Admiralty's Influence

*Maggie Gardner**

Abstract

From the earliest days of the republic, the broad scope of admiralty jurisdiction brought foreign parties and foreign disputes into federal courts. In order to support the system of maritime commerce, federal judges sitting in admiralty could and did hear disputes with no U.S. parties that arose in international or foreign waters. To determine when intervention in foreign disputes was helpful or hurtful, admiralty courts developed a range of special procedural tools. Over the course of the twentieth century, the U.S. Supreme Court migrated some of these special admiralty procedures to civil litigation more generally. This Essay traces the migration and evolution of three such procedures: forum non conveniens, the enforcement of forum selection clauses, and the modern presumption against extraterritoriality. Recognizing the admiralty roots of these doctrines in turn serves to demythologize them. They are neither as timeless nor as settled as Supreme Court decisions have suggested, and they represent a greater incursion on the legislative powers of Congress and the states than the Supreme Court has acknowledged.

Table of Contents

* Professor of Law, Cornell Law School. This Essay benefitted from discussion at the Chicago-Virginia Foreign Relations Roundtable as well as at this Symposium. I am also grateful for the research assistance of Gabrielle Blom and Ashley Stamegna.

INTRODUCTION

Admiralty law is inherently transnational. Although it does not bind nations,[1] it is "international in character"[2] and reflects the shared custom of maritime states.[3] U.S. admiralty courts, as they recognized themselves in the 1800s, served in a sense as "international courts,"[4] or as "court[s] of the world."[5] The transnational context of admiralty, in turn, required the development of special procedures for handling international and foreign claims.

Over the course of the twentieth century, as transnational litigation expanded beyond the realm of maritime trade, the U.S. Supreme Court migrated some of these special admiralty procedures into general civil practice.[6] Doctrinal evolution that reflects changing social conditions is a natural part of any legal system, particularly one based on the common law. But the migration of these admiralty procedures into general practice was notably incomplete. Because the Supreme Court did not account for the admiralty roots of these procedures, it never fully addressed the separation-of-powers implications of their migration. The procedures also lost important nuance in the process of migration, ossifying into tools of docket control that do not adequately account for international comity or fairness concerns.

This Essay traces the migration of three such doctrines: forum non conveniens, the enforcement of forum selection clauses, and the modern presumption against extraterritoriality. Its descriptive argument is that all three doctrines rely—without acknowledgment—on justifications that reflect admiralty's unique context. Acknowledging those admiralty roots in turn provides several doctrinal and normative insights.

First, these doctrines are not as timeless or inevitable as judicial decisions—particularly those of the Supreme Court—might suggest. As modern reinventions, there is no reason they cannot be further reformed or refined—or reconsidered altogether.

---

1 *See* GUSTAVUS H. ROBINSON, HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES 5–6 (1939). By contrast, international maritime law is a treaty-based body of law that nation states generally treat as binding. *See id.* at 10–11.

2 *Id.* at 1.

3 *See* FRANK L. MARAIST, THOMAS C. GALLIGAN JR. & CATHERINE M. MARAIST, ADMIRALTY IN A NUTSHELL 2–3 (6th ed. 2010).

4 Thomassen v. Whitwell, 23 F. Cas. 1003, 1004 (E.D.N.Y. 1877) (No. 13,928).

5 Bolden v. Jensen, 70 F. 505, 509 (D. Wash. 1895).

6 As this Essay describes, these procedures included forum non conveniens, the enforcement of forum selection clauses, and the presumption against extraterritoriality.

Second, in the transition to general civil practice, these doctrines lost much of the nuance regarding international comity that informed their use in admiralty. One way in which these doctrines might be refined, then, would be to reintroduce the contextual flexibility they previously enjoyed.

Third, because the transformation of these admiralty doctrines into doctrines of general applicability was not explicit, the Supreme Court did not attempt to justify the migrated doctrines' greater incursion on the legislative powers of Congress or the states. These doctrinal migrations thus represent greater judicial lawmaking than the language of Supreme Court opinions would suggest to the casual reader.

The Article starts with a brief description of admiralty jurisdiction and its historically significant role for the federal courts. It then traces the admiralty roots of the three doctrines in turn, drawing out three normative lessons along the way: that these doctrines were not timeless or inevitable, that they have lost valuable nuance and flexibility in the process of migration, and that the judicial power behind their broader application remains undertheorized. The ultimate aim is relatively modest: to dispel some of the mythology around these doctrines and to encourage reflection on their structure and current uses.

I. Admiralty Jurisdiction

Admiralty has its own procedure, its own substantive law, and its own head of federal jurisdiction. Through the nineteenth century, the federal courts kept separate dockets for law, equity, and admiralty, with each "side" of the court following separate procedural rules.[7] Admiralty had its own procedural language, with plaintiffs called "libellants," their complaints called "libels," and defendants called "respondents"[8] (when the defendant was a ship, the ship's owner was the "claimant" or "intervenor"[9]). While the law and equity sides of the federal courts were merged in 1938 under the Federal Rules of Civil Procedure, admiralty was not similarly merged with law and equity until 1966.[10] Even today, the Supplemental Rules for Admiralty or Maritime Claims provide for specialized treatment of claims brought under the federal courts' admiralty jurisdiction.[11] This formal division mattered, most notably because jury trials were not available in admiralty;[12] there was also a

7 Maraist et al., *supra* note 3, at 11, 392.

8 Thomas J. Schoenbaum, Admiralty and Maritime Law 10 (5th ed. 2012).

9 Robert M. Hughes, Handbook of Admiralty Law 401 (2d ed. 1920).

10 Maraist et al., *supra* note 3, at 393.

11 *See* Fed. R. Civ. P. A (Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions).

12 Maraist et al., *supra* note 3, at 11.

long-running debate about whether federal courts sitting in admiralty could provide equitable remedies.[13]

The substantive law applied in admiralty is also special, being based in part on a global common law.[14] This general maritime law as distilled by the federal courts controls in state courts,[15] but it is distinct from other federal common law because it does not independently give rise to federal question jurisdiction.[16] Although Congress has passed many statutes governing some aspects of admiralty law, large swaths of admiralty are still governed by this general maritime law, including tort, contract, and the seaman's remedies of unseaworthiness and maintenance and cure.[17]

Finally, ever since the First Judiciary Act, Congress has granted the lower federal courts subject matter jurisdiction over "any civil case of admiralty or maritime jurisdiction,"[18] a grant of jurisdiction that is potentially global in scope. It is distinct from the federal courts' federal question and diversity jurisdiction, meaning there is no statutory or citizenship precondition to the federal courts' jurisdiction.[19] Further, Congress has historically placed no limits on the federal venues in which admiralty claims could be heard.[20]

This congressional grant of admiralty jurisdiction has always provided the federal courts with exclusive subject matter jurisdiction over all prize cases and "all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it."[21] The "saving to suitors" clause, however, significantly narrows this grant of exclusive jurisdiction. First, it permits claimants to bring their admiralty disputes under diversity jurisdiction (if the citizenship prerequisites are satisfied) or under federal question jurisdiction (if the dispute involves a congressional statute like the Jones Act).[22] Invoking diversity or federal question jurisdiction in turn provides access to jury trials or potentially greater equitable relief.[23] Second, it allows state courts concurrent jurisdiction

---

13 *See id.* at 420. This debate subsided after the merger of admiralty with law and equity in 1966. *See id.* at 422–23; *see also* SCHOENBAUM, *supra* note 8, at 11.

14 *See* MARAIST ET AL., *supra* note 3, at 3.

15 *See id.* at 7, 13.

16 *Id.* at 12.

17 *See id.* at 6–7, 10, 398.

18 *Id.* at 10. Today that grant is codified at 28 U.S.C. § 1333.

19 *See* MARAIST ET AL., *supra* note 3, at 12.

20 *See id.* at 408.

21 28 U.S.C. § 41(3) (1940). The 1948 recodification of this language updated the language to "saving to suitors in all cases all other remedies to which they are otherwise entitled." *See* 28 U.S.C. § 1333 note.

22 *See* MARAIST ET AL., *supra* note 3, at 10, 12.

23 *See id.* at 13, 422–23. Indeed, if the federal court has subject matter jurisdiction under both 28 U.S.C. § 1333 and some other basis of jurisdiction, like diversity or federal question jurisdiction,

over many admiralty claims, with the notable exception of in rem proceedings.[24] Many admiralty claims create implied liens on the vessel, which can in turn only be enforced through in rem proceedings in federal court.[25] Such claims giving rise to maritime liens include claims for wages, salvage, collision, personal injury, repairs, and the provision of "necessaries."[26] In such proceedings, the vessel is arrested by the court, named as the defendant, and—if the claims are sustained—ultimately sold to compensate the claimants.[27]

In short, all a federal court needed to have authority to hear an admiralty dispute, given the broad grant of subject matter jurisdiction and the lack of venue requirements, was the temporary presence of a ship in port[28] or, if an in personam action, the temporary presence of the ship's personnel.[29] This meant that federal courts sitting in admiralty could potentially assert jurisdiction over any ship that entered port in order to hear any claim that could give rise to a maritime lien, no matter the nationality of the parties or the place where the claim arose. Thus it was not uncommon, from the earliest years of the republic, for admiralty courts to hear disputes solely between foreign parties involving conduct and harms that occurred in foreign territories or international waters[30]—what today might somewhat derisively be labelled "foreign-cubed" cases.[31]

---

the claimant must designate that they wish to rely on § 1333 such that the Supplemental Rules will apply. *See* FED. R. CIV. P. 9(h)(1).

24 *See* MARAIST ET AL., *supra* note 3, at 395–96. Other exceptions to concurrent jurisdiction may include salvage and general average, in addition to prize or any other claim specified by statute. *See* SCHOENBAUM, *supra* note 8, at 7.

25 *See* MARAIST ET AL., *supra* note 3, at 99–102 (describing types of implied maritime liens); SCHOENBAUM, *supra* note 8, at 9 (explaining how a maritime lien is "a special security interest recognized only in admiralty" and enforced through a special in rem process).

26 *See* MARAIST ET AL., *supra* note 3, at 100–02, 113.

27 *See id.* at 110–12.

28 *Id.* at 402.

29 *See* SCHOENBAUM, *supra* note 8, at 7.

30 *See, e.g.*, Moran v. Baudin, 17 F. Cas. 721, 722 (D. Pa. 1788) (No. 9785) (applying French law to grant relief to a French sailor on a French ship); Weiberg v. The St. Oloff, 29 F. Cas. 591, 593–94 (D. Pa. 1790) (No. 17,357) (ordering Swedish ship sold, over protest of Swedish consul, to pay presumably Swedish sailors released by the court from their service in light of the "cruel and unwarrantable" treatment of the Swedish master); Ellison v. The Bellona, 8 F. Cas. 559, 559 (D.S.C. 1798) (No. 4407) ("Courts of admiralty have a general jurisdiction in causes civil and maritime; and the 9th section of the judiciary act of congress vests that power in this court. The case of seamen's wages comes within this description of causes; and this jurisdiction has been uniformly exercised by me, as regards foreigners generally."); Mason v. The Blaireau, 6 U.S. (2 Cranch) 240 (1804) (exercising jurisdiction over a dispute involving salvage of a foreign ship by another foreign ship in international waters).

31 *See generally* Maggie Gardner, *"Foreignness*," 69 DEPAUL L. REV. 469 (2020) (critiquing the label "foreign-cubed" as imprecise and problematically rhetorical).

This was not an error or oversight on the part of the First Congress. The global breadth of admiralty jurisdiction protected the steady flow of maritime commerce by preventing jurisdictional gaps.[32] Ships, goods, and people were constantly on the move, often through international waters where no nation could assert territorial jurisdiction.[33] Resolving admiralty disputes thus required cooperation and goodwill among seafaring nations to balance the need for remedies against disruptions to the maritime trade. As Justice Story explained in the context of bottomry bonds,[34] the court which obtains jurisdiction over the ship has a *duty* to hear such claims, as otherwise bottomry bonds would not be enforceable and an important means of financing maritime trade would disappear.[35] "The refusal [of jurisdiction] might indeed well be deemed a disregard of national comity," Justice Story summed up, "inasmuch as it would be withholding from a party the only effectual means of obtaining his right."[36]

Also meriting special solicitude were the claims of seamen.[37] The labor of seamen kept global trade afloat, yet their work involved hardships and perils, with lengthy voyages during which they were at the complete mercy of their "masters."[38] "On account of the peculiar character of seamen," explained a 1920 admiralty treatise, "the courts scrutinize closely their contracts, in order to protect them from imposition. They

---

32 *See, e.g.*, David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 997 (2008) ("Litigation realities justified [admiralty's] expansive and legislatively unchecked grant of adjudicatory power.").

33 *See id.*

34 A bottomry bond "is an obligation executed generally in a foreign port by the master of a vessel for repayment of advances to supply the necessities of the ship . . . which bond creates a lien on the ship which may be enforced in admiralty in case of her safe arrival at the port of destination." ROBERT M. HUGHES, HANDBOOK OF ADMIRALTY LAW 87 (1st ed. 1901).

35 *See* The Jerusalem, 13 F. Cas. 559, 561 (Story, Circuit Justice, C.C.D. Mass. 1814) (No. 7293) (noting that the U.S. court "is indeed, the only tribunal capable of enforcing a specific performance in rem by seizing into its custody the very subject of hypothecation. To its guardian care, I may without rashness affirm, the whole commercial world look for security and redress, and without its summary interference, maritime loans would, in all probability, become obsolete. A jurisdiction so ancient and beneficial, which exercises its powers according to the law of nations . . . ought not to be restrained within narrow bounds, unless authority or public policy distinctly requires it.").

36 *Id.* at 562. The Supreme Court reasoned similarly regarding cases of collision or salvage. *See* The Belgenland, 114 U.S. 355, 362–63 (1885) (explaining that "[b]oth, when acted on the high seas, between persons of different nationalities, come within the domain of the general law of nations, or *communis juris*, and are *prima facie* proper subjects of inquiry in any Court of Admiralty which first obtains jurisdiction of the rescued or offending ship").

37 *See* SCHOENBAUM, *supra* note 8, at 220–21. "Seamen" is a technical term in admiralty law referring to just about everyone who works on a vessel. *See id.* at 224–25; *see also* HUGHES, *supra* note 9, at 23 ("Every one who is regularly attached to the ship, and contributes to her successful handling, is a seaman . . . .").

38 *See* SCHOENBAUM, *supra* note 8, at 220–21 (elaborating on these concerns). Traditionally, the ship's master could use corporeal punishment to maintain discipline onboard, though by the twentieth century, statutes largely prohibited that practice. *See* HUGHES, *supra* note 9, at 27.

are improvident and wild, easily imposed upon, and the constant prey of designing men."[39] Seamen's claims for wages thus gave rise to implied maritime liens on the ships on which they served that took precedence over all other claims, except for the court's own costs.[40]

But admiralty's jurisdictional overbreadth could also encourage rent-seeking behavior that could undermine maritime trade. In particular, U.S. courts were wary of foreign sailors seeking to separate from their foreign ships while in U.S. ports, where wages might be higher.[41] If sailors could abandon their vessels midvoyage, merchants and masters would have to scramble to find new crew at great expense, delaying departures and draining profits. To prevent these disruptions while still protecting seamen, nations increasingly regulated their employment, requiring they sign before embarking a formal contract of employment, or "shipping articles."[42] Meanwhile, bilateral treaties and custom developed to limit incursion into the internal employment disputes of foreign ships in U.S. ports.[43]

In short, the global scope of admiralty jurisdiction, and the need to account for international systemic interests when exercising it, led the federal courts sitting in admiralty to develop specialized tools to address potential excesses of U.S. jurisdictional authority.[44] These included a discretionary power to decline jurisdiction over disputes involving no U.S. parties or U.S. causes of action;[45] a willingness to enforce clauses in seamen's articles or other maritime contracts that designated foreign forums for hearing disputes;[46] and a rule limiting the application of U.S. regulatory statutes to the internal governance of foreign ships temporarily in U.S. waters.[47] These tools in turn shaped the twentieth-century doctrines of forum non conveniens, forum selection clause enforceability, and the modern presumption against extraterritoriality.

---

39 HUGHES, *supra* note 9, at 24.

40 *See* MARAIST ET AL., *supra* note 3, at 113.

41 *See, e.g.*, The Infanta, 13 F. Cas. 37, 39 (S.D.N.Y. 1848) (No. 7030) ("This court has repeatedly discountenanced actions by foreign seamen against foreign vessels not terminating their voyages at this port, as being calculated to embarrass commercial transactions and relations between this country and others in friendly relations with it.").

42 *See, e.g.*, SCHOENBAUM, *supra* note 8, at 225 (discussing the requirement in terms of U.S. law).

43 *See, e.g.*, HUGHES, *supra* note 9, at 27–28 ("As a rule, the court will not take jurisdiction in controversies between the seamen of a foreign ship and her master or the ship. Many of the countries have express treaty stipulations giving sole cognizance of these disputes to their consuls. In cases where such a treaty exists, the court will not interfere at all.").

44 *See* SCHOENBAUM, *supra* note 8, at 11 (noting that, in light of such conditions, "a specialized law relating to transfer, forum-non-conveniens, choice of law, and choice of forum applies in admiralty").

45 *See infra* Part II.

46 *See infra* Part III.

47 *See infra* Part IV.

II. Forum Non Conveniens

Under the doctrine of forum non conveniens, a judge has discretion to decline jurisdiction over a case on the understanding that the dispute would more appropriately be heard by the courts of another sovereign.[48] The label "forum non conveniens" was introduced to the United States by a 1929 *Columbia Law Review* article by a New York lawyer named Paxton Blair, who imported the label from Scottish caselaw and applied it to the preexisting practice of some state courts, most notably New York.[49] In 1947, the U.S. Supreme Court adopted forum non conveniens for use by federal courts in cases at law in *Gulf Oil Corp. v. Gilbert*[50] and in equity in *Koster v. (American) Lumberman's Mutual Casualty Co.*[51] In doing so, the Supreme Court described forum non conveniens as originating in state court practice and reflecting Scottish and English common law roots.[52]

That historical claim was more rhetorical than accurate. State court use of discretionary dismissals was still quite limited—and quite controversial—in 1947.[53] And what state court practice did exist was arguably rooted not in Scottish or English law, but in admiralty.[54] This Part describes the early development by U.S. admiralty courts of a discretionary power to decline to hear foreign-cubed cases, what this Essay will refer to as "historical admiralty practice." It then traces how that historical admiralty practice influenced the initial development of state court practices permitting discretionary dismissals in nonadmiralty cases. In light of these historical antecedents, this Part then reexamines

---

48 *See* Maggie Gardner, *A Primer on Forum Non Conveniens*, Transnat'l Litig. Blog (Aug. 10, 2022), https://tlblog.org/a-primer-on-forum-non-conveniens/ [https://perma.cc/P3Q7-HCZ3].

49 *See* Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1 (1929). As Blair noted, only a few U.S. courts had used the term "forum non conveniens" before his article. *Id.* at 2 n.4.

50 330 U.S. 501 (1947).

51 330 U.S. 518 (1947).

52 *See Gulf Oil*, 330 U.S. at 505 n.4, 507 n.6.

53 *See* William S. Dodge, Maggie Gardner & Christopher A. Whytock, *The Many State Doctrines of Forum Non Conveniens*, 72 Duke L.J. 1163, 1166–67 (2023).

54 The term "forum non conveniens" first appeared in Scottish cases in the later nineteenth century, though there is some debate about whether earlier Scottish cases permitted discretionary dismissals under a different label. *Compare* Ardavan Arzandeh, *The Origins of the Scottish* Forum Non Conveniens *Doctrine*, 13 J. Priv. Int'l L. 130, 132–34 (2017) (tracing the development of the Scottish doctrine and concluding that the practice began mid-nineteenth century), *with* Edward L. Barrett Jr., *The Doctrine of* Forum Non Conveniens, 35 Calif. L. Rev. 380, 387 n.35 (1947) (asserting that the practice was reflected in earlier Scottish decisions). When English courts adopted forum non conveniens in the early twentieth century, they actually cited New York state case law. *See* Logan v. Bank of Scot. (No. 2) [1906] 1 KB 141 at 148–51 (Eng.) (citing Collard v. Beach, 87 N.Y.S. 884 (App. Div. 1904)). As described below, that New York state caselaw in turn derived from maritime disputes between foreigners in New York state courts in the early 1800s. *See infra* Section II.B.

Gulf Oil, highlighting how the majority opinion never fully defined or justified the federal courts' power to decline jurisdiction outside of the admiralty context.

A. Early Admiralty Practice

Through the nineteenth century, both state and federal courts generally assumed that their jurisdiction was mandatory.[55] Admiralty, however, was different in terms both of judicial power and practical demands. Judges sitting in admiralty were engaged in a global project of coordinating rights and remedies with other seafaring nations; their procedural and substantive power was more flexible and less dependent on Congress than it was on the law side of the courts.[56] Admiralty disputes also posed a practical challenge because of the breadth of the congressional grant of subject matter jurisdiction and the ease of establishing what we today would call personal jurisdiction over transient ships and crew.[57] Thus, while federal courts sitting in admiralty recognized that they had the authority to hear disputes that involved no U.S. parties or U.S. causes of action,[58] they quickly developed a doctrine permitting the discretionary dismissal of such "foreign-cubed" disputes.[59] The Supreme Court acknowledged this power in 1804 when it resolved a dispute over a British ship's salvage of a French ship in international waters: in affirming that admiralty courts have jurisdiction over "a case entirely between foreigners," Chief Justice John Marshall nonetheless noted that such jurisdiction might not always be exercised.[60]

---

55 *See, e.g.*, Marcus, *supra* note 32, at 996 n.128 (gathering sources).

56 *See id.* at 997 (describing the breadth of admiralty jurisdiction and Congressional abdication).

57 *See, e.g.*, *id.* at 997–98 (similarly describing challenge of admiralty jurisdiction).

58 *See supra* note 30 (gathering cases).

59 *See, e.g.*, Thompson v. The Catharina, 23 F. Cas. 1028, 1028 (D. Pa. 1795) (No. 13,949) ("I have avoided taking cognizance, as much as possible, of disputes in which foreign ships and seamen, are concerned."); Thomson v. The Nanny, 23 F. Cas. 1104, 1107 (D.S.C. 1805) (No. 13,984) ("[A]lthough I do not say that this court has no jurisdiction in matters respecting foreign seamen, yet I think it ought not to exercise any in the case now before it, but remit the parties to their own domestic forum."). For later statements of the doctrine, see, for example, Slocum v. W. Assurance Co., 42 F. 235, 236 (S.D.N.Y. 1890) (stating that admiralty courts have discretion to "decline to entertain jurisdiction in maritime causes arising abroad, where none of the parties are resident here"); Muir v. The Brisk, 17 F. Cas. 954, 955 (E.D.N.Y. 1870) (No. 9901) ("The right of the court of admiralty, to decline to entertain jurisdiction, when all the parties are foreigners residing abroad, has been often declared."); Can. Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413, 421 (1932) ("The rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower federal courts."). *Canada Malting* expanded this discretionary doctrine slightly by permitting its application where the dispute arose in U.S. waters but involved no U.S. parties. *See.* 285 U.S. at 423–24.

60 Mason v. The Blaireau, 6 U.S. (2 Cranch) 240, 264 (1804). For more on the backstory of *Mason v. The Blaireau*, see generally Maggie Gardner, *Throwback Thursday:* Mason v. The

The historical admiralty power to decline jurisdiction in disputes between foreigners, however, never solidified into a formal test.[61] The admiralty courts considered a range of factors, none of which was dispositive.[62] The applicability of foreign law might weigh in favor of dismissal,[63] but sometimes U.S. judges simply applied the foreign law.[64] As Justice Story quipped in exercising jurisdiction over such a foreign-cubed case in 1814, "I am not aware, that the inconvenience [of applying Ottoman law] is so great as has been represented."[65] Courts gave great weight to the views of foreign consul, often dismissing cases upon a consul's request,[66] but other times they retained jurisdiction despite a foreign consul's protests.[67] Courts enforced the forum selection clauses in sailors' shipping articles,[68] except when they did not.[69] Other potential considerations weighing in favor of retaining jurisdiction over "foreign-cubed" cases included whether the case involved customary international law,[70] whether key evidence was located in the

---

Blaireau, TRANSNAT'L LITIG. BLOG (Apr. 14, 2022), https://tlblog.org/throwback-thursday-mason-v-the-blaireau/ [https://perma.cc/WJD8-7V3Q].

61 *See, e.g.*, The Ester, 190 F. 216, 221, 223 (E.D.S.C. 1911) (noting that "these decisions disclose[] no uniform rule for the guidance of the court" such that "it is difficult to draw any uniform, logical rule from them"); The Becherdass Ambaidass, 3 F. Cas. 13, 14 (D. Mass. 1871) (No. 1203) ("It is not possible, of course, to lay down a precise rule to govern even the sound and judicial discretion of a court in future cases.").

62 This discussion draws from a larger forthcoming project. *See* Maggie Gardner, *Admiralty, Abstention, and the Allure of Old Cases*, 99 NOTRE DAME L. REV. (forthcoming 2024).

63 *See, e.g.*, Kelly v. The Topsy, 44 F. 631, 635–36 (D.S.C. 1890) (explaining that, where foreign law is involved and "the tribunals of their own country are open and accessible to them, the court withholds its hand, remitting the parties to their own courts, in which their own laws are better understood, and the means of enforcing them possibly more complete"); *Thomson*, 23 F. Cas. at 1106 (noting "it was [generally] proper to refer [seamen] to the tribunals of their own country, where the lex loci being better understood, more complete justice could be done than in a foreign court, at a distance, and not thoroughly acquainted with the rules obtaining in the country of the parties").

64 *See, e.g.*, Davis v. Leslie, 7 F. Cas. 134, 136–38 (S.D.N.Y. 1848) (No. 3639) (applying British law even though it differed from the general maritime law).

65 The Jerusalem, 13 F. Cas. 559, 562 (Story, Circuit Justice, C.C.D. Mass. 1814) (No. 7293).

66 *See, e.g.*, Lynch v. Crowder, 15 F. Cas. 1172, 1173 (S.D.N.Y. 1849) (No. 8637) (emphasizing importance of foreign consul's objection to jurisdiction); Robin v. The Cacique, 20 F. Cas. 958, 959 (E.D. Pa. 1823) (No. 11,931) (deferring to consul after ascertaining that there had been "no capricious or wanton breaking up of the [vessel's] voyage").

67 *See, e.g.*, *Kelly*, 44 F. at 636; Bernhard v. Creene, 3 F. Cas. 279, 281 (D. Or. 1874) (No. 1349); Weiberg v. The St. Oloff, 29 F. Cas. 591, 591–93 (D. Pa. 1790) (No. 17,357).

68 For a discussion of admiralty's openness to forum selection clauses, see Marcus, *supra* note 32, at 997–1000.

69 *See, e.g.*, Bucker v. Klorkgeter, 4 F. Cas. 555, 557–59 (S.D.N.Y. 1849) (No. 2083).

70 *See, e.g.*, *Kelly*, 44 F. at 635 (noting that if the "common law of nations" applies to a claim, "special grounds should appear to induce the court to refuse jurisdiction"); The Russia, 21 F. Cas. 86, 88 (S.D.N.Y. 1869) (No. 12,168) (noting that the general common law, which applies in cases of collision, can be equally applied by all courts).

United States,[71] and whether the parties were of different nationalities and thus could not be referred to a common home forum.[72]

The historical admiralty practice lacked not just a tidy test but also a succinct label. Admiralty courts had been exercising this jurisdictional discretion in foreign-cubed cases for 130 years before Paxton Blair introduced the term "forum non conveniens" to U.S. legal audiences.[73] After the Supreme Court decided *Gulf Oil*, however, the federal admiralty courts increasingly referred to their long-existing practice as "forum non conveniens," though they continued to apply the more flexible admiralty framework.[74] It was only after the merger of admiralty with law and equity in 1966 that federal courts began using the *Gulf Oil* test to analyze forum non conveniens in admiralty cases as well.[75] By 1980, the Second Circuit sitting en banc in *Alcoa S.S. Co. v. M/V Nordic Regent*[76] could assert that federal courts were "consistently" applying *Gulf Oil*'s framework in admiralty cases.[77] Indeed, since *Alcoa*, the Supreme Court has repeatedly assumed that the *Gulf Oil* framework applies to admiralty disputes.[78]

In short, the historical admiralty practice permitting dismissals of disputes between foreigners has merged fully with *Gulf Oil*'s doctrine of forum non conveniens. More important for present purposes, however, is the extent to which *Gulf Oil*'s doctrine of forum non conveniens derives from the historical admiralty practice.

---

71 *See, e.g.*, *Kelly*, 44 F. at 636 (emphasizing the need for immediate investigation of the departure of seaman from a ship at port); Basquall v. The City of Carlisle, 39 F. 807, 815 (D. Or. 1889) (concerned that witnesses and evidence would dissipate if sailor were sent to his home forum).

72 *See, e.g.*, Thomassen v. Whitwell, 23 F. Cas. 1003, 1004 (E.D.N.Y. 1877) (No. 13,928) (noting absence of a "forum that will not be foreign to one of" the parties); *Basquall*, 39 F. at 815 ("[J]urisdiction will not be declined where the suit is between foreigners who are subjects of different governments, and therefore have no common forum.").

73 *See supra* text accompanying note 50.

74 *See, e.g.*, Gkiafis v. S.S. Yiosonas, 387 F.2d 460, 462 (4th Cir. 1967); Anastasiadis v. S.S. Little John, 346 F.2d 281, 282–83 (5th Cir. 1965).

75 *See, e.g.*, Paper Operations Consultants Int'l, Ltd. v. S.S. H.K. Amber, 513 F.2d 667, 671 (9th Cir. 1975) ("Although *Gulf Oil Corp.* was a non-admiralty case and did not involve foreign nationals, its reasoning has been applied in admiralty cases . . . ."); Mobil Tankers Co. v. Mene Grande Oil Co., 363 F.2d 611, 613 (3d Cir. 1966) (citing *Canada Malting* for discretion to decline admiralty jurisdiction and noting that *Gulf Oil* "is relevant insofar as it provides . . . criteria" for the application of that discretion).

76 654 F.2d 147 (2d Cir. 1980) (en banc).

77 *Id.* at 153.

78 *See* Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 434 (2007); Am. Dredging Co. v. Miller, 510 U.S. 443, 448 (1994); Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 143 (1988).

B. State Doctrines of Forum Non Conveniens

Paxton Blair suggested that the doctrine of forum non conveniens was deeply rooted in state practice,[79] a narrative adopted by the Supreme Court in *Gulf Oil*.[80] But as scholars pointed out then[81] as well as now,[82] the doctrine's roots in state practice were actually quite shallow. "By the 1940s, only ten states and the District of Columbia had embraced such discretion to decline jurisdiction, while six had expressly rejected it."[83] Indeed, the state practice of discretionary dismissals can be traced almost entirely back to the New York practice extolled by Paxton Blair. That New York practice, in turn, not only postdated the development of admiralty discretion but also was arguably derived from it.

New York was the first state, by at least half a century, to permit discretionary dismissals of cases.[84] Notably, the first New York cases recognizing such a discretion were a pair of foreign maritime cases. In the 1817 case of *Gardner v. Thomas*,[85] New York's high court held that the state's courts had the authority to hear the tort claim of a British sailor against a British ship's British master regarding an alleged assault and battery on the high seas.[86] The high court nonetheless held that jurisdiction in that case should be declined because the sailor could bring his claim in British courts upon his return.[87] Six years later, in *Johnson v. Dalton*,[88] the same court clarified that New York courts should not *always* decline to hear maritime disputes between foreign parties.[89] Jurisdiction should be exercised in *Johnson*, the New York high court held, because "to send the plaintiff to a foreign tribunal" in that case "would be a denial of justice."[90]

---

79 *See* Blair, *supra* note 50, at 2 ("While the doctrine has but rarely been referred to by name in American cases, . . . decisions showing applications of it are numerous . . . ." (footnotes omitted)).

80 Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 505 n.4 (1947) ("The doctrine did not originate in federal but in state courts.").

81 *See, e.g.*, Barrett, *supra* note 55, at 388 ("Yet few American courts have actually accepted the doctrine. In most states it has not even been considered. In others it has been rejected."); Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 912 (1947) (critiquing Blair for counting cases that turned on problems of jurisdiction or venue, not discretion).

82 *See* Dodge et al., *supra* note 54, at 1165–67.

83 *Id.* at 1174.

84 *See id.* at 1166 n.11, 1179.

85 14 Johns. 134 (N.Y. Sup. Ct. 1817).

86 *See id.* at 137.

87 *See id.* at 137–38 ("[O]ur Courts may take cognizance of *torts* committed on the high seas, on board of a foreign vessel where both parties are foreigners; but I am inclined to think it must, on principles of policy, often rest in the sound discretion of the Court to afford jurisdiction or not, according to the circumstances of the case.").

88 1 Cow. 543 (N.Y. Sup. Ct. 1823).

89 *See id.* at 550.

90 *Id.*

It took the rest of the nineteenth century for this concept of discretionary dismissals to spread to nonmaritime claims in New York courts. Almost half a century later, a New York court suggested it had the power to decline jurisdiction over a nonmaritime tort case that involved no New York parties and no New York cause of action.[91] By the early 1900s, the New York courts had solidified a doctrine of discretionary dismissals limited to tort cases that arose outside the state between non-New York parties.[92]

Meanwhile, the Michigan Supreme Court hinted at similar discretion in two influential decisions. In *Great Western Railway Co. v. Miller*,[93] the Michigan Supreme Court held that the defendant had waived any objection to Michigan's jurisdiction by voluntarily appearing in court.[94] "But," it continued in dicta, "where the parties are not residents of the United States, and the trespass was committed abroad, the right of action in our courts can only be claimed as a matter of comity, and [the courts] are not compellable to proceed in such cases."[95] The court did not cite any authorities for this observation, but the plaintiff had cited to *Gardner* and *Johnson*, the New York state court maritime decisions.[96] Twenty years later, in *Cofrode v. Gartner*,[97] the Michigan Supreme Court cited to *Great Western Railway* in holding that the state courts did *not* have the power to decline jurisdiction when the case involved U.S. parties, even if none of the parties resided in Michigan.[98] But were the question instead "[w]hether courts ought to take jurisdiction in suits between aliens," the court suggested it would follow the example of the federal admiralty practice in permitting dismissals.[99]

---

91 *See* McIvor v. McCabe, 26 How. Pr. 257 (N.Y. Super. Ct. 1863); *see also* Dewitt v. Buchanan, 54 Barb. 31, 33 (N.Y. Gen. Term 1868).

92 *See, e.g.*, Wertheim v. Clergue, 65 N.Y.S. 750, 751–52 (App. Div. 1900) ("It has become the settled law of this state that its courts will not entertain certain actions of tort between nonresidents where the cause of action arose outside of the territorial jurisdiction of the state, unless special reasons are shown why it should do so . . . ."). New York only expanded the application of forum non conveniens to nontort cases in 1952, Bata v. Bata, 105 N.E.2d 623, 625–26 (N.Y. 1952), and to cases involving in-state parties in 1972, Silver v. Great Am. Ins. Co., 278 N.E.2d 619, 622 (N.Y. 1972).

93 19 Mich. 305 (1869).

94 *See id.* at 315.

95 *Id.*

96 *See id.* at 311 (summarizing defendant's argument).

97 44 N.W. 623 (Mich. 1890).

98 *See id.* at 625–26.

99 *Id.* at 625 (discussing *Mason v. Blaireau*, 6 U.S. (2 Cranch) 240 (1804), in noting that "[i]n suits between foreigners, brought in our courts, the courts are not obliged to entertain jurisdiction. They may and usually do so upon principles of comity, and seldom decline . . . ."). Despite the dicta in *Cofrode* and *Great Western Railway*, however, Michigan did not formally adopt forum non conveniens until 1973. *See* Cray v. Gen. Motors Corp., 207 N.W.2d 393, 395, 398 (Mich. 1973) (explaining that *Cofrode* did not settle the question).

Gardner, *Johnson*, *Great Western Railway*, and *Cofrode* in turn proved extremely influential as the idea of discretionary dismissals spread gradually to other states. Into the 1930s, almost every state court considering or adopting the practice relied on one or more of these decisions.[100] The one partial exception was Massachusetts, which initially recognized the power to decline jurisdiction in equity cases in 1867 and 1896 in cases that cited in relevant part only to other Massachusetts state court cases.[101] But when Massachusetts expanded that discretionary power to cases at law in 1933, the Massachusetts high court cited to *Great Western Railway*.[102]

In short, the state practice of discretionary dismissals on which the Supreme Court relied in *Gulf Oil* can be traced back almost entirely to two early maritime cases, *Gardner* and *Johnson*. In addition to these explicit citation chains, it is also possible that the historical admiralty practice influenced state courts in more subtle ways. Consider that the earliest and most cited state court decisions discussing discretionary dismissals—those from Michigan, Massachusetts, and New York—were all from states where federal judges sitting in admiralty had long been exercising discretion to dismiss "foreign-cubed" maritime cases.[103] Lawyers and judges in those districts would thus have been exposed to the historical admiralty practice, even if they did not explicitly rely upon it when recognizing a similar discretion in nonadmiralty cases. There is

---

100 Texas cited to *Gardner* and *Great Western Railway* when first permitting discretionary dismissals. Morris v. Mo. Pac. Ry. Co., 14 S.W. 228, 230 (Tex. 1890). Wisconsin cited to *Gardner*, *Johnson*, and *Great Western Railway* when—like Michigan—it rejected discretionary dismissals for cases involving U.S. citizens, Eingartner v. Ill. Steel Co., 68 N.W. 664, 665 (Wis. 1896), while leaving open the possibility of such discretion in cases involving foreign parties, Disconto Gesellschaft v. Terlinden, 106 N.W. 821, 823 (Wis. 1906), *aff'd sub nom.*, Disconto Gesellschaft v. Umbreit, 208 U.S. 570 (1908). When Vermont first expressed openness to discretionary dismissals in 1904, it cited *Gardner* and *Great Western Railway*. Morisette v. Canadian Pac. Ry. Co., 56 A. 1102, 1103 (Vt. 1904). Louisiana initially adopted such discretion in 1920, citing to a treatise that in turn cited *Gardner*, *Johnson*, *Cofrode*, the Wisconsin and Texas decisions, and an 1896 Massachusetts decision. Stewart v. Litchenberg, 86 So. 734, 736 (La. 1920) (citing 7 RULING CASE LAW 1035–37 (William M. McKinney & Burdett A. Rich eds., 1915)), *overruled by* Fox v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll., 576 So. 2d 978 (La. 1991). Maine adopted discretionary dismissals in 1927, citing the Wisconsin decisions and the same 1896 Massachusetts decision. Foss v. Richards, 139 A. 313, 314 (Me. 1927). And New Jersey intermediate courts pointed to the New York practice when they began applying forum non conveniens in the early 1930s. Sielcken v. Sorenson, 161 A. 47, 48 (N.J. Ch. 1932); Kantakevich v. Del., L. & W.R. Co., 10 A.2d 651, 652 (Hudson County Ct. 1940); Anderson v. Del., L. & W.R. Co., 11 A.2d 607, 608–09 (Passaic County Ct. 1940).

101 *See* Smith v. Mut. Life Ins. Co. of N.Y., 96 Mass. (14 Allen) 336, 343 (1867); Nat'l Tel. Mfg. Co. v. Dubois, 42 N.E. 510, 510 (Mass. 1896).

102 *See* Universal Adjustment Corp. v. Midland Bank, Ltd., of London, 184 N.E. 152, 158 (Mass. 1933).

103 *See, e.g.*, The Sailor's Bride, 21 F. Cas. 159, 160 (McLean, Circuit Justice, C.C.D. Mich. 1859) (No. 12,220); The Jerusalem, 13 F. Cas. 559, 561–62 (Story, Circuit Justice, C.C.D. Mass. 1814) (No. 7293); Burckle v. The Tapperheten, 4 F. Cas. 692, 694–95 (S.D.N.Y. 1826) (No. 2141).

at least a decent argument that the early twentieth-century state court practice that Paxton Blair and the U.S. Supreme Court labeled "forum non conveniens" was not the spontaneous development of some inherent but long-dormant common law power, but rather emerged from and was shaped by discretionary dismissals in admiralty.

C. Revisiting Gulf Oil

The Supreme Court's decision in *Gulf Oil* to adopt forum non conveniens divided the Court five to four.[104] In his dissent, joined by Justice Wiley Rutledge, Justice Hugo Black argued that the power to decline jurisdiction had previously been limited to "the exercise of the extraordinary admiralty and equity powers of the district courts."[105] That power in turn had reflected "reasons peculiar to the special problems of admiralty and to the extraordinary remedies of equity."[106] Applying that discretion "in actions for money judgments deriving from statutes or the common law" was judicial overreach into Congress's lawmaking domain[107] and an abdication of Congress's grant of diversity jurisdiction.[108]

The majority tried to address this argument in Part I of its opinion. Because Justice Black was correct that there was no federal precedent for declining diversity or federal question jurisdiction in the absence of a threat to federalism, the majority relied on implications from adjacent contexts.[109] It started with *Canada Malting Co. v. Paterson Steamships, Ltd.*,[110] an admiralty case that in dicta asserted that "[c]ourts of equity and of law also ocassionally [sic] decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal."[111] For this broad proposition, however, *Canada Malting* only cited to law review articles, including Blair's; two British decisions; and a Dormant Commerce Clause case that limited the ability of state courts to hear cases unrelated to the state forum.[112]

---

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

105 *Id.* at 513 (Black, J., dissenting).

106 *Id.*

107 *Id.* at 514–15.

108 *Id.* at 512–13 ("Never until today has this Court held, in actions for money damages for violations of common law or statutory rights, that a district court can abdicate its statutory duty to exercise its jurisdiction for the alleged convenience of the defendant to a lawsuit.").

109 The closest precedent was *Williams v. Green Bay & W.R.R. Co.*, 326 U.S. 549 (1946), decided the prior term, which held that the doctrine of forum non conveniens had been incorrectly applied in that case without adopting or rejecting the doctrine's use in future cases, *id.* at 552–53. *See Gulf Oil*, 330 U.S. at 505 (invoking *Williams*).

110 285 U.S. 413 (1932).

111 *Id.* at 423.

112 *Id.* at 423 n.6 (citing Davis v. Farmers Coop. Equity Co., 262 U.S. 312 (1923)).

Those sources do not speak to the power of *federal* courts to refuse jurisdiction assigned by Congress.

The *Gulf Oil* majority next noted that the Court had previously approved state court use of forum non conveniens, even when plaintiffs sought to enforce federal rights.[113] And it invoked the same Dormant Commerce Clause case as *Canada Malting*.[114] Again, what state courts could or could not do did not address Justice Black's concern about declining congressional grants of authority to the federal courts.

Finally, the *Gulf Oil* majority asserted that "[o]n substantially *forum non conveniens* grounds we have required federal courts to relinquish decision of cases within their jurisdiction where the court would have to participate in the administrative policy of a state,"[115] citing *Burford v. Sun Oil Co.*[116] and a related case.[117] But fifty years later, the Supreme Court clarified that *Burford* abstention—and potentially all other abstention doctrines—can only be used to dismiss nonlegal claims.[118] Ironically, in that subsequent decision the Supreme Court distinguished forum non conveniens from abstention on the basis that forum non conveniens can be used to dismiss legal claims—without acknowledging that *Gulf Oil* justified that very power by pointing to *Burford* abstention.[119]

Having gathered the closest federal precedents available, the *Gulf Oil* majority then dropped a footnote in which it asserted that "[t]he doctrine did not originate in federal but in state courts" and that "[w]herever it is applied in courts of other jurisdictions, its application does not depend on whether the action is at law or in equity."[120] The implication, in other words, was that forum non conveniens is an inherent part of the common law, such that no special justification is needed to permit its use to decline Congress's grant of diversity jurisdiction. To support this idea of common law tradition, the *Gulf Oil* majority cited some then-recent English cases, several New York state court cases, *Great Western Railway*,[121] and a New Hampshire case[122] that relied on

---

113 *See Gulf Oil*, 330 U.S. at 504.

114 *Id.* at 505 (discussing *Davis*, 262 U.S. 312).

115 *Id.*

116 319 U.S. 315 (1943).

117 *Gulf Oil*, 330 U.S. at 505 (citing R.R. Comm'n v. Rowan & Nichols Oil Co., 311 U.S. 570 (1941)).

118 *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 729–30 (1996).

119 *See id.* at 721–22.

120 *Gulf Oil*, 330 U.S. at 505 n.4 (citations omitted); *see also id.* at 507 (stating that "both in England and in this country the common law worked out techniques and criteria for dealing with" the problem of exorbitant jurisdiction).

121 *See id.* at 505 n.4, 507 n.6.

122 *See id.* at 505 n.4 (citing Jackson & Sons v. Lumbermen's Mut. Cas. Co., 168 A. 895 (N.H. 1933)).

a Massachusetts case[123]—which in turn cited to New York caselaw and *Great Western Railway*.[124] The majority did not mention the six states that had explicitly rejected forum non conveniens.[125] Nor did it recognize that the limited caselaw which it did cite largely traced back to the same admiralty doctrine that the majority was trying to avoid.[126] The common law roots of forum non conveniens in the state courts, in short, were quite shallow.

A more honest embrace of admiralty practice as the source of forum non conveniens might have had several benefits. First, it would have connected the need for such discretion in diversity and federal question cases with the problems that initially gave rise to such discretion in admiralty: namely, the need to check overexpansive adjudicative jurisdiction.[127] Key to the application of forum non conveniens, in other words, should be a finding that the invoked forum has no meaningful nexus to the dispute. Recognizing such a limit on the doctrine may in turn have helped forum non conveniens retain its original limitation to disputes involving no local parties.[128] Instead, forum non conveniens has evolved to allow local defendants to seek discretionary dismissal of cases brought in their home courts.[129]

Second, a more honest embrace of forum non conveniens's admiralty roots might have led the *Gulf Oil* majority to borrow more directly from the flexible admiralty framework or at least encouraged lower courts to interpret the *Gulf Oil* factors in light of the admiralty practice. For example, the admiralty practice makes clear that *Gulf Oil*'s "private interest[s]" should focus not just or even primarily on the litigation convenience of defendants; admiralty courts were equally interested in what practical benefits plaintiffs gained from suing in the U.S. courts, including access to evidence within the U.S. forum,[130] the ability to

123 *See Jackson*, 168 A. at 896 (citing Universal Adjustment Corp. v. Midland Bank, Ltd., of London, 184 N.E. 152 (Mass. 1933)).

124 *See Universal Adjustment Corp.*, 184 N.E. at 157–58.

125 *See* Leet v. Union Pac. R.R. Co., 155 P.2d 42, 44 (Cal. 1944); Mattone v. Argentina, 175 N.E. 603, 605 (Ohio 1931); Boright v. Chi., Rock Island & Pac. R.R. Co., 230 N.W. 457, 460 (Minn. 1930); Bright v. Wheelock, 20 S.W.2d 684, 700 (Mo. 1929); Herrmann v. Franklin Ice Cream Co., 208 N.W. 141, 142–43 (Neb. 1926); State *ex rel.* Smith v. Belden, 236 N.W. 542, 542–43 (Wis. 1931).

126 The majority did quote from *Canada Malting*, but it did not discuss it as an admiralty case, nor did it otherwise cite admiralty decisions or discuss the admiralty practice despite the extensive citations contained in *Canada Malting* itself. *Compare* Gulf Oil, 330 U.S. at 504 (quoting Can. Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413, 422–23 (1932)), *with id.* at 513–14 (Black, J., dissenting) (invoking *Canada Malting* as an admiralty decision).

127 *See supra* Section II.A.

128 *See* Dodge et al., *supra* note 54, at 1180.

129 *See id.* at 1185–89.

130 *See* Basquall v. The City of Carlisle, 39 F. 807, 815–16 (D. Or. 1889) (retaining jurisdiction in part because the plaintiff's evidence was located within the U.S. forum); The Sneland I, 19 F.2d 528, 529 (E.D. La. 1927) (same).

secure personal jurisdiction over defendants,[131] or the promise of an enforceable judgment given the location of the ship from which any remedy would be paid.[132] The admiralty practice also sheds light on *Gulf Oil*'s rather cryptic allusion to the "local interest in having localized controversies decided at home."[133] The operative words here are not "local interest," which modern courts tend to emphasize,[134] but "localized controversies," which might refer to admiralty's greater willingness to decline jurisdiction when the parties hail from the same country.

Third and most importantly, acknowledging the leap from admiralty jurisdiction to diversity and federal question jurisdiction—that is, confronting more directly Justice Black's concerns—might have helped limit forum non conveniens, like other abstention doctrines, to truly extraordinary cases. Instead, the myth of the timeless common law doctrine of forum non conveniens has allowed it to evolve into a mundane tool of docket control while evading the critical reevaluation that other abstention doctrines have been receiving.[135] In short, forum non conveniens today has a much broader scope than it did originally, yet it is less connected to what justified that power in the first place.

III. Forum Selection Clauses

Today's presumption that U.S. courts will enforce contractual clauses selecting forums for dispute resolution has both obvious and not-so-obvious roots in admiralty practice. This Part begins with the well-known story, starting with *The Bremen v. Zapata Off-Shore Co.*[136] and continuing through *Carnival Cruise Lines, Inc. v. Shute*.[137] It then turns to the longer but less well-known admiralty practice of enforcing forum selection clauses in maritime contracts.[138] The admiralty courts took these contractual clauses into account when considering whether to decline jurisdiction in disputes between foreigners, but they

131 *See* The Lilian M. Vigus, 15 F. Cas. 520, 521 (S.D.N.Y. 1879) (No. 8346) (worrying that relegating the seamen to Canadian courts "would be practically equivalent to denying their claim altogether, since there appears to be no probability that they would find there either vessel or owners to sue").

132 *See* Kelly v. The Topsy, 44 F. 631, 636 (D.S.C. 1890) (concluding that "the court will proceed and decide the case against the wish, and, at times, against the protest, of the foreign consul" when the seaman "would be compelled to search the world" for his former ship were it permitted to depart the forum).

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

134 *See* Maggie Gardner, *Deferring to Foreign Courts*, 169 U. Pa. L. Rev. 2291, 2327 (2021) (describing recent case law).

135 *See* Maggie Gardner, *Abstention at the Border*, 105 Va. L. Rev. 63, 74–80 (2019) (describing the U.S. Supreme Court's curtailment of abstention doctrines).

136 407 U.S. 1 (1972).

137 499 U.S. 585 (1991).

138 The most thorough account of this history is Marcus, *supra* note 32, at 977–78.

did not always defer to them.[139] There is some irony that this flexible admiralty practice is the origin of both the federal courts' current commitment to enforcing forum selection clauses and the modern doctrine of forum non conveniens. In 2013, the Supreme Court combined these two strands of procedure in *Atlantic Marine Construction Co. v. U.S. District Court*[140] but as the mirror image of what the admiralty courts previously had done: instead of treating forum selection clauses as one consideration in a flexible analysis akin to forum non conveniens, federal courts today use a simplified version of forum non conveniens as the procedural vehicle for strictly enforcing forum selection clauses.[141] Far from the contextual and nuanced approach of the admiralty courts, the Supreme Court has directed federal judges to use the same set of tools to reach preordained results.

A. The Bremen *and* Carnival Cruise—*and* Atlantic Marine

The Supreme Court's 1972 decision in *The Bremen* marked a sea change in how U.S. courts, particularly federal courts, treat forum selection clauses. That admiralty dispute involved a German company contracting with a U.S. company to tow an oil drilling rig from Louisiana to Italy.[142] After the U.S. company's rig was damaged in a storm while still in the Gulf of Mexico and was towed to Tampa, Florida, the U.S. company brought suit in federal court in Florida despite a clause in the parties' contract providing that any dispute would be brought in London.[143] The district court and appellate court applied existing precedent to conclude that the forum selection clause was presumptively not enforceable, reflecting the then-prevalent assumption that U.S. courts would not allow private agreements to "oust" them of their jurisdiction.[144] The Supreme Court reversed, holding that "in the light of present-day commercial realities and expanding international trade[,] we conclude that the forum clause should control absent a strong showing that it should be set aside."[145]

---

139 *See supra* notes 69–70.

140 571 U.S. 49 (2013).

141 *See* Robin Effron, Atlantic Marine *and the Future of Forum Non Conveniens*, 66 HASTINGS L.J. 693, 717 (2015) ("It seems that [after *Atlantic Marine*,] the conclusion for any district court confronted with a forum-selection clause is all but foreordained.").

142 The Bremen v. Zapata Off-Shore Co, 407 U.S. 1, 2 (1972).

143 *See id.* at 2–4.

144 *See id.* at 6; *see also id.* at 9 ("Forum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction' of the court."); *id.* at 9 n.10 (collecting cases). For a description of the ouster doctrine, see Marcus, *supra* note 32, at 994–96.

145 *The Bremen*, 407 U.S. at 15.

The Court's reasoning in *The Bremen* centered on the dispute's international maritime context. There was the policy concern that "[t]he expansion of American business and industry [to foreign markets] will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."[146] In particular, the Court recognized that "foreign businessmen" doing business with U.S. companies on a global scale would prefer a preselected neutral forum with expertise in the relevant subject area.[147] There was also no fairness concerns where "[t]he choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen."[148] And there was a recognition of admiralty's special need for forum selection clauses given maritime trade's global reach,[149] the high stakes of transoceanic arrangements,[150] and the inherently transnational character of admiralty law.[151] Notably, the Court described its new presumption in favor of enforcing forum selection clauses as "the correct doctrine to be followed by federal district courts *sitting in admiralty*."[152]

It was not immediately clear after *The Bremen* whether its holding was limited to admiralty, or perhaps to transnational contracts, or to business contracts reflecting equal bargaining power. As the Supreme Court itself recognized in 1988, *The Bremen*'s admiralty context meant its holding might be "instructive" but not necessarily controlling in cases outside of admiralty, as "federal common law developed under admiralty jurisdiction [is] not freely transferable to [the] diversity [jurisdiction] setting."[153]

---

146 *Id.* at 9; *see also id.* at 8–9 (emphasizing the expansion of international trade involving U.S. businesses and declaring that "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."); *id.* at 13–14 ("The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.").

147 *Id.* at 11–12.

148 *Id.* at 12; *see also id.* (characterizing the parties' contract as "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power"); *id.* at 17 ("This case . . . involves a freely negotiated international commercial transaction . . . .").

149 *See id.* at 13 ("Manifestly[,] much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the [rig or ship] might happen to be found.").

150 *See id.* (stressing that "[i]n this case . . . we are concerned with a far from routine transaction" involving "an extremely costly piece of equipment" that would travel halfway around the world, "travers[ing] the waters of many jurisdictions.").

151 The Court emphasized repeatedly that the London court was known for its expertise in admiralty law. *See id.* at 12, 17. It also invoked the reciprocal practice of "other common-law countries including England" of enforcing forum selection clauses. *Id.* at 11.

152 *Id.* at 10 (emphasis added).

153 Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 28 (1988) (citing Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641–42 (1981)).

Coincidentally, an opportunity to expand *The Bremen*'s solicitude of forum selection clauses to consumer contracts arose in another admiralty case, *Carnival Cruise*.[154] *Carnival Cruise* again emphasized the geographic problems raised by admiralty: because ships can be subject to many different jurisdictions given their inherently mobile nature, certainty as to forum is particularly beneficial in the maritime context.[155] But as both the plaintiffs and the defendant in *Carnival Cruise* were U.S. parties,[156] *The Bremen*'s concerns for transnational expectations and fairness were replaced with a greater emphasis on freedom of contract.[157]

That freedom-of-contract thread became dominant as forum selection clauses became presumptively enforceable across the board. Thus in *Atlantic Marine*, a 2013 case that despite its name had nothing to do with admiralty, the Supreme Court held that forum selection clauses should be enforced "[i]n all but the most unusual cases" in light of the parties' contractual "bargain."[158] "When parties have contracted in advance to litigate disputes in a particular forum," the unanimous Court summed up, "courts should not unnecessarily disrupt the parties' settled expectations."[159] *Atlantic Marine* was entirely about the sanctity of contract; the admiralty concerns for reciprocal expectations of other countries and the pragmatic needs of international trade had fallen away entirely.

B. Deeper Admiralty Roots

The admiralty roots of forum selection clause enforceability run deeper than *The Bremen*, however. As Professor David Marcus has described, there was already a long-standing receptivity to forum selection clauses in admiralty contracts.[160] The rationales for the "ouster" doctrine were weaker in admiralty: admiralty courts had flexible procedural powers; Congress had not set venue rules for admiralty disputes, meaning that any one court declining jurisdiction "did not implicate legislative prerogative" in having chosen it; and admiralty courts already

154 *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

155 *See id.* at 593.

156 *See id.* at 587.

157 *See id.* at 592–95.

158 Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct., 571 U.S. 49, 66 (2013). It is notable that in describing how the analysis under 28 U.S.C. § 1404(a) will almost always point to transferring a case to the preselected forum, the Supreme Court cited repeatedly not to the majority in *Stewart*, but to the concurrence—including the concurrence's downplaying of the difference between admiralty and diversity jurisdiction. *See id.* at 63–65.

159 *Id.* at 66.

160 *See* Marcus, *supra* note 32, at 988 ("Federal courts sitting in admiralty have enforced forum selection clauses since the eighteenth century.").

understood their jurisdiction to be discretionary in disputes between foreigners.[161]

The admiralty courts' willingness to recognize forum selection clauses was in turn intertwined with the historical admiralty practice that became forum non conveniens.[162] One of the considerations that admiralty courts would weigh in deciding whether to hear disputes between foreigners was whether the parties had contractually agreed to take disputes to a different a forum.[163] These agreements—what we would today call forum selection clauses—showed up in business contracts[164] as well as in seamen's shipping articles.[165] Notably, however, the existence of such a forum selection clause was not dispositive; it was instead one consideration among many in deciding whether to retain jurisdiction over disputes between foreigners.[166] In the words of the Southern District of New York,

> [W]hile, in general, our courts will respect and enforce a stipulation between a foreign master and his crew, which limits them to suing in their own country, they have frequently asserted both the power and the willingness to grant relief to a seaman, notwithstanding such an agreement, whenever the interests of justice demand that they should do so.[167]

Into the 1950s and 1960s, admiralty courts analyzed forum selection clauses in maritime contracts in terms of reasonableness, using a forum non conveniens-type weighing of considerations.[168] It was these

---

161 *Id.* at 1002 (developing these points).

162 *See id.* at 998–99 (describing historical admiralty practice and linking it to forum non conveniens).

163 *See, e.g.*, U.S. Merchs.' & Shippers' Ins. Co. v. A/S Den Norske Afrika Og Australie Line (*The Tricolor*), 1 F. Supp. 934, 936 (S.D.N.Y. 1932) (declining jurisdiction in a "controversy . . . between aliens" that "arises out of a contract made abroad" with a "stipulation that the parties would litigate only in the courts of Oslo"); Gildemeister & Co. v. Peruvian S.S. & Floating Dock Co. (*The Iquitos*), 286 F. 383, 384 (W.D. Wash. 1921) (emphasizing, among other factors supporting dismissal, that "there is existing a contract between the parties stipulating the tribunal and jurisdiction in which the controversy shall be determined"); Thompson v. The Catharina, 23 F. Cas. 1028, 1028 (D. Pa. 1795) (No. 13,949) (suggesting general enforceability of forum selection clauses but also noting possible exceptions).

164 *See, e.g.*, *The Tricolor*, 1 F. Supp. at 936.

165 *See, e.g.*, Fry v. Cook (*The Carolina*), 14 F. 424, 426 (D. La. 1876).

166 *See, e.g.*, Slocum v. W. Assurance Co., 42 F. 235, 235–36 (S.D.N.Y. 1890) (declining to enforce contractual agreement to resolve dispute in Toronto when plaintiffs were U.S. citizens and when the defendant's business was conducted at least partly in the United States); Bucker v. Klorkgeter, 4 F. Cas. 555, 556–57 (S.D.N.Y. 1849) (No. 2083) (noting that forum selection clauses in shipping articles "are regarded by the American courts as valid," but nonetheless declining to enforce one in light of the unseaworthiness of the vessel).

167 *Bucker*, 4 F. Cas. at 558.

168 Marcus, *supra* note 32, at 1005–07, 1013; *see also, e.g.*, Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S., 187 F.2d 990, 990–91 (2d Cir. 1951) (emphasizing discretion in affirming

cases that *The Bremen* invoked when holding that "the correct doctrine to be followed by federal district courts sitting in admiralty" is to treat forum selection clauses as "prima facie valid," to "be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."[169]

C. Reconsidering the Forum Selection Clause Revolution

The Bremen, then, was not such a revolution in the enforceability of forum selection clauses as might at first appear.[170] But *The Bremen* did begin a significant shift in the justification for, and the strength of, the federal policy of enforcing forum selection clauses when it invoked the "ancient concepts of freedom of contract" to support its holding.[171] In dwelling on the parties' "arm's-length," "sophisticated" business negotiations,[172] *The Bremen* helped reorient the frame for forum selection clause enforceability from an all-things-considered evaluation of reasonableness to a stricter adherence to contractual language.

That shift to a freedom-of-contract paradigm continued through *Carnival Cruise* and was cemented by *Atlantic Marine*.[173] In that latter case, the Supreme Court unanimously held that federal courts should presumptively enforce forum selection clauses pointing to other federal courts and that they should do so by using 28 U.S.C. § 1404 to transfer cases to the designated forum.[174] If the forum selection clause points instead to a state court or a foreign forum, the Court suggested that the federal judge should enforce the clause by dismissing the case for forum non conveniens.[175] The Court further explained that the "balancing-of-interests standard" underlying both forum non conveniens and

---

the dismissal of an admiralty dispute in light of a forum selection clause); Wm. H. Muller & Co v. Swedish Am. Line Ltd., 224 F.2d 806, 808 (2d Cir. 1955) (explaining that forum selection clauses in admiralty are invalid only if unreasonable), *overruled by* Indussa Corp. v. S.S. Ranborg, 377 F.2d 200, 204 (2d Cir. 1967) (en banc) (holding that forum selection clauses are never enforceable if they conflict with the Carriage of Goods by Sea Act), *overruled by* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 530, 534–38 (1995) (holding that arbitration clauses, and by implication other forum selection clauses, do not conflict with Carriage of Goods by Sea Act).

169 The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 & n.11 (1972).

170 *See* Marcus, *supra* note 32, at 978–79 (situating *The Bremen* as an application of admiralty's traditional openness to forum selection clauses).

171 *The Bremen*, 407 U.S. at 11.

172 *Id.* at 11–14.

173 Marcus sees *Carnival Cruise* as the main turning point toward a contractual approach to forum selection clauses. *See* Marcus, *supra* note 32, at 1027–32. Regardless of the precise pivot point, the reasonableness approach of the admiralty courts had been completely lost by *Atlantic Marine*, which postdated Marcus's account.

174 *See* Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 59–60 (2013).

175 *See id.* at 60.

§ 1404 would be altered in light of a forum selection clause.[176] Typically for both § 1404 and forum non conveniens, the plaintiff's choice of forum is given some amount of deference; the court then weighs the parties' private interests, meaning their litigation convenience, and various public interests, such as burdens on the courts or the broader public's interest in the case.[177] In the presence of a forum selection clause, however, the plaintiff's contrary choice of forum "merits no weight," and the court "should not consider arguments about the parties' private interests," given they presumably took litigation convenience into account when they agreed to the forum selection clause in the first place.[178] Because the public interest factors "will rarely defeat a transfer motion" under § 1404, only in "extraordinary circumstances" should a federal court decline to transfer the case to the chosen federal forum or to dismiss the case for forum non conveniens in favor of the chosen state or foreign forum.[179] The freedom-of-contract rationale for enforcing forum selection clauses, in other words, justifies holding the parties to their contractual commitments regardless of extracontractual considerations, including fairness or countervailing public interests.

The shift from admiralty and international comity to the freedom-of-contract frame has meant, in turn, the loss of nuance or flexibility in the federal enforcement of forum selection clauses.[180] When *Atlantic Marine* told courts to enforce forum selection clauses by dismissing cases for forum non conveniens, it flipped history on its head: the existence of a forum selection clause was traditionally a factor weighed in evaluating whether to dismiss a foreign dispute, while now the discretion to dismiss is merely the procedural vehicle for presumptively enforcing the forum selection clause.[181] That reversal reflects the shift in the underlying rationale for enforcing forum selection clauses from international comity to sanctity of contract. It is not that the rationales for doctrines should never change. But it is interesting to note that the Court's freedom-of-contract reasoning in *Atlantic Marine* was insufficient for nearly 200 years to justify the enforcement of forum selection clauses in everyday transactions; it was admiralty and its concern for enabling cross-border trade that bridged that gap.

---

176 *Id.* at 61–63.

177 On the basic framework of the forum non conveniens analysis, see, for example, Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. Rev. 390, 403–06 (2017).

178 *Atl. Marine Constr. Co.*, 571 U.S. at 63–64.

179 *Id.* at 62, 64.

180 For scholars developing—and critiquing—this transformation, see generally Effron, *supra* note 142; Marcus, *supra* note 32.

181 *See* Effron, *supra* note 142, at 717 (summarizing the current status of the Supreme Court's caselaw as "Behold: The Multifactor Test with One Factor, the Balancing Test with No Balance, the Discretionary Standard with but One Permissible Outcome").

IV. The Presumption Against Extraterritoriality

The presumption against extraterritoriality, in its modern incarnation, assumes that a federal statute only applies within the United States unless it "gives a clear, affirmative indication that it applies extraterritorially."[182] The presumption's articulation, justification, and approach have evolved over time, including a prolonged period of disuse during the second half of the twentieth century.[183] Then in 1991, Supreme Court revived the presumption in *Equal Employment Opportunity Commission v. Arabian American Oil Co.* ("*Aramco*"),[184] and in 2010, it formalized the presumption into a highly textual two-step framework in *Morrison v. National Australia Bank Ltd.*[185] The Supreme Court has since enthusiastically applied the modern presumption to a range of federal statutes, often to approve dismissal of cases brought by foreign plaintiffs against U.S. companies.[186] The textualist orientation of the modern presumption, however, derives from a distinct admiralty doctrine. A key quotation in *Aramco*, taken out of context from an admiralty case, has helped justify a rigorous revitalization of the presumption against extraterritoriality, one that reduces contextual nuance and operates to constrain Congress.

A. The Evolving Presumption Against Extraterritoriality

When the Supreme Court invoked the presumption against extraterritoriality in *Aramco*, it was after a hiatus of forty years—a hiatus so prolonged that the 1987 *Restatement (Third) of Foreign Relations Law* did not even bother to include it.[187] The Court had last discussed the presumption in *Foley Brothers v. Filardo*[188] in 1949, a case about the applicability of the Eight Hour Law to a U.S. citizen working as a

182 RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 337 (2016).

183 For helpful descriptions of this evolution, see William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 Harv. L. Rev. 1582 (2020); John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 Am. J. Int'l L. 351 (2010).

184 499 U.S. 244, 248 (1991).

185 561 U.S. 247, 265–66 (2010). For a description of *Morrison*'s version of the presumption, see William S. Dodge, *A Primer on Extraterritoriality*, Transnat'l Litig. Blog (Mar. 25, 2022), https://tlblog.org/a-primer-on-extraterritoriality/ [https://perma.cc/992X-D8LR].

186 *See, e.g.*, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1935–36 (2021) (applying the presumption to reject Alien Tort Statute claims brought by foreign plaintiffs against U.S. corporations); *RJR Nabisco, Inc.*, 579 U.S. at 345 (applying the presumption to reject civil RICO claims brought by foreign governments against a major U.S. corporation). On the Supreme Court's procedural hostility to cases involving foreign plaintiffs suing U.S. companies, see generally Pamela K. Bookman, *Litigation Isolationism*, 67 Stan. L. Rev. 1081 (2015).

187 *See* Dodge, *supra* note 184, at 1596.

188 336 U.S. 281 (1949).

contractor for the U.S. Government in Iraq and Iran.[189] There the Court described the presumption as a "canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States," a presumption that was "based on the assumption that Congress is primarily concerned with domestic conditions."[190] To evaluate whether that presumption was rebutted, the Court considered the language of the statute, its structure or "scheme," and its legislative history.[191] Finding no indication of a contrary intent, the Court concluded that the statute did not apply to the plaintiff's work in the Middle East.[192]

When the Supreme Court resuscitated the presumption against extraterritoriality in *Aramco*, it gave the presumption a more textualist flavor.[193] *Aramco* was also an employment case involving a U.S. employee of a U.S. company who was stationed in Saudi Arabia.[194] In holding that Title VII did not cover that employment relationship,[195] the Court focused on the text of Title VII, declaring that "unless there is 'the affirmative intention of the Congress clearly expressed,' *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957), we must presume [that a statute] 'is primarily concerned with domestic conditions.' *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)."[196] As Justice Marshall explained in his dissent, the majority thereby transformed the presumption into a clear statement rule, focused not on divining Congress's actual intent but on "deriv[ing] meaning from various instances of statutory silence."[197]

Key to the majority's recasting of the presumption was the language quoted from *Benz v. Compania Naviera Hidalgo, S.A.*,[198] language which turned the presumption's search for congressional purpose into a requirement of explicit authorization.[199] But as Justice Marshall pointed

---

189 *See id.* at 282–83. Two terms before *Aramco*, the Court had invoked *Foley Brothers*'s "canon of construction" without additional discussion. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 440–41 (1989).

190 *Foley Bros., Inc.*, 336 U.S. at 285.

191 *See id.* at 285–87.

192 *See id.* at 290–91.

193 *See Aramco*, 499 U.S. 244, 248 (1991).

194 *See id.* at 247.

195 *See id.* at 249.

196 *Id.* at 248.

197 *Id.* at 261 (Marshall, J., dissenting).

198 353 U.S. 138 (1957).

199 *See infra* Section IV.C. In *Foley Bros.*, the Court reasoned that interpreting the Eight Hour Law to reach U.S. employees in foreign countries would also mean that it reached *foreign* employees in foreign countries because under "the scheme of the Act, . . . [n]o distinction is drawn therein between laborers who are aliens and those who are citizens of the United States." Foley Bros., Inc. v. Filardo, 336 U.S. 281, 286 (1949). Applying U.S. law to temporary foreign workers in foreign countries would be so extreme, according to the Court, that "[a]n intention so to regulate

out in his *Aramco* dissent, *Benz* was not a decision about the presumption against extraterritoriality.[200] In fact, *Benz* was discussing the mirror image of a presumption against extraterritoriality: it addressed a narrow admiralty doctrine—the internal affairs rule—that presumes that U.S. law does not apply to certain disputes arising *within* the United States.[201]

B. Benz *and the Internal Affairs Rule*

The internal affairs rule emerged out of the same constellation of concerns that led to the other two admiralty procedures already discussed: the discretionary dismissals of disputes between foreigners and the enforcement of forum selection clauses in foreign seamen's shipping articles. The idea that U.S. courts should not interfere in the employment relationship between foreign ships and their crew solidified over the course of the nineteenth century into a rule that port states should not regulate the internal administration of foreign-flagged ships while they are temporarily within the port state's territorial jurisdiction.[202] It is debated whether this internal affairs rule reached the level of customary international law or was merely a matter of international comity.[203] Regardless, the Supreme Court repeatedly emphasized in the twentieth century that U.S. courts should not breach it lightly.[204]

In *Benz*, the Supreme Court held that the Labor Management Relations Act[205] did not apply to "damages resulting from the picketing of a foreign ship operated entirely by foreign seamen under

---

labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of *a clearly expressed purpose*." *Id.* (emphasis added). The Court in *Foley Bros.*, however, did not require such "a clearly expressed purpose" when evaluating whether the law reached U.S. employees working overseas—which was precisely the question at issue in *Aramco*. That distinction may explain why the *Aramco* majority went looking for similar language in other cases—like *Benz*.

200 *See Aramco*, 499 U.S. at 264–66 (Marshall, J., dissenting).

201 *See Benz*, 353 U.S. at 142–47.

202 *See* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 129 (2005) ("[A] general statute will not apply to certain aspects of the internal operations of foreign vessels temporarily in United States waters, absent a clear statement."); Knox, *supra* note 184, at 361–78 (summarizing doctrine).

203 *See* Knox, *supra* note 184, at 373–74. In the splintered opinions in *Spector*, for example, Justice Scalia seemed to view the doctrine as a rule of international law, while the plurality treated it as a matter of international comity. *Compare Spector*, 545 U.S. at 133 (opinion of Kennedy, J.) ("It suffices to observe that the guiding principles in determining whether the clear statement rule is triggered are the desire for international comity and the presumed lack of interest by the territorial sovereign in matters that bear no substantial relation to the peace and tranquility of the port."), *with id.* at 150 (Scalia, J., dissenting) ("This rule is predicated on the 'rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship.'" (quoting McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963))).

204 *See, e.g.*, *Spector*, 545 U.S. at 125; *Benz*, 353 U.S. at 147.

205 29 U.S.C. *§§ 141–197.*

foreign articles while the vessel is temporarily in an American port."[206] The primarily German and British crew of a Liberian-flagged vessel owned by a Panamanian corporation had gone on strike while docked in Portland, Oregon, demanding higher wages and other more favorable conditions than their shipping articles provided.[207] Because the ship was in U.S. territorial waters, the Court explained, Congress *could* legislate to regulate the ship's internal affairs; whether it had in fact done so was a question of statutory interpretation.[208] In interpreting the Labor Management Relations Act, the Court was sensitive to the stakes involved in regulating the internal affairs of a foreign ship only transiently in U.S. waters. "For us to run interference in such a delicate field of international relations," the Court reasoned, "there must be present the affirmative intention of the Congress clearly expressed."[209] In other words, courts should not assume that U.S. statutes apply to the internal regulation of foreign ships *even when they are located within the territory of the United States* unless Congress has clearly spoken, given the strong international consensus behind the internal affairs rule.[210]

That rule has a different orientation and relationship with territoriality than does the presumption against extraterritoriality.[211] The internal affairs rule is outward facing, avoiding conflict with the flag state's clear prerogative to regulate its own ships.[212] The presumption against extraterritoriality, at least in its modern incarnation, is inward facing, operationalizing an assumption that Congress legislates with only domestic applications in mind.[213] The internal affairs rule recognizes that the flag state always has a strong regulatory interest in the affairs of its ships, while the presumption against extraterritoriality is more prophylactic, seeking to avoid *possible* regulatory conflicts. More significantly, the international affairs rule limits the reach of U.S. law *within* U.S. territory; the presumption against extraterritoriality limits

---

206 *Benz*, 353 U.S. at 139. The ship in question was owned by a Panamanian corporation, flew a Liberian flag, and had no American crewmembers. *Id.* The crew's shipping articles incorporated British regulations. *Id.*

207 *Id.* The articles had been signed in Bremen, Germany, and reflected British laws and regulations. *Id.*

208 *See id.* at 142.

209 *Id.* at 147. The Court continued:

> [Congress] alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal [to extend regulations to foreign-flagged ships] should be directed to the Congress rather than the courts.

Id.

210 *See Spector*, 545 U.S. at 129.

211 *But see id.* at 139 (plurality opinion) (asserting that the internal affairs rule "operates much like the principle that general statutes are construed not to apply extraterritorially").

212 *See, e.g.*, *Benz*, 353 U.S at 147.

213 *See Aramco*, 499 U.S. 244, 248 (1991).

the reach of U.S. law *outside* of U.S. territory. As Justice Marshall argued in his *Aramco* dissent, the "strict clear-statement rule of *Benz*" does not apply to the sort of questions raised in extraterritoriality cases like *Aramco*.[214]

It bears emphasis that *Aramco*'s reliance on *Benz*'s language was not an evolution of the internal affairs rule itself: the Supreme Court was not merging the two doctrines of statutory interpretation. The Court has continued to treat *Benz* as holding that "a general statute will not apply to certain aspects of the internal operations of foreign vessels temporarily in United States waters, absent a clear statement."[215] The internal affairs rule lives on as a distinct clear statement rule.

C. Influence on the Modern Presumption Against Extraterritoriality

Meanwhile, however, *Aramco*'s selective quotation from *Benz* has helped turn the modern presumption against extraterritoriality into something very close to a clear statement rule.[216] In *Morrison*, the Court summarized this passage from *Aramco* as holding that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[217] In 2016, the Court in turn summarized that passage from *Morrison* as asking how far "Congress has affirmatively and unmistakably instructed" that a statute reach.[218] This shift in language has meant a shift in application: the emphasis is now on the text of the specific statutory provision, rather than the structure of the surrounding statutory scheme or other contextual clues of legislative intent.[219] The language of *Benz*, taken out of context, has excused the Court transforming the presumption against extraterritoriality into a requirement that Congress make explicit its intention that each individual statutory provision apply to extraterritorial conduct.

This transformation matters because this new presumption is much more demanding of Congress, perhaps surpassing Congress's institutional capacity. Many laws to which the modern presumption is now being applied were adopted before this stricter presumption was articulated, making the presumption's retrospective application particularly

---

214 *Id.* at 265–66 (1991) (Marshall, J., dissenting).

215 *Spector*, 545 U.S. at 129.

216 The Supreme Court has insisted that the modern presumption is not a clear statement rule. *See* RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 339 (2016); *see also* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 265 (2010). It is hard to see the difference in practice, however.

217 *Morrison*, 561 U.S. at 255.

218 *RJR Nabisco*, 579 U.S. at 335.

219 *See* Maggie Gardner, RJR Nabisco *and the Runaway Canon*, 102 Va. L. Rev. Online 134, 140–41 (2016) (describing how *RJR Nabisco* rejected arguments based on statutory similarity and structure).

suspect.[220] Further, it may simply be unrealistic to expect congressional bill writers to track the Court's shifting presumptions or to be able to draft laws with the degree of specificity the Court now requires, at least without introducing unintended errors.[221] The current presumption against extraterritoriality is a significant limitation on the legislative power of Congress, even though it is framed as an effort to effectuate congressional intent.[222]

Conclusion

By tracing the admiralty roots of forum non conveniens, forum selection clause enforcement, and the modern presumption against extraterritoriality, this Essay does not intend to suggest that such doctrinal evolution is inherently problematic. Procedure should develop to address new needs and changing conditions. But it is helpful to be clear-eyed about where these doctrines come from.

First, none of these doctrines are timeless or a foregone conclusion. *Gulf Oil*, *Carnival Cruise*, and *Aramco* were each a greater break from past precedent than the Supreme Court was willing to acknowledge. Demythologizing these cases should make it easier to evaluate their doctrines critically and perhaps reconsider some of the choices that the Supreme Court has made.

Second, it is notable that these doctrinal evolutions all involved a loss of contextual nuance and flexibility, largely to the detriment of plaintiffs. The admiralty precursor to forum non conveniens was less formalized and was often resolved in favor of retaining jurisdiction. The admiralty approach to forum selection clauses, still reflected at least partly in *The Bremen*, permitted evaluation of such clauses for reasonableness. And the prior incarnation of the presumption against extraterritoriality was more purposivist in orientation, encouraging consideration of broader contextual clues to discern congressional intent.

Third, some of these shifts represent incursions into Congress's legislative powers. The embrace of forum non conveniens for diversity and federal question cases is in tension with the Supreme Court's continuing insistence that it is for Congress to define the subject matter jurisdiction of the lower courts.[223] And the increasingly strict application

---

220 *See* Dodge, *supra* note 184, at 1636 (discussing the intertemporal problem of changing canons of construction).

221 *See, e.g.*, Gardner, *supra* note 220, at 141–43 (developing these points and gathering additional scholarship).

222 *See id.* at 143 ("In applying this transformed presumption, the Supreme Court poses as a faithful agent of congressional intent, but it is in fact a disciplinarian of Congress's global aspirations.").

223 *See* Gardner, *supra* note 136, at 74–80 (describing recent Supreme Court trends regarding jurisdictional obligation).

of the modern presumption against extraterritoriality puts the courts in the position of policing Congress's global perspective. Regardless of the desirability of these developments, obscuring their admiralty roots has allowed the Supreme Court to rely on a mythologized past to avoid fully justifying the new paths it has laid.