignty concerns or its preference for its own style of litigation, focusing instead on the "substantive

205. For example, courts in the Second Circuit combine the *Restatement (Third)* factors with additional *Minpeco* factors: "the hardship of compliance on the party or witness from whom discovery is sought [and] the good faith of the party resisting discovery." *E.g., Strauss II*, 249 F.R.D. 429, 439 (E.D.N.Y. 2008) (alteration in original) (quoting *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 523 (S.D.N.Y. 1987)). Courts in the Ninth Circuit consider as additional factors "the hardship that inconsistent enforcement would impose" on the objecting party and the likelihood that such enforcement would "achieve compliance" with local laws. *See, e.g., St. Jude Med. S.C. v. Janssen-Counotte*, 104 F. Supp. 3d 1150, 1161 (D. Or. 2015) (quoting *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992)).

206. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 cmt. c (advising courts to weigh "the long-term [sic] interests of the United States generally in international cooperation in law enforcement and judicial assistance, in joint approach to problems of common concern, in giving effect to formal or informal international agreements, and in orderly international relations").

207. *Tansey v. Cochlear Ltd.*, No. 13-CV-4628 (SJF)(SIL), 2014 WL 4676588, at *4 (E.D.N.Y. Sept. 18, 2014).

208. *Pershing Pac. W., LLC v. MarineMax, Inc.*, No. 10-cv-1345-L (DHB), 2013 WL 941617, at *8 (S.D. Cal. Mar. 11, 2013).

209. *Milliken & Co. v. Bank of China*, 758 F. Supp. 2d 238, 248-49 (S.D.N.Y. 2010) (recognizing, however, that this broad interest is less weighty than more policy-specific interests); *In re Air Cargo Shipping Servs.*, 278 F.R.D. at 54; *In re Glob. Power Equip. Grp.*, 418 B.R. 833, 848 (Bankr. D. Del. 2009).

policies or interests of the foreign state.”²¹⁰ But it is easier for courts to point to another state’s overarching preferences than to determine specific substantive policies. Thus, courts typically refer to other states’ broad interests in “controlling access to information within [their] borders” and “afford[ing] . . . citizens protections against discovery in foreign litigation”—and then discount these interests as “relatively weak” or too general to be relevant.²¹¹ Sometimes judges do identify more specific substantive concerns—like antitrust, terrorism, or restitution for Holocaust victims—but then assert that the two states share those concerns.²¹² Whether France and the United Kingdom agree that cartels, terrorists, or Nazis are bad, however, does not mean that they share an interest in U.S. courts enforcing U.S. causes of action—and U.S.-style discovery—against European industry or banks.²¹³

And under both rubrics—the tripartite standard as well as the multifactor balancing test—the assumption that foreign blocking statutes are merely symbolic is now so engrained that new information cannot dislodge it. For example, U.S. courts long refused to take the French blocking statute seriously because its criminal provisions were never enforced.²¹⁴ Then, in 2007, France prosecuted and fined a French attorney under the statute for turning over

210. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 cmt. c.

211. *E.g.*, *In re Air Cargo Shipping Servs.*, 278 F.R.D. at 54-55; *see also* Burke, *supra* note 76, at 9-10 (critiquing district courts’ discounting of foreign states’ judicial sovereignty concerns); Buxbaum, *supra* note 2, at 93-95 (doing the same).

212. *See, e.g.*, *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 304 (3d Cir. 2004) (“[T]here is no reason to assume that discovery under the Federal Rules would inevitably offend Germany’s sovereign interest because presumably Germany, like the United States, would prohibit the alleged price-fixing conspiracy and would welcome investigation of such antitrust violation to the fullest extent.”); *In re Air Cargo Shipping Servs.*, 278 F.R.D. at 54 (“[T]his is a case involving violations of antitrust laws whose enforcement is essential to the country’s interests in a competitive economy. . . . The interest in prohibiting price-fixing of the type alleged here is shared by France”); *Strauss I*, 242 F.R.D. 199, 213-14 (E.D.N.Y. 2007) (concluding that the “mutual interests of the United States and France in combating terrorism outweigh the French interest, if any, regarding the disputed discovery” (italics omitted)); *Bodner v. Paribas*, 202 F.R.D. 370, 375-77 (E.D.N.Y. 2000) (asserting that “the goals of the [Holocaust victim] plaintiffs in this case clearly are consistent with the objectives of the French Government” despite interventions from the French government calling for use of the Evidence Convention).

213. Indeed, the transnational reach of U.S. antitrust and financial regulation has been a source of friction with European allies since the 1940s. *See* BORN & RUTLEDGE, *supra* note 46, at 680-82.

214. *See, e.g.*, *Bodner*, 202 F.R.D. at 375 (“As held by numerous courts, the French Blocking Statute does not subject defendants to a realistic risk of prosecution”); *In re Aircrash Disaster near Roselawn*, 172 F.R.D. 295, 310 (N.D. Ill. 1997); *see also Strauss I*, 242 F.R.D. at 220-21 (collecting cases “refus[ing] to give effect to the French blocking statute”).

documents in a U.S. proceeding.²¹⁵ Now U.S. courts do not take the French blocking statute seriously because it has only ever been enforced once.²¹⁶ And the courts' skepticism of the French blocking statute continues to spill over to other states' statutes that embody more specific policy concerns, like the protection of data privacy or bank secrecy.²¹⁷

Twice judges have attempted to distill a rubric from the open-endedness of *Aérospatiale*. Both times the pull of case management concerns, the difficulty of assessing sovereign interests (amplified by the *Aérospatiale* Court's discounting of the balance of interests already struck by the political branches), and the draw of oft-repeated dicta to fill in difficult-to-ascertain facts miscalibrated and ossified the inquiry until one particular result was locked in.²¹⁸ Given the weight of precedent, new information cannot dislodge these ossified factors and even judges approaching the question with an open mind will find themselves nearly compelled to rule against use of the Evidence Convention.

B. Forum Non Conveniens

Commentators have heavily criticized the federal courts for undervaluing the interests of foreign plaintiffs in dismissing cases for forum non

215. See Daniel S. Alterbaum, Comment, *Christopher X and CNIL: A Clarion Call to Revitalize the Hague Conventions*, 38 YALE J. INT'L L. 217, 223-24 (2013) (citing *In re Avocat "Christopher X,"* Cour de cassation [Cass.] [supreme court for judicial matters] Paris, crim., Dec. 12, 2007, Bull. crim., No. 309 (Fr.)).

216. "[The appellant's] attempt to distinguish well established precedent based on its claim that French authorities are only now enforcing the statute does not change the sovereignty considerations underlying the Supreme Court's analysis of the French blocking statute." *SNP Boat Serv. S.A. v. Hotel le St. James*, 483 B.R. 776, 787 (S.D. Fla. 2012); see also *MeadWestvaco Corp. v. Rexam PLC*, No. 1:10cv511 (GBL/TRJ), 2010 WL 5574325, at *2 & n.1 (E.D. Va. Dec. 14, 2010), *aff'd mem.*, No. 1:10cv511, 2011 WL 102675 (E.D. Va. Jan. 10, 2011); *In re Air Cargo Shipping Servs.*, 278 F.R.D. at 54; *Strauss II*, 249 F.R.D. 429, 450-51 (E.D.N.Y. 2008); *In re Glob. Power Equip. Grp.*, 418 B.R. 833, 849-50 (Bankr. D. Del. 2009). As the Second Circuit has helpfully clarified in another context, courts should not discount the existence of conflicting foreign laws simply because the foreign country has not pursued enforcement actions. See *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 191-92 (2d Cir. 2016).

217. See *Milliken & Co. v. Bank of China*, 758 F. Supp. 2d 238, 249 (S.D.N.Y. 2010) (discounting China's interest in its bank secrecy laws because the Chinese government had not specifically intervened and the Chinese criminal law implications were vague); *AccessData Corp. v. ALSTE Techs. GmbH*, No. 2:08cv569, 2010 WL 318477, at *2 (D. Utah Jan. 21, 2010) (citing *Aérospatiale* to establish that a German data protection law did not warrant deference); *Schindler Elevator Corp. v. Otis Elevator Co.*, 657 F. Supp. 2d 525, 532 (D.N.J. 2009) (discounting the applicability of Swiss law in part due to a lack of known prosecutions for complying with U.S. court orders).

218. *Cf. Iontcheva*, *supra* note 2, at 892 (calling for intervention in 2001 "before the district courts' scattered decisions coalesce into a body of precedent carrying its own force").

conveniens,²¹⁹ a doctrine that allows judges to decline jurisdiction in cases they believe would be more appropriately heard in another country's courts.²²⁰ In particular, scholars worry that courts grant motions to dismiss for forum non conveniens close to 50% of the time.²²¹ That rate increases for cases involving foreign plaintiffs but not for cases involving foreign defendants.²²² This protectionist tilt in forum non conveniens practice may reflect not the individual bias of judges, however, as much as the structure of this common law inquiry. Here again the Supreme Court has emphasized trial court discretion²²³ while transplanting a poorly fitting balancing test from the domestic context. The combination of poor fit and broad discretion has encouraged judges to overemphasize local concerns, leading to the test's miscalibration.²²⁴ Meanwhile, efforts to adapt the test to the transnational context have only led to ossification and generalization because the added inquiries exceed judicial capacity. The result is a doctrine that has predictably come to favor local defendants—the very parties who were traditionally supposed to benefit least from its protection.²²⁵

In its 1981 decision in *Piper Aircraft Co. v. Reyno*, the Supreme Court instructed judges to evaluate forum non conveniens motions in transnational cases through a balancing test that it had created for domestic cases.²²⁶ Under

219. For a partial sampling of an extensive literature, see Davies, *supra* note 126, at 311-15; Heiser, *supra* note 62, at 613-14; Lear, *supra* note 1, at 561-62; and Joel H. Samuels, *When Is an Alternative Forum Available?: Rethinking the Forum Non Conveniens Analysis*, 85 IND. L.J. 1059, 1059-60, 1111 (2010).

220. *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007).

221. See, e.g., Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT'L L. 157, 169 (2012) (finding that motions to dismiss for forum non conveniens in reported federal cases were granted 48% of the time between 2007 and 2012); Samuels, *supra* note 219, at 1077 n.108 (finding a 41% dismissal rate among published federal cases between 1982 and 2007); Whytock, *supra* note 17, at 502 & n.114 (finding a 47% dismissal rate among a random sample of 210 published decisions by district court judges between 1990 and 2005).

222. See Whytock, *supra* note 17, at 524-27.

223. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-50, 257 (1981) ("If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.").

224. Cf. David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L.J. 353, 359 (1994) ("A non-exhaustive, unweighted, and unranked listing of factors does not afford much if any doctrinal guidance, particularly when virtually every factor on the list is itself somewhat vague and amorphous." (footnote omitted)).

225. See Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. (forthcoming 2017) (explaining how forum non conveniens was historically a plea reserved for defendants who resided outside the forum).

226. 454 U.S. at 257.

that domestic rubric, first articulated in the 1947 case *Gulf Oil Corp. v. Gilbert*,²²⁷ courts weigh a set of public and private interests in having a case tried locally versus in a sister state.²²⁸ This was not a test designed to help trial judges take into account the foreign or systemic interests at stake in a transnational case.

Take the test's public interest factors, which focus on administrative burdens for the local forum. They instruct judges to weigh the congestion of the court's docket; "the unfairness of burdening citizens . . . with jury duty" for cases "unrelated" to the forum; the "local interest in having localized controversies decided at home"; and "the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law," including a preference for cases being tried by courts "at home with the law that must govern the action."²²⁹ Notably missing from these factors is any explicit consideration of comity, a key consideration for any transnational case. Nor is it clear where such comity interests might fit within the test even if individual judges were to raise them. Indeed, because these public interest factors are framed from the perspective of administrative difficulties for the local court, they encourage judges to focus on particularly salient (meaning concrete, pressing, and immediately perceivable) considerations that will often cut *against* the courts' background comity obligation of providing fair fora for foreign parties.²³⁰

These public interest factors are also a poor fit for the transnational context because the Court in *Gilbert* had no need to engage in any comparative inquiry. In *Gilbert*, the dispute—between a Virginian businessman and a Pennsylvania corporation over a warehouse fire in Virginia—had no real

227. 330 U.S. 501, 508-09 (1947).

228. Since the adoption of the federal venue transfer statute shortly after *Gilbert* was decided, federal judges can simply transfer cases they believe would be more appropriately heard in another U.S. state. See 28 U.S.C. § 1404 (2015). Forum non conveniens is thus used by federal courts today primarily in the context of transnational litigation, where the alternative forum is not another state but another country. See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994).

229. *Piper*, 454 U.S. at 241 n.6 (quoting *Gilbert*, 330 U.S. at 509).

230. "It was long settled that neither foreign citizens nor foreign residents were barred from access to U.S. courts, including in actions arising abroad under foreign law. This rule rested on principles of international law, and was uniformly acknowledged by commentators." BORN & RUTLEDGE, *supra* note 46, at 366; see also *Rasul v. Bush*, 542 U.S. 466, 484 (2004) ("The courts of the United States have traditionally been open to nonresident aliens."); *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578 (1908) ("Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights."). Commentators have thus argued that the greater comity risk with forum non conveniens comes not from the retention of transnational cases but from the dismissal in particular of cases involving foreign plaintiffs and U.S. defendants. See, e.g., *Lear*, *supra* note 1, at 563; *Whytock & Robertson*, *supra* note 68, at 1491-92.

connection to the state of New York, where the suit was brought.²³¹ Any alternative forum with some nexus to the parties or the harm would have been more appropriate in terms of judicial administration. But for most transnational cases, the parties, evidence, or harms will stretch across multiple countries, including the United States. *Gilbert's* factors do not help judges choose among those possible fora. Should jury duty be imposed on a community that has *some* relation to the litigation?²³² What if the dispute is not "localized" within a single other jurisdiction or if the persons affected do not all live in one place?²³³ Nor does the *Gilbert* test guide judges to consider whether a trial in the foreign forum will in fact resolve the defendant's concerns. In *Gilbert*, the alternative forum was another federal district court that would apply equivalent procedures, but the procedures of a foreign forum will necessarily differ.²³⁴ In short, the public interest factors only help judges consider how *this* forum will hurt the *defendant's* interests. It does not help judges weigh the two fora's comparative interests in the case or consider whether the alternative forum will in fact solve any identified shortcomings or further the interests of justice. As a result, the transplanted test is miscalibrated from the outset to favor local administrative interests over systemic concerns about international comity.

Gilbert's private interest factors likewise encourage miscalibration. They direct judges to consider the ease of obtaining evidence, the availability of compulsory attendance of witnesses, and the option for a view of the premises, as well as "all other practical problems that make trial of a case easy, expeditious and inexpensive."²³⁵ Not only do these factors focus judges' attention on an already salient concern (access to evidence), but that concern is also of decreasing relevance in the modern era. Indeed, the *Gilbert* test's focus on access to evidence is outdated, predating rounds of amendments to the Federal

231. 330 U.S. at 502-03. Similarly, *Koster v. (American) Lumbermens Mutual Casualty Co.*, decided the same day as *Gilbert*, was a derivative action brought on behalf of an Illinois corporation against an Illinois citizen and another Illinois corporation. 330 U.S. 518, 519-20, 522-23 (1947). Though the case was raised by a New York shareholder in a New York-based court, that nominal plaintiff was just one of many spread across the country, all with equal claim against the alleged wrongdoing. *See id.* at 519, 523-26.

232. *See Gilbert*, 330 U.S. at 508-09 ("Jury duty is a burden that ought not to be imposed upon the people of a community which has *no* relation to the litigation." (emphasis added)).

233. *See id.* at 509 (noting that "[t]here is a local interest in having localized controversies decided at home" and that when cases "touch the affairs of many persons, there is reason for holding the trial in their view and reach").

234. *See Davies*, *supra* note 126, at 384 (noting that the *Gilbert* factors presuppose "the interdistrict, intra-American context in which *Gilbert* and *Koster* were decided," which is not applicable in transnational cases).

235. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 & n.6 (1981) (quoting *Gilbert*, 330 U.S. at 508).

Rules that make long-distance evidence collection and the preservation of witness testimony much easier.²³⁶ The district courts' lack of experience with the Evidence Convention has also led some judges to discount the Convention as a tool for obtaining evidence or the testimony of witnesses located in other countries.²³⁷ As a result, courts applying the *Gilbert* test treat the location of evidence or nonparty witnesses abroad as a greater obstacle than is warranted.

Even if judges sometimes recognize that evidence gathering in transnational cases is getting easier,²³⁸ *Gilbert's* framing of the private interest factors still requires judges to evaluate evidentiary concerns first and foremost. That focus will tend to favor defendants, particularly U.S. defendants worried about obtaining evidence from other countries. To see why, consider that at the outset of a case, it is difficult (if not impossible) to forecast what evidence will be critical to establishing, or defending against, nascent claims.²³⁹ Most defendants will thus be able to point to some evidence abroad that may be relevant for their defense. Judges can presume that plaintiffs, in choosing the forum, have already taken into account the difficulty of obtaining evidence from abroad, but they may harbor due process concerns for defendants who claim they need access to foreign evidence.

Further, it is hard for judges to forecast whether the alternative foreign forum will resolve the defendants' evidentiary concerns: given that U.S. discovery practices remain the broadest in the world,²⁴⁰ it is a challenge for U.S. judges to evaluate (or perhaps even imagine) whether the foreign court's jurisdiction over evidence will actually translate into party access. Though judges do at times acknowledge that foreign courts may have similar difficulties gathering evidence scattered across several countries,²⁴¹ judges

236. See Davies, *supra* note 126, at 324-46.

237. See, e.g., *Warrick v. Carnival Corp.*, No. 12-61389-CIV, 2013 WL 3333358, at *7 (S.D. Fla. Feb. 4, 2013); *In re Air Crash at Madrid*, 893 F. Supp. 2d 1020, 1032 (C.D. Cal.), *amended by* No. 2:10-ml-02135 GAF (RZx), 2011 WL 2183972 (C.D. Cal. May 16, 2011), *aff'd sub nom.* Fortaner v. Boeing Co., 504 F. App'x 573 (9th Cir. 2013); *Mastafa v. Austl. Wheat Bd. Ltd.*, No. 07 Civ. 7955(GEL), 2008 WL 4378443, at *8 (S.D.N.Y. Sept. 25, 2008).

238. See, e.g., *Reid-Walen v. Hansen*, 933 F.2d 1390, 1397 (8th Cir. 1991).

239. This is not for lack of trying, however. The Eleventh Circuit, for example, has directed district courts to undertake a three-stage "private interest" analysis for each cause of action: the court should identify the elements of the cause of action, "consider the necessary evidence required to prove and disprove each element," and then "make a reasoned assessment as to the likely location of such proof." *Ford v. Brown*, 319 F.3d 1302, 1308 (11th Cir. 2003). In application, this staged analysis takes up a lot of room but appears to provide little additional benefit. See, e.g., *Warrick*, 2013 WL 3333358, at *4-9.

240. Cf. BORN & RUTLEDGE, *supra* note 46, at 969-70 (describing narrower conceptions of discovery in other countries).

241. See, e.g., *Baxter Int'l Inc. v. AXA Versicherung AG*, 908 F. Supp. 2d 920, 926 (N.D. Ill. 2012); *Klyszcz v. Cloward H2O LLC*, No. 11-23023-Civ., 2012 WL 4468345, at *4 (S.D. Fla. Sept. 26, 2012); *In re Air Crash*, 893 F. Supp. 2d at 1033 ("[N]o matter where these

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typically rely on defendant stipulations that they will provide U.S.-style discovery to plaintiffs before foreign courts.²⁴² This again favors dismissal, yet it is uncertain whether such stipulations are enforceable, at least as a practical matter.²⁴³

In sum, the poorly fitting public and private interest factors from *Gilbert* tend to overfavor the interests of defendants, particularly U.S. defendants, while failing to account for systemic interests like comity. To this mismatched domestic test, *Piper* added two threshold glosses to try to account for the transnational context. First, the Court directed judges to ensure that there is an adequate and available alternative forum in another country, one that has jurisdiction to hear the case and the ability to provide some relief, even if significantly circumscribed.²⁴⁴ Second, the Court reaffirmed *Gilbert*'s "strong presumption in favor of the plaintiff's choice of forum," but only if the plaintiff is a U.S. citizen or resident; a foreign plaintiff's choice of forum is entitled to less deference.²⁴⁵ Rather than improve the fit of forum non conveniens to transnational cases, however, these glosses only increased parochial pressures within the doctrine.

At first glance, *Piper*'s requirement of an adequate and available alternative forum would seem to counteract the skew of the *Gilbert* test by ensuring that plaintiffs will not be left without a viable forum. But that inquiry has proven too complex to be practical, with the result that foreign fora are almost never found to be either inadequate or unavailable.²⁴⁶ This is not particularly surprising. *Piper* discouraged courts from inquiring too deeply into the question of adequacy,²⁴⁷ recognizing that such questions would strain judicial capacity²⁴⁸: How should a court determine whether a foreign court is unfair or

suits are tried, one side will face difficulty in gathering evidence and presenting witnesses for its case. . . . In either situation, the out-of-country evidence will be central to one party's case.").

242. See, e.g., *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1330 (11th Cir. 2011); *Giglio Sub S.N.C. v. Carnival Corp.*, No. 12-21680-CIV, 2012 WL 4477504, at *16-17 (S.D. Fla. Sept. 26, 2012).

243. See Thomas Orin Main, *Toward a Law of "Lovely Parting Gifts": Conditioning Forum Non Conveniens Dismissals*, 18 SW. J. INT'L L. 475, 479 (2012).

244. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, 254 & n.22 (1981). The relief available in the alternative forum is considered sufficient unless it "is so clearly inadequate or unsatisfactory that it is no remedy at all." *Id.* at 254.

245. *Id.* at 255-56.

246. See, e.g., Heiser, *supra* note 1, at 1172-73; Whytock & Robertson, *supra* note 68, at 1457-60. For a thorough discussion of the shortcomings in courts' analyses of the adequate and available alternative forum requirement, see Samuels, *supra* note 219.

247. See *Piper*, 454 U.S. at 251; see also *id.* at 254 n.22 (emphasizing the high bar of the adequate and available alternative forum inquiry).

248. See Kevin M. Clermont, *The Story of Piper: Forum Matters*, in CIVIL PROCEDURE STORIES, *supra* note 40, at 199, 214 (noting that Justices Marshall and Rehnquist chose a high bar
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whether the remedies available from the foreign court are inadequate?²⁴⁹ And if the court does think its foreign peer is unfair and its law inadequate, how could it say as much without causing offense?²⁵⁰

Instead, courts have avoided this awkward inquiry through two moves, one addressing the adequacy requirement and the other addressing the requirement of availability. Both swap an institutionally challenging inquiry for an easier heuristic. First, courts have set a high bar for finding another country's courts to be inadequate and then relied on prior decisions' findings of foreign court adequacy, leading to a self-reinforcing cycle based largely on judges' intuitions about other countries.²⁵¹ When in doubt, courts have relied on defendant stipulations that they will provide extra discovery to the plaintiffs in the foreign forum, beyond what the forum might typically require, or that they will agree to the enforcement of any resulting judgment in the United States.²⁵² Second and similarly, courts avoid assessing the availability of foreign fora by relying instead on defendant waivers regarding personal

for this inquiry to help judges avoid becoming mired in complex and sensitive evaluations of foreign legal systems).

249. Indeed, courts may bend over backwards to avoid such determinations. *See, e.g.*, *Harp v. Airblue Ltd.*, 879 F. Supp. 2d 1069, 1073 (C.D. Cal. 2012) (finding the plaintiff's evidence of corruption insufficient because it related to systemic corruption within Pakistan rather than judicial corruption specifically); *id.* at 1074 (speculating that a high-profile case "is unlikely to get lost in the shuffle" of Pakistan's courts and thus would not be subject to the documented delays of other cases); *id.* at 1075 (discounting the plaintiff's fear of traveling to Pakistan despite U.S. State Department travel advisories).
250. *See, e.g.*, *Carijano v. Occidental Petrol. Corp.*, 643 F.3d 1216, 1226 (9th Cir. 2011) (voicing concern about U.S. judges appearing to condemn the sufficiency of other countries' legal systems); *Niv v. Hilton Hotels Corp.*, 701 F. Supp. 2d 328, 337-38 (S.D.N.Y. 2008) (emphasizing that "[c]ourts must be cautious before finding incompetence or corruption by other nation's [sic] judicial systems" and collecting cases to the same effect); Heiser, *supra* note 62, at 616 (noting the hesitancy of U.S. courts "to label the court system of another country procedurally 'inadequate'"); Rutledge, *supra* note 69, at 1078-79 (arguing that instead of "minimiz[ing] jurisdictional competition . . . , the adequacy analysis simply worsens matters by miring courts in value-laden judgments about the acceptability or unacceptability of a foreign forum").
251. *See, e.g.*, *Seguros Universales, S.A. v. Microsoft Corp.*, 32 F. Supp. 3d 1242, 1249-50 (S.D. Fla. 2014); *In re Air Crash near Peixoto de Azevedo*, 574 F. Supp. 2d 272, 283-84 (E.D.N.Y. 2008); *see also* Davies, *supra* note 126, at 322 (noting that some courts base their adequacy findings on their own consideration of publicly available material).
252. *See* Heiser, *supra* note 62, at 616-17, 616 n.45 (collecting cases); Main, *supra* note 243, at 480.

jurisdiction, service of process, and statutes of limitations,²⁵³ all of which defendants are quick to accept if it means the U.S. case will be dismissed.²⁵⁴

These waivers and stipulations likely do more to reassure the court, however, than to protect the plaintiff, who will be hard pressed to enforce them once the case is out of U.S. court.²⁵⁵ For one thing, the foreign forum may not accept them; statutes of limitations and other jurisdictional defects may protect interests that are not defendants' to waive.²⁵⁶ It is also unclear how such conditions can be enforced without either stepping on the toes of the foreign forum or imposing significant extra costs on plaintiffs. The use of antisuit injunctions to try to control the conduct of defendants in the alternative forum is considered the nuclear option in transnational litigation, as it is inherently offensive to the foreign forum.²⁵⁷ And what if the foreign court refuses to accept a defendant's waiver of a jurisdictional defect and enters judgment for the defendant? As Thomas Main points out, if the plaintiff brings the case back to a U.S. court, that court may then be forced to choose between the recognition of a presumptively valid foreign judgment and the prior conditional dismissal of another U.S. court.²⁵⁸ Courts have tried to ameliorate these problems by either dismissing cases without prejudice or by staying them so that plaintiffs can return if problems arise,²⁵⁹ but finding reassurance in such "return jurisdiction" clauses relies on a herculean conception of plaintiffs' patience, litigiousness, and financial resources.²⁶⁰

Then there is *Piper's* distinction between foreign and domestic plaintiffs. That gloss does not aid comity interests, as it is widely perceived as discriminatory against foreigners.²⁶¹ The distinction has also proven

253. See Davies, *supra* note 126, at 316; Heiser, *supra* note 62, at 614-15, 615 nn.36-37 (collecting cases and commentary); Main, *supra* note 243, at 480 & nn.22-23 (collecting cases).

254. Heiser, *supra* note 1, at 1171. And these are just the tip of the iceberg: Thomas Main has identified fifteen additional categories of conditions that courts have attached to dismissals for forum non conveniens. See Main, *supra* note 243, at 480-84.

255. See Main, *supra* note 243, at 479.

256. See *id.*

257. See Dodge, *supra* note 22, at 2114.

258. See Main, *supra* note 243, at 479 (identifying this possibility).

259. As Main points out, stays can raise their own set of problems, in particular the appealability of a nonfinal order. *Id.*

260. See Davies, *supra* note 126, at 318-19.

261. Christopher Whytock's empirical study of forum non conveniens dismissals suggests that "the *Piper* distinction between U.S. and foreign plaintiffs, as applied by the U.S. district courts, is not merely a proxy for convenience, but instead may discriminate against foreign plaintiffs as such, thus raising significant questions about compliance with equal-access provisions" in U.S. treaties. Whytock, *supra* note 17, at 527; *id.* at 523-24, 524 tbl.6 (finding that foreign plaintiffs' claims are dismissed for forum non
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unworkably complex in application. Though the concept seems simple—U.S. plaintiffs get more deference, foreign plaintiffs get less—that binary clarity falls away on closer examination. What exactly does “less deference” or “somewhat more deference”²⁶² mean, and what is the baseline from which deference is measured?²⁶³ Should courts similarly assume that a local defendant is *not* inconvenienced by suit in its home forum?²⁶⁴ And if so, what counts as a “local” defendant?²⁶⁵ Is a U.S. plaintiff doing significant business in a foreign country really inconvenienced if forced to litigate there?²⁶⁶ What about a corporation that is only nominally incorporated in the United States but is in all other respects foreign?²⁶⁷ Or a U.S. plaintiff who initially brought suit in the

conveniens at a significantly higher rate regardless of the defendant’s nationality); *see also* Burbank, *supra* note 23, at 242, 246 (suggesting that forum non conveniens, particularly the differential presumption, is perceived by other nations as discriminatory).

262. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 n.23 (1981) (“Citizens or residents deserve *somewhat more* deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum.” (emphasis added)).
263. For the Seventh Circuit, “less deference” means that “[w]hen application of the doctrine would send the plaintiffs to their home court, the presumption in favor of giving plaintiffs their choice of court is *little more than a tie breaker*.” Abad v. Bayer Corp., 563 F.3d 663, 667 (7th Cir. 2009) (emphasis added). The Ninth Circuit has repeatedly emphasized, in possible contrast, that “less deference is not the same thing as no deference.” Ravelo Monegro v. Rosa, 211 F.3d 509, 514 (9th Cir. 2000). The First Circuit, meanwhile, has suggested that *domestic* plaintiffs no longer have an “automatic right to the presumption” and should be denied its invocation if they are “acting with a vexatious and oppressive motive.” Interface Partners Int’l Ltd. v. Hananel, 575 F.3d 97, 102 (1st Cir. 2009).
264. *See, e.g.*, Gschwind v. Cessna Aircraft Co., 161 F.3d 602, 609 (10th Cir. 1998) (“[A] forum resident should have to make a stronger case than others for dismissal based on *forum non conveniens*.”); Reid-Walen v. Hansen, 933 F.2d 1390, 1395 (8th Cir. 1991) (“[W]here the forum resident seeks dismissal, this fact should weigh strongly against dismissal.”); *see also* Galustian v. Peter, 591 F.3d 724, 732 (4th Cir. 2010) (raising the same observation). *But see* Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 74 (2d Cir. 2003) (declining to give substantial deference to the plaintiffs’ choice of the defendant’s home forum).
265. *Compare* DiFederico v. Marriott Int’l, Inc., 714 F.3d 796, 800, 806 (4th Cir. 2013) (emphasizing the local connections of the defendant when U.S. plaintiffs sued the local franchisor of a separately incorporated foreign company), *with* Jiali Tang v. Synutra Int’l, Inc., 656 F.3d 242, 246, 252-53 (4th Cir. 2011) (discounting local connections when foreign plaintiffs sued the local parent company of a foreign subsidiary).
266. *See, e.g.*, Reid-Walen, 933 F.2d at 1395 (noting this issue in dicta); RIGroup LLC v. Trefonisco Mgmt. Ltd., 949 F. Supp. 2d 546, 553 (S.D.N.Y. 2013); Dtex, LLC v. BBVA Bancomer, S.A., 512 F. Supp. 2d 1012, 1020 (S.D. Tex. 2007), *aff’d per curiam*, 508 F.3d 785 (5th Cir.).
267. *See, e.g.*, U.S.O. Corp. v. Mizuho Holding Co., 547 F.3d 749, 750, 752 (7th Cir. 2008); *see also* RIGroup, 949 F. Supp. 2d at 553 (refusing to defer to the plaintiffs’ choice of forum when the U.S. plaintiff was a shell company).

foreign forum?²⁶⁸ And in transnational cases with multiple parties, is one U.S. plaintiff enough? Should courts count the number of foreign versus domestic plaintiffs in deciding whether to invoke the lightened presumption,²⁶⁹ or should they instead assess the legitimacy of the U.S. plaintiff's interest in the case?²⁷⁰

The actual complexity of this determination has led courts to look beyond the plaintiffs' nationalities to their subjective motivations. Most notably, the Second Circuit has interpreted the differential presumption as a "sliding scale" that reflects the plaintiffs' forum-shopping motives.²⁷¹ That turn to forum-shopping motives does not resolve the complexity, however, but merely shifts its source. Even though *Gilbert* and *Piper* framed forum non conveniens as a check on plaintiffs'-side forum shopping,²⁷² forum shopping is not so easy to evaluate. It is an inherent aspect of the adversarial process, as both plaintiffs and defendants want cases heard in the forum most hospitable to their interests.²⁷³ It may even serve beneficial purposes in the marketplace for

268. See, e.g., *Indusoft, Inc. v. Taccolini*, 560 F. App'x 245, 252 (5th Cir. 2014) (per curiam); *Hananel*, 575 F.3d at 103.

269. See *Carijano v. Occidental Petrol. Corp.*, 643 F.3d 1216, 1228-29 (9th Cir. 2011) (rejecting further parsing of the presumption to account for the relative numbers of U.S. and foreign plaintiffs).

270. See, e.g., *Vivendi SA v. T-Mobile USA Inc.*, 586 F.3d 689, 694-95 (9th Cir. 2009) (giving a U.S. coplaintiff's choice of forum less deference because its role in the case was the result of "eleventh-hour efforts to strengthen connections with the United States").

271. *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73 (2d Cir. 2001) ("[W]e give greater deference to a plaintiff's forum choice to the extent that it was motivated by *legitimate reasons*, including the plaintiff's convenience and the ability of a U.S. resident plaintiff to obtain jurisdiction over the defendant, and diminishing deference to a plaintiff's forum choice to the extent that it was motivated by *tactical advantage*." (emphasis added)); see also *Vivendi*, 586 F.3d at 694-95 (invoking the plaintiff's illegitimate forum-shopping motives in affirming a forum non conveniens dismissal); *Hananel*, 575 F.3d at 102-03, 102 n.9 (adopting the Second Circuit's sliding scale approach). As examples of such illegitimate "tactical advantage[s]," the Second Circuit noted those "resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum." *Iragorri*, 274 F.3d at 72.

272. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 251-52 (1981) (fretting that U.S. courts were "already extremely attractive to foreign plaintiffs" and that without a robust forum non conveniens doctrine, "[t]he flow of litigation into the United States would increase and further congest already crowded courts" (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947))); see also *id.* at 252 n.18 (listing reasons—presumably illegitimate—why foreign plaintiffs would prefer U.S. fora).

273. See *Vivendi*, 586 F.3d at 695 n.10 (recognizing that a "competent attorney, as part of his ethical obligation to represent his client with reasonable diligence, is obligated to consider various fora and to choose the best forum in which to file a client's complaint" but affirming the district court's determination that the plaintiff's forum-shopping motives were illegitimate in that case (citation omitted)). For more neutral accounts of

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procedural innovations and administrative efficiency.²⁷⁴ Further, to the extent there is “good” or “bad” forum shopping, that line is hard to discern and likely in the eye of the beholder.²⁷⁵ And because both sides can forum shop, how is a judge to weigh plaintiffs’ “good” forum-shopping motives against defendants’ “good” forum-shopping motives or plaintiffs’ “bad” forum-shopping motives against defendants’ “bad” forum-shopping motives?²⁷⁶

The differential presumption is thus hard to apply, whether treated as a binary determination or a sliding scale. It may also be distorting the traditional presumption even in cases involving domestic plaintiffs. In such cases, judges relying on prior opinions that turned on the weaker presumption may find their analysis inflected with the ramifications of that weaker presumption even as they continue to dutifully recite the stronger version. Thus, at times, cases involving U.S. plaintiffs are dismissed even though the public and private factors are in equipoise, or at least do not weigh strongly in the defendant’s favor.²⁷⁷ And as *Gilbert’s* initial presumption—the primary bastion of plaintiff interests in a forum non conveniens analysis—is weakened for U.S. and foreign

forum shopping, see, for example, Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 80-82 (1999); Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 335-36 (2006); and Franco Ferrari, *Forum Shopping: A Plea for a Broad and Value-Neutral Definition* (N.Y. Univ. Sch. Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 14-39, 2014).

274. See Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, 616-21 (2016) (collecting sources).

275. See *id.* at 590; Silberman, *supra* note 8, at 342 (“[W]hat is ‘tactical’ and what is ‘legitimate’ may be an almost impossible line to draw and may prove to be just another issue over which to litigate.”); *cf.* Whytock, *supra* note 17, at 485, 526 (concluding that judges can distinguish “between appropriate and inappropriate forum shopping” through forum non conveniens but finding that “conservative and liberal judges may have different conceptions of what constitutes inappropriate transnational forum shopping into U.S. courts”).

276. Perhaps the answer is that defendant motives simply do not matter. See *Piper*, 454 U.S. at 252 n.19 (“We recognize, of course, that 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.”).

277. This is not always the case; sometimes judges do apply a strong presumption in favor of U.S. plaintiffs that overcomes strong arguments in defendants’ favor. See, e.g., *DiFederico v. Marriott Int’l, Inc.*, 714 F.3d 796, 803-08 (4th Cir. 2013) (declining to dismiss U.S. citizens’ case regarding a terrorist bombing in Pakistan even though most of the evidence was located in Pakistan and the bombing was of significant local concern in Pakistan). The claim is instead that this strong presumption is no longer consistently applied even when the plaintiff is a U.S. citizen residing in the local forum. See, e.g., *Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 365-67 (6th Cir. 2008) (declining to evaluate all of the factors before dismissing a case brought by local plaintiffs); *Lynch v. Hilton Worldwide, Inc.*, No. 11-1362 (JBS/AMD), 2011 WL 5240730, at *3 (D.N.J. Oct. 31, 2011) (treating local tort plaintiffs’ choice of forum as warranting less deference because the plaintiffs’ accident occurred in London).

plaintiffs alike, the *Gilbert* test becomes even more lopsided in favor of defendants, particularly U.S. defendants.

In sum, the Supreme Court transplanted a domestic rubric to the transnational forum non conveniens context, and the poor fit of those transplanted factors has made it difficult for district courts to adequately account for foreign or systemic interests in their analyses. The resulting miscalibration is heightened by *Piper's* suggestion that a foreign plaintiff's choice of forum merits little deference, while the safety valve meant to protect plaintiffs exceeds the institutional capacity of the courts and has thus been simplified and ossified out of existence.

C. The Hague Service Convention

Compared to their application of the Evidence Convention and forum non conveniens, the district courts' application of the Service Convention appears more sensitive to foreign interests: district courts typically require strict compliance with the Service Convention, a practice that protects the due process interests of foreign defendants and the jurisdictional interests of other nations. That pattern of adherence reflects the clear structure of the treaty, the Supreme Court's affirmation of a strong presumption in favor of its application, and the ready ascertainability of its exceptions. To the extent the Federal Rules have introduced to this analysis a discretionary loophole that has led some courts to fall prey to parochial pressures, the inquiry's clear and codified structure has also enabled other courts to push back against this creeping parochialism.

Although there are similarities in the design of the Evidence Convention and the Service Convention, the differences in phrasing of their opening provisions have led the Supreme Court to interpret the former as discretionary but the latter as mandatory for cases that fall within its scope.²⁷⁸ For cases that fall within the scope of the Service Convention, service must be completed through one of several clearly delineated channels.²⁷⁹ First, plaintiffs can send a request for service to the foreign state's Central Authority, which every state

278. Compare *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 529, 533-41 (1987) (holding that the Evidence Convention is nonmandatory), with *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988) (holding that the Service Convention is mandatory). The Court's interpretation of the Evidence Convention as nonmandatory is entirely plausible but not inevitable. See, e.g., *Bermann*, *supra* note 164, at 531-35; *Borchers*, *supra* note 71, at 81; *Burbank*, *supra* note 60, at 132-34, 149.

279. There is no hierarchy among these different channels; each is equally preferred and valid. PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS 65 (3d ed. 2006).

party must establish; the Central Authority must accept requests for service, oversee their execution, and provide certificates of service.²⁸⁰ Second, the Service Convention identifies additional channels of service that are available unless the foreign state affirmatively opts out of them, including service “by postal channels,”²⁸¹ service by judicial officials (like *hussiers*) or private process servers,²⁸² and service by consular or diplomatic officers.²⁸³ Third, states may permit additional methods of service either unilaterally or through additional agreements.²⁸⁴ The Hague Conference maintains a website listing approved channels of service for each member state.²⁸⁵

While service must be completed through one of these channels when the Service Convention applies, there are nonetheless several well-defined exceptions to its scope. First, the Convention does not apply if the defendant’s physical address is unknown.²⁸⁶ Second, the Convention does not control if service can be completed without transmitting documents abroad.²⁸⁷ In

280. Hague Service Convention, *supra* note 18, arts. 2-6. The only exception to a state party’s obligation to provide service through its Central Authority is if the state “deems that compliance would infringe its sovereignty or security,” a conclusion that may not rest “solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.” *Id.* art. 13.

281. *Id.* art. 10(a). There remains a circuit split over whether article 10(a) allows for service by mail. Compare *Nuovo Pignone, SpA v. Storman Asia M/V*, 310 F.3d 374, 384 (5th Cir. 2002) (holding that article 10(a) does not allow service by mail), and *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 173-74 (8th Cir. 1989) (holding the same), with *Brockmeyer v. May*, 383 F.3d 798, 802-03 (9th Cir. 2004) (holding that article 10(a) does allow service by mail), and *Ackermann v. Levine*, 788 F.2d 830, 838-41 (2d Cir. 1986) (holding the same). The Supreme Court will shortly resolve this question. See *Menon v. Water Splash, Inc.*, 472 S.W.3d 28 (Tex. App. 2015), *cert. granted*, 137 S. Ct. 547 (2016). For the present, this Article adopts the majority view (both domestically and internationally) that service by mail is affirmatively permitted by the Convention. See PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INT’L LAW, *supra* note 279, at 77 & n.275, 80 (noting that other countries appear to agree that service by mail is permitted by article 10(a)); see also *Petition for a Writ of Certiorari* at 14, *Menon*, No. 16-254, (U.S. Aug. 25, 2016), 2016 WL 4537379 (noting that allowance of service by mail is the majority view among federal courts of appeals). Even assuming that the Service Convention approves service by mail as a matter of international law, however, it must still be authorized under domestic law. See *Brockmeyer*, 383 F.3d at 803-04.

282. Hague Service Convention, *supra* note 18, art. 10(b)-(c).

283. *Id.* arts. 8-9. This channel is moot for U.S. purposes as the United States does not typically permit its diplomatic officers to serve documents abroad. See 22 C.F.R. § 92.85 (2016).

284. See Hague Service Convention, *supra* note 18, arts. 11, 19.

285. See HCCH, Table Reflecting Applicability of Articles 8(2), 10(a)(b) and (c), 15(2) and 16(3) of the Hague Service Convention (2015) [hereinafter Hague Service Convention Table], <https://assets.hcch.net/docs/6365f76b-22b3-4bac-82ea-395bf75b2254.pdf>.

286. Hague Service Convention, *supra* note 18, art. 1.

287. See *id.*

Volkswagenwerk Aktiengesellschaft v. Schlunk, the Supreme Court held that the law of the forum determines whether service can be completed without transmitting documents abroad,²⁸⁸ a legal conclusion with which the Permanent Bureau of the Hague Conference seems to agree.²⁸⁹ Thus, if the law of the relevant U.S. state allows for substituted service on a foreign defendant's local agent and if that service can be completed domestically, the Convention does not apply.²⁹⁰ Finally, if the foreign state's Central Authority does not respond to a valid request for service within six months, the local court may move ahead with a default judgment.²⁹¹

U.S. plaintiffs must also comply with the Federal Rules of Civil Procedure.²⁹² At the time the Court decided *Schlunk* in 1987, Rule 4(i) provided federal litigants with additional, more flexible methods of service when attempting to serve a party located in a foreign country, but it did not mention the Service Convention explicitly.²⁹³ The 1993 amendments to Rule 4, by explicitly mentioning the treaty, raised the treaty's profile while providing a more detailed structure for analyzing foreign service.²⁹⁴

In sum, we have a clearly structured treaty that is backed by a Supreme Court mandate and incorporated into the Federal Rules. And federal courts are consistently applying the Service Convention. In written decisions analyzing motions to quash foreign service, dismiss for inadequate service abroad, or request court approval for alternative service abroad under Rule 4(f)(3), judges do one of three things: (1) they find the Convention satisfied on its own terms (because the Central Authority has returned a certificate of service²⁹⁵ or because service was effected by mail or private process server to which the foreign state had not objected under article 10²⁹⁶), (2) they find the Convention

288. 486 U.S. 694, 700 (1988).

289. See PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INT'L LAW, *supra* note 279, at 14-21. *But see Schlunk*, 486 U.S. at 708, 716 (Brennan, J., concurring in the judgment) (disagreeing with this conclusion and worrying that it would undermine the reciprocity reflected in the treaty).

290. See *Schlunk*, 486 U.S. at 707 (majority opinion).

291. Hague Service Convention, *supra* note 18, art. 15.

292. See *Brockmeyer v. May*, 383 F.3d 798, 803-04 (9th Cir. 2004); PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INT'L LAW, *supra* note 279, at 71 (discussing the legislative history of the Service Convention).

293. See FED. R. CIV. P. 4(f) advisory committee's note to 1993 amendment.

294. See *id.*

295. Courts are rightly reluctant to look behind these certificates of service. See, e.g., *Lumber Liquidators Leasing, LLC v. Sequoia Floorings, Inc.*, No. 3:13-CV-313, 2014 WL 272401, at *6-7 (E.D. Va. Jan. 24, 2014); *Greene v. Le Dorze*, No. CA 3-96-CV-590-R, 1998 WL 158632, at *2-3 (N.D. Tex. Mar. 24, 1998).

296. See, e.g., *BBK Tobacco & Foods LLP v. Juicy eJuice*, No. CV-13-00070-PHX-GMS, 2014 WL 1686842, at *3-4 (D. Ariz. Apr. 29, 2014) (noting that Canada had not objected to use
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inapplicable by its own terms (because the plaintiff has been unable to learn the defendant's address²⁹⁷ or because service can be completed locally under state law²⁹⁸), or (3) they require the plaintiff to attempt service again through one of the Convention's approved channels.²⁹⁹ Federal judges are thus routinely putting the interests of foreign defendants and foreign states (as embodied by a multilateral treaty) before the convenience of U.S. plaintiffs and sometimes themselves—a distinctly nonparochial outcome.³⁰⁰

Why has this doctrine not succumbed to parochial pressures? Most obviously, the Service Convention is framed in mandatory terms, and as interpreted by the Supreme Court in *Schlunk*, it sets a strong default presumption that the Convention applies unless judges can identify a reason why it would not. Further, unlike the Evidence Convention, the Service Convention adds to what is already a fairly rule-based determination. Although U.S. courts ultimately evaluate notice in terms of a constitutional standard, the Federal Rules long ago simplified the evaluation by providing formalized categories of constitutionally adequate service.

In addition, the potential reasons why the Service Convention may not be applicable in a particular case are readily ascertainable. Plaintiffs seeking to establish the sufficiency of service can rely on the certificate of service that the foreign state's Central Authority is obliged to provide and that domestic courts

of a process server); *Curcuruto v. Cheshire*, 864 F. Supp. 1410, 1412-13 (S.D. Ga. 1994) (noting that Canada had not objected to use of registered mail).

297. *See, e.g.*, *SEC v. China Ne. Petrol. Holdings*, 27 F. Supp. 3d 379, 397-99 (S.D.N.Y. 2014) (holding that a plaintiff must make a concerted effort to identify the defendant's physical address); *Compass Bank v. Katz*, 287 F.R.D. 392, 395-97 (S.D. Tex. 2012) (holding the same).

298. *See, e.g.*, *Humble v. Gill*, No. 1:08CV-166-M, 2009 WL 1126004, at *1-2 (W.D. Ky. Apr. 27, 2009).

299. *See, e.g.*, *Chowaniec v. Heyl Truck Lines*, No. 90 C 07034, 1991 WL 111156, at *3 (N.D. Ill. June 17, 1991).

300. Again, there is a possible selection bias in the cases selected for written opinions. Judges might be more likely to write opinions when they dismiss cases for inadequate service because those decisions are immediately appealable. *Cf. Hoffman et al.*, *supra* note 158, at 703-05 (hypothesizing that judges write opinions out of fear of reversal on appeal). They would thus favor written decisions when they require strict compliance with the Service Convention and be more likely to resolve motions summarily when they approve noncompliant service. The diversity of the cases' procedural postures and outcomes offsets that concern, however. Some of these decisions *affirm* service because the judge concluded that it complied with the Convention. *See, e.g.*, *Patty v. Toyota Motor Corp.*, 777 F. Supp. 956, 958-59 (N.D. Ga. 1991). Others direct plaintiffs to additional options under the Convention and give plaintiffs more time to pursue them. *See, e.g.*, *Randolph v. Hendry*, 50 F. Supp. 2d 572, 580 & n.7 (S.D. W. Va. 1999); *Pennebaker v. Kawasaki Motors Corp.*, 155 F.R.D. 153, 158 (S.D. Miss. 1994). And many of these decisions are not on motions to dismiss but rather on plaintiffs' requests for approval of alternative methods of service under Rule 4(f)(3). *See, e.g.*, *Agha v. Jacobs*, No. C 07-1800 RS, 2008 WL 2051061, at *1 (N.D. Cal. May 13, 2008).

are obliged to accept as proof of service.³⁰¹ If a plaintiff instead opts for service through one of the article 10 channels, such as by mail or private process server, the judge can check the Hague Conference’s website to determine whether the foreign state has objected to such forms of service or attached any conditions to them.³⁰² Plaintiffs wishing to establish that the Convention does not apply can provide evidence of their unsuccessful efforts to locate addresses for foreign defendants or of extreme Central Authority delay.³⁰³ Federal judges are also used to applying forum state law to assess the adequacy of substituted service.³⁰⁴ Finally, if the judge concludes that the plaintiff must try again to effect service in accordance with the Convention, the procedures the plaintiff must pursue are clear—and not dissimilar to procedures used domestically.³⁰⁵

There is, however, a line of cases that do not require compliance with the Service Convention even when it applies. These cases reflect the parochial pressures in miniature. That these cases have not overtaken the doctrine as a whole also indicates the potential value of strong initial presumptions with enumerated exceptions in helping courts avoid unintended parochialism in the aggregate.

The problem traces back to the 1993 amendments to Rule 4. Since that amendment, Rule 4(f) has provided three options when an individual (or a corporation³⁰⁶) is to be served outside the United States:

Unless federal law provides otherwise, an individual . . . may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

301. See, e.g., *Lumber Liquidators Leasing, LLC v. Sequoia Floorings, Inc.*, No. 3:13-CV-313, 2014 WL 272401, at *6-7 (E.D. Va. Jan. 24, 2014); *Greene v. Le Dorze*, No. CA 3-96-CV-590-R, 1998 WL 158632, at *2-3 (N.D. Tex. Mar. 24, 1998).

302. See Hague Service Convention Table, *supra* note 285. For an example of a district court referring to the Hague Conference’s website for this purpose, see *BBK Tobacco & Foods LLP v. Juicy eJuice*, No. CV-13-00070-PHX-GMS, 2014 WL 1686842, at *3 (D. Ariz. Apr. 29, 2014).

303. See *Harper v. W.W. Grainger, Inc.*, No. 3:12-CV-97, 2013 WL 2470751, at *3-4 (W.D. Ky. June 7, 2013) (permitting alternative service under Rule 4(f)(3) based on the plaintiff’s evidence that the Hong Kong Central Authority had not acted on his request); *Marlabs Inc. v. Jakher*, No. 07-cv-04074 (DMC)(MF), 2010 WL 1644041, at *1-3 (D.N.J. Apr. 22, 2010) (approving service on the defendant’s U.S. counsel “[i]n an abundance of caution” when the plaintiff demonstrated concerted efforts to locate and serve the defendant in India yet the defendant denied having received service).

304. See FED. R. CIV. P. 4(e)(1).

305. Compare Hague Service Convention, *supra* note 18, arts. 5, 10, with FED. R. CIV. P. 4(e).

306. See FED. R. CIV. P. 4(h)(2) (approving service on a corporation outside the United States by any method listed under Rule 4(f) except for personal delivery under Rule 4(f)(2)(C)(i)).

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:[listing four options]; or

(3) by other means not prohibited by international agreement, as the court orders.³⁰⁷

While the new Rule 4(f)(1) increased awareness of the Service Convention, the new Rule 4(f)(3) introduced a safety valve that the Ninth Circuit has interpreted as a broad standard applicable in all cases. In *Rio Properties, Inc. v. Rio International Interlink*, a U.S. plaintiff had not been able to locate the Costa Rican defendant, which existed primarily online, in order to serve it.³⁰⁸ Because Costa Rica is not a member of the Convention, Rule 4(f)(1) was not at issue.³⁰⁹ The defendant, even while evading service, argued that the plaintiff must attempt each and every method of service described in Rule 4(f)(2) before seeking permission to use alternative (and easier) methods under Rule 4(f)(3).³¹⁰ In rejecting this argument, the court relied on the simple disjunctive relationship of Rule 4(f)'s three options:

Rule 4(f)(3) is not subsumed within or in any way dominated by Rule 4(f)'s other subsections; it stands independently, on equal footing. Moreover, no language in Rule 4(f)(1) or 4(f)(2) indicates their primacy, and certainly Rule 4(f)(3) includes no qualifiers or limitations which indicate its availability only after attempting service of process by other means.³¹¹

In the context of Rule 4(f)(2), *Rio's* reasoning seems correct, or at least unobjectionable.³¹² But some district courts have since relied on *Rio* to conclude that, even when the Service Convention *does* apply, plaintiffs can immediately invoke Rule 4(f)(3) to seek approval to serve foreign defendants through less formal means, like e-mail or Facebook.³¹³

That extension of *Rio's* dicta is wrong under Rule 4 and violates the Service Convention. The Advisory Committee's notes to Rule 4(f) make clear that

307. *Id.* 4(f).

308. 284 F.3d 1007, 1012-13 (9th Cir. 2002).

309. *See id.* at 1015 n.4.

310. *Id.* at 1014-16.

311. *Id.* at 1015.

312. Because Rule 4(f)(2) sets out four different options for service, some of them broad and open ended, it would be inefficient—and most likely not the intention of the Advisory Committee—to require plaintiffs to exhaust each option in every case.

313. *See, e.g.,* *WhosHere, Inc. v. Orun*, No. 1:13-cv-00526-AJT-TRJ, 2014 WL 670817, at *1-3 (E.D. Va. Feb. 20, 2014); *Feyko v. Yuhe Int'l, Inc.*, No. CV 11-05511 DDP (PjWx), 2013 WL 5142362, at *1-2 (C.D. Cal. Sept. 12, 2013); *Knit with v. Knitting Fever, Inc.*, No. 08-4221, 2010 WL 4977944, at *3-5 (E.D. Pa. Dec. 7, 2010); *Studio A Entm't, Inc. v. Active Distributions, Inc.*, No. 1:06CV2496, 2008 WL 162785, at *2-3 (N.D. Ohio Jan. 15, 2008); *Williams-Sonoma Inc. v. Friendfinder Inc.*, No. C 06-06572 JSW, 2007 WL 1140639, at *1-2 (N.D. Cal. Apr. 17, 2007).

Rule 4(f)(3) was intended as a safety valve available only when the Convention, by its own terms, does not apply.³¹⁴ And even setting aside the explanatory notes, Rule 4(f)(3) allows only for alternative methods of service that are “not prohibited by international agreement.”³¹⁵ As everyone agrees, the Convention is mandatory when it applies.³¹⁶ Thus, unless the Convention does not apply by its own terms, any method of service not approved by the Convention is effectively prohibited under Rule 4(f)(3).

Courts invoking *Rio*'s dicta have maneuvered around this limiting language in Rule 4(f)(3) in two ways, neither of which is satisfying. First, courts assert that methods of service are only prohibited under the Service Convention if they are *explicitly* proscribed.³¹⁷ Thus, service by e-mail, facsimile, or Facebook is not “prohibited” by international agreement because these methods are not explicitly referenced in the Service Convention or in any state's article 10 objections.³¹⁸ This leads to the absurd result of a judge in a single opinion denying permission to serve by mail where the foreign state has

314. For example, the notes suggest using Rule 4(f)(3) when another country's Central Authority refuses to “serve a complaint seeking punitive damages or to enforce the antitrust laws of the United States,” which would violate the other country's obligations under article 13 of the Convention. FED. R. CIV. P. 4(f) advisory committee's note to 1993 amendment; *see also* Hague Service Convention, *supra* note 18, art. 13 (“[A state] may not refuse to comply [with a request for service] solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.”). More debatably, the Advisory Committee read a six-month good-faith time limit into the Service Convention based on article 15, which allows a court to issue a default judgment if at least six months have passed and the plaintiff, despite using a method of service approved by the Convention, has not been able to obtain a certificate of service. *See* FED. R. CIV. P. 4(f) advisory committee's note to 1993 amendment (suggesting use of Rule 4(f)(3) when another country's Central Authority has not effected service “within the six-month period provided by the Convention”); *see also* Hague Service Convention, *supra* note 18, art. 15; Burbank, *supra* note 60, at 121, 137 (criticizing this interpretation of the Convention).

315. FED. R. CIV. P. 4(f)(3).

316. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988); PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INT'L LAW, *supra* note 279, at xxv-xxvi.

317. *See, e.g., Studio A Entm't*, 2008 WL 162785, at *2-4; *Williams-Sonoma*, 2007 WL 1140639, at *2.

318. *See* *FTC v. Pecon Software Ltd.*, No. 12 Civ. 7186(PAE), 2013 WL 4016272, at *4-5 (S.D.N.Y. Aug. 7, 2013) (explaining that the court can authorize service by e-mail and Facebook because neither is prohibited by any international agreement); *Studio A Entm't*, 2008 WL 162785, at *4 (approving service by fax in Canada). Other judges have applied similar reasoning—looking for explicit denunciation in the Service Convention or the foreign state's laws—in approving substituted service on local counsel or agents. *See* *Knit with*, 2010 WL 4977944, at *5; *In re LDK Solar Sec. Litig.*, No. C 07-05182 WHA, 2008 WL 2415186, at *2-4 (N.D. Cal. June 12, 2008).

objected to such service under article 10 of the Convention but approving (at least in theory) service by e-mail because the foreign state has not explicitly denounced such methods as well.³¹⁹

Second, courts have pointed to *Schlunk* to conclude that ad hoc substituted service, such as service on local counsel, can be completed domestically and thus does not violate the Service Convention.³²⁰ This misreads both *Schlunk* and Rule 4. Under *Schlunk*, the sufficiency of substituted service is determined ex ante based on existing forum state law;³²¹ it is not an open-ended exception to be defined by judges in individual cases. Only if state law affirmatively allows for substituted service on local agents does *Schlunk* except such service from the Convention's coverage.³²² In that case, service is completed domestically under Rule 4(e)(1).³²³ Service under Rule 4(f), on the other hand, occurs "at a place not within any judicial district of the United States."³²⁴ If a court reaches Rule 4(f)(3), then, *Schlunk's* exception for domestic substituted service is inherently no longer relevant.³²⁵ Nonetheless, judges have occasionally approved forms of substituted service under Rule 4(f)(3) that would not be sufficient under forum state law, and they have invoked *Schlunk* to suggest that the Convention does not prohibit such service.³²⁶

The reasoning in these cases is thus flawed, so why have these courts found it appealing? The 1993 amendments to Rule 4(f) could be an example of an increasingly complex rule pushing decisionmakers toward a simpler

319. See *Fisher v. Petr Konchalovsky Found.*, No. 15-cv-9831(AJN), 2016 WL 1047394, at *1-2 (S.D.N.Y. Mar. 10, 2016); *Williams-Sonoma*, 2007 WL 1140639, at *1-2.

320. See, e.g., *Vanleeuwen v. Keyuan Petrochemicals, Inc.*, No. CV 11-9495 PSG (JCGx), 2012 WL 5992134, at *3 (C.D. Cal. Nov. 30, 2012); *Brown v. China Integrated Energy, Inc.*, 285 F.R.D. 560, 563-65 (C.D. Cal. 2012); *In re China Educ. All., Inc. Sec. Litig.*, No. CV 10-9239 CAS (JCx), 2011 WL 6846214, at *2-3, *3 n.1 (C.D. Cal. Dec. 29, 2011); *Richmond Techs., Inc. v. Aumtech Bus. Sols.*, No. 11-CV-02460-LHK, 2011 WL 2607158, at *11-14 (N.D. Cal. July 1, 2011); *FMAC Loan Receivables v. Dagra*, 228 F.R.D. 531, 533-34 (E.D. Va. 2005).

321. See 486 U.S. at 707.

322. See *id.* at 706-08.

323. Rule 4(e)(1) permits service within the United States by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made," such as by serving a party's local registered agent. FED. R. CIV. P. 4(e)(1).

324. *Id.* 4(f).

325. See, e.g., *Drew Techs., Inc. v. Robert Bosch, L.L.C.*, No. 12-15622, 2013 WL 6797175, at *2-3 (E.D. Mich. Oct. 2, 2013) (reasoning similarly).

326. See, e.g., *Richmond Techs., Inc. v. Aumtech Bus. Sols.*, No. 11-CV-02460-LHK, 2011 WL 2607158, at *11-13, *13 n.7 (N.D. Cal. July 1, 2011) (acknowledging substituted service not based on forum state law).

standard.³²⁷ For courts in the Ninth Circuit, dicta from that higher court provided persuasive cover for reducing a multistep decision to a more familiar exercise of judicial discretion. That equitable impulse encourages miscalibration in these decisions: in some of these cases, for example, the court cannot but sympathize with plaintiffs trying to track down foreign defendants whose only known identity is a transitory online presence.³²⁸ But by turning immediately to Rule 4(f)(3) to solve such problems, judges elevate concrete case management concerns over the systemic comity interests embodied in the Service Convention. That tilt becomes more exaggerated when judges effectively shift the burden onto foreign defendants by asking them to prove a negative: instead of requiring plaintiffs to point to the text of the treaty, foreign law, or forum state law to identify why an exception to the Convention is warranted, this approach requires the defendant to prove that the foreign state does not allow a certain form of service. Finally, to avoid judging the efficiency of other countries' Central Authorities, a difficult and sensitive inquiry, some judges have fallen back on generalized assertions that complying with the Convention is difficult, costly, time consuming, and inherently futile,³²⁹ relying at times on nothing more than the plaintiffs' bare assertion³³⁰ or ossified citations.³³¹

The news is not all bad, however. Despite these parochial pressures in miniature, the clear structure and mandatory nature of the Service Convention

327. It is recognized that rules are often rounded at the edges as decisionmakers chafe at their under- or overinclusiveness. *See* Schauer, *supra* note 106, at 804-05 (summarizing the literature); Sullivan, *supra* note 12, at 63 & n.261. The reaction suggested here, however, is not as much about the tension between rules and standards as about the tension between complexity and simplicity. *Cf.* Kaplow, *supra* note 12, at 590 (discussing tradeoffs between complexity and simplicity as distinct from tradeoffs between rules and standards). Indeed, an intricate set of rules can produce *less* predictability in outcome as compared to simple standards because the “multiplicity of technical rules give[s] [the decisionmaker] greater discretion in employing them and in choosing how much emphasis to put on each one.” Doron Teichman & Eyal Zamir, *Judicial Decision-Making: A Behavioral Perspective*, in *THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW* 664, 687-88 (Eyal Zamir & Doron Teichman eds., 2014) (describing behavioral psychology studies).

328. *See, e.g.,* Williams-Sonoma Inc. v. Friendfinder Inc., No. C 06-06572 JSW, 2007 WL 1140639, at *1 (N.D. Cal. Apr. 17, 2007).

329. *See, e.g.,* Vanleeuwen v. Keyuan Petrochemicals, Inc., No. CV 11-9495 PSG (JCGx), 2012 WL 5992134, at *2 (C.D. Cal. Nov. 30, 2012); Knit with v. Knitting Fever, Inc., No. 08-4221, 2010 WL 4977944, at *5 (E.D. Pa. Dec. 7, 2010).

330. *See, e.g.,* *In re* LDK Solar Sec. Litig., No. C 07-05182 WHA, 2008 WL 2415186, at *3 (N.D. Cal. June 12, 2008) (accepting the plaintiffs' assertion that serving the remaining defendants abroad would be difficult).

331. *See, e.g.,* Feyko v. Yuhe Int'l, Inc., No. CV 11-05511 DDP (PJWx), 2013 WL 5142362, at *2-3 (C.D. Cal. Sept. 12, 2013); *In re* GLG Life Tech Corp. Sec. Litig., 287 F.R.D. 262, 266-67 (S.D.N.Y. 2012).

have prevented those pressures from distorting the doctrine as a whole. The line of cases misapplying Rule 4 is still limited. Although most district court opinions will now acknowledge *Rio's* dicta, they do so only to distinguish it.³³² Most judges also require plaintiffs to do more than simply assert that service through the Convention's channels would be too difficult.³³³ Though it would be preferable for the courts of appeals to clarify the limits of *Rio's* troublesome dicta, *Rio's* harm has been circumscribed. The ultimate lesson of the Convention and Rule 4, then, may be the feasibility of maintaining a discretionary safety valve that risks some over- or underinclusiveness, where that fuzziness on the margins is cabined by the clear structure of the initial inquiry.

D. Recognition of Judgments

Given the discussion so far, it should not be surprising that the recognition of foreign judgments by U.S. courts has been so markedly nonparochial. Like transnational service of process, the recognition of foreign judgments has been framed in terms of a pro-comity default presumption with clearly enumerated exceptions.³³⁴ Dating back to the Supreme Court's 1895 decision in *Hilton*, U.S. courts have presumptively recognized foreign judgments unless one of a limited number of exceptions applies. Most of these exceptions are susceptible to concrete evidence or objective legal proof, or they involve familiar legal determinations. For example, under both the common law and the uniform acts that codify the common law,³³⁵ courts must refuse to recognize a foreign

332. See, e.g., *Midmark Corp. v. Janak Healthcare Private Ltd.*, No. 3:14-cv-088, 2014 WL 1764704, at *3 (S.D. Ohio May 1, 2014); *Virtual Point, Inc. v. Hedera AB*, No. 13-CV-5690 YGR, 2014 WL 1729025, at *2-3 (N.D. Cal. Apr. 29, 2014); *U.S. Aviation Underwriters, Inc. v. Nabtesco Corp.*, No. C07-1221RSL, 2007 WL 3012612, at *2 (W.D. Wash. Oct. 11, 2007).

333. Courts are consistent in this requirement regardless of the country in which the defendant is located. See, e.g., *KG Marine, LLC v. Vicem Yat Sanayi ve Ticaret as*, 24 F. Supp. 3d 312, 314-15 (W.D.N.Y. 2014) (involving defendants in Turkey); *Midmark*, 2014 WL 1764704, at *2-3 (involving defendants in India); *Virtual Point*, 2014 WL 1729025, at *2-3 (involving a defendant in Sweden); *SEC v. China Ne. Petrol. Holdings*, 27 F. Supp. 3d 379, 397-99 (S.D.N.Y. 2014) (involving defendants in China); *Compass Bank v. Katz*, 287 F.R.D. 392, 395-96 (S.D. Tex. 2012) (involving defendants in Mexico); *Agha v. Jacobs*, No. C 07-1800 RS, 2008 WL 2051061, at *2 (N.D. Cal. May 13, 2008) (involving defendants in Germany); *U.S. Aviation Underwriters*, 2007 WL 3012612, at *1-2 (involving a defendant in Japan).

334. See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 (AM. LAW INST. 1987).

335. Generally, in diversity cases, federal courts apply the state law of judgment recognition. An exception is the SPEECH Act, Pub. L. No. 111-223, 124 Stat. 2380 (2010) (codified as amended at 28 U.S.C. §§ 4101-4105 (2015)), which governs the enforcement of foreign defamation judgments as a matter of national law. Most states have adopted one of the uniform acts, both of which codify the common law test derived from *Hilton*.

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judgment if the foreign court lacked personal jurisdiction over the defendant,³³⁶ an inquiry that courts evaluate using the same standards as they would in domestic cases.³³⁷ Courts may also refuse to recognize a foreign judgment if the defendant did not receive adequate notice, if the judgment was obtained by extrinsic fraud, or if the judgment conflicts with another final judgment or a dispute resolution procedure to which the parties had agreed.³³⁸ On these points, parties can produce, for example, proof of service or notice, evidence of fraud, the contrary judgment, or their prior agreement.

There are a couple of exceptions that could be interpreted broadly, allowing judges to review foreign judgments more aggressively if they wished. First, courts do not recognize foreign judgments if the judicial system of the foreign state is fundamentally unfair.³³⁹ Second, courts may decline to recognize foreign judgments when those judgments are “repugnant to the public policy” of the forum.³⁴⁰ Yet denials of enforcement are still rare under both exceptions.³⁴¹

See UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4 (UNIF. LAW COMM’N 2005); UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT §§ 3-4 (UNIF. LAW COMM’N 1962); *see also Foreign-Country Money Judgments Recognition Act*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act> (last visited Apr. 4, 2017) (listing states that have adopted the 2005 Act); *Foreign Money Judgments Recognition Act*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act> (last visited Apr. 4, 2017) (listing states that have adopted the 1962 Act).

336. *See* UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(b)(2); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(1)(b).

337. *See* RONALD A. BRAND, FEDERAL JUDICIAL CENTER INTERNATIONAL LITIGATION GUIDE: RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS 17-18 (2012), [http://www.fjc.gov/public/pdf.nsf/lookup/brandenforce.pdf/\\$file/brandenforce.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/brandenforce.pdf/$file/brandenforce.pdf).

338. *See* UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(c)(1)-(2), (4)-(5); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2)(b)-(c), (e)-(f). On the distinction between extrinsic fraud, which deprives a defendant of the opportunity to be heard, and intrinsic fraud, or irregularities in proceedings that should be raised and resolved in the initial forum, *see* UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4 cmt. 7.

339. UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(b)(1); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(1)(a).

340. UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(c)(3); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2)(d).

341. On courts’ unwillingness to reject foreign judgments based on the systemic unfairness of foreign legal systems, *see*, for example, Stephan, *supra* note 8, at 94. For rare examples of such rejection, *see* *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 137, 141-42 (2d Cir. 2000); and *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410-13 (9th Cir. 1995). *Cf.* *Osorio v. Dow Chem. Co.*, 635 F.3d 1277, 1278-79 (11th Cir. 2011) (affirming the lower

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Why have these exceptions not expanded in practice? Two possible, perhaps complementary, explanations are worth considering. First, the exceptions are phrased as high bars: the foreign judicial system must be *fundamentally* unfair; the judgment must be *repugnant* to public policy.³⁴² Second, judges are sensitive to institutional capacity concerns implicated by searching reviews of foreign judicial systems.³⁴³ This sensitivity could explain, for example, why judges have downplayed the evaluation of foreign judicial systems as a whole. Indeed, that particular exception has morphed in practice into inquiring whether the *individual proceedings* in question were fundamentally unfair.³⁴⁴ Judges have thus swapped out a broad, difficult, and politically sensitive factual question for one that is both narrower and more amenable to concrete evidence obtainable by the parties.

Here again, as with the Service Convention, there is a strong default presumption with ascertainable exceptions and a couple of discretionary safety valves that are not easily invoked in every case. But what if complexity were

court's refusal to recognize a Nicaraguan judgment on three different grounds but declining to address whether Nicaragua generally provides impartial tribunals).

On the rarity of invocation of the public policy exception, see, for example, BRAND, *supra* note 337, at 21. See also, e.g., Naoko Ohno v. Yuko Yasuma, 723 F.3d 984, 1002-03, 1013 (9th Cir. 2013) (emphasizing the rarity of the exception's invocation in concluding that a Japanese judgment against a church was not repugnant to the First Amendment). The public policy exception was invoked, for a time, by courts worried that enforcing foreign defamation judgments would conflict with First Amendment protections, see BRAND, *supra* note 337, at 21-22, but Congress has now codified this defamation exception to foreign judgment recognition through the SPEECH Act, see 28 U.S.C. §§ 4101-4105 (2015).

342. See, e.g., Heiser, *supra* note 62, at 640-41, 640 n.176, 653 & n.249 (collecting cases).

343. See John B. Bellinger, III & R. Reeves Anderson, *Tort Tourism: The Case for a Federal Law on Foreign Judgment Recognition*, 54 VA. J. INT'L L. 501, 519 n.75 (2014) (collecting cases). This institutional self-awareness could also explain the demise of the reciprocity requirement for foreign judgments. Back in 1895, the Supreme Court held in *Hilton* that the presumption in favor of enforcing foreign judgments is overcome when the foreign jurisdiction would not have enforced a U.S. judgment in similar circumstances. *Hilton v. Guyot*, 159 U.S. 113, 210 (1895). The resulting reciprocity requirement imposed a heavy burden on courts, which had to determine the nuances of foreign law regarding judgment enforcement. See Coyle, *supra* note 30, at 1111-12. Further, refusing to enforce a foreign judgment for lack of reciprocity elevated systemic concerns over party fairness to a degree that proved difficult for courts to accept in practice. See *id.* at 1124 & n.53 (gathering scholarly criticisms of the reciprocity rule). The reciprocity requirement dropped out of usage and was not included in the uniform acts, though it has recently made a reappearance—amid much controversy—in a new model statute proposed by the American Law Institute. See AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 7(a) (2006); Coyle, *supra* note 30, at 1111-13 (discussing the controversy).

344. See Stephan, *supra* note 8, at 93-94. But see BRAND, *supra* note 337, at 13-14 (asserting that courts have only refused to enforce judgments on this ground when the foreign system as a whole is defective).

increased in this context as it was with the 1993 amendments to Rule 4(f)—for example, by the addition of more standard-based exceptions? We may soon find out. The revised uniform act—published in 2005 and already adopted by twenty states and the District of Columbia³⁴⁵—has codified two additional grounds for refusing to recognize foreign judgments: courts may decline to recognize a foreign judgment if there is “substantial doubt about the integrity of the rendering court” or if the “specific proceeding . . . was not compatible with the requirements of due process of law.”³⁴⁶ Note the vague phrasing of these exceptions, which do not project a bar as high as the systemic unfairness and public policy exceptions. What is “substantial doubt”? Whose standards of “due process” should the court apply? Such vaguely worded additions may open space for parochial pressures to grow.³⁴⁷

V. Avoiding Parochial Procedure

The experience of the courts in handling questions of transnational procedure suggests that further educating judges about the value and role of international law can help—but will not by itself prevent the development of parochial procedure. This Article has argued that parochial procedure may instead be the result of institutional and cognitive constraints, amplified through the path dependence of the common law. If so, correcting for judicial parochialism requires structural, not just personal, solutions.

In particular, the foregoing discussion suggests three lessons regarding the design of procedural inquiries. First, and not surprisingly, it is difficult for courts to evaluate systemic interests on a case-by-case basis. A complex consideration that is nonetheless fairly consistent across cases is a prototypical example of when *ex ante* decisionmaking—that is, rules—will be most efficient.³⁴⁸ Thus, in the context of transnational litigation, a well-formulated inquiry should begin with a strong presumption reflecting the balance of comity and sovereign interests already struck by the political branches. This presumption might be based, for example, on the default application of private

345. See *Foreign-Country Money Judgments Recognition Act*, *supra* note 335.

346. See UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(c)(7)-(8) (UNIF. LAW COMM'N 2005); see also *id.* § 4(c)(6) (allowing a court to deny recognition if it believes that the foreign court should have dismissed the case for *forum non conveniens*). The new uniform act also expands the public policy exception to cover not only causes of action but also judgments that are repugnant to the forum's public policy. See *id.* § 4(c)(3); see also Bellinger & Anderson, *supra* note 343, at 511.

347. Cf. Whytock, *supra* note 28, at 116 (worrying “[t]his change invites US judges to more closely scrutinise the specific foreign country court proceedings leading to a judgment”). But see Bellinger & Anderson, *supra* note 343, at 541 (defending these changes).

348. See Kaplow, *supra* note 12, at 573, 577.

international law treaties even when they are not mandatory by their own terms.³⁴⁹ Or it might be based on an assumption about Congress's default preferences, as was the Supreme Court's recent reinvigoration of the presumption against extraterritoriality.³⁵⁰ Similarly, with *forum non conveniens*, courts might invoke a presumption in favor of exercising congressionally granted jurisdiction instead of discounting a foreign plaintiff's choice of forum.

Second, given the frequency with which these procedural questions arise, simple rubrics (whether rules or standards) will reduce the risk of error. Indeed, the story of parochial procedure may be more about the need for simplicity than about the tradeoffs between rules and standards.³⁵¹ A second stage of analysis might thus introduce *limited* additional considerations to sort cases into a few common categories. Too many considerations in run-of-the-mill decisions can encourage the conscious or subconscious use of heuristics, with less relevant or redundant factors overwhelming the test if they are immediately pressing or easier to assess.³⁵² Some considerations—like efficiency and judicial workload—need not be specified; such factors will color judges' calculi whether or not they are explicit, and their enumeration may lead to undue emphasis. Others, like the balancing of systemic interests, are best accounted for in the framing of initial presumptions given the difficulty of assessing them accurately on a case-by-case basis. In general, balancing tests invite clutter, as considerations can be named without assigning relative weight.³⁵³ Self-sufficient exceptions to a presumption, on the other hand, have

349. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 556 (1987) (Blackmun, J., concurring in part and dissenting in part) (proposing a default presumption that the Evidence Convention should apply because the Convention already “largely accommodated all three categories of interests relevant to a comity analysis—foreign interests, domestic interests, and the interest in a well-functioning international order”); see also Martinez, *supra* note 27, at 514 (identifying such an approach as a “more antiparochial, system-protective practice”).

350. See Rutledge, *supra* note 86, at 197-98; cf. Goldsmith, *supra* note 36, at 1425-26 (discussing *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400 (1990), as implementing a clear initial presumption under the act-of-state doctrine that relegates “fine-grained” inquiry to “exceptional case[s]”).

351. See Kaplow, *supra* note 12, at 589-90 (discussing the choice between complexity and simplicity as a separate consideration from the choice between rules and standards).

352. Cf. Beebe, *supra* note 10, at 1645-46 (observing that “multifactor tests of ten or even eight factors appear to ask too much of the judge’s ability simultaneously to weigh competing concerns” and recommending that tests be limited to three or four factors). For additional legal scholars drawing this connection from the behavioral psychology literature, see, for example, VERMEULE, *supra* note 89, at 5; and Schauer, *supra* note 106, at 811-12.

353. Cf. Bone, *supra* note 98, at 2016 (critiquing multifactor tests for, among other things, lacking clear principles to guide the normative task of comparing values).

built-in weight (they overcome the presumption), which may beneficially constrain their enumeration.

Third, if the key pivot point in the development of parochial procedure is the pull of case-specific facts, then decisionmaking structures should help ensure that difficult cases do not distort run-of-the-mill doctrine.³⁵⁴ Thus, for example, if a discretionary safety valve is needed for unusual cases, the invocation of that safety valve should be set as a high bar to help flag those cases as exceptional, signaling to later courts that they should be wary of relying on them. Separately, the lack of meaningful appellate review can compound parochial pressures by removing the most likely corrective influence.³⁵⁵ When issues are complex and systemic interests are at stake, appellate review should be less deferential.

Taking these three points together, what we want is not a complex rule or standard that tries to forecast all difficult cases but rather a simple rule that sorts out the easy cases combined with a simple standard that can be invoked in particularly difficult or unusual cases.³⁵⁶ By avoiding open-ended discretion at the outset, this sort of decisional ordering can protect against unruly rulification, which can sabotage the very fairness gains sought from standards. A loosening of the rubric at later stages of the analysis, however, after the bulk of cases have been resolved, preserves discretion where it matters most: on the margins where simple rules become over- or underinclusive.³⁵⁷ Such structured decisionmaking is not antithetical to the evaluation of international comity.³⁵⁸ Indeed, one of the most traditional embodiments of comity in the

354. Cf. Yair Listokin, *Bounded Institutions*, 124 YALE L.J. 336, 360-61 (2014) (arguing that when unbiased agents are nonetheless prone to systemic errors, principals should prefer “bounded structures” for allocating resources).

355. See Friendly, *supra* note 85, at 748-54 (critiquing *Piper* for compounding the discretionary nature of forum non conveniens by subjecting it only to abuse of discretion review).

356. This general structure echoes the conclusions of other scholars who have considered the tradeoffs between discretion and institutional capacity. Cf. Clermont, *supra* note 248, at 229 (“Legislative rules should be the dominant motif. But there will irresistibly be a residual role for judicial discretion, in adjusting the demands of the rare case to the rigid rules.”); Friendly, *supra* note 85, at 768-69 (advocating, in lieu of broad discretion, a rule of preference with discretionary exceptions set as high bars).

357. Put another way, this structure restricts judges’ initial intuitive responses, forcing deliberative reasoning in order to invoke an exception. Cf. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 29-42 (2007) (proposing that trial judges be induced to deliberate in order to verify their intuitions, for example by writing more opinions and using checklists).

358. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 554-55 (1987) (Blackmun, J., concurring in part and dissenting in part) (noting that “[t]here is . . . nothing inherent in the comity principle that requires case-by-case analysis” and gathering examples of general rules of comity employed for other common inquiries); see also Bermann, *supra* note 164, at 536 (cataloging “strong presumptions” in comity
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U.S. common law—the recognition of foreign judgments—has flourished for more than a century in this rule-like form.

Finally, throughout the analysis, consideration should be given to the manageability of the factual inquiries courts are asked to make. What can judges accurately determine, and what can parties reliably establish? *Piper* illustrates the pitfalls of invoking decisional ordering without thorough consideration of the manageability of the resulting inquiry. Recall that the Court instructed lower courts to consider, at the threshold of the *forum non conveniens* inquiry in transnational cases, only whether the remedy available in the alternative forum was grossly inadequate.³⁵⁹ But determining gross inadequacy still requires an inquiry into foreign law, which can then mire courts in complex evaluations.³⁶⁰ In contrast, the factual inquiries involved in the application of the Service Convention are much more manageable.³⁶¹ To the extent certain inquiries are necessary but strain judicial capacity, burdens of proof (or standards of review) can be used to resolve uncertainty in favor of system-enhancing outcomes.

This leaves the question who will design these better-structured rubrics for trial judges to apply. Codification is the most obvious choice, and there are many potential authors: nations via the negotiation of treaties, Congress or state legislatures via statutes, uniform law commissions and the American Law Institute via clarification of the common law, or the Advisory Committee via revision of the Federal Rules.³⁶² There are lessons here, too, for the Supreme Court: both for sensitivity to the constraints lower courts face in attempting to balance comity and case-specific interests on a case-by-case basis and for the need to intervene more than once every thirty years to correct the course of doctrinal developments that have international implications. There is the possibility, too, that the parochialism of individual *Justices*, rather than that of individual judges, still matters given the Court's ability to shape procedural doctrine. To the extent reformers wish to focus on judicial education, then, those efforts are best directed toward the median Justices on the Supreme Court who will cast the deciding votes in these transnational cases.³⁶³

doctrines meant “to promote a cooperative international regime”). Indeed, as William Dodge has recently concluded, the *Aérospatiale* test and *forum non conveniens* are among the few doctrines involving international comity considerations that are framed as standards rather than as rules. See Dodge, *supra* note 22, at 2082 & n.56, 2130.

359. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 251, 254 & n.22 (1981).

360. See Davies, *supra* note 126, at 321-22.

361. See *supra* Part IV.C.

362. Cf. Coyle, *supra* note 1, at 436-37, 436 n.19 (arguing for greater incorporation of international law into the U.S. Code).

363. It is notable that the Court's transnational cases have consistently been decided by close votes. In addition to the split votes in *Aérospatiale* and *Piper*, for example, the Court's
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In the meantime, district court judges can work intentionally to minimize these pressures. Though the weight of accumulated practice can be heavy, judges may be able to shift burdens of proof or persuasion, reconsider unhelpful simplifications or ossifications of specific factors, and identify honestly where they lack information to make accurate findings. In short, the pressures explored here are not inevitable, and the structure of decisionmaking can be refined or reformed through a number of institutional actors.

Conclusion

This Article took as a starting point a critique that runs through much of the recent literature on transnational litigation. According to that critique, the procedural practice of U.S. courts is undermining the long-term reciprocity of private international law, which strains relations with allies, raises costs for U.S. parties, and creates access-to-justice gaps. This parochial critique is incomplete, however, to the extent it has not explored why U.S. procedure is only sometimes parochial. I have proposed an alternative explanation for parochial procedure: in the context of unfamiliar law, difficult facts, and dynamic effects, judges as constrained decisionmakers will gravitate toward rubrics that evolve to favor local interests while ossifying foreign factors. The plausibility of this account was explored through four common doctrines of procedure in transnational cases, and a framework of sequential decisionmaking was proposed to minimize the growth of parochial procedure. The goal, both in theory and in prescription, is not to rule out the possibility of *any* parochial decision but rather to ensure that doctrines and judicial practice in the aggregate are not unintentionally tilted against the reciprocity on which private international law depends.

While this Article has focused on the context of private international law, the dynamics it explores and the decisional ordering it proposes may be equally applicable to other complex and abstruse areas of law that involve difficult-to-ascertain general facts and broader systemic interests—for example, securities law,³⁶⁴ antitrust,³⁶⁵ patent disputes, bankruptcy appeals, and complex

more recent opinions on the presumption against extraterritoriality have been approved by narrow majorities. *See, e.g.,* *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2096 (2016) (4-3 decision); *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1662 (2013) (5-4 decision).

364. *See generally* Bainbridge & Gulati, *supra* note 10 (offering a similar analysis of the use of heuristics in securities law).

365. *Cf.* Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 44-55 (2016) (arguing that the development of Sherman Act section 1 analysis toward strict threshold rules reflects judges' unwillingness to explicitly weigh incommensurate values, though not necessarily their institutional incapacity to do so).

litigation.³⁶⁶ Meanwhile, this Article’s more general insight—that U.S. judges are not necessarily nationalistic, even if as a group they consistently reach parochial outcomes—might help reorient the broader debate among international law scholars about the sources and implications of American exceptionalism. At least when it comes to the courts, the United States’ apparent insensitivity to other countries’ interests or the value of multilateral institutions may not reflect U.S. chauvinism so much as the structural constraints of the U.S. judicial system. Those interested in promoting greater U.S. engagement in international law may thus wish to focus on channeling discretion in litigation to the cases that need it the most. In light of institutional and behavioral constraints, the discretion of trial judges—and the interests such discretion is meant to promote—may be best protected by obviating the need to exercise it in every case.

³⁶⁶ See Bone, *supra* note 98 (discussing similar considerations in the context of procedural rules, including those governing class actions); cf. Wolff, *supra* note 26, at 1941-43 (disagreeing with Bone but recognizing both the need for a discretionary “safety valve” and the risks inherent in “robust judicial discretion”).