Duplicative Foreign Litigation

Austen L. Parrish*

What should a court do when a lawsuit involving the same parties and the same issues is already pending in the court of another country? With the growth of transnational litigation, the issue of reactive, duplicative proceedings—and the waste inherent in such duplication—becomes a more common problem. The future does not promise change. In a modern, globalized world, litigants are increasingly tempted to forum shop among countries to find courts and law more favorably inclined to them than their opponents.

The federal courts, however, do not yet have a coherent response to the problem. They apply at least three different approaches when deciding whether to stay or dismiss U.S. litigation in the face of a first-filed foreign proceeding. All three approaches, however, are undertheorized, fail to account for the costs of duplicative actions, and uncritically assume that domestic theory applies with equal force in the international context. Relying on domestic abstention principles, courts routinely refuse to stay duplicative actions believing that doing so would constitute an abdication of their "unflagging obligation" to exercise jurisdiction. The academic community in turn has yet to give the issue sustained attention, and a dearth of scholarship addresses the problem.

This Article offers a different way of thinking about the problem of duplicative foreign litigation. After describing the shortcomings of current approaches, it argues that when courts consider stay requests they must account for the breadth of their increasingly extraterritorial jurisdictional assertions. The Article concludes that courts should adopt a modified lis pendens *principle and reverse the current presumption. Absent exceptional circumstances, courts should usually stay duplicative litigation so long as the party seeking the stay can establish that the first-filed foreign action has jurisdiction under U.S. jurisdictional principles. This approach—pragmatic in its orientation, yet also more theoretically coherent than current law—would help avoid the wastes inherent in duplicative litigation, and would better serve long-term U.S. interests.*

---

* Vice Dean for Academic Affairs and Professor of Law, Southwestern Law School. J.D., Columbia University School of Law, 1997; B.A., University of Washington, 1994. The author is the Director of Southwestern's Summer Law Program in Vancouver, B.C., Canada, where he teaches courses in international and comparative law at the University of British Columbia. For their helpful comments and insights, the author is grateful to Ron Aronovsky, Ashley Parrish, Gary Rowe, and Christopher Whytock. This article benefited from exchanges had with Vaughan Black, Joost Blom, John Swan, and Janet Walker over the issue of parallel proceedings in Canada, as well as discussions had at the 2008 joint annual meetings of the Law and Society Association and the Canadian Law and Society Association about the development of transnational law with Samuel Baumgartner, Paul Dubinsky, Shi-Ling Hsu, and Christopher Whytock. The author thanks Brian Luper, Elliot Jung, and Neil Vanderwoude for their research assistance.

Table of Contents

Introduction

In recent years, the idea of transnational law as a solution to international challenges has captivated legal academia.[1] Whether because of globalization,[2] changes in law and theory,[3] or other reasons,[4]

---

1 For recent examples, see T. Alexander Aleinikoff, *Transnational Spaces: Norms and Legitimacy*, 33 YALE J. INT'L L. 479 (2008) (discussing legitimization of transnational norms); Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1 (2008) (advocating and encouraging extraterritorial litigation to solve cross-border and global challenges); *see also* Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 255 (2006) (analyzing domestic law and courts that regulate transnationally); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183–86 (1996) (noting the rise of transnational litigation); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2348–49 (1991) (suggesting that transnational public law litigation merges formerly distinct types of domestic and international litigation).

2 *Cf.* Robert Howse, *The End of the Globalization Debate: A Review Essay*, 121 HARV. L. REV. 1528 (2008) (arguing that debates over globalization have become questions of global law). *See generally* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1112–15 (2000) (describing categories of judicial interaction comprising judicial globalization). For recent books discussing the impact of globalization, see JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION (2007); SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2006).

3 *See infra* Part II.B; *see also* Trevor C.W. Farrow, *Globalization, International Human Rights, and Civil Procedure*, 41 ALTA. L. REV. 671 (2003) (describing from a Canadian perspective the convergence of globalization, human rights, and civil procedure).

4 ANDREW S. BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION 3 (2003) (describing how transnational litigation has emerged, in part, with the advent of "great technological advances, particularly in the field of transportation and telecommunications and, more generally, through the internet's facilitation of international commerce . . . ."); *cf.* Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction over and Enforcement of Judgments*

transnational cases have taken on greater significance.[5] Transnational law is now taught as a first-year course in law schools,[6] and national courts, applying domestic law, have emerged to play an important, if not the primary, role in responding to cross-border challenges.[7] As transnational actions have increased, however, new difficulties present themselves.

One of the more intractable difficulties is the problem of parallel proceedings. What should a court do when a lawsuit involving the same parties and the same issues is already pending in the court of another country? Finding a coherent answer to this question has not been easy. Yet a need to find one exists. The number of foreign par-

---

Against Alien Defendants, 39 HASTINGS L.J. 799, 799 (1988) ("It is trite but true to observe that disputes between United States nationals and people from other lands have been increasing steadily and doubtless will continue to do so.").

5 *See* Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT'L ECON. L. 1297 (2004) (asserting that transnational litigation is a distinct field of law); Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301 (2008) (describing transnationalism in American procedural law); Linda Silberman, *Transnational Litigation: Is There a "Field"? A Tribute to Hal Maier*, 39 VAND. J. TRANSNAT'L L. 1427 (2006) (arguing that transnational litigation is a field that merits autonomous treatment).

6 *See* Helen Hershkoff, *Integrating Transnational Legal Perspectives into the First Year Civil Procedure Curriculum*, 56 J. LEGAL EDUC. 479, 479 (2006) (noting "the move to globalize the curriculum at other law schools has gathered steam, fueled by conferences, symposia, and workshops . . . with current efforts aimed at ensuring 'that the vast majority, if not all, of law school graduates have exposure to issues of international, transnational, and comparative law'" (quoting Franklin A. Gevurtz et al., *Report Regarding the Pacific McGeorge Workshop on Globalizing the Law School Curriculum*, 19 GLOBAL BUS. & L.J. 1, 3 (2005))); Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN. ST. INT'L L. REV. 745, 751–52 (2006) (describing how and why law schools include transnational law in the first-year curriculum); Elizabeth Rindskopf Parker, *Why Do We Care About Transnational Law?*, 24 PENN. ST. INT'L L. REV. 755, 757–61 (2006) (describing the need to include transnational materials in the law school curriculum); Mathias Reimann, *From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum*, 22 PENN ST. INT'L L. REV. 397 (2004) (calling for development of transnational law courses).

7 *See* Tonya Putnam, *Courts Without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere*, 63 INT'L ORG. 459 (2009) (describing extraterritorial regulation and exploring the potential for external conduct to undermine domestic legal rules); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 490 (2005) (arguing that the relationship between international and domestic legal norms should be conceived as a synergistic one in which domestic courts are active participants in developing international law); Christopher A. Whytock, *Domestic Courts and Global Governance*, 101 AM. SOC'Y INT'L L. PROC. 166, 167–68 (2007) (defining governance-oriented analysis and applying it to forum non conveniens). *See generally* Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 818, 845 (2009) (describing the increase in extraterritorial transnational litigation). For an early and seminal look at the role of national courts and transnational cases, see RICHARD A. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (1964).

allel proceedings, like the number of transnational cases, is on the rise.[8] And with the loosening of jurisdictional doctrines, as well as the spread of American-style litigation,[9] the future promises greater clashes between judicial systems as litigants are tempted to forum shop, vying to find courts and law more favorably inclined to them than their opponents.[10]

---

8 *See* Kimberly Hicks, *Parallel Litigation in Foreign and Federal Courts: Is Forum Non Conveniens the Answer?*, 28 REV. LITIG. 659, 660 (2009) (describing the increase in parallel litigation and how "[m]ultiple parties are trying to fight wars on multiple fronts, to the detriment of both the legal system and the concerned parties"); 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, 3 (2004) [hereinafter Teitz, *Both Sides of the Coin*] (explaining that "[i]ncreasing globalization of trade has both multiplied the number of parallel proceedings and the number of countries whose courts are facing the challenge of concurrent jurisdiction"); Louise Ellen Teitz, *Parallel Proceedings—Sisyphean Progress*, 36 INT'L LAW. 423, 433 (2002) (predicting an exponential increase in international parallel proceedings); Louise Ellen Teitz, *Parallel Proceedings: Treading Carefully*, 32 INT'L LAW. 223, 229 (1998) [hereinafter Teitz, *Treading Carefully*] (noting that "parallel proceedings continue to increase in frequency with no immediate relief in view"); 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, 80 (1999) ("Parallel litigation occurs increasingly often today as a result of an unprecedented expansion of transnational economic activities and a resulting increase in international business disputes."); *cf.* Andre Nollkaemper, *Cluster Litigation in Cases of Transboundary Harm*, *in* TRANSBOUNDARY ENVIRONMENTAL POLLUTION: THE CASE OF CHINA (Edward Elgar ed., 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091389 (describing the increased use of environmental "cluster litigation"—parallel or serial litigation of overlapping or closely related claims before multiple courts); Gilles Cuniberti, *Parallel Litigation and Foreign Investment Dispute Settlement*, 21 ICSID REV. FOREIGN INVESTMENT L.J. 381, 381 (2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1045181 (describing trends and explaining that "parallel litigation has become a recurrent issue in foreign investment disputes"); Cortelyou Kenney, Comment, *Disaster in the Amazon: Dodging "Boomerang Suits" in Transnational Human Rights Litigation*, 97 CAL. L. REV. 857 (2009) (describing the increase of parallel litigation in the human rights context as a way to subvert foreign proceedings).

9 Some have described the U.S.'s three largest exports as "'rock music, blue jeans, and United States law.'" United States v. Verdugo-Urquidez, 494 U.S. 259, 281 (1990) (Brennan, J., dissenting) (quoting V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L LAW. 257, 257 (1980)).

10 Andreas F. Lowenfeld, Editorial Comment, *Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM. J. INT'L L. 314, 314 (1997) (arguing that "[f]orum shopping, which used to be a favorite indoor sport of international lawyers, has developed into a fine art"). For an empirical assessment of whether forum shopping leads to a change in the law, see Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV (forthcoming 2009). Issues of overlapping jurisdiction arise in a host of other contexts. For a good discussion in the area of international trade law, see Elizabeth Trujillo, *From Here to Beijing: Public/Private Overlaps in Trade and Their Effects on U.S. Law*, 40 LOY. U. CHI. L.J. 691 (2009).

Despite its salience,[11] few commentators have addressed the issue of reactive,[12] duplicative foreign proceedings. The treatment of these kinds of parallel proceedings "remains one of the most unsettled areas of the law of federal jurisdiction,"[13] and a dearth of scholarship explores how a court should proceed if the same case is already pending in a foreign forum. Lower court decisions are muddled, as judges apply at least three distinct approaches that are undertheorized.[14] The Supreme Court of the United States, for its part, has never spoken directly to the issue and has not rescued the lower courts from their confusion.[15] The United States is not alone in its uncertainty. Other

---

11 A number of recent panels at major international law conferences have been dedicated to the issue of parallel proceedings. *See, e.g.*, Discretion to Decline Jurisdiction in International Cases, Panel at the American Branch of the International Law Association, International Law Weekend-West (Mar. 7, 2009); Litigation Here, Litigation There, Litigation Everywhere: Litigating the Same International Trade and Investment Disputes in Multiple Fora, Panel at the ABA Section of International Law Spring Meeting (Apr. 17, 2009). Corporations and their counsel are acutely aware of the growing problems of duplicative litigation. *See, e.g.*, Neil Klein, *How to Stop Parallel Foreign Litigation via a U.S. Antisuit Injunction*, FLA. SHIPPER, Dec. 1, 2008, at 14, *available at* http://www.mckassonklein.com/FloridaShipper.pdf. For some recent examples of parallel actions in foreign courts, see Vigano v. Houghton (2009) 224 F.L.R. 189 (Austl.) (parallel proceedings in Federal Magistrates Court of Australia and the United States); MGM Well Serv., Inc. v. Mega Lift, Inc., [2007] F.C. 1134 (Can.) (parallel litigation in Canada and the United States); Merck & Co v. Brantford Chemicals, Inc., [2005] F.C. 1360 (Can.) (parallel patent litigation in Canada and the United States); Andersen v. St. Jude Medical, Inc., [2006] 33 C.P.C. (6th) 159 (Can.) (parallel class action proceedings existed in Canada and the United States); Deutsche Bank AG v. Highland Crusader Offshore Partners LP, [2009] EWHC (Comm) 730, [2009] Lloyd's Rep. 61 (Queen's Bench Div. (Commercial Ct.)) (Eng.) (antisuit injunction sought in U.K. action to prevent parallel proceedings in Texas); Karaha Bodas Co. LLC v. Persuahaan Pertambanagan, [2008] H.K.E.C. 1007 (C.A.) (H.K.), 2008 WL 1933262 (noting that party had filed parallel litigation in Switzerland, Texas, New York, Indonesia, Cayman Islands, Canada and Singapore to avoid payment of an arbitral award); Bank of China (Hong Kong) Ltd. v. Nam Tai Elecs., Inc., [2009] 2 H.K.L.R.D. 33 (C.F.I.) (H.K.) (proceedings in Hong Kong to restrain party from initiating an action in the United States); Donohue v. Armco Inc., [2001] UKHL 64, [2002] 1 All E.R. 749 (H.L.) (U.K.) (antisuit injunction proceedings in the U.K. to prevent parallel U.S. litigation).

12 Reactive litigation refers to a countersuit that the first action's defendant files against the first action's plaintiff. In contrast, repetitive litigation is when a plaintiff files two or more parallel suits against the same defendant. This Article focuses on reactive litigation only. *See* Allan D. Vestal, *Reactive Litigation*, 47 IOWA L. REV. 11 (1961) [hereinafter Vestal, *Reactive Litigation*] (distinguishing reactive litigation from repetitive litigation); Allan D. Vestal, *Repetitive Litigation*, 45 IOWA L. REV. 525 (1960) [hereinafter Vestal, *Repetitive Litigation*] (same).

13 N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT'L ECON. L. 601, 603 (2006).

14 As described in Part I.B, *infra*, the three approaches are often referred to as the *Colorado River*, *Landis*, and international abstention approaches. *See infra* notes 46–69; *see also* Goldhammer v. Dunkin' Donuts, Inc., 59 F. Supp. 2d 248, 252 (D. Mass. 1999) (noting disagreement among federal courts as to how to approach requests to dismiss a proceeding pending the outcome of a parallel proceeding in a foreign court).

15 *See* Calamita, *supra* note 13, at 603; Linda S. Mullenix, *A Branch Too Far: Pruning the*

countries struggle with these difficult issues too.[16] Last year, the Supreme Court of Canada decided what scholars predicted would be a seminal case,[17] only for the court to issue a decision that revealed the same doctrinal confusion found in U.S. court decisions.[18]

In the United States, ingrained assumptions contribute to the difficulty in responding to duplicative litigation. For one, much of the existing analysis of foreign parallel proceedings is drawn from domestic theory, without any serious consideration as to whether the domestic can be so easily grafted onto the international, or whether the two situations are comparable at all.[19] A form of American exceptional-

---

Abstention Doctrine, 75 GEO. L.J. 99, 103–04 (1986) (arguing that "[r]ather than providing the lower courts with meaningful criteria for principled restraint, the Supreme Court has supplied an empty conglomeration of talismanic phrases and incantations"); Martine Stückelberg, Lis Pendens *and* Forum Non Conveniens *at the Hague Conference*, 26 BROOK. J. INT'L L. 949, 960–61 (2001) (arguing that the lack of a Supreme Court decision has led to different approaches in different circuits).

16 J.J. FAWCETT, DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW (1995) (containing reports on the practice of declining jurisdiction in Argentina, Australia, Belgium, Canada, Finland, France, Germany, Great Britain, Greece, Israel, Italy, Japan, The Netherlands, New Zealand, Quebec, Sweden, Switzerland, and the United States). The European Court of Justice recently confronted related issues in addressing the availability of an antisuit injunction in the well-known *West Tankers* case. Case C-185/07, Allianz SpA v. West Tankers, Inc., [2009] All E.R. (EC) 491. For a detailed online symposium about the case, see Gilles Cuniberti, *West Tankers: Online Symposium*, CONFLICT OF LAWS.NET, http://conflictoflaws.net/2009/west-tankers-online-symposium/.

17 *See, e.g.*, Vaughan Black & John Swan, Commentary, *Concurrent Judicial Jurisdiction: A Race to the Court House or to Judgment?*, 46 CAN. BUS. L.J. 292 (2008); Joost Blom, *Concurrent Judicial Jurisdiction and* Forum Non Conveniens*—What Is to Be Done?*, 47 CAN. BUS. L.J. 166 (2009); Austen L. Parrish, *Comity and Parallel Foreign Proceedings: A Reply to Black and Swan*, 47 CAN. BUS. L.J. 209 (2009); Janet Walker, Teck Cominco *and the Wisdom of Deferring to the Court First Seised, All Things Being Equal*, 47 CAN. BUS. L.J. 192 (2009).

18 Teck Cominco Metals Ltd. v. Lloyd's, [2009] 1 S.C.R. 321, 2009 SCC 11 (Can.), *available at* http://scc.lexum.umontreal.ca/en/2009/2009scc11/2009scc11.html. The Supreme Court of Canada's decision summarily concluded that the issue of parallel proceedings can be addressed through the use of the forum non conveniens doctrine, without explaining the reasons for its application. *Id.* at paras. 22–31, 38. The approach ultimately assumed that the waste of duplicative actions is inevitable. *Id.* at para. 38.

19 *See* Stephen B. Burbank, Essay, *The United States' Approach to International Civil Litigation: Recent Developments in Forum Selection*, 19 U. PA. J. INT'L ECON. L. 1, 14–17 (1998) (describing how through "cross-fertilization" domestic doctrines drive analysis of foreign parallel proceedings); Teitz, *Both Sides of the Coin*, *supra* note 8, at 71 (arguing that "in the United States there is a continuing attempt to squeeze the parallel proceedings problem into the shoes of domestic doctrines, shoes that are both too small and too old to fit the larger needs of transnational dispute resolution"); *see also* Dubinsky, *supra* note 5, at 341 (describing how courts are prone to use domestic doctrine when addressing transnational issues). For a general discussion of the incorrect reliance on domestic precedent in the transnational context, see Posner v. Essex Ins. Co., 178 F.3d 1209, 1222–24 (11th Cir. 1999); *see also* Louise Ellen Teitz, *Parallel Proceedings and the Guiding Hand of Comity*, 34 INT'L LAW. 545, 546–47 (2000).

ism is also often at play.[20] Some issues are too important, or so it is believed, to be left to foreign courts. Lastly, the question of what to do with parallel proceedings conventionally has had an awkward relationship with jurisdictional doctrines. The existence of jurisdiction—and the federal courts' "virtually unflagging obligation" to exercise it[21]—is touted as the primary reason why even duplicative actions must proceed unhindered.[22]

This Article takes a different tack. After critiquing and describing the limitations of current doctrine, it argues that when courts address foreign duplicative litigation they must account for the breadth of their extraterritorial jurisdictional assertions. In recent decades, jurisdictional doctrines have expanded dramatically not through legislative enactment, but by virtue of judge-made rules that have untethered jurisdiction, choice of law, and related doctrines from their original territorial moorings.[23] Since a dramatic re-envisioning of these doctrines seems unlikely, staying duplicative litigation becomes a key means for courts to accommodate and cabin the excesses of modern jurisdictional law and to avoid overburdening the judiciary.[24] In short, to the extent that U.S. courts continue to exercise jurisdiction broadly (perhaps, in some contexts, exorbitantly) a greater willingness

---

20 For a description of different kinds of American exceptionalism, see Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1480–87 (2003); *see also* James C. Hathaway, *America, Defender of Democratic Legitimacy?*, 11 EUR. J. INT'L L. 121, 132–34 (2000) (assessing the consequences of American exceptionalism).

21 Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976); *see also* Hyde v. Stone, 61 U.S. (20 How.) 170, 175 (1858) (explaining that when courts have jurisdiction "[t]he courts . . . cannot abdicate their authority or duty in any case in favor of another jurisdiction"); Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."). This concept of the mandatory exercise of jurisdiction likely evolved from the common law rule *judex tenetur impertiri judicium suum* (a court with jurisdiction over a case is bound to decide it). Sim v. Robinow, (1892) 19 R. 665, 668 (H.L.) (Scot.).

22 For perhaps the most well-known article arguing that federal courts violate separation of powers when they decline to exercise jurisdiction in the face of parallel state proceedings, see Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

23 For a general discussion of judge-made rules and jurisdiction, see Ann Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 CASE W. RES. L. REV. 1035 (1990); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769 (1992). For a recent detailed description of how even textualists have erratically interpreted jurisdictional statutes, see Peter J. Smith, *Textualism and Jurisdiction,* 108 COLUM. L. REV. 1883 (2008).

24 *See infra* Part I.A.

to stay reactive domestic litigation in the face of first-filed foreign proceedings is prudent.

Viewing abstention as a way to temper extraterritorial jurisdiction, this Article concludes by offering a different approach to duplicative foreign proceedings. Courts should embrace a modified *lis alibi pendens* principle[25] and reverse the prevailing presumption, which is heavily weighted in favor of allowing cases to continue even when duplicative foreign litigation is ongoing. Departing from current practice, courts should usually stay domestic proceedings when a first-filed foreign action exists, so long as the foreign court would have jurisdiction over the action under U.S. jurisdictional principles.[26] Creating a rough symmetry between stay decisions and when a foreign court is considered a reasonable and appropriate forum under U.S. jurisdictional rules would create a fairer system for litigants, reduce the waste of unnecessary duplication, and, on balance, better serve long-term U.S. interests.

I. The Problem

Any proposal for addressing duplicative foreign litigation must account for the costs that parallel proceedings impose. In the literature these costs are often downplayed, while the three primary doctrinal approaches to parallel proceedings that courts currently employ only partly capture what is at stake.

A. Waste, Inefficiencies, and Gamesmanship

Parallel proceedings raise a host of problems. As one commentator explains: "[T]here is almost nothing in principle to support the maintenance of concurrent, parallel proceedings in the courts of different countries."[27] Duplicative litigation is patently wasteful.[28] It im-

---

25 *Lis alibi pendens*, or simply *lis pendens*, is defined as a "suit pending elsewhere." BLACK'S LAW DICTIONARY 931 (6th ed. 1990).

26 The approach would be similar to what some have referred to as the "recognition prognosis" that has been adopted in many Western European countries. *See* FAWCETT, *supra* note 16, at 36–37.

27 Calamita, *supra* note 13, at 610; *see also* Vestal, *Reactive Litigation*, *supra* note 12, at 15 ("The policy of law generally seems to be that all facets of a controversy should be tried in a single action."); Janet Walker, *Parallel Proceedings—Converging Views: The* Westec *Appeal*, 38 CAN. Y.B. INT'L L. 155, 155 (2000) ("In the jungles of transnational litigation, there is probably nothing quite as savage as parallel litigation. It is savage because the commencement of a second proceeding on the same matters in a different forum almost inevitably represents some form of abuse." (footnote omitted)).

28 James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1064 (1994) ("Many of the costs of duplicative litigation are self-

poses a heavy financial burden on the parties by forcing them to litigate the same case simultaneously in two places, and sometimes in piecemeal fashion.[29] It also needlessly consumes scarce court resources, as two judges work on the same legal problem.[30] The waste is magnified if the ultimate judgment in one action renders the other action meaningless.[31] The concern for conserving scarce judicial resources should not be downplayed: the backlog of cases in U.S. courts[32] threatens access to justice.[33]

---

evident. It is patently wasteful."); *see also* Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L. 327, 339–46 (2004) (exploring the means to address and deal with the problems of parallel international litigation); Teitz, *Both Sides of the Coin*, *supra* note 8, at 3–15 (describing the increase of parallel proceedings, the race to file, and the problems with concurrent jurisdiction in international cases).

29 Calamita, *supra* note 13, at 609–10; *see also* Kathryn E. Vertigan, Note, *Foreign Antisuit Injunctions: Taking a Lesson from the Act of State Doctrine*, 76 GEO. WASH. L. REV. 155, 158 (2007) ("Although fears of a race to judgment are one concern that parallel litigation raises, there are others. These other concerns include increased expense and inconvenience to litigants, a waste of scarce judicial resources, and the risk of inconsistent judgments arising from the two different fora.").

30 *See* Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 811 (1989) (explaining how relitigation of identical issues wastes judicial resources); Treviño de Coale, *supra* note 8, at 80 (explaining that "[d]uplicative international proceedings impose a heavy financial burden on the parties involved, waste judicial resources, and risk contradictory judgments"); Vestal, *Reactive Litigation*, *supra* note 12, at 16 (noting the waste of resources that duplicative litigation causes).

31 *See* Note, *Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation*, 59 YALE L.J. 978, 983 (1950) [hereinafter *Power to Stay*] ("One tribunal's expenditure of time and effort will prove wasted since the first decision will be res judicata in the other suit."); *see also* Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League, 652 F.2d 852, 856 (9th Cir. 1981) (explaining how permitting litigation to proceed concurrently in two fora "could result in inconsistent rulings or even a race to judgment").

32 *See* THE BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 1 (1989) (arguing that litigants must wait too long to resolve civil disputes); Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 1–9 (1990) (describing the backlog of cases and delay in the federal courts); George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 527 (1989) ("Litigation delay has proven a ceaseless and unremitting problem of modern civil justice."); *cf.* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 985–95 (2003) (describing fears of undue delay, case backlog, and access to justice concerns). For a discussion in the context of duplicative litigation, see Freer, *supra* note 30, at 832 (arguing that "[c]ourts are a public resource, providing financed resolution of private disputes" and that "multiplicity is a harm to society's legitimate interest in judicial efficiency").

33 For an overview exploring recent issues of access to justice, see *Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151 (2009). For a classic formulation, see Chambers v. Balt. & Ohio R.R., 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and

Issues of cost and efficiency are not the only concern. Parallel proceedings are also problematic because they "smack[ ] of an indefensible gamesmanship, jeopardizing public faith in the judicial system."[34] A litigant may file parallel proceedings solely to vex or harass the opposing party.[35] At the very least, the ability to file a concurrent, parallel action invites tactics designed to delay the suit from proceeding in the forum not of the plaintiff's choice.[36] This is the race to judgment problem.[37] Concurrent proceedings can also lead to inconsistent judgments and subject the parties to incompatible obligations.[38] In some cases, a settlement strategy motivates the filing of a reactive suit, as the costs of litigating on two fronts are prohibitive for many plaintiffs.[39]

Further considerations exist beyond cost, efficiency, and gamesmanship. Continuing a case, when the same case between the same parties was already filed in a foreign forum, can implicate foreign relations and breed resentment. As one scholar notes, "[n]ot only are foreign relations apt to be more fragile than" state-to-state and federal-to-state relations, "but they are also more apt to be disturbed—specif-

---

lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . . .").

34 Rehnquist, *supra* note 28, at 1064 (describing the problems caused by duplicative litigation in the U.S. federal and state courts).

35 Michael T. Gibson, *Private Concurrent Litigation in Light of* Younger*,* Pennzoil*, and* Colorado River, 14 OKLA. CITY U. L. REV. 185, 196–98 (1989) ("The reacting party often is trying to vex or harass the original plaintiff . . . . Reactive litigation generated by these illegitimate motives serves no useful purpose and often creates significant problems."); Vestal, *Repetitive Litigation*, *supra* note 12, at 526 (describing how plaintiffs can harass defendants through the filing of duplicative parallel proceedings); *cf.* Yoshimasa Furuta, *International Parallel Litigation: Disposition of Duplicative Civil Proceedings in the United States and Japan*, 5 PAC. RIM L. & POL'Y J. 1, 4 (1995) (arguing that parallel proceedings can have benefits in narrow circumstances, but noting the problem of harassment).

36 *See* Calamita, *supra* note 13, at 610 n.17 (citing Airbus Industrie G.I.E. v. Patel, [1999] 1 A.C. 119 (H.L.) (appeal taken from Eng.) (U.K.)).

37 *See* Vestal, *Reactive Litigation*, *supra* note 12, at 16 (describing the race-to-judgment problems created by parallel proceedings).

38 *See* Takao Sawaki, *Battle of Lawsuits:* Lis Pendens *in International Relations*, 23 JAPANESE ANN. INT'L L. 17, 19–20 (1980) (exploring how duplicative actions can result in conflicting judgments); *see also* EFCO Corp. v. Aluma Sys. USA, Inc., 983 F. Supp. 816, 824 (S.D. Iowa 1997) ("Maintaining two concurrent and simultaneous proceedings would consume a great amount of judicial, administrative, and party resources for only speculative gain. Furthermore, simultaneous adjudications regarding identical facts and highly similar legal issues create the risk of inconsistent judgments.").

39 *See* Furuta, *supra* note 35, at 5 (describing how the defendant may "intend[ ] to place the burden on the plaintiff in anticipation of a favorable settlement of the dispute"). For a classic example, see Bethell v. Peace, 441 F.2d 495, 498 (5th Cir. 1971) (antisuit injunction granted based on vexatious nature of foreign litigation).

ically by the apparent interference of one state's courts in the judicial business of another's."[40] In high-profile suits, duplicative litigation can potentially interfere with the executive's management of foreign affairs.[41] And when duplicative litigation proceeds simultaneously in two countries, courts are aware of the key role they play. "One court may be asked to accelerate (or delay) its adjudication to thwart (or enhance) the potentially preclusive effect of a result in the other court, a strategy that squarely pits docket against docket, if not court against court."[42] For these reasons, near universal agreement exists that duplicative litigation, in theory, should be avoided.

B. Three Doctrinal Approaches

Presently, U.S. courts apply variations on three different approaches when concurrent, duplicative proceedings are pending in a foreign country.[43] In all three approaches, courts mostly continue to address parallel proceedings in the international context using the tools of domestic doctrine.[44] And generally courts are reluctant to stay an action pending resolution of a first-filed foreign action, concerned that deferring to a foreign court constitutes an abdication of their responsibility to hear a case once jurisdiction vests.[45] As detailed below, the overriding presumption is against declining jurisdiction.

---

40 George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589, 606 (1990).

41 This can be particularly true if parties seek antisuit injunctions in either court. *See generally* Trevor C. Hartley, *Comity and the Use of Antisuit Injunctions in International Litigation*, 35 AM. J. COMP. L. 487 (1987) (considering whether antisuit injunctions are breaches of comity or threaten relations with other countries).

42 Rehnquist, *supra* note 28, at 1065; *see also* LaDuke v. Burlington N. R.R., 879 F.2d 1556, 1560 (7th Cir. 1989) (describing the danger that, when two suits are allowed to proceed simultaneously, "a party may try to accelerate or stall proceedings in one of the forums in order to ensure that the court most likely to rule in its favor will decide a particular issue first").

43 Commentators have labeled the approaches differently. *See, e.g.*, GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 524–26 (4th ed. 2007) (describing approaches based on *Landis* and *Colorado River*); Calamita, *supra* note 13, at 655–69 (describing Abstentionists, Landites, and Internationalists); Jocelyn H. Bush, Comment, *To Abstain or Not to Abstain?: A New Framework for Application of the Abstention Doctrine in International Parallel Proceedings*, 58 AM. U. L. REV. 127, 145–47 (describing *Colorado River*, *Landis*, and international abstention approaches).

44 *See* BORN & RUTLEDGE, *supra* note 43, at 524–25.

45 For some recent examples where courts failed to find the extraordinary circumstances needed to outweigh the courts' unflagging obligation to exercise jurisdiction, see Answers in Genesis of Ky., Inc. v. Creation Ministries Int'l, Ltd., 556 F.3d 459, 467–69 (6th Cir. 2009); Royal & Sun Alliance Ins. Co. of Can. v. Century Int'l Arms, Inc., 466 F.3d 88, 93–94 (2d Cir. 2006); *In re* CP Ships Ltd. Sec. Litig., No. 8:05-MD-1656-T-27TBM, 2008 WL 4663363, at *3 (M.D. Fla. Oct. 21, 2008), *aff'd*, No. 08-16334, 2009 WL 2462367 (11th Cir. Aug. 13, 2009); Ekland Mktg. Co.

The first approach developed from the U.S. Supreme Court's 1976 landmark decision in *Colorado River Water Conservation District v. United States.*[46] The *Colorado River* case involved the exercise of federal jurisdiction when the parties were simultaneously litigating the same issues in state court.[47] In now oft-cited language,[48] the Court cautioned that abstention in the federal-state context should occur only in "exceptional" circumstances because a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" exists.[49] The Court explained, however, that in rare cases "principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations" control.[50] Abstention might be appropriate, the Court found, when necessary for "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."[51]

After *Colorado River*, a number of cases reaffirmed its core holding[52] and later courts applied the case and its progeny in the international context.[53] Because a "heavy obligation to exercise jurisdiction" exists,[54] under this approach courts rarely stay litigation when faced

---

v. Lopez, No. CIV. S-05-0761 FCD/GGH, 2007 WL 2288319 (E.D. Cal. Aug. 8, 2007); Miller Brewing Co. v. Molson Coors Brewing Co., No. 05-C-1307, 2006 WL 1543975 (E.D. Wis. May 30, 2006); *cf.* Bigio v. Coca-Cola Co., 239 F.3d 440, 454 (2d Cir. 2000) ("When a court dismisses a complaint in favor of a foreign forum pursuant to the doctrine of international comity, it declines to exercise jurisdiction it admittedly has.").

46 Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). For a recent student note describing the case and supporting its use when addressing foreign parallel proceedings, see Bush, *supra* note 43, at 135–36, 148–51.

47 *Colo. River*, 424 U.S. at 805–06.

48 *See, e.g.*, Deakins v. Monaghan, 484 U.S. 193, 203 (1988); Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 552 (1983).

49 *Colo. River*, 424 U.S. at 817–18; *see also id.* at 813, 819 (describing the "duty of a District Court to adjudicate a controversy properly before it" and emphasizing that "[o]nly the clearest of justifications will warrant dismissal").

50 *Id.* at 817 (describing general principles to guide the decision as to whether exceptional circumstances are present).

51 *Id*. (quotation omitted). The Court later emphasized that courts should consider six factors to determine whether to abstain under *Colorado River*: (1) whether either court has assumed jurisdiction over a res; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) consideration of where the case was filed first; (5) whether state or federal law controls; and (6) the adequacy of the state forum to protect the parties' rights. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15–16, 23, 26 (1983).

52 *See, e.g.*, *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 13, 19; Will v. Calvert Fire Ins. Co., 437 U.S. 655, 663–64 (1978).

53 BORN & RUTLEDGE, *supra* note 43, at 524 (citing cases); *see, e.g.*, AAR Int'l, Inc. v. Nimelias Enters. S.A., 250 F.3d 510, 516–18 (7th Cir. 2001); Neuchatel Swiss Gen. Ins. Co. v. Lufthansa Airlines, 925 F.2d 1193 (9th Cir. 1991).

54 *Colo. River*, 424 U.S. at 820.

with duplicative foreign proceedings.[55] Rather, "'[p]arallel proceedings on the same in personam claim [are] ordinarily . . . allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other.'"[56]

A second, related approach recognizes the general unflagging obligation of federal courts to exercise jurisdiction conferred upon them, but then focuses on the unique considerations that private international disputes raise.[57] Characterized as international abstention, this second approach infuses comity and broader fairness considerations into the analysis, as well as concern over the efficient use of judicial resources.[58] Under the international abstention approach, courts tend to more readily stay an action pending resolution of an identical first-filed foreign proceeding. Several courts, however, have limited the application of international abstention—and, in turn, the use of comity—to when a foreign decision has been reached (finding it inapplicable to pending foreign actions).[59] Notably, unlike stays entered under

---

55 *See, e.g.*, *Neuchatel Swiss Gen. Ins. Co.*, 925 F.2d at 1194–95 (reversing stay in absence of exceptional circumstances); *see also* Gen. Motors Corp. v. Ignacio Lopez de Arriortua, 948 F. Supp. 656, 669 (E.D. Mich. 1996) (finding insufficient exceptional circumstances).

56 China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987) (quoting Laker Airways, Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 926–27 (D.C. Cir. 1984) (citing *Colo. River*, 424 U.S. at 817)); *see also* Royal & Sun Alliance Ins. Co. of Can. v. Century Int'l Arms, Inc., 466 F.3d 88, 93 (2d Cir. 2006) (noting that "while the relevant factors to be considered differ depending on the posture of the case, the starting point for the inquiry remains unchanged: a district court's 'virtually unflagging obligation' to exercise its jurisdiction" (citing *Colo. River*, 424 U.S. at 817)).

57 For a recent example, see Belize Telecom, Ltd. v. Gov't of Belize, 528 F.3d 1298, 1305 (11th Cir. 2008) (noting the general obligation to exercise jurisdiction, but reiterating a narrow exception for some private international law cases); *see also* Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1134, 1157–58 (C.D. Cal. 2005) (discussing exception to unflagging obligation but noting its use must be rare).

58 *See, e.g.*, Turner Entm't Co. v. Degeto Film GmbH, 25 F.3d 1512, 1518–23 (11th Cir. 2004). Under the international abstention doctrine, courts promote three "readily identifiable goals": (1) international comity; (2) fairness to litigants; and (3) efficient use of judicial resources. *Id.* at 1518; *see also* Posner v. Essex Ins. Co., 178 F.3d 1209, 1223–24 (11th Cir. 1999) (describing international abstention doctrine); Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc., 180 F.3d 896, 898–99 (7th Cir. 1999) (setting forth factors to consider when deciding whether to abstain); *Mujica*, 381 F. Supp. 2d at 1157 (citing the Eleventh Circuit decision in *Turner* and the Seventh Circuit decision in *Finova Capital Corp.* as adopting and formulating the doctrine); Supermicro Computer, Inc. v. Digitechnic, S.A., 145 F. Supp. 2d 1147, 1149 (N.D. Cal. 2001) (noting that as formulated in *Turner*, "[i]nternational abstention is rooted in concerns of international comity, judicial efficiency, and fairness to litigants").

59 *See, e.g.*, BP Chems. Ltd. v. Jiangsu Sopo Corp., 429 F. Supp. 2d 1179, 1182 (E.D. Mo. 2006) (rejecting international abstention doctrine and finding that "[i]nternational comity suggests deference to judicial decisions, not to pending actions"); Linear Prods., Inc. v. Marotech, Inc., 189 F. Supp. 2d 461, 466 n.1 (W.D. Va. 2002) (rejecting the use of the international abstention doctrine when faced with related Canadian proceeding).

the *Colorado River* doctrine, stays granted employing international abstention are generally not considered final rulings and therefore are not immediately appealable.[60]

The third approach—and the least followed for transnational litigation[61]—is drawn from cases dealing with parallel litigation pending in more than one federal court.[62] In that context, "something close to a system of *lis pendens* operates, with a strong preference in favor of the first filed case."[63] This approach can be traced to *Landis v. North American Co*., where Justice Cardozo, writing for the court, rested the decision to stay on the inherent equitable powers of the court: "[T]he 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."[64] Under *Landis*, courts employ a balancing test[65] that requires the mo-

---

60 Groenveld Transp. Efficiency v. Eisses, 297 Fed. App'x 508, 512 (6th Cir. 2008) (finding stay order did not constitute a final order and appellate court lacked jurisdiction to hear appeal); Boushel v. Toro Co., 985 F.2d 406, 408 (8th Cir. 1993) (finding stay order is not immediately appealable).

61 James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 799 (1999) (noting that "*Landis* is not often cited by courts addressing intrafederal parallels, apparently because its formulation of a first-impression test has been superseded by later, more definitive cases"). *Compare* BORN & RUTLEDGE, *supra* note 43, at 523 ("Although it has occasionally been suggested that the *lis pendens* doctrine is not available in international cases, the doctrine has frequently been invoked to stay domestic actions in favor of parallel proceedings in non-U.S. courts." (footnotes omitted)), *with* Bermann, *supra* note 40, at 610 (arguing that *lis pendens* does not operate in the international setting).

62 *See* Landis v. N. Am. Co., 299 U.S. 248, 254–55 (1936) (describing approach to parallel federal litigation); *see also* Michael M. Wilson, Comment, *Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of* Colorado River, 44 U. CHI. L. REV. 641, 644–46 (1977) (describing how interjurisdictional stays are commonly granted).

63 Stephen B. Burbank, *Jurisdictional Equilibrium, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 213 (2001). *See generally* Note, *Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions*, 98 HARV. L. REV. 1023, 1038-43 (1985) (evaluating the practice of staying civil proceedings while parallel criminal proceedings progress).

64 *Landis*, 299 U.S. at 254. For a recent discussion of the court's inherent authority to control procedure, see Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813 (2008).

65 "In determining whether to grant a motion to stay, courts consider such factors as: (1) the length of the requested stay; (2) the 'hardship or inequity' that the movant would face in going forward with the litigation; (3) the injury that a stay would inflict upon the nonmovant; and (4) whether a stay will simplify issues and promote judicial economy." St. Clair Intellectual Prop. Consultants v. Fujifilm Holding Corp., No. 08-373-JJF-LPS, 2009 WL 192457, at *2 (D. Del. Jan. 27, 2009) (citing *Landis*, 299 U.S. at 254–55). Other courts have said the *Landis* test balances seven factors: (1) comity; (2) the adequacy of relief available in the other forum; (3) judicial efficiency; (4) the identity of the parties and issues in the two cases; (5) the likelihood of prompt disposition in the other forum; (6) convenience to the parties, counsel, and witnesses;

vant to "make out a clear case of hardship or inequity in being required to go forward [in the other forum] . . . ."[66] The burden is on the party seeking the stay to establish grounds for it; the court's decision to grant the stay is discretionary.[67]

Another wrinkle adds to the confusion. Although these three approaches to reactive, duplicative litigation are different, with distinct emphases and historical roots, courts have blurred the lines separating them.[68] Judges commonly now cite all three approaches—relying on *Colorado River*, *Landis*, or international abstention cases simultaneously—neglecting to acknowledge the tension (or, perhaps, even inconsistency) in doing so.[69]

II. The Critique

All three analytical approaches that U.S. courts use fail to adequately address, in differing degrees, the problems of first-filed, duplicative foreign proceedings. Courts would be better off decoupling the issue of foreign duplicative proceedings from the domestic abstention doctrines and expressly recognizing that international abstention acts as a counter to balance the increasingly broad jurisdictional reach of American courts.

---

and (7) the possibility of prejudice if the stay or dismissal is granted. *See, e.g.*, Nigro v. Blumberg, 373 F. Supp. 1206, 1212–13 (E.D. Pa. 1974); *see also* Battle v. Anderson, 564 F.2d 388, 397 (10th Cir. 1977) (describing a similar four-factor test).

66 *Landis*, 299 U.S. at 255; *see also* Dellinger v. Mitchell, 442 F.2d 782, 786 (D.C. Cir. 1971) (noting the *Landis* balancing test).

67 *See* Ohio Env't Council v. U.S. Dist. Ct. S.D. Ohio, 565 F.2d 393, 396 (6th Cir. 1977) (explaining that whether to enter a stay is within the "sound discretion" of the district court and that the party seeking the stay bears the burden of showing "that there is pressing need for delay, and that neither the other party nor the public will suffer harm from entry of the order." (citing *Landis*, 299 U.S. at 254–55)); *see also* Castanho v. Jackson Marine, Inc., 484 F. Supp. 201, 209 (E.D. Tex. 1980) (noting the district court's discretion and the party seeking the stay's burden); Kahan v. Rosenstiel, 285 F. Supp. 61, 62 (D. Del. 1968) (commenting that the party seeking a stay or dismissal in federal court must show the decision in a parallel state action would dispose of all issues).

68 BORN & RUTLEDGE, *supra* note 43, at 526 n.31 ("[S]everal recent courts are beginning to blur the traditional fine distinctions between the '*Colorado River*' approach and the '*Landis*' approach. Instead, they cite principles from both decisions and announce a set of factors drawing on both lines of authority.").

69 *Id.* (citing Nat'l Union Fire Ins. Co. v. Kozeny, 115 F. Supp. 2d 1243, 1246–47 (D. Colo. 2000) and Goldhammer v. Dunkin' Donuts, Inc., 59 F. Supp. 2d 248, 251–53 (D. Mass. 1999)); *see also* George, *supra* note 61, at 907 (explaining how courts have integrated both the *Landis* and *Colorado River* approaches, and how the tests are similar in application).

A. The Limits of Current Doctrine

The present approaches to first-filed, foreign, duplicative litigation can be critiqued on a number of fronts. As an initial matter, *Landis* abstention—used to address duplicative federal court proceedings—conceptually is ill-suited for the international context.[70] *Landis* is concerned with intrajurisdictional stays, when the reactive litigation is filed in the same court system.[71] Distinguishing between intra- and interjurisdictional stay requests is sound: although the differences are sometimes overplayed,[72] foreign courts can have starkly different judicial systems and conceptions of justice.[73] Bright-line, automatic, first-to-file rules (without other adjustments) work best when similar jurisdictional and judgment-enforcement rules are used and the existence of concurrent jurisdiction is rare.[74] Moreover, in practice, courts that utilize *Landis* as the starting point for the analysis commonly end up considering factors similar to those considered under the *Colorado River* or international abstention approaches.[75]

On the other hand, the other two approaches—*Colorado River* and international abstention—have their own limitations. Both approaches have led to paradoxical results. Under current law, U.S. courts are more respectful of comity when no foreign action exists and

---

70 *See* Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am., 651 F.2d 877, 887 n.10 (3d Cir. 1981) (asserting that the first-to-file rule was never meant to apply in cases where two courts were not of the same sovereign (citing Crosley Corp. v. Hazeltine Corp., 122 F.2d 925, 929 (3d Cir. 1941))), *aff'd sub nom.* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).

71 *See Landis*, 299 U.S. at 249–53.

72 The debate over the use of foreign law in U.S. Supreme Court decisions is an example where some judges and commentators overplay the variations among different countries' judicial systems and conceptions of justice. For an overview of the debate, see Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637.

73 Countries vary dramatically, for example, in their approaches to the doctrine of forum non conveniens. *See* FAWCETT, *supra* note 16, at 10–21 (describing the different approaches throughout the world, including those of Canada, Israel, Japan, New Zealand, the United Kingdom, and the United States); MICHAEL KARAYANNI, FORUM NON CONVENIENS IN THE MODERN AGE: A COMPARATIVE AND METHODOLOGICAL ANALYSIS OF ANGLO-AMERICAN LAW (2004) (describing approaches to forum non conveniens).

74 *See* Blom, *supra* note 18, at 167–68. *See generally* ARTHUR TAYLOR VON MEHREN, THEORY AND PRACTICE OF ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY OF THE DOCTRINE, POLICIES AND PRACTICES OF COMMON- AND CIVIL-LAW SYSTEMS 342–43 (Hague Academy of International Law 2002) (1996) (from 295 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW) (While "priority in time is normally decisive in [intrajurisdictional] litigation," in the international context the second filed proceeding is traditionally "not barred by any State by an essentially automatic *lis pendens* rule.").

75 BORN & RUTLEDGE, *supra* note 43, at 525–26.

the offense to foreign sovereigns is at best speculative than when a foreign court has already asserted jurisdiction and the likelihood of offense is real. This is because courts may dismiss a case by virtue of forum non conveniens without considering its unflagging obligation to exercise jurisdiction.[76] Under forum non conveniens, a U.S. court will dismiss a case if it finds itself to be a significantly inconvenient forum whereas requiring that the parties litigate elsewhere would better serve the interests of the public and the parties.[77] The paradox is therefore twofold. First, courts are more willing to dismiss than stay an action (i.e., they are more willing to impose a harsher result).[78] Second, courts find comity to be a more potent concept when the possibility of offending a foreign sovereign and the threat of duplicative costs is at most speculative.

This inconsistent treatment—difficult to justify in any principled way—is likely an historical oddity. Courts developed one line of cases under forum non conveniens, simultaneously crafted international abstention in an entirely separate line of cases, and failed to recognize the substantial overlap. In the forum non conveniens context, unlike the abstention context, the notion of an unflagging obligation to exercise jurisdiction long ago gave way to the concept of international comity.[79]

---

76 *See* Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 782 (1985) (arguing that a court's discretionary ability to ignore formal rules of jurisdiction through forum non conveniens has, "for the most part, escaped serious scrutiny"). For some early criticisms of the forum non conveniens doctrine, see Alexander M. Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q. 12 (1949); Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947).

77 *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255–61 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507–09 (1947); 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. (SUPPLEMENT) 245, 245–46 (1994).

78 Some dispute exists as to whether a stay is meaningfully different than a dismissal. *See* Goldhammer v. Dunkin' Donuts, Inc., 59 F. Supp. 2d 248, 252 (D. Mass. 1999) (stating that "as a practical matter, in many circumstances a stay is tantamount to dismissal"); David A. Sonenshein, *Abstention: The Crooked Course of* Colorado River, 59 TUL. L. REV. 651, 671 (1985) (arguing that no meaningful difference exists between a stay and a dismissal). *But see* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 720–21 (1996); Abdullah Sayid Rajab Al-Rifai & Sons W.L.L. v. McDonnell Douglas Foreign Sales Corp., 988 F. Supp. 1285, 1291 (E.D. Mo. 1997) (holding that *Quackenbush* precludes an outright dismissal, but not a stay, in favor of parallel foreign litigation).

79 *See* KARAYANNI, *supra* note 73, at 125–31 (2004) (describing the decline of the "ouster theory" and the re-emergence of international comity); Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 33–34 (1929) (providing an early analysis of the doctrine's use in U.S. courts); Comment, *Forum Non Conveniens, A New Federal Doctrine*, 56 YALE L.J. 1234, 1234–36, 1240–41 (1947) [hereinafter *Forum Non Con-*

Another problem exists in relying on *Colorado River* for international cases. The unflagging obligation of federal courts to exercise jurisdiction is a principle peculiar to the domestic context. The "unflagging obligation" language[80] developed in the context of the civil rights movement[81] and, despite some protests in the case to the contrary,[82] is generally understood to reflect long-ensuing debates over federalism.[83] The unflagging obligation was formulated with concerns that state courts were not as prone as federal courts to promptly and effectively vindicate federal constitutional rights, or, at least, that Southern state court judges could not be trusted as guardians of con-

---

veniens] (describing how in both federal and state courts, forum non conveniens became an exception to the rule that courts must exercise jurisdiction); 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, 949 (1990) (describing the tension between forum non conveniens and the *judex tenetur* principle); *cf.* Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 432 (2007) (permitting courts to dismiss based on forum non conveniens without first determining the existence of jurisdiction); David G. Morgan, *Discretion to Stay Jurisdiction*, 31 INT'L & COMP. L.Q. 582, 582 (1982) (explaining that "[t]he English High Court has always enjoyed an inherent discretion to stay an action in order to prevent injustice, even though proper jurisdiction has been founded and even though there is no foreign jurisdiction clause").

80 Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

81 *See* James E. Pfander, Brown II*: Ordinary Remedies for Extraordinary Wrongs*, 24 LAW & INEQ. 47, 73 (2006) ("*Pullman* abstention represented a major obstacle to the ability of civil rights plaintiffs to challenge the many new laws that Southern legislatures adopted to frustrate the *Brown I* decision."); Redish, *supra* note 22, at 72 (discussing the use of traditional abstention in civil rights cases to "effectively prohibit the federal courts from enforcing federal civil rights laws, in particular section 1983, and from exercising their congressionally-vested jurisdiction to enforce those laws" (footnote omitted)); Bryce M. Baird, Comment, *Federal Court Abstention in Civil Rights Cases: Chief Justice Rehnquist and the New Doctrine of Civil Rights Abstention*, 42 BUFF. L. REV. 501, 503 (1994) (arguing that the Supreme Court through abstention doctrines has "exclude[d] civil rights litigants from the federal forum which Congress and the courts have expressly guaranteed to such plaintiffs").

82 *Colo. River*, 424 U.S. at 817 (suggesting federalism concerns were absent from the decision).

83 For a general overview of these debates, see Philip B. Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 487 (1960) (arguing that one problem of "cooperative judicial federalism" is "how to utilize the special expertise of each of two judicial systems, State and federal"); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 625 (1991) (arguing that "the challenge lies in finding a principled means of identifying those cases that belong in federal court"); *cf.* Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 506 (1928) ("[T]he proper allocation of authority between United States and state courts is but part of the perennial concern over the wise distribution of power between the states and the nation."). *See generally* Owen M. Fiss, Dombrowski, 86 YALE L.J. 1103 (1977) (describing the Warren Court's determination to protect the civil rights movement and its subsequent dismantling by the Burger Court through cases like *Younger v. Harris*, 401 U.S. 37 (1971)).

stitutional rights.[84] Skeptics of federal and state court parity "posit an overt hostility on the part of state courts to the vindication of federal constitutional rights."[85] Underlying the debate, then, over whether the federal courts must exercise the jurisdiction Congress has granted them is the acknowledgement that the Constitution grants Congress the primary authority for defining the federal courts' jurisdiction.[86]

Regardless of the merits of this parity debate, the considerations animating it are not present in the international context.[87] The nation's system of federalism specifically embraces and encourages concurrent federal and state court jurisdiction,[88] and achieving the correct balance between federal and state court authority is a key component of federalism.[89] In contrast, no higher civil court exists on the international plane,[90] nor does any world constitution purport to distribute

---

84 *See, e.g.*, Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 539 (1989) (noting the abstention doctrine "rested upon a fundamental distrust of state courts to protect federal rights"); *see also* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105 (1977) (describing as a "dangerous myth" the assumption that "state courts will vindicate federally secured constitutional rights as forcefully as would the lower federal courts"); Redish, *supra* note 22, at 91–92 ("If it is thought that state judges . . . will be more sympathetic to state concerns, then it is difficult to see how state judges can also be equally enthusiastic enforcers of federal rights against state action." (footnote omitted)).

85 Michael E. Solimine & James L. Walker, *State Court Protection of Federal Constitutional Rights*, 12 HARV. J.L. & PUB. POL'Y 127, 130 (1989); *see also* Friedman, *supra* note 84, at 537–38 ("Implicit in every criticism of abstention is the assumption that, absent federal forum, federal rights will not be vindicated. Abstention's critics are of the view that state courts are not as sensitive to claims of federal rights as are federal courts. Thus, denial of a federal forum runs the risk of effectively denying the plaintiff a federal right." (footnotes omitted)).

86 U.S. CONST. art. III, § 2.

87 For a discussion of how the international legal system is different from the domestic system in another context, see Suzannah Linton & Firew Kebede Tiba, *The International Judge in an Age of Multiple International Courts and Tribunals*, 9 CHI. J. INT'L L. 407, 415–18 (2009).

88 *See* Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 514 (1962) (noting the "historic acceptance of concurrent state and federal jurisdiction over cases arising under federal law"); *see also* Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861 (1985) (discussing the relationship between federalism and concurrent federal and state jurisdiction).

89 For a nice description, see John B. Oakley, *The Story of* Owen Equipment v. Kroger*: A Change in the Weather of Federal Jurisdiction*, *in* CIVIL PROCEDURE STORIES 75, 112 (Kevin M. Clermont ed., 2004) ("'Federalism' has become a code word for insisting that federal power is indeed limited, that the national government remains essentially a federal union of sovereign states, and that state authority should be zealously protected. Federalism celebrates states as organs of republican government constituted by locally accountable officials. By preserving the dignity and authority of state government, federalism guards against the processes of government becoming too remote from the people they govern, especially in matters of day-to-day life."). *See generally* Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987) (arguing for a conception of federalism which respects the relative strengths of federal and state court systems).

90 Both the International Court of Justice (ICJ) and the International Criminal Court

authority between different nations' courts.[91] Internationally, concurrent exercise of authority is often discouraged to avoid conflict, and each nation-state is under an obligation to exercise its sovereignty in a way that reduces interference with the sovereignty of others.[92]

Nor do the separation of powers concerns, which have been thought to require courts to exercise jurisdiction once vested,[93] exist in the international context. In domestic cases, declining jurisdiction in the absence of clear statutory authority may or may not be "a power

---

(ICC) are, of course, international courts, but they possess limited jurisdiction, and relatively few international issues (let alone civil actions) are resolved in either forum. *See* Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, 1060 (providing that the ICJ hears disputes only between states who have accepted the court's jurisdiction); *see also* Rome Statute of the International Criminal Court arts. 12–13, July 17, 1998, 2187 U.N.T.S. 90, 99 (authorizing the ICC to exercise jurisdiction over nationals of a nonstate party if (1) a national of an accepting nonstate party commits a crime within the territory of a state party, or (2) a national of a nonparty commits a crime referred to the ICC by the Security Council).

91 *See* U.N. Charter art. 2, para. 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."). There are some who notably argue for the constitutionalization of international law. For a recent discussion of some of the literature, see Thomas Giegerich, *The* Is *and the* Ought *of International Constitutionalism: How Far Have We Come on Habermas's Road to a "Well-Considered Constitutionalization of International Law"?*, 10 GERMAN L.J. 31, 31 n.1 (2009) (citing advocates of constitutionalization); *see also* TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005) (collecting essays on constitutionalization); TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN MODELS (Nicholas Tsagourias ed., 2007) (same, with special reference to Europe).

92 *See* Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905 (1938), *further proceedings at* 3 R.I.A.A. 1938 (1941) (holding that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another"); *see also* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9) (holding that it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"); Lac Lanoux (Spain v. Fr.), 12 R.I.A.A. 281 (1957), *as reprinted in* 53 AM. J. INT'L L. 156, 169–70 (1959) (holding that states have a duty to cooperate and account for the interests of other states); Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1928) (describing how states must respect the interest of other states); Rio Declaration on Environment and Development, Principle 2, June 14, 1992, 31 I.L.M. 874, 876 (declaring that states have the obligation "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction").

93 Martin H. Redish is the leading proponent of the view that declining jurisdiction violates separation-of-powers principles. *See* Redish, *supra* note 22; *see also* MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY 47–74 (1991) (arguing that total and partial judge-made abstention are unacceptable); *cf.* 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, 1016–19 (1990) (arguing that the Supreme Court's abstention doctrines are illegitimate).

grab—a usurpation of congressional power to define the jurisdiction of the federal courts—that is incompatible with basic premises of constitutional democracy."[94] But in the international context, the existence of parallel proceedings is largely not one of Congressional choice, but a result of judge-made jurisdictional rules.[95] Presumably what the courts give, they can take away.[96]

Another point is worth making, although it is not peculiar to foreign parallel proceedings. The universally quoted language that courts have a "virtually unflagging obligation"[97] to hear cases is, as a descriptive matter, simply wrong. Courts flag in their obligation to hear cases all the time. From the justiciability doctrines,[98] to forum non conveniens,[99] to abstention,[100] to exhaustion of state remedies,[101] to supplemental jurisdiction,[102] courts now commonly decline to hear

---

94 RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1190 (5th ed. 2003).

95 As described *infra* Part II.B, the expansion of jurisdictional rules—leading to concurrent exercises of jurisdiction—have mostly been court driven.

96 This species of argument—that a greater power includes the lesser power—is a familiar one to federal courts scholars. *See, e.g.*, Lockerty v. Phillips, 319 U.S. 182, 187 (1943) (concluding that Congress's greater power to ordain and establish inferior courts impliedly includes the lesser power to determine those courts' jurisdiction). *Compare* Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sage*r, 77 NW. U. L. REV. 143, 145 (1982) ("Because [Congress] retains [the power to abolish the lower courts], Congress may exercise the 'lesser' power of 'abolishing' lower federal courts as to certain *issues—i.e.*, limit their jurisdiction."), *with* Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030–31 (1982) (rejecting greater-includes-lesser theory), *and* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 908, 912, 914–15 (1984) (rejecting greater-includes-lesser theory).

97 Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

98 *See generally* FALLON ET AL., *supra* note 94, at 79–85, 114–267 (describing the justiciability doctrines, including standing, ripeness, mootness, political question doctrine, and advisory opinions); *see also* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 306–10 (1979) (describing the representative purpose of the justiciability doctrines); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–71 (1973) (describing the justiciability doctrines and setting out the traditional private rights and special function models of the federal courts).

99 *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 238 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507–09 (1947); McLennan v. Am. Eurocopter Corp., 245 F.3d 403, 423–24 (5th Cir. 2001). For interjurisdictional federal transfers, see 28 U.S.C. § 1404 (2006).

100 *See, e.g.*, Younger v. Harris, 401 U.S. 37, 44–48 (1971) (*Younger* abstention); La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28–29 (1959) (*Thibodaux* abstention); Burford v. Sun Oil Co., 319 U.S. 315, 333–34 (1943) (*Burford* abstention); R.R. Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941) (*Pullman* abstention). *See generally* FALLON ET AL., *supra* note 94, at 1186–212 (summarizing the various abstention doctrines).

101 *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 557–59 (1985).

102 28 U.S.C. § 1367(c) (providing courts discretion to decline supplemental jurisdiction).

cases even though jurisdiction has attached.[103] The appropriate question to ask then is not whether courts may decline jurisdiction—that happens routinely as the so-called absolute right doctrine has come into disfavor.[104] The question is whether declining jurisdiction in a particular context is wise. At the very least, staying a case in the face of parallel litigation is substantially more similar to forum non conveniens than to domestic abstention doctrines—in fact, several countries address parallel litigation using forum non conveniens.[105] And in any case, when a court stays a case rather than dismisses it, the court technically has not abdicated its duty or refused to exercise the jurisdiction granted it.[106] So reliance on the Court's unflagging obligation language is particularly misplaced.[107]

The three approaches contain other oddities that make them poorly suited for handling duplicative foreign litigation. One puzzling oddity is the continued distinction between in rem, quasi-in-rem, and in personam actions.[108] If the first-filed case is an in rem action, courts will routinely stay litigation[109] on the fiction that only one sovereign

---

103 David Shapiro wrote the pathbreaking article arguing that courts have discretion to decline to exercise jurisdiction. *See* Shapiro, *supra* note 101, at 547 (explaining how courts have significant discretion to decline jurisdiction in a range of contexts); *see also* Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891 (2004) (honoring David Shapiro and explaining the continuing influence of his article). For earlier discussions of judicial discretion, see Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982); Nathan Isaacs, *The Limits of Judicial Discretion*, 32 YALE L.J. 339 (1923).

104 For discussion of the absolute right doctrine, see Wilson, *supra* note 62, at 646–53.

105 FAWCETT, *supra* note 16, at 28–29. For example, this is true in Canada. *Id.* at 29; *see also* Teck Cominco Metals Ltd. v. Lloyd's, [2009] 1 S.C.R. 321, 2009 SCC 11, *available at* http://scc.lexum.umontreal.ca/en/2009/2009scc11/2009scc11.html.

106 Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 721 (1996) ("Unlike the outright dismissal or remand of a federal suit, we held, an order merely staying the action 'does not constitute abnegation of judicial duty. On the contrary, it is a wise and productive discharge of it. There is only postponement of decision for its best fruition.'" (quoting La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 29 (1959))).

107 For early cases where the Court rejected the *Cohens v. Virginia* formulation and declined to exercise jurisdiction over foreign matters, see Can. Malting Co. v. Patterson S.S. Ltd., 285 U.S. 413, 422–24 (1932) (jurisdiction properly declined where all parties were Canadian citizens and litigation would be more appropriately conducted in foreign court); The Belgenland, 114 U.S. 355, 364–65 (1885) (stating courts use discretion in accepting jurisdiction over controversies when all parties are foreigners).

108 One court's jurisdiction over a res is considered an exceptional circumstance warranting *Colorado River* abstention on the part of another court. *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976); *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15–16 (1983) (quoting *Colo. River*, 424 U.S. at 818–19).

109 *See* Jennifer M. Anglim, *Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chattels*, 45 HARV. INT'L L.J. 239, 262–65 (2004) (describing distinction in how courts treat in rem and in personam cases in deciding whether to issue a stay in the context of international litigation); George, *supra* note 61, at 782,

may effectively exercise jurisdiction over a res.[110] This focus on whether a court has assumed jurisdiction over a res is strange. *Shaffer v. Heitner*[111] purportedly precluded such a basis for differentiating between cases,[112] the Supreme Court having long interred the hoary distinction between in rem and in personam labels, at least for jurisdictional purposes.[113] Although in rem cases may often provide a stronger case for abstaining because of the fear of conflicting judgments related to the same piece of the property, the same general concerns (conflicting judgments, unnecessary waste, tension between different sovereigns, etc.) are present for in personam cases as well.

Lastly, a more fundamental weakness can be levied against all three approaches. The approaches are easily manipulated, riddled as

---

788, 864 (describing different treatment of in rem cases); *see also* Donovan v. City of Dallas, 377 U.S. 408, 412 (1964) (explaining that with in rem or quasi in rem cases, the court having custody of the property has exclusive jurisdiction (citing Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 465–68 (1939))); United States v. $270,000.00 in United States Currency, 1 F.3d 1146, 1147–48 (11th Cir. 1993) (noting that in rem jurisdiction is exclusive); Cassity v. Pitts, 995 F.2d 1009, 1012 (10th Cir. 1993) ("When the same parties are involved in litigation that is *in rem* or *quasi in rem*, the court where the last suit was filed must yield jurisdiction." (citing *Princess Lida*, 305 U.S. at 466)). *But cf.* Markham v. Allen, 326 U.S. 490, 494 (1946) (finding that federal court had jurisdiction over claims even though state assumed jurisdiction over decedent's property); United States v. Klein, 303 U.S. 276, 281–82 (1938) (holding that other courts do not lose power to adjudicate rights merely because federal courts controlled the property).

110 *See, e.g.*, Kline v. Burke Constr. Co., 260 U.S. 226, 229–30 (1922) ("'[W]hen one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void.'" (quoting Covell v. Heyman, 111 U.S. 176, 182 (1884))); *see also* Note, *Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits*, 60 COLUM. L. REV. 684, 684 (1960) (articulating rule that first court establishing jurisdiction over the property in an in rem case exercises jurisdiction to exclusion of the other); *Power to Stay*, *supra* note 31 (similar).

111 Shaffer v. Heitner, 433 U.S. 186 (1977).

112 *See id.* at 211–12 (characterizing any distinction between in rem and in personam jurisdiction as a "fiction" and stating that all exercises of personal jurisdiction, whether in rem, quasi in rem or in personam, must satisfy the minimum contacts standard of *International Shoe* and its progeny); *see also* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 312 (1950) ("Distinctions between actions *in rem* and those *in personam* are ancient and originally expressed in procedural terms what seems really to have been a distinction in the substantive law of property under a system quite unlike our own.").

113 *See, e.g.*, Mullenix, *supra* note 15, at 119–20 (arguing that the "jurisdiction over the res" factor contained in *Colorado River* "consists of an anachronistic jurisdictional principle" that "is something of an anomaly"); Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347, 1359 (2000) (describing any distinction between in rem and in personam cases as "little more than a metaphysical relic of a very different epistemological age"); Rehnquist, *supra* note 28, 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." (footnote omitted)).

they are with a long litany of ill-defined policy and other vague considerations.[114] Some courts balance as many as three factors and ten subfactors.[115] But no guidance is given to how much relevance or weight a court should afford each factor. And often the factors are apples and oranges to one another. For example, although courts routinely pay lip service to adjudicatory comity, courts appear to have little understanding of what exactly comity consists of, or what weight to afford it in the final analysis.[116] When should reciprocity considerations trump efficiency and access-to-justice concerns? Courts are at a loss. And how the factors indicate an outcome in a given case is almost anyone's guess. Although balancing tests certainly are nothing new, the result of this particularly vague and open-ended balancing is a hodgepodge of ad hoc, results-oriented decisions, and the absence of any sort of predictability.[117] One respected commentator has harshly

---

114 For criticism of balancing tests in all aspects of transnational litigation, see Spencer Weber Waller, *A Unified Theory of Transnational Procedure*, 26 CORNELL INT'L L.J. 101 (1993); *see also* James P. George, *International Parallel Litigation—A Survey of Current Conventions and Model Laws*, 37 TEX. INT'L L.J. 499, 508 (2002) (describing the *Colorado River* approach as balancing nine factors and the *Landis* approach as balancing seven factors).

115 *See, e.g.*, Belize Telecom, Ltd. v. Gov't of Belize, 528 F.3d 1298 (11th Cir. 2008). The court considered three factors: (1) international comity; (2) fairness to litigants; and (3) efficiency. *Id.* at 1305. The court also considered various sets of sub-factors, including:

> (1) whether the judgment was rendered via fraud; (2) whether the judgment was rendered by a competent court utilizing proceedings consistent with civilized jurisprudence; . . . (3) whether the foreign judgment is prejudicial, in the sense of violating American public policy because it is repugnant to fundamental principles of what is decent and just . . . [4] the order in which the suits were filed; [5] the more convenient forum; . . . [6] the possibility of prejudice to parties resulting from abstention . . . [7] the inconvenience of the federal forum; [8] avoidance of piecemeal litigation; [9] whether the actions have common parties and issues; and [10] whether the alternative forum will issue a prompt decision.

Id. at 1305, 1306, 1308 (citing Turner Entm't Co. v. Degeto Film GmbH, 25 F.3d 1512, 1518–22 (11th Cir. 1994)); *see also* PaineWebber, Inc. v. Cohen, 276 F.3d 197, 206–07 (6th Cir. 2001) (balancing eight or more factors); Boushel v. Toro Co., 985 F.2d 406, 409 n.2 (8th Cir. 1993) (considering five factors); Grammar, Inc. v. Custom Foam Sys. Ltd., 482 F. Supp. 2d 853, 857 (E.D. Mich. 2007) (balancing eight factors (citing *PaineWebber*, 276 F.3d at 206–07)).

116 For examples of scholars who criticize the use of comity, see Michael D. Ramsey, *Escaping "International Comity,"* 83 IOWA L. REV. 893 (1998), and Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53 (1991).

117 *Cf.* Stein, *supra* note 76, at 785 (explaining how forum non conveniens decisions, with similar balancing tests, "tend to be a mechanical litany of the seminal Supreme Court language followed by a summary conclusion" (footnote omitted)). Many have argued that jurisdictional rules should be clear. *See* Martha A. Field, *The Uncertain Nature of Federal Jurisdiction,* 22 WM. & MARY L. REV. 683, 683 (1981) (describing the benefits of jurisdictional rules that are "clear and simple"); *cf.* Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 974 (2009) (describing jurisdiction's "feigned inflexibility").

observed that decisions relying on *Colorado River* are inevitably conclusory and filled with "legal gibberish."[118]

B. Expanding Jurisdiction

Another way of looking at foreign parallel proceedings exists, one that appreciates the interconnectedness between the growth of concurrent actions and the expanding reach of federal court jurisdiction. As a general matter, U.S. courts have systematically broadened their jurisdictional reaches as they have discarded territorial theories of jurisdiction.[119] More recently, pressure to use domestic laws (rather than international law) to solve global problems and extend American power abroad has contributed to these jurisdictional expansions. As these expansions occurred, the number of concurrent and overlapping actions in turn exploded.[120]

1. Legal Realism and Territoriality's Decline

Before the Second World War, territoriality was a defining feature of American law.[121] Conflict of laws doctrine,[122] as well as prescriptive[123] and adjudicatory jurisdiction,[124] were founded on

---

118 Mullenix, *supra* note 15, at 104.

119 *See* Paul B. Stephan, *A Becoming Modesty—U.S. Litigation in the Mirror of International Law*, 52 DePaul L. Rev. 627, 634 (2002) ("Since World War II, U.S. courts have generally broadened their subject matter and personal jurisdiction"); *see also* George A. Rutherglen, International Shoe *and the Legacy of Legal Realism*, 2001 Sup. Ct. Rev. 347 (tracing the move away from territorial jurisdiction).

120 *See supra* notes 8–10 and accompanying text (describing increase of parallel proceedngs).

121 For a description of some of the history of territoriality in American law, see Kal Raustiala, Does the Constitution Follow the Flag? Territoriality and Extraterritoriality in American Law (2009).

122 *See* 1 Joseph Beale, A Treatise on the Conflict of Laws 311–12 (1935) ("Since the power of a state is supreme within its own territory, no other state can exercise power there. . . . It follows generally that no statute has force to affect any person, thing, or act . . . outside the territory of the state that passed it."); *see also* Lea Brilmayer, Conflicts of Laws 19–33 (2d ed. 1995) (describing territorial theories of conflict of laws).

123 *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."); The Antelope, 23 U.S. (10 Wheat.) 66, 122 (1825) (explaining that "no nation can prescribe a rule for others"); The Appollon, 22 U.S. (9 Wheat.) 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens."); Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) (explaining that the jurisdiction of a nation within its own territory is "necessarily exclusive and absolute" and, accordingly, that territory demarcated the limits of nation's law).

124 *See* Pennoyer v. Neff, 95 U.S. 714, 720 (1877) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."); Galpin v. Page, 85 U.S. (18 Wall.) 350, 367 (1873) (discussing territorial limits of jurisdiction); Rose v. Himely, 8

territorial theories that geographically constrained judicial power.[125] Jurisdiction was limited by territoriality: a theory derived from Dutch scholars[126] which found that "each sovereign had jurisdiction, exclusive of all other sovereigns', to bind persons and things present within its territorial boundaries."[127] Or, in Justice Story's words, "every nation possesse[d] an exclusive sovereignty and jurisdiction within its own territory," and "it would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation, that other nations should be at liberty to regulate either persons or things within its territories."[128] With the world carved up into separate, territorial regions and court power based on territorial principles, jurisdictional overlap and the problem of parallel proceedings were rare.[129]

At the end of the Second World War, however, pragmatism, legal realism, and other related theories began to discredit territorial theories of jurisdiction and the problem of concurrent jurisdictional assertions became more prevalent.[130] Legal realists attacked the formalist

---

U.S. (4 Cranch) 241, 279 (1808) (turning to international law and territoriality to define the limits of personal jurisdiction). *See generally* Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 872, 872 nn.116–20 (listing early cases that approached personal jurisdiction using territoriality principles drawn from the law of nations).

125 T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 12–18 (2002) (describing how territorial or sovereignty-based approaches were followed in various areas of the law, such as the presumption against extraterritorial application of law and in the enforcement of judgments law).

126 *See* 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, 56–57, 65 (1937); *see also* Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 259–60 (explaining how Justice Story borrowed from Dutch theorist Ulrich Huber the concept of sovereign authority that each sovereign had jurisdictional prerogative within its borders); James Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America*, 38 AM. J. COMP. L. 73, 74–85 (1990) (describing how early American jurisdictional theories developed from Dutch theorists, including Ulrich Huber).

127 KEVIN M. CLERMONT, CIVIL PROCEDURE: TERRITORIAL JURISDICTION AND VENUE 6 (1999).

128 JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19, 21 (Arno Press 1972) (1834).

129 *See* Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 189; *see also* David J. Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INT'L L. 185, 193–202 (1984) (explaining how territorial theories of jurisdiction avoided jurisdictional conflicts and overlap).

130 *See* Joseph William Singer, Review Essay, *Legal Realism Now*, 76 CAL. L. REV. 465, 474 (1988) (explaining how "[t]he legal realists wanted to replace formalism with a pragmatic attitude toward law generally" and that "[t]his attitude treats law as made, not found"); *see also* KARAYANNI, *supra* note 73, at 114–24 (describing the impact of legal realism on jurisdictional rules); Hayward D. Reynolds, *The Concept of Jurisdiction: Conflicting Legal Ideologies and Persistent Formalist Subversion*, 18 HASTINGS CONST. L.Q. 819, 824–25 (1991) ("*International Shoe* and *Mullane v. Central Hanover Bank & Trust Co.* were products of social changes in the 20th

assumptions that underpinned territorial approaches to law.[131] The legal realists argued that the power to regulate did not flow "naturally and inevitably from some self-evident theory" like territoriality.[132] Instead, realists pushed for "reasonableness" to be the touchstone of any jurisdictional analysis.[133]

The result—through a series of decisions in the mid-century—was that the law of personal and legislative jurisdiction, as well as the related fields of venue and choice of law were "swept clear of nearly all rules, at least those that [could] be applied in a more or less determinate fashion, yielding all-or-nothing results."[134] In 1945 alone, two prominent decisions—*International Shoe*[135] for personal jurisdiction and *Alcoa*[136] for legislative jurisdiction—"ushered in [a] new era and marked a dramatic and undeniable break with" the tradition of territoriality.[137]

Century and of legal realist thinking. . . . The legal realist's social-functional conception of law and legal institutions provided the Court with a theoretical framework for interpreting and applying constitutional provisions in a way that allowed the social change and growth that had been inhibited by rigid, conservative formalism." (footnote omitted)); Rutherglen, *supra* note 119 (describing legal realism's impact on personal jurisdiction); Logan Everett Sawyer III, *Jurisdiction, Jurisprudence, and Legal Change: Sociological Jurisprudence and the Road to* International Shoe, 10 GEO. MASON L. REV. 59 (2001) (describing how legal realism and social science led to *International Shoe*).

131 *See* Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 316 (1990) (noting that legal rules in the nineteenth century were "fixed, inexorable, and logically deductible"); *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 at 259 (1977) (noting the link between legal formalism and mercantile interests in conceiving of law "as a fixed and inexorable system of logically deducible rules").

132 *See* KARAYANNI, *supra* note 73, at 120–21 n.62 (arguing that legal realism was "a legal movement that sought to substitute notions of territoriality with functional standards to guarantee fairness of outcomes"); *see also* ERNEST G. LORENZEN, SELECTED ARTICLES ON THE CONFLICTS OF LAWS 11 (1947) ("The common law has not hidden in its bosom a logical set of rules which can be derived from its notion of territoriality. . . . [T]he adoption of the one rule or the other depends entirely upon considerations of policy which each sovereign state must determine for itself."); Kramer, *supra* note 129, at 209.

133 *See* Austen L. Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1467–70 (2008) [hereinafter Parrish, *The Effects Test*] (describing the move away from territorial theories in the legislative jurisdiction context); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 13–18 (2006) [hereinafter Parrish, *Sovereignty*] (citing sources and discussing the move to reasonableness in the analysis of personal jurisdiction).

134 Rutherglen, *supra* note 119, at 347; *see also* Waller, *supra* note 114, at 102–16 (describing the lack of clear rules in transnational cases).

135 Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

136 United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 443–44 (2d Cir. 1945) (holding that the U.S. antitrust laws applied to foreign conduct intentionally affecting the United States, even when that conduct occurred abroad).

137 Courtney G. Lytle, *A Hegemonic Interpretation of Extraterritorial Jurisdiction in Anti-*

In the personal jurisdiction context—with *International Shoe*[138] and later with cases like *Shaffer v. Heitner*[139]—the Court discarded a core premise of early jurisdictional doctrines that states could not assert jurisdiction over people outside their borders. Together, the decisions interred the premise that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory" and that "no State can exercise direct jurisdiction and authority over persons or property without its territory."[140] Judicial inquiry "shifted from territorial considerations to a qualitative evaluation of the relationships among the plaintiff, the defendant, the forum state, and the events occasioning the litigation."[141] The idea that fairness and not territorial borders provided the only limitation on jurisdictional power was then carried to the international context.[142] Courts finally expanded personal jurisdiction by re-embracing a form of terri-

---

trust: From American Banana *to* Hartford Fire, 24 SYRACUSE J. INT'L L. & COM. 41, 57 (1997). The same transformation occurred in other areas. *See, e.g.*, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 318–20 (1950) (replacing territorial-based notice rules with rules focused on fairness).

138 *Int'l Shoe*, 326 U.S. at 310. For a description of how *International Shoe* dramatically broke from territorial jurisdictional theories in the personal jurisdiction context, see Rutherglen, *supra* note 119, at 348; Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 692, 697–98 (1987).

139 Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702–03 (1982) (explaining that personal jurisdiction is concerned with an individual's liberty interest and is not intended to protect the territorial sovereignty of the states); Shaffer v. Heitner, 433 U.S. 186, 211–12 (1977) (disclaiming the notion from *Pennoyer v. Neff* that "territorial power is both essential to and sufficient for jurisdiction").

140 Pennoyer v. Neff, 95 U.S. 714, 722 (1877); *see also* Mills v. Duryee, 11 U.S. (7 Cranch) 481, 486 (1813) (Johnson, J., dissenting) ("[J]urisdiction cannot be justly exercised by a state over property not within the reach of its process, or over persons not owing them allegiance or not subjected to their jurisdiction . . . ."). For a description of the changes, see Wendy Collins Perdue, *The Story of* Shaffer*: Allocating Jurisdictional Authority Among the States*, *in* CIVIL PROCEDURE STORIES, *supra* note 89, at 129; *see also* Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Non Conveniens*, 65 YALE L.J. 289 (1956) (discussing the historical development and present day inadequacies of the transient rule of personal jurisdiciton); Linda J. Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33 (1978) [hereinafter Silberman, *End of an Era*] (offering background and analysis of the *Shaffer* opinions and discussing the implications for future jurisdiction and choice of law problems).

141 Silberman, *End of an Era*, *supra* note 140, at 52–53; *see also id.* at 53 n.88 (citing *Developments in the Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909, 924 (1960)).

142 *See* Parrish, *Sovereignty*, *supra* note 133, at 13–28; *see also* Edward B. "Teddy" Adams, Jr., *Personal Jurisdiction over Foreign Parties*, *in* INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS 113, 114 (David J. Levy ed., 2003) (noting that the same standards apply for "personal jurisdiction over a non-resident or foreign defendant"); Gary A. Haugen, *Personal Jurisdiction and Due Process Rights for Alien Defendants*, 11 B.U. INT'L L.J. 109, 110 (1993) (describing how the courts treat the Due Process Clause's jurisdictional protections as "apply[ing] to alien defendants in the same way they apply to domestic defendants").

toriality through transient jurisdiction.[143] U.S. courts now exercise "general jurisdiction based solely on transient physical presence, the attachment of property, or extensive business activities unrelated to the cause of action."[144]

The same drift occurred in the context of legislative jurisdiction: courts moved from an approach based on territorial limits to one founded on concepts of fairness. Initially, legislatures were barred from creating laws that regulated foreigners abroad.[145] Over time that prohibition changed to a presumption, where Congress was permitted to regulate abroad, but was presumed not to.[146] More recently, the presumption was turned upside-down with the development of the so-called "effects test,"[147] which has given courts near universal

---

143 Burnham v. Superior Court, 495 U.S. 604 (1990).

144 Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 474 (2006); *see also* Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 95–96 (1999) [hereinafter Clermont, *Jurisdictional Salvation*] ("The Europeans' principal objection to U.S. jurisdictional law is its proclivity to base general jurisdiction on rather thin contacts, namely, allowing any and all causes of action to be brought on the basis of the defendant's physical presence, property ownership, or doing business in the forum.").

145 *See* STORY, *supra* note 128, at 21 (explaining "it would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation, that other nations should be at liberty to regulate either persons or things within its territories"); *see also* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356–57 (1909) (setting out the territorial limits to laws); The Antelope, 23 U.S. (10 Wheat.) 66, 122 (1825) (explaining that "no nation can prescribe a rule for others" and finding the United States does not have the authority to nullify foreign laws); The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens."); Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) (explaining that territory demarcated the limits of a nation's law); *cf.* Buxbaum, *supra* note 1, at 268 (explaining how extraterritorial regulation was initially viewed as illegitimate).

146 *See* Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 Nw. U. L. REV. 598, 607 (1990) ("What began . . . as a prohibition against the perceived violation of international law through extraterritorial regulation became simply a legal test for subject matter jurisdiction."); *see also* Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) (describing the presumption against extraterritoriality))); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85 (1998) (describing the presumption and arguing for the effects test).

147 United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 443–44 (2d Cir. 1945). For later articulations of the effects test, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987) ("[A] state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory . . . ."); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965) (stating that federal statutes apply to "conduct occurring within, or having effect within, the territory of the United States"). For cases that find the presumption against extraterritoriality inapplicable when an effect is felt in the United States, see *In*

jurisdiction.[148]

As legal rules of jurisdiction became more indeterminate, the jurisdictional reach of American courts grew too.[149] In fact, the growth was so dramatic that the forum non conveniens doctrine arguably developed from a need "to decline jurisdictional power, notwithstanding its existence."[150]

2. Globalization and the World in U.S. Courts

Legal realism and the demise of territorial rules, however, was just a harbinger of things to come. Although jurisdiction expanded midcentury with the decline of territorial theories, it continued to expand at the end of the twentieth century for at least two additional reasons. The first was globalization and technological advances. The second, arguably more important although often downplayed, was the reluctance in the United States to embrace international law and the systematic turn to national courts and domestic law to solve international challenges.

Early in the twentieth century, the international cartel movement created complex business relationships that crossed national borders.[151] In the later part of the twentieth century, globalization—and

---

re Simon, 153 F.3d 991, 995 (9th Cir. 1998); Envtl. Def. Fund v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 925 (D.C. Cir. 1984); Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968).

148 BORN & RUTLEDGE, *supra* note 43, at 573 (questioning whether in today's global economy the effects test permits almost limitless legislative jurisdiction); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1182 (2006) ("[I]n an electronically connected world the effects of any given action may immediately be felt elsewhere with no relationship to physical geography at all."); R.Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146, 159 (1957) (explaining how the effects test means there exists "virtually no limit to a State's territorial jurisdiction").

149 For a detailed description of the growth in extraterritorial laws, see Parrish, *The Effects Test*, *supra* note 133; Parrish, *Sovereignty*, *supra* note 133; *see also* 2 VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 8.3 (2d ed. 2009) (describing the many U.S. laws that have extraterritorial effect).

150 KARAYANNI, *supra* note 73, at 109; *see* William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1704 (1992); Stein, *supra* note 76; *Forum Non Conveniens*, *supra* note 79. For a recent discussion, see Bloom, *supra* note 117, at 986 (arguing that "[f]orum non conveniens is not just a common-law trapdoor for parties. It is a procedural backstop for courts, a handy tool allowing judges to release jurisdictional pressures and to avert jurisdictional excess, however tardily").

151 David J. Gerber, *Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems*, 26 HOUS. J. INT'L L. 287, 293 (2004); *see also id.* at 300–01 (explaining how global markets "tend to increase both the likelihood of [jurisdictional] conflicts and their intensity"). For a discussion of how this occurred in the domestic context, see Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 506–09

a number of great technological advances in communication and transportation[152]—led to tremendous interdependence between countries, as trade and labor mobility increased.[153] As economies became more interdependent, the pressure to regulate cross-border activities increased.[154] And as communication and transportation became easier, jurisdiction doctrines based on reasonableness meant broader jurisdictional assertions were inevitable.[155] The advent of the Internet

(1997) (discussing how, as states became interdependent, pressure resulted on the courts to interpret the Dormant Commerce Clause as protecting a single, common market, rather than the states being divided into a series of markets).

152 *See supra* notes 2, 4.

153 For a description of the integration that occurred in the Canada-U.S. context, see Shi-Ling Hsu & Austen L. Parrish, *Litigating Canada-U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity*, 48 VA. J. INT'L L. 1 (2007).

154 Numerous commentators have described the changes. For a sampling, see Kal Raustiala, *The Evolution of Territoriality: International Relations and American Law*, *in* TERRITORIALITY AND CONFLICT IN AN ERA OF GLOBALIZATION 219, 220, 234–48 (Miles Kahler & Barbara F. Walter eds., 2006) (arguing territoriality is "decreasingly important as a jurisdictional principle" in a globalizing world); John Gerrard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relation*s, 47 INT'L ORG. 139, 148–63 (1993) (discussing the evolution of modern territoriality); Saskia Sassen, *Territory and Territoriality in the Global Economy*, 15 INT'L SOC. 372, 373 (2000) ("[W]e are seeing processes of incipient denationalization of sovereignty—the partial detachment of sovereignty from the national state."). Paul Schiff Berman has argued in a series of articles that in an age of globalization, territorial borders should have little significance in jurisdictional questions. *See* Paul Schiff Berman, *Dialectical Regulation, Territoriality, and Pluralism*, 38 CONN. L. REV. 929, 932–38 (2006) (exploring how to accommodate non-territorial-based norms through legal pluralism and arguing that territoriality is eroding); Berman, *supra* note 148, at 1168 (arguing for a conflict approach different from "territorially-based sovereigntism" and universalism); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 329–70 (2002) (surveying ten challenges to territorial based rules for jurisdiction).

155 *See, e.g.*, Mut. Serv. Ins. Co. v. Frit Indus., Inc., 358 F.3d 1312, 1320 (11th Cir. 2004) (finding exercise of jurisdiction because, among other things, "modern methods of transportation and communication have lessened the burden of defending suit in a foreign jurisdiction" (quotation omitted)); Anderson v. Dassault Aviation, 361 F.3d 449, 455 (8th Cir. 2004) (finding exercise of jurisdiction over foreign manufacturer reasonable in part because foreign manufacturer had "ready access to air transportation for conveniently making the trip"); Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1132–33 (9th Cir. 2003) (finding personal jurisdiction over U.K. insurance broker, noting that modern advances in transportation and communication have reduced the burden of foreign litigation); Deprenyl Animal Health, Inc. v. Univ. of Toronto Innovations Found., 297 F.3d 1343, 1356 (Fed. Cir. 2002) (finding burden on foreign corporation minimal "in light of modern transportation and communication methods"); Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1323 (9th Cir. 1998) (stating that the location of witness and documents "no longer weighed heavily given the modern advances in communication and transportation"); Sher v. Johnson, 911 F.2d 1357, 1365 (9th Cir. 1990) (noting as a rule that requiring a nonresident to defend locally is not constitutionally unreasonable "[i]n this era of fax machines and discount air travel"); *see also* CLERMONT, *supra* note 127, at 12 ("Of course, the revolution of transportation and communication has increased the occurrence of long-distance disputes, but it has also decreased the burden of long-distance litigating.").

led to further pressure to ignore any remaining territorial limits to the exercise of judicial power and increased the number of overlapping laws.[156]

The second driving force was the move away from international law as a palatable way to address global challenges. During the late 1990s, conservative, neorealist scholars[157] attacked international law believing it to threaten American independence.[158] Modern liberal internationalist scholars also turned away from international law by promoting the influence of nonstate and substate actors, who sought to have a greater voice and role in international law and relations.[159] Both positions were ideologically driven and intimately tied to the domestic culture wars.[160] The neorealists were largely allied with con-

---

156 *See* Thomas Schultz, *Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface*, 19 EUR. J. INT'L L. 799, 799–804 (2008) (responding to the "general understanding [that] the Internet forms one of the paradigms which underlie the general view of deterritorialization, transnationalism, state decline, and the replacement of national pyramids of normativity by global networks of spread-out normativity," *id.* at 801); *see also* JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 179–83 (2006) (describing and responding to the perception that we are in a borderless world where state sovereignty has little importance). One of the most well-known cases involving jurisdiction based on Internet contacts occurred when a French court ordered Yahoo.com to block access to websites selling Nazi memorabilia or otherwise assisting in the denial of the Holocaust. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000, *available at* http:// www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm; *see also* Berman, *Globalization of Jurisdiction*, *supra* note 154, at 337–42, 516–21 (describing the Yahoo! case).

157 KENNETH WALTZ, THEORY OF INTERNATIONAL POLITICS (1979) (describing the classic account of neorealism or structural realism).

158 *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing that customary international law is undemocratic); Daniel W. Drezner, *On the Balance Between International Law and Democratic Sovereignty*, 2 CHI. J. INT'L L. 321, 322–34 (2001) (describing concern that "international law is making a sure and steady encroachment on democratic sovereignty, affecting the United States in particular," *id.* at 322–23); Jed Rubenfeld, Commentary, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2006–21 (2004) (arguing that "international law today rests on a fundamentally antidemocratic conception of fundamental law," *id.* at 2006, and responding to objections to that argument); *see also* Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 653 n.16 (2002) (describing this kind of scholarship).

159 *See* Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1, 36–37 (2006) (describing new approaches focused on substate actors). *See generally* JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW, NORMS, ACTORS, PROCESSES: A PROBLEM-ORIENTED APPROACH 107–261 (2d ed. 2006) (describing changes in international law theory and the focus on nonstate actors); J. MARTIN ROCHESTER, BETWEEN PERIL AND PROMISE: THE POLITICS OF INTERNATIONAL LAW 21–22 (2006) (describing how nonstate actors compete with nation-states in the international arena).

160 *See* Bryant G. Garth, *Rebuilding International Law After the September 11th Attack: Contrasting Agendas of High Priests and Legal Realists*, 4 LOY. U. CHI. INT'L L. REV. 3 (2007); Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119

servative domestic movements, which for decades had sought to roll back a progressive civil rights agenda.[161] The modern internationalists in turn sought to give greater power to environmental, human rights, and indigenous rights groups as a way of advancing progressive, public-interest-oriented values.[162]

Both groups were successful in their own way. The United States increasingly withdrew from international law and its institutions, preferring to use domestic law (applied extraterritorially) to solve global challenges.[163] These ideological tugs meant jurisdictional doctrines were pushed to encompass claims even less connected to the United States. Many see U.S. courts as "both a means for redressing many of the world's evils and a model for others to emulate."[164] Currently, few disputes escape the long jurisdictional arms of U.S. courts.

III. The Proposal

So what is to be done? An integrated approach to parallel litigation is needed, one that avoids the costs of unnecessary duplication, protects American interests from foreign overreaching, and recognizes how parallel litigation is connected to jurisdiction. A two-step inquiry commends itself to achieving these goals.[165]

HARV. L. REV. 1404–14 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005)).

161 Garth, *supra* note 160, at 3 (describing the new legal realists). For a general description of how domestic groups exert influence on the international level, see YVES DEZALAY & BRYANT GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES (2002) (describing influence of nongovernmental organizations ("NGOs") largely dominated by U.S. interests); Yves Dezalay & Bryant Garth, *Dollarizing State and Professional Expertise: Transnational Processes and Questions of Legitimation in State Transformation, 1960–2000*, *in* TRANSNATIONAL LEGAL PROCESSES: GLOBALISATION AND POWER DISPARITIES 197 (M. Likosky ed., 2002) (describing importing and exporting of ideas and norms from the domestic to the international); Yves Dezalay & Bryant Garth, *From the Cold War to Kosovo: The Rise and Renewal of the Field of International Human Rights*, 2 ANN. REV. L. & SOC. SCI. 231 (2006) (describing influence of human rights NGOs and the U.S. foreign policy establishment in international law).

162 Robert Howse, *Human Rights, International Economic Law and Constitutional Justice: A Reply*, 19 EUR. J. INT'L L. 945, 945 (2008) ("New actors have been empowered in the international legal system (not only individuals but various kinds of nonstate collectivities as well); conceptions of responsibility have been altered; classic notions, such as territorial sovereignty and recognition of statehood, have sometimes subtly and sometimes radically been reshaped or adapted . . . .").

163 For an expanded discussion of this phenomenon, see Parrish, *supra* note 7, at 841–56.

164 Stephan, *supra* note 119, at 627. This rise of extraterritorial adjudication has been associated with hegemonic decline. *See* Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, EUR. J. INT'L L. 369, 402–05 (2005).

165 The proposal has similar elements to that recently suggested by N. Jansen Calamita. The proposals differ, however, in that this one does not promote adjudicatory comity as the basis

A. Reversing the Presumption

As a starting point, courts should reverse the existing presumption and do away with references—in the international context—to a court's so-called unflagging obligation to exercise jurisdiction.[166] Courts instead should presumptively find a stay warranted if the moving party can establish that: (1) it filed a parallel foreign action first; and (2) the foreign court would have jurisdiction consistent with U.S. jurisdictional principles.

Tethering the initial presumption to U.S. jurisdictional standards serves several ends. First, it would ensure a level of fairness for litigants. For the foreign court to have jurisdiction (under U.S. principles), by definition the foreign court would be considered an acceptable forum under U.S. Due Process standards.[167] The minimum contacts test for personal jurisdiction ensures that the defendant has sufficient contacts with the foreign forum so that the exercise of jurisdiction is reasonable.[168] The presumption against extraterritoriality for legislative jurisdiction, and to a lesser extent the effects test, similarly ensures that the foreign forum has some connection to the underlying transaction upon which the lawsuit is based (i.e., that a substantial effect is felt in the foreign forum).[169]

---

for the proposal, but instead is more pragmatic in its approach as a way to promote U.S. interests while avoiding unnecessary waste. *See* Calamita, *supra* note 13, at 673–76.

166 The reversal of a presumption is not an academic change. Presumptions are significant. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 621 (1992) (describing the impact of presumptions and clear statement rules); *see also* Antonio E. Bernardo et al., *A Theory of Legal Presumptions*, 16 J.L. ECON. & ORG. 1 (2000) (applying game theory and law and economics to presumptions within corporate and commercial contexts); Tamar Frankel, *Presumptions and Burdens of Proof as Tools for Legal Stability and Change*, 17 HARV. J.L. & PUB. POL'Y 759 (1994) (examining presumptions and burdens of proof in litigation between corporate management and shareholders).

167 *See* Clermont, *Jurisdictional Salvation*, *supra* note 144, at 100 (explaining how after *Shaffer v. Heitner* the Court shifted the focus onto "the individual's liberty interest in not being subject to the illegitimate power of a foreign sovereign").

168 *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945); Leslie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441, 445–46 (1991); *see also* Clermont, *Jurisdictional Salvation*, *supra* note 144, at 104–05 (describing how reasonableness has been overlayed onto the question of court power, to insert fundamental fairness considerations into the jurisdictional analysis); Linda J. Silberman, *"Two Cheers" for* International Shoe *(and None for* Asahi*): An Essay on the Fiftieth Anniversary of* International Shoe, 28 U.C. DAVIS L. REV. 755, 759–60 (1995) (describing the two-step level of analysis in the personal jurisdiction inquiry and the relatively new focus on fairness concerns).

169 *See* United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 444 (2d Cir. 1945) (explaining that agreements, although made abroad, are still unlawful if they are intended

Second, a reversed presumption would be easy to apply, lead to greater predictability, and avoid arbitrary results. Predictability is one reason Europe has generally preferred a *lis pendens* rule over a multifactor balancing test.[170] A presumptive stay does not require the court to assess the unquantifiable (and often unknowable) interests of a foreign forum or otherwise evaluate foreign law.[171] Instead, the test would require that the court assess what it does routinely: determine whether under U.S. law jurisdiction exists to proceed.

Lastly, creating symmetry between jurisdiction and international abstention ensures that U.S. interests are accounted for. If Congress becomes concerned that too many actions may be decided abroad, it need only curtail the breadth of the court's jurisdictional assertions. The U.S. interest in having a case heard locally is at its lowest, if the foreign court is a reasonable and appropriate forum under U.S. standards. If, in contrast, the foreign court has asserted jurisdiction on an exorbitant basis,[172] then the U.S. court should not defer[173] and the stay should be denied.

The benefits to staying an action when the first-filed case is before a court of appropriate jurisdiction are also evident in this approach. The United States will avoid the costs that unnecessarily duplicative actions engender. Following the first-to-file rule reduces the number of transnational lawsuits proceeding concurrently, thereby eliminating the potential for conflicting decisions and an invidious race to judgment. Respecting a presumptive *lis pendens* rule would also provide greater structure and guidance to the lower courts on

---

to affect imports and actually do affect them); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965); *cf.* S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 25 (Sept. 7) (explaining that "[i]f . . . a guilty act committed on the high seas produces its effects on a vessel flying another flag" the state of the ship upon which the effect is felt has jurisdiction). For an early analysis of the use of the effects test, see Harvard Research in Int'l Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. (SUPPLEMENT) 435 (1935).

170 *See* MATHIAS REIMANN, CONFLICT OF LAWS IN WESTERN EUROPE: A GUIDE THROUGH THE JUNGLE 9–11 (1995).

171 *See* Washington v. Glucksberg, 521 U.S. 702, 787 (1997) (Souter, J., concurring in judgment) ("The principal enquiry at the moment is into the Dutch experience, and I question whether an independent front-line investigation into the facts of a foreign country's legal administration can be soundly undertaken through American courtroom litigation."). In a different context, see Ernesto J. Sanchez, *A Case Against Judicial Internationalism*, 38 CONN. L. REV. 185 (2005) (arguing that judges with expertise in U.S. law lack access to adequate resources to research, interpret, and apply foreign law).

172 A classic example is the French courts assertion of jurisdiction based on nationality alone. C. CIV. art. 14.

173 Indeed, the foreign court's judgment will not be recognized or enforced in such a situation. *See, e.g.*, Soc'y of Lloyd's v. Reinhart, 402 F.3d 982, 993 (10th Cir. 2005).

what comity entails while curbing the potential for unprincipled, ad hoc decisions and the attendant costs created by uncertainty. Instead of the current "hydra-headed" approach, where courts have to balance multiple factors, the court would engage in one inquiry: whether the plaintiff's claims can be litigated in an already pending foreign forum with jurisdiction.[174] Finally, a stay would discourage the filing of unnecessary reactive litigation and the corresponding increase in expense and inconvenience to both parties and courts.

B. A Shifting Burden

If the moving party makes the preliminary showing to establish a presumptive stay, the burden should then shift to the party opposing the stay.[175] The opposing party can overcome the initial presumption through demonstrating that a manifest injustice would occur if the U.S. litigation fails to proceed. A defendant meets this burden by demonstrating that waiting for the foreign proceedings to conclude would be fundamentally unfair or through establishing that the foreign forum is a forum non conveniens. Courts should be particularly sensitive to whether the natural plaintiff[176] filed the foreign action and whether the U.S. case involves parties and activities occurring abroad (even if the U.S. forum itself is not forum non conveniens).

A hypothetical drives home the approach. Assume that a New York citizen is in a car accident in New York with a French citizen, and both suffer injuries. Also assume: (1) the French citizen brings an action in France, asserting jurisdiction based on the plaintiff's nationality;[177] (2) subsequently the New York citizen files a reactive action in New York federal district court; and (3) the French citizen moves to stay the second-filed U.S. action. Under these circumstances, the U.S. federal court would appropriately deny any request to stay the second-filed New York action. Jurisdiction based on a plaintiff's nation-

---

174 Rehnquist, *supra* note 28, at 1111.

175 Federal courts are very familiar with the concept of shifting burdens. *See, e.g.*, Fed. R. Civ. P. 56 (shifting burdens for summary judgment); *see also Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1579–1602 (1996).

176 Under the common law, the natural plaintiff is the aggrieved party and the "master of the complaint." *See generally* Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 180–83, 190 (2000). The issue of who the natural plaintiff is arises most commonly in the declaratory judgment context.

177 C. CIV. arts. 14–15 (authorizing jurisdiction over virtually any action brought by a plaintiff of French nationality); *see also* Kevin M. Clermont & John R.B. Palmer, *Article 14 Jurisdiction, Viewed from the United States*, *in* DE TOUS HORIZONS: MÉLANGES XAVIER BLANC-JOUVAN 473 (2005) (examining French courts' use of the expansive nationality-based jurisdiction granted by Article 14); Clermont & Palmer, *supra* note 144, at 482–84 (same).

ality is not a permissible basis for jurisdiction under U.S. law.[178] Because personal jurisdiction would not exist under U.S. jurisdictional principles, the French citizen could not meet its initial burden.

On the other hand, if the New York citizen had substantial contacts with France, sufficient to establish general jurisdiction, then the French citizen would meet its initial burden. But the New York court would still be hesitant to stay the U.S. action. Under the forum non conveniens doctrine, a French court may be viewed as an inappropriate forum given that the accident, witnesses, and events all occurred in New York.[179] Again, under U.S. procedural rules, a French forum would be considered improper.

C. Responding to Critics

While a number of objections are sometimes raised to a presumptive *lis pendens* approach, those objections feel makeweight when carefully scrutinized. The most common objection is the perception that a first-filed presumption would promote a race to the courthouse. But that objection seems misplaced. First, a race to the courthouse already exists. Current approaches consider who filed first as one of the many factors balanced in the analysis.[180] Similarly, we already tolerate races under *Landis* in federal-to-federal cases, as well as in intrastate cases.[181] Second, the race to the courthouse is less problematic than the alternative race to judgment. At least the race to the courthouse involves only the litigants, not the courts.[182] Third, current jurisdictional and forum non conveniens rules limit the number of possible places where the race could take place.

Another common objection suggests that staying a proceeding undermines a plaintiff's choice of forum. The opposite, however, is true. Creating a presumption in favor of a stay better protects the original plaintiff's choice of forum—a prerogative the U.S. system has long promoted.[183] Reactive litigation, in contrast, by definition at-

---

178 The Due Process clause focuses on the defendant's connections with the forum state, not the plaintiff's. *See generally* Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85 (1983) (noting, in reviewing approaches to personal jurisdiction, that limits on jurisdiction are defendant-based).

179 *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 258–60 (1981) (applying forum non conveniens to similar facts).

180 *See supra* Part I.B.

181 *See supra* notes 64–66 and accompanying text.

182 *See* Rehnquist, *supra* note 28, at 1068, 1112 ("If there must be a race, let it exhaust only the litigants, not the courts as well.").

183 *See* Ryan, *supra* note 176, at 168 ("The plaintiff's forum-selection privilege is axiomatic to the common-law tradition of party autonomy.").

tempts to displace the plaintiff's first-filed choice of forum by permitting the defendant in the first action to second-guess the plaintiff's choice and litigate on two fronts.[184] By allowing actions first filed in appropriate foreign courts to proceed, the plaintiff's choice is protected. The myriad of current approaches leaves litigants with so little certainty about what the court will likely do that it induces litigants to strategically file reactive suits—knowing that doing so will significantly increase an opponent's costs, while creating more confusion at the judgment-enforcement stage.[185]

Nor does the proposed first-filed presumption elevate efficiency and administration considerations over issues of substance. As an initial matter, much of modern U.S. federal civil procedure is animated by efficiency concerns and attempts to reduce the costs of litigation.[186] From pleading requirements,[187] to rules of joinder and supplemental jurisdiction,[188] to summary judgment,[189] to preclusion,[190] federal proce-

---

184 *See* Vestal, *Reactive Litigation*, *supra* note 12, at 11–12.

185 *See* Teitz, *Treading Carefully*, *supra* note 8, at 229.

186 *See* Miller, *supra* note 32, at 984, 996–1016 (describing how lawmakers and judges have responded to a perceived litigation explosion "by refashioning the language and administration of several of the Federal Rules of Civil Procedure to emphasize efficiency and conservation of judicial resources," *id.* at 984); *see also* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, §§ 101–106, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471–482 (2006)) (requiring federal district courts to implement civil justice expense and delay reduction plans to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes," § 103, 104 Stat. at 1990).

187 *See, e.g.*, FED. R. CIV. P. 8(d) (permitting pleading of alternate theories and inconsistent facts); FED. R. CIV. P. 12(b), (g)–(h) (permitting defendant to raise several defenses simultaneously and encouraging consolidation); *see also* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 252–55 (4th ed. 2005) (describing the function and effectiveness of modern pleadings and the break from the formalistic and inefficient common law writ system).

188 Mary Kay Kane, *Original Sin and the Transaction in Federal Civil Procedure*, 76 TEX. L. REV. 1723, 1730–31 (1998) (describing how efficiency concerns and the desire to avoid piecemeal litigation underlie the joinder rules and the development of supplemental jurisdiction); *see also* Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 633–34 (3d Cir. 1961) (noting that the tests for joinder of compulsory counterclaims and for supplemental jurisdiction "are the same because Rule 13(a) and the doctrine of ancillary jurisdiction are designed to abolish the same evil, viz., piecemeal litigation in the federal courts").

189 David L. Shapiro, *The Story of* Celotex*: The Role of Summary Judgment in the Administration of Civil Justice*, *in* CIVIL PROCEDURE STORIES, *supra* note 89, at 343, 363 (noting that the changes to summary judgment in the *Celotex*, *Matsushita*, and *Anderson* trilogy were an attempt "at achieving judicial efficiency while preserving fairness to litigants"); *see also* Miller, *supra* note 32, at 996–1003 (focusing on how the summary judgment standard changed to respond to calls for greater judicial efficiency and to deter litigation).

190 Parklane Hosiery Co. v. Shore, 439 U.S. 322, 332–33 (1979) (precluding relitigation and use of nonmutual, offensive issue preclusion so long as use of preclusion would be fair); Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971) (rejecting the mutuality require-

dural rules seek to avoid piecemeal litigation and promote efficiency.[191] It seems strange then that such efficiency concerns, balanced against fairness, have been mostly ignored in the parallel-litigation context.

But the approach is not simply driven by balancing considerations of cost and judicial efficiency: a more important interest is at stake. The United States has an interest in promoting an international system that reduces conflict and values democratic self-government. Those ideals are undermined if our national courts (and others) exercise jurisdictional power extraterritorially.[192] One circuit court has explained the problems with such legal imperialism:

> The United States should not impose its own view of [legal standards] upon a foreign country . . . . if the foreign country involved was . . . a country with a vastly different standard of living, wealth, resources, level of health care and services, values, morals and beliefs than our own. . . . Faced with different needs, problems and resources . . . [the foreign country] may, in balancing the pros and cons of a [product's] use, give different weight to various factors than would our society . . . . Should we impose our standard upon them in spite of such differences? We think not.[193]

---

ment for issue preclusion and noting that "[t]he broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue," *id.* at 328); *see also* Robert G. Bone, *Rethinking the "Day in the Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 196 (1992) (criticizing the mutuality requirement in part because "a person who was not a party to the first suit frequently may relitigate legal and factual issues that have already been determined in that suit").

191 *See generally* Lewis A. Grossman, *The Story of* Parklane*: The "Litigation Crisis" and the Efficiency Imperative*, *in* CIVIL PROCEDURE STORIES, *supra* note 89, at 387) (describing responses to a perceived litigation crisis in American procedure).

192 For a discussion of how extraterritorial laws raise concerns, including concerns of democratic legitimacy, see Parrish, *The Effects Test*, *supra* note 133, at 1482–89; *see also* Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277 (1989) (setting out a political rights-based approach to conflict of laws); Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT'L & COMP. L. REV. 297, 312–13 (1996) (describing the undemocratic nature of extraterritorial laws); *cf.* Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1065 (2004) ("[T]he task today is to identify democratic principles appropriate to transnational lawmaking phenomena.").

193 Harrison v. Wyeth Labs. Div. of Am. Home Prods. Corp., 510 F. Supp. 1, 4–5 (E.D. Pa. 1980), *aff'd*, 676 F.2d 685 (3d Cir. 1982); *see also* William L. Reynolds, *supra* note 150, at 1708–09 (noting that "[a]ll law represents a compromise among many policy objectives" and that "[w]e should at least hesitate before imposing 'our' solutions on 'their' problems").

Although we may "cherish an image of our courts as the refuge of all seeking succor,"[194] as one commentator somewhat colorfully explains, "[i]t is past time for us to get it through our heads that it is not everyone but us who is out of step."[195] Extensive use of extraterritorial jurisdiction and the judicial unilateralism which it entails may also be symptomatic of a decline of hegemonic power[196]—a decline we presumably do not wish to hasten.

Said differently, our broad jurisdictional doctrines help ensure that a plaintiff can seek relief from harm, even for activities not closely connected with the United States.[197] When litigation is not pending elsewhere, it may be desirable for our courts to step in to provide a remedy. At the same time, when litigation is pending in an appropriate foreign forum, having the U.S. court stay its hand helps ameliorate the negative consequences of our sweeping jurisdictional rules.[198] As with forum non conveniens, the ability to stay a case pending the resolution of a foreign action "should not be viewed as a cynical effort by federal judges to dump cases they do not wish to hear," but rather should be seen to serve the important function of helping our courts deal with problems of multinational litigation.[199]

A final point is worth emphasizing. While a version of comity underlies the proposed approach, comity does not mean mindless deference to a foreign institution. Countries embrace comity for self-interested reasons, not out of some abstract respect of foreign sovereigns.[200] Comity embodies the concepts of mutuality and reci-

---

194 Reynolds, *supra* note 150, at 1710 (arguing that "'[j]udicial chauvinism' should be replaced by 'judicial comity'" (citation omitted)); *see also* Stephan, *supra* note 119, at 661 (arguing that U.S. courts should refrain from attempting to solve global problems).

195 Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 155.

196 *See* Krisch, *supra* note 164, at 385. *See generally* Parrish, *supra* note 7, at 818 (describing the U.S. retreat from international law and resulting reliance on the extraterritorial application of U.S. law).

197 Forum non conveniens has been increasingly interpreted to guarantee dismissal when the alleged wrongful act and injury occurred in another country. For a discussion, see Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609, 611–19 (2008) ("Various elements of the modern doctrine of forum non conveniens almost guarantee[s] [dismissal] where the alleged wrongful act and injury occurred in another country." *Id.* at 609.).

198 *See* Reynolds, *supra* note 150, at 1711.

199 *Id.*; *see also* Earl M. Maltz, *Choice of Forum and Choice of Law in the Federal Courts: A Reconsideration of* Erie *Principles*, 79 KY. L.J. 231, 248–50 (1991).

200 *See* Hilton v. Guyot, 159 U.S. 113, 163–64 (1895) (defining comity as "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

procity, similar to how those concepts are embodied in other international principles,[201] such as good neighborliness,[202] the no-harm principle,[203] the duty to warn,[204] and the duty to cooperate.[205] States agree to impose restraints on unilateral sovereign action because by so agreeing other states will do the same, thus better preserving overall sovereignty. Said differently, comity is a way that nation-states surrender a small degree of sovereignty in the short term to restore control lost to external forces over the long term. One can criticize comity and reciprocity,[206] but they are cornerstones of the international system—ones that the United States has long benefited from.

Conclusion

Transnational litigation is here to stay. Cross-border and transboundary cases are simply a feature of a globalized, interconnected world. As a result, duplicative foreign proceedings will become more common. In short, litigants increasingly have a choice of where to

---

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").

201 *See* UnitedStates *ex rel.* Saroop v. Garcia, 109 F.3d 165, 169 (3d Cir. 1997) (explaining that deference to foreign judicial proceedings "fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations" (quoting Spatola v. United States, 925 F.2d 615, 618 (2d Cir. 1991))).

202 *See* Günther Handl, *Territorial Sovereignty and the Problem of Transnational Pollution*, 69 AM. J. INT'L L. 50, 55–56 (1975) (describing the notion of good neighborliness in international law and the exercise of territorial rights).

203 *See* Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (1938/1941) (holding that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another"); *see also* Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1928) (describing how states must respect the interest of other states); Rio Declaration on Environment and Development, Principle 2, June 14, 1992, 31 I.L.M. 874, 876 (declaring that states have the obligation "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction"); Declaration of the United Nations Conference on the Human Environment, Principle 21, June 16, 1972, 11 I.L.M. 1416, 1420 (affirming state responsibility to "ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction").

204 *See* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9) (holding that it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States").

205 *See* Lac Lanoux (Spain v. Fr.), 12 R.I.A.A. 281 (1957), *as reprinted in* 53 AM. J. INT'L L. 156, 169–70 (1959) (holding that states have a duty to cooperate and account for the interests of other states).

206 *See, e.g.*, Ramsey, *supra* note 116, at 951–52 (opining that international comity is a term that confuses domestic courts and "should be abandoned"); Weinberg, *supra* note 116, at 55 (concluding that comity "is discriminatory and substantively damaging to the rule of law"); *see also* GOLDSMITH & POSNER, *supra* note 160.

battle: here, abroad, or in both places. Despite this reality, U.S. federal courts have been slow to adjust to the realities of modern, transnational cases, preferring instead to apply domestic doctrine, despite the obvious inconsistencies in doing so and the costs of allowing duplicative cases to proceed.

This Article advocates for an approach that seeks to avoid the needless costs of duplicative, reactive cases. Instead of the current approach, which is often animated by federalism concerns, the presumption should be in favor of staying a U.S. action in the face of a first-filed, duplicative, foreign proceeding, so long as the foreign forum has jurisdiction consistent with U.S. jurisdictional principles. That presumption should only be overcome if the party opposing the stay can demonstrate some fundamental unfairness in waiting until the foreign proceeding is concluded. Adopting a modified *lis pendens* principle and reversing the current presumption would help to avoid the waste inherent in duplicative litigation and better serve long-term U.S. interests.