ARTICLES

RETHINKING COMITY: TOWARDS A COHERENT TREATMENT OF INTERNATIONAL PARALLEL PROCEEDINGS

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1. INTRODUCTION AND OVERVIEW

The treatment of international parallel proceedings remains one of the most unsettled areas of the law of federal jurisdiction in the United States. There is no consensus in U.S. federal courts as to the appropriate legal framework for addressing cases involving truly parallel, concurrent proceedings in the courts of a foreign country.[1] This is true whether the court is asked to issue an anti-suit injunction or asked to stay or dismiss its own proceedings in deference to the pending foreign action. Given that the Supreme Court has never spoken to the appropriate framework to be employed in parallel proceedings of cases involving the courts of foreign countries, it may be unsurprising that the federal courts are divided in their approaches. What is surprising, however, is that while the academic literature has paid considerable attention to the problem of anti-suit injunctions in international cases (i.e., cases in which a party asks a foreign court to enjoin a parallel proceeding in a U.S. court),[2] scant attention has been paid to the alternative course available to a domestic court: the stay or dismissal of its *own* proceedings. Instead, the majority of the articles that have been written on the topic have merely chronicled the divergent approaches taken by federal courts in the stay/dismissal context; there has been almost no effort in these articles to propose a consti-

[1] *See infra* Section 3.

[2] *See, e.g.*, Kent Anderson, *What Can the United States Learn from English Anti-Suit Injunctions? An American Perspective on* Airbus Industrie GIE v. Patel, 25 YALE J. INT'L L. 195, 197 (2000) (arguing that the United States should fully commit to a strict comity-based standard); Steven R. Swanson, *The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions*, 30 GEO. WASH. J. INT'L L. & ECON. 1, 2 (1996) (arguing that a "restrictive approach [to anisuit injunction cases] better reflects significant needs of both the United States and the international system").

tutional framework to allow the federal courts to deal with these cases.[3]

Notably, there *has* been considerable ink spilled on the question of whether the federal courts possess the constitutional power to limit or decline jurisdiction in deference to pending proceedings in U.S. *state* courts.[4] However, to the extent that these discussions have considered *international* parallel proceedings, they have done so only tangentially, assuming, it seems, that what is appropriate in the domestic federal-state context is appropriate in the international context as well. Consequently, this scholarship has tended

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[3] *See, e.g.*, Louis F. Del Duca & George A. Zaphiriou, *Rules for Declining to Exercise Jurisdiction in Civil and Commercial Matters: Forum Non Conveniens, Lis Pendens*, 42 AM. J. COMP. L. 245 (1994) (analyzing the difficulties arising when courts in different territories assume jurisdiction over the same matter); Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1 (2004) (discussing alternatives to parallel proceedings); Margarita Treviño de Coale, *Stay, Dismiss, Enjoin, or Abstain?: A Survey of Foreign Parallel Litigation in the Federal Courts of the United States*, 17 B.U. INT'L L.J. 79 (1999) (reviewing cases involving international parallel litigation). Notably, a number of articles *have* addressed the question from the perspective of the U.S. government as a whole, rather than from the perspective of the U.S. courts alone. *See, e.g.*, Ronald A. Brand, *Comparative* Forum Non Conveniens *and the Hague Convention on Jurisdiction and Judgments*, 37 TEX. INT'L L.J. 467 (2002) (discussing *forum non conveniens* in transnational litigation); Teitz, *supra*. Specifically, these articles have proposed that the United States enter into some manner of multilateral convention on civil jurisdiction to address the issue of international parallel proceedings, such as the now moribund Hague Convention. This Article does not pursue such proposals, as it seems highly unlikely that an international agreement regarding parallel proceedings will be reached any time soon and, perhaps more importantly, because U.S. courts already have the power to satisfactorily address such cases without help from the executive and/or legislative branches.

[4] *See, e.g.*, Donald L. Doernberg, *"You Can Lead a Horse to Water . . .": The Supreme Court's Refusal to Allow the Exercise of Original Jurisdiction Conferred by Congress*, 40 CASE W. RES. L. REV. 999 (1989) (analyzing the Supreme Court's narrow construction of jurisdictional provisions); Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530 (1989) (discussing the abstention doctrine); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (reviewing the abstention doctrine in the federal courts); James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049 (1993) (arguing that the abstention doctrine should reflect the Constitution's forum neutrality); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1984) (arguing that judicial discretion in matters of jurisdiction is "much more pervasive than is generally recognized"); David A. Sonenshein, *Abstention: The Crooked Course of* Colorado River, 59 TUL. L. REV. 651 (1985) (reviewing the *Colorado River* abstention doctrine); Lewis Yelin, Burford *Abstention in Actions for Damages*, 99 COLUM. L. REV. 1871 (1999) (arguing against the extension of the *Burford* abstention doctrine).

to frame the problem in terms of "abstention," the hoary term adopted by the Supreme Court to describe the jurisprudence fashioned in a line of cases beginning in the 1940's.[5] What these state-focused articles have failed to consider in-depth, however, is whether the Supreme Court's domestic abstention doctrines—created within the context of a constitutional federal system of government—are at all apt for addressing the issues that arise in the situation of an *international* parallel proceeding.

This Article seeks to begin a debate on the appropriate constitutional framework for U.S. courts faced with the question of whether to decline the exercise of their jurisdiction in international, parallel proceedings cases. Specifically, this Article proposes a judicial approach rooted in and based on historic common law principles of adjudicatory comity.[6] Comity, of course, is not without its critics[7] and, undoubtedly, at the mere mention of the term red flags will go up for some readers. Nevertheless, in this Article, I argue that comity, *properly understood within its common law historical context*, provides the *key* for the Supreme Court and other federal courts to deal dynamically with international parallel proceedings, while *simultaneously* meeting the requirements of constitutionality.

This should not be seen as a vague, fluffy or controversial statement. Since the earliest days of the Republic, the Supreme Court has turned to principles of comity to decline or limit the ex-

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[5] For a summary of the Court's abstention case law, *see infra* Section 5.

[6] This Article focuses on the federal treatment of *international* parallel proceeding cases. Accordingly, domestic parallel proceeding cases are not considered here, except insofar as the rationale of those cases bears upon the treatment of foreign *lis alibi pendens*, as it clearly does in a number of federal cases. In addition, as noted below, this Article addresses cases involving assertions of in personam jurisdiction, not in rem proceedings or bankruptcy matters.

[7] *See, e.g.*, SAMUEL LIVERMORE, DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS 26 (1828) (describing comity as "a phrase, which is grating to the ear, when it proceeds from a court of justice"); Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53 (1991) (arguing that reciprocal comity is discriminatory and damaging to the rule of law). *See also* A.V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 10 (1896) (describing the reliance on comity as "a singular specimen of confusion of thought produced by laxity of language"); Peter Kaye, *Jurisdictional discretion of English courts (3)*, 134 SOLIC. J. 703, 706 (1990) ("References to comity . . . should only be made with caution, and preferably dropped altogether."). For a review of early continental European criticism of comity, see, e.g., Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 375 (1918) (discussing Huber's view on the "Conflict of Laws").

ercise of federal jurisdiction in international cases. And, as I will demonstrate in this Article, the historic, common law principles of comity—in particular adjudicatory comity—are the *very same principles* that underlie *current* case law on the enforcement of foreign judgments and the doctrine of *forum non conveniens*.

In short, this Article will show that the principles of comity empower the federal courts, as a matter inherent to their judicial function, to exercise discretion with respect to their jurisdiction in cases of international parallel proceedings. Moreover, in exercising this comity-based discretion, the courts are *not* bound by the Supreme Court's domestic abstention jurisprudence and its attendant federalism concerns. Instead, they are empowered to craft rules based upon the fundamental concerns addressed by principles of comity and raised in international cases. And, as this Article will show, historically the courts have been able to craft sensible and workable rules for translating the theoretical concept of comity into practice in the context of federal jurisdiction.

Following a brief sketch of the problem of international parallel proceedings in Section 2, this Article addresses the history, basic character, and criticisms of comity. Section 3 examines the development of comity in Anglo-American common law, from its origins as a basis for resolving issues related to the conflicts of laws ("prescriptive comity"), to its place as a basis for domestic courts to defer or limit the exercise of jurisdiction in deference to the courts of another sovereign ("adjudicatory comity"). A review of this history demonstrates the firm place that principles of comity occupy in the common law generally. However, it also reveals the way in which adjudicatory comity in particular has served as the animating principle for the federal courts' treatment of foreign judgments and development of the doctrine of *forum non conveniens*.

Such a historical review of the lineage of adjudicatory comity should prove useful here because, as we shall see, current invocations of "international comity" by the federal courts in cases of international parallel proceedings seem largely unaware of the character and pedigree of comity within the common law. Few federal courts seem to understand that the common law adopted comity over two-hundred years ago specifically to provide a theoretical justification for allowing courts to defer to the legislative, judicial, and executive activities of a *foreign* sovereign in order to do justice in individual cases. Such a review is also useful for showing that much of the academic criticism of comity has been misplaced.

Section 4 carries the review of the development of comity in the common law to the role played by comity in the state courts in foreign parallel proceedings cases. As Section 4 shows, for over one hundred years the common law in the states has embraced the idea that principles of comity grant the courts discretion *not* to exercise their jurisdiction in cases involving international parallel proceedings. Much more than that, however, the common law is uniform such that such discretion should be exercised freely and later-filed domestic proceedings should be stayed pending the outcome of earlier-filed foreign proceedings involving substantially similar parties and issues. Indeed, a number of state courts have even developed detailed frameworks of analysis for implementing this presumption in favor of the extension of comity to foreign proceedings in appropriate cases.

Against the backdrop of the uniform application of principles of comity to foreign parallel proceedings in the common law state courts, Section 5 asks whether such discretionary extension of comity to foreign parallel proceedings is constitutionally permissible in the federal context. In so doing, Section 5 addresses the work of other commentators who have discussed the nature of federal jurisdiction and argued for varying limits on the exercise of discretion by federal courts in carrying out Congress's jurisdictional grants. Section 5 concludes that both as a matter of the Supreme Court's own jurisprudence and sound constitutional theory, historic common law principles of adjudicatory comity provide a legitimate basis for jurisdictional discretion in international parallel proceedings cases.

Section 5 also considers the current treatment of international parallel proceedings in the federal courts. As noted above, there is currently no agreed analytical framework for addressing international parallel proceedings in the federal courts. As a result, among the federal courts, various bases for the exercise (or non-exercise) of discretion in international parallel proceedings cases have been advanced. On the whole, these cases have sought to justify their divergent approaches via analogies to the Supreme Court's domestic parallel proceedings of jurisprudence. Section 5 argues that none of these approaches are satisfactory because the analogies are inapt. Instead, the federal courts should recognize that the basis for discretion to decline jurisdiction in appropriate cases lies in common law principles of adjudicatory comity, which are not preempted by Congress's jurisdictional grants.

Section 6 discusses how the federal courts should exercise that discretion. Section 6 rejects domestic analogies as inappropriate for analyzing the basis of federal court discretion in international cases. Instead, Section 6 argues that courts should be looking to principles of adjudicatory comity for guidance in crafting rules and presumptions in order to specifically respond to the issues raised in cases of international parallel proceedings. Section 6 goes on to propose how principles of adjudicatory comity can be fashioned into a workable and constitutionally acceptable framework for application by the federal courts.

2. THE PROBLEM OF INTERNATIONAL PARALLEL PROCEEDINGS

It is often stated that increased global commerce, combined with expansive concepts of personal jurisdiction, has led to a proliferation of the number of cases in which jurisdiction to adjudicate lies in the courts of more than one country.[8] While "[I]n an ideal juridical world, the venue in which a piece of transnational litigation proceeded would not affect the resolution of that litigation,"[9] in reality, venue may have an enormous impact on the outcome of a dispute. Whether as a result of differences in the procedural rules of the fora or variations in the cost and convenience of litigating in a particular venue, or simply because choice of law rules may differ (or be applied differently) between jurisdictions, the battle for where litigation is to take place may often be the most important and bitterly fought issue in a transnational case.[10] Not only may the forum in which the parties litigate have a decisive effect on how a particular case is decided, but winning or losing the

[8] *See, e.g., Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992) (noting that every transnational commercial transaction "presents the possibility of concurrent jurisdiction in the courts of the nations of the parties involved concerning any dispute arising in the transaction"); Smith Kline v. Bloch, [1983] 1 W.L.R. 730, 737-38 (C.A. 1983) (discussing possible jurisdiction in more than one country).

[9] Andrew S. Bell, *The Negative Declaration in Transnational Litigation*, 111 LAW Q. REV. 674, 674 (1995).

[10] *See* ADRIAN BRIGGS & PETER REES, CIVIL JURISDICTION AND JUDGMENTS 194 (2d ed. 1997) ("[I]t is undeniable that the question where a dispute is to be tried will very often be the most significant factor in the parties' appraisal of the likely outcome of the case."); David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 938 (1990) (discussing choice of jurisdiction transnational personal injury actions).

battle of the fora may also have profound implications for the way the parties view the strength of their respective cases and, hence, the attractiveness and likelihood of settlement.[11]

2.1. Types of International Parallel Proceedings

Given the stakes at issue, it is not surprising that although an action has been brought initially in the courts of country A, frequently one of the parties to that action, whether the original plaintiff or defendant, will decide, for whatever reason of perceived advantage, to bring a subsequent action in the courts of country B. If the subsequent action is brought by the plaintiff in the original action, its action may do little more than duplicate the already pending lawsuit.[12] There may be some basis of recovery or available relief which is peculiar to the subsequently chosen forum, or the plaintiff may simply seek to make matters more onerous on the defendant by requiring the defense of litigation in multiple fora.

When the subsequent litigation is brought by the original defendant, however, the circumstances may be quite different. Here, the form of the subsequent action is likely to vary depending on the character of the original, pending lawsuit.[13] For example, the first lawsuit may simply seek a declaration of the plaintiff's nonliability to the defendant (a so-called "negative declaration"). In such a case, the original defendant may decide to initiate its own action in a different forum for *damages*, so as to assume for itself the role of plaintiff. Conversely, where the original litigation is a straight, run-of-the-mill damages action and not a claim for declaratory relief, the defendant may still seek to become a plaintiff in its own right by initiating litigation in a different forum on claims

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[11] One court noted that:

> [T]he reality of the matter is that my decision as to the venue for trial will put one party or the other into a stronger position when negotiating any possible settlement of this claim. I cannot think of any other reason why the parties should go to such trouble and expense over this preliminary skirmish.

The "Al Battani," (1993) 2 Lloyd's Rep. 219, 221 (Q.B.D. Eng.).

[12] *See generally* Allan D. Vestal, *Repetitive Litigation*, 45 IOWA L. REV. 525 (1960) (discussing the occurrence of multiple litigation arising from a single situation).

[13] *See* Allan D. Vestal, *Reactive Litigation*, 47 IOWA L. REV. 11 (1961) (discussing the situations in which a defendant in one lawsuit will initiate reactive legislation based on the same factual controversy in another jurisdiction).

that may or may not be available as counterclaims in the original action. Alternatively, the original defendant may bring its own belated claim for a negative declaration in a different forum. As Andreas Lowenfeld has famously put it, "Forum shopping, which used to be a favorite indoor sport of international lawyers, has developed into a fine art."[14]

2.2. Why International Parallel Proceedings Are Problematic

Even allowing for the exercise of party autonomy, there is almost nothing in principle to support the maintenance of concurrent, parallel proceedings in the courts of different countries. Indeed, if one assumes the existence of a substantial identity of the parties and issues and that justice is able to be done in the courts of both country A and country B, one can quickly recognize that entertaining concurrent, parallel proceedings of the type described raises a host of objections.[15] Such duplicative litigation carries with it increased costs and inconvenience to the parties[16] and invites deep-pocketed litigants to attempt to exhaust less financially robust adversaries through the institution of multiple proceedings in different jurisdictions around the world.[17] In addition, parallel

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[14] Andreas F. Lowenfeld, *Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM. J. INT'L L. 314, 314 (1997). *See also* The Atlantic Star, [1974] A.C. 436, 471 (H.L.) ("'Forum-shopping is . . . a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented . . . .").

[15] My objections to parallel proceedings apply to truly competing, parallel proceedings and do not encompass merely related proceedings. If two sets of proceedings involve different parties, different facts, or different legal claims, the arguments against multiplicity lose their force. *See infra* Section 5 (addressing foreign *lis alibi pendens* cases).

[16] *See, e.g.*, Efco Corp. v. Aluma Sys., USA, Inc., 983 F. Supp. 816, 824 (S.D. Iowa 1997) (stating that, for the case at hand, "[m]aintaining two concurrent and simultaneous proceedings would consume a great amount of judicial, administrative, and party resources for only speculative gain"); The Abidin Daver, [1984] 1 A.C. 398, 410 (H.L.) (appeal taken from Eng.) (U.K.) ("[I]t must be more expensive to litigate about liability for the same collision in two jurisdictions than it would be to litigate in one alone.").

[17] Parallel proceedings also invite tactical gamesmanship by litigants designed to delay the suit from proceeding in the forum not of their choice. For an example of how parallel proceedings can multiply and beget parallel proceedings of their own, see Airbus Industrie G.I.E. v. Patel, [1999] 1 A.C. 119 (H.L.) (appeal taken from Eng.).

proceedings carry the risk of legal havoc caused by inconsistent decisions in different courts on the same issues between the same parties.[18]

Moreover, even if inconsistent decisions are not reached because of the application of res judicata, one tribunal's expenditure of time and effort will prove wasted as a result of the duplication of effort.[19] Thus, the maintenance of parallel proceedings consumes scarce judicial and administrative resources, which could otherwise be allocated more efficiently by adjudication through a single litigation in a single forum.[20] As Philip Kurland has observed of the problem generally:

> It hardly seems appropriate that, with our judicial resources taxed to the extent they are, actions should proceed simultaneously in both courts [state and federal actions raising the same questions] with the judgment in one ultimately to be utilized as res judicata in the second .... [C]ertainly proceedings in two courts to resolve the same questions between the same parties is a patent abuse when the Chief Justice of the United States and the Chief Justices of most of our industrial States continually testify to the immense problems of judicial administration which exist because the courts of their respective jurisdictions are so heavily overburdened with litigation.[21]

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[18] Numerous courts have identified this potential problem. *See, e.g.*, Evergreen Marine Corp. v. Welgrow Int'l Inc., 954 F. Supp. 101, 104 (S.D.N.Y. 1997) (noting that a stay of litigation minimizes the risk of inconsistent judgments with respect to related claims); *The Abidin Daver*, [1984] 1 A.C. at 412 ("Comity demands that such a situation should not be permitted to occur .... It is a recipe for confusion and injustice."). The House of Lords' Privy Council faced just this situation in *Showlag v. Mansour*, [1995] 1 A.C. 431 (P.C. 1994) (appeal taken from Jersey) (U.K.).

[19] The *Hunt v. B.P. Exploration Co. (Libya)* litigation is a prime example. There, Hunt commenced proceedings in Texas for negative declaratory relief approximately one month after commencement of proceedings for damages brought by B.P. in England. The English court arrived at a decision first and the Texas court, before which Hunt's declaratory action was still pending, gave res judicata effect to the Texas declaration. The Texas proceedings to that point were for naught. Hunt v. BP Exploration Co. (Libya), 492 F. Supp. 885 (N.D. Tex. 1980); B.P. Exploration Co. (Libya) v. Hunt, [1983] 2 A.C. 352 (H.L. 1981) (appeal taken from Eng.). *See also* Note, *Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation*, 59 YALE L.J. 978, 983 (1950) ("One tribunal's expenditure of time and effort will prove wasted since the first decision will be res judicata in the other suit.").

[20] *See, e.g., Efco Corp.*, 983 F. Supp. at 824.

[21] Philip B. Kurland, Toward A Co-Operative Judicial Federalism: The Fed-

Lastly, the pendency of parallel proceedings in the courts of two or more countries may serve, in some cases, to increase tensions between those countries as a matter of state-to-state relations.[22]

2.3. *Principle Methods of Response to International Parallel Proceedings*

In traditional terms, a court presented with a domestic action which parallels a pending foreign action is said to have a case of "*lis alibi pendens*" before it, literally "a lawsuit pending elsewhere."[23] Barring the applicability of a legislative or treaty-based scheme for allocating jurisdiction with the foreign forum,[24] a court faced with a case of international *lis alibi pendens* has three principle options.[25] First, the domestic court may decide to decline the exercise of its own jurisdiction by staying or dismissing its own proceedings in favor of the pending foreign action. Second, the domestic court may attempt to take exclusive jurisdiction of the dispute through the issuance of an injunction, an "anti-suit injunction," prohibiting the parties from any further proceedings in the foreign action.[26] Third, and usually as the result of the denial of a

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eral Court Abstention Doctrine, Address Before the Conference of Chief Justices at Miami Beach, Fla. (Aug. 20, 1959), *in* 24 F.R.D. 481, 491–92 (1960).

[22] The litigation surrounding the bankruptcy of Laker Airways and Laker's subsequent efforts to pursue antitrust claims in the United States is, perhaps, the most famous recent example of the way in which international parallel proceedings can give rise to diplomatic and political tensions. *See* Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 958 (D.C. Cir. 1984) (recognizing the tensions created by the court's decision).

[23] PETER NORTH & J.J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 347 (13th ed. 1999).

[24] Such schemes are not unheard of. For example, the Brussels Regulation provides rules for the treatment of parallel proceedings among members of the European Union. Council Regulation 44/2001, 2001 O.J. (L 12) 1 (EC). The Lugano Convention makes the same rules applicable to states within the European Economic Area. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 88/592, 1988 O.J. (L 319) 9.

[25] *See, e.g.*, Airbus Industrie GIE v. Patel, [1999] 1 A.C. 119, 131–33 (H.L.) (appeal taken from Eng.) (discussing the three basic options before the court).

[26] As noted in the Introduction, U.S. courts are not uniform in their approaches to the issuance of anti-suit injunctions in international cases. *See, e.g.*, George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589 (1990) (discussing problems and controversies associated with use of anti-suit injunctions). The focus of this Article, however, is on

request for one of the first two options, the domestic court may decide to exercise concurrent jurisdiction with the foreign court, thus allowing both actions to proceed simultaneously.

2.4. *An Outline of the Varied and Unsatisfactory Approaches Taken by the Federal Courts When Asked to Stay or Dismiss Their Own Proceedings*

As noted at the outset, the U.S. federal courts currently are divided regarding the proper analytical framework for determining whether to decline jurisdiction in international *lis alibi pendens* cases. There are three principle factions. The first faction, which I have dubbed the "Abstentionists," begin by drawing an analogy between international *lis alibi pendens* cases and cases in which a federal court is asked to defer to pending *state* proceedings as a matter of "wise judicial administration." These courts therefore rely on the Supreme Court's "abstention" case law in reaching their decisions, namely, *Colorado River Water Conservation District v. United States*[27] and its progeny. In so doing, the Abstentionists emphasize a "virtually unflagging obligation [on the federal courts] . . . to exercise the jurisdiction granted to them by Congress."[28] They accordingly *limit* deference to foreign proceedings to cases involving "exceptional circumstances," which clearly does not include the simple fact of a foreign *lis alibi pendens*.

The second faction, which I have dubbed the "Landites," begins by analogizing international parallel proceedings to cases involving *lis alibi pendens* in two *federal* courts. These courts therefore rely on the Supreme Court's decision in *Landis v. North American Co.* in reaching their decisions.[29] In so doing, these courts emphasize the wastefulness of public and private resources involved in entertaining parallel proceedings and, therefore, find a broad discretion to defer to pending foreign proceedings. Finally, a third

whether, and under what circumstances, a U.S. federal court should stay or dismiss its own proceedings in favor of those pending in the courts of another country. Accordingly, cases involving the issuance of anti-suit injunctions are not addressed here, except insofar as those cases are considered by the federal courts when deciding whether to decline jurisdiction. *Laker Airways*, 731 F.2d at 909.

27 Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

28 *Id.* at 1248.

29 Landis v. N. Amer. Co., 299 U.S. 248 (1936).

group of courts, which I have dubbed the "Internationalists," eschews both of these approaches. They follow instead what the Eleventh Circuit has called a doctrine of "international abstention." This doctrine purportedly arises directly out of "international comity," as well as the court's inherent power to manage cases before it.

Notably, all three factions, not just the Internationalists, agree that "international comity" is somehow implicated. Unfortunately, none of the courts have made much effort to address what they mean by "international comity," and, in any case, they are widely divided as to how such "international comity"—whatever it may be—should apply in individual cases. The courts have not attempted to explain in any depth where this "international comity" comes from. Neither have they explained how "international comity" relates to the nature of the discretion that the courts purport to be exercising, nor how it shapes the manner in which these cases are decided.

As a result, the only practical meaning of "international comity" in the current case law is its role as a signal to litigants that the court will engage in some sort of ad hoc balancing in reaching its decision. This is unfortunate because when one looks at the history of comity, and the course of its development in the common law, one finds that comity has a firm place as a basis for the exercise of principled judicial discretion in jurisdictional matters. Moreover, comity embodies specific interests and values to which the federal courts can look to fashion coherent legal rules for decision-making in foreign *lis alibi pendens* cases. Although I will return to the federal courts and their current dilemma in due course, I now turn to the history and character of comity, to provide a basic understanding of the one concept that all of the federal courts, regardless of their approach, purport to rely upon when faced with cases of international *lis alibi pendens*.

3. THE DEVELOPMENT OF ADJUDICATORY COMITY IN THE COMMON LAW

In this Section, I review the history of comity in the common law, tracing its use and development in three distinct phases: first, as a jurisprudential solution for conflicts of laws problems; second, as the basis for the enforcement of foreign judgments; and, third, as the theoretical support for the doctrine of *forum non conveniens*.

At the outset, I note that there are two types of "comity" relevant to our inquiry here: "prescriptive comity" and "adjudicatory comity." As described in detail below, the first—prescriptive comity—is a term used to justify the decision of a sovereign to permit the application of foreign law within its own territory and, by implication, to limit the application of its own law to matters within its jurisdiction. Prescriptive comity explains—jurisprudentially—how a domestic sovereign can give effect to the laws of another sovereign within its own territory, while at the same time maintaining its claim to absolute sovereign power. As discussed in Section 3.1, below, comity in this "prescriptive" sense provided the basis for the common law's development of conflicts of laws jurisprudence.

However, while prescriptive comity addresses the question of the domestic sovereign's application of foreign law generally, it does not squarely address the question of the impact, if any, of the acts of a foreign court within the domestic sovereign's territory. Therefore, on the heels of the development of comity-based conflicts of laws rules, the common law next addressed the question whether a domestic sovereign could or should defer within its own jurisdiction to specific judgments rendered by foreign courts. As discussed in Section 3.2, below, the common law's answer to this question built upon the principles of prescriptive comity that undergird the approach taken to conflicts of laws questions. In the end, the common law articulated a second type of comity—"adjudicatory comity"—related specifically to the acts of foreign courts, and not just to the question of foreign law generally.

Notably, while the common law originally developed the principle of adjudicatory comity to address the recognition and enforcement of previously rendered foreign judgments, it soon came to extend those principles to yet a third problem: whether, and under what circumstances, if any, a domestic sovereign should actually defer to a foreign court as the appropriate forum in the first instance, i.e., before a foreign action had even been filed. As discussed in Section 3.3, below, the common law developed the doctrine of *forum non conveniens* to address this problem, a doctrine that is itself rooted in the principles of adjudicatory comity.

3.1. *The Original Role: Prescriptive Comity and the Conflicts of Laws*

Comity first developed in its "prescriptive" sense when legal theorists in the seventeenth century addressed the question of conflicts of law, hypothesizing and justifying instances in which foreign law might be recognized within a domestic legal system. For these theorists, comity served, in the absence of any public international law rules, as the theoretical bridge to link national and foreign legal systems. However while "prescriptive" comity in this way filled in gaps in public international law, "prescriptive" comity did not become a doctrine of public international law. Instead, "prescriptive" comity became a creature of domestic law. Even more specifically, prescriptive comity became the province of domestic courts, and not the province of legislative or executive institutions. In the eighteenth and nineteenth centuries, domestic courts used comity to develop specific rules in the context of conflicts of law decisions. In so doing, these courts articulated three goals associated with comity that were to animate all future adaptations of comity-based discretion by the common law.

3.1.1. *Comity's development as a bridge between national and foreign legal systems in the absence of rules provided by public international law*

Comity originally developed in seventeenth-century Europe as a theoretical explanation for how an absolutely powerful domestic sovereign could give effect to foreign law within its territory without implicitly diminishing or denying its absolute power.[30] Proceeding from the core principle that the application of sovereign power extends to all within the confines of the sovereign's territory, but not beyond,[31] Ulrich Huber and other Dutch legal theorists conceived of comity as a discretionary act of accommodation, by which a domestic sovereign would recognize within its territory the laws of a foreign sovereign, as long as that recognition did "not

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[30] *See generally,* D.J. Llewelyn Davies, *The Influence of Huber's* De Conflictu Legum *on English Private International Law,* 18 BRIT. Y.B. INT'L L. 49 (1937); Lorenzen, *supra* note 7, at 379; Hessel E. Yntema, *The Comity Doctrine,* 65 MICH. L. REV. 9 (1966).

[31] Lorenzen, *supra* note 7, at 403 ("The laws of each state have force within the limits of that government and bind all subject to it, but not beyond."). For an alternate translation, see Davies, *supra* note 30.

cause prejudice to the power or rights of such government or of their subjects."[32] Notably, the domestic sovereign did not recognize foreign law within its territory because of any binding international obligation.[33] Indeed, to have framed the concept would have been to restrict the sovereign's rights in a way precisely in conflict with the premise of exclusive sovereign territorial power.[34] Rather, Huber and the other Dutch theorists gave "comity" as the reason for giving recognition and effect to foreign law.

But why should a domestic sovereign grant this comity to the laws of a foreign sovereign? For Huber, there were two principle reasons. First, Huber saw that the application of foreign law in individual cases would promote the ends of justice. Second, Huber explained that "[a]lthough the laws of one country can have no direct force in another country, yet nothing could be more inconvenient to the commerce and general intercourse of nations than that transactions valid by the law of one place should be rendered of no effect elsewhere owing to a difference in the law."[35] The reasons for comity thus embraced the aspirational goal of doing justice in individual cases, as well as the practical goal of creating an international environment in which transnational commerce could flourish.

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32 Lorenzen, *supra* note 7, at 401.

33 *See, e.g., Comity of Nations*, 31 L. MAG. 276 (1844); Ernest G. Lorenzen, *Story's Commentaries on the Conflict of Laws – One Hundred Years After*, 48 HARV. L. REV. 15 (1934); Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, (1991). For a view that Huber's conception of comity implied binding obligations of international law, see Davies, *supra* note 30, at 57–58; Yntema, *supra* note 30, at 29–30. *See also* Hersch Lauterpacht, International Law—The General Part, *in* INTERNATIONAL LAW: COLLECTED PAPERS 1, 38 (Eliho Lauterpacht ed., 1970) (suggesting that while "public international law in no way limits the freedom of action of States" in the application of choice of law rules, nevertheless, even in the absence of treaty, "they are not, in principle, free to disregard foreign law altogether"). I find the suggestions that comity imposes international law obligations to be unconvincing. Even assuming that there are situations in which a domestic state's application of its own law or refusal to recognize foreign law may create an international *delict* that gives rise to complaint by the foreign sovereign, surely that result occurs as a consequence of the effect such refusal has upon the foreign sovereign's nation and not per se because of the nature of the domestic sovereign's choice of law rules or lack of them.

34 As Story commented with regard to Huber's position: "whatever force and obligation the laws of one country have in another, depend solely upon the laws, and municipal regulations of the latter . . . ." STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 23 (2d ed. 1841).

35 *See* Lorenzen, *supra* note 7, at 401.

Huber's comity was a "prescriptive" comity. Clearly, the sovereign already held the power to prescribe the rules for dealing with cases in its courts, and could apply its own law if it so chose. Comity, however, provided the domestic sovereign with a high-level theoretical prescription for how it could forego such an exercise of power within its territory, without simultaneously diminishing its sovereignty. Moreover, Huber's prescriptive comity also provided an explanation for a corollary limitation on the reach of the sovereign's own laws; by allowing foreign law to have effect within its territory, the sovereign also implicitly limited the scope of application of its own laws. Thus, from its inception, comity occupied a unique position within the law because it served as a bridge between national and foreign legal systems where public international law provided no rules.

But how should the sovereign decide when it is actually appropriate to defer to foreign law in individual cases? To answer this question, Huber used his general maxims to construct specific rules for the extension of comity to foreign law in various classes of cases. It is not necessary here to explore in detail Huber's thoughts on when a domestic sovereign should extend comity to foreign laws in cases such as a marriage consecrated in another country[36] or moveable property[37] and wills.[38] Instead, the important point to note is that although comity provided a general theoretical justification for the decision of a domestic sovereign to give recognition and effect to foreign law within its territory, comity did *not*—in and of itself—provide the rules for when that recognition and effect should be granted in specific cases. That latter decision was left to the domestic sovereign to determine as a matter of its domestic law through the construction of rules addressed to the factual circumstances of the type of case before it—always bearing in mind the original and overarching goals of comity: to do justice in individual cases and to foster the effective flow of international commerce.

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[36] Lorenzen, *supra* note 7, at 410.

[37] *Id.* at 417.

[38] *Id.* at 405.

3.1.2. *Principles of prescriptive comity in practice: the development of domestic conflicts of laws jurisprudence by common law courts in the eighteenth and nineteenth centuries*

Although a creature of continental Europe originally, the idea of comity found its greatest acceptance in the common law, particularly during the eighteenth and nineteenth centuries. Through the widespread acceptance (in both England and the United States) of Joseph Story's COMMENTARIES ON THE CONFLICT OF LAWS,[39] as well as a series of influential judgments in England,[40] Huber's prescriptive comity entered the common law as a theoretical explanation for the resolution of conflicts of law questions.[41] Notably, within the common law, comity retained the discretionary character originally given to it by Huber. That is, although the question of extending comity touched upon issues concerning the interaction of sovereign nations—matters typically within the scope of public international law and international obligation—no state could demand the application of comity from another as of right. Thus, although comity in the common law gave rise to purely domestic rules, it nevertheless retained its role as a bridge between public and private international law and as a force for mediating between foreign and domestic law.

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39 STORY, *supra* note 34.

40 *See, e.g.*, Robinson v. Bland, (1760) 96 Eng.Rep. 129, (K.B.) (holding that a contract must be judged by the laws of the kingdom. "[F]oreign laws are to be regarded in England, only where they vary from the general common law: and not where they contradict express prohibitory statutes."). Holman et al. v. Johnson, (1775) 98 Eng. Rep. 1120 (K.B.) (holding that where goods sold were to be delivered in England where they were prohibited, the contract is void, but if they are to be delivered elsewhere, this is not the case).

41 *See* P. E. Nygh, *The Territorial Origin of English Private International Law*, 2 U. TASMANIA L. REV. 28, 40 (1964-67) ("It is notable that Huber was the first foreign author to attract to any great extent the attention of English judges in the latter part of the eighteenth century. However, by that time the basic territorialism of the English choice of law rules had already been established and Huber's writings served only to provide a rational basis for what had been evolved instinctively."); Davies, *supra* note 30, at 49.

3.1.2.1. Common law comity: an international concept used to fashion domestic rules of law

Being distinct from the regime of public international law, once comity entered the common law, the decision whether to extend it in individual cases became a part of the law of the domestic forum. Story in particular emphasized that the decision whether to apply comity to the laws and legal acts of foreign sovereigns was reserved exclusively to the province of the domestic sovereign's laws, e.g., the domestic law of the United States.[42] As Story put it: "[e]very nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions, on which its exercise may be justly demanded."[43] The point was similarly made in England in judgments by Lords Mansfield[44] and Stowell[45]: as a matter of common law, the recognition of the laws and legal acts of foreign sovereigns was granted *not* as a result of any superseding obligation binding upon the Crown, but as a matter of the law of England. Consistent with Huber's original conception, this "local law interpretation"[46] of prescriptive comity carried with it the crucial proviso that comity need never be extended to foreign laws and acts where to do so would be prejudicial to the fundamental policies of the domestic forum.[47]

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[42] STORY, *supra* note 34, § 34.

[43] *Id.* § 33.

[44] *See, e.g.*, Somerset v. Stewart, (1772) 98 Eng. Rep. 499 (K.B.) (holding that slave brought in from where slavery was allowed must be freed because slavery was illegal in England).

[45] Dalrymple v. Dalrymple, (1811) 161 Eng. Rep. 665, 667 (P.) ("Being entertained in an English Court, it must be adjudicated according to English law . . . applicable to such a case."). *See* Caldwell v. Vanvlissengen, (1851) 68 Eng. Rep. 571, 575 (Ch.) (summarizing Story's view: a judge applies foreign law, not because it is enacted by a foreign legislator, but because his own law required the particular question to be adjudicated according to the foreign law).

[46] Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law*, 76 AM. J. INT'L L. 280, 283 (1982).

[47] *See, e.g., Holman*, 98 Eng. Rep. at 1122 (quoting Huber, "[i]n England, tea, which has not paid duty, is prohibited; where it is not prohibited . . . and an action is brought for the price of it in England, the buyer shall be condemned to pay the price; because the contract was good and valid"); STORY, *supra* note 34, § 36.

3.1.2.2. Common law comity: the exclusive province of the judiciary

Having accepted prescriptive comity as a jurisprudential explanation for the domestic sovereign's discretionary recognition of foreign laws, common law jurists next faced the question of which department of the domestic government should exercise the discretion afforded to the sovereign by comity. In both England and the United States the answer, emphatically, was the judiciary. As Story concluded from his review of the case law in his COMMENTARIES ON THE CONFLICT OF LAWS:

> In England and America the courts of justice have hitherto exercised the same authority in the most ample manner; and the legislatures have in no instance (it is believed) in either country interfered to provide any positive regulations. The common law of both countries has been expanded to meet the exigencies of the times, as they have arisen . . . .[48]

The U.S. Supreme Court endorsed this conclusion in 1895 in *Hilton v. Guyot*[49] and added its own gloss to the question of which department of the U.S. government had the power to determine when comity should be granted:

> The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when . . . there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them.[50]

Thus, from its earliest acceptance into the common law of England and the United States, the decision on whether to extend comity in individual cases was seen as a discretion appropriately vested in the courts, to be exercised by them as a matter of their inherent judicial power. Moreover, that discretion was independent of the then-prevailing distinctions between law and equity. Its existence and exercise was not dependent upon the nature of the

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[48] STORY, *supra* note 34, § 24.

[49] Hilton v. Guyot, 159 U.S. 113, 164 (1895) (discussing Story's COMMENTARIES ON THE CONFLICT OF LAWS).

[50] *Id.* at 163.

court in which the domestic matter was brought, nor the nature of the relief sought; in both law and equity, it applied.

3.1.2.3. Common law comity: crafting domestic rules that achieve three overriding goals

So how then should the domestic sovereign's courts determine when to extend comity and apply foreign law in individual cases? As it had been for Huber, so it was for Story: comity could explain why the domestic sovereign was able to give effect to a foreign sovereign's acts within its own territories, but comity did not provide specific rules to say when foreign law should be applied in individual cases. As Story put it in his COMMENTARIES: "[t]he doctrine of Huberus would seem, therefore, to stand upon just principles . . . [but] from its generality, it leaves behind many grave questions as to its application . . . ."[51] It was in answering those questions that the well-known and well-established rules of conflicts of law developed.[52]

Reviewing the writings of Huber and Story, as well as the early conflicts of laws decisions, reveals three overriding goals that must be accomplished by any comity-based, domestic rule: (i) the overarching requirement that justice be done in individual cases; (ii) the domestic forum's need to vindicate its own fundamental values; and (iii) the practical desirability of making decisions which would "further the development of an effectively functioning international system."[53] Notably, the first reason is the primary reason. Comity is employed primarily to do justice in individual cases by facilitating the application of the law most appropriate to the parties' dispute, even if it happens to be foreign.

Yet critics frequently overlook this aspect of comity, asserting erroneously that comity is "designed merely to promote friendly legal relations between sovereigns and not to protect litigants'

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[51] STORY, *supra* note 34, § 38.

[52] The basis for the decision of domestic courts to apply foreign law continues to be a contention issue for academic commentators. For one of the best reviews of the issues raised see Friedrich K. Juenger, *General Course on Private International Law*, 193 REC. DES COURS 131, 167 (1983), in which Juenger concludes by noting that the question of why domestic courts apply foreign law is still very much open to satisfactory answer, with comity, public international law, vested rights, and interest analysis all vying for preeminent position.

[53] Maier, *supra* note 46, at 283.

rights and interests."[54] Such characterizations confuse the goals of comity with the role it plays as a jurisprudential theory designed to preserve territorial sovereignty. Yes, indeed, the early common law recognized that the extension of comity would promote the development of international commerce through the recognition of rights and obligations derived from foreign law, but the courts applied comity with the primary aim of providing justice in individual cases.

In *Bank of Augusta v. Earle*, for example, the U.S. Supreme Court in 1839 specifically justified the application of comity on the grounds that "it contributes so largely to promote justice between individuals."[55] Likewise, Story summed up the goals of extending comity by observing that:

> The true foundation on which the administration of international law must rest, is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.[56]

Thus, even more important than the conflicts of law rules themselves are the basic contours of comity as it developed in the eighteenth and nineteen centuries—namely, its nature as a domestic rule, the fact that it is a form of discretion to be exercised exclusively by the judiciary, and the three basic goals that must be accomplished by any particular domestic rule crafted by common law courts. As demonstrated in the next section, all of these features were picked up on by the common law, and indeed expanded upon, when common law courts began to consider the question of whether domestic courts could or should enforce judgments already rendered by *foreign* courts.

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[54] James Paul George & Fred C. Pederson, *Conflict of Law*, 41 SW. L.J. 383, 409 (1987).

[55] Bank of Augusta v. Earle, 38 U.S. 519, 520 (1839).

[56] STORY, *supra* note 34, § 35. Story's use of the term "international law" should not be mistaken as a reference to *public* international law. The term "international law" was often used by early writers to refer to matters of *private* international law. *See* Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 212-14 (1972) (discussing meaning and development of the terms "international law" and "private international law").

3.2. *Principles of Adjudicatory Comity as the Basis for Limiting the Exercise of Domestic Court Jurisdiction: The Enforcement of Foreign Judgments*

In the nineteenth century, the common law extended comity-based discretion to a new arena: adjudicatory comity. Specifically, the domestic sovereign now recognized not only foreign *legislative* acts, but foreign *judicial* acts as well. As discussed in Section 3.2.1, below, the U.S. Supreme Court solidified the transition in the United States in the landmark case of *Hilton v. Guyot*.[57] Moreover, as discussed in Section 3.2.2, below, *Hilton v. Guyot* also added a new gloss to the ideal of comity that would thereafter be carried forward in the American common law.

3.2.1. *The Common Law Landmark:* Hilton v. Guyot

The first obvious application of adjudicatory comity in the courts of the United States came within the field of the enforcement of foreign judgments. In essence, the threshold question to be addressed was why a U.S. court would recognize the judicial act of another sovereign in its courts (i.e., a foreign judgment), or, put somewhat differently, why a U.S. court would tell a litigant properly before its courts: "No. Even though we have jurisdiction over the subject matter and parties at issue in this case, you may not litigate the merits of this matter here because it has been adjudicated already in another country." The Supreme Court answered these questions in *Hilton v. Guyot*.

In *Hilton*, the plaintiff sought enforcement in the United States of the judgment of a French court. There, the Supreme Court looked to the concept of comity to justify the exercise of judicial discretion to *decline* jurisdiction over the merits of the case, for the purpose of deferring to the prior-adjudication of a truly, foreign court. In invoking principles of comity to support its decision, the Supreme Court sought to define the contours of the term. In the oft-quoted words of Justice Gray:

> The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what

[57] Hilton v. Guyot, 159 U.S. 113 (1895).

> our greatest jurists have been content to call "the comity of nations." Although the phrase has often been criticised, no satisfactory substitute has been suggested. "Comity," in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[58]

Using this definition of comity, the Supreme Court then went on to develop a general common law rule governing when U.S. federal courts should enforce foreign judgments:

> Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of a party that the judgment was erroneous in law or in fact.[59]

3.2.1.1. *The misplaced criticism of* Hilton's *reliance on comity*

Justice Gray's definition of comity has been the subject of a host of academic criticism in both England and the United States.[60] Much of the academic criticism of Justice Gray's attempted definition, and of definitions of comity in general, has been directed at the difficulty of defining comity with sufficient specificity so as to

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[58] *Id.* at 163–64.

[59] *Id.* at 202–03.

[60] *See, e.g.*, Paul, *supra* note 33, at 9–11 (discussing criticism of Justice Gray's definition of comity in the United States).

indicate how its principles might apply in specific cases.[61] As an early continental critic bluntly put it, "one cannot even approximate to a correct decision the simplest case of private international law upon this principle."[62] Others have described comity as "a phrase, which is grating to the ear, when it proceeds from a court of justice"[63] or noted that it as been "employed in a meaningless or misleading."[64] Nevertheless, even in the face of such criticism, the definition of comity offered in *Hilton* is far and away the most cited language on comity in all of American law.[65]

Leaving aside a margin for rhetorical flourish in the phrasing of some of these critiques, these criticisms of comity demand too much. Like other terms in the law, "comity," be it prescriptive or adjudicatory, stands as a short-hand term to denote a collection of identifiable interests and values that must be balanced in given cases and from which rules of law develop.[66] That the principles encompassed by the term "comity" do not present themselves on their face as three-prong tests with shifting burdens of proof,[67]

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[61] For a somewhat premature obituary of comity, see Rodolfo De Nova, *The First American Book on Conflict of Laws*, 8 AM. J. LEGAL HIST. 136, 143 (1964) ("[T]he term has by now all but gone out of use in conflicts parlance and this is not to be regretted. Legal historians may have it all for themselves . . . .").

[62] W. SCHAFFNER, ENTWICKELUNG DES INTERNATIONALEN PRIVATRECHTS § 30 (1841), *quoted in* FRIEDRICH CARL VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS 76 (William Gutherie, trans., 2d ed. 1880).

[63] LIVERMORE, *supra* note 7, at 16.

[64] NORTH & FAWCETT, *supra* note 23, at 5.

[65] *Hilton*'s influence extends beyond the United States. Justice Gray's definition of comity has been adopted by the Canadian Supreme Court. *See* Amchem Prods. Inc. v. Workers' Comp. Bd., [1993] 102 D.L.R. (4th) 96, 105 (Can.) (quoting Justice Gray's definition of comity, as quoted in *Morguard Invs. Ltd. v. De Savoye*, [1990] 76 D.L.R. (4th) 256, 269 (Can.)).

[66] *See* Laker Airways. Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984) ("Since comity varies according to the factual circumstances surrounding each claim for its recognition, the absolute boundaries of the duties it imposes are inherently uncertain."); *see also* STORY, *supra* note 34, § 36 ("[T]he phrase, 'comity of nations,' . . . is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another."); *cf.* Saul v. His Creditors, 5 Mart. (n.s.) 569, 595-96 (La. 1827) ("[C]omity is, and ever must be, uncertain . . . it must necessarily depend on a variety of circumstances, which cannot be reduced within any certain rule.").

[67] *See* Davies, *supra* note 30, at 58 ("The doctrine of comity, at most, only provides a theoretical foundation upon which a system of Conflict of Laws may be built."); Maier, *supra* note 46, at 281 ("[E]mphasis on the voluntary nature of the doctrine has led to its use to describe an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith."); Steven R.

however, hardly seems a reasonable criticism of the doctrine when the same "deficiency" may be claimed for principles such as "public policy," "equity,"[68] and "due process," which are basic to Anglo-American law.[69]

It is the function of the courts to take such broad principles and fashion rules of law from them that may be applied in future cases. Comity is no different. "Rules of comity are a portion of the law that they enforce. Precedents mark the line that they should follow."[70] If the criticism of comity is really that invocations of comity can serve as a justification for ad hoc judicial interest balancing, then it seems that the problem is not so much comity, as it is the tendency of courts to substitute such exercises of discretion for meaningful legal rules.[71]

Perhaps more important, while much contemporary attention and criticism of comity has focused on Justice Gray's definition of comity, *Hilton* is actually a rather bad example for comity's critics. In *Hilton*, the Court did in fact develop very specific and manageable rules for the recognition of foreign judgments in the United States, rooted explicitly in its understanding of the interests addressed by the principles of comity. In so doing, the Court fashioned a legal framework for the recognition of foreign judgments that differs very little from the rules generally applicable in the United States today, more than 100 years after the original deci-

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Swanson, *The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions*, 30 GEO. WASH. J. INT'L L. & ECON. 1, 4 (1996) ("Comity is not a rule; rather it is a principle or policy that supports court-applied rules.").

[68] For an interesting discussion of the similarity between the definitions of equity and the definitions of comity, see Herbert Barry, *Comity*, 12 VA. L. REV. 353, 354 (1926).

[69] Indeed, although continental writers have been among the harshest critics of comity, see Lorenzen, *supra* note 7, at 396–98, such broad, basic principles are fundamental to civil law systems as well. *See* Paul, *supra* note 33, at 32–34 (discussing comity and the similar concept of *ordre public* in civil law systems).

[70] Russian Socialist Federated Soviet Republic v. Cibrario, 139 N.E. 259, 260 (N.Y. 1923).

[71] Comity's unpredictable side emerges when courts fail to use its principles to construct rules of meaningful specificity. Comity has been used to justify schemes of ad hoc interest balancing that leave parties and lowers courts with bewilderingly little guidance. *See, e.g.*, Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, S.D. Iowa, 482 U.S. 522, 548 (1987) (Blackmun, J., dissenting) (criticizing "the Court's case-by-case inquiry for determining whether to use Convention procedures and its failure to provide lower courts with any meaningful guidance for carrying out that inquiry").

sion.[72] In short, the use of comity to justify a domestic court's *decline* of jurisdiction has worked well in practice.

Moreover, it should come as no surprise that the common law used Huber's comity to justify the recognition of both foreign legislative acts *and* foreign judicial acts. *First*, Huber's comity addressed the relationship between domestic and international law and between domestic and foreign legal systems at a high level of generality. In so doing, Huber's comity raised practical questions about the manner in which justice should be rendered in the domestic sovereign's *courts*—the place where these relationships and systems would most often to clash. As such, the concept of comity, developed by Huber and advanced by Story into the common law, carried with it another aspect of application that was not strictly concerned with prescribing the reach of the domestic sovereign's laws, but instead with prescribing the jurisdiction of the domestic sovereign's courts: adjudicatory comity.

Second, although frequently overlooked by scholars of comity, in his *De Conflictu Legum Diversarum in Diversis Imperiis*, Huber specifically anticipated the development of an adjudicatory form of comity by expanding his study to include the issue of foreign judgment enforcement and the application of res judicata. As to both subjects, Huber posited that the general principles that he had set forth, including the sovereign's exercise of comity, could also provide an explanation for why the courts of one country would generally defer to the prior adjudication of a matter in the courts of another, except, of course, where such recognition conflicted with the domestic forum's own public policy.[73]

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[72] *See* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 941–42 (3d ed. 1996) (noting that some twenty-two states have adopted some form of the Uniform Foreign Money Judgments Recognition Act (UFMJRA) for the enforcement of foreign judgments, and that the UFMJRA is based closely on *Hilton*). *Compare* Hilton v. Guyot, 159 U.S. 113, 202–03 (1895) (giving deference to foreign judgments "where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction") *with* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 92, 98 (1971) (stating that valid judgments rendered in foreign nations after a fair trial by a competent court will be recognized in the United States).

[73] Lorenzen, *supra* note 7, at 376, 378.

3.2.2. Hilton's *additional gloss on the American understanding of comity: the comity of the courts*

In addition to establishing common law rules for the enforcement of foreign judgments in the United States, the *Hilton* court also developed a new principle in the common law conception of comity. Specifically, the Court *limited* the inquiry that a domestic court could undertake into the procedures of the foreign court. Indeed, the *Hilton* Court expressly rejected the suggestion that it should undertake a comparison of the systems of civil procedure in the United States and France and find the French judgment unenforceable because the procedures of the civil law lacked "safeguards which are by [U.S.] law considered essential."[74] Instead, the Court held that "we are not prepared to hold that the fact that the procedure . . . differed from that of our own courts is, of itself, a sufficient ground for impeaching the foreign judgment."[75]

This aspect of the *Hilton* decision draws a distinction between "adjudicatory comity" and a separate concept known as the "comity of the courts." "Adjudicatory comity" is a set of principles that justify deference by a domestic court to the judgments of a foreign court. In contrast, the "comity of the courts" is a tool of analysis used by the domestic forum's courts in determining whether to extend adjudicatory comity in the case at bar. Thus, when Justice Gray wrote that "'comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other,"[76] the comity that he was discussing was adjudicatory comity (i.e., the principle justifying a domestic court's unilateral decision to decline or limit its jurisdiction in favor of a foreign court, where to do so would be in the interests of justice and would not contravene the domestic forum's public policy). However, when Justice Gray admonished against comparing French procedures with U.S. procedures in the Court's inquiry into whether the French procedures adequately assured a just result in the case before it, he was referring to comity in a different sense; he was referring to the "comity of the courts." This "comity of the

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[74] *Hilton*, 159 U.S. at 205. In particular, the defendants had complained that one of the plaintiffs in France had been permitted to testify while not under oath and had not been subject to cross-examination, and that certain documents had been admitted into evidence which would have been excluded under U.S. law. *Id.*

[75] *Id.*

[76] *Id.* at 163–64.

courts" is manifestly different from the adjudicatory comity which animates the domestic court's deference, although it does play an important role in determining how the domestic sovereign's courts will exercise adjudicatory comity when called upon to do so.[77]

As the classical conception of comity by Huber and Story makes clear, the domestic sovereign's exercise of comity always depends upon the sovereign's satisfaction that deference to the foreign sovereign will not work an injustice or be against the domestic forum's fundamental public policy. Unlike Justice Gray in *Hilton*, however, neither Huber nor Story posited any restraints upon the domestic sovereign's inquiry in this regard. There was no sense in either man's writings that the domestic sovereign should be circumspect in its inquiry into the nature of the foreign law or whether that foreign law would be unjust or offend the values of the domestic forum.

However, as the common law transitioned from prescriptive comity to adjudicatory comity, it incorporated the "comity of the courts" in its application of adjudicatory comity. Thus, in *Hilton*, Justice Gray would not lightly countenance the allegations that French procedure had been inadequate to assure a just result and,

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[77] The comity of the courts has become entrenched as a principle of judicial restraint in many contexts in U.S. and English law. *See, e.g.*, First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 626–27 (1983) (holding that separate juridical status of foreign state-owned entities will be presumed on comity grounds in cases involving alleged liability of such entities for acts of their governments); China Trade and Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 35 (2d Cir. 1987) ("The equitable factors relied upon by the district court in granting the anti-suit injunction are not sufficient to overcome the restraint and caution required by international comity."); Panama Processes, S.A. v. Cities Serv. Co., 796 P.2d 276, 286 (Okla. 1990) (refusing to compare Brazilian and U.S. procedures); *see also* Refco Inc. v. E. Trading Co., [1999] 1 Lloyd's Rep. 159, 159 (A.C..) (deciding on comity grounds that *Mareva* injunctions should not be issued where a similar order has been applied for and refused by the foreign court); In re State of Norway's Application (No. 2), [1988] 3 W.L.R. 603, 628 (A.C..), *aff'd in part*, [1990] 1 A.C. 723 (H.L.) (using comity to form the basis for the English rule treating a foreign court's Letters of Request as proper and answerable unless the opposing party can point to a clear conclusion that the request cannot be properly given effect); Mackender v. Feldia A.G., [1966] 2 Q.B. 590, 599 (A.C..) (using comity to treat applications for leave to serve process out of England); Société Nationale Industrielle Aerospatiale v. Lee Kui Jak, [1987] 1 A.C. 871, 881 (P.C.) (appeal taken from C.A.) (relying on principles of comity to consider whether an injunction should be granted to restrain a plaintiff beginning or pursuing an action in another jurisdiction). *See generally* DICEY AND MORRIS ON THE CONFLICT OF LAWS 6 (Lawrence Collins et al., eds., 13th ed. 2000) (noting comity's role "as a tool for applying or re-shaping the rules of the conflict of laws").

indeed, applied a presumption that the French judicial system was capable of adequately administering justice. Likewise, in cases of *forum non conveniens*, to which we will turn next, U.S. courts have repeatedly emphasized that when considering the adequacy of a foreign forum, no foreign forum will be declared inadequate merely because its justice system differs from that of the United States.[78] It is important to keep the concepts of adjudicatory comity and the comity of the courts distinct. On the one hand, adjudicatory comity signifies the foundation for the domestic court's exercise of discretion to determine whether it should decline or limit its exercise of jurisdiction in favor of a foreign court. On the other hand, the comity of the courts is simply a rule of the domestic forum that guides how that discretion should be exercised.

3.3. *Adjudicatory Comity as the Basis for the Common Law Doctrine of* Forum Non Conveniens

3.3.1. *The original development of the doctrine of* forum non conveniens *in Scotland: recognizable roots in adjudicatory comity*

Having relied upon adjudicatory comity to justify the enforcement of foreign judgments, the common law next extended the principles underlying that view to the related idea that, in certain

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[78] *See infra* notes 113-16 and accompanying text. Even though the *Hilton* court determined that there were no grounds for impugning the integrity of the French judgment under the rules for enforcement it had set forth, the Court nevertheless decided that enforcement should be withheld on the grounds that comity necessitated reciprocity in the treatment of U.S. judgments by French courts, which it found was lacking in the case at hand. In this respect, *Hilton* injected a very political sense of comity, whereby the courts would be called upon to exercise political and diplomatic judgment in deciding whether adjudicatory comity was warranted. This was not faithful to the comity of Huber and Story that had entered the common law. Moreover, as Chief Justice Fuller pointed out in dissent, even if it might be appropriate for the domestic sovereign generally to consider reciprocity in its relations with other sovereigns, the judiciary was the wrong government institution to make such a political decision. *See Hilton*, 159 U.S. at 234 ("[I]t is for the government, and not for its courts, to adopt the principle of retorsion . . . .") (Fuller C.J., dissenting). In any event, this misconception of adjudicatory comity as a political tool was short-lived, and today there is no suggestion that comity in the recognition of foreign judgments depends upon reciprocity. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 92, 98 (1971) (requiring no reciprocity in order to recognize foreign nation judgments as valid). *See generally* BORN, *supra* note 72, at 938–42 (noting contemporary approaches to enforceability of foreign judgments in the United States).

cases, a domestic court ought to go a step further and decline to exercise jurisdiction where the foreign action was not yet pending. As has been well-traced in academic writings[79] and judicial opinions,[80] the doctrine of *forum non conveniens*, as it came to be known, originated in the courts of Scotland in the 1800s.[81] Reviewing those early Scottish cases, it is clear that, in deferring the exercise of their jurisdiction to the courts of a foreign sovereign, the Scottish courts were *not* exercising a discretion based upon any particular statutory authority, but rather upon principles of adjudicatory comity.[82]

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[79] *See, e.g.*, Edward L. Barrett, Jr., *The Doctrine of* Forum Non Conveniens, 35 CAL. L. REV. 380, 386–87 (1947) (noting that the term, *forum non conveniens*, appeared to have been first used in the Scottish courts, where use of the doctrine was a well-established rule); Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 2 (1929) (citing several Scottish cases and treatises as leading exposition on the doctrine of *forum non conveniens*); Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 909–10 (1947) (stating that the term, *forum non conveniens*, was first used in Scotland in the latter part of the nineteenth century, and that the scope of the doctrine itself was the subject of much disagreement among the Scottish courts); Joseph Dainow, *The Inappropriate Forum*, 29 ILL. L. REV. 867, 870 (1935) (noting that the "doctrine and plea of *forum non conveniens*" has a long tradition of practice in Scotland).

[80] *See, e.g.*, Am. Dredging Co. v. Miller, 510 U.S. 443, 449 (1994) ("Although the origins of the doctrine in Anglo-American law are murky, most authorities agree that *forum non conveniens* has its earliest expression . . . in Scottish estate cases.").

[81] *See generally* DAVID MAXWELL, THE PRACTICE OF THE COURT OF SESSION 115–16 (1980) (reviewing the Scottish doctrine of *forum non conveniens*). In some early cases in the United States, the courts *did* claim discretion to decline jurisdiction in cases more appropriately heard elsewhere—usually in admiralty cases involving foreign seamen—but those cases are sporadic and their reasoning sparse, and they cannot be fairly read to have marked a general acceptance of *forum non conveniens* by U.S. common law at such an early stage. *See, e.g.*, Willendson v. Forsoket, 29 F. Cas. 1283, 1284 (D. Pa. 1801) (declining jurisdiction of an admiralty case involving foreign seamen except in special cases, such as to protect seamen against "oppression and injustice"); Gardner v. Thomas, 14 Johns. 134, 137 (N.Y. Sup. Ct. 1817) (declining on "principles of policy" jurisdiction of a tort case where the tort was committed on the high seas aboard a foreign vessel and where both parties were foreigners); *cf.* Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 796 n.43 (1984) (arguing, erroneously in my view, that courts in these cases "absolutely precluded" the exercise of discretion with respect to matters of jurisdiction).

[82] *See* Sim v. Robinow, [1892] 9 S.C. 665, 669 (H.L.) (reviewing Scottish cases and finding that "[i]n all these cases there was one indispensable element present when the Court gave effect to the plea of *forum non conveniens*, namely, that the Court was satisfied that there was another Court in which the action ought to be tried as being more convenient for all the parties, and more suitable for the ends of justice"); Williamson v. The N-E. Ry. Co., [1884] 11 S.C. 596, 598 (Sess.) (stating that although jurisdiction of the case was "undeniable," the "question of *forum*

Thus, even though a plaintiff may have complied with the rules of venue and jurisdiction, the Scottish courts nevertheless held the power to decline jurisdiction in cases where the Court found that the interests of justice required the matter to be heard in the courts of another nation.

As Lord Sumner put it in *La Société du Gaz de Paris v. Société Anonyme de Navigation "Les Armateurs Français"*: "[t]he object in the words *non conveniens* . . . is to find that *forum* which is the more suitable for the ends of justice and which is preferable because pursuit of litigation in that *forum* is more likely to secure the ends of justice."[83] Addressing the conflict between the court's duty to entertain an action over which it has jurisdiction—reflected in the phrase, "*judex tenetur impertiri judicium*"[84]—and its discretion to exercise adjudicatory comity towards a foreign forum under the doctrine of *forum non conveniens*, Lord Sumner observed that "the Court's duty to entertain the suit *can be no higher* than its duty to listen, then, if the circumstances warrant it, to sustain the plea [of *forum non conveniens*]."[85]

In essence, through the doctrine of *forum non conveniens*, the Scottish courts were endorsing the view that there might be occasions in which a domestic court could properly tell litigants before it, "No, you may not litigate this matter here, because even though jurisdiction and venue properly lie in this court, in the interests of justice, this matter is more appropriately heard in the courts of another nation to which we will defer." This, of course, is the essence of adjudicatory comity.

3.3.2. *Early U.S. practice: the common law development of jurisdictional discretion in cases in admiralty*

The doctrine of *forum non conveniens* entered U.S. common law following the Scottish model. In the United States, the doctrine

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conveniens" must be additionally considered); Clements v. Macaulay, [1866] 4 S.C. 583, 592 n.* (Sess.) (noting that the plea of *forum non conveniens* raises the question of whether, "for the interests of the parties, and for the interests of justice, the cause may more suitably be tried elsewhere"); Longworth v. Hope, [1865] 3 S.C. 1049, 1053 n.* (Sess.) (noting that the plea of *forum non competens* is appropriate in "cases in which the Court may consider it more proper for the ends of justice that the parties should seek their remedy in another forum").

83 [1925] 23 Lloyd's List. Rep. 209, 213 (Sess.).

84 *Id.* at 212.

85 *Id.* at 213 (emphasis added).

was accepted first largely in the courts of admiralty and some state courts, but not in the federal courts.[86] The reason for this peculiar path of development lay in the unique nature of the admiralty courts and the limitations on the assertion of jurisdiction in non-admiralty courts prior to the Supreme Court's decision in 1945 in *International Shoe Co. v. Washington*.[87]

The discretion in the courts of admiralty to extend adjudicatory comity to the courts of another sovereign (whether or not given the formal label "*forum non conveniens*") was a natural fit almost from the founding of those courts in the United States.[88] The admiralty courts possessed a broad jurisdiction that was not confined by the territorial requirements placed upon the courts at law and equity. Additionally, the admiralty courts were unencumbered by any limiting venue provisions.[89] Adjudicatory comity, therefore, through the development of the doctrine of *forum non conveniens*, served as a ready tool for domestic admiralty courts to limit the potential reach of their jurisdiction and ensure that justice would be done in individual cases.[90] Notably, the reasoning of the admiralty

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[86] American Dredging Co. v. Miller, 510 U.S. 443, 449–50 (1994) (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504–05, 505 n.4 (1947)). *See also* Alexander M. Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty: An Object Lesson in Uncontrolled Discretion*, 35 CORNELL L. Q. 12, 16–19, 26 (1949) (discussing *Gilbert*).

[87] Int'l Shoe Co. v. Wash., 326 U.S. 310 (1945). *See* Stein, *supra* note 81, at 803–04 (noting that the "minimum contacts test" in *International Shoe* expanded plaintiffs' choices of forum selection because personal jurisdiction was no longer dependent upon the "physical presence of the defendant within the jurisdiction").

[88] *See, e.g.*, Willendson v. Forsoket, 29 F. Cas. 1283, 1284 (D. Pa. 1801) (declining jurisdiction of an admiralty case involving foreign seamen under a "reciprocal policy" of comity, rooted in "justice due from one friendly nation to another"); Gardner v. Thomas, 14 Johns. 134, 137 (N.Y. Sup. Ct. 1817) ("[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.").

[89] *See* Braucher, *supra* note 79, at 919 (discussing the federal courts' development of discretionary power to decline jurisdiction); Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 303–04 (1956) (noting that admiralty courts are unencumbered by venue provisions that would limit the subjection of non-citizens to domestic jurisdiction).

[90] *Cf.* Stein, *supra* note 81, at 810 ("The formal jurisdiction of the admiralty courts was intentionally overinclusive to assure that seamen frequently working abroad were provided with an adequate remedy. The forum non conveniens doctrine was the only tool available to limit the jurisdiction of the courts and was

courts made clear that the decline of jurisdiction was a discretionary act of adjudicatory comity given effect through the application of the domestic sovereign's own law, and *not* as the result of any international obligation.[91]

3.3.3. Forum non conveniens *comes of age in the U.S. federal courts: the recognition of common law jurisdictional discretion in* in personam *actions*

3.3.3.1. *The situation prior to* International Shoe v. Washington

Prior to 1945, the expansive notions of jurisdiction found in the courts of admiralty were not present in the courts of law and equity. In 1877, in *Pennoyer v. Neff*,[92] the Supreme Court strictly linked the constitutional exercise of jurisdiction by a court to the geographic limits of its sovereign territory.[93] While a court possessed jurisdiction over any persons and property within those boundaries, it was otherwise without jurisdiction.[94] As Allan Stein has pointed out, this linking of jurisdiction and territoriality "created a system in which there was little or no concurrent jurisdiction between states"[95]—let alone between the United States and foreign sovereigns. As a result, the conditions that led to the steady development of *forum non conveniens* in the admiralty courts were not present in the courts of law and equity.[96] With the Court's land-

carefully molded to insure that there would be some remedy in every case while maintaining the comity of nations whose ships and subjects might be involved.").

91 *See, e.g.*, Canada Malting Co. v. Paterson Steamships, Ltd., 285 U.S. 413, 421 (1932) (stating that admiralty courts had an "unqualified discretion" to decline jurisdiction in suits between foreigners "in the interests of justice"). As a matter of international law, because jurisdiction and venue properly lay in the U.S. admiralty courts there is no international legal obligation on the U.S. court to decline to hear the case before it in deference to the courts of another sovereign. Conversely, because no obligation to defer lay upon the admiralty courts of the domestic sovereign, no deference may be demanded as of right by the courts of another. Hence, the only condition under which deference would be granted was as a result of the application of the domestic forum's own law.

92 Pennoyer v. Neff, 95 U.S. 714 (1877).

93 *Id.* at 722.

94 *Id.*

95 Stein, *supra* note 81, at 802.

96 *Id.*

mark decision in *International Shoe Co. v. Washington*,[97] however, that changed.

International Shoe rewrote the constitutional rules for the assertion of personal jurisdiction in U.S. courts. Out went the strict territorial theory of jurisdiction set forth in *Pennoyer* and in came the idea of "minimum contacts."[98] No longer was personal jurisdiction simply an expression of the territorial limits of the sovereign.[99] Now the assertion of personal jurisdiction encompassed a complex balance of the sovereign's interest in the conduct at issue, the relative convenience of holding trial in the jurisdiction, the foreseeability of trial within the jurisdiction, and the notion that if a defendant had availed him- or herself of the forum's laws the forum's assertion of jurisdiction was equitable.[100] Almost overnight, the jurisdictional reach of the U.S. courts, state and federal, had drastically expanded. With it came the problem of federal and truly international parallel proceedings.

3.3.3.2. *Adjudicatory Comity at the Roots of the Adoption of Forum Non Conveniens in the Federal Courts*

Confronted with this newly expansive notion of jurisdiction, the federal courts suddenly faced cases in which, despite the fact that jurisdiction was proper, the interests of justice compelled the conclusion that the case would more appropriately be heard in a foreign forum. But how to rationalize the existence of discretion to decline the exercise of jurisdiction admittedly possessed? Enter adjudicatory comity once again—this time expressed in the terms of a doctrine of *forum non conveniens* applicable in the courts of law and equity—to provide a basis for a domestic court to defer jurisdic-

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[97] 326 U.S. 310 (1945).

[98] *International Shoe*, 326 U.S. at 316.

[99] Nevertheless, notwithstanding the "minimum contacts" test set forth in *International Shoe*, territoriality as a basis for personal jurisdiction does live on through the continued acceptance of so-called "tag" jurisdiction, described by Justice Scalia as having a particular "pedigree" in U.S. jurisdictional jurisprudence. Burnham v. Cal., 495 U.S. 604, 621 (1990) (opinion of Scalia, J.); *See also* James Weinstein, *The Early American Origins of Territoriality in Judicial Jurisdiction*, 37 ST. LOUIS U. L.J. 1, 53–54 (1992) (discussing Scalia's analysis in *Burnham*).

[100] *See* Stein, *supra* note 81, at 803 (outlining the balancing test).

tion in deference to the courts of another sovereign, when the interests of justice so demanded.[101]

When the Supreme Court recognized the doctrine of *forum non conveniens* in the federal courts in 1947[102]—only two years after *International Shoe*—it did not make any direct references to "comity" in its decisions.[103] Nevertheless, when one reads the court's decisions in those cases, it is clear that adjudicatory comity serves as the founding principle for the court's acceptance of the doctrine. In *Gilbert v. Gulf Oil Co.*, for example, the Court endorsed the principle that, notwithstanding the Congressional grant of jurisdiction and venue to the lower federal courts, a federal district court nevertheless had the power—as a matter of common law—to dismiss an ordinary action for damages on the ground that trial in the courts of another jurisdiction would be more appropriate in the interests of justice. This was true even though the plaintiff had fully complied with the rules of venue and jurisdiction in the domestic forum.[104]

Quoting Justice Brandeis' opinion in *Canada Malting Co. v. Patterson Steamships*, an admiralty case which had involved the application of *forum non conveniens* to the courts of a foreign nation, the Court in *Gilbert* observed:

> This Court, in one form of words or another, has repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances. As formulated by Mr. Justice Brandeis the rule is:
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> > Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true;

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101 *Cf.* Comment, *Forum Non Conveniens, A New Federal Doctrine*, 56 YALE L.J. 1234, 1234 (1947) (arguing that the expansion of constitutional assertions of personal jurisdiction led to the development of the *forum non conveniens* doctrine).

102 Prior to recognizing the application of the doctrine in actions at law in the federal courts in *Gilbert* and *Koster*, the Court had considered the nature of the doctrine in a number of earlier cases arising in different contexts. *See, e.g.*, Canada Malting Co. v. Paterson Steamships, 285 U.S. 413 (1932) (admiralty); Broderick v. Rosner, 294 U.S. 629 (1935) (state court proceedings).

103 Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Koster v. (Am.) Lumbermens Mutual Cas. Co., 330 U.S. 518 (1947).

104 *Gilbert*, 330 U.S. at 507. The specific questions before the Court were "whether the United States District Court has inherent power to dismiss a suit pursuant to the doctrine of *forum non conveniens* and, if so, whether that power was abused in this case." *Id.* at 502.

> else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts administering other systems of our law. Courts of equity and of law occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents, or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal.[105]

In the view of the Court, then, congressional grants of jurisdiction and venue *were to be read against the backdrop of the common law,* and the common law included an inherent discretion to decline jurisdiction because a particular court was not the most appropriate for trial.[106]

In reaching this conclusion, the Court patently rejected Justice Black's dissenting contention that *as a matter of constitutional law* "'the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.'"[107] Instead, the Court held that "[t]he principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."[108] In essence, the Court in *Gilbert* agreed with Lord Sumner's conclusion in *Societe du Gaz de Paris*—one of the original Scottish cases—that notwithstanding the court's duty to entertain an action,

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[105] *Id.* at 504 (quoting Canada Malting Co. v. Paterson Steamships, Ltd. 285 U.S. 413, 422 (1932)). *Gilbert,* of course, was not an international case. There, the dispute concerned whether the case should be heard in either Virginia or New York. Nevertheless, as shown below, the principles settled by *Gilbert* with respect to the doctrine of *forum non conveniens* have been held by the Court to apply in cases in which the possible alternative forum is the court of a foreign sovereign. *See, e.g.,* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253 (1981) (providing an example where the alternative forum was Scotland).

[106] *See Gilbert,* 330 U.S. at 507 (describing the problem as "a very old one affecting the administration of the courts as well as the rights of the litigants). *See also* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716–717 (1996) (discussing the common law backgrounds of both the federal abstention doctrines and the doctrine of forum non conveniens).

[107] *See Gilbert,* 330 U.S. at 513 (Black, J. dissenting) (quoting Hyde v. Stone, 20 How. 170, 175 (1857)).

[108] *Gilbert,* 330 U.S. at 507.

that duty "can be *no higher* than its duty to listen to, and if circumstances warrant, to sustain the plea [of *forum non conveniens*]."[109]

As in *Hilton*, however, the Supreme Court in *Gilbert* did not end its inquiry with a general recognition of the need for a comity-based discretion. Instead, the Court went on to craft a set of rules designed to address the new class of cases faced by the federal courts. In short, the principles of adjudicatory comity called for different application in *forum non conveniens* cases than they had in foreign enforcement cases. In the case of foreign judgment enforcement, as we have seen, the Court embraced a framework of analysis that reflected a preference for the enforcement of foreign judgments over the exercise of jurisdiction to hear cases anew in the domestic forum. In the main, the Court in *Hilton* determined that justice is better served by extending adjudicatory comity to the judgment of a foreign court, rather than permitting the re-litigation of the merits of the matter in a domestic court through a full exercise of its admitted jurisdiction to do so.

In the *forum non conveniens* situation, however, the Court found a different set of circumstances. In cases involving *forum non conveniens*, no party had yet initiated an action in a foreign forum—let alone a court reducing such action to judgment.[110] Thus, the principle basis for the preferred deference in the foreign judgment enforcement situation is absent. Accordingly, in *Gilbert* the Court adopted the presumption that a plaintiff who has established the domestic court's jurisdiction and venue over the parties and the subject matter of the dispute should rarely have his or her choice of forum disturbed, unless—and here the presumption may be rebutted—upon a balance of identified interests, the domestic court concludes that the interests of justice demand that the action be tried in an adequate, available, alternative forum.[111]

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[109] Societe of Paris du Gaz de Paris v. Societe Anonyme de Navigation "Les Armateurs Francais" [hereinafter *Societe du Gaz de Paris*], [1926] S.C. 13, 21 (H.L. 1925) (opinion of Lord Sumner) (emphasis added).

[110] As to the idea that in principle this need not be so, *see infra* Section 4.3.

[111] *See Gilbert*, 330 U.S. at 508 (listing interests and factors to be used by the court in applying *forum non conveniens*); *see also* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (giving factors which a court may consider in using its discretion to dismiss a case).

3.3.4. American Dredging Company v. Miller: *confirmation of the constitutionality of* forum non conveniens

In 1948, following the decision in *Gilbert*, Congress enacted the federal venue transfer statute—28 U.S.C. § 1404(a)—which supplanted the common law doctrine of *forum non conveniens* in cases where the alternate forum was another federal district court.[112] The doctrine, however, remains applicable in cases in which the more appropriate forum is a foreign court. Indeed, as the law now stands, federal courts will defer *only* to the courts of a foreign nation under the doctrine of *forum non conveniens*.[113]

Significantly, the Supreme Court's most recent *forum non conveniens* case—*American Dredging Co.*[114]—reconfirms not only the continuing applicability of the doctrine as a matter of common law but also its firm constitutionality when applied by the federal courts. The case makes for striking reading. In discussing the jurisprudential pedigree of the doctrine, the Court describes the doctrine as a "federal *common-law* venue rule," allowing a federal district court to "determin[e] which among various competent courts will decide the case."[115] That is, although a U.S. court may possess the power to exercise jurisdiction over a matter brought before it, nevertheless a common law, "self-imposed restraint upon an authority actually possessed"[116] allows the U.S. court to decline to exercise that power in the interests of justice where there is a foreign court capable of exercising jurisdiction over the matter. *American Dredging* thus represents a firm, if unspoken, recognition that the foundations of the doctrine of *forum non conveniens* and the discretion wielded by the courts in its name are rooted in historical principles of common law adjudicatory comity. It also stands for the proposition that the U.S. Constitution permits the federal

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[112] *See* Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955) (discussing Congressional intent when adopting §1404). Under section 1404(a), "[d]istrict courts were given more discretion to transfer . . . than they had to dismiss on grounds of *forum non conveniens*." *Piper Aircraft*, 454 U.S. at 253.

[113] *See, e.g., Piper Aircraft*, 454 U.S. at 253. (providing an example where the alternative forum, Scotland). *See* American Dredging Co. v. Miller, 510 U.S. 443, 449 n. 2 (1994) ("As a consequence [of 28 U.S.C. § 1404(a)], the federal doctrine of *forum non conveniens* has continuing application only in cases in where the alternative forum in abroad.").

[114] 510 U.S. 443 (1994).

[115] *Id.* at 453 (emphasis added).

[116] Cole v. Cunningham, 133 U.S. 107, 113 (1890).

courts to exercise such discretion in deference to a foreign court even where the U.S. action fully complies with the letter of Congress's venue and jurisdictional enactments.

4. THE RECOGNITION OF ADJUDICATORY COMITY AS THE BASIS FOR COMMON LAW DISCRETION TO DECLINE JURISDICTION IN FOREIGN *LIS ALIBI PENDENS* CASES

In the preceding Section, we traced the path of comity as it entered the common law, *first* as a justification for applying foreign legislative acts, and *second* as a justification for discretionary deference in federal court to foreign judicial action, *viz.*, foreign judgments and foreign jurisdiction to adjudicate a case. Viewed as a continuum, the next logical step in the development of the role of adjudicatory comity would be for the federal courts to use its principles to craft a doctrine to address pending, parallel proceedings in foreign courts. As discussed briefly at the outset, however, and in greater detail in Section 5, *infra*, while the federal courts have made some tentative steps in that direction, those steps have not been satisfactory.

The U.S. *state* courts, however, have led the way. Faced with the problem of parallel proceedings, U.S. state courts have embraced common law principles of comity to justify the dismissal or stay of parallel cases before their courts. Moreover, U.S. state courts have used principles of comity to develop practical tests for determining when a stay or dismissal should be issued. In this Section, I trace this development in the state courts.

4.1. *Early Efforts to Address the Problem of Foreign* Lis Alibi Pendens*: The Limited Scope of the Common Law Plea of Abatement*

The common law was initially mixed in its response to the problem of foreign parallel proceedings because of the existence of a common law, affirmative defense known as the "plea of abatement." Under the plea, a party was entitled to a dismissal without prejudice of the action before the court wherever it could show that another action (a) by the same plaintiff against the same defendant (b) for the same cause of action (c) had been brought earlier (d) in a

court of the *same* sovereign.[117] The grant of the plea had nothing to do with adjudicatory comity. Instead, where the technical requirements were met, abatement was available as a matter of right; there was no discretion in the court to deny the plea.[118] Although concerned with parallel proceedings in the *same* jurisdiction, the common law plea also had an impact on parallel proceedings in foreign jurisdictions. Indeed, where the technical requirements of the plea were not met, such as where the parallel proceeding was pending in a *foreign* jurisdiction, abatement was prevented by its very terms. Nor was there thought to be any discretion in the court to grant an abatement in such a situation.[119] As the Supreme Court of Pennsylvania put the rule, in language that would have been acceptable in every state, "[w]hether upon the principle of comity between sister states, or convenience, the pendency of a personal action [in the courts of another sovereign] may *not* be pleaded in abatement."[120] *A fortiori*, the plea was likewise unavailable where the pending suit was filed after the domestic suit,[121] involved different parties,[122] or where the roles of the parties were reversed from the domestic action.[123]

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[117] *See* Sparry's Case, (1591) 77 Eng. Rep. 61, 61–62 (Exch.) (holding that an action pending before the King's Bench would abate a subsequent action brought in the Exchequer).

[118] *See, e.g.*, Walsh v. Durkin, 12 Johns. 99, 102 (N.Y. 1815) (providing an example of case where the court recognized this lack of discretion).

[119] *See, e.g.*, Urlin v. Hudson, (1685) 23 Eng. Rep. 502 (Ch.) (denying abatement where first action was brought in a foreign court).

[120] Irvine v. Lumbermen's Bank, 2 Watts. & Serg. 190, 219–20 (Pa. 1841) (emphasis added). *See, e.g.*, Grider v. Apperson & Co., 32 Ark. 332, 335 (1877); Hatch v. Spofford, 22 Conn. 485, 488 (1853); Chadwick v. Gill, 141 A. 618, 619 (Del. Ch. 1928); Singer v. Scott, 44 Ga. 659, 660-61 (1872); McJilton v. Love, 13 Ill. 486, 494 (1851); Salmon v. Wootton, 39 Ky. 422, 423 (1840); Lindsay v. Larned, 17 Mass. 190, 197 (1821); Goodall v. Marshall, 11 N.H. 88, 99 (1840); Kerr v. Willets, 48 N.J.L. 78, 79 (1886); Bowne v. Joy, 9 Johns. 221 (1812); A.M. Sloan & Co. v. McDowell, 75 N.C. 29, 33 (1876); J.P. Cnatzel & Co. v. Bolton, 14 S.C.L. (3 McCord) 33 (1825); Drake v. Brander, 8 Tex. 351, 357 (1852); *accord*, Insurance Co. v. Brune's Assignee, 96 U.S. 588, 592 (1877); Shaw v. Lyman, 79 F. 2, 4 (C.C.W.D.N.C. 1896); Foster v. Vassall, (1747) 24 Eng. Rep. 1138, 1139–40 (Ch.).

[121] Bussard v. Marshall, 14 U.S. 215, 217 (1816) (Story, J.).

[122] *See, e.g.*, Casey v. Harrison, 13 N.C. 244, 245 (1829) (explaining that the pendency of another suit with a different plaintiff is not cause for abatement).

[123] Certain Logs of Mahogany, 5 F. Cas. 374, 375 (C.C.D. Mass. 1837) (Story, J.) ("[T]he plea of a prior lis pendens applies . . . not to cases, where there are cross suits by a plaintiff in one suit, who is defendant in another."); Wood v. Lake, 13 Wis. 84, 92 (1860) ("[I]t is not sufficient that they be the same persons, but they

Note that in this quote, the Pennsylvania court refers to the problem in terms of its "sister states," and not other nations. The careful reader may thus question the relevance of state common law cases to the question of truly international *lis alibi pendens* cases. But these cases are relevant. *First*, the state courts saw themselves, for purposes of jurisdiction, as separate nation states. At root, their conception of jurisdiction hearkened back to Huber's early maxims that all sovereign power was territorial in nature and that the nature of the sovereign's power could not extend beyond its borders.[124] As the Supreme Court of New Jersey put it in a case in which the prior action was pending just across the Hudson River in a court in New York:

> The true reason is that every country is sovereign and unrestricted in its powers, legislative, judicial and executive, and hence does not acknowledge the right of any other nation to hinder its own sovereign acts and proceedings. If the suit is abated here, it may be that no adequate remedy can be had in the other jurisdiction. We do not know the mode of trial there, the rules of evidence, the statutes pertaining to limitation or usury, or what kind of judgment and satisfaction will be had, or whether if satisfaction can be had, it may not be upon terms inimical to the policy of our laws. Duty to its citizens forbids that a state shall send the suitor out of its own jurisdiction, and constrain him to seek justice elsewhere.[125]

Second, the U.S. Supreme Court declared as early as 1858 that courts of the various states of the Union are to be treated as foreign

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must be the same as *plaintiffs and defendants*; and if their position in this respect be reversed, the plea will be bad.") (emphasis added). Substantively, the same rules applied to actions brought in equity as well as in cases in which the prior action was pending in a federal court. *See, e.g.*, Pierce v. Feagans, 39 F. 587, 588 (C.C.E.D. Mo. 1889); Blake v. Barnes, 12 N.Y.S. 69 (N.Y. Sup. Ct. 1890); *see also* The Kongsli, 252 F. 267, 270 (D. Maine 1918) (explaining that prior filed *in personam* action would not abate later-filed action in admiralty).

[124] *See, e.g.*, Island of Palmas (U.S. v. Neth.) 2 R.I.A.A. 829, 838 ("Territorial sovereignty is, in general, a situation recognised and delimited in space, either by so-called natural frontiers as recognised by international law or by outward signs of delimitation that are undisputed, or else by legal engagements entered into between interested neighbours, such as frontier conventions, or by acts of recognition of States within fixed boundaries.").

[125] Kerr v. Willetts, 2 A. 782, 783 (N.J. 1886).

to one another as the courts of different countries.[126] As Justice Curtis put it while riding circuit:

> Though the constitution and laws of the United States require, that the judgments rendered in one state shall receive full faith and credit in another, yet, in respect to all proceedings prior to judgment, the courts of the different states, acting under different sovereignties, must be considered as so far foreign to each other, that a remedy sought by judicial proceedings under one, cannot be treated as a mere and simple repetition of a remedy sought under another.[127]

In any event, in the face of the strict limitations of the plea of abatement, a number of early courts questioned whether there might not exist some other basis for allowing a domestic court to defer its exercise of jurisdiction in cases of foreign parallel proceedings.[128] Looking for such a basis, some early courts interpreted the Full Faith and Credit Clause of the U.S. Constitution to mean that the courts of the various states should consider themselves as being of the same sovereign, such that the rule of abatement would apply.[129] This argument, however, never commanded broad support within the states[130] and was soon put to rest by the Supreme Court decision referenced above.[131]

Other courts contrived of exceptions to the strict application of the requirements of the plea of abatement by focusing on particular classes of cases, such as where a foreign court in the parallel pro-

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126 *See, e.g.*, Covell v. Heyman, 111 U.S. 176, 182 (1884) (discussing parallel in rem proceedings in state and federal courts); *see also* Ableman v. Booth, 62 U.S. 506, 516 (1858) (discussing the concept in the context of habeas corpus).

127 White v. Whitman, 29 F. Cas. 1029, 1029–1030 (C.C.D.R.I. 1852) (Curtis, J.) (No. 17, 561); *accord* Salmon v. Wootton, 39 Ky. 422, 423 (1840); Seevers v. Clement, 28 Md. 426, 434 (1868) (explaining that states are essentially foreign to each other in respect to their municipal relations).

128 *See* Lynch v. Hartford Fire Ins. Co., 17 F. 627, 628 (C.C.D.N.H. 1883) ("The general rule is that a plea of *lis alibi pendens* is not good when the litigation is in a court of foreign jurisdiction. We may regret this, but it has been repeatedly so held. . . . I am much inclined to think that courts of law will hereafter hold that they may attain the same end through their power of postponing actions and suspending judgments.").

129 *See, e.g.*, Hart v. Granger, 1 Conn. 154, 163 (1814).

130 *See* Hatch v. Spofford, 22 Conn. 485 (1853) (overruling *Hart v. Granger* and describing how states are bound to respect the proceedings in other states).

131 *See, e.g.*, *Covell*, 111 U.S. at 182 (1884) (discussing parallel *in rem* proceedings in state and federal courts).

ceeding already had taken possession of property or issued a writ of attachment.[132] The courts justified these departures on the legal fiction that where jurisdiction over a *res* had been exercised by a foreign court, that exercise of jurisdiction acted physically, or at least metaphysically, to remove the *res* from any possible exercise of jurisdiction by the domestic court. While today we may question the need for such elaborate fictions,[133] the common law generally adopted these exceptions. Nevertheless, the exceptions have not swallowed the rule. The common law has remained to this day unyielding to any attempt to broaden the class of cases that may be dismissed under the plea of abatement any further. In particular, the plea still may not be used with respect to *in personam* foreign *lis alibi pendens* actions.[134]

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[132] Harvey v. Great N. R. Co., 52 N.W. 905, 906 (Minn. 1892) ("The pendency of a prior action by foreign attachment in another jurisdiction, which binds the debt, may always be set up by way of defense to a suit by the defendant in the attachment to recover the same debt. This constitutes an exception to the general rule that *lis pendens* in a foreign court is not a good plea."). *See, e.g.*, Embree v. Hanna, 5 Johns. 101, 102 (N.Y. Sup. Ct. 1809) (explaining that a person who has been compelled to pay a debt once by a jurisdiction, should not be forced to pay the same debt again in another jurisdiction).

[133] Rehnquist, *supra* note 4, at 1106 ("[A]fter the fiction of in rem jurisdiction has been drained of any force in the personal jurisdiction context, one can hardly take seriously a rule that can be explained only by recourse to the in rem-in personam distinction.").

[134] *See, e.g.*, Advanced Bionics Corp. v. Medtronic, Inc., 105 Cal. Rptr. 2d 265, 271 (Cal. Ct. App. 2001) (explaining that a second court's failure to defer to the first, where both have concurrent jurisdiction, is not the type of error that will render future proceedings void); Sauter v. Sauter, 495 A.2d 1116, 1118 (Conn. App. Ct. 1985) (holding that prior action was not a sufficient ground of abatement in a marital dissolution context); McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., 263 A.2d 281, 283 (Del. 1970) (discussing the right of stay of an action in Delaware where a prior action was already pending in Alabama); Farmers Union Coop. Elevator & Shipping Ass'n v. Grain Dealers Mut. Ins. Co., 398 P.2d 571, 572-73 (Kan. 1965) (describing the lack of right to abatement in the context of an elevator explosion policy); Dotson's Adm'r v. Ferrell, 169 S.W.2d 320, 321 (Ky. 1942) (explaining the issue in the context of the construction of a will); Fitch v. Whaples, 220 A.2d 170, 172 (Me. 1966) (explaining the issue in a breach of contract suit); Barker v. Eastman, 82 A. 166, 169 (N.H. 1912) (describing the issue in a case involving two bills of equity involving rights growing out of a will); Am. Home Prods. Corp. v. Adriatic Ins. Co., 668 A.2d 67, 71-72 (N.J. Super. Ct. App. Div. 1995) (involving a suit brought against liability insurers regarding environmental claims); Beneke v. Tucker, 176 P. 183, 185 (Or. 1918) (involving a suit related to the recovering of a note and a mortgage foreclosure); Singer v. Cha, 550 A.2d 791, 793 (Pa. Super. Ct. 1988) (holding that the pendency of a negligence action of a physician in one state did not preclude the patient from bringing an in personam action in another state); Mills v. Howard, 228 S.W.2d 906, 908 (Tex. Civ.

4.2. *A Solution Found: Adjudicatory Comity as the Justification for Common Law, Discretionary Limits on the Exercise of Jurisdiction in Foreign* Lis Alibi Pendens *Cases*

With the requirements for the plea of abatement so firmly fixed in the common law, state courts looked outside of the plea to common law principles of adjudicatory comity to justify the exercise of a discretionary power to stay, rather than dismiss, a domestic action in the face of a foreign *lis alibi pendens*. While Story, in an early case, wondered whether such discretionary power existed, nineteenth century state court judges swiftly recognized that the discretion to stay a domestic proceeding in deference to a foreign *lis alibi pendens* was as much within the power of the court as it was to create the common law rules of abatement requiring the mandatory dismissal in deference to a domestic *lis alibi pendens*. [135] In 1825, for example, in *J.P. Cnatzel & Co. v. Bolton*, the South Carolina Court of Appeals endorsed the principle that where a pending foreign *in personam* action would "affect the rights" to be determined in an action pending in the domestic court, it was well within the power of the domestic court to stay its own proceedings to await the determination by the foreign court, which could then be plead as either collateral estoppel or res judicata.[136] Similarly, in 1886, in *Kerr v. Willetts*—the same decision of the New Jersey Supreme Court cited above for its refusal to abate a New Jersey action in favor of a pending action in New York—the court went on to add that even though the plea of abatement was not available in an *in personam* case of foreign *lis alibi pendens*, "[t]he pending suit in the

App. 1950) (involving the modification of a divorce decree); Power Train, Inc. v. Stuver, 550 P.2d 1293, 1294 (Utah 1976) (discussing the issue in context of an allegedly tortuous misrepresentation of inventors in a patent).

[135] *See* Wadleigh v. Veazie, 28 F. Cas. 1319, 1320 (C.C.D. Me. 1838) (No. 17,031) (expaining the absolute lack of discretionary authority in cases of this sort). Bowne v. Joy, 9 Johns. 221 (N.Y. 1812) ("The pendency of a suit in a *foreign* court, by the same plaintiff against the same defendant, for the same cause of action, is *no stay or bar* to a new suit instituted here.") (second emphasis added); Conrad v. Buck, 21 W.Va. 396, 404 (1883) (reaffirming that the pendency of a suit in a foreign court will not entitle a party to a stay in the context of a partnership dispute).

[136] J.P. Cnatzel & Co. v. Bolton, 14 S.C.L. (3 McCord) 33, 38 (1825).

foreign jurisdiction may furnish ground for staying the suit here . . . ."[137]

What accounted for the recognition at common law of the discretionary judicial power to stay a domestic *in personam* proceeding in deference to a foreign *lis alibi pendens*? It was recognition of the principles underlying the extension of comity in other situations (*e.g.*, foreign judgment enforcement and *forum non conveniens*) that also are implicated in cases of international parallel proceedings. That is, although the domestic sovereign's courts may have the power to affect their jurisdiction in a given case, the principles of comity justify those courts to exercise a self-imposed restraint and defer the exercise of that jurisdiction in order to do justice in individual cases. In short, a court which has had its jurisdiction invoked, also has the duty to determine under principles of adjudicatory comity whether such jurisdiction should be limited or declined.[138] In the context of a foreign *lis alibi pendens*, the need to do justice means a recognition that parallel proceedings create the same potential of injustice for litigants and the judiciary—if not more—when they are pending in the courts of different sovereigns as when they are pending in the courts of the same sovereign where the rule of abatement normally applies.[139]

It is important to note that the state courts' motivation for recognizing this discretionary power was *not* merely a concern with administrative matters for the court's convenience or maintaining happy relations between sovereigns. Rather, the state courts patently were concerned with doing justice, and being seen to do justice in cases in which the courts' jurisdiction is invoked. In *Simmons v. Superior Court*, one of the leading cases in the state courts, the California Court of Appeals offers one of the most thorough

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137 Kerr v. Willetts, 2 A. 782, 783 (1886). *Accord* Hatch v. Spofford, 22 Conn. 485, 499 (1853) (explaining that a foreign *lis alibi pendens* "may be cause for staying proceedings").

138 *See, e.g.*, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947) (describing the common law power of the federal courts to apply the doctrine of *forum non conveniens*); *Societe du Gaz de Paris*, [1926] Sess. Cas. 13, 21 (H.L. 1925) ("[T]he Court's duty to entertain the suit can be no higher than its duty to listen to, and if circumstances warrant, to sustain the plea [of *forum non conveniens*].").

139 *See* Allentown Foundry & Mach. Works v. Loretz, 44 N.Y.S. 689, 690 (N.Y. App. Div. 1897) (finding "no reason" why an *in personam* action pending in Massachusetts should not stay an *in personam* action in New York when, if the earlier action had also be pending in New York, the plea of abatement would have applied).

explanations for why, as a matter of common law, a trial court may exercise adjudicatory comity in appropriate cases and defer its exercise of jurisdiction in favor of a foreign court, even where normal common law rules of abatement are not satisfied:

> While it is unquestionably the law that the pendency of a prior action in another state between the same parties, involving the same cause of action does not entitle a party as a matter of right to an abatement of a second suit, we think it is equally true that it is within the discretion of the court in which the second action is pending to stay the same until after the decision of the first, and that *the principle of comity between the states* calls for the refusal on the part of the courts of this state to proceed to a decision before the termination of the prior action . . . .
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> . . . .
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> The rule which forbids a later action in the same state between the same parties involving the same subject matter [*i.e.*, the rule of abatement] rests upon principles of wisdom and justice, to prevent vexation, oppression and harassment, to pervent [sic] unnecessary litigation, to prevent a multiplicity of suits—in short, to prevent two actions between the same parties involving the same subject matter from proceeding independently of each other. *We think there is no distinction in reason or difference* in principle between a case where a later action between the same parties involving the same subject matter is commenced in the state and a case where a later action between the same parties involving the same subject matter is commenced in another state. If proceedings should be stayed in the first case mentioned, it is in order to avoid a multiplicity of suits and prevent vexatious litigation, conflicting judgments, confusion and unseemly controversy between litigants and courts. Any and all of this may occur where the later action is commenced in another state, as well as where it is commenced in the same state.[140]

So compelling has the case been for the discretion to extend adjudicatory comity in *in personam* cases involving earlier-filed for-

[140] Simmons v. Superior Court, 214 P.2d 844, 848–49 (Cal. Dist. Ct. App. 1950) (emphasis added) (citations omitted).

eign parallel proceedings, that *every* state court in the United States that has considered the issue has recognized that the domestic trial court has the discretion in *in personam* cases to exercise adjudicatory comity to stay its own proceedings in deference to the proceedings in a foreign court, *whether that court be in another state or another country*.[141]

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[141] *See, e.g.*, W. Union Tel. Co. v. Howington, 73 So. 550, 551 (Ala. 1916) (discussing the stay of a personal injury action because of pendency of the same action in the U.S. District Court); Matanuska Elec. Ass'n v. Chugach Elec. Ass'n, 99 P.3d 553, 560 (Alaska 2004) (discussing the doctrine of comity as one of deference in the context of a contract breach suit in overlapping jurisdictions); Tonnemacher v. Touche Ross & Co., 920 P.2d 5, 10 (Ariz. Ct. App. 1996); Perkins v. Benguet Consol. Mining Co., 132 P.2d 70, 98 (Cal. Dist. Ct. App. 1942), *cert. denied*, 319 U.S. 774 (1943) (Philippines); Simmons v. Superior Court, 214 P.2d 844, 848-49 (Cal. Dist. Ct. App. 1950); Nationwide Mut. Ins. Co. v. Mayer, 833 P.2d 60, 62 (Colo. Ct. App. 1992); Hatch v. Spofford, 22 Conn. 485, 499 (1853); McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., 263 A.2d 281, 283 (Del. 1970); Bradley v. Triplex Shoe Co., 66 A.2d 208, 210 (D.C. 1949); Robinson v. Royal Bank of Can., 462 So.2d 101, 102 (Fla. Dist. Ct. App. 1985) (Canada); Polaris Pub. Income Funds v. Einhorn, 625 So.2d 128, 129 (Fla. Dist. Ct. App. 1993); Jones v. Warnock, 67 Ga. 484, 485 (1881); Solarana v. Indus. Elecs., Inc., 428 P.2d 411, 416 (Haw. 1967); Cont'l Cas. Co. v. Brady, 907 P.2d 807, 811 (Idaho 1995); Wiseman v. Law Research Serv., Inc., 270 N.E.2d 77, 80 (Ill. App. Ct. 1971); Young v. Herald, 209 N.E.2d 525, 527 (Ind. App. 1965); Edward Rose Bldg. Co. v. Cascade Lumber Co., 621 N.W.2d 193, 195-96 (Iowa 2001); Farmers Union Coop. Elevator & Shipping Ass'n v. Grain Dealers Mut. Ins. Co., 398 P.2d 571, 574 (Kan. 1965); Dotson's Adm'r v. Ferrell, 169 S.W.2d 320, 321 (Ky. 1942); Chapa v. Chapa, 471 So.2d 986, 988 (La. Ct. App. 1985); Fitch v. Whaples, 220 A.2d 170, 172 (Me. 1966); Coppage v. Orlove, 278 A.2d 587, 588 (Md. 1971); Travenol Labs., Inc. v. Zotal, Ltd., 474 N.E.2d 1070, 1072 (Mass. 1985); Green Tree Acceptance, Inc. v. Midwest Fed. Sav. & Loan Ass'n, 433 N.W.2d 140, 141-42 (Minn. Ct. App. 1988); Brunton v. Floyd Withers, Inc., 716 S.W.2d 823, 827 (Mo. Ct. App. 1986); Barker v. Eastman, 82 A. 166, 169 (N.H. 1912); Am. Home Prods. Corp. v. Adriatic Ins. Co., 668 A.2d 67, 71-72 (N.J. Super. Ct. App. Div. 1995); Exxon Research & Eng'g Co. v. Indus. Risk Insurers, 775 A.2d 601, 611 (N.J. Super. Ct. App. Div. 2001) (Venezuela); Dolbeer v. Stout, 139 N.Y. 486, 489, 34 N.E. 1102, 1102 (1893); A.P. Youngblood, Inc. v. Banca Commerciale Italiana, 164 N.Y.S. 285 (App. Div. 1917); Commercial Union Ins. Co. v. Wheeling Pittsburgh Corp., 666 N.E.2d 571, 574 (Ohio Ct. App. 1995); Moody v. Branson, 136 P.2d 925, 928 (Okla. 1943); Beneke v. Tucker, 176 P. 183, 185 (Or. 1918); Radio Corp. of Am. v. Rotman, 411 Pa. 630, 631, 192 A.2d 655, 657 (1963); J.P. Cnatzel & Co. v. Bolton, 14 S.C.L. (3 McCord) 33 (1825); Space Master Int'l, Inc. v. Porta-Kamp Mfg. Co., 794 S.W.2d 944, 946 (Tex. Ct. App. 1990); Power Train, Inc. v. Stuver, 550 P.2d 1293, 1294 (Utah 1976); *see also* Sw. Pub. Serv. Co. v. Thunder Basin Coal Co., 978 P.2d 1138, 1145 (Wyo. 1999) (discussing a declaratory judgment action). In addition to these common law precedents, a number of state legislatures have codified the courts' prior common law practice. *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/2-619 (2005); N.Y. C.P.L.R. § 3211(a)(4) (McKinney 1991) (displaying codification of common law in Illinois); N.C. GEN. STAT. § 1-75.12 (2005) (displaying the codification of common law in North Carolina).

4.3. *The Application of Adjudicatory Comity in Practice: The Development of Specific Rules for the Exercise of Discretion in Foreign* Lis Alibi Pendens *Cases*

As has been noted from the outset, while principles of adjudicatory comity act as a jurisprudential explanation for why a domestic court may defer to another sovereign in certain cases, those principles do not on their own dictate the specific analytical approach that a court should use to determine whether to forgo jurisdiction in any given case. Thus, while the courts at common law have been uniform in their recognition of the applicability of adjudicatory comity and the discretion to decline or limit the exercise of jurisdiction in cases of prior-pending parallel proceedings, the courts have also had to consider by what rules and criteria that discretion should be exercised. As we have seen, although principles of comity apply generally to many different classes of cases, courts need to tailor the rules derived from comity to the factual circumstances presented and the particular issues raised in a case.

Thus, in cases involving the enforcement of foreign judgments, principles of adjudicatory comity counsel a presumptive deference to the prior decision of a foreign court, while in the context of *forum non conveniens* cases, the absence of prior pending action abroad results in a presumption in favor of the domestic court retaining jurisdiction over the case already before it.[142] As Judge Wilkey rightly observed in the *Laker Airways* case, "[c]omity varies according to the factual circumstances surrounding each claim for its recognition."[143] Viewed along the continuum of enforcement of judgment cases and cases of *forum non conveniens*, the factual circumstances presented by a case of foreign *lis alibi pendens* fall somewhere in the middle: there is as yet no foreign judgment, but there is already a parallel action pending in another court.

In developing specific rules for foreign *lis alibi pendens* cases, the state courts have avoided conflating the rules for such cases

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[142] For an interesting exploration of the idea that the principles underlying foreign judgment enforcement and *forum non conveniens* might be brought even closer together by the refusal of domestic courts to recognize and enforce foreign judgments rendered in a forum that was a *forum non conveniens* in the first place, see Adrian Briggs, *Which Foreign Judgments Should We Recognise Today?*, 36 INT'L & COMP. L.Q. 240 (1987).

[143] Laker Airways Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984).

with the rules applicable in cases of foreign judgment enforcement or *forum non conveniens*. These courts have recognized that, because the factual circumstances of a *lis alibi pendens* case are different, so must the presumptions applicable in such cases be different.[144] Accordingly, *every* state court that has considered the issue has concluded that, even though the presumption in a *forum non conveniens* case may be in favor of retaining jurisdiction, that is not the presumption that should apply in a case of a prior-pending foreign *lis alibi pendens*. Instead, the uniformly accepted presumption in such cases is that a domestic court should ordinarily *decline* to exercise jurisdiction where there is an earlier-filed action among substantially the same parties and involving substantially the same issues.[145] As the Appellate Division of the New Jersey Superior

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[144] *See, e.g.*, McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., 263 A.2d 281, 283 & n.2 (Del. 1970) (holding that "discretion should be exercised freely in favor of the stay when there is a prior action pending elsewhere" in contrast "with the rule that such discretion is to be sparingly used in a *forum non conveniens* case where there is no prior action pending elsewhere").

[145] *See* Matanuska Elec. Ass'n, Inc. v. Chugach Elec. Ass'n, Inc., 99 P.3d 553, 560 (Alaska 2004) ("The doctrine of comity teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of litigation, have had an opportunity to pass upon the matter."); Simmons v. Superior Court, 214 P.2d 844, 848 (Cal. Ct. App. 1950) ("[T]he principle of comity between the states calls for the refusal on the part of the courts of this state to proceed to a decision before the termination of a prior action. . . ."); *McWane Cast Iron Pipe Corp.* 263 A.2d at 283 & n. 2 (Del. 1970) ("[D]iscretion should be exercised freely in favor of the stay when there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues."); Polaris Pub. Income Funds v. Einhorn, 625 So.2d 128, 129 (Fla. Dist. Ct. App. 1993) ("Principles of comity between sovereigns suggest that a court of one state should stay a proceeding pending before it on grounds that a prior-filed case involving substantially the same subject matter and parties is pending in another state's courts."); Green Tree Acceptance, Inc. v. Midwest Fed. Sav. & Loan Ass'n, 433 N.W.2d 140, 141-42 (Minn. Ct. App. 1988) ("Where two courts have concurrent jurisdiction, the first to acquire jurisdiction generally has priority to decide the case . . . ."); Cogen Tech. v. Boyce Eng'g Int'l, Inc., 574 A.2d 1018, 1020 (N.J. Super. Ct. App. Div., 1990) *cert. denied*, 585 A.2d 368 (N.J. 1990) ("[T]here is ordinarily no reason to entertain subsequent local litigation paralleling an already instituted action in another state."); Commercial Union Ins. Co. v. Wheeling Pittsburgh Corp., 666 N.E.2d 571, 574 (Ohio Ct. App. 1995) ("The general rule is that when the jurisdiction of two courts is invoked concerning the same subject matter, the tribunal whose power was first invoked acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate the matter."); Moody v. Branson, 136 P.2d 925, 928 (Okla. 1943) ("In such cases, a court should ordinarily decline to entertain jurisdiction of the issue under the doctrine of comity."); Space Master Int'l, Inc. v. Porta-Kamp Mfg. Co., 794 S.W.2d 944, 946 (Tex. App. 1990) ("As a matter of comity . . . it is the

Court rightly put the distinction: the factual and legal situation raised in "a 'comity-stay' analysis is qualitatively different from a *forum non conveniens* analysis .... The general rule favors stays or dismissals in comity-stay situations, in the absence of special equities. The general rule in a *forum non conveniens* analysis favors retention of jurisdiction, unless the forum is manifestly in appropriate."[146] Indeed, no state court that has considered the issue has found to the contrary.

Appropriately, a number of state courts have gone beyond stating the general common law principle that adjudicatory comity should be extended freely in cases of foreign *lis alibi pendens* and sought to develop more detailed frameworks of analysis that may be used by trial courts in determining whether the discretion to defer to a foreign action should be exercised in a given case. While not citing Story, these courts seem to have recognized his warning that although the principles of comity "would seem, therefore, to stand on just principles ... from its generality, it leaves behind many grave questions as to its application ...."[147] These courts also appear to have been cognizant of the criticisms of applications of comity (adjudicatory or prescriptive) which note that unless principles of comity are used to fashion legal rules that may be understood and applied by courts and litigants, mere invocations of "comity" can lead to undesirable ad hoc decision-making.

The New Jersey courts have lead the way in constructing legal rules for the treatment of foreign *lis alibi pendens* cases. In New Jersey, the appellate courts have constructed a framework of analysis to address both cases of earlier- and later-filed parallel proceed-

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custom for the court in which the later action is instituted to stay proceedings therein until the prior action is determined or, at least, for a reasonable time, and the custom has practically grown into a general rule which strongly urges the duty upon the court in which the subsequent action is instituted to do so."); Teague v. Bad River Band, 612 N.W.2d 709, 719 (Wis. 2000) ("Ordinarily, a court should not exercise jurisdiction over subject matter over which another court of competent jurisdiction has commenced to exercise it.").

146 Am. Home Prod. Corp. v. Adriatic Ins. Co., 668 A.2d 67, 72–73 (N.J. Super. Ct. App. Div. 1995). *See, e.g.*, McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., 263 A.2d 281, 283 & n.2 (Del. 1970) (contrasting the rule that "discretion should be exercised freely in favor of the stay when there is a prior action pending elsewhere" with "the rule that such discretion is to be sparingly exercised in a forum non conveniens case where there is no prior action pending elsewhere").

147 STORY, *supra* note 34, § 37.

ings. Under the New Jersey rule, once it is established that (1) there is a first-filed action in another jurisdiction, (2) involving similar parties, claims, and legal issues, and (3) in which the proponent of the later-filed domestic action will have the opportunity for adequate relief, the burden of proof shifts to the party seeking to bring the belated domestic action to establish that there are "special equities" that nonetheless favor retention of the case by the New Jersey court.[148] These "special equities" include the strength of the connection of the dispute to the respective forums, whether deferring to the foreign forum would be prejudicial to New Jersey public policy, how far advanced the foreign action is in comparison to the later-filed New Jersey action, and the issue of fairness to the parties.[149] In cases in which the foreign action has been filed after the domestic action, conversely, the doctrine of *forum non conveniens* will apply.

New Jersey is not alone in adopting this basic approach with its clear presumption in favor of avoiding duplicative domestic litigation. All of the other state courts that have considered the issue have found that the temporal sequence of the filing of the domestic and foreign suits acts as a predicate for determining whether the legal presumption should be in favor of retaining jurisdiction in the domestic court or deferring to the foreign proceeding.[150] We

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[148] *Am. Home Prod. Corp.*, 668 A.2d at 73–74 (N.J. Super. Ct. App. Div. 1995); Exxon Research & Eng'g Co. v. Indus. Risk Insurers, 775 A.2d 601, 611 (N.J. Super. Ct. App. Div. 2001).

[149] STORY, *supra* note 34, §§ 32–33. The list is non-exhaustive. *Am. Home Prod. Corp.*, 668 A.2d at 74 ("Other factors and interests, not yet specifically articulated by our courts, also could present special equities.")

[150] Commercial Union Ins. Co. v. Wheeling Pittsburgh Corp., 666 N.E.2d 571, 574 (Ohio Ct. App. 1995) ("The general rule is that when the jurisdiction of two courts is invoked concerning the same subject matter, the tribunal whose power was first invoked acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate the matter."). Nevertheless, as noted in the text, the adequacy and need for a "first-filed" predicate is an important issue, which we will discuss shortly. *See* STORY, *supra* note 34, § 38. *But see* M.E. Jones, Inc. v. Arel Commc'n & Software, Ltd., 2003 WL 1949786 (Ohio Ct. App. 2003). In this unreported and precedentially limited decision, a panel of the Ohio Court of Appeals appears to have eschewed the application of a presumption in the exercise of their judicial discretion and instead simply called for a balancing of identified interests by the trial court when "nearly identical actions are underway in both an American court and in a foreign court." *Id.* at *2. The factors considered under this approach are essentially the same as those identified by the New Jersey court in *American Home Products*, except that because there is no need for a predicate showing that the foreign action was filed first and involves similar parties, claims, and legal issues,

will return to question of the importance of temporal sequence in Section 5, when we discuss the structure of the discretion available in foreign *lis alibi pendens* cases in the federal courts. For now, however, it is sufficient to note the common law's universal recognition of the judicial discretion to apply adjudicatory comity to defer to parallel proceedings in the courts of a foreign sovereign, and the determination that a domestic court should ordinarily do so in cases in which there is a foreign *lis alibi pendens*.

5. THE PROBLEM WITH THE CURRENT TREATMENT OF FOREIGN *LIS ALIBI PENDENS* CASES IN THE FEDERAL COURTS

As indicated above, the federal courts have begun to address the question of foreign *lis alibi pendens* cases. However, none of the three approaches that they have taken to date are fully satisfactory. Moreover, the current state of affairs in the federal courts seems anomalous when viewed against both prior federal court reliance on comity-based discretion in similar cases and state court use of comity-based discretion in cases of foreign *lis alibi pendens*. As we have seen, since the earliest days of the Republic, U.S. courts (state and federal) have recognized that common law principles of comity (prescriptive and adjudicatory) provide a basis for a domestic court to exercise discretion to decline or limit the extension of domestic law (substantive or jurisdictional) in cases in which to do so would be in the interests of justice.[151] Moreover, the state courts in particular have recognized that this discretion is wholly applicable in cases of international parallel proceedings.[152] Surely the issues

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these two elements are placed into the general mix of factors to be balanced.

Thus the:

> "factors to be balanced when determining whether to grant a motion for stay or dismissal in favor of litigation in an overseas forum . . . are as follows: the similarity of parties and issues involved, promotion of judicial efficiency, adequacy of relief available in the alternative [foreign] forum, considerations of fairness to all parties and possible prejudice to any of them, and the temporal sequence of filing for each action."

Id. (quoting Caspian Inv., Ltd. v. Vicom Holdings, Ltd., 770 F. Supp. 880, 884 (S.D.N.Y. 1991). Obviously, an unreported decision by one panel of the Ohio Court of Appeals, rendered expressly without precedential value, does not undermine the reported position of the Ohio courts, which makes a presumption in favor of deference contingent upon the presence of an earlier-filed action.

151 *See supra* Section 3.

152 *Id.*

and concerns that have prompted these state courts to recognize discretion to exercise adjudicatory comity in foreign *lis alibi pendens* cases also arise when the parallel proceeding is in a U.S. federal court. Why, then, have the U.S. federal courts, before which so many international cases come, been unable to arrive at the seemingly most obvious answer?

Examination of the three types of recent federal cases reveals the problem. While every federal court that has considered the issue has assumed that the federal courts have some measure of discretion to decline or limit jurisdiction in deference to a foreign *lis alibi pendens*, none has justified its discretion on the basis of a sound understanding of comity.[153] Indeed, the federal courts are either unwilling to recognize and/or are unaware of the historical common law principles of comity that provide a constitutional basis for the exercise of discretionary power by the federal courts. In other words, doctrinally speaking, the federal courts are in the wrong place. And, being in the wrong place, the courts are busily crafting rules that either pander to inappropriate concerns or, perhaps worse, are unbounded by any relevant, meaningful principles. After all, the manner in which a court exercises discretion depends in large measure on the perceived basis of that discretion. In this Section, I discuss each of the three factions, and the particular problems with their approaches. With respect to the first two factions, discussed in Sections 5.1 and 5.2, I conclude that the courts are in the wrong place, doctrinally speaking, because they have been distracted by inapt analogies. With respect to the third faction, also discussed in Section 5.2, I highlight the drawbacks of approaching the problem without a rigorous theoretical underpinning.

5.1. *Faction One – The Abstentionists: Inapt Analogy to Abstention Doctrine Leads to a Rule That is Unnecessarily Limited*

The first faction of federal courts, represented primarily by the Seventh Circuit, have justified the application of a highly limited discretionary power modeled upon the Supreme Court's restrictive domestic abstention jurisprudence[154] (specifically, *Colorado River*

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153 *Id.*

154 *See* AAR Int'l, Inc. v. Nimelias Enterprises S.A., 250 F.3d 510, 518 (7th Cir. 2001) (exercising a highly limited discretionary power).

Water Conservation District v. District Court[155] and its progeny[156]). In so doing, the courts have referenced "the interests of international comity,"[157] but have made no effort to explain what those interests might be or how or why they result in the exercise of the limited discretion the court believes is authorized. In Section 5.1.1, I discuss the abstention case law on which the "abstentionist" courts rely, including the grounding of the abstention rules in federalism concerns, and the resulting limited discretion to decline jurisdiction under the Constitution. In Section 5.2.1, I explain why common law, comity-based discretion is more appropriate in international cases and leads to better results.

5.1.1. Federal-state abstention cases provide an inapt theoretical framework for foreign lis alibi pendens *cases*

In a series of cases beginning in the 1940s,[158] the Supreme Court

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155 Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

156 *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) (citing *Colo. River* as the basis for the opinion).

157 *AAR Int'l, Inc.*, 250 F.3d at 518. *See* Neuchatel Swiss Gen. Ins. Co. v. Lufthansa Airlines, 925 F.2d 1193, 1195 (9th Cir. 1991) ("[T]he fact that the parallel proceedings are pending in a foreign jurisdiction rather than in a state court is immaterial."); Szabo v. CGU Int'l Ins., PLC, 199 F. Supp. 2d 715, 719 (S.D. Ohio 2002) (adopting the Seventh Circuit's approach); *see also* Al-Abood *ex rel.* Al-Abood v. El-Shamari, 217 F.3d 225, 232 (4th Cir. 2000) (applying *Colorado River* test).

158 While the Supreme Court has cautioned that "[t]he various types of abstention doctrines are not rigid pigeonholes into which federal courts must try to fit cases," *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987), the Court's abstention jurisprudence does lend itself to acceptable division by reference to the cases in which the various types of abstention were first recognized. The chronology of the Court's abstention jurisprudence thus begins with so-called "Pullman" abstention, derived from the Court's decision in *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 643 (1941). Pullman abstention is required where decision of a federal constitutional issue can be avoided by deferring to a state court's resolution of an unsettled state law issue. "Burford" abstention was developed two years later in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Burford abstention is required where the exercise of concurrent federal jurisdiction would disrupt a complex state regulatory regime. *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), gave us the "Thibodaux" abstention, which is required, or at least permissible, where a state law issue is unsettled and politically sensitive. "Younger" abstention is required where the federal defendant has commenced criminal or civil enforcement proceedings in state court against the federal plaintiff. Younger v. Harris, 401 U.S. 37 (1971). "Colorado River" abstention, by far the most germane to the subject of this Article, addresses the discretion of a federal court to defer in limited circumstances to duplicative, ongoing state court litigation. *Colo. River*, 424 U.S. at 817.

created various types of abstention doctrines that justified dismissal of a case, properly before a federal court, on the ground that a state court constituted a better forum for the resolution of the case. The Court's abstention doctrines were expressly motivated by "considerations of proper constitutional adjudication and regard for federal-state relations."[159] In *Colorado River*, on which the Abstentionist Courts rely, the Supreme Court developed what has become a particular strain of its domestic abstention jurisprudence, basing its justification for abstention on what it characterized as "considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation'" within the context of the U.S. federal system of government.[160]

Notably, the Court in *Colorado River* disavowed the presence of any specific federalism issues in the case at hand, which simply involved a concurrent proceeding in the state court. Thus, as a result of this "absence of weightier considerations of constitutional adjudication and state-federal relations,"[161] the Court emphasized that in order to overcome the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them,"[162] only "exceptional" circumstances would justify this new form of abstention.[163] As the Court subsequently described in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, relevant factors include: (1) the convenience of the alternative fora; (2) the desirability of avoiding piecemeal litigation; (3) the order in which the cases were filed; (4) whether foreign or federal law will apply; (5) the relative progress of the two actions; (6) whether the foreign action protects the federal plaintiff's rights; and (7) the vexatious or contrived nature of the federal claim, "with the balance heavily weighted in favor of the exercise of jurisdiction."[164]

Notwithstanding the Court's statement in *Colorado River* that there were no "considerations of proper constitutional adjudication

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159 *Colo. River*, 424 U.S. at 817.

160 *Id.* at 817. (quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180 (1952)).

161 *Id.* at 818.

162 *Id.* at 817.

163 *See id.* at 818–19 (referencing the exceptional circumstances criterion).

164 Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15–16 (1985).

and regard for federal-state relations" present in that case,[165] there are nevertheless compelling reasons to view *Colorado River* as a case whose reasoning is necessarily rooted in the Court's conception of federalism, and whose application thus should be limited to domestic circumstances. Looking at *Colorado River* through a historical lens, *Colorado River* at bottom was an abatement case in which the defendants had sought to abate (i.e., dismiss) the federal action because of the proceedings pending in the state court, and the district court had granted the "abatement" by dismissing the federal case.

As a matter of the common law, and the Supreme Court's own jurisprudence, this could never have been appropriate.[166] The common law, as we have seen, has always been strict in its requirements for a successful plea of abatement, demanding that the cases be pending in courts of the same sovereign,[167] and that the case sought to be abated be the later-filed action.[168] Neither of these circumstances were present in *Colorado River*. Not only were the cases pending in the courts of different sovereigns, but the federal proceeding sought to be abated was actually the first-filed action.[169] Thus, the Court undoubtedly was correct when it noted that the general rule is that "the pendency of an action in the state court is *no bar* to proceedings concerning the same matter in the Federal court having jurisdiction."[170]

Given this acknowledgement of the limits of the common law rule of abatement, if the Court had been inclined nevertheless to endorse deference to the state court under common law principles, one would have thought that it would have sought to root the district court's discretion in the either the doctrine of *forum non conveniens* (which would have allowed for a dismissal under the Court's decision in *Gilbert v. Gulf Oil*) or would have looked to cases involving adjudicatory comity in which, as we have seen, courts have discretion to stay an action even if dismissal under

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165 *Colo. River*, 424 U.S. at 817.

166 *See, e.g.*, Stanton v. Embrey, 93 U.S. 548, 554 (1876) ("[T]he pendency of a prior suit in another jurisdiction is not a bar to a subsequent suit.").

167 *See supra* note 117-23 and accompanying text.

168 *See id.*

169 *See Colo. River*, 424 U.S. at 817 (stating the circumstances of the case).

170 *Id.* at 817 (citing McClellan v. Carland, 217 U.S. 268, 282 (1910), 217 U.S. at 282) (emphasis added).

abatement is inappropriate.[171] The Court took neither route. Instead, it proceeded almost without reference to the history of the issue or the common law's treatment of such cases and chose to craft a new branch of its domestic abstention jurisprudence to permit a dismissal where the common law plainly would not have done so.

The Court's recent decision in *Quackenbush v. Allstate Insurance Co.*[172] suggests that this is an appropriate reading of *Colorado River* and, moreover, that the present Court in not entirely comfortable with the *Colorado River* decision, nor its follow-on case, *Moses H. Cone*,[173] in which the Court extended *Colorado River* to cover cases in which the federal court had not dismissed the action before it, but simply stayed its proceedings instead. In *Quackenbush*, the Court drew a sharp distinction between a dismissal and a stay, reasoning that a stay involved no failure or refusal to exercise jurisdiction, while a dismissal plainly did, and that such failure or refusal could be justified only in cases where the relief sought was equitable or otherwise discretionary.[174] The Court based its decision in *Quackenbush* on the idea that a request for injunctive, declaratory, or other equitable relief triggers the historical discretionary powers of a court of equity, which could justify a decision not to exercise jurisdiction resulting in dismissal, but that in the absence of the invocation of such equitable powers, a dismissal would not be appropriate in an in personam damages action.[175] At the same time, the Court expressly indicated that its decision with respect to its abstention doctrines did not affect its case law on the doctrine of *forum non conveniens* (where dismissal is the normal course regardless of the nature of the relief sought), which the Court described as "of a distinct historical pedigree."[176]

The reasoning of *Quackenbush* raises a number of profound questions about the continuing vitality of the Court's decisions in *Colorado River* and *Moses H. Cone*. It is hard to reconcile the decision to dismiss in *Colorado River* with *Quackenbush*'s holding that

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171 *See supra* notes 154-156 and accompanying text.

172 Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996).

173 Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15-16 (1985).

174 *Quackenbush*, 517 U.S. at 731.

175 *See id.* at 717-18 (stating the Court's basis for decision).

176 *Id.* at 721-22.

the dismissal of an *in personam* action on abstention grounds is only appropriate in cases in which the relief being sought is "equitable or otherwise discretionary."[177] That, of course, was not the basis for the decision in *Colorado River*. Indeed, *Colorado River* entirely eschewed reliance on common law principles or the nature of the federal action—even though the federal suit was a discretionary action for declaratory relief—and instead, as we have seen, decided the case on the basis of a new theory of abstention that purported to justify a dismissal of the federal action.[178]

The reasoning of *Quackenbush* throws the entire basis for that decision into considerable doubt. And while it may require the Court to address the interplay of *Quackenbush* and *Colorado River* in federal-state parallel cases, such an apparent undercutting of the rationale of *Colorado River* should at least dissuade the federal courts from extending its holding outside of the domestic context in which it was originally decided. Moreover, given that *Colorado River* specifically dealt with the dismissal of an earlier-filed federal action—and not the stay of a later-filed case as common law principles of adjudicatory comity counsel should be the approach—there is even less to commend a broad application of the *Colorado River* framework in international *lis alibi pendens* cases.

With respect to the continuing vitality of *Moses H. Cone*, *Quackenbush* raises an even more serious question. In *Moses H. Cone*, even though the lower court had only stayed its proceedings (as opposed to dismissing the case), the Court justified its decision to apply *Colorado River*'s strict presumption against allowing deference to a pending state court proceeding on the ground "that a stay is as much a refusal to exercise federal court jurisdiction as a dismissal."[179] In *Quackenbush*, however, the Court flatly rejected this conclusion and, indeed, went to great pains to distinguish between dismissals and stays, emphasizing that "an order merely staying the action 'does not constitute abnegation of judicial duty.'"[180]

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[177] *Id.* at 732.

[178] Had the Court in *Colorado River* treated the case as one involving the discretion to decline jurisdiction where declaratory relief is requested, presumably the Court might simply have cited *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 495 (1942) (ruling that the district court has discretion to decline jurisdiction in a declaratory judgment action where another suit is pending in state court), discussed the impact of the federal statute present in *Colorado River*, and called it a day.

[179] *Moses*, 460 U.S. at 28.

[180] Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 721 (1996) (quoting Louisi-

This is undoubtedly correct both doctrinally and practically. As a doctrinal matter, courts have long distinguished in principle the decision to stay a matter from the decision to dismiss it. Indeed, that is one of the principle doctrinal distinctions that has allowed the common law to accept a *lis alibi pendens* stay based upon adjudicatory comity in cases in which the more restrictive rule of abatement would not apply.[181] Moreover, as a practical matter, a stay versus a dismissal can mean the difference between satisfying a statute of limitations deadline or facing a subsequent ruling that the limitations period has expired. A stay in such cases retains the jurisdiction of the staying court so that in the event that the alternate action does not proceed in a reasonably expeditious manner, the staying court may lift its stay and proceed with the case.[182] In *Moses H. Cone*, the Court—perhaps in a desire to assure that the stay order at issue in that case would be immediately appealable under 28 U.S.C. § 1291[183]—simply breezed by these distinctions in reaching its decision to equate a stay with a dismissal.

Quackenbush, however, implicitly disapproves of the *Moses H. Cone* conflation and reaffirms that the distinctions between the decision to dismiss and the decision to stay are important because of the common law background of the federal courts' jurisdictional powers. *Quackenbush* thus calls into question the propriety of continuing to apply the *Colorado River* framework in stay cases because the only reason for the Court's decision to apply the *Colorado River* framework in *Moses H. Cone* was the Court's erroneous conclusion that the stay in that case was equivalent to a dismissal.[184] This, of course, has great bearing on the treatment of foreign *lis alibi pendens* cases, where, as we have seen, the common law, adjudica-

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ana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 29 (1959)).

181 *See supra* note 158 and accompanying text.

182 *See, e.g.*, Tonnemacher v. Touche Ross & Co., 920 P.2d 5, 11 (Ariz. Ct. App. 1996) (discussing differences between a stay and dismissal in *lis alibi pendens* context).

183 *See* Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 30 (1985) (Rehnquist, J., dissenting) (citing one possible reason for equating a stay with a dismissal).

184 *Cf.* Stephen B. Burbank, *The United States' Approach to International Civil Litigation: Recent Developments in Forum Selection*, 19 U. PA. J. INT'L ECON. L. 1, 17 (1998) (arguing that as a result of *Quackenbush*, federal courts should cease applying the *Colorado River* analysis in international parallel proceedings cases).

tory comity approach calls for a stay of the domestic action and not a dismissal.[185]

5.1.2. *The constitutionality of discretion to extend adjudicatory comity in foreign* lis alibi pendens *cases*

All courts facing *lis alibi pendens* cases are concerned about the constitutionality of a decision to dismiss or stay a case where jurisdiction properly lies in the federal court. This is true generally because "the federal courts are not courts of general jurisdiction."[186] Instead, "they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto."[187] In addition to this general proposition, one must also consider the Supreme Court's statements on numerous occasions, beginning with Justice Marshall's famous dictum in *Cohens v. Virginia* in 1821, that a federal court "has no right . . . to decline the exercise of jurisdiction which is given" it by Congress.[188] Taking these statements on their face, they would appear to leave little room for the exercise of judicial discretion in matters of jurisdiction. Moreover, the abstentionist courts are even more likely to heed such language, viewing the problem, as they do, through the lens of federal-state relations. Indeed, *Colorado River* and its progeny echo these sentiments, making any court relying on such cases especially cautious to exercise such discretion.

In addition to language from some court decisions, some commentators have argued forcefully that exercises of discretion by the federal courts which limit or decline the exercise of jurisdiction amount to impermissible "judicial lawmaking" and a "judicial usurpation of legislative authority, in violation of the principle of

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[185] For a strong pre-*Quackenbush* critique of the *Colorado River* decision in terms of the domestic abstention doctrine, see Rehnquist, *supra* note 4, at 1049.

[186] Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986).

[187] *Id.*

[188] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, J.); *see also* Kline v. Burk Consrt. Co., 260 U.S. 226, 234–35 (1922) (stating that the federal or state court with jurisdiction must proceed with the action); McClellan v. Carland, 217 U.S. 268, 282 (1910) (holding that when a federal court has jurisdiction, it may not simply turn a portion of the matter over to a state court); Chicot County v. Sherwood, 148 U.S. 529, 534 (1893) (stating that jurisdiction of federal courts may not be transferred to state courts by state legislatures); Hyde v. Stone, 61 U.S. (20 How.) 170, 175 (1857) (holding that federal courts must exercise jurisdiction in cases where it exists, and that state legislatures cannot take this jurisdiction for the states).

separation of powers."[189] These academic arguments must be taken seriously because they purport to be based not only in the Court's own statements, but also in the structure of the Constitution. In answering them, it will not do to overcome their effect by arguing that discretion by the federal courts to extend adjudicatory comity should exist as a matter of sound political/legal theory. If the federal courts have the power to exercise adjudicatory comity in the first place, it must rest either in the power granted to the federal courts by the Constitution and/or congressional jurisdictional statutes or in the powers historically held by the courts under common law.[190]

However, as David Shapiro has pointed out, the central problem with the so-called "separation of powers" argument is that it ignores the fact that the congressional grants of jurisdiction have historically been understood as including significant amounts of judicial discretion, which the federal courts exercise as part of their common law powers.[191] This discretion "rounds out the edges of

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189 Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 115 (1984). *See id.* at 74 ("[N]either total nor partial judge-made abstention is acceptable as a matter of legal process and separation of powers.").

190 *See* Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 42-43 (2001) (grouping the bases for federal judicial power into three categories: express, implied, and inherent). "*Express powers* are those immediately evident or directly derived from text [e.g., the Constitution and federal jurisdictional statutes]," while "*[i]mplied powers*, by comparison, . . . are not outrightly conferred as such, but their existence manifestly corresponds to one or more identifiable enumerated powers." *Id.* "*Inherent powers*, in contrast with both express and implied powers, 'do not depend on the existence of any textual assignment.' Rather than flowing from the text, they flow from the character or needs of—that is, they are inherent to—the governmental institution itself." *Id.* (citation omitted). Using these classifications here, the powers derived from principles of adjudicatory comity would fall within the category of "inherent powers."

191 *See* Shapiro, *supra* note 4, at 545 (surveying a variety of areas in which the federal courts exercise jurisdictional discretion as a matter of common law and concluding that "suggestions of an overriding obligation . . . are far too grudging in their recognition of judicial discretion in matters of jurisdiction"). *See also* Rehnquist, *supra* note 4, at 1102-04 (examining the "faulty premise" of the Supreme Court's decision in *Colorado River*). In addition to the direct applications of judicial discretion to jurisdictional matters identified by Shapiro, Richard Matasar, and Gregory Bruch have identified a host of areas in which the Supreme Court, as a matter of common law lawmaking, has created procedural laws by which it manages the jurisdiction of the federal courts. Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1328-32

jurisdictional enactments"[192] and reflects the power that courts have held throughout Anglo-American legal history to balance the duty to entertain an action—*"judex tenetur impertiri judicium suum"*—with the equally important obligation to ensure that the exercise of jurisdiction conferred is used to do justice.[193] Such exercises of discretion are not a betrayal of the text of the Constitution or even a rejection of the general obligation of the federal courts to decide the cases within their jurisdiction. Instead, they are a deeply entrenched aspect of the judicial function, supported both by the historical development of the U.S. legal system and contemporary judicial practice.[194]

The discretion that Shapiro describes is not an unfettered discretion that would allow the federal courts to hear cases at their pleasure, but a "principled discretion," whereby the courts act based upon "criteria drawn from the relevant statutory or constitutional grant of jurisdiction or from the tradition within which the

(1986); *see, e.g.*, Herron v. Southern Pacific Co., 283 U.S. 91, 93, 99 (1931) (showing an example for the allocation of authority between judges and juries); Indianapolis & St. Louis R.R. v. Horst, 93 U.S. 291, 300 (1876) (showing an example for charging the jury); Shields v. Barrow, 58 U.S. (17 How.) 130, 139-41 (1854) (showing an example for joinder of necessary or indispensable parties); Cooke v. Woodrow, 9 U.S. (5 Cranch) 13, 14 (1809) (showing an example for evidence); Logan v. Patrick, 9 U.S. (5 Cranch) 288 (1809) (showing an example for service of process); Mandeville v. Wilson, 9 U.S. (5 Cranch) 15 (1809) (showing an example for pleadings); Radford v. Craig, 9 U.S. (5 Cranch) 289 (1809) (showing an example for default judgments); Grayson v. Virginia, 3 U.S. (3 Dall.) 320 (1796) (showing an example for service of process).

192 Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891, 1893 (2004).

193 *See, e.g.*, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947) (describing the common law power of the federal courts to apply the doctrine of *forum non conveniens*); *Societe du Gaz de Paris*, [1926] Sess. Cas. 13, 21-22 (H.L. 1925) (Scot.) (Opinion of Lord Sumner) ("[T]he Court's duty to entertain the suit can be no higher than its duty to listen, then, if the circumstances warrant it, to sustain the plea [of *forum non conveniens*].").

194 In a way, demanding proof of the legitimacy of the judicial discretion to apply principles of comity (prescriptive or adjudicatory) that the federal courts have been exercising from the early days of the Republic is almost a non-sequiter. At a certain point the legitimacy of the power to exercise discretion may be founded upon the history of the custom itself and, one might note, congressional acquiescence in that custom. *See* Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 137-44 (1984) (discussing explicit versus implicit acquiescence and the use of objections by the legislative and executive branches of the federal government).

grant arose . . . ."[195] The idea that the common law forms a dynamic part of the exercise of federal jurisdiction should not be controversial or surprising. Indeed, the Supreme Court has recognized on many occasions that the congressional grants of jurisdiction to the federal courts need to be understood against the backdrop of the common law.[196]

As we have seen, part of that common law history and tradition, tracing roots back to before the Founding, are the principles of adjudicatory comity in international cases. Whether in an action to enforce a foreign judgment or to dismiss a case under the doctrine of *forum non conveniens*, common law principles of adjudicatory comity vest in the federal courts the power to exercise discretion in *in personam* actions to determine whether congressionally conferred jurisdiction should be limited or declined in the interests of justice.[197] This power to apply principles of comity is appropriately—in the absence of positive legislative action to the contrary—a judicial one and seems to have existed in the common law since principles of comity entered the common law in the eighteenth and nineteenth centuries. As Story concluded from his review of pre-Constitution case law in 1834, and as was endorsed by the Supreme Court in *Hilton v. Guyot*:

> In England and America the courts of justice have hitherto exercised the same authority [to determine whether to extend comity] in the most ample manner; and the legislatures have in no instance (it is believed) in either country interfered to provide any positive regulations. The common law of both countries has been expanded to meet the exigencies of the times as they have arisen . . . .[198]

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195 Shapiro, *supra* note 4, at 578.

196 *See* American Dredging Co. v. Miller, 510 U.S. 443, 452 (1994) (describing the doctrine of *forum non conveniens* as a common law "supervening venue provision"); *Gilbert*, 330 U.S. at 507 (describing the common law power of the federal courts to apply the doctrine of *forum non conveniens*). *See also* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996) (discussing the common law background of the federal abstention doctrines and the doctrine of *forum non conveniens*).

197 *See supra* Section 5.1.2.

198 Story, *supra* note 34, § 24. *See* Hilton v. Guyot, 159 U.S. 113, 163 (1895) (quoting Story's *Commentaries* and stating further that with respect to the decision whether or not comity should be extended "the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them").

5.2. *Factions Two and Three – The Landites and the Internationalists: Unexplained Reliance on* Landis v. North American Co. *and the Eleventh Circuit's Murky Doctrine of "International Abstention"*

Even though the *Colorado River* analysis is not appropriate for cases addressing the stay of a federal court proceeding in deference to a foreign *lis alibi pendens* case, it must be said that the analytical approach taken by those courts, which have based the exercise of discretion on the Supreme Court's decision in *Landis v. North American Co.*[199] concerning parallel proceedings in two different federal courts is little more satisfactory. As noted above, a number of courts have sought to link "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"[200] described in *Landis* with unexplained references to "international comity." In so doing, these courts have held that notwithstanding the precedent of *Colorado River* in the federal-state context,[201] a stay *or* dismissal of U.S. proceedings in deference to a foreign *lis alibi pendens* is within the trial court's discretion as exercised through a balancing of various factors, including the similarity of the parties and issues involved, the promotion of judicial efficiency, the adequacy of relief available in the alternative forum, considerations of fairness to the parties and possible prejudice, and the temporal sequence of the filing of each action.[202] In a similar vein, the Eleventh Circuit Court of Appeals has developed an analytical framework that it has labeled "interna-

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[199] 299 U.S. 248 (1936).

[200] *Id.* at 254.

[201] *See, e.g.*, Boushel v. Toro Co., 985 F.2d 406 (8th Cir. 1993) (granting stay because of pending action in foreign jurisdiction); Evergreen Marine Corp. v. Welgrow Int'l Inc., 954 F. Supp. 101 (S.D.N.Y. 1997) (granting stay because of pending action in foreign jurisdiction); Caspian Inv. Ltd. v. Vicom Holdings Ltd., 770 F. Supp. 880, 884–85 (S.D.N.Y. 1991) (commenting that federal courts may decline to exercise jurisdiction when case is pending in a foreign jurisdiction); Brinco Mining Ltd. v. Federal Ins. Co., 552 F. Supp. 1233 (D.D.C. 1982) (providing an example where a U.S. federal court deferred to a foreign court with action pending).

[202] *See, e.g., Caspian Invs. Ltd.*, 770 F.Supp. at 884–85 (explaining relevant considerations of a federal court when determining whether or not to exercise jurisdiction when a case is pending in a foreign court); Ronar Inc. v. Wallace, 649 F.Supp. 310, 318 (S.D.N.Y. 1986) (giving an example of a federal court abstaining from exercising jurisdiction when proceeding is under way in a foreign court).

tional abstention,"[203] identifying three principles apparently meant to control the district court's decision to defer to foreign proceedings: "(1) a proper level of respect for the acts of our fellow sovereign nations—a rather vague concept referred to in American jurisprudence as international comity; (2) fairness to litigants; and (3) efficient use of scarce judicial resources."[204]

Even if these cases rested on more solid doctrinal footing, i.e., if they recognized that the power of discretion that they are exercising is a common law power of adjudicatory comity—the approaches offered by these courts would still not be satisfying because they fail to provide meaningful guidance for the decision of individual cases. To be sure, these cases identify a host of factors to be balanced, but the balancing itself is completely ad hoc. To take the Eleventh Circuit's "international abstention" approach, for example, in the only case in which that court has addressed in depth the application of its new abstention doctrine,[205] the Eleventh Circuit held that the district court had properly issued a stay because (a) "the district court found no evidence that the [foreign] court was not competent to hear the claims or would not use fair and just proceedings in deciding the case," (b) certain insurance policies in the case were governed by the law of the foreign forum and one of the defendants was incorporated there, and (c) the foreign action had been filed nearly a year before the domestic action.[206] Aside from scattershot reference to this amalgam of factors, however, the court offered no explanation for why these particular facts, out of all others in the case, were relevant, nor what weight the district court either had or should have given to these facts, nor, indeed, what the Eleventh Circuit believed "international comity" to be in the first place.[207] Other examples from other courts[208] provide equally unappealing instances of such ad hoc de-

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203 Turner Entm't Co. v. Degeto Film, 25 F.3d 1512, 1518 (11th Cir. 1994).

204 Posner v. Essex Ins. Co., 178 F.3d 1209, 1223-24 (11th Cir. 1999).

205 *Id.*

206 *Id.* at 1224.

207 In *Seguros del Estado, S.A. v. Scientific Games, Inc.*, 262 F.3d 1164, 1170 (11th Cir. 2001), the court did at least indicate that in order for its "international abstention" approach to apply it must be shown as a threshold matter that the proceedings in the foreign and domestic courts are parallel.

208 *See, e.g.*, Boushel v. Toro Co., 985 F.2d 406 (8th Cir. 1993); Evergreen Marine Corp. v. Welgrow Int'l Inc., 954 F. Supp. 101 (S.D.N.Y. 1997); Caspian Investments Ltd. v. Vicom Holdings Ltd., 770 F. Supp. 880, 884-85 (S.D.N.Y. 1991);

cision-making,[209] offering almost unfettered discretion to the district courts and no real guidance as to how that discretion should be properly exercised.

In addition to ad hoc decision-making, courts that have relied on the Court's decision in *Landis* have also not been consistent in their disposition of cases in which it is believed that deference should be given to a foreign parallel proceeding. Some courts, reacting to the Court's decision in *Quackenbush*, have concluded that a stay is the appropriate manner in which deference should be exercised.[210] Others continue to issue dismissals where there is a for-

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Brinco Mining Ltd. v. Fed. Ins. Co., 552 F. Supp. 1233 (D.D.C. 1982).

[209] One final note should be made of two classes of decisions in which the courts have purported to invoke principles of "international comity," but seem to have misunderstood their applicability in foreign *lis alibi pendens* cases. In one group of cases, a number of U.S. courts have taken the view that principles of comity are not applicable unless and until the foreign proceeding has resulted in a final judgment. Citing the Supreme Court's definition of comity in *Hilton v. Guyot*, 159 U.S. 95 (1895), these courts have held that comity is applicable only "to another sovereign's definite law or judicial decision," and not to a pending foreign action. Dragon Capital Partners L.P. v. Merrill Lynch Capital Servs. Inc., 949 F. Supp 1123, 1127 n.8 (S.D.N.Y. 1997). As we have seen, however, the history of comity's development in the common law, together with the overwhelming weight of case law, simply does not support this view. Principles of comity have been applied frequently by courts in the U.S. and England in a myriad of situations which do not concern deference to legislative acts or judicial decisions of foreign sovereigns, including, most importantly, cases of foreign *lis alibi pendens*. Other courts have made a different error by concluding that there is no role for comity in the context of a pending foreign *lis*. For these courts, the supposed inapplicability of principles of comity has lead to the embrace of a mistaken "rule" that parallel cases in the courts of two different sovereigns should "ordinarily" proceed concurrently. *See, e.g.*, Goldhammer v. Dunkin' Donuts Inc., 59 F. Supp. 2d 248 (D. Mass. 1999); Nycal Corp. v. Inoco PLC, 968 F. Supp. 147 (S.D.N.Y. 1997). The foundation of the error that these courts make is their uncritical reliance on case law developed in the context of anti-suit injunctions, where the proposition—against issuing an injunction against a foreign proceeding—is that "parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously." Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 926–27 (D.C. Cir. 1984). This is a disturbing trend because the reasoning of these anti-suit injunction cases is not readily transplantable to cases involving a stay by the domestic court. Indeed, as Judge Wilkey rightly observed in the *Laker Airways* case, "[c]omity varies according to the factual circumstances surrounding each claim for its recognition." 731 F.2d at 937. The requirements of comity are simply different in the two classes of cases. *See* discussion *supra* Section 2.3. For a more detailed analysis of the issues raised by anti-suit injunctions in the United States and England, see for example, Anderson, *supra* note 2; Swanson, *supra* note 2; Bermann, *supra* note 26.

[210] *See, e.g., Goldhammer*, 59 F. Supp. 2d at 252 (staying case).

eign *lis alibi pendens*.[211] The application of common law principles of adjudicatory comity, however, indicates that only one course is appropriate: the stay.[212] Not only is this a fundamental, if somewhat arbitrary, distinction between the common law plea of abatement and the common law application of adjudicatory comity,[213] but, as we have seen above, there are practical reasons why a domestic court should maintain a jurisdictional connection to the action in the event that the foreign proceedings prove unable to secure a just and timely resolution of the dispute.[214]

5.3. *Recent Second Circuit Dicta: A Suggestion of a Historically and Doctrinally Adequate Basis for Discretion in Parallel Proceedings Cases*

Only one court seems to have suggested a historically and doctrinally adequate explanation for the discretionary power of a federal court to decline or limit the exercise of jurisdiction in an international *lis alibi pendens* case. In *Diorinou v. Metzitis*, the Second Circuit observed that when a court exercises jurisdictional discretion under principles of adjudicatory comity, it is "invoking a doctrine akin to *forum non conveniens*."[215] By this statement, although the court did not elaborate, the Second Circuit appears to be acknowledging that the power of a federal court to defer its exercise of jurisdiction to a foreign *lis alibi pendens* is a matter of discretionary power rooted in traditional common law principles of adjudicatory comity, "akin to the doctrine of *forum non conveniens*." If this is indeed what the Second Circuit is getting after, it would not only be fully consistent with the historical development of adjudicatory comity within the common law, but it would also represent a significant statement regarding the constitutional authority for federal jurisdictional discretion in international *lis alibi pendens* cases.

There are sound reasons for identifying the pedigree of the federal courts' discretionary power in international *lis alibi pendens* cases with the doctrine of *forum non conveniens* and not with the

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211 *See, e.g.*, Paraschos v. YBM Magnex Int'l, Inc., 130 F. Supp. 2d 642, 647 (E.D. Pa. 2000) (issuing dismissal where action existed in Canadian court).

212 *See supra* Section 2.4.

213 *See supra* Section 3.

214 *See supra* Section 2.4.

215 Diorinou v. Mezitis, 237 F.3d 133, 139 (2d Cir. 2001).

domestic abstention doctrines. In the first place, unlike the Supreme Court's domestic abstention jurisprudence, the doctrine of *forum non conveniens* has developed—and indeed today only applies—in international cases in which the domestic court is asked to defer to proceedings in a foreign forum. As we have seen, at the foundations of that development are traditional principles of common law adjudicatory comity, which from the first were conceived to address international cases. In contrast, the domestic abstention doctrines ever and always have been creatures of the federal-state arrangements, designed to operate with specific attention to the issues raised in the peculiar context of the U.S. system of federal government. Thus, the Supreme Court appropriately has emphasized that its domestic abstention doctrines and the doctrine of *forum non conveniens* are cut from different doctrinal cloth and that the principles and presumptions at work in the two classes of cases are not transferable.[216]

Moreover, the doctrinal placement of the authority for the exercise of discretion in *lis alibi pendens* cases is consistent with the Supreme Court's classification of the doctrine of *forum non conveniens* in *American Dredging Co. v. Miller*[217] as a "federal common-law venue rule" that allows a federal district court in international cases the discretion to "determin[e] which among various competent courts will decide the case."[218] Adjudicatory comity in foreign *lis alibi pendens* cases functions much to the same effect. As the cases from the states indicate, principles of adjudicatory comity empower the courts to exercise discretion to determine where a case should best be heard where parallel actions are pending in different countries. Indeed, it is noteworthy that in both England and Canada, the courts have not seen the need to develop, as the U.S. state courts have, an independent theory for applying adjudicatory comity to foreign *lis alibi pendens* cases, but instead have found it sufficient simply to recalibrate the doctrine of *forum non conveniens*

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[216] Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 721–23 (1996). *Cf.* Stephen Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millenium?*, 7 TUL. J. INT'L & COMP. L. 111, 120 (1999) (noting that in *Quackenbush* the Court recognized *forum non conveniens* as "discrete").

[217] Am. Dredging Co. v. Miller, 510 U.S. 443 (1994).

[218] *Id.* at 453.

in such cases to meet the special factual conditions raised by the existence of an earlier-filed parallel case.[219]

Although this Article does not propose that the doctrine of *forum non conveniens* as such should be applied by the federal courts to address cases of earlier-filed international parallel proceedings, as the development of the doctrine in England and Canada suggests, in principle there is no reason why the framework used to apply *forum non conveniens* in the United States could not be modified to accommodate the unique factual circumstances and issues present in such cases. In a sense, the question is really one of practicality and vocabulary and not a distinct doctrinal source of power or legitimacy.[220] Fifty years on from the Court's decision in *Gilbert v. Gulf Oil*, the doctrine of *forum non conveniens* in the United States, with its attendant presumptions against displacing the domestic forum, is probably most comfortable in its current role in the United States addressing cases in which the foreign action has not yet been filed (or has been filed later).

Indeed, the relatively few cases applying the U.S. *forum non conveniens* doctrine in cases of a prior-pending foreign action reveal a variety of unsatisfactory results. Some courts have essentially ignored the existence of the foreign *lis* in conducting their analysis, obviously missing the fundamental point that the manner of application of principles of adjudicatory comity depends upon the factual circumstances of the case at hand. One approach does not fit every case.[221] Other courts, by contrast, have only considered the

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[219] *See, e.g.*, The Abidin Daver, [1984] A.C. 398, 411 (H.L.) (appeal taken from Eng.) (Lord Diplock); Spiliada Maritime Corp. v. Cansulex Ltd., [1987] A.C. 460, 476 (H.L.) (appeal taken from Eng.) (Lord Goff); de Dampierre v. de Dampierre, [1988] A.C. 92, 108 (H.L.) (appeal taken from Eng.); 472900 B.C. Ltd. v. Thrift Canada Ltd., [1999] 6 W.W.R. 4416 (Can.) (providing examples of where Canadian and English courts have used *forum non conveniens* to decide whether to stay an action when a parallel case existed in another court).

[220] *Cf.* Owens Bank Ltd. v. Bracco, [1992] 2 A.C. 443 (Ct. App.) ("[T]he Latin tags '*forum non conveniens*' and '*lis alibi pendens*' . . . are no more than convenient tags to describe particular fields in which the general principle, the prevention of injustice, may be applicable."), *aff'd*, [1992] 2 A.C. 443 (Eng. H.L.).

[221] *See* Biblical Archaeology Soc'y, No. 92-5590, 1993 WL 39572 (E.D. Pa. Feb. 10, 1993) (finding principles of comity inapplicable to a pending case in a foreign court and according no weight to the *lis alibi pendens* within the *forum non conveniens* analysis); Cliffs-Neddrill Turnkey Int'l-Oranjestad v. M/T Rich Duke, 734 F. Supp. 142 (D. Del. 1990) (finding that public interest favors the alternative forum); Reavis v. Gulf Oil Co., 85 F.R.D. 666 (D. Del. 1980) (rejecting dismissal of action under *forum non conveniens* analysis).

presence of a pending foreign action in terms of the foreign forum's availability and adequacy under the *Gilbert* test.[222] These cases also fail to recognize that the presence of an earlier-filed foreign action, as opposed to a merely prospective foreign action (or action filed subsequent to the domestic action), means that the principles of adjudicatory comity apply differently and, accordingly, the presumptions applicable in the two kinds of cases should not be the same. Similarly, a number of courts have found that a pending foreign *lis* is relevant to the "private interest" factors of the *forum non conveniens* analysis, particularly the burden of litigating concurrently in two fora, but, here again, these cases have failed to understand that the dynamic principles of adjudicatory comity require an analysis that is tailored to the kind of case before the court and not simply transplanted from a related, yet distinct, type of case.[223]

The confusion exemplified by these cases suggests that it is probably too late in the day for a comprehensive treatment of foreign *lis alibi pendens* cases under the rubric of federal *forum non conveniens*. There is too much baggage associated with the Court's discussions of *forum non conveniens* in the context of prospective actions in cases like *Gilbert* and *Reyno* to make it likely that, in the absence of direct Supreme Court guidance, the federal courts will draw the kind of distinctions in analysis that the unique circumstances of an earlier-filed foreign action requires. In a sense this is unfortunate because, as this Article has shown, the doctrine of *forum non conveniens* and the application of principles of adjudicatory comity to cases of prior-pending foreign proceedings are cut from the same common law doctrinal cloth. As a result, even though one may not wish to apply the term *forum non conveniens* to a court's application of principles of adjudicatory comity in a case of a prior-pending foreign parallel proceeding, in essence one

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[222] *See, e.g.*, Banco Latino v. Gomez Lopez, 17 F. Supp. 2d 1327, 1332 (S.D. Fla. 1998) (pendency of proceeding in Venezuela "lends further support to the adequacy of the Venezuelan forum").

[223] *See, e.g.*, Creative Tech, Ltd. v. Aztech Sys. PTE, Ltd., 61 F.3d 696, 703 (9th Cir. 1995); Wong v. United Airlines, No. 99-1441, 2001 WL 30192 (E.D. La. Jan. 10, 2001); B.C.C.I. Holdings (Lux.) S.A. v. Mahfouz, 828 F. Supp. 92, 98 (D.D.C. 1993); *see also* M&I Eastpoint Tech., Inc. v. Mid-Med Bank, No. 99-411-JD, 2000 WL 1466150 at *9 (D.N.H. Jan. 28, 2000) (parallel pending proceeding in Malta relevant to "public interest" factor of adjudicating case with economy of judicial resources).

should consider that the recognition of the legitimacy of the doctrine of *forum non conveniens* generally in the United States serves as a tacit recognition of the legitimacy of judicial discretion to apply principles of adjudicatory comity in appropriate international parallel proceedings cases because the distinction between the application of adjudicatory comity in a U.S. *forum non conveniens* case, and a prior-pending foreign *lis alibi pendens* case is really only about the presumptions that should apply to the distinct factual circumstances of the two kinds of cases. It is hoped that this is what the Second Circuit means when it identifies a "kinship" between applications of adjudicatory comity in cases of foreign *lis alibi pendens* and cases of *forum non conveniens*.[224]

6. A PROPOSAL FOR TREATING FOREIGN *LIS ALIBI PENDENS* CASES UNDER COMMON LAW PRINCIPLES OF ADJUDICATORY COMITY

As has been noted throughout, the application of principles of "[c]omity varies according to the factual circumstances surrounding each claim for its recognition."[225] Thus, we have seen above that in cases of foreign judgment enforcement, the common law embraces a preference for the enforcement of foreign judgments that results in a presumptive limitation on the domestic court's exercise of its jurisdiction. Rather than have the domestic court exercise the full measure of its jurisdiction and hear the merits of the parties' dispute, the courts act by principles of adjudicatory comity to create a presumption that the foreign judgment should be enforced unless the party challenging that enforcement is able to

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[224] In another sense, the development of the *forum non conveniens* as a framework that has become so closely associated with cases of prospective foreign litigation is ironic. An early application of *forum non conveniens*, often cited by the Supreme Court, *Canada Malting Co. v. Paterson S.S., Ltd.*, was itself a case involving a *lis alibi pendens* in the Admiralty Court of Canada. 285 U.S. 413 (1932). Notably, in the district court's decision in that case, which the Court duly affirmed, a substantial consideration in favor of declining jurisdiction was the existence of the parallel Canadian action and the concern that if the two actions were allowed to proceed "the Canadian Court of Admiralty [might] determine liability one way, and this court another way." Canada Malting Co. v. Paterson Steamships, 49 F.2d 802, 804 (D.C.N.Y. 1930). The district court speculated that "[s]uch antagonistic determinations might lead to a multiplicity of actions to determine the rights and liabilities of the parties—something that should be avoided." *Id.* This represents a missed opportunity, perhaps.

[225] Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984). *See, supra* text accompanying note 147.

show that to do so would violate certain specified interests of the domestic forum.[226] Conversely, in cases involving the doctrine of *forum non conveniens*, the common law adjusts the application of adjudicatory comity and shifts its presumption in favor of the plaintiff who has established the domestic court's jurisdiction and venue, either in the absence of any proceeding in a foreign forum or where the foreign action is later-filed.[227] Thus, the domestic plaintiff should rarely have his or her choice of forum disturbed, unless upon a balance of identified interests, the domestic court concludes that the in the interests of justice the action should be tried in an adequate alternative foreign forum.[228]

What these cases of foreign judgment enforcement and *forum non conveniens* tell us about cases of *lis alibi pendens* is that when the issue is the application of adjudicatory comity, one size does not fit all. The presumptions that are appropriate in one class of cases involving the application of adjudicatory comity are not necessarily appropriate in another. Instead, what the courts must do for each class of cases in which adjudicatory comity is implicated is to craft rules derived from the principles underlying adjudicatory comity, such as the goal of doing justice in individual cases and the desireability of promoting efficient adjudication of transnational disputes by preventing unnecessary litigation, the possibility of conflicting judgments, and unseemly controversy between the courts of different sovereigns. We have seen that principles of adjudicatory comity provide a basis for the exercise of jurisdictional discretion by the federal courts; it remains to determine how such principles should be crafted into rules that are tailored to the factual circumstances raised.

6.1. A Presumption for First-Filed Cases

This Article proposes that in exercising jurisdictional discretion based upon principles of adjudicatory comity, a U.S. federal court should ordinarily defer through the issuance of a stay to proceedings taking place in foreign countries in cases in which: (1) the foreign action was filed first; (2) the foreign action involves substan-

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226 *See* discussion *supra* Section 4.3.

227 *See* discussion *infra* Section 6.2.

228 *See id.*

tially the same parties and issues as the U.S. action such that res judicata would apply between the two; and (3) the foreign court is able to provide adequate relief on the parties' claims. Once the moving party has made such a preliminary showing, the burden should shift to the non-moving party (i.e., the proponent of a the federal forum) to show that there are particular reasons that should cause the trial court not to exercise its discretion in favor of a stay but instead to exercise its full measure of jurisdiction to hear the case on its merits. In considering what kinds of reasons might persuade a domestic court not to stay its own proceedings in deference to a prior-filed foreign *lis alibi pendens*, the trial courts should look to see whether there are special circumstances present that undercut the goals behind principles of adjudicatory comity. That is, the courts should look to see whether the circumstances of the case suggest that deference to the forum court would violate domestic public policy, prejudice the rights of those entitled to the protection of U.S. law, or whether the facts indicate that the foreign action was contrived to usurp the "natural" plaintiff's choice of forum by bringing a preemptive claim for a declaration of nonliability.

Application of the rule proposed above is in keeping with virtually every common law court that has considered the issue—indeed, it is heavily based upon the approach taken by the New Jersey courts. Its adoption as a standard in the federal courts in exercising their comity-based discretion would have a number of beneficial effects. First, it would allow the federal courts to avoid the "recipe for confusion and injustice"[229] created by allowing concurrent parallel actions. That is, it would reduce to a minimum the number of cases in which international cases proceeded concurrently, thereby eliminating the potential for conflicting decisions[230] and discouraging an unseemly race to be the first to obtain judgment in the respective litigants' chosen fora.[231] Second, it would also serve to prevent unnecessary, and potentially vexatious and

[229] The Abidin Daver, [1984] 1 A.C. 398, 410 (H.L.) (appeal taken from Eng.) (U.K.).

[230] *See, e.g.*, Evergreen Marine Corp. v. Welgrow Int'l Inc., 954 F. Supp. 101, 104 (S.D.N.Y. 1997) (illustrating where domestic court granted stay of action to allow foreign litigation to proceed in order to reduce conflicts).

[231] *See, e.g.*, Sauter v. Sauter, 495 A.2d 1116, 1118 (Conn. App. Ct. 1985) (providing an example of where the court ruled that despite the existence of two actions, both could continue and one would not be dismissed).

harassing, litigation, which carries with it increased costs and inconvenience to the parties and courts involved[232] and invites litigation by attrition. Finally, application of a first-filed presumption would give structure and guidance to courts that are faced with applying their comity-based discretion and curb the potential for the ad hoc decision-making that has plagued the decisions of the federal courts which have already concluded that they have significant discretion to stay foreign *lis alibi pendens* cases. In so doing, it would respond to Shapiro's concern that the exercise of jurisdictional discretion by the federal courts must be "capable of being articulated and openly applied . . . evaluated by critics of the courts' work, and reviewed by the legislative branch" if it is to exist within a regime of law.[233]

Although the relative simplicity and clarity of a rule incorporating a first-filed presumption with a shifting burden of proof and specific factors for consideration would do much to give order and predictability to the exercise of judicial discretion in cases of foreign *lis alibi pendens*, even within this framework there are questions to be answered by the court: Was the foreign action filed first? Are the parties and issues substantially similar such that res judicata would apply? Is the litigation in the foreign forum capable of providing adequate relief on the parties' claims? The need to address such threshold questions, however, should not counsel against the adoption of the rule. These are the kinds of questions that we ask courts to resolve in many kinds of cases and the need to address them at a preliminary stage seems a small price to pay for an approach to international prior-pending proceedings that reflects an overarching goal of achieving the efficient and equitable adjudication of individual cases.

Moreover, with regard to the issues that may arise from a nonmoving party's assertions that there are special circumstances that militate in favor of the domestic court's retention of jurisdiction, here again, the issues raised are not unlike those raised in the analyses applied by the federal courts in other kinds of cases. Thus, for example, when a court is asked to determine in a *lis alibi*

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232 *See, e.g.*, Efco Corp. v. Aluma Sys., USA, Inc., 983 F. Supp. 816, 824 (S.D. Iowa 1997); *The Abidin Daver*, [1984] A.C. at 398. ("[I]t must be more expensive to litigate about liability for the same collision in two jurisdictions than it would be to litigate in one alone.").

233 Shapiro, *supra* note 4, at 578.

pendens stay analysis whether deference to the foreign court would violate domestic public policy, it is answering a question that we ask courts to answer in other fields as well. That is not to say that it will be easy in every case to decide these issues; the experience with traditional *forum non conveniens* cases suggests that there will be hard issues, such as the weight to be given to the presence of a federal claim.[234] Nevertheless, given that a decision to defer or not to defer can mean the difference between a litigation occurring once or twice in different fora around the world, any burden borne by the parties or the courts in resolving these threshold issues would seem to be outweighed by the far greater burden of letting unnecessary actions proceed concurrently.

6.2. *Treating Parallel Proceedings Where the Foreign Action is not First-Filed*

Any proposal to adopt a presumption in favor of first-filed foreign parallel proceedings prompts another question: What of the situation in which it is the domestic action that is first-filed, but yet it appears to the court that in the interests of justice the matter should be more appropriately decided in the courts of another country? Here it seems that there may be no need for the courts to recognize a new approach because the law as it currently stands can address these matters through the doctrine of *forum non conveniens* and through the discretionary power of the federal courts to deny declaratory relief.

We adopt a presumption in favor of earlier-filed foreign actions because we presume that if the later-filed domestic action is essentially duplicative then there is no reason why the later court should entertain such a case. Where the domestic action, however, is not the later-filed, and it is the foreign action which appears merely duplicative, the basis for such a presumption disappears, although the reasons for deference might not. Litigation in the foreign forum, for example, even though later-filed, may still appear to be the more appropriate under traditional *forum non conveniens* analysis. Moreover, the earlier-filed U.S. action might seek a negative declaration and appear to have been filed for little reason other than to try to usurp the natural plaintiff's choice of forum in which

234 Lonny S. Hoffman & Keith A. Rowley, *Forum Non Conveniens in Federal Statutory Cases*, 49 EMORY L.J. 1137 (2000).

case, again, the domestic court may find grounds to exercise its admitted discretion under the established rules addressing the issuance of such relief.[235] In either situation, even though the U.S. action has been first filed, the court retains the discretion to address the foreign parallel proceeding in a way that is guided by a framework of analysis that reflects—but is not mechanically bound by—the presumptions appropriate to the general factual situation at hand.

7. CONCLUSION

The treatment of international parallel proceedings remains one of the most unsettled areas of the law of federal jurisdiction in the United States. Short of attention by the Supreme Court, a consensus among the federal courts may never emerge. In this Article, I have tried to look at the problem of international parallel proceedings as part of a historical continuum of situations in which U.S. courts have been called upon to address proceedings in the courts of foreign sovereigns. In so doing, I have argued that the key to developing a constitutionally coherent and practicably workable analytical approach to the relatively modern problem of international parallel proceedings lies in the application of principles of adjudicatory comity that have been a part of the common law for over two hundred years. Under those principles, the federal courts possess the discretionary power to limit the exercise of their jurisdiction in appropriate cases in deference to the courts of a foreign sovereign. Much like the rules governing the enforcement of foreign judgments or the application of the doctrine of *forum non conveniens*, such an exercise of discretion does not constitute an abdication by the federal courts of their obligation to exercise the jurisdiction conferred upon them by Congress, but instead reflects the common law background against which the jurisdictional statutes were enacted. As such, while the considerations of federalism and our constitutional form of government that are appropriate in

[235] *See, e.g.*, Dow Jones & Co. v. Harrods Ltd., 346 F.3d 357, 359–60 (2d Cir. 2003) (affirming district court's decision of earlier-filed domestic action for negative declaratory relief in deference to pending action for libel in England); *see also* Nw. Airlines v. Am. Airlines, 989 F.2d 1002, 1007 (8th Cir. 1993) (noting similar concerns in context of issuing an anti-suit injunction); First Midwest Corp. v. Corporate Fin. Assoc., 663 N.W.2d 888, 892 (Iowa 2003) (noting that preemptive filing of a negative declaratory action may counsel in favor of the dismissal of an action for declaratory relief in favor of a later-filed action).

the federal-state context may dictate one kind of approach to domestic parallel proceedings, in international cases, where those interests are absent, common law principles of adjudicatory comity dictate a different approach. Thus, I have argued that a distinct analytical framework for international cases needs to be created in the federal courts and that such a framework should include a presumption in favor of deferring to earlier-filed foreign actions unless special circumstances can be shown for why the federal court should retain jurisdiction. In so doing, I hope that this Article may at least be the start of a larger debate on the proper modalities for the exercise of the federal courts' discretion.

Moreover, the adoption of a presumption in favor of earlier-filed foreign parallel proceedings would have the salutary effect of harmonizing the treatment of comity-based stay cases with the treatment of requests for anti-suit injunctions. In an anti-suit injunction case a domestic court is asked to enjoin legal proceedings in the courts of a sovereign foreign nation. In that scenario, many courts in the United States have recognized that the injunction necessarily interferes with the jurisdiction of the foreign court and raises issues of comity.[236] As a result, for many U.S. courts the general rule is that principles of comity require a presumption that the U.S. court should not issue the injunction interfering with the foreign court's jurisdiction and should allowing the domestic and the foreign actions to proceed concurrently, unless exceptional circumstances are shown.[237] In a comity-stay case, by contrast, because of the unique procedural posture of the case before the court the implications of applying comity are completely different—yet the goals remain the same.[238] There, the matter before the U.S. court is an affirmative request to extend comity to the proceedings

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[236] *See, e.g.*, Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984).

[237] *See* Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 17–18 (1st Cir. 2004) (discussing competing federal approaches).

[238] *See* Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1202 (2d Cir. 1970) ("[W]e can see no reason why the end result should be different when the party seeking to preserve the primacy of the first court moves the second court to stay its hand rather than asking the first court to enjoin prosecution of the second case. Whatever the procedure, the first suit should have priority, 'absent the showing of balance of convenience in favor of the second action.'") (citations omitted); *cf.* Societe Nationale Industrielle Aerospatiale v. Lee Kui Jak, [1987] A.C. 871, 892–94 (P.C.) (appeal from Brunei) (noting the different applications of principles in *forum non conveniens* cases and anti-suit injunction cases).

in the foreign court. By adopting both a presumption in favor of deferring to the earlier-filed foreign action in comity-stay cases and a presumption against interfering with the foreign proceedings in anti-suit injunction cases, the federal courts will begin to create some symmetry and harmony in their treatment of international parallel proceedings.