

ABSTENTION AT THE BORDER

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The lower federal courts have been invoking “international comity abstention” to solve a range of problems in cross-border cases, using a wide array of tests that vary not just across the circuits, but within them as well. That confusion will only grow, as both scholars and the Supreme Court have yet to clarify what exactly “international comity abstention” entails. Meanwhile, the breadth of “international comity abstention” stands in tension with the Supreme Court’s recent reemphasis on the federal judiciary’s obligation to exercise congressionally granted jurisdiction. Indeed, loose applications of “international comity abstention” risk undermining not only the expressed preferences of Congress, but the interests of the states as well.

This Article argues against “international comity abstention” both as a label and as a generic doctrine. As a label, it leads courts to conflate abstention with other comity doctrines that are not about abstention at all. And as a generic doctrine, it encourages judges to decline their jurisdiction too readily, in contrast to the presumption of jurisdictional obligation. In lieu of a single broad doctrine of “international comity abstention,” then, this Article urges federal judges to specify more narrow grounds for abstention in transnational cases—grounds that can be separately justified, candidly addressed, and analyzed through judicially manageable frameworks. For example, a primary basis for “international comity abstention” has been deference to parallel proceedings in foreign courts, a common problem that deserves its own dedicated analytical framework. A separate doc-

* Assistant Professor of Law, Cornell Law School. For insightful conversations and comments, I am grateful to Pam Bookman, Sergio Campos, Elena Chachko, Zachary Clopton, Scott Dodson, Harlan Grant Cohen, John Coyle, William Dodge, Robin Effron, Kristen Eichensehr, Tara Leigh Grove, Nelson Tebbe, and Susannah Barton Tobin, as well as participants in the Cornell Law School faculty retreat, the Climenko workshop at Harvard Law School, the Junior International Law Scholars Association’s annual workshop at American University Washington College of Law, the Junior Faculty Federal Courts Workshop at the University of Oklahoma College of Law, and the International Law in Domestic Courts Annual Workshop at the University of Pennsylvania Law School. My thanks as well to Sarah Mishkin and Rebecca Schindel, whose exceptional research assistance helped launch this project.

trine for deferring to integrated foreign remedial schemes may also be appropriate. Perhaps other limited bases for transnational abstention could be identified as well. The goal should not be a strict formalism that insists that judges' hands are tied, but rather a channeling of judicial discretion so as to promote—rather than displace—interbranch dialogue about the proper role of comity in the courts.

INTRODUCTION	64
I. TENSION AT THE BORDER	73
<i>A. Domestic Abstention and the Critique of Prudential</i>	
<i>Restraint</i>	74
<i>B. Is Transnational Litigation Different?</i>	81
1. <i>The Limited Exceptionalism of Transnational Litigation</i>	81
2. <i>Avoiding Excessive Transnational Litigation</i>	84
<i>C. Striking the Balance</i>	88
<i>D. Designing Doctrines</i>	90
II. THE PROBLEM WITH “INTERNATIONAL COMITY ABSTENTION”	93
<i>A. Comity Is Not a Doctrine</i>	94
<i>B. Distinguishing Positive and Negative Comity: The</i>	
<i>Recognition of Foreign Judgments</i>	96
<i>C. Distinguishing Prescriptive and Adjudicative Comity:</i>	
<i>Statutory Construction and Choice of Law</i>	102
III. ABSTENTION IN TRANSNATIONAL LITIGATION	108
<i>A. Problematic Grounds</i>	110
1. <i>Political Sensitivity</i>	110
2. <i>Unsettled Foreign Law</i>	112
3. <i>Party Convenience</i>	113
<i>B. Better Bases for Abstention</i>	115
1. <i>Foreign Parallel Proceedings</i>	116
2. <i>Integrated Foreign Remedial Schemes</i>	121
IV. CONCLUSION	125

INTRODUCTION

For the second time last Term, the Supreme Court heard a case that the lower courts had dismissed based on “international comity abstention.”¹ And for the second time, the Court carefully avoided deciding

¹ See *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797 (1993).

whether abstention based on international comity is legitimate, much less what the parameters of such abstention would be.² No one else seems to know, either. The tests applied by the lower courts vary not just across circuits, but within them as well.³ The courts are using different tests because they are invoking “international comity abstention” to address a range of different problems. Sometimes it is invoked to avoid a potential conflict with foreign law, akin to the foreign-state compulsion defense.⁴ This category arguably includes both of the Supreme Court cases, *Animal Science Products v. Hebei Welcome Pharmaceutical Co.*⁵ and *Hartford Fire Insurance Co. v. California*.⁶ At other times, and using a different set of factors, federal courts have invoked “international comity abstention” to dismiss cases they fear are too politically

² See Question Presented, *Animal Sci. Prods.*, 138 S. Ct. 1865 (No. 16-1220), <https://www.supremecourt.gov/docket/docketfiles/html/qp/16-01220qp.pdf> [<https://perma.cc/6KVE-B72J>] (granting certiorari but declining to address the question of “[w]hether a court may abstain from exercising jurisdiction on a case-by-case basis, as a matter of discretionary international comity, over an otherwise valid Sherman Antitrust Act claim involving purely domestic injury”); see also *Animal Sci. Prods.*, 138 S. Ct. at 1872 (answering only the narrow question on which the Court had granted certiorari).

The first instance was in *Hartford Fire Insurance Co. v. California*, where the Court avoided deciding whether “in a proper case a court may decline to exercise Sherman Act jurisdiction” on “grounds of international comity.” *Hartford*, 509 U.S. at 798; see also *id.* at 799 (“We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.”). As Justice Scalia noted in his dissent, although the Court did not use the term “abstention,” it framed the question as one of abstention (i.e., the voluntary declining of jurisdiction), as had the lower courts. See *id.* at 818 n.9 (Scalia, J., dissenting). What the Court actually did in *Hartford* is notoriously hard to parse; that puzzle is explored further below in Section II.C.

³ Compare *Royal & Sun All. Ins. Co. of Can. v. Century Int’l Arms, Inc.*, 466 F.3d 88, 94 (2d Cir. 2006) (considering eight factors), with *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 184–85 (2d Cir. 2016) (considering a different set of ten factors); compare *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004) (weighing “the strength of the United States’ interest in using a foreign forum, the strength of the foreign governments’ interests, and the adequacy of the alternative forum”), with *Turner Entm’t v. Degeto Film GmbH*, 25 F.3d 1512, 1518 (11th Cir. 1994) (weighing “international comity; . . . fairness to litigants; and . . . efficient use of scarce judicial resources”); compare also *Mujica v. AirScan Inc.*, 771 F.3d 580, 603–08 (9th Cir. 2014) (Bybee, J.) (setting out at least twelve factors for evaluating international comity abstention), with *Cooper v. Tokyo Elec. Power Co.*, 860 F.3d 1193, 1205–09 (9th Cir. 2017) (Bybee, J.) (not applying all of the sub-factors identified in *Mujica*).

⁴ For further discussion of the foreign-state compulsion defense and the categorization of *Animal Science Products* and *Hartford Insurance*, see Section II.C below. Given that these cases were more about conflicts of law than abstention, the Supreme Court was wise not to use them to address the tricky question of “international comity abstention.”

⁵ 138 S. Ct. at 1865.

⁶ 509 U.S. at 764.

sensitive,⁷ a sort of addendum to the political question doctrine or a variant of foreign affairs preemption.⁸ For example, the Ninth Circuit in *Mujica v. AirScan, Inc.*⁹ used “international comity abstention” to dismiss state-law claims in a human rights suit based primarily on a concern that the case would harm U.S. foreign relations.¹⁰ At yet other times, courts invoke “international comity abstention” to stay or dismiss cases in light of parallel litigation in foreign courts.¹¹ Though this is the least controversial use of “international comity abstention,” even here the lower courts are divided as to the appropriate standard to apply.¹² Nor is there any authoritative secondary source on what “international comity abstention” entails; what minimal scholarly attention it has received so far has been fleeting, fragmented, and inconclusive.¹³

⁷ See, e.g., *Mujica*, 771 F.3d at 615; *Ungaro-Benages*, 379 F.3d at 1240. But see *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 393–94 (3d Cir. 2006) (refusing to apply international comity abstention as a means of avoiding a politically sensitive case).

⁸ I am skeptical of abstention based on such amorphous political sensitivities. See *infra* Subsection III.A.1.

⁹ 771 F.3d at 580.

¹⁰ *Id.* at 609–12; see also *Ungaro-Benages*, 379 F.3d at 1238 (applying a different three-factor test for international comity abstention based on foreign relations concerns).

¹¹ See, e.g., *Royal & Sun All. Ins. Co. of Can. v. Century Int’l Arms, Inc.*, 466 F.3d 88, 92, 94–97 (2d Cir. 2006) (declining to apply international comity abstention despite foreign proceedings); *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 898, 901 (7th Cir. 1999) (affirming stay in light of foreign parallel proceedings).

¹² See *infra* Subsection III.B.1.

¹³ Most scholars who have discussed international comity abstention have treated it as a doctrine that addresses foreign parallel proceedings. See *infra* note 247 (gathering sources). But as this Article describes, courts are invoking international comity abstention far beyond that context. Others have briefly noted international comity abstention as part of larger works mapping federal procedure in transnational litigation. See Pamela K. Bookman, *Litigation Isolationism*, 67 *Stan. L. Rev.* 1081, 1096–97 (2015); William S. Dodge, *International Comity in American Law*, 115 *Colum. L. Rev.* 2071, 2112–14 (2015) [hereinafter *Dodge, International Comity in American Law*]. Professors William Dodge and Paul Stephan, in a scholarly amicus brief, challenged the Second Circuit’s application of international comity abstention in the *Animal Science Products* case, though their critique was necessarily limited by the context of that case. See Brief of Professors William S. Dodge and Paul B. Stephan as Amici Curiae Supporting Petitioners, *Animal Sci. Prods.*, 138 S. Ct. 1865 (No. 16-1220). Finally, Professors Donald Childress III and Michael Ramsey have analyzed some of the abstention cases gathered here, but in articles that address the “doctrine of comity” more broadly. See Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 *U.C. Davis L. Rev.* 11 (2010); Michael D. Ramsey, *Escaping “International Comity,”* 83 *Iowa L. Rev.* 893 (1998). As I argue in this Article, talking about a broad “doctrine of comity” is the source of much confusion about international comity abstention. See *infra* Part II.

In short, “international comity abstention” is an amorphous and malleable tool that allows the federal courts to decline jurisdiction in a wide array of cases for a wide variety of reasons. In addition to inviting uncertainty and inconsistency, that open-ended use of abstention in transnational cases is in tension with the Supreme Court’s renewed emphasis on the “virtually unflagging obligation” of the federal courts “to exercise the jurisdiction given them” by Congress.¹⁴ This presumption of jurisdictional obligation is of course not new,¹⁵ nor is the debate over how far it extends.¹⁶ The Court has never fully endorsed Professor Martin Redish’s famous argument that judicial abdication is illegitimate.¹⁷ But in the time since Professor David Shapiro’s equally famous rejoinder—that federal courts traditionally have exercised discretion in smoothing out the edges of their jurisdiction¹⁸—the Court has been busy curtailing the very prudential doctrines on which Shapiro’s defense of discretion relied.¹⁹ As others have noted,²⁰ the Court has signaled a retreat from

¹⁴ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). For discussion of this trend, see Section I.A below.

¹⁵ See, e.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (“We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.”); *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans (NOPSI)*, 491 U.S. 350, 358 (1989) (“Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred.”); *England v. La. State Bd. of Medical Exam’rs*, 375 U.S. 411, 415 (1964) (“When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction” (quoting *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909))); *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.”); see also *Union Pac. R.R. v. Bhd. of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 71 (2009) (noting that “there is surely a starting presumption that when jurisdiction is conferred, a court may not decline to exercise it”).

¹⁶ See Fred O. Smith, Jr., *Undemocratic Restraint*, 70 *Vand. L. Rev.* 845, 871–74 (2017) (summarizing debate since the 1920s).

¹⁷ See Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 *Yale L.J.* 71 (1984); see also 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, 1370 (2000) [hereinafter Redish, *Intersystemic Redundancy and Federal Court Power*] (recognizing the Supreme Court has declined to accept this argument).

¹⁸ David L. Shapiro, *Jurisdiction and Discretion*, 60 *N.Y.U. L. Rev.* 543, 545 (1985).

¹⁹ See *id.* at 550–55 (discussing, *inter alia*, abstention, standing, and ripeness doctrines as traditional examples of judicial discretion to decline jurisdiction).

²⁰ See Joel S. Nolette, *Last Stand for Prudential Standing? Lexmark and Its Implications*, 16 *Geo. J.L. & Pub. Pol’y* 227, 230–32, 237–39, 242–51 (2018); Smith, *supra* note 16, at 855–65; Leading Cases — *Lexmark International, Inc. v. Static Control Components, Inc.*, 128 *Harv. L. Rev.* 321, 322, 328–29 (2014); see also John F. Manning, *The Supreme Court*,

domestic doctrines of abstention,²¹ cast doubt on prudential standing and ripeness requirements,²² and emphasized the narrowness of the political question doctrine.²³ When judges decline to exercise the jurisdiction they otherwise have, the Court has warned, they encroach on Congress's prerogative to set the jurisdiction of the federal courts.²⁴ Underlying the Court's recent wariness of prudential doctrines, in other words, is a separation-of-powers concern that these doctrines of "judicial restraint" have only served to increase judicial power.²⁵

2013 Term—Foreword: The Means of Constitutional Power, 128 Harv. L. Rev. 1, 73 n.415 (2014) (noting the Court's retreat from abstention and prudential standing doctrines).

²¹ *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 593–94 (2013) (clarifying narrow limits of *Younger* extension); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 731 (1996) (explaining that "federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary"); see also *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1156–57 (2017) (Sotomayor, J., concurring in the judgment) (noting that "this Court has repeatedly emphasized that certification offers clear advantages over [*Pullman*] abstention").

²² See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386–87, 1387 n.3 (2014) (clarifying that concepts "previously classified as an aspect of 'prudential standing'" are better understood as requirements of Article III standing (e.g., generalized grievances) or as an act of statutory interpretation (e.g., the zone-of-interests test)); see also *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (declining to consider "the continuing vitality of the prudential ripeness doctrine" but suggesting that *Lexmark* and *Sprint* drew that continuing vitality into question).

²³ See *Zivotofsky v. Clinton*, 566 U.S. 189, 194–95 (2012) (discussing only two factors of the political question doctrine while emphasizing that the doctrine is but "a narrow exception" to the "responsibility to decide cases properly before" the courts); see also *id.* at 1431–34 (Sotomayor, J., concurring in part and concurring in the judgment) (categorizing the factors omitted by the majority as addressing prudential concerns).

²⁴ See, e.g., *Lexmark*, 134 S. Ct. at 1388 (cautioning that a court "cannot limit a cause of action that Congress has created merely because 'prudence' dictates"); *NOPSI*, 491 U.S. 350, 359 (1989) ("Underlying these assertions [of required exercise of jurisdiction] is the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds."); see also *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) (reaffirming that Congress's control of the federal courts' jurisdiction is an essential component of the separation of powers); William P. Marshall, *Abstention, Separation of Powers, and Recasting the Meaning of Judicial Restraint*, 107 Nw. U. L. Rev. 881, 883, 892, 896–98 (2013) (describing how Redish's position did not gain adherents but asserting that it "changed the way that the meaning of judicial restraint was conceptualized" along these lines).

²⁵ For scholars making this argument in light of prudential doctrines, see, for example, Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. Colo. L. Rev. 1395, 1396, 1418 (1999) (criticizing what he terms the "foreign relations effects test" as purporting to protect political branch prerogatives in foreign affairs but in fact empowering the courts); Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. Rev. 1908, 1913 (2015) (arguing that the modern political question doctrine is "not . . . a doctrine of judicial restraint (or subservience), but . . . a source of judicial

This Article critiques the lower courts' wide-ranging use of "international comity abstention" in light of the Supreme Court's recent re-emphasis on jurisdictional obligation as a bulwark for the separation of powers. That concern for jurisdictional obligation does not stop at the border: judges should be equally skeptical of a broad and amorphous doctrine of abstention in transnational cases just as they would be in domestic cases. The label "international comity abstention" (and all of its variants²⁶) is problematically generic and inherently confusing as "comity" is not a unitary doctrine.²⁷ This vague label has led courts to conflate different comity doctrines, inviting expansive abstention that is out of step with the Court's professed concern for judicial restraint.

The goals of this Article, then, are threefold. Descriptively, it provides the first comprehensive account and critique of the federal courts' use of "international comity abstention." Prescriptively, it aims to clarify the federal courts' current practice and to outline a more restrained path forward. In particular, I urge federal judges to drop the amorphous label of "international comity abstention" and to identify instead distinct bases for abstention in transnational cases—much as they have in domestic cases—that can then be distinctly analyzed. Doing so will discourage undisciplined abstention while identifying gaps for which more specific doctrines should be developed.

power"); see also *Leading Cases*, *supra* note 20, at 328 (noting the Court's apparent view that "[p]rudential standing . . . can be used by courts as a tool of nearly unfettered policy discretion"); cf. Curtis A. Bradley, *The Irrepressible Functionalism in U.S. Foreign Relations Law*, in *U.S. Foreign Relations Law 12–16* (Curtis A. Bradley ed., forthcoming 2019), <https://ssrn.com/abstract=3228497> [<https://perma.cc/N75M-BN3C>] (suggesting that the Supreme Court's recent first-order formalism in some foreign relations doctrines has been justified by second-order functionalism, including separation-of-powers concerns).

²⁶ The courts have not been entirely consistent even in their labeling of this concept. See, e.g., *Cooper v. Tokyo Elec. Power Co.*, 860 F.3d 1193, 1205 (9th Cir. 2017) ("dismiss[al] . . . on comity grounds"); *Royal & Sun All. Ins. Co. of Can. v. Century Int'l Arms, Inc.*, 466 F.3d 88, 92 (2d Cir. 2006) ("international comity abstention"); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237 (11th Cir. 2004) ("International comity . . . is an abstention doctrine . . ."); *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1222 (11th Cir. 1999) (*per curiam*) ("international abstention"). For purposes of collecting federal court practice for this Article, I have included as examples of "international comity abstention" those decisions that used this label (or a close variant), as well as cases that applied abstention principles (even if not identified as such) that are framed in terms of international comity.

²⁷ Rather, it is a multivalent interest that informs a range of doctrines. See *infra* Section II.A (discussing different facets of "comity").

The resulting analytical framework will be a familiar one for the Court, akin to its unanimous rejection in *Taylor v. Sturgell*²⁸ of “virtual representation” in preclusion doctrine.²⁹ The starting point is a strong default rule: here, the presumption that federal courts should exercise the jurisdiction granted by Congress. There may be exceptions to that default, but those exceptions should be narrow and defined with particularity. A broad, amorphous exception (like “international comity abstention”) risks undermining the default rule, denying due process to litigants, and imposing unnecessary analytical burdens on judges.³⁰ But as in *Taylor*, this is not an inflexible approach; additional exceptions may be identified and developed as needed. This approach only requires that such exceptions be tailored and transparent.³¹

This analytical structure is a pragmatic formalism, one that accounts for the institutional and psychological pressures of judicial decision making without disclaiming all judicial discretion. This is the third, normative goal of the Article: to advocate for such pragmatic formalism in treating procedural questions. If the goal is judicial humility vis-à-vis the other branches, that goal can be undermined not only by open-ended discretion, but also by firm rules that declare judges’ hands to be tied.³² Strict formalism—because it is defined and enforced by judges—can shut down helpful dialogue between the component parts of government.³³ The better approach is not to deny all ability to abstain in trans-

²⁸ 553 U.S. 880 (2008).

²⁹ See *id.* at 885. I am grateful to Professor Robin Effron for identifying this analytical analogy.

³⁰ See *Taylor*, 553 U.S. at 898–901 (critiquing “virtual representation” on these grounds).

³¹ The Court followed a similar structure in another unanimous opinion that was also authored by Justice Ginsburg and is both more recent and more closely related: *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2013). In *Sprint*, however, the Court did not leave space for a residual category like it did in *Taylor*; under *Sprint*, *Younger* abstention was strictly limited to three previously recognized and specific grounds. *Id.* at 591 (stating these three “exceptional” categories “define *Younger*’s scope”). Perhaps forty years from now, the courts will similarly feel they have identified all legitimate categories of transnational abstention. For now, however, it seems prudent to leave some space for courts to identify additional (but carefully circumscribed) grounds for abstention in transnational cases.

³² Cf. James E. Pfander, *Scalia’s Legacy: Originalism and Change in the Law of Standing*, 6 Br. J. Am. Legal Stud. 85 (2017) (critiquing Justice Scalia’s standing decisions for “exercis[ing] a form of judicial power that he had been quick to decry in other settings[:] He deployed his own conception of the proper limits on government action as the basis for invalidating choices made by the political representatives of the people”).

³³ My thinking on this dynamic has been greatly influenced by the recent work of Professors Harlan Cohen and Fred Smith, Jr. See Harlan Grant Cohen, *A Politics-Reinforcing Political Question Doctrine*, 49 Ariz. St. L.J. 1 (2017); Smith, *supra* note 16. I am also grateful

national cases, but to precisely identify and defend grounds for such abstention in a manner that invites intervention by the other branches.

The discussion here should thus be of practical interest to federal judges and those who appear before them, but it bears on a broader range of conversations as well. For those interested in international commerce and private international law, this doctrinal clarification will add much-needed clarity and predictability to judicial decision making.³⁴ For those interested in human rights litigation, the currently muddled doctrine of “international comity abstention” is an obstacle to state courts and state law being able to fill the void left by *Kiobel v. Royal Dutch Petroleum Co.*³⁵ And for those concerned about the domestic division of power within our constitutional system, the current approach to abstention in transnational cases unnecessarily aggrandizes the federal judicial power at the expense of Congress and the states.

The Article proceeds as follows. Part I describes the Supreme Court’s continuing ambivalence about abstention and its recent re-emphasis on jurisdictional obligation. It argues that the presumption of jurisdictional obligation applies to transnational litigation as well. Even though the federal government—and the Executive in particular—has a special claim to foreign policy expertise, all branches of the government as well as the states have some role to play in managing transnational litigation. Further, the presumption of jurisdictional obligation, as applied to transnational cases, does not necessarily conflict with the Supreme Court’s recent interest in curtailing transnational litigation.³⁶ Part I concludes by considering what the presumption of jurisdictional obligation might then tell us about the appropriate scope of abstention in transnational cases.

for an illuminating conversation with Professor Nelson Tebbe on this theme. For further discussion, see Section I.C below.

³⁴ Cf. Dodge, *International Comity in American Law*, supra note 13, at 2131 (arguing that phrasing comity doctrines in rule-like terms will further commercial convenience and better effectuate foreign interests by increasing predictability).

³⁵ 569 U.S. 108 (2013). On the importance of state courts and state-law claims for the future of human rights litigation in the United States, see, for example, Roger P. Alford, *The Future of Human Rights Litigation After Kiobel*, 89 *Notre Dame L. Rev.* 1749, 1763 (2014); Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 *B.U. L. Rev.* 397, 399–401 (2018); Christopher A. Whytock et al., *After Kiobel—International Human Rights Litigation in State Courts and Under State Law*, 3 *U.C. Irvine L. Rev.* 1, 5–6 (2013); see also Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 *Geo. L.J.* 709, 739–41 (2012) (noting likely turn to state courts in human rights litigation).

³⁶ See, e.g., Bookman, supra note 13, at 1084–85, 1088–1100 (describing this trend).

On the one hand, if overextended as an absolute rule, the presumption of jurisdictional obligation risks undermining the very separation-of-powers interests it is meant to promote. Some flexibility is needed. On the other hand, poorly designed exceptions may encourage expansive or lopsided doctrinal development over time.³⁷ My worry is that vaguely defined bases for transnational abstention will inevitably lead to more dismissals—and the assertion of greater judicial power—than judges initially intend. In lieu of a single, broad doctrine of abstention for transnational cases, I argue, judges should identify a few specific, narrow bases for abstention that can be reliably evaluated through judicially manageable standards.

Turning from theory to practice, Part II argues against the federal courts' currently broad conception of "international comity abstention." First, it explains that "comity" is not itself a doctrine; rather, it is a principle that informs multiple doctrines, and it can point in different directions depending on the question being asked. The danger of the label of "comity abstention," then, is that it encourages judges to conflate abstention with other comity-based doctrines that are not about abstention at all. Indeed, federal judges have drawn on other comity-inflected doctrines—like the recognition of foreign judgments, statutory construction, and conflicts of law—to try to fill in the currently amorphous content of "international comity abstention." The rest of Part II shows how this conflation has occurred, how it risks confusing judicial decision making, and how it may also lead to the displacement of state law by federal judge-made law.

Disentangling these other comity doctrines has the additional benefit of clarifying how the need for abstention in transnational cases is narrower than might at first appear. Part III considers, then, what grounds for abstention remain. It argues against basing abstention in transnational cases on generalized functional concerns, such as the unsettled nature of foreign law, political sensitivities, or the personal convenience of the parties. Such broad and indeterminate grounds for abstention will inevitably expand over time, undermining the default presumption of jurisdictional obligation.

³⁷ Here I draw on prior work exploring the evolution of procedural doctrines in the context of complexity and uncertainty. See Maggie Gardner, *Parochial Procedure*, 69 *Stan. L. Rev.* 941, 958–67 (2017) [hereinafter Gardner, *Parochial Procedure*]; Maggie Gardner, *Retiring Forum Non Conveniens*, 92 *N.Y.U. L. Rev.* 390, 417–29 (2017) [hereinafter Gardner, *Retiring Forum Non Conveniens*].

There are, however, other bases for abstention that do not raise the same risks. In particular, Part III recognizes that there is a real need for abstention in transnational litigation to address foreign parallel proceedings—the major current use of international comity abstention that should be salvaged, clarified, and renamed. It also considers a potential new category for transnational abstention, loosely analogous to *Burford* abstention in domestic cases, to defer to foreign consolidated remedial schemes for resolving interdependent claims.

Part IV concludes by considering how the dialogue between Congress and the courts regarding transnational abstention might continue to evolve, particularly through the development of private international law treaties. By leaving space for Congress to supplement or supplant judicial practice, the approach to abstention and doctrinal design urged here may do more to promote judicial humility than would an absolute denial of all discretion.

I. TENSION AT THE BORDER

This Part juxtaposes two trends at the Supreme Court. It begins by describing the Court's renewed embrace of jurisdictional obligation: that even if courts are not constitutionally required to exercise the full scope of jurisdiction assigned to them by Congress, it is nonetheless suspect when they decline to do so.³⁸ It then argues that this presumption extends to transnational litigation, despite the Supreme Court's recent interest in limiting transnational cases in U.S. courts.³⁹

The Part concludes, however, with a warning against applying the presumption of jurisdictional obligation too rigidly. Enforcing jurisdictional obligation through strict rules may lead to judicial aggrandizement in a different form: judicial pronouncements of what the Constitution requires, or what Congress must say specifically to overcome court-imposed limits, can serve to constrain rather than to empower Congress and the states.⁴⁰ In considering how transnational abstention doctrines might be designed to better account for the presumption of jurisdictional obligation, I argue not for avoiding all abstention, but for limiting it to discrete, judicially manageable bases.⁴¹

³⁸ See *infra* Section I.A.

³⁹ See *infra* Section I.B.

⁴⁰ See *infra* Section I.C.

⁴¹ See *infra* Section I.D.

A. Domestic Abstention and the Critique of Prudential Restraint

In the mid-twentieth century, the Supreme Court articulated a series of abstention doctrines meant primarily to protect state interests from federal encroachment.⁴² From the outset, however, the Court's willingness to abdicate congressionally granted jurisdiction has found many critics, including among its own members. More recently, the Court has embraced these concerns—particularly those sounding in the separation of powers—in emphasizing the limits of abstention and signaling a retreat from other doctrines of prudential restraint.

Pullman abstention: The abstention doctrine first recognized in *Railroad Commission of Texas v. Pullman Co.*⁴³ allows federal courts to abstain in cases where the only way to avoid a constitutional question would be to resolve unsettled state law. Nearly since its inception, however, critics have worried that too much abstention, even when limited to the courts' equitable powers,⁴⁴ would undercut Congress's direction to hear these cases. Shortly after *Pullman*, the Supreme Court clarified that a question of state law that is "uncertain or difficult to determine" is not by itself a reason to abstain; some additional concern, like the avoidance of a constitutional question, is required. Otherwise abstention would "thwart the purpose" of the diversity jurisdiction granted by Congress⁴⁵—which, after all, "was not conferred for the benefit of the federal courts or to serve their convenience."⁴⁶

Over the last twenty-five years, *Pullman* abstention has been largely displaced by statutes permitting federal courts to certify questions of state law to state courts.⁴⁷ As of 2010, all states but North Carolina had such certification statutes, though the breadth and process of certifica-

⁴² See, e.g., *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959) (noting that abstention is a tool for maintaining "harmonious federal-state relations"); *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941) ("This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers.").

⁴³ 312 U.S. 496 (1941).

⁴⁴ See *Pullman*, 312 U.S. at 500–01 (grounding *Pullman* abstention in equitable powers).

⁴⁵ *Meredith v. Winter Haven*, 320 U.S. 228, 235–36 (1943).

⁴⁶ *Id.* at 234.

⁴⁷ See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75–77, 79 (1997) (noting that "[c]ertification today covers territory once dominated by" *Pullman* abstention and that certification does not "entail the delays, expense, and procedural complexity that generally attend abstention decisions").

tion varies.⁴⁸ And the Supreme Court has encouraged the lower courts to use certification in lieu of abstention; as Justice Sotomayor recently explained, the Court “has repeatedly emphasized that certification offers clear advantages over abstention,” rendering abstention a less favored device for furthering “cooperative judicial federalism.”⁴⁹

Burford and Thibodaux abstention: The abstention doctrines established by *Burford v. Sun Oil Co.*⁵⁰ and *Louisiana Power & Light Co. v. City of Thibodaux*⁵¹ both recognize a need for centralized decision making in certain circumstances. *Burford* abstention applies when federal review of a state-law question “would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.”⁵² As the Court later summarized in *New Orleans Public Service, Inc. v. Council of the City of New Orleans* (“NOPSI”),⁵³ abstention based on *Burford*’s rationale is only appropriate when there is a danger that the federal court could “disrupt the State’s attempt to ensure *uniformity* in the treatment of an ‘*essentially local* problem.’”⁵⁴ Similarly in *Thibodaux*, the Supreme Court was concerned about resolving unsettled questions of state law that implicate the state’s sovereign prerogatives, such as the state’s eminent domain power.⁵⁵ There are some topics so bound up with the state’s sovereignty (particularly its territorial sovereignty), *Thibodaux* seems to suggest, that federal courts should allow state courts to resolve such questions in the first instance.

Both *Burford* and *Thibodaux* were close decisions issued over strong dissents that warned that judicial abdication in such cases could under-

⁴⁸ See Richard H. Fallon, Jr. et al., *Hart and Wechsler’s The Federal Courts and the Federal System* 1116 n.6 (7th ed. 2015).

⁴⁹ *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1157 (2017) (Sotomayor, J., concurring in the judgment) (citing *Arizonans for Official English*, 520 U.S. at 75; *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 396 (1988); *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)).

⁵⁰ 319 U.S. 315 (1943).

⁵¹ 360 U.S. 25 (1959).

⁵² *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976) (summarizing *Burford*).

⁵³ 491 U.S. 350 (1989).

⁵⁴ *Id.* at 362 (quoting *Ala. Pub. Serv. Comm’n v. Southern Ry. Co.*, 341 U.S. 341, 347 (1951)) (emphases added).

⁵⁵ *Thibodaux*, 360 U.S. at 28 (noting both that eminent domain power “is intimately involved with sovereign prerogative” and that the question of eminent domain in that case further “concern[ed] the apportionment of governmental powers between City and State”—another matter of state sovereign prerogative).

mine the congressional grant of diversity jurisdiction.⁵⁶ Justice Frankfurter, who had authored *Pullman*, was nonetheless adamant in *Burford* that the lack of a constitutional question made abstention in the face of unsettled state law an unacceptable intrusion on congressional power. “It is the essence of diversity jurisdiction that federal judges and juries should pass on asserted claims,” he insisted, “because the result might be different if they were decided by a state court.”⁵⁷ “The duty of the judiciary is to exercise the jurisdiction which Congress has conferred,” he concluded, not to write its own view of jurisdictional policy into law.⁵⁸ Likewise, Justice Brennan’s dissent in *Thibodaux* warned that overextension of abstention would “wreak havoc with federal jurisdiction.”⁵⁹ “Until Congress speaks otherwise,” he urged, “the federal judiciary has no choice but conscientiously to render justice for litigants from different States entitled to have their controversies adjudicated in the federal courts.”⁶⁰

Colorado River *abstention*: The Supreme Court in *Colorado River Water Conservation District v. United States*⁶¹ recognized (though without using the label of “abstention”⁶²) that federal courts may defer to parallel litigation in state courts.⁶³ The circumstances in which a federal court may do so must be “exceptional,” however, given the federal courts’ “virtually unflagging obligation . . . to exercise the jurisdiction given them.”⁶⁴ Even with that warning, *Colorado River* has been criti-

⁵⁶ “To deny a suitor access to a federal district court under the circumstances of this case,” Justice Frankfurter began his *Burford* dissent, “is to disregard a duty enjoined by Congress and made manifest by the whole history of the jurisdiction of the United States courts based upon diversity of citizenship between parties.” *Burford*, 319 U.S. at 336 (Frankfurter, J., dissenting).

⁵⁷ *Id.* at 344 (emphasis added).

⁵⁸ *Id.* at 348.

⁵⁹ *Thibodaux*, 360 U.S. at 36 (Brennan, J., dissenting).

⁶⁰ *Id.* at 41.

⁶¹ 424 U.S. 800 (1976).

⁶² See *id.* at 813. Although the Court distinguished *Colorado River* from previously recognized abstention doctrines, that distinction appears to be more historical than substantive; for the sake of brevity, this Article refers to *Colorado River* deference as a form of abstention.

⁶³ See *id.* at 817–18.

⁶⁴ *Id.*; see also *id.* at 819 (“Only the clearest of justifications will warrant dismissal.”); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19 (1983) (referring to “*Colorado River*’s exceptional-circumstances test”). Such exceptional circumstances include (i) “the desirability of avoiding piecemeal litigation,” (ii) “the order in which jurisdiction was obtained by the concurrent forums,” (iii) “the inconvenience of the federal forum,” and whether (iv) “the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts.” *Colorado River*, 424 U.S. at 818. Other relevant fac-

cized for elevating the administrative concerns of judges over the jurisdictional directives of Congress.⁶⁵

Younger *abstention*: Perhaps the most controversial branch of domestic abstention has been the equitable restraint doctrine associated with *Younger v. Harris*,⁶⁶ under which the federal courts will generally not hear claims for equitable relief against pending state criminal prosecutions.⁶⁷ At first, the category of cases subject to *Younger* abstention seemed potentially limitless,⁶⁸ expanding to encompass civil enforcement actions brought by the state⁶⁹ and even some civil proceedings in which the state was not a party.⁷⁰

That expansion has ground to a halt, however. In *NOPSI*, Justice Scalia emphasized “the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction,” with *Younger* abstention deriving solely from the courts’ equitable powers.⁷¹ That emphasis on equity was more fully developed in

tors include whether state law will provide the rule of decision—in other words, *Colorado River* “abstention” should generally not apply in federal question cases—and whether the state-court proceeding will adequately protect the non-movant party. See *Moses H. Cone*, 460 U.S. at 23, 26.

It is notable that the factors mentioned in *Colorado River* were not so much “factors” as a collection of circumstances in which the Court had previously acknowledged the need for some flexibility in declining jurisdiction. The first “factor,” for example, was a reference to the courts’ equitable discretion to stay cases seeking declaratory judgments. See *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942); see also *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995) (discussing *Brillhart* as establishing a more flexible standard than *Colorado River* for use in Declaratory Judgment Act cases). The third “factor” listed in *Colorado River* was a reference to the doctrine of *forum non conveniens* as articulated by the Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), which is discussed further below in Subsection III.A.3. And the fourth factor reflects the narrow *Princess Lida* doctrine, see *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456 (1939), noted below in Subsection III.B.2.

⁶⁵ See, e.g., Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 *Geo. L.J.* 99, 156 (1986) (“[A]bstention for reasons of wise judicial administration . . . is properly construed only as an unprincipled judicial self-help remedy. It is judicial activism of the most blatant kind: a cynical disregard for clearly expressed congressional intent that the federal courts exercise jurisdiction under circumstances that are statutorily defined.”).

⁶⁶ 401 U.S. 37 (1971).

⁶⁷ *Id.* at 43–44.

⁶⁸ See Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 *Harv. L. Rev.* 2283, 2295 (2018) (“Over the course of the next decade, *Younger* abstention expanded . . . precipitously . . .”).

⁶⁹ See *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

⁷⁰ See *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987).

⁷¹ *NOPSI*, 491 U.S. at 359.

Quackenbush v. Allstate Insurance Co.,⁷² in which a unanimous Court located the authority to abstain in the courts' equitable powers, a source of discretion that fits more easily with Congress's authority to set the jurisdiction of the federal courts.⁷³ Thus the power to dismiss cases based on abstention is limited to cases seeking equitable or other discretionary forms of relief.⁷⁴ After *Quackenbush*, cases seeking nondiscretionary legal remedies may only be stayed.⁷⁵

Most recently, in *Sprint Communications, Inc. v. Jacobs*,⁷⁶ the Court made clear its disinterest in further expanding abstention principles. "In the main," Justice Ginsburg wrote for another unanimous Court, "federal courts are obliged to decide cases within the scope of federal jurisdiction."⁷⁷ Thus "federal courts ordinarily should entertain and resolve on the merits an action within the scope of a jurisdictional grant, and should not 'refus[e] to decide a case in deference to the States.'"⁷⁸ In particular, the *Sprint* Court warned against broad grounds for abstention and limited *Younger* abstention to the three "exceptional circumstances" it had previously identified.⁷⁹ Recall also in this regard the Court's stated preference for certification of state law questions whenever possible.⁸⁰ Ab-

⁷² 517 U.S. 706 (1996).

⁷³ See *id.* at 717–18.

⁷⁴ *Id.* at 731. While *Quackenbush* addressed the application of *Burford* abstention in particular, its holding was phrased more broadly in terms of "cases based on abstention principles." *Id.* On the questionable defensibility of this holding given the Court's prior abstention cases, see Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 *Notre Dame L. Rev.* 1891, 1898–1900 (2004).

⁷⁵ Justice Kennedy, in a concurrence, did raise the possibility that a suit for damages might be dismissed "where a serious affront to the interests of federalism could be averted in no other way." *Quackenbush*, 517 U.S. at 733 (Kennedy, J., concurring). He was alone, however, in wishing to leave this door open. See *id.* at 731–32 (Scalia, J., concurring) ("I would not have joined today's opinion if I believed it left such discretionary dismissal available.").

The limits on abstention articulated in *Quackenbush* may not necessarily extend to *Colorado River* deference to parallel litigation, however, as the Court was careful not to label such deference as abstention and has separately acknowledged that a stay in such circumstances "is as much a refusal to exercise federal jurisdiction as a dismissal." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14–15 & n.16, 28 (1983). *Quackenbush* also excepted *forum non conveniens* from its curtailment of abstention, though not on analytically satisfying grounds. See Gardner, *Retiring Forum Non Conveniens*, *supra* note 37, at 454–55.

⁷⁶ 571 U.S. 69 (2013).

⁷⁷ *Id.* at 72.

⁷⁸ *Id.* at 73 (quoting *NOPSI*, 491 U.S. at 368).

⁷⁹ *Id.* at 81–82.

⁸⁰ See *supra* notes 47–49 and accompanying text.

stention, the Court has made clear, is not a blunt instrument to be invoked broadly, but a scalpel to be used rarely, if at all.⁸¹

Other prudential doctrines: The Court's concern about jurisdictional obligation extends beyond abstention to other discretionary doctrines of judicial restraint. Most notably, the Court in *Lexmark International, Inc. v. Static Control Components, Inc.*⁸² drew into question the continuing viability of "prudential standing" as an exercise of judicial discretion.⁸³ The concept of prudential standing, Justice Scalia wrote for the majority, "is in some tension with [the Court's] recent reaffirmation" in *Sprint* of the federal courts' obligation to exercise their congressionally granted jurisdiction.⁸⁴ In particular, *Lexmark* clarified that challenges to standing based on a statute's "zone of interests" are not resolved as a matter of judicial discretion, but are instead matters of statutory interpretation.⁸⁵ And in a footnote, Justice Scalia suggested that the Court has recharacterized the bar on generalized grievances—a prudential limit on standing—as another aspect of Article III's injury-in-fact requirement.⁸⁶ In several standing decisions since *Lexmark*, the Court has avoided reference to prudential requirements even while alluding to generalized grievances⁸⁷ and the zone-of-interests test,⁸⁸ suggesting that the re-

⁸¹ Cf. Richard H. Fallon, Jr., *Why Abstention Is Not Illegitimate: An Essay on the Distinction Between "Legitimate" and "Illegitimate" Statutory Interpretation and Judicial Lawmaking*, 107 Nw. U. L. Rev. 847, 850, 869 (2013) ("Since the 1980s, the Supreme Court has not only arrested the expansion of abstention doctrine, but also pruned some of its branches.")

⁸² 572 U.S. 118 (2014).

⁸³ See Ernest A. Young, *Prudential Standing after Lexmark International, Inc. v. Static Control Components, Inc.*, 10 Duke J. Const. L. & Pub. Pol'y 149, 151–53 (2014)

⁸⁴ *Lexmark*, 572 U.S. at 126.

⁸⁵ *Id.* at 127.

⁸⁶ *Id.* at 127 n.3. In the same footnote, Justice Scalia also drew into question the proper characterization of limits to third-party standing. See *id.* (conceding that "[t]he limitations on third-party standing are harder to classify" and concluding that "consideration of that doctrine's proper place in the standing firmament can await another day"). But see *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (relying on third-party standing without referencing *Lexmark*).

⁸⁷ See *Gill v. Whitford*, 138 S. Ct. 1916, 1929–31 (2018) (characterizing as a question of "injury in fact" what might have been characterized as a generalized grievance); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (summarizing only the constitutional limits on Article III standing); *id.* at 1555 (Ginsburg, J., dissenting) (noting that the particularity requirement—a component of injury-in-fact—"bars complaints raising generalized grievances").

⁸⁸ See *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296, 1302–03 (2017) (noting that *Lexmark* identified the label of "prudential standing" as "misleading, for the requirement at issue [the zone-of-interests test] is in reality tied to a particular statute" and is thus a question of statutory interpretation).

categorizing of prudential standing requirements may not be limited to *Lexmark*'s Lanham Act context (or to Scalia's tenure on the Court⁸⁹).

Meanwhile, in *Susan B. Anthony List v. Driehaus*,⁹⁰ Justice Thomas cast doubt on the continuing viability of prudential ripeness requirements, echoing *Lexmark*'s concern that such prudential restraint is in tension with the federal courts' obligation to exercise the jurisdiction granted by Congress.⁹¹ And in *Zivotofsky v. Clinton* ("*Zivotofsky I*"),⁹² the majority emphasized that the political question doctrine is but a "narrow exception" to the rule that "the Judiciary has a responsibility to decide cases properly before it,"⁹³ and it omitted the doctrine's more prudential factors.⁹⁴ This is not to suggest that the Court is ready to embrace an absolute rule of jurisdictional obligation.⁹⁵ But the Court has been interested lately in eliminating or narrowing the exceptions to the rule.⁹⁶

⁸⁹ See Pfander, *supra* note 32, at 90–91, 96–97, 105–06 (attributing these shifts to Scalia's jurisprudence).

⁹⁰ 134 S. Ct. 2334 (2014).

⁹¹ *Id.* at 2347 (quoting *Lexmark* in remarking on this tension but concluding that "we need not resolve the continuing vitality of the prudential ripeness doctrine in this case").

⁹² 566 U.S. 189 (2012).

⁹³ *Id.* at 194–95 (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

⁹⁴ See *id.* at 195 (citing only two factors: "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it" (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993))). In contrast, Justices Sotomayor and Breyer urged the continuing relevance of prudential considerations in allowing judges to avoid politically charged foreign relations cases. *Id.* at 202–06 (Sotomayor, J., concurring in part and concurring in the judgment); *id.* at 212–13 (Breyer, J., dissenting); see also Nolette, *supra* note 20, at 243 & n.127 (gathering commentators who have understood *Zivotofsky I* as a repudiation of the political question doctrine's prudential factors).

⁹⁵ See, e.g., Young, *supra* note 83, at 163. In particular, for a critique of Scalia's standing decisions as an expression of judicial functionalism that belies an absolute commitment to separation-of-powers principles, see Pfander, *supra* note 32, at 106.

⁹⁶ An exception may be the Court's reaffirmation of the "comity doctrine" that "restrains federal courts from entertaining claims for relief that risk disrupting state tax administration." See *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 417 (2010). The state-tax comity doctrine is a "prudential doctrine" much akin to abstention, and like abstention, it supports cooperative federalism. But it operates in conjunction with a congressional directive (the Tax Injunction Act), which indicates congressional support for the comity doctrine and which—as a practical matter—limits the range of equitable relief a federal court is able to grant. See *id.* at 421–24.

2019]

Abstention at the Border

81

B. Is Transnational Litigation Different?

This Section argues that transnational litigation is not so different as to displace entirely the separation-of-powers concerns underlying the presumption of jurisdictional obligation. Nor is open-ended abstention in transnational cases necessary to further the Court's recent efforts to curtail excessive cross-border litigation. Broad judicial discretion to decline congressionally granted jurisdiction should also be suspect in the context of transnational litigation.

1. The Limited Exceptionalism of Transnational Litigation

Along some dimensions, transnational litigation does differ from purely domestic litigation. It might implicate foreign relations doctrines, like foreign sovereign immunity or the act of state doctrine. Occasionally, high-profile cases may ruffle the feathers of foreign allies.⁹⁷ And even routine procedural decisions may require judicial assistance from other countries, whether ad hoc or via formal treaty arrangements.⁹⁸ Transnational cases thus trigger the standard intuition that foreign affairs are within the special competence of the executive branch.⁹⁹ And to the extent that the executive branch does have a particular interest in transnational litigation, perhaps the presumption of jurisdictional obligation—that the federal courts should defer to Congress's jurisdictional grants—should apply less stringently in this context.

Several considerations, however, cut in the other direction. First, it is the rare transnational case that garners the attention of a foreign sovereign today. Given the global economy, most transnational litigation involves run-of-the-mill disputes, often sounding in traditional fields of (domestic) state power like contracts or torts—not high-stakes political fights that implicate the core diplomatic prerogatives of the federal government.¹⁰⁰

⁹⁷ See generally Kristen E. Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 Va. L. Rev. 289 (2016) (discussing foreign sovereigns' interventions in U.S. litigation as amici).

⁹⁸ See generally Gardner, *Parochial Procedure*, supra note 37, at 968–83, 994–1003 (discussing the federal courts' application of the Hague Evidence Convention and the Hague Service Convention).

⁹⁹ See Bradley, supra note 25, at 4–6 (summarizing traditional functional arguments for executive control of foreign relations).

¹⁰⁰ See, e.g., Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 Va. L. Rev. 649, 651 (2000) (noting that “a bright-line distinction between ‘foreign’ and ‘domestic’ . . . appears increasingly less tenable in this age of globalization”); Jack L. Goldsmith,

Second, the common shorthand that the Executive has special competence in foreign relations is not wrong, but it is only a partial truth. Within our constitutional structure, all components of the government—including Congress, the courts, and the states—have some role to play in matters that touch on foreign interests, albeit to differing degrees.¹⁰¹ For one thing, U.S. states have their own interests in transnational litigation that the Constitution does not entirely displace.¹⁰² As Professors Seth Davis and Chris Whytock have recently emphasized in the context of human rights litigation, “[p]roviding law for the redress of wrongs is not a matter of foreign relations committed to the federal government simply because those wrongs involve human rights violations.”¹⁰³ At the very least, states have interests in providing remedies for common law and statutory injuries committed within their territory or against their citizens, regulating their citizens (including corporate citizens), and maintaining judicial forums for pursuing all of the above. Recognizing the validity and breadth of such state interests does not mean that those in-

Federal Courts, Foreign Affairs, and Federalism, 83 Va. L. Rev. 1617, 1622 (1997) (“The problem is that the traditional conception of foreign affairs has changed to include matters formerly viewed as purely domestic issues But as this distinction between foreign and domestic affairs has waned, the criterion of ‘foreign relations’ has lost whatever reliability it might have had as an indicator of matters that should presumptively be governed by federal law.”). See generally Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 Harv. L. Rev. 1897 (2015) (arguing that the Supreme Court has moved away from foreign affairs exceptionalism in recent Terms).

¹⁰¹ See, e.g., Goldsmith, *supra* note 100, at 1622–23, 1665 (arguing against “wooden notions of foreign affairs exclusivity” and in favor of recognizing state interests in transnational cases); see also Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 Geo. Wash. L. Rev. 380, 389 (2015) (“If state criminal procedure and random lovers’ quarrels can be plausibly described as having foreign affairs implications, and foreign-based banks, oil companies, terrorists, and insurgents can be subjected to the full force of federal regulation, the mere mention of the term ‘foreign affairs’ or ‘national security’ cannot be enough to release the government or its policies from judicial scrutiny.” (citations omitted)).

¹⁰² Cf. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003) (suggesting that states may legislate in areas of “traditional state responsibility” in a manner that “affects foreign relations” as long as it does not conflict with federal law); Goldsmith, *supra* note 100, at 1677 (noting that the broad label of “[f]oreign relations includes many matters traditionally regulated by states,” such that states may have a “legitimate interest in the regulation of foreign relations” alongside the federal government); Ingrid Wuerth, *The Future of the Federal Common Law of Foreign Relations*, 106 Geo. L.J. 1825, 1830–32 (2018) (arguing that dormant foreign affairs preemption may be in decline).

¹⁰³ Davis & Whytock, *supra* note 35, at 404.

terests—and the state’s power to enforce them—are unlimited.¹⁰⁴ But under our federalist system, they should not be lightly ignored.

And even when the federal interest in a cross-border case *is* greater than that of the states, that federal interest does not reside entirely within the executive branch. Congress has a role in managing foreign relations as well,¹⁰⁵ and the proper institutional function of the courts might be to carry out those congressional directives instead.¹⁰⁶ Consider in this regard the Foreign Sovereign Immunities Act, which directs the courts to resolve certain questions implicating foreign interests in the first instance.¹⁰⁷ Or consider other statutes with more substantive aims, from Title VII¹⁰⁸ to antitrust laws¹⁰⁹ to sex trafficking prohibitions,¹¹⁰ where Congress has explicitly indicated its intent that the statute’s proscriptions extend, at least to some extent, beyond U.S. borders. The message from Congress is that the federal courts should be engaged in some transnational litigation.

The current practice of broad abstention in transnational cases is in tension with the role of Congress and the states in setting the parameters of court access. Like domestic abstention, abstention in transnational cases treads on Congress’s power to define the scope of the federal

¹⁰⁴ One significant limit, of course, is the Due Process Clause of the Fourteenth Amendment. Another is foreign affairs preemption. See, e.g., *Garamendi*, 539 U.S. at 413–20.

¹⁰⁵ See, e.g., Kristen E. Eichensehr, Courts, Congress, and the Conduct of Foreign Relations, 85 U. Chi. L. Rev. 609, 612–14, 629–39 (2018) (exploring Congress’s power to conduct foreign relations); Ryan M. Scoville, Legislative Diplomacy, 112 Mich. L. Rev. 331, 336–51, 380–93 (2013) (documenting Congress’s ability and willingness to engage in foreign diplomacy); Recent Signing Statements, 131 Harv. L. Rev. 674, 678 (2017) (using the Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017), to illustrate how “Congress too enjoys special gifts as a maker of foreign policy” and arguing that “the Court should adopt a balanced functionalism that pays respect to Congress’s talents”); cf. Curtis A. Bradley & Jack L. Goldsmith, Presidential Control over International Law, 131 Harv. L. Rev. 1201, 1257–70 (2018) (describing—and encouraging—interbranch checks on presidential control over international law).

¹⁰⁶ 28 U.S.C. §§ 1330, 1602–11 (1994); see also Bradley, *supra* note 100, at 713–16 (identifying the Foreign Sovereign Immunities Act, the act of state doctrine, and dormant foreign affairs preemption doctrine as examples of questions where *Chevron* deference should not apply because Congress has not delegated lawmaking authority to the Executive).

¹⁰⁷ See *id.* at 713–14.

¹⁰⁸ See 42 U.S.C. § 2000e (2012).

¹⁰⁹ See Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 (codified at 15 U.S.C. § 6a).

¹¹⁰ See, e.g., 18 U.S.C. § 2423(a) (2012).

courts' jurisdiction.¹¹¹ But more than domestic abstention, it also risks undermining Congress's regulatory goals. In domestic cases, after all, federal courts abstain in favor of other U.S. courts, which are more likely than foreign courts to resolve disputes in a manner that aligns with (or even applies) U.S. federal law.¹¹²

Further, while doctrines of domestic abstention are justified as promoting "our federalism,"¹¹³ transnational abstention may instead displace state laws or state decisions regarding court access. Especially when paired with other federal judge-made law (consider, for example, removal based on dormant foreign affairs preemption of otherwise non-removable diversity cases¹¹⁴), "international comity abstention" may enable federal judges to override state remedies and state forums.¹¹⁵ To the extent some states are opening courthouse doors to transnational cases,¹¹⁶ then, the federal courts may be poised to close them—not based on congressional directives or constitutional demands, but on the intuition of federal judges that some cases simply do not belong in U.S. courts.

2. Avoiding Excessive Transnational Litigation

Alternatively, one might be skeptical that the presumption of jurisdictional obligation applies as strongly to transnational cases given its tension with another trend at the Supreme Court: its growing wariness of

¹¹¹ See Elizabeth T. Lear, Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power, 91 Iowa L. Rev. 1147, 1152–53 (2006) (arguing that forum non conveniens, which is a form of transnational abstention, usurps congressional power to define the federal courts' jurisdiction); Robert J. Pushaw, Jr., The Inherent Powers of Federal Courts and the Structural Constitution, 86 Iowa L. Rev. 735, 855 (2001) (arguing that the "power to dismiss suits" on the basis that they are "better brought in state or foreign courts" belongs to Congress, not federal judges).

¹¹² Cf. Stephen B. Burbank, Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a *Via Media*?, 26 Hous. J. Int'l L. 385, 399–400 (2004) (arguing that forum non conveniens should not be applied to statutory claims because doing so undermines domestic regulatory interests).

¹¹³ E.g., *Thibodaux*, 360 U.S. at 28.

¹¹⁴ See Goldsmith, *supra* note 100, at 1623–24, 1631 (critiquing judge-made foreign relations law, including dormant foreign affairs preemption, as displacing legitimate efforts by states to regulate transnational conduct).

¹¹⁵ *Id.* at 1696–97 (criticizing *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997), on this basis).

¹¹⁶ The willingness of state courts to entertain such cases is by no means universal. See, e.g., *Aranda v. Philip Morris USA Inc.*, 183 A.3d 1245, 1255 (Del. 2018) (allowing forum non conveniens dismissal of a transnational suit against Delaware defendants even in the absence of an available alternative forum).

transnational litigation in U.S. courts.¹¹⁷ In recent Terms, the Supreme Court has, for example, curtailed the use of the Alien Tort Statute to litigate foreign conduct,¹¹⁸ reinvigorated the presumption against extraterritoriality to circumscribe the geographic reach of U.S. laws,¹¹⁹ reaffirmed the use of forum non conveniens to dismiss transnational cases,¹²⁰ and limited the ability of U.S. courts to assert personal jurisdiction over foreign corporations in particular.¹²¹

Though notable, this trend does not—and should not—override the Court’s parallel emphasis on jurisdictional obligation. For one thing, the Court has itself suggested that the principle applies to transnational litigation by insisting on narrow applications of two abstention-like doctrines: the political question doctrine and the act of state doctrine. The political question doctrine, the Court emphasized in *Zivotofsky I*, is but a “narrow exception to [the] rule” that “the Judiciary has a responsibility to decide cases properly before it, even those it ‘would gladly avoid.’”¹²² And earlier, in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*,¹²³ the Court explained that the act of state doctrine is not some “vague doctrine of abstention” that allows courts to decline jurisdiction based on the risk of “embarrassment” to the executive branch or foreign governments.¹²⁴ “The short of the matter is this,” Justice Scalia summed up for a unanimous bench: “Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them”¹²⁵—even when those cases and controversies touch on foreign interests.

Nor do judges need a broad power to abstain in order to prevent excessive transnational litigation. To the extent the Court’s circumscrip-

¹¹⁷ See generally Bookman, *supra* note 13 (documenting and critiquing this trend).

¹¹⁸ See *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124–25 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004).

¹¹⁹ See, e.g., *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016); *Kiobel*, 569 U.S. at 124–25; *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255, 265 (2010).

¹²⁰ See *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 425 (2007).

¹²¹ See *Daimler AG v. Bauman*, 571 U.S. 117, 121–22 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919–20 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877–78 (2011) (plurality opinion).

¹²² *Zivotofsky I*, 566 U.S. at 194–95 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

¹²³ 493 U.S. 400 (1990).

¹²⁴ *Id.* at 406, 408–09.

¹²⁵ *Id.* at 409.

tion of transnational litigation reflects a concern about the exorbitant exercise of jurisdiction¹²⁶—that U.S. laws and courts are reaching too far beyond U.S. borders—the Court’s recent decisions have addressed many of those exorbitant practices. With newly refined tools to determine the geographic limits of statutes, reign in personal jurisdiction, and limit the reach of the Alien Tort Statute in particular, federal judges have less need for open-ended safety valves like *forum non conveniens* or international comity abstention.¹²⁷

Comity—the idea that U.S. courts should recognize the interests of foreign sovereigns in expectation that other nations will do the same¹²⁸—does not require a broad power to abstain in transnational cases, either. As the Court has noted, comity indicates that there must be a limit on the geographic scope of U.S. laws and litigation in order not to alienate other countries, on whose good graces U.S. parties must often depend in turn.¹²⁹ This facet of comity has motivated some of the Justices—particularly Justices Breyer and Ginsburg—in their decisions limiting transnational litigation in U.S. courts.¹³⁰ But comity is not a unitary

¹²⁶ See generally Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 *Me. L. Rev.* 474, 474 (2006) (defining exorbitant jurisdiction as “those classes of jurisdiction, although exercised validly under a country’s rules, that nonetheless are unfair to the defendant because of a lack of significant connection between the sovereign and either the parties or the dispute”).

¹²⁷ See, e.g., Gardner, *Retiring Forum Non Conveniens*, *supra* note 37, at 429–39.

¹²⁸ See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part) (“Comity is not just a vague political concern favoring international cooperation when it is in our interest to do so. Rather it is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill.”); *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (defining comity as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation”). For a recent, thorough exploration of the concept of comity on which this Article builds, see Dodge, *International Comity in American Law*, *supra* note 13.

¹²⁹ See, e.g., *F. Hoffmann-La Roche Ltd. v. Empagran S. A.*, 542 U.S. 155, 164–65 (2004) (emphasizing the need to help “the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today’s highly interdependent commercial world”); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (noting that the presumption against extraterritoriality “serves to protect against unintended clashes between our laws and those of other nations that could result in international discord”); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (“We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.”).

¹³⁰ See *Daimler AG v. Bauman*, 571 U.S. 117, 141 (2014) (noting the “risks to international comity” that arise when U.S. allies “do not share the [same] uninhibited approach to personal jurisdiction”); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 128–29 (2013) (Breyer, J., concurring in the judgment) (noting the role of comity in “lead[ing] each nation

doctrine that always calls for forbearance.¹³¹ Sometimes what comity requires is not restraint, but the accommodation of foreign litigants,¹³² foreign law,¹³³ and foreign judgments.¹³⁴ If U.S. courts exclude *too*

to respect the sovereign rights of other nations by limiting the reach of its own laws and their enforcement”); see also *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1405–06 (2018) (opinion of Kennedy, J.) (stressing judicial restraint in the treatment of foreign corporations in order to encourage similar treatment of U.S. corporations abroad).

¹³¹ Indeed, the historical roots of comity lie in the recognition of foreign interests in domestic courts, not the forbearance of domestic courts out of deference to foreign interests. See, e.g., Campbell McLachlan, *Lis Pendens* in International Litigation 32–34 (2009) (suggesting the Dutch progenitors of comity were comfortable with “giving effect to foreign law and foreign judgments,” but not necessarily the “much stronger form of comity” of “ced[ing] the power of adjudication to a foreign court”).

¹³² On providing judicial fora for foreign plaintiffs, see, for example, *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578 (1908) (“Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights.”); Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 366 (5th ed. 2011) (“It was long settled that neither foreign citizens nor foreign residents were barred from access to U.S. courts, including in actions arising abroad under foreign law.”). Recently, in *Jesner v. Arab Bank PLC*, the Justices generally agreed that the Alien Tort Statute was designed to provide foreigners with a judicial forum in order to avoid international retaliation, though they disagreed sharply about whether and when providing such a forum could shift from preventing international friction to creating it. Compare *Jesner*, 138 S. Ct. at 1406 (“The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations But here, and in similar cases, the opposite is occurring.”), and *id.* at 1410 (Alito, J., concurring in part and concurring in the judgment) (similar), with *id.* at 1435 (Sotomayor, J., dissenting) (“[H]olding corporations accountable for violating the human rights of foreign citizens when those violations touch and concern the United States may well be necessary to avoid the international tension with which the First Congress was concerned Immunizing the corporation from suit under the ATS merely because it is a corporation . . . might cause serious diplomatic friction.”).

On providing judicial fora for foreign sovereigns in particular, see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408–09 (1964) (“Under principles of comity governing this country’s relations with other nations, sovereign states are allowed to sue in the courts of the United States.”), and Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against “Judicial Imperialism,”* 73 Wash. & Lee L. Rev. 653, 660 (2016) (summarizing Supreme Court doctrine on this point). On the normalcy of foreign states appearing as plaintiffs before U.S. courts, see generally *id.* (highlighting the regularity of foreign sovereigns appearing as plaintiffs in U.S. courts); Zachary D. Clopton, *Diagonal Public Enforcement*, 70 Stan. L. Rev. 1077 (2018) (discussing foreign governments’ use of U.S. courts to invoke U.S. federal law); see also Eichensehr, *supra* note 97 (describing interventions of foreign states as amici in U.S. Supreme Court cases).

¹³³ See Dodge, *International Comity in American Law*, *supra* note 13, at 2100-02; see also *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1873 (2018) (“In the spirit of ‘international comity,’ a federal court should carefully consider a foreign state’s views about the meaning of its own laws.” (citation omitted)).

¹³⁴ See *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

many transnational cases, then, they may end up undermining a different set of comity commitments.¹³⁵ As Justice Ginsburg recently explained, an overly strict presumption against extraterritoriality “might spark, rather than quell, international strife,” for “[m]aking such litigation available to domestic but not foreign plaintiffs is hardly solicitous of international comity or respectful of foreign interests.”¹³⁶ In short, comity and the presumption of jurisdictional obligation may at times point in the same direction: towards exercising the jurisdiction set by Congress and expected by allies.

Finally, to the extent this trend to limit transnational litigation has instead been motivated by skepticism of foreign plaintiffs or of litigation more generally, the principle of jurisdictional obligation serves as a reminder of the constitutional values at stake when jurists allow their normative commitments to displace congressional directives. As a general matter, the federal courts—in transnational and domestic cases alike—should presumptively hear those cases that fall within their grants of jurisdiction, even if individual judges would have drawn those lines differently.

C. *Striking the Balance*

Recognizing the presumption of jurisdictional obligation at work in transnational litigation, however, does not require an absolute bar on all abstention. Similar to the Court’s treatment of abstention in domestic cases, the better approach is to emphasize the presumption in favor of exercising jurisdiction and to enumerate limited, narrow, and specified exceptions to that rule.¹³⁷ This Section offers both a theoretical and a pragmatic defense for that approach.

As a theoretical matter, if the presumption of jurisdictional obligation is rooted in the separation of powers, a denial of all judicial discretion to decline jurisdiction can be as dangerous as an embrace of full discretion.

¹³⁵ See, e.g., Bookman, *supra* note 13, at 1120–21; Buxbaum, *supra* note 132, at 656–58; Gardner, *Retiring Forum Non Conveniens*, *supra* note 37, at 392–95.

¹³⁶ *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2115 (2016) (Ginsburg, J., concurring in part and dissenting in part and from the judgement); see also *id.* (“[A] foreign nation is generally entitled to prosecute any civil claim in the courts of the United States upon the same basis as a domestic corporation or individual might do. To deny him this privilege would manifest a want of comity and friendly feeling.” (alteration in original) (quoting *Pfizer Inc. v. India*, 434 U.S. 308, 318–19 (1978) (internal quotation marks omitted)).

¹³⁷ Cf. *Sprint*, 571 U.S. at 76–77 (adopting this approach for *Younger* abstention). For further discussion of this parallel, see note 31 above.

Even if justified as an act of judicial humility, disclaiming discretion may serve instead to displace congressional preferences by reifying boundaries that are themselves identified by judges. With abstention, for example, it may be impossible for Congress to draw clear jurisdictional lines *ex ante*.¹³⁸ Insisting on strict, formalistic adherence to jurisdictional grants may perversely hamper Congress by forcing Congress to err on the side of underinclusive jurisdictional grants.

This is not a new insight. Professor Fred Smith, Jr. has recently explained how recasting prudential doctrines as constitutional limits increases judicial power at the expense of Congress: While Congress could override prudential limits on standing, for example, it cannot override a constitutionalized prohibition on generalized grievances.¹³⁹ Similarly, Professor Harlan Cohen sees power rather than restraint in the Court's narrowing of the political question doctrine in *Zivotofsky I*. By limiting judicial discretion to decline jurisdiction in *Zivotofsky I*, the Court in *Zivotofsky v. Kerry* ("*Zivotofsky II*")¹⁴⁰ was able to shut down an active debate about the division and exercise of foreign affairs power between the political branches in a way that reduces rather than furthers democratic dialogue.¹⁴¹ Professor James Pfander has argued that Justice Scalia's standing decisions (including *Lexmark*) swapped prudential doctrines that had self-consciously left room for Congress to intervene for Scalia's own judicial "conception of the proper limits on government action," which then serves "as the basis for invalidating choices made by the political representatives of the people."¹⁴² Both Dean John Manning and Professor Alison LaCroix have critiqued the Roberts Court's invocations of the Necessary and Proper Clause as giving the Court, "rather than Congress, the final say about how to implement federal power,"¹⁴³ thereby "narrow[ing] the permissible scope of congressional regulatory power."¹⁴⁴

¹³⁸ See, e.g., Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 *Stan. L. Rev.* 971, 1006–07 (2009); Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 *Va. L. Rev.* 1, 3–5 (2011); Meltzer, *supra* note 74, at 1893; Shapiro, *supra* note 18, at 574.

¹³⁹ Smith, *supra* note 16, at 852–53.

¹⁴⁰ 135 S. Ct. 2076 (2015).

¹⁴¹ See Cohen, *supra* note 33; see also Cohen, *supra* note 101, at 388–89 (explaining that the Roberts Court's turn to formalism in foreign affairs "is not a product of judicial humility or restraint; this formalism is about a Court retaking control").

¹⁴² Pfander, *supra* note 32, at 89, 106.

¹⁴³ Manning, *supra* note 20, at 5.

¹⁴⁴ Alison L. LaCroix, *The Shadow Powers of Article I*, 123 *Yale L.J.* 2044, 2052–53 (2014).

Strict formalism raises pragmatic concerns as well, particularly when it comes to abstention. Rules that place questions of jurisdiction and justiciability into straitjackets will only encourage nontransparent moves to create judicial flexibility elsewhere. This hydraulic pressure can lead to the distortion of other doctrines or the use of unreviewable case management tools to manage these cases away.¹⁴⁵ To the extent Congress cannot draw perfect jurisdictional lines in advance, judges will need some breathing room around the edges; denying all discretion will only serve to make the inevitable exercise of such discretion less transparent.

D. Designing Doctrines

The challenge, then, is to provide space for exceptions without allowing those exceptions to overtake the default rule. This is where I part ways with Shapiro's defense of jurisdictional discretion. Shapiro counted on reasoned elaboration by judges to identify manageable criteria and to narrow—rather than expand—the bounds of discretion over time.¹⁴⁶ The problem is that broad, unstructured doctrines of judicial restraint, like the current formulation of “international comity abstention,” do not promote the sort of reasoned elaboration on which Professor Shapiro pinned his hopes.¹⁴⁷

I have explained elsewhere how open-ended standards for evaluating complex systemic values like international comity are prone to distortion over time.¹⁴⁸ For present purposes, it suffices to note that designing judicially manageable frameworks, at least in the context of procedure, involves three interrelated considerations. First and most importantly,

¹⁴⁵ For example, as Professor Harlan Cohen has cogently warned, one risk of strict formalism “is that cases that cannot easily be resolved with formal tools will not be resolved at all. A renewed commitment to formalism may also mean stricter pleading or standing standards or a sort of backdoor functionalism [on the part of the Supreme Court] through the denial of certiorari in thorny foreign affairs cases.” Cohen, *supra* note 101, at 391 (citation omitted).

¹⁴⁶ See Shapiro, *supra* note 18, at 574–75, 578–79; see also Meltzer, *supra* note 74, at 1919 (summarizing this aspect of Shapiro's argument).

¹⁴⁷ Cf. Meltzer, *supra* note 74, at 1910–13 (“I think Shapiro may at times be just a little too sanguine that judicial discretion will be exercised in a fashion that will be conducive to predictable, stable, and relatively expeditious and efficient decisionmaking . . .”).

¹⁴⁸ See Gardner, *Parochial Procedure*, *supra* note 37, at 958–67; Gardner, *Retiring Forum Non Conveniens*, *supra* note 37, at 418–23; see also Ronald A. Heiner, *The Origin of Predictable Behavior*, 73 *Am. Econ. Rev.* 560, 563, 565 (1983) (explaining how when “an agent's perceptual abilities become less reliable or the environment becomes more complex,” “allowing greater flexibility to react to more information or administer a more complex repertoire of actions will not necessarily enhance an agent's performance”).

the factors must align with the question being asked. Analytical frameworks that require consideration of distinct factors can help judges check their intuition and thereby improve their decision making,¹⁴⁹ but only if the factors are relevant. That may sound obvious, but particularly in complex or unfamiliar fields like transnational litigation, judges have transplanted rubrics from not-quite-analogous doctrines. For example, sometimes judges draw on domestic analogues that do not adequately take into account international comity considerations.¹⁵⁰ Other times, they may draw on comity doctrines that are designed to answer fundamentally different questions.¹⁵¹ This mismatch leaves judges trying to evaluate factors that do not fit the problem before them, resulting in more of a Rorschach test than an analytical guide. A primary goal of Part II is to weed out such tangential factors from discussions of abstention in transnational cases.

Second, the factors must be judicially ascertainable, meaning they must be fairly specific and must turn on information judges can reliably obtain.¹⁵² And third, the number of factors and the inquiry they demand must be limited for the sake of efficiency, particularly for procedural or threshold questions that often need to be resolved without extensive factual development.¹⁵³ Factors that are too numerous or too hard to evaluate encourage judges to fall back on generalized or conclusory state-

¹⁴⁹ See Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 *Cornell L. Rev.* 1, 3, 33 (2007) (describing and advocating for such an “intuitive-override” approach to judging).

¹⁵⁰ See, e.g., Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 *Am. J. Comp. L.* 203, 208–09, 212–13 (2001) (critiquing cross-fertilization between domestic and transnational procedure that prioritizes national uniformity over transnational cooperation); Gardner, *Retiring Forum Non Conveniens*, supra note 37, at 419 (critiquing the transplantation of the domestic test for *forum non conveniens* to the context of transnational litigation without any modification); Austen L. Parrish, *Duplicative Foreign Litigation*, 78 *Geo. Wash. L. Rev.* 237, 242 (2010).

¹⁵¹ I describe a couple examples of such conflation, and the problems it causes, in Part II.

¹⁵² Cf. Zachary D. Clopton, *Judging Foreign States*, 94 *Wash. U. L. Rev.* 1, 31 (2016) (in the context of doctrinal design, noting that “U.S. courts are equipped to handle disputes” that are “legal, retrospective, bilateral, and constrained”).

¹⁵³ To analogize again to the Court’s critique of nonparty preclusion, “a diffuse balancing approach . . . would likely create more headaches than it relieves. Most obviously, it could significantly complicate the task of district courts faced in the first instance with preclusion questions. An all-things-considered balancing approach might spark wide-ranging, time-consuming, and expensive discovery tracking factors potentially relevant under seven- or five-prong tests.” *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008); see also Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 *Cardozo L. Rev.* 1961, 2015–16 (2007) (discouraging the use of complex multifactor tests for procedural decisions).

ments; the factors will not be independently evaluated in new cases and thus will become rote and marginalized over time.¹⁵⁴ The tendency to ossify or gloss over hard or misaligned factors is further increased by the phenomenon of “satisficing,” in particular the use of stopping rules: decision makers, consciously or otherwise, may settle for “good enough” outcomes based on the first few factors they consider in lieu of pursuing an optimally correct outcome that may depend on a much more complex inquiry.¹⁵⁵ Thus tests that call for weighing ten or a dozen factors should be viewed skeptically, as decision makers may not be willing or even able to independently assess all of them.¹⁵⁶

Take, for example, one of the Eleventh Circuit’s tests for comity abstention: courts should weigh “(1) international comity; (2) fairness to litigants; and (3) efficient use of scarce judicial resources.”¹⁵⁷ That standard is so vague as to be practically meaningless, so the Eleventh Circuit has added additional subfactors for each part of the standard. Some of those subfactors were drawn from *Colorado River*,¹⁵⁸ a domestic doctrine that might not translate perfectly to the transnational context.¹⁵⁹ Other factors were drawn from the test for recognizing foreign judgments¹⁶⁰—a test that is orthogonal to the question of abstention.¹⁶¹

¹⁵⁴ On the challenges of evaluating factors relating to foreign sovereign interests or foreign judicial systems, see Gardner, *Parochial Procedure*, supra note 37, at 965–67. For a specific example of how these challenges can distort doctrinal inquiries, see Gardner, *Retiring Forum Non Conveniens*, supra note 37, at 422–23 (describing the adequate and available alternative forum inquiry for *forum non conveniens*).

¹⁵⁵ See, e.g., Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 *Calif. L. Rev.* 1581, 1601–04 (2006).

¹⁵⁶ See *id.* at 1645–46 (“[M]ultifactor tests of ten or even eight factors appear to ask too much of the judge’s ability simultaneously to weigh competing concerns and may simply result in the stampeding of less significant factors.”); Bone, supra note 153, at 2016 (“[T]he resulting process can easily turn into ad hoc weighing that lacks meaningful constraint and jeopardizes principled consistency over the system as a whole.”).

¹⁵⁷ *Belize Telecom, Ltd. v. Gov’t of Belize*, 528 F.3d 1298, 1305 (11th Cir. 2008) (citing *Turner Entm’t v. Degeto Film GmbH*, 25 F.3d 1512, 1518 (11th Cir. 1994)).

¹⁵⁸ See *id.* at 1308 (defining the factors of “fairness to litigants” and “efficient use of judicial resources” as including, *inter alia*, the *Colorado River* factors of “the order in which the suits were filed,” “the more convenient forum,” and “avoidance of piecemeal litigation” (quoting *Turner*, 25 F.3d at 1521–22)).

¹⁵⁹ See *infra* Subsection III.B.1 (suggesting an approach to parallel transnational litigation that differs from *Colorado River*).

¹⁶⁰ See *Belize Telecom*, 528 F.3d at 1306 (defining the factor of “international comity,” for purposes of comity abstention, as concerning “(1) whether the judgment was rendered via fraud; (2) whether the judgment was rendered by a competent court utilizing proceedings consistent with civilized jurisprudence; and (3) whether the foreign judgment is prejudicial, in the sense of violating American public policy” (quoting *Turner*, 25 F.3d at 1519)).

The end result is a ten-part test in which several factors are irrelevant to abstention and others are hard to ascertain, with no indication of their relative weight or importance. That test is difficult to apply and is thus unlikely to lead to consistent results.

The next Part identifies how the broad label of “international comity abstention” has encouraged this sort of misalignment of factors in the tests of several circuits, and it attempts to disentangle abstention from other comity-inflected doctrines. Part III then turns to what better-designed doctrines of transnational abstention might look like in practice: narrowly defined exceptions to the strong default of jurisdictional obligation that turn on a few ascertainable factors.

II. THE PROBLEM WITH “INTERNATIONAL COMITY ABSTENTION”

The first step to correcting course on transnational abstention is to clarify what it is not. At present, federal judges are describing and analyzing “international comity abstention” by drawing on other comity doctrines not related to abstention. This conflation carries two risks. First, it may undermine state and congressional interests that these other comity doctrines are trying to protect. Second, it leads to confusion, as the transplanted factors often do not map logically onto the question of abstention. That muddling decreases the transparency of judicial reasoning and may also increase error rates.¹⁶²

The root of this confusion lies in the very label of “international comity abstention.”¹⁶³ Comity is not a single doctrine, but a principle that inflects a variety of doctrines. Different comity-based doctrines require different analyses; they involve different starting presumptions and may point in different directions. The labeling of “comity abstention,” however, encourages judges (and their clerks) to draw broadly from prior discussions of comity, whether or not those discussions addressed abstention principles specifically. After distinguishing the different types of comity-based doctrines, this Part explains how questions of absten-

¹⁶¹ For further discussion of this distinction, see Section II.B below.

¹⁶² See Ramsey, *supra* note 13, at 951 (concluding that such undifferentiated use of the term “comity” “confuses matters that should be straightforward,” “finesses and submerges important issues that should merit serious discussion,” and leads to “unpredictability that generally characterizes and unsettles the law of international relationships”).

¹⁶³ Cf. *id.* at 895–96 (arguing that imprecise invocations of the broad term “comity” invites “intuitive judgment” that “leads to an abandonment of analytic evaluation”).

tion have become entangled with questions regarding the recognition of foreign judgments and the construction of statutes.

A. Comity Is Not a Doctrine

Comity doctrines vary by valence and by the type of interests they are meant to protect. In circumscribing transnational litigation,¹⁶⁴ the Supreme Court has recently been invoking comity as a tool of *forbearance* that helps the courts avoid stepping on the toes of foreign sovereigns. But such restraint is only one side of comity. Comity may at times require *action* by the host state, whether in terms of recognizing foreign judgments, applying foreign law, or providing a judicial forum for foreigners and foreign states.¹⁶⁵ As Professor William Dodge has explained, we should thus distinguish between (what I will call) “negative” comity and “positive” comity doctrines.¹⁶⁶

Dodge further divides comity doctrines based on the different types of foreign interests they aim to accommodate.¹⁶⁷ Some comity doctrines, such as the presumption against extraterritoriality, recognize foreign sovereigns’ prerogatives to regulate conduct (“prescriptive comity”). Others, such as forum non conveniens, recognize foreign sovereigns’ prerogatives to adjudicate conduct (“adjudicative comity”). And still others, such as foreign sovereign immunity, recognize the prerogatives of foreign sovereigns before U.S. courts (“sovereign party comity”). Combining these two dimensions produces the following matrix.

¹⁶⁴ See *supra* Section I.B.2.

¹⁶⁵ See *supra* notes 132–134.

¹⁶⁶ The description of comity here is drawn directly from Dodge’s account, although I have modified some of his terminology. See Dodge, *International Comity in American Law*, *supra* note 13, at 2078–79 (dividing comity doctrines into those recognizing a “principle of recognition” versus those recognizing a “principle of restraint”). For additional efforts to disaggregate “comity,” see Joel R. Paul, *Comity in International Law*, 32 *Harv. Int’l L.J.* 1 (1991); Ramsey, *supra* note 13.

¹⁶⁷ Dodge, *International Comity in American Law*, *supra* note 13, at 2078.

2019]

Abstention at the Border

95

*Table 1: Disaggregating Comity*¹⁶⁸

	Negative Comity	Positive Comity
Prescriptive Comity	<i>Interpreting legislation so as not to intrude on interests of other states</i> <ul style="list-style-type: none"> • Presumption against extra-territoriality • Avoiding “unreasonable interference” with foreign sovereign interests (<i>Empagran</i>) • Foreign-state compulsion 	<i>Applying or recognizing the law of another state</i> <ul style="list-style-type: none"> • Choice of law (e.g., applying foreign law) • Act of state doctrine
Adjudicative Comity	<i>Declining jurisdiction in deference to the adjudicative interests of another country</i> <ul style="list-style-type: none"> • Forum non conveniens • “International comity abstention” • Prudential exhaustion • Limits on personal jurisdiction 	<i>Supporting the work of foreign courts or allowing access to U.S. courts</i> <ul style="list-style-type: none"> • Recognition and enforcement of foreign judgments • Foreign plaintiff access to U.S. courts • Judicial assistance (e.g., discovery under 28 U.S.C. § 1782)
Sovereign Party Comity	<i>Declining to assert power over foreign sovereigns</i> <ul style="list-style-type: none"> • Foreign state immunity • Foreign official immunity 	<i>Allowing foreign sovereigns to leverage power of the host state</i> <ul style="list-style-type: none"> • Ability of foreign sovereigns to bring suit in U.S.

Combining these different valences and purposes of comity can confuse judicial analysis and potentially lead to erroneous outcomes. Put simply, it is important to stay inside the box—and even within the same box, factors from one doctrine will not necessarily bear on another.¹⁶⁹

¹⁶⁸ This table is derived from the one compiled by Dodge, see *id.* at 2079 tbl.1, though I have omitted a few comity doctrines not discussed in this Article.

¹⁶⁹ See N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. Pa. J. Int'l Econ. L. 601, 674 (2006) (“[W]hen the issue is the application of adjudicatory comity, one size does not fit all. The presumptions that are appropriate in one class of cases involving the application of adjudicatory comity are not necessarily appropriate in another.”).

B. Distinguishing Positive and Negative Comity: The Recognition of Foreign Judgments

The Eleventh Circuit has popularized a test for “international comity abstention” that incorporates factors taken from the recognition of foreign judgments.¹⁷⁰ This is a mistake, as these two doctrines ask very different questions. The recognition of a foreign judgment is an act of positive comity, while abstaining from deciding a case is an act of negative comity. The former looks backward, at a judgment already issued, while the latter looks forward, by making space for ongoing or future foreign court proceedings.¹⁷¹ Indeed, the factors relevant to recognizing foreign judgments are often orthogonal to the reasons why a judge might abstain in a transnational case. Consider factors like “whether the judgment was rendered via fraud” or “whether the foreign judgment is . . . repugnant to fundamental principles of what is decent and just”¹⁷²; how does a judge apply those factors to decide whether to abstain in a case where there has been no prior foreign judgment? This mismatch leads to muddled analysis, which increases the risk that courts will abstain from cases they should perhaps hear. And because the recognition of foreign judgments is typically a matter of state law,¹⁷³ the conflation of judgment recognition with a federal doctrine of abstention can sideline state law as well.

The U.S. approach to recognizing foreign judgments dates back to the Supreme Court’s 1895 decision in *Hilton v. Guyot*.¹⁷⁴ In the *Hilton* tradition, now embodied in two uniform acts adopted by most U.S. states,¹⁷⁵

¹⁷⁰ The recognition and the enforcement of a foreign judgment are two slightly different matters. Recognition precedes enforcement; it also applies more broadly, encompassing matters of res judicata and issue preclusion. I will refer here primarily to the “recognition of foreign judgments” as the broader of the two concepts.

¹⁷¹ The Eleventh Circuit has recognized this distinction, explaining that “[t]he doctrine of international comity can be applied retrospectively or prospectively,” *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004), yet it still treats the doctrine on the whole as “an abstention doctrine,” *id.* at 1237.

¹⁷² *Mujica v. AirScan Inc.*, 771 F.3d 580, 608 (9th Cir. 2014) (quoting *Belize Telecom, Ltd. v. Gov’t of Belize*, 528 F.3d 1298, 1306 (11th Cir. 2008)).

¹⁷³ The only exception to this is the SPEECH Act, a federal law that governs the enforcement of foreign libel judgments. See generally John F. Coyle, *The SPEECH Act and the Enforcement of Foreign Libel Judgments in the United States*, 18 *Y.B. Priv. Int’l L.* 245 (2017) (analyzing the SPEECH Act and the cases that have interpreted and applied it since its inception).

¹⁷⁴ 159 U.S. 113 (1895).

¹⁷⁵ See Unif. Foreign-Country Money Judgments Recognition Act [UFCMJRA] § 4 (Unif. Law Comm’n 2005); Unif. Foreign Money-Judgments Recognition Act §§ 3–4 (Unif. Law Comm’n 1962); see also Foreign-Country Money Judgments Recognition Act, Unif. Law

U.S. courts apply a strong presumption in favor of recognizing foreign judgments.¹⁷⁶ That presumption can be overcome by a limited number of exceptions, which are framed as high bars: for example, U.S. courts generally refuse to recognize foreign judgments if the foreign court lacked personal jurisdiction over the defendant or jurisdiction over the subject matter, or if the foreign judicial system is fundamentally unfair.¹⁷⁷ Given the narrowness of these exceptions, U.S. courts are known to be particularly receptive to foreign judgments, perhaps more so than the courts of any other country.¹⁷⁸

These judgment recognition factors have seeped into the judge-made test for international comity abstention through two routes. One is *Hilton* itself, which also happens to provide one of the Court's strongest pronouncements on the meaning and importance of international comity; judges, it seems, have not always distinguished between *Hilton*'s general pronouncements on comity and its specific analysis of foreign judgment enforcement. The other route has been through some early, influential appellate cases that involved both abstention and the recognition of foreign judgments. While those early cases did not themselves conflate the two inquiries, later opinions that drew on those cases folded the inquiries together. The result is a mismatched framework that can encourage (or excuse) the exercise of bare judicial intuition. That evolutionary story can be told in four cases.

The story begins with *Ingersoll Milling Machine Co. v. Granger*,¹⁷⁹ a 1987 Seventh Circuit case regarding a cross-border employment dispute. The employee, as the defendant in the U.S. case, moved to dismiss the employer's complaint based on proceedings in the Belgian courts.¹⁸⁰

Comm'n, <https://www.uniformlaws.org/committees/community-home?CommunityKey=a-e280c30-094a-4d8f-b722-8dcd614a8f3e> [<https://perma.cc/53FD-DWBU>] (last visited Feb. 4, 2019) (listing states that have adopted the 2005 Act); The Uniform Foreign-Country Money Judgments Recognition Act: A Summary, Unif. Law Comm'n, <https://my.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e34db215-4834-ad24-7b1b-52d1f9c730c6> [<https://perma.cc/X2NC-K6DJ>] (last visited Feb. 4, 2019) (stating that thirty-two states enacted the 1962 Act).

¹⁷⁶ See *Hilton*, 159 U.S. at 202–03; Restatement (Fourth) of Foreign Relations Law § 481 (Am. Law Inst. 2018); UFCMJRA § 4(a).

¹⁷⁷ UFCMJRA § 4(b); Restatement (Fourth) of Foreign Relations Law § 483 (Am. Law Inst. 2018).

¹⁷⁸ See, e.g., Kevin M. Clermont, Jurisdictional Salvation and the Hague Treaty, 85 Cornell L. Rev. 89, 93 (1999).

¹⁷⁹ 833 F.2d 680 (7th Cir. 1987).

¹⁸⁰ *Id.* at 683.

Those Belgian proceedings were much further advanced, and once the Belgian court issued its judgment in the employee's favor, the employee counterclaimed in the U.S. case to enforce the Belgian judgment here.¹⁸¹ The Seventh Circuit analyzed distinctly the two questions of parallel proceedings and judgment enforcement, using two different tests. First, it applied *Colorado River Water Conservation District v. United States* to affirm the district court's decision to stay the U.S. case in favor of the Belgian proceedings.¹⁸² Second, the court applied Illinois law to evaluate whether the Belgian judgment was entitled to recognition and enforcement¹⁸³ (it was¹⁸⁴). Though one can quibble with whether *Colorado River* is the right standard for evaluating foreign parallel proceedings,¹⁸⁵ *Ingersoll* is an analytically clear opinion.

The Eleventh Circuit drew on *Ingersoll* in its 1994 opinion in *Turner Entertainment v. Degeto Film GmbH*,¹⁸⁶ another case involving foreign parallel proceedings (this time in Germany) in which the foreign court had already rendered a judgment. In *Turner*, however, the defendant sought only a stay of the U.S. proceedings and not separate recognition of the German judgment.¹⁸⁷ The Eleventh Circuit in *Turner*, self-consciously fashioning a doctrine of "international abstention" to resolve this question, identified three broadly relevant considerations: "(1) . . . international comity; (2) fairness to litigants; and (3) efficient use of scarce judicial resources."¹⁸⁸ These highly generalized interests do not provide a meaningful analytic structure, however, so the *Turner* court had to fill them in. For "fairness to litigants" and "efficient use of scarce judicial resources," the court drew additional factors from *Colorado River*. But on the question of "international comity," the *Turner* court drew on *Hilton* and *Ingersoll* to identify such factors as "whether the judgment was rendered via fraud," "whether the judgment was rendered by a competent court utilizing proceedings consistent with civilized jurisprudence," "whether the foreign judgment . . . is repugnant to

¹⁸¹ *Id.*

¹⁸² *Id.* at 685–86.

¹⁸³ *Id.* at 686–90.

¹⁸⁴ *Id.* at 692.

¹⁸⁵ See *infra* Section III.B.1 (noting differences in approach to this question among the lower courts).

¹⁸⁶ 25 F.3d 1512 (11th Cir. 1994).

¹⁸⁷ See *id.* at 1517–18.

¹⁸⁸ *Id.* at 1518.

fundamental principles of what is decent and just,” and “the relative strengths of the American and German interests.”¹⁸⁹

As the *Turner* court recognized, these factors had been “developed for the purpose of considering actions brought to enforce foreign judgments,” even though *Turner* itself did “not contain an enforcement action.”¹⁹⁰ But the court reasoned that these factors might still be relevant in *Turner* “because a judgment has been rendered in the parallel proceeding” in Germany.¹⁹¹ When a court is considering whether to defer to foreign parallel proceedings, it might indeed be relevant to take into account the stage of those proceedings—for example, whether the complaint has just been filed versus whether the foreign court has already issued a decision. But taking the stage of foreign proceedings into account does not require looking behind the foreign decision to evaluate its potential enforceability.

By nonetheless incorporating judgment recognition factors into its abstention analysis, the *Turner* court introduced two difficulties: First, it did not consider what future courts might make of this set of criteria in cases that raised only one of these two issues (recognition of a foreign judgment *or* deference to a foreign parallel proceeding). And second, it elided the distinction between federal and state law in the court’s analysis. While the *Turner* court did acknowledge that a judgment enforcement action would normally be decided under state law, it avoided grappling with that tension by asserting that federal and state law pointed in the same direction in *Turner*.¹⁹²

Both difficulties took root in the Eleventh Circuit’s later decision in *Belize Telecom, Ltd. v. Government of Belize*.¹⁹³ The parties in *Belize Telecom* were not debating whether to stay U.S. proceedings in light of foreign parallel proceedings, like in *Turner*. Rather, *Belize Telecom* concerned whether the U.S. court was bound by a Belize court’s prior interpretation of the parties’ contract.¹⁹⁴ If raised properly by the parties, this dispute might have been framed as a question of *res judicata*. Instead, the Eleventh Circuit raised it *sua sponte* as an application of “the princi-

¹⁸⁹ Id. at 1519, 1521. The last factor is not from the standard test for recognizing foreign judgments and is problematically broad. See *infra* note 240.

¹⁹⁰ *Turner*, 25 F.3d at 1519 n.11.

¹⁹¹ Id.

¹⁹² See id. at 1520 & n.12.

¹⁹³ 528 F.3d 1298 (11th Cir. 2008).

¹⁹⁴ See id. at 1304.

ples of international comity”¹⁹⁵ and invoked *Turner* to help it decide whether “*abstention* is appropriate when a foreign court has already rendered a decision on the merits of the case.”¹⁹⁶

Because *Turner* had incorporated the judgment recognition factors into a federal abstention doctrine, *Belize Telecom* analyzed these factors as a matter of federal law,¹⁹⁷ even while again acknowledging that state law would normally apply to the question of judgment recognition.¹⁹⁸ Further, because it relied on *Turner*, the *Belize Telecom* court applied the *Colorado River* factors,¹⁹⁹ even though the case involved no ongoing parallel litigation. It also took from *Turner* (which had taken it from *Ingersoll*) the additional factor of “the relative strength of the American and [foreign] interests.”²⁰⁰ Such a general weighing of sovereign interests has no place in determining whether to recognize a foreign judgment. Characterizing a matter of judgment recognition as one of abstention, then, led the court to apply a consideration (the weighing of sovereign interests) that is much broader than any of those traditionally evaluated under the standard U.S. approach to recognizing foreign judgments.

Despite the conflation and doctrinal messiness of the Eleventh Circuit opinions, however, these difficulties nonetheless remained marginal—more semantic than seismic—to the court’s analysis in both cases. Then came the Ninth Circuit’s decision in *Mujica v. AirScan, Inc.*²⁰¹ *Mujica* involved a Colombian military raid against a Colombian village in which seventeen civilians, including children, were killed.²⁰² In addition to suing the Colombian government in Colombia,²⁰³ survivors of the raid filed suit in the Central District of California against two U.S. corporations, including one based in Los Angeles, over their roles in the military operation. On appeal, the Ninth Circuit first dismissed the plaintiffs’

¹⁹⁵ Id. at 1304 & n.7.

¹⁹⁶ Id. at 1305 & n.9 (emphasis added).

¹⁹⁷ See id. at 1306–07.

¹⁹⁸ See id. at 1306 n.10. Like in *Turner*, the court reasoned in a footnote that state and federal law would lead to the same result in this particular case. See id.

¹⁹⁹ See id. at 1308.

²⁰⁰ See id. at 1307.

²⁰¹ 771 F.3d 580 (9th Cir. 2014).

²⁰² Id. at 584–85.

²⁰³ The Colombian suit led to a settlement between the government and the survivors; the Colombian courts also found three of the military officers involved in the raid guilty of manslaughter. Id. at 585–86.

federal claims based on recent Supreme Court precedent²⁰⁴ and then dismissed their state-law claims with prejudice based on a novel test for “international comity abstention.” In developing that test, *Mujica* drew primarily on a *different* Eleventh Circuit test for international comity abstention, that of *Ungaro-Benages v. Dresdner Bank AG*.²⁰⁵ While *Turner* purported to analyze “(1) . . . international comity; (2) fairness to litigants; and (3) efficient use of scarce judicial resources,”²⁰⁶ *Ungaro-Benages* purported to weigh “[1] the strength of the United States’ interest in using a foreign forum, [2] the strength of the foreign governments’ interests, and [3] the adequacy of the alternative forum.”²⁰⁷ Notably, *Ungaro-Benages* did not further specify the content of these three considerations, and it also treated the question of judgment recognition as *separate* from this vague tripartite standard.²⁰⁸ But the *Mujica* court conflated the two issues again by drawing on *Belize Telecom*’s list of judgment recognition factors to fill in what *Ungaro-Benages* meant by “the adequacy of the [alternative] forum.”²⁰⁹

This conflation was particularly problematic in *Mujica* as the case did not involve any prior judgments between the parties (unlike in *Ingersoll*, *Turner*, and *Belize Telecom*). Yet the *Mujica* majority concluded that the Colombian courts were “adequate” in large part due to a Colombian judgment that the plaintiffs had secured against a different defendant (the Colombian government).²¹⁰ This is backwards: whether a past judgment against the Colombian government could be enforced in U.S. courts does not establish the future adequacy of the Colombian courts in the plaintiffs’ case against private defendants. If anything, the opposite is true, as the Colombian judgment meant the plaintiffs were barred from pursuing additional recovery against private parties (like the defendants) in Colombian courts.²¹¹ In short, *Mujica* involved neither foreign parallel proceedings nor an existing foreign judgment between the parties, yet it used the Eleventh Circuit’s conflation of these two questions to justify dismissing state-law claims based on a loosely defined doctrine of federal common law.

²⁰⁴ See *id.* at 590–96.

²⁰⁵ 379 F.3d 1227 (11th Cir. 2004). *Ungaro-Benages* is discussed further in Part III below.

²⁰⁶ *Turner*, 25 F.3d at 1518.

²⁰⁷ *Ungaro-Benages*, 379 F.3d at 1238.

²⁰⁸ See *id.*

²⁰⁹ See *Mujica*, 771 F.3d at 608.

²¹⁰ See *id.* at 614.

²¹¹ See *id.*

The federal courts should take care to return to *Ingersoll's* analytical clarity. The recognition of a foreign judgment must be analyzed distinctly from the question of abstention. While the existence of a judgment *between the same parties* might be relevant to determining whether to defer to foreign parallel proceedings given their advanced status, that single consideration does not require incorporating the judgment recognition test into an abstention analysis.

C. Distinguishing Prescriptive and Adjudicative Comity: Statutory Construction and Choice of Law

In discussing “international comity abstention,” some courts have been careful to distinguish between prescriptive comity and adjudicative comity.²¹² The questions each type of comity addresses are distinct: prescriptive comity asks whether a jurisdiction’s law applies, while adjudicative comity asks whether the court should hear the case in order to apply that law.²¹³ Analyses of abstention should not be confused with questions of prescriptive comity, which include the geographic reach of statutes, choice of law, and the foreign-state compulsion defense (e.g., “true conflicts” as invoked by the Supreme Court in *Hartford Fire Insurance Co. v. California*²¹⁴).

Unfortunately, the analytical structure for resolving questions of prescriptive comity is itself not clear. This Section starts by describing that structure for prescriptive comity, beginning with what is more settled and ending with what is not. In trying to fill (or ignore) that gap, judges have drawn on tangentially related doctrines like international comity abstention. Though this move is understandable, it ought nevertheless to be avoided. The second half of this Section uses a couple of recent cases to identify the dangers of that move. When judges use international comity abstention to address questions of prescriptive comity, they obfuscate what issues they are really deciding, which in turn raises con-

²¹² For examples of opinions that carefully distinguish these two concepts, see *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2d Cir. 2006); *In re Maxwell Comm’n Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996); see also *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005) (distinguishing between choice of law and foreign parallel proceedings as distinct questions).

²¹³ See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (noting that the “extraterritorial reach” of a U.S. statute “has nothing to do with the jurisdiction of the courts”); see also *id.* at 818 n.9 (faulting lower courts for confusing the question of the reach of the Sherman Act with the question of abstention).

²¹⁴ *Id.* at 764, 798.

cerns about accuracy and accountability. And once again, this conflation can shortchange state law, in particular the state interests embodied in choice-of-law methodology.

Prescriptive comity is not an easy equation to solve. International law allows countries great leeway in extending their laws to individuals and conduct beyond their borders,²¹⁵ and it is not uncommon for countries' prescriptive jurisdictions to overlap. This is not in itself a problem, but it does require judges to consider whether and when their own domestic law should give way to the legislative interests of other countries. U.S. judges address this question through both positive and negative prescriptive comity doctrines.

On the *positive comity* side, judges employ choice-of-law rules to determine which sovereign's laws should govern a dispute. Additionally, more narrow doctrines of prescriptive comity instruct U.S. judges to make space for foreign laws. The act of state doctrine, for example, directs judges to take as valid "the acts of foreign sovereigns taken within their own jurisdictions."²¹⁶

On the *negative comity* side, judges use canons of statutory construction like the presumption against extraterritoriality to help them identify the geographic limits of U.S. statutes. After *Morrison v. National Australia Bank Ltd.*,²¹⁷ the initial steps of this analysis are clear, at least when the plaintiffs have asserted claims under federal statutes. Under *Morrison*'s step one, the judge determines whether the federal statute rebuts the presumption against extraterritoriality. If there is no clear intent that the statute should apply extraterritorially, then under *Morrison*'s step two, the judge determines if the asserted application of the statute would in fact be extraterritorial by asking whether the statute's regulatory "focus" occurred in the United States.²¹⁸

But if the statute does rebut the presumption at step one—and many statutes do—then the judge has to determine to what extent the statute

²¹⁵ See Maggie Gardner, Channeling Unilateralism, 56 Harv. Int'l L.J. 297, 304–06 (2015) (describing the recognized bases for prescriptive jurisdiction under international law while noting how "their application in practice can be controversial if pushed too far beyond the core zone of accepted state practice").

²¹⁶ See *W. S. Kirkpatrick & Co. v. Evtl. Tectonics Corp., Int'l*, 493 U.S. 400, 405, 409 (1990).

²¹⁷ 561 U.S. 247 (2010).

²¹⁸ See *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016) (summarizing two-step inquiry from *Morrison*).

extends beyond U.S. borders.²¹⁹ The outer limit of a statute's reach is informed by international law: under the *Charming Betsy* canon, judges presume that Congress did not intend to exceed the scope of internationally recognized bases for prescriptive jurisdiction.²²⁰ As noted, however, the permissible bases of prescriptive jurisdiction will often overlap with those of other countries. Is there a limit to the reach of extraterritorial U.S. statutes short of the outer bounds of international law, and if so, how are judges to determine what that limit is?

The Supreme Court has made clear that there is a limit but has left fairly ambiguous how judges are to identify it. In *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*,²²¹ the Court explained that it “construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations,” based on the assumption “that legislators take account of the legitimate sovereign interests of other nations when they write American laws.”²²² The lower courts have not avidly followed this direction, however, because *Empagran* left unclear what “unreasonable interference” might mean.

This is where things get messy. It is not clear that the *Empagran* Court knew what “unreasonable interference” meant either, beyond the facts of that case. The new *Restatement (Fourth) of the Foreign Relations Law of the United States* suggests it provides a supplementary principle of interpretation, the application of which varies from statute to statute.²²³ Lower courts, in trying to find this limit, have drawn on a set of factors initially developed by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America National Trust & Savings Ass'n*²²⁴ and which were then incorporated into Section 403 of the *Restatement*

²¹⁹ See, e.g., *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 609 (9th Cir. 1976) (“[I]t is evident that at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction.”).

²²⁰ See, e.g., *Hartford*, 509 U.S. at 814–15 (Scalia, J., dissenting) (applying *Charming Betsy* canon in this context); *id.* at 818 (“[T]he practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence.”).

²²¹ 542 U.S. 155 (2004).

²²² *Id.* at 164 (emphasis added).

²²³ See *Restatement (Fourth) of the Foreign Relations Law of the United States* § 405 rep. note 5 (Am. Law Inst. 2018).

²²⁴ 549 F.2d 597 (9th Cir. 1976). The Third Circuit articulated a closely related set of factors, based largely on *Timberlane*, in *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979).

(Third) of the *Foreign Relations Law of the United States*.²²⁵ But neither *Timberlane* nor Section 403 are tools of statutory construction, which is what *Empagran* calls for, and their fine-grained, context-specific inquiries do not fit well the task of statutory construction, which must take place at a higher level of generality.²²⁶ Put another way, balancing sovereign interests may make sense when determining whether to apply a statute to a given set of facts (a conflicts of law-type question), but not when interpreting a statute as it will apply across cases.²²⁷ Indeed, this may explain *Empagran*'s wariness of case-by-case application of *Timberlane*-like factors when construing federal statutes—an approach it felt was “too complex to prove workable.”²²⁸

In the end, the correct resolution to the *Empagran* problem—or for the structure of prescriptive comity analysis more generally—is beyond the scope of this Article. Of greater present concern, the confusion generated by the *Empagran* gap has spilled over into the lower courts' analysis of abstention. Two recent examples may help to illustrate.

The Second Circuit in *In re Vitamin C Antitrust Litigation*,²²⁹ in dismissing an antitrust class action brought against Chinese vitamin manufacturers, struggled with an *Empagran* problem regarding the extent to

²²⁵ For a recent example of a court using the *Timberlane* factors to determine the geographic reach of an extraterritorial statute, see, for example, the Ninth Circuit's opinion in *Trader Joe's Co. v. Hallatt*, 835 F.3d 960 (9th Cir. 2016).

²²⁶ Cf. Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. Chi. L. Rev. 657, 766 (2013) (noting that treating the presumption against extraterritoriality as a question of statutory interpretation, thereby “trying to attribute rules of applicability to the statute itself,” may result in different line-drawing than if the courts applied choice-of-law analysis in individual cases).

²²⁷ The interest-balancing approach of *Timberlane* and Section 403, for one thing, does not necessarily lead to consistent results. See William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 Harv. Int'l. L.J. 101, 147 (1998). If the balance might be struck differently by different judges, it would be problematic to read that balance into the statute itself. Put a slightly different way, it is hard to connect the outcome of an indeterminate balancing test to ex ante congressional intent, which means treating that test as an act of statutory interpretation risks displacing the role of the political branches in identifying what is in fact in the national interest. Cf. Stephen B. Burbank, *The World in Our Courts*, 89 Mich. L. Rev. 1456, 1465–66 (1991) (reviewing Gary B. Born & David Westin, *International Civil Litigation in United States Courts: Commentary and Materials* (1989)) (noting that transnational cases call for “special deference to choices made . . . by the political branches” and voicing concern that Section 403 analysis could infringe on those political choices).

²²⁸ *Empagran*, 542 U.S. at 168. Specifically, the Court rejected application of the *Mannington Mills* balancing test, see *id.*, which was based on *Timberlane*'s factors.

²²⁹ 837 F.3d 175 (2d. Cir. 2016), vacated, 138 S. Ct. 1865 (2018).

which the (admittedly extraterritorial) antitrust laws extend to foreign conduct. The court concluded that “because Defendants could not simultaneously comply with Chinese law and U.S. antitrust laws, the principles of international comity required the district court to abstain from exercising jurisdiction.”²³⁰ Though framed as a matter of abstention, this holding was really about prescriptive comity.²³¹ The bulk of the panel’s analysis focused on whether Chinese law in fact required the Chinese defendants to collude to set prices,²³² including whether the court should defer to statements from the Chinese government about the content of Chinese law.²³³ But the requirements for the foreign-state-compulsion defense were likely not met given the intertwining of public and private actions in a state-managed economy,²³⁴ and *Empagran* had discouraged judges from relying on case-by-case balancing to resolve conflicts between regulatory regimes. The Second Circuit’s solution was to invoke *Timberlane*-like factors but to call it abstention.

Notably, there is another Second Circuit doctrine of “international comity abstention,” one drawn from *Colorado River* and limited to the context of foreign parallel proceedings.²³⁵ *Vitamin C*’s failure to distinguish that doctrine invites confusion when later judges try to reconcile these differing approaches. On remand from the Supreme Court, it will be important to clarify for future courts that this case is about prescriptive comity, *not* adjudicative comity.

The Ninth Circuit similarly drew on *Timberlane* and Section 403 when applying “international comity abstention” in *Mujica*. On the one hand, the *Mujica* majority insisted that the case raised a question of adjudicative, not prescriptive, comity; for this reason, it concluded, the

²³⁰ *Id.* at 179.

²³¹ See Brief for the United States as Amicus Curiae Supporting Petitioners at 20, *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018) (No. 16-1220).

²³² See *Vitamin C*, 837 F.3d at 186–92.

²³³ See *id.* at 189–92.

²³⁴ See Restatement (Fourth) of the Foreign Relations Law of the United States § 442 (Am. Law Inst. 2018). The Restatement (Fourth) clarifies that, for the foreign-state compulsion defense to apply, the sanctions for failing to comply with the foreign law must be severe, and the person in question must have “acted in good faith to avoid the conflict.” *Id.*

²³⁵ See *Royal & Sun All. Ins. Co. of Can. v. Century Int’l Arms, Inc.*, 466 F.3d 88, 94 (2d Cir. 2006) (listing a different set of eight factors); see also *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2d Cir. 2006) (holding that the district court had applied the wrong test for “international comity” because it used the *Timberlane* factors, which relate not to abstention, but to “whether a court should apply United States law extraterritorially”).

“true conflict” language of *Hartford Fire* did not control.²³⁶ But then in defining a new test for international comity abstention,²³⁷ it self-consciously drew on *Timberlane* and Section 403.²³⁸ This incorporation of choice-of-law-type factors mattered. The approach of *Timberlane* and Section 403 calls on courts to identify and weigh the interests of various sovereigns. By bringing in the *Timberlane* factors, the panel in *Mujica* thus created space to engage in a general assessment of “the foreign policy interests of the United States,” “the interests of the foreign state,” and “any public policy interests”²³⁹ when weighing abstention. This open-ended assessment of sovereign interests stretches the institutional capacity of the courts and can quickly devolve into the exercise of judicial intuition.²⁴⁰

Furthermore, by converting prescriptive into adjudicative comity, the *Mujica* majority displaced California’s own choice-of-law rules for the state-law claims.²⁴¹ And though it did acknowledge California’s “significant interest in providing a forum for those harmed by the actions of its corporate citizens,” it downplayed that interest as “general,” cautioning that it “should not be overstated” given that only one of the two defendants was a California corporation.²⁴² Even if California were to express its interest in such cases more clearly, moreover, the court suggested that such legislation would then run afoul of dormant foreign affairs

²³⁶ See *Mujica*, 771 F.3d at 598-603. In this regard, the *Mujica* panel was likely correct.

²³⁷ See *id.* at 621 (Zilly, J., concurring in part and dissenting in part) (critiquing the majority’s reliance on a “novel” and “very suspect version of the international comity doctrine”).

²³⁸ See Roger Alford, *The Ninth Circuit’s Muddled Comity Analysis in Mujica*, *Opinio Juris* (Nov. 21, 2014), <http://opiniojuris.org/2014/11/21/ninth-circuits-muddled-comity-analysis-mujica/> [<https://perma.cc/C9DC-HBRD>] (noting the “strange[ness]” in the court’s reasoning in this regard); William S. Dodge, *International Comity Run Amok*, *Just Security* (Feb. 3, 2015), <https://www.justsecurity.org/19640/international-comity-run-amok/> [<https://perma.cc/PD4C-5HQ5>] (same).

²³⁹ *Mujica*, 771 F.3d at 604, 607.

²⁴⁰ See, e.g., Goldsmith, *supra* note 25, at 1415–17; Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 *Yale L.J.* 1170, 1191–92 (2007); Peter B. Rutledge, *Toward a Functional Approach to Sovereign Equality*, 53 *Va. J. Int’l L.* 181, 192 (2012) (noting concerns about the ability of judges in transnational cases “to make value-laden judgments about seemingly incommensurable values”); see also *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) (“The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.”).

²⁴¹ Professor Roger Alford has argued that California’s choice-of-law rules would have pointed to the application of Colombian law in *Mujica*. See Alford, *supra* note 238.

²⁴² *Mujica*, 771 F.3d at 610 (quoting *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1232 (9th Cir. 2011)).

preemption,²⁴³ with the result that the state's interest could never outweigh the general national interest in the conduct of foreign relations (as defined by the Ninth Circuit).

To be fair, the *Mujica* majority was basing its foreign policy assessment largely on the State Department's intervention in that particular case, as well as the (slightly less emphatic) interventions of the government of Colombia.²⁴⁴ Even if the majority got right the evaluation of foreign policy in *Mujica*, however (and I am not sure that it did), its broad framing of the analysis was nonetheless problematic. First, the twelve-factor test defined and deployed in *Mujica* hides what the majority's analysis really turned on: the amount of deference due to the executive branch's intervention, as well as to the intervention of a foreign government. That reliance merited greater clarity, as the question of deference due to executive branch intervention on questions of comity is important yet unsettled.²⁴⁵ Second, *Mujica* left lower courts in the Ninth Circuit with a test for "international comity abstention"—a question of negative adjudicative comity—derived from tests for prescriptive comity (*Timberlane* and Section 403) and positive adjudicative comity (recognition of foreign judgments²⁴⁶). That test does not fit well the analysis of abstention and may mislead future judges, and their clerks, when trying to resolve complicated questions of comity.

III. ABSTENTION IN TRANSNATIONAL LITIGATION

Once attention is focused on the need for *abstention* in transnational cases—putting aside questions of foreign judgment validity and the reach of U.S. laws—what specific grounds for abstention might courts wish to recognize? The last Part argued that courts should jettison the label of "international comity abstention," which is too easily confused with the broader principle of comity and leads too often to the conflation

²⁴³ See *id.* at 610 n.24 ("Were California to manifest a specific interest in redressing claims arising out of the Santo Domingo incident or in Colombia's drug wars more generally, its interests could well be preempted by the political branches' foreign affairs power.").

²⁴⁴ See *id.* at 609–11.

²⁴⁵ Compare, e.g., Posner & Sunstein, *supra* note 240, at 1177–78 (arguing that courts should defer to reasonable positions taken by the Executive in private cases), with Dodge, *International Comity in American Law*, *supra* note 13, at 2133, 2137–40 (arguing that the executive branch should not be allowed to "dictate the outcomes of particular cases on foreign policy grounds"). The Ninth Circuit missed an opportunity to engage with this debate because it buried the question behind the vague label of "international comity abstention."

²⁴⁶ See *supra* Section II.B.

of different comity doctrines. The goal in this Part is to start to identify more specific and manageable bases for abstention in transnational cases. To that end, this Part first critiques three possible grounds for transnational abstention: the political sensitivity of foreign relations cases, the complex or unsettled nature of the applicable foreign law, and the convenience of private parties. All of these bases, I suggest, lack the judicially manageable standards that will keep them from expanding over time.

But there are potentially legitimate grounds for abstention in transnational cases that are also capable of remaining cabined. The primary need for such restraint relates to foreign parallel proceedings. Indeed, this has been a primary basis for the courts' invocation of "international comity abstention," and most of the scholarly attention to transnational abstention so far has focused on this application.²⁴⁷ Yet as this literature demonstrates, the federal courts have been applying different tests for analyzing the problem of foreign parallel proceedings. Subsection III.B.1 suggests a unified approach to foreign parallel proceedings that would be sensitive to the questions of doctrinal design raised in this Article. Regardless of the approach adopted, however, it is important for the courts to have a clear, consistent, and tailored inquiry that stands on its own, rather than being subsumed into broader doctrines (like international comity abstention or *forum non conveniens*) that sweep in extraneous considerations.

The best account for the remaining cases that have invoked "international comity abstention"—both descriptively and normatively—is as deference to integrated remedial schemes set up by foreign governments and that depend on all related claims being settled through the same forum. The domestic comparison might be to *Burford* or *Thibodaux* abstention,²⁴⁸ or to even narrower doctrines that recognize the need for exclusive jurisdiction over a specific limited *res*.²⁴⁹ Subsection III.B.2 considers such a basis for abstention, as well as its possible drawbacks.

²⁴⁷ See, e.g., Burbank, *supra* note 150; Jocelyn H. Bush, To Abstain or Not To Abstain?: A New Framework for Application of the Abstention Doctrine in International Parallel Proceedings, 58 Am. U. L. Rev. 127, 130–31 (2008); Calamita, *supra* note 169; Gaspard Curioni, Interest Balancing and International Abstention, 93 B.U. L. Rev. 621, 623–26 (2013); 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); Parish, *supra* note 150.

²⁴⁸ See *supra* Section I.A.

²⁴⁹ See, e.g., *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466–67 (1939).

*A. Problematic Grounds**1. Political Sensitivity*

I am not sanguine about basing abstention on the political sensitivity of a particular case. Tools like the political question doctrine, act of state doctrine, and the law of immunity already address the foreign relations implications of transnational cases. Some courts have gone farther to allow dismissal even beyond cases covered by the political question doctrine—for example, the Eleventh Circuit in *Ungaro-Benages v. Dresdner Bank AG*.²⁵⁰ In *Ungaro-Benages*, the court had to decide whether a claim for Holocaust restitution was effectively barred by an executive agreement between the United States and Germany, under which Germany committed to establishing a foundation to handle Holocaust restitution claims while the United States committed to encouraging (but not requiring) its courts to treat that German foundation as the exclusive forum for resolving such claims.²⁵¹ In concluding that the political question doctrine did not bar the case, the Eleventh Circuit correctly noted that “not all issues that could potentially have consequences to our foreign relations are [non-justiciable] political questions.”²⁵² But the court was nonetheless concerned about those foreign relations implications. In order to affirm the district court’s dismissal of the Holocaust restitution claim in light of the executive agreement, then, the Eleventh Circuit announced a new test for international comity abstention, one that turned on “the strength of the United States’ interest in using a foreign forum, the strength of the foreign governments’ interests, and the adequacy of the [foreign] forum.”²⁵³

The outcome in *Ungaro-Benages* was not necessarily wrong. The problem was that it depended on a broad invocation of functional for-

²⁵⁰ 379 F.3d 1227 (11th Cir. 2004).

²⁵¹ *Id.* at 1231. This was the same executive agreement that the Supreme Court held preempted a conflicting state law in *American Insurance Association v. Garamendi*, 539 U.S. 396, 420 (2003).

²⁵² *Id.* at 1235.

²⁵³ See *id.* at 1237–39. In doing so, it passed over the Eleventh Circuit’s existing test for international comity abstention already set out in *Turner Entertainment*, drawing instead from three Second Circuit opinions (two of which declined to abstain and the third of which phrased its analysis in terms of standing rather than abstention). See *id.* at 1238 (relying on *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 109 F.3d 850 (2d Cir. 1997); and *Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582 (2d Cir. 1993)).

foreign relations concerns, an approach that is difficult to cabin.²⁵⁴ Courts generally lack the institutional capacity to make fine-grained determinations about foreign sovereign interests or domestic interests in foreign affairs.²⁵⁵ As a result, reasoning based on functional foreign relations concerns is likely to be generalized and based on intuition, not facts—and that generalized, intuitive reasoning is prone to overexpansion.²⁵⁶ Thus even though the Eleventh Circuit has tried to limit *Ungaro-Benages* in later opinions to “exceptional diplomatic circumstances,”²⁵⁷ the Ninth Circuit subsequently used the broad language of *Ungaro-Benages* to justify a larger scope for international comity abstention in *Mujica v. AirScan, Inc.*²⁵⁸

Further, if abstention based on political sensitivity is driven by the same functional justifications that informed prudential approaches to the political question doctrine and the act of state doctrine, permitting abstention on this ground risks supplanting the Supreme Court’s efforts to cabin those other foreign-affair doctrines.²⁵⁹ (Indeed, the district court in *Mujica* had dismissed that case based on the political question doctrine pre-*Zivotofsky I*²⁶⁰; the Ninth Circuit avoided reevaluating that determination post-*Zivotofsky I* by turning instead to international comity abstention.) As the Third Circuit noted in refusing to dismiss a claim based on the same U.S.-German Holocaust restitution agreement, the Supreme Court’s warning against assuming “that every case or controversy which touches foreign relations lies beyond judicial cognizance” applies just as much to abstention as it does to the political question doctrine.²⁶¹

²⁵⁴ For an alternative approach for addressing the concerns in *Ungaro-Benages*, see Section III.B.2 below.

²⁵⁵ See sources gathered supra note 240.

²⁵⁶ Cf. Gardner, Parochial Procedure, supra note 37, at 964–67 (describing risk of overexpansion).

²⁵⁷ See *GDG Acquisitions, LLC v. Gov’t of Belize*, 749 F.3d 1024, 1026 (11th Cir. 2014); see also *id.* at 1030–31 (emphasizing that *Ungaro-Benages* was an outlier and noting the lack of precedent supporting its approach).

²⁵⁸ 771 F.3d 580, 603 (9th Cir. 2014).

²⁵⁹ See supra text accompanying notes 122–125; see also Brief of Professors of International Litigation as Amici Curiae in Support of Neither Party at 17–21, *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018) (No. 16-1220) (warning that open-ended abstention based on international comity may supplant the narrower act of state doctrine and foreign-state compulsion defense).

²⁶⁰ 566 U.S. 189 (2012).

²⁶¹ *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 394 (3d Cir. 2006) (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962), in noting that the courts’ virtually unflagging obli-

Such restraint may be easier advised than implemented, however. Indeed, the recent evolution of international comity abstention might itself be a symptom of the Supreme Court's curtailment of the act of state and political question doctrines. When it comes to vague but unsettling foreign relations concerns, the search for a judicial safety valve may be inevitable. A compromise might be to allow for such abstention only when based on executive branch input. This is how the Eleventh Circuit later tried to distinguish *Ungaro-Benages*.²⁶² It is critical, however, that abstention not turn *solely* on the executive branch's intervention: both the act of state doctrine and the Foreign Sovereign Immunities Act were designed to relieve the Executive Branch of the diplomatically sensitive task of making such determinative interventions in every case. Rather, if such a ground for transnational abstention were recognized, executive branch intervention should be treated as a necessary but not a sufficient condition for abstention in extraordinary cases.²⁶³

2. Unsettled Foreign Law

Judges should also be wary of the temptation to dismiss transnational cases because those cases require the application of complex or unsettled foreign law. Dealing with foreign law is part of the typical workload of U.S. courts.²⁶⁴ And federal judges are used to making educated assessments about the uncertain law of other jurisdictions.²⁶⁵ Indeed, domestic abstention doctrines like *Pullman* do not allow federal judges to abstain solely on the basis of unsettled state law: something more is re-

gation to exercise their jurisdiction in transnational cases "is not diminished simply because foreign relations might be involved").

²⁶² See *GDG Acquisitions*, 749 F.3d at 1032.

²⁶³ My thanks to Professor Scott Dodson for suggesting this intermediate prescription.

²⁶⁴ See *GDG Acquisitions*, 749 F.3d at 1034 ("[F]ederal courts regularly interpret and apply foreign law without offending international interests."); *DiFederico v. Marriott Int'l, Inc.*, 714 F.3d 796, 807–08 (4th Cir. 2013) (emphasizing that U.S. courts apply foreign law all the time and have the tools to do so); *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 179 (2d Cir. 2006) ("While adjudication of plaintiffs' common law claims may also require some modest application of Egyptian law, the courts of this Circuit are regularly called upon to interpret foreign law without thereby offending principles of international comity." (citation omitted)); see also *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1873 (2018) (discussing interpretation of foreign law by federal courts).

²⁶⁵ See, e.g., *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 426 (1964) (Douglas, J., concurring) ("Since *Erie R. Co. v. Tompkins*, the federal courts under [diversity] jurisdiction daily have the task of determining what the state law is. The fact that those questions are complex and difficult is no excuse for a refusal by the District Court to entertain the suit." (citations omitted)).

quired.²⁶⁶ “[T]he difficulties of ascertaining what the state courts may hereafter determine the state law to be,” the Supreme Court has warned, “do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision. The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience.”²⁶⁷

Even if a *Pullman*-like basis for abstention were to be adopted for transnational cases, then, there would need to be an additional “plus” factor. And that “plus” factor should not be the political sensitivity of the case, as that concern is too easy to invoke whenever complex or unsettled foreign law is at stake. (For example, any time the law of Country *X* has not been resolved, a judge might assert that it would cause friction for a U.S. court to attempt to resolve it.) Note also the rise of certification in reducing the need for *Pullman* abstention domestically.²⁶⁸ While certification internationally is more complicated, it is not outside the realm of feasibility.²⁶⁹ Just as *Pullman* abstention has been marginalized in domestic cases, particularly through the use of certification, so should judges be wary of such a basis for abstention into transnational cases: judges have other tools for handling difficult questions of foreign law short of avoiding those cases altogether.²⁷⁰

3. Party Convenience

Judges may also be tempted to take into account the challenges that cross-border litigation poses for private parties, particularly defendants.²⁷¹ The difficulty is that cross-border litigation is inherently incon-

²⁶⁶ See, e.g., *Meredith v. Winter Haven*, 320 U.S. 228, 235–36 (1943).

²⁶⁷ *Id.* at 234.

²⁶⁸ See *supra* Section I.A.

²⁶⁹ See *Animal Sci. Prods.*, 138 S. Ct. at 1875 (noting European and inter-American treaties to which the United States is not a party that allow for nonbinding transnational certification).

²⁷⁰ *Cf. id.* at 1873–74 (suggesting factors federal courts might weigh in evaluating a foreign sovereign’s submission regarding the meaning of foreign law).

²⁷¹ That the lower courts have at times included party convenience as a factor of international comity abstention is likely the fault of *Colorado River*, which drew its party convenience factor directly from *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), where the Court first defined the forum non conveniens analysis. See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976). In the context of *Colorado River*, however, lower courts have “amply demonstrated the vacuousness” of this factor, and it is often ignored. *Mullenix*, *supra* note 65, at 132–34 (gathering cases and critiquing this factor in the context of *Colorado River*).

venient, and it is never an easy calculus to determine where litigation would be most convenient (and whose convenience should be prioritized).²⁷² More fundamentally, it is worth asking whether party inconvenience is ever an appropriate basis for declining congressionally granted jurisdiction.²⁷³ To the extent that the inconvenience caused by transnational litigation is so great as to raise a due process concern, such due process concerns are already addressed (or could be addressed) through other doctrines.²⁷⁴

Federal courts also use forum non conveniens to address party convenience concerns, though I have argued, along with others, that the doctrine is not properly understood as a tool for avoiding mere inconvenience.²⁷⁵ Indeed, many of the critiques I raise here about international comity abstention apply equally to forum non conveniens: both are overbroad doctrines of abstention that lump too many concerns into one poorly framed rubric.²⁷⁶ At the very least, judges should be careful to keep forum non conveniens distinct from their analyses of other bases for abstention in transnational cases. Some courts have been careful to do so,²⁷⁷ but others have self-consciously combined these tests, importing factors from forum non conveniens into the assessment of interna-

²⁷² See Gardner, *Retiring Forum Non Conveniens*, supra note 37, at 421, 425–26 (discussing the difficulty of assessing convenience in transnational cases in the context of forum non conveniens).

²⁷³ For scholars critiquing forum non conveniens on this basis, see sources gathered in note 111 above.

²⁷⁴ See *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (describing reasonableness factors for the exercise of personal jurisdiction); McLachlan, supra note 131, at 21 (arguing that doctrines for managing parallel litigation are justified by the need to ensure due process for parties); cf. Clermont, supra note 178, at 119 (suggesting that forum non conveniens leads only to “multiplying costs and delays, increasing uncertainty, and facilitating discrimination against foreigners” given that the reasonableness factors within personal jurisdiction already address extreme inconvenience).

²⁷⁵ See, e.g., Gardner, *Retiring Forum Non Conveniens*, supra note 37, at 414–15 (noting that the original purpose of the doctrine was to avoid injustice and emphasizing that “non conveniens” translates not to “inconvenience,” but to “inappropriate” or “unsuitable”); Clermont, supra note 178, at 119 (urging that forum non conveniens “should not expand into a doctrine of inconvenience”).

²⁷⁶ See Gardner, *Retiring Forum Non Conveniens*, supra note 37, at 405–27 (discussing the shortcomings of the federal doctrine of forum non conveniens).

²⁷⁷ See, e.g., *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178–79 (2d Cir. 2006); *Phila. Macaroni Co. v. Italpasta Ltd.*, No. 09-2460, 2010 WL 1568508, at *11 n.13 (E.D. Pa. Apr. 20, 2010).

tional comity abstention.²⁷⁸ The problem here is not so much that these doctrines ask different questions, but that the factors may be doing different work in one doctrine versus the other.²⁷⁹

Ultimately, I would like to see both labels retired and replaced by a few specific grounds for abstention in transnational cases. To the extent that forum non conveniens is too deeply engrained in federal practice to be retired overnight, however, judges do not need an additional open-ended concept of “international comity abstention” to further broaden the discretion they already have under forum non conveniens.²⁸⁰ Consider *Mujica* once again in this regard. The district court in *Mujica* had denied the defendants’ motions to dismiss for forum non conveniens and for transnational abstention.²⁸¹ By defining a new test for “international comity abstention” that encompassed both sets of considerations, the Ninth Circuit was able to reach a different conclusion. The combination of these two judge-made tests, in other words, may exaggerate the already great judicial discretion granted by each.

B. Better Bases for Abstention

In sum, political sensitivity, unsettled foreign law, and party convenience should all be avoided as bases for transnational abstention because they are too malleable and thus prone to expansive application. But there are grounds for abstention in transnational cases that can be more pre-

²⁷⁸ See, e.g., *Mujica*, 771 F.3d at 612 n.25; *Ungaro-Benages*, 379 F.3d at 1238 (“Our determination of the adequacy of the alternative forum is informed by *forum non conveniens* analysis.”).

²⁷⁹ For example, the adequacy and availability of a foreign forum is a threshold inquiry in the forum non conveniens context—and a very low threshold at that. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 251, 254 n.22 (1981); Kevin M. Clermont, *The Story of Piper: Forum Matters*, in *Civil Procedure Stories* 199, 217–18 (Kevin M. Clermont ed., 2d ed. 2008) (“[T]he way courts apply the supposed rule [of adequate and available forum] means that the prerequisite of an alternative forum might be more a useful verbiage than a working rule.”); Gardner, *Parochial Procedure*, supra note 37, at 988–89 (describing how this inquiry in the context of forum non conveniens has evolved such that “foreign fora are almost never found to be either inadequate or unavailable”). *Mujica* imported that low bar into its abstention analysis to conclude that Colombian courts were generally adequate, even though the *Mujica* plaintiffs would be barred by the Colombian courts from suing the U.S. defendants. *Mujica*, 771 F.3d at 612–14; see also *Cooper v. Tokyo Elec. Power Co.*, 860 F.3d 1193, 1210 (9th Cir. 2017) (asserting analysis of this factor is the same for both doctrines).

²⁸⁰ Cf. Clermont, supra note 279, at 225 (critiquing forum non conveniens for raising “legal- process dangers” by allowing ad hoc, murky decision making to obscure what courts are really doing).

²⁸¹ *Mujica*, 771 F.3d at 586–87.

cisely defined, based on considerations that judges have the institutional capacity to evaluate reliably. Such grounds would not raise the same dangers of distortion. This Section explores two such grounds: deference to foreign parallel proceedings and deference to integrated foreign remedial schemes.

1. Foreign Parallel Proceedings

Many of the federal cases that have invoked “international comity abstention” do so in light of foreign parallel proceedings.²⁸² Yet there is no uniformity to their approach: Some courts analyze the relevance of foreign parallel proceedings under comity-based doctrines like international comity abstention, forum non conveniens, or *lis alibi pendens*; other courts have instead employed domestic doctrines like *Colorado River Water Conservation District v. United States*²⁸³ (federal court deference to state parallel litigation) or *Landis v. North American Co.*²⁸⁴ (federal court deference to federal parallel litigation).²⁸⁵ Courts may combine these approaches, as well—for example, by drawing on *Colorado River* to fill in the requirements of international comity abstention.²⁸⁶

The irony is that none of these rubrics is well-suited for addressing the specific question of foreign parallel proceedings—and with mismatched rubrics comes the risk of muddled, misdirected, and mistaken analysis.²⁸⁷ Both international comity abstention and forum non conveniens are too broad, implying a range of additional considerations that are

²⁸² See, e.g., Dodge, International Comity in American Law, *supra* note 13, at 2112 (“In most circuits, international comity abstention is simply an application to foreign proceedings of the federal–state abstention doctrine articulated in *Colorado River*.”).

²⁸³ 424 U.S. 800 (1976).

²⁸⁴ 299 U.S. 248 (1936).

²⁸⁵ See, e.g., Calamita, *supra* note 169, at 613–14, 671–72 (collecting cases); Parrish, *supra* note 150, at 237, 248–51 (same). The most common approach, however, is that based on *Colorado River*. See Dodge, International Comity in American Law, *supra* note 13, at 2112. But even those courts that purport to apply *Colorado River* or *Landis* to this question have varied in how they describe the resulting test. See Bush, *supra* note 247, at 129–31.

²⁸⁶ See, e.g., Royal & Sun All. Ins. Co. of Can. v. Century Int’l Arms, Inc., 466 F.3d 88, 92–93 (2d Cir. 2006) (citing *Colorado River*, 424 U.S. at 817, 820); Turner Entm’t Co. v. Degeto Film GmbH, 25 F.3d 1512, 1518 (11th Cir. 1994).

²⁸⁷ See *supra* Section I.D (discussing the risks of poorly fitting rubrics); see also Calamita, *supra* note 169, at 655 (concluding that because the federal courts are “doctrinally . . . in the wrong place” on the question of foreign parallel proceedings, they “are busily crafting rules that either pander to inappropriate concerns or, perhaps worse, are unbounded by any relevant meaningful principles”).

irrelevant to the question of whether to defer to foreign proceedings.²⁸⁸ On the other hand, simply applying domestic precedent (like *Colorado River* or *Landis*) ignores the procedural, substantive, and remedial differences that exist between a U.S. court and a foreign court.²⁸⁹ *Landis* is a particularly problematic analogy, as the presumption of jurisdictional obligation is not implicated when a federal court defers to another federal court.²⁹⁰ Using the label *lis alibi pendens* might make sense, as might a rough but more accessible translation—something like “parallel proceedings abstention.”

Another issue that has divided the courts (and scholars) is what default presumption courts should apply: Should federal courts presumptively allow domestic litigation to proceed despite pending parallel litigation in a foreign court (akin to *Colorado River*), or should they presumptively stay cases before them in deference to suits filed first in foreign jurisdictions (akin to *Landis* or the civil law approach to *lis alibi pendens*)?²⁹¹ My preference would be for a more European-style presumption of a stay, but subject to discrete exceptions.²⁹² Though this presumption pulls against jurisdictional obligation, it is a limited and manageable exception justified by concrete comity interests. First, it is capable of remaining a cabined exception to the courts’ jurisdictional obligation—at least if labeled clearly—because it depends on a small and readily ascertainable set of facts: Are there foreign proceedings that

²⁸⁸ See Calamita, *supra* note 169, at 672 (“There is too much baggage associated with the Court’s discussions of *forum non conveniens* . . . to make it likely that . . . the federal courts will draw the kind of distinctions in analysis” that would be required.); cf. Gardner, *Retiring Forum Non Conveniens*, *supra* note 37, at 451–52 (noting that international comity abstention is too vague and *forum non conveniens* too unrelated to serve as viable doctrines for managing parallel litigation).

²⁸⁹ See, e.g., Burbank, *supra* note 150, at 232–33.

²⁹⁰ See, e.g., Bush, *supra* note 247, at 149–50.

²⁹¹ Compare, e.g., *Royal & Sun All.*, 466 F.3d at 93, 95 (applying *Colorado River*), and *Al-Abood ex rel. Al-Abood v. El-Shamari*, 217 F.3d 225, 232 (4th Cir. 2000) (same), with *Cont’l Time Corp. v. Swiss Credit Bank*, 543 F. Supp. 408, 410 (S.D.N.Y. 1982) (emphasizing preference for first-filed litigation); compare also, e.g., Calamita, *supra* note 169, at 674–75 (endorsing presumptive stay), and Parrish, *supra* note 150, at 270 (same), with Bush, *supra* note 247, at 131 (endorsing *Colorado River* approach of allowing parallel litigation to proceed).

²⁹² Cf. Burbank, *supra* note 150, at 229–31, 234 (recommending that U.S. courts and rule makers follow the European approach but with specified bases of exception); Calamita, *supra* note 169, at 674–75 (recommending preference for first-filed cases but listing reasons that might overcome that preference). According to Professor Jansen Calamita, U.S. state courts that have considered the issue of foreign parallel proceedings have uniformly adopted such a presumption of deference to pending foreign litigation.

are “parallel,” in the sense that they involve “substantially similar” (though not necessarily identical) parties and issues?²⁹³ Second, it would align U.S. practice with that of many of our allies, particularly our European allies, which suggests it would promote reciprocal treatment and general goodwill.²⁹⁴ Third, and relatedly, it should tend to foster greater comity over time. To the extent it aligns with the practice of major allies, it increases the possibility of greater harmonization of practice through later treaties. And to the extent it reduces the frequency of parallel litigation, it should decrease the need for antisuit injunctions (i.e., the use of injunctions to try to limit or stop litigation in a foreign court), which can undermine comity. Finally, a presumptive stay in light of foreign parallel proceedings has the practical benefits of being easy to apply and avoiding duplicative judicial effort.²⁹⁵

Adopting a presumption of a stay does not, however, require a strict “first-filed” rule. Exceptions to the presumption can address the due process and fairness concerns that the proverbial “race to the courthouse” evokes. The trick is to frame these further exceptions narrowly and via judicially ascertainable factors so that they do not grow over time to displace the default rule (here, the presumption that second-filed litigation should be stayed). Not helpful, for example, would be a general exception allowing judges to determine which country has the greater interest in the case—or any other formulation that devolves into identifying and weighing sovereign interests. Better are exceptions that turn on specific considerations that courts have the ready tools to evaluate. For example, if the U.S. plaintiff can show that the plaintiff in the foreign proceedings is not diligently pursuing the foreign case (or that there has otherwise been an unacceptable delay in the foreign court), the U.S. court should either deny the stay in the first instance or lift a stay

²⁹³ Defining what constitutes “parallel” proceedings is itself, however, an open question. For courts adopting the “substantially similar” approach, see, for example, *Royal & Sun All.*, 466 F.3d at 94; *Al-Abood*, 217 F.3d at 232; *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 898 (7th Cir. 1999). For a discussion of additional options, see Redish, *Intersystemic Redundancy and Federal Court Power*, supra note 17, at 1362–67 (describing possible “res judicata,” “supplemental jurisdiction,” and “relitigation” conceptions of parallel proceedings).

²⁹⁴ See Bookman, supra note 13, at 1136 (recommending the use of foreign analogs to inform our understanding of what comity entails).

²⁹⁵ Cf. Parrish, supra note 150, at 270–71 (justifying a first-filed approach on similar grounds).

previously imposed, allowing U.S. litigation to proceed.²⁹⁶ The U.S. court might also consider—before imposing the stay—whether a judgment resulting from the foreign proceeding would generally be enforceable in the United States.²⁹⁷ That might entail, for example, a preliminary consideration of whether the foreign court has acceptable jurisdiction, whether its judicial system provides for due process, or whether the foreign proceeding would offend some fundamental aspect of U.S. public policy.²⁹⁸ As in the judgment enforcement context, these considerations would be set at a high bar, such that they could rarely be invoked successfully.

Finally, some special categories of cases might warrant different treatment—most notably, actions for declaratory judgments. A major shortcoming of a strict first-filed rule is that it encourages likely defendants to preemptively seek a declaratory judgment in the jurisdiction of their choice. Where there is parallel litigation, then, involving a request for declaratory relief, preference should typically be given to the action filed by the “natural” plaintiff.²⁹⁹ For example, if the foreign proceeding was initiated first but in the posture of a declaratory judgment action, the default presumption (favoring a stay in deference to the foreign proceeding) would be weaker, and the U.S. judge could allow the “natural” plaintiff to continue his litigation in the U.S. court. On the other hand, there may be times when the first-filed suit in a U.S. court is a declaratory judgment action and the “natural” plaintiff has subsequently filed suit in a foreign forum. In that circumstance, the U.S. judge should have the flexibility to stay the first-filed declaratory judgment action in deference to the later-filed foreign suit. Such a stay would not conflict with the

²⁹⁶ Cf. Burbank, *supra* note 150, at 222–23 (suggesting parallel litigation should be allowed to proceed where the plaintiff in the first-filed case fails to advance that case); Calamita, *supra* note 169, at 669 (urging the use of stays, rather than dismissals, in order to allow judges to correct for such delinquencies).

²⁹⁷ For a similar approach, see Burbank, *supra* note 150, at 234. See also McLachlan, *supra* note 131, at 62–63 (discussing a Swiss statute that allows for stays only if the resulting judgment will likely be enforceable in Switzerland).

²⁹⁸ Cf. Calamita, *supra* note 169, at 675 (suggesting that courts, in applying a first-filed presumption, should nonetheless “look to see whether the circumstances of the case suggest that deference to the forum court would violate domestic public policy, prejudice the rights of those entitled to the protection of U.S. law, or whether the facts indicate that the foreign action was contrived to usurp the ‘natural’ plaintiff’s choice of forum”).

²⁹⁹ See *Natuzzi Americas, Inc. v. Petrook*, No. 1:12CV559, 2013 WL 6628763, at *3–*5 (M.D.N.C. Dec. 16, 2013) (modifying the test for foreign parallel proceedings in a declaratory judgment action, in particular to downplay the first-filed factor where the U.S. plaintiff sought declaratory relief only after receiving a demand letter from the foreign defendant).

presumption of jurisdictional obligation, it should be noted, as declaratory relief is inherently discretionary.³⁰⁰

If courts were to adopt the opposite starting presumption—allowing parallel litigation to proceed in the absence of exceptional circumstances, along the lines of *Colorado River*—that approach would need to accommodate additional specialized tests for issues like bankruptcy, for which courts employing a *Colorado River* framework have already developed a greater willingness to stay U.S. litigation based on the need to consolidate insolvency proceedings as much as possible within a single jurisdiction.³⁰¹ Having a range of modified tests for different subject matters, however, invites more confusion and conflation. Indeed, some courts have already conflated the bankruptcy approach with international comity abstention more broadly. Avoiding the need to do so is an additional benefit of adopting a European-style presumption in favor of deferring to foreign parallel proceedings, regardless of the subject matter.

It will take time to work out the details of a parallel proceeding-specific doctrine. In the interim, judges should at least be clear when their invocation of international comity abstention (or *forum non conveniens*) is premised on the existence of parallel proceedings, and they should identify with similar clarity the test and default presumption (to stay or not to stay) that they apply. That clarity will both aid in the development of a more considered and narrowly tailored doctrine and minimize the perception that “international comity abstention” provides broad, general grounds for declining jurisdiction in transnational cases.

³⁰⁰ See, e.g., *Burbank*, supra note 150, at 227 n.113 (noting that staying or dismissing an action for declaratory judgment does not raise separation-of-powers concerns because the Declaratory Judgment Act does not create rights but merely enables judicial discretion); cf. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286–88 (1995) (articulating a lighter standard for abstention in declaratory judgment actions).

³⁰¹ On the need for a particularly deferential approach to foreign parallel insolvency proceedings, see, for example, *Royal & Sun Alliance Insurance Co. of Canada v. Century International Arms, Inc.*, 466 F.3d 88, 92–93 (2d Cir. 2006); *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005) (“We have repeatedly held that U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding.”); *In re Simon*, 153 F.3d 991, 998–99 (9th Cir. 1998) (describing the “philosophy” of the Bankruptcy Code’s structure as “deference to the country where the primary insolvency proceeding is located . . . and flexible cooperation in administration of assets,” with the result that “the bankruptcy court must consider the status and progress of other nations’ insolvency proceedings in determining how to manage domestic bankruptcies”).

2. *Integrated Foreign Remedial Schemes*

Even a clearly stated doctrine of abstention based on foreign parallel proceedings, however, will leave unaddressed those cases where foreign litigation may not yet have been commenced, but there is affirmative action on the part of a foreign government that indicates its unique ability to resolve the matter. Consider again in this regard the Eleventh Circuit's decision in *Ungaro-Benages*. A more cabined way of expressing the concern raised by *Ungaro-Benages* might be as a doctrine of abstention in transnational cases that is roughly analogous to *Burford* or *Thibodaux* abstention domestically: that federal judges should stay U.S. cases if a foreign sovereign has indicated that it is resolving a complex set of claims through a unitary procedure, whether judicial or administrative, the success of which depends on the consolidation of claims before one forum.³⁰²

Federal procedure amply recognizes the need to address interrelated claims within a single proceeding, whether through interpleader,³⁰³ intervention as of right,³⁰⁴ the required joinder of indispensable parties,³⁰⁵ or even class actions pursuant to Federal Rule of Civil Procedure 23(b)(1).³⁰⁶ *Burford v. Sun Oil Co.* extends that idea across cases: It recognizes that there is a need to resolve some sets of claims within unified proceedings.³⁰⁷ At stake in *Burford* was the State of Texas's management of the East Texas oil field, a natural resource that not only required coordinated conservation, but also implicated "the whole economy of the State."³⁰⁸ Individual claims regarding new oil wells were "not mere

³⁰² Cf. James E. Pfander & Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal-State Jurisdictional Overlap*, 92 *Tex. L. Rev.* 1, 68–71 (2013) (noting criticisms of *Burford* but suggesting that the doctrine could be salvaged by similarly focusing on the need to provide consolidated treatment of interdependent claims involving scarce resources). Note this basis may also displace the perceived need for prudential exhaustion in transnational cases. See Dodge, *International Comity in American Law*, *supra* note 13, at 2110–11. It might also further alleviate any remaining need for forum non conveniens. Cf. *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1144–45 (9th Cir. 2001) (applying forum non conveniens to dismiss claims regarding an airplane crash in New Zealand in light of New Zealand's accident fund for mass disasters). See generally Gardner, *Retiring Forum Non Conveniens*, *supra* note 37, at 429–43 (noting the declining need for forum non conveniens in light of other procedural developments).

³⁰³ Fed. R. Civ. P. 22.

³⁰⁴ Fed. R. Civ. P. 24(a).

³⁰⁵ Fed. R. Civ. P. 19.

³⁰⁶ Fed. R. Civ. P. 23(b)(1).

³⁰⁷ 319 U.S. 315 (1943).

³⁰⁸ *Id.* at 319–20.

isolated disputes between private parties,” but interrelated decisions that could result, if not properly managed, in “the irretrievable loss of oil in other parts of the field.”³⁰⁹ Where the matter is of special state concern³¹⁰ and of established state expertise,³¹¹ the *Burford* majority concluded, federal courts may stay their hand to allow unified resolution of those claims.³¹²

That idea could be extrapolated to matters of special concern to foreign states, where the foreign state has established an integrated remedial structure to address interlinked claims. In *Ungaro-Benages*, for example, the Eleventh Circuit was worried about protecting a settlement structure meant to reach “thousands of other victims of the Nazi regime.”³¹³ As it noted, “the German government has a significant interest in having the Foundation be the *exclusive* forum for these claims.”³¹⁴ Likewise, in *Bi v. Union Carbide Chemicals and Plastics Co.*, the Second Circuit dismissed a challenge to a settlement reached by the Indian government on behalf of the thousands of victims of the Bhopal gas leak disaster.³¹⁵ In both of these cases, “Germany and India had powerful and easily discernible interests in protecting their dispute-resolution systems involving thousands of claimants from the corrosion or collapse that would occur if [these individual] claims were handled by [U.S.] federal courts.”³¹⁶ Likewise, U.S. courts might stay cases that could undercut the administration of a foreign government’s settlement fund for a mass disaster.³¹⁷ Consider, in this regard, the challenge that foreign litigation might have posed to the centralized handling of the 9/11 first responder

³⁰⁹ Id. at 324.

³¹⁰ Id.

³¹¹ Id. at 327.

³¹² Id. at 334.

³¹³ *Ungaro-Benages*, 379 F.3d at 1240.

³¹⁴ Id. at 1239 (emphasis added).

³¹⁵ 984 F.2d 582, 583 (2d Cir. 1993).

³¹⁶ *GDG Acquisitions, LLC v. Gov’t of Belize*, 749 F.3d 1024, 1032 (11th Cir. 2014) (distinguishing *Ungaro-Benages* and *Bi* from other cases that may also implicate foreign sovereign interests).

³¹⁷ See, e.g., *Peiqing Cong v. ConocoPhillips Co.*, 250 F. Supp. 3d 229, 232, 235 (S.D. Tex. 2016) (dismissing claims of Chinese fishermen regarding oil spill in deference to settlement fund established between ConocoPhillips and the Chinese government and administered by China); cf. *Cooper v. Tokyo Elec. Power Co.*, 860 F.3d 1193, 1207–09 (9th Cir. 2017) (recognizing the need for such deference to foreign compensation funds but declining to stay or dismiss claims related to the Fukushima nuclear disaster in light of other considerations).

claims in the United States.³¹⁸ A more mundane example is cross-border bankruptcy proceedings, a context in which the federal courts have long recognized the need for coordination with and deference to foreign courts that have primary jurisdiction over the bankruptcy estate.³¹⁹

Acknowledging that some cases discussing “international comity abstention” might be better categorized under this narrower basis for abstention, however, is not to suggest that all of these cases were decided correctly. Indeed, in the absence of a clear framework, it is quite possible that U.S. judges have applied their intuitions regarding such comprehensive remedial schemes in an inconsistent fashion. There are risks, too, in recognizing such a basis for abstention. The integrated foreign remedial scheme, for example, might have been established through self-dealing or otherwise might represent the interests not of the foreign public but of a handful of political leaders whose pockets may be lined by powerful defendants.³²⁰ Or the foreign scheme’s scope of potential claimants might be too narrow, or its process too difficult, to provide meaningful access to justice.³²¹ The analogy to domestic abstention, after all, is very rough: when federal courts defer to state proceedings, they can count on those proceedings applying a familiar set of laws through familiar proceedings, cabined by the same Constitution. Transnational abstention requires a much greater leap of faith. In light of these considerations, the following should be taken only as a preliminary con-

³¹⁸ See Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 Wash. U. L. Rev. 1027, 1029 (2013) (regarding “[t]he claims of first responders injured by the toxic conditions at the site of the September 11, 2001 World Trade Center disaster,” explaining that “Congress created a comprehensive scheme for the resolution of those first-responder claims, specifying a liability rule, preempting alternative remedies, imposing a collective damages cap, and enacting an exclusive grant of jurisdiction to the federal court in the Southern District of New York that resulted in the consolidation of more than 10,000 individual cases before Judge Alvin Hellerstein”).

³¹⁹ “Comity is especially important in the context of the Bankruptcy Code” because it “facilitate[s] ‘equitable, orderly, and systematic’ distribution of the debtor’s assets.” In re Maxwell Comm’n Corp., 93 F.3d 1036, 1048 (2d Cir. 1996) (quoting *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 458 (2d Cir. 1985)); see also cases gathered supra note 301.

³²⁰ For example, the plaintiffs in *Bi* were collaterally attacking the Indian Government’s settlement of the Bhopal disaster based on the Government’s “unacceptable conflict of interest” and the plaintiffs’ lack of notice and representation in the settlement proceedings. See *Bi*, 984 F.2d at 584.

³²¹ Such access-to-justice concerns might have motivated the Third Circuit in *Gross v. German Foundation Industrial Initiative*, 456 F.3d 363 (3d Cir. 2006), when it refused to defer to the same Holocaust restitution fund as the Eleventh Circuit did in *Ungaro-Benages*.

cept for recognizing abstention based on integrated foreign remedial schemes—an effort to begin a conversation, not to definitively endorse a new doctrine.

The starting point would be, again, that federal courts should exercise their congressionally granted jurisdiction. Along the lines of *Burford* or *Thibodaux* abstention, however, a court might decline its jurisdiction in an exceptional case (but would not be required to) if all of the following conditions were met: First, there is a foreign consolidated remedial scheme meant to address interrelated claims. Though it need not be judicial in nature, something more than a run-of-the-mill settlement is required: for example, an established administrative process for accident compensation, or a major government-negotiated and government-administered settlement process. Second, the scheme must depend upon the coordinated resolution of the interrelated claims—for example, due to the limited nature of the settlement fund or disputed *res*,³²² or perhaps due to the inextricable interrelatedness of the claims themselves.³²³

Third, the U.S. court should ensure that the foreign sovereign to which it would defer does in fact have a significant nexus to the underlying dispute—for example, that it was the location of the mass disaster in question. This factor would not entail a comparative analysis, nor would it be a high bar; rather, it is meant to serve as a check to ensure that the foreign government is well-situated to assess and resolve the claims. Fourth, the U.S. court should decline to abstain if it harbors doubt that the foreign remedial scheme is capable of providing relief—for example, if the foreign remedial scheme appears to lack jurisdiction over all the relevant parties, if its processes raise serious due process concerns, or if the fund is too limited to provide meaningful relief. This final check does not ask the U.S. court to evaluate the foreign judicial system writ large, but to inquire into objective limiting factors regarding the particular case before it.

Any abstention on this basis would, again, best be treated as a stay,³²⁴ allowing the U.S. court to revisit its decision to defer in light of signifi-

³²² Cf. *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 (1939) (holding that federal courts must yield jurisdiction to a state court that first acquires jurisdiction over a particular *res*).

³²³ Cf. *Burford*, 319 U.S. at 324 (noting that one litigant's claim for oil allotments might lead to "the irretrievable loss of oil in other parts of the field," to the detriment of other rights-holders).

³²⁴ The purpose of a stay, it bears emphasizing, is to provide some flexibility for judges to revisit the question, not to relax the initial standard. In the long run, a stay in favor of foreign

2019]

Abstention at the Border

125

cant delays, indications of corruption, an actual denial of fundamental due process, or similar reasons. Finally, interventions by the U.S. government or foreign government to explain the scheme and the need for consolidated treatment should be welcomed and treated as persuasive but not decisive.³²⁵

IV. CONCLUSION

The federal courts should jettison the nascent doctrine of “international comity abstention” in its current amorphous form. Just as there is no one “abstention doctrine” in domestic practice, so there should not be a blanket concept of abstention in transnational cases. To the extent there are legitimate bases for abstention in transnational cases, those bases should be addressed through far more narrow and specific inquiries.

To embrace a broader conception of “international comity abstention” would be to further expand the scope of the judiciary’s power vis-à-vis Congress and the states. Increasingly when it comes to transnational litigation, it is the federal courts who are the final arbiter of what cases can and cannot be heard.³²⁶ When Congress or the states are able to satisfy all of the Supreme Court’s growing requirements in framing laws that bring transnational cases into U.S. courts, federal judges should not claim an additional open-ended discretionary power to refuse to hear them.

The more moderate approach advocated here, in contrast, allows courts to flag possible comity concerns while leaving space for the other branches to develop alternative solutions, in particular through the de-

proceedings will be functionally equivalent to a dismissal, as the final judgment of the foreign proceeding will likely be given res judicata effects by U.S. courts.

³²⁵ Cf. *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1869, 1873–74 (2018) (holding that federal courts are “not bound to accord conclusive effect to the foreign government’s statements” regarding the meaning of its domestic laws and suggesting criteria that courts might use in evaluating such statements). Such interventions should not be given determinative weight as doing so would allow the executive branch (or the foreign government) to override Congress’s grant of jurisdiction. Further, strong or mandatory deference to the foreign government in particular would undercut the checks regarding the adequacy of the foreign scheme, which should be built into any basis for abstention along these lines.

³²⁶ Cf. Bookman, *supra* note 13, at 1120 (arguing transnational litigation avoidance carries a separation-of-powers cost because it is court-driven); Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. Rev. 1081, 1121–22 (2010) (arguing that Congress is often better positioned than the courts to determine court access policy for transnational cases).

velopment of international agreements.³²⁷ Thus, for example, the courts' special treatment of cross-border bankruptcies—in which U.S. courts expressed a willingness to defer to insolvency proceedings centered in other jurisdictions—helped foster a formal international approach that has now been codified by Congress in Chapter 15 of the Bankruptcy Code. Even narrower subject-matter specific solutions are possible. For example, the Convention on Supplementary Compensation for Nuclear Damage commits member countries to consolidating claims relating to a nuclear accident in the jurisdiction where the accident occurs and establishes a common fund to pay for any resulting judgments.³²⁸ Beyond such subject matter-specific agreements to consolidate litigation within a single jurisdiction, Congress might also adopt federal legislation requiring deference to foreign parallel proceedings, perhaps in light of a new Hague treaty on judgment recognition.³²⁹ In the meantime, the federal courts should be circumspect in—but not rigidly opposed to—recognizing narrow circumstances in which they might need to defer to the judicial activity of other sovereigns.

Ultimately, cross-border activity—and the disputes it generates—are messy. The solution should not be categorical rules that attempt to draw strict lines between U.S. interests and foreign interests,³³⁰ but cabined flexibility that acknowledges both the reality of overlapping interests and the role of all component parts of our government in navigating that overlap effectively.

³²⁷ Cf. Amy Coney Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813, 888 (2008) (concluding that “[u]niform procedural regulation,” including abstention doctrines, “is ultimately in the control of Congress”); Burbank, *supra* note 150, at 233 (noting Congress and the President are competent to define judicial treatment of foreign parallel proceedings).

³²⁸ Convention on Supplementary Compensation for Nuclear Damage, arts. III, XIII, July 22, 1998, 36 I.L.M. 1454; see also *Cooper v. Tokyo Elec. Power Co.*, 860 F.3d 1193, 1199–1204 (9th Cir. 2017) (discussing the convention).

³²⁹ See Burbank, *supra* note 150, at 229, 234 n.146 (recommending federal legislation to address problem of parallel proceedings and noting that such legislation would alleviate any separation-of-powers concerns regarding abstention on that basis). On the renewed negotiations for a treaty regarding the enforcement of judgments (which would likely address the issue of parallel proceedings), see generally The Judgments Project, Hague Convention on Private International Law, <https://www.hcch.net/en/projects/legislative-projects/judgments> [<https://perma.cc/3EYQ-33NC>] (last visited Apr. 4, 2017).

³³⁰ Cf. Hannah L. Buxbaum, *The Scope and Limitations of the Presumption Against Extraterritoriality*, 110 *AJIL Unbound* 62, 62 (2016) (questioning the “sufficiency of [categorical, territory-based rules] to address the messy and often unpredictable patterns of transnational economic activity”).